UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

March 28, 2003

The Honorable William J. Murphy
Speaker of the House of Representatives
Speaker's Office
State House
Providence, Rhode Island 02903

The Honorable Gordon D. Fox
Majority Leader of the House of Representatives
Majority Leader's Office
State House
Providence, Rhode Island 02903

The Honorable Robert A. Watson
Minority Leader of the House of Representatives
Minority Leader's Office
State House
Providence, Rhode Island 02903

Members of the House Judiciary Committee
c/o The Honorable Robert E. Flaherty
Chairperson, Committee on the Judiciary
House of Representatives
State House, Room 206
Providence, Rhode Island 02903

The Honorable Rene R. Menard
House of Representatives
Providence, Rhode Island 02903

Re: Proposed Bills H.5936 and H.5639, Proposed Restrictions on Competition From Non-Attorneys In Real Estate Closing Activities

Dear Speaker and Members of the House of Representatives:

We understand that the Rhode Island House of Representatives is considering two bills that would amend the definition of "practice of law" to require lawyers to represent buyers in virtually all aspects of the real estate closing process. These bills are H.5936 and H.5639, both entitled, "An Act Relating To Criminal Offenses - Law Practice."

Both bills are very similar to H.7462, considered by the House of Representatives last year. The Department of Justice and the Federal Trade Commission urged the House to reject that bill because it would have restrained competition between lawyers and nonlawyers for real estate closing business, likely resulting in increased costs for Rhode Island consumers. The current bills raise many of the same concerns as H.7462 did. Accordingly, we urge the General Assembly to reject the current legislation for the reasons stated in our March 29, 2002 letter.[1] A copy of our 2002 letter is attached.

Sincerely yours,

R. Hewitt Pate
Acting Assistant Attorney General
United States Department of Justice
Antitrust Division

By Order of the
Federal Trade Commission,

Timothy J. Muris
Chairman

[1] The bills primarily differ from the old bill in two respects. First, the new bills will allow realtors to answer questions about purchase and sale agreements and other issues that the old bill would have forbidden. Second, H. 5639 contains a provision present in the old bill that would permit employees of corporations owned exclusively by Rhode Island attorneys to close transactions. We believed this provision could raise interstate commerce clause and other concerns. H. 5936, however, does not include this provision. In any event, these changes do not diminish our concerns about the potential anticompetitive impact of the bills and we urge their rejection.

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

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Washington, DC 20530

March 29, 2002

The Honorable John B. Harwood
Speaker of the House of Representatives
Speaker's Office
State House
Providence, Rhode Island 02903

The Honorable Gerard M. Martineau
Majority Leader of the House of Representatives
Majority Leader's Office
State House
Providence, Rhode Island 02903

The Honorable Robert A. Watson
Minority Leader of the House of Representatives
Minority Leader's Office
State House
Providence, Rhode Island 02903

Members of the House Judiciary Committee
c/o The Honorable Robert E. Flaherty
House of Representatives
State House
Room 206
Providence, Rhode Island 02903

Re: Proposed Bill H. 7462, Restricting Competition From Non-Attorneys In Real Estate Closing Activities

Dear Speaker and Members of the House of Representatives:

We understand that the Rhode Island House of Representatives is considering legislation that would amend the definition of "practice of law" to require lawyers to represent buyers in almost all aspects of the real estate closing process. The United States Department of Justice and the Federal Trade Commission recommend that the Rhode Island House of Representatives reject proposed bill H. 7462, "An Act Relating To Criminal Offenses - Law Practice." Lawyers and non-lawyers currently compete in Rhode Island to offer such services. There is no indication that consumers are harmed under current law, and substantial evidence that consumers benefit from competition between closing services offered by lawyers and non-lawyers. Based on other States' experience, the legislation is likely to increase closing costs and inconvenience for Rhode Island consumers and businesses.

The Interest and Experience of the U.S. Department of Justice and the Federal Trade Commission

The United States Department of Justice and the Federal Trade Commission are entrusted with enforcing this nation's antitrust laws.

For more than 100 years, since the passage of the Sherman Antitrust Act, the Justice Department has worked to promote free and unfettered competition in all sectors of the American economy. Restraining competition can force consumers to pay increased prices or accept goods and services of poorer quality. Consequently, anticompetitive restraints are of significant concern to the Department, whether they are imposed by a "smokestack" industry or by a profession. Restraining competition has the potential to injure consumers. For this reason, the Justice Department's civil and criminal enforcement programs are directed at eliminating such restraints. As part of those efforts, the Justice Department encourages competition through advocacy letters such as this one. The Department has been concerned about attempts to restrict non-lawyer competition in real estate closings. The Department has urged Kentucky, Virginia, and North Carolina to reject such opinions, through letters to their State Bars and an *amicus curiae* brief filed with the Kentucky Supreme Court last year.[1]

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[1] In addition, the Justice Department has challenged attempts by county bar associations to adopt restraints similar to the proposed legislation. For example, the Justice Department sued and obtained a judgment against one bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. *United States v. Allen County Indiana Bar Association*, Civ. No. F-79-0042 (N.D. Ind. 1980). Likewise, the Justice Department obtained a court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. *United States v. New York County Lawyers' Association*, No. 80 Civ. 6129 (S.D.N.Y. 1981).

Congress created the Federal Trade Commission in 1914 to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The Federal Trade Commission is concerned about restrictions that may adversely affect the competitive process and raise prices or decrease quality. Because the Commission has broad responsibility for consumer protection, it is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception. Pursuant to its statutory mandate, the Federal Trade Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. The Commission has challenged anticompetitive restrictions on the business practices of state-licensed professionals, including lawyers.[2] In addition, the staff have conducted studies of the effects of occupational regulation[3] and submitted comments about these issues to state legislatures, administrative agencies, and others. The Commission also has had significant experience in analyzing and challenging restrictions on competition in the real estate industry.[4]

The Proposed Legislation

Broadly speaking, there are two types of real estate loan closings: those involving purchases, and those not involving purchases. Prior to closing a purchase, the closing agent will have prepared a deed transferring ownership and will have overseen the steps necessary to ensure that the seller has clear title to the property and that the funds for purchase are properly transferred. The title process involves an examination of the title record and the removing of exceptions to the title. At the closing, the closer will witness the signing of the deed transferring ownership, the execution of the documents transferring funds for purchase, and the execution of the loan documents prepared by the buyer's lender. Prior to a closing that does not involve a purchase -- such as a refinancing or home equity loan -- the closing agent will have updated the title history from the time the borrower purchased the property and overseen the steps necessary to transfer funds from the lender to the borrower or the holder of the borrower's existing mortgage on the property. The closer will then witness the execution of the loan documents and any other necessary papers. In lieu of hiring an agent to prepare the paperwork, search the title, and handle fund transfers, the lender can choose to perform all of these activities itself.

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[2] *See, e.g., Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990).

[3] *See, e.g.,* Carolyn Cox and Susan Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics, FTC, October 1990.

[4] *Port Washington Real Estate Board*, 120 F.T.C. 882 (1995) (consent order); *Industrial Multiple and American Industrial Real Estate Association*, 116 F.T.C. 704 (1993) (consent order); *United Real Estate Brokers of Rockland, Ltd. (Rockland County Multiple Listing System)*, 116 F.T.C. 972 (1993) (consent order); *Bellingham-Whatcom County Multiple Listing Bureau*, 113 F.T.C. 724 (1990) (consent order); *Puget Sound Multiple Listing Association*, 113 F.T.C. 733 (1990) (consent order).

H. 7462 would apply to both residential and commercial closings. The bill would apply to initial purchases, refinancings, second mortgages, and closed-end home equity loans (in which a borrower receives a loan secured by the real estate, with a fixed repayment schedule). The bill would require buyers and borrowers to hire attorneys throughout the closing process. Buyers and borrowers refinancing existing mortgages would have to hire lawyers to represent them in "examining" title and removing exceptions to title, supervising the disbursement of funds, and responding to questions and ramifications of the transaction. Currently, lawyers and non-lawyers compete to provide these services. Moreover, almost all Rhode Island title searches are presently performed by independent third-parties who are not lawyers. If the bill's provision governing "examining" title means that lawyers must conduct title searches, the result would be a complete change in Rhode Island practice. If the bill refers instead to reviewing the results of the title search, this function also is currently performed both by skilled non-lawyers and attorneys. Furthermore, non-lawyers currently clear exceptions to title when doing so does not involve the practice of law. One of the most common tasks they perform is calling lenders and others to obtain releases from previous mortgages and performing other administrative work. Non-lawyers often disburse funds and respond to questions about Rhode Island real estate transactions, as long as they are not giving legal advice. If the bill is adopted, nonlawyers who perform these services would be guilty of the crime of unauthorized practice of law and subject to fines and imprisonment. *See* R.I. GEN. LAWS § 11-27-14 (2001).

The proposed legislation would except five real estate-related activities from the definition of the practice of law: (a) any corporation lawfully engaged in insuring titles to real property may continue "conducting its business;" (b) real estate agents and others whose principal source of income is commissions or profits from real estate sales or leases may draft deeds, mortgages, leases, and agreements in connection with sales or leases negotiated by them; (c) a domestically-chartered title insurance company lawfully engaged in performing real estate closings may continue "conducting its business;" (d) a corporation which is owned *exclusively* by Rhode Island attorneys and is lawfully engaged in performing real estate closings, may conduct its business, as long as any non-lawyer officer or agent employed by the corporation is acting under the direct supervision of an attorney licensed by Rhode Island; and (e) a lender may close its own home equity lines of credit. (Such lines involve allowing homeowners to borrow, repay, and then borrow again up to the line's limit, often using checks or credit cards, and thus differ from closed-end home equity loans.) The exception for real estate agents appears limited to the right to draft mortgages, deeds, and similar papers and does not appear to include the ability to answer questions or explain the ramifications of a real estate transaction.

The Public Interest Warrants Granting Rhode Islanders The Choice To Use A Lay Closing Service

In considering whether a service is the practice of law in Rhode Island, the Legislature must of course consider the public interest. Prohibitions on the unauthorized practice of law should serve the public interest and protect the public good, as the Supreme Court of Rhode

Island has recognized. *See Unauthorized Practice of Law Committee v. State of Rhode Island*, 543 A.2d 662, 665-66 (R.I. 1988).

Indeed, when the Supreme Court of New Jersey rejected an Unauthorized Practice of Law ("UPL") opinion similar to the legislation at issue here, it wrote:

> The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether nonlawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.
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> . . .
>
> We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities.

In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995).

In considering how best to protect the public interest, it is worth noting that the antitrust laws and competition policy generally consider sweeping restrictions on competition harmful to consumers and justified only by a showing that the restriction is needed to prevent significant consumer injury. Our analysis supports the conclusion that the public interest would not be harmed, and indeed would be significantly served, by continuing to allow competition from lay services in Rhode Island.

The Proposed Legislation Would Likely Hurt the Public
by Raising Prices and Eliminating Service Competition

Free and unfettered competition is at the heart of the American economy. The United States Supreme Court has observed, "ultimately, competition will produce not only lower prices but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950)); *accord*, *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990). Competition benefits consumers of both traditional manufacturing industries and services offered by the learned professions. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *National Society of Professional Engineers*, 435 U.S. at 689. In several States, as in Rhode Island today, non-lawyers compete with attorneys to provide real estate closing services, including the examination and clearing of title, the disbursement of funds, and the answering of

non-legal questions.[5] Such competition has consistently resulted in lower prices and more choices in how and where closing services are provided. The proposed legislation would likely erect an insurmountable barrier that would prevent competition in Rhode Island from these lay closing services.

The legislation could cause Rhode Island consumers to pay higher closing costs in five ways.

First, the bill would force Rhode Islanders who would not otherwise choose to pay for the services of a lawyer at closing to do so. The legislation requires buyers to have legal representation, which means hiring and paying for an additional lawyer.[6] Buyers already pay for the services of the lender's closing agent as part of their closing costs. Hence, the bill would increase costs for all consumers who might prefer the combination of price, quality, and service that a lay closing service offers. Moreover, besides hurting consumers who are buying and selling homes and commercial properties, the bill would damage those obtaining closed-end home equity loans or refinancing existing real estate loans. Some lenders currently handle these closings without additional charge.

Second, the bill, by eliminating competition from lay providers, would likely increase the price of lawyers' closing services, because the availability of alternative, lower-cost lay services typically restrains the fees that lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay agent would likely pay higher prices.

Third, the bill could reduce competition from out-of-state mortgage lenders and title companies, harming consumers who find lower interest rates or more attractive refinancing packages with these lenders. Out-of-state lenders may not have facilities in Rhode Island to close loans and thus may have to contract with in-state services to close them. These services may include lay providers, or be partially owned by lay providers, which the bill would forbid. Some

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[5] For example, the DOJ and FTC have analyzed the impact of competition from non-lawyer closing services in New Jersey, Virginia, and North Carolina. *See* Letter from Charles A. James and Timothy J. Muris to the Ethics Committee of the North Carolina Bar Re North Carolina State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) <http://www.ftc.gov/be/V020006.htm>; Letter from Joel I. Klein and William J. Baer to the Supreme Court of Virginia Re Proposed UPL Opinion #183 (Jan. 3, 1997) <http://www.ftc.gov/be/v960015a.htm>.

[6] Rhode Island currently requires that buyers be represented by counsel or a title insurance company for purposes of searching the title. The buyer may sign a waiver of this right, in which case the lender selects the agent who will do this. *See* R.I. GEN. LAWS § 19-9-6 (2001). It is not clear that buyers could, under the bill, waive their rights to representation during the entire closing process, so that the lender's lawyer could represent the buyer throughout . (The statutory waiver appears to apply only to the title process.) Even if buyers could, they would presumably have to hire their own attorneys in the event of potential conflict of interests.

conduct their entire loan application and approval process via the Internet, simultaneously reducing costs and increasing customer convenience. The convenience offered by Internet-based mortgage lenders may be especially important to some Rhode Island consumers. The bill could diminish these options.

Fourth, if by requiring lawyers to "examine titles," the bill applies to title searches, it means that consumers and businesses would have to pay attorneys to perform this time-intensive search currently conducted by third-party lay services.

The use of lay closers has reduced costs to consumers in other states. In 1995, after a 16-day evidentiary hearing conducted by a special master, the New Jersey Supreme Court rejected an opinion eliminating lay closings. The Court found that real estate closing fees were much lower in southern New Jersey, where lay closings were commonplace, than in the northern part of the State, where lawyers conducted almost all closings. This was true even for consumers who chose attorney closings. South Jersey buyers represented by counsel throughout the entire transaction, including closing, paid $650 on average, while sellers paid $350. North Jersey buyers represented by counsel paid an average of $1,000 and sellers paid an average of $750. *See In re Opinion No. 26*, 654 A.2d at 1348-49.[7]

The experience in Virginia was similar. Lay closing services have operated in Virginia since 1981, when the State rejected an Opinion declaring lay closings to be the unauthorized practice of law. A 1996 Media General study found that lay closings in Virginia were substantially less expensive than attorney closings.

Virginia Closing Costs			
	Median	Average	Average Including Title Examination
Attorneys	$350	$366	$451
Lay Services	$200	$208	$272

Media General, *Residential Real Estate Closing Cost Survey*, September 1996 at 5. In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. *Va. Code Ann.* §§ 6.1-2.19 - 6.1-2.29 (Michie 1997). (At the time, the state Supreme Court had been considering an Opinion declaring real estate closings to be the practice of law. *See Proposed Virginia UPL Opinion No. 183.*)

[7] In South Jersey, about 40% of buyers and 35% of sellers were represented by counsel at closing. In North Jersey, 95.5% of buyers and 86% of sellers were represented by counsel.

Rhode Island's experience is likely to be similar. One industry source estimated that costs could increase by at least $200-500 if buyers are required to hire their own attorneys, in addition to paying for the lender's closing lawyer. Currently, if buyers choose to hire their own title lawyers, they pay an additional $200-500.

Furthermore, the bill is likely to hurt consumers by denying them the right to choose a lay closing provider that offers a combination of services that better meets individual consumer needs. Specifically, some of the Rhode Island companies that are owned in part by non-attorneys often close loans during the evenings or weekends, when consumers are off work, or are willing to come to the consumer's home or other convenient location. This is important for Rhode Islanders unable to take time off from work and for others for whom travel is difficult or time consuming. Consumers would likely lose this convenience under the bill, since many lawyers may be less likely to accommodate consumers in this manner.

A fifth way the bill will likely harm consumers is that it could prevent realtors from providing simple explanations of common documents used in real estate and mortgage transactions. H. 7462 would allow realtors to continue to draft deeds, mortgages, and other agreements. The realtors, however, presumably could not explain any of these agreements since the bill requires a lawyer to respond to "any questions and ramifications" of the real estate transaction. Hence, consumers would have to pay lawyers to explain the basic purchase and sales agreement they enter into as the first step towards buying a home. Currently, realtors fill out the agreement and can explain it. They may explain to consumers the ramifications of failing to have the home inspection done on time, the meaning of the mortgage contingency clause, and other portions of this agreement. Likewise, realtors currently explain what is required by Rhode Island law to obtain a smoke detector certificate and other certificates required by law for the purchase and sale of a home. The bill appears to require lawyers to do this, as doing so could be considered "responding to questions or ramifications of the transaction."

In addition, commercial entities could be hurt by the bill. Buyers and sellers involved in commercial real estate purchases may already be represented by counsel, but may wish to use an independent lay closing agent for the services involved in closing, or use non-lawyers in their own legal departments. Yet, the proposed legislation would apply to commercial entities, forcing them in all instances to use lawyers or the title insurance companies excepted by the bill.

The Goal of Increasing Consumer Protection Does Not Warrant Adopting This Bill

Antitrust law and policy are very important forms of consumer protection. Consumers benefit immensely from competition among different types of service providers. As the United States Supreme Court has explained:

> The assumption that competition is the best method of allocating resources in a free market recognizes that *all elements of a bargain - quality, service, safety, and durability* - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

National Society of Professional Engineers, 435 U.S. at 695 (emphasis added); *accord*, *Superior Court Trial Lawyers Association*, 493 U.S. at 423. Allowing non-lawyers to compete permits Rhode Island consumers to consider all relevant factors in selecting a provider of closing services, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. In general, the antitrust laws and competition policy require that a sweeping private restriction on competition be justified by a valid need for the restriction and require that the restriction be narrowly drawn to minimize its anticompetitive impact. These requirements protect the public interest in competition. *See generally F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).

There does not seem to have been any showing of need for extensive prohibitions of lay closing service competition. At a minimum, the House should not adopt H. 7462 unless it sees strong factual evidence demonstrating that Rhode Islanders are actually hurt by the availability of closing services performed by anyone other than an employee of a corporation owned entirely by Rhode Island lawyers, a domestically chartered title company, or a title insurance company, and finds that this is not outweighed by the harm to consumers of foreclosing competition.

The Justice Department and the Federal Trade Commission have spoken with several participants in the Rhode Island real estate industry, including lawyers. None has cited any instances of actual consumer injury in Rhode Island from non-lawyer closings. In fact, it appears that at least one attorney has absconded with real estate transaction proceeds. *See Four Lawyers Disciplined in Separate Cases*, PROVIDENCE JOURNAL, June 4, 1996 at B08 (attorney Philip Champagne embezzled $50,000 from proceeds of real estate transaction). A showing of harm is particularly important where, as here, the proposed restraint prevents consumers from using an entire class of providers. Without a showing of actual harm, restraining competition in a way that is likely to hurt Rhode Islanders by raising prices and eliminating consumers' ability to choose among competing providers is unwarranted.

Proponents of the bill have not demonstrated that skilled non-lawyers cannot perform the functions of examining titles and removing exceptions, supervising the disbursement of funds, and responding to non-legal questions and explaining the non-legal ramifications of a real estate transaction. Non-lawyers currently do almost all of the title searches in Rhode Island. Non-lawyers do work to remove title exceptions; they call lenders for discharges on previous mortgages, for example, and review the results of those calls to determine whether to remove an exception. Indeed, the process of removing exceptions is often easier in refinancings and closed-end home equity loans and yet legal representation of the borrower would also be required for them. Likewise, non-lawyers currently answer non-legal questions from buyers and borrowers. For example, if a consumer asks what a foreclosure is, a non-lawyer can answer that question.

Similarly, non-lawyers supervise the disbursement of funds, with no harm to consumers.[8] According to witnesses, closing is largely an administrative task that may be performed by non-lawyers.

Indeed, the proposed legislation appears to recognize that it is not necessary for a lawyer to perform the closing functions. The bill would continue to allow closings by lenders of their home equity lines of credit, and closings by "domestically chartered title insurance companies," and by any corporation "lawfully engaged in the insuring of titles to real property." Consumers and businesses who close using these entities would not have to hire lawyers to perform these functions. Non-lawyers could examine their title and remove exceptions, supervise fund disbursement, and answer their questions and explain the transaction's ramifications. (Of course, as in all situations, these non-lawyers could not provide legal advice.)

Moreover, a substantial number of closings involve home equity loans or the refinancing of existing loans.[9] Because a related transaction has already gone through the closing process once, property law questions (e.g., relating to clear title) are less likely to arise, and legal advice on these matters is less likely to be needed.

The assistance of a licensed lawyer at closing may be desirable, and consumers may decide they need a lawyer in certain situations. A consumer might choose to hire an attorney to answer legal questions, perform title work, provide advice, negotiate disputes, or offer various protections. Consumers who hire attorneys may in fact get better service and representation at the closing than those who do not. But, as the New Jersey Supreme Court has concluded, this is no sound reason to eliminate lay closing services as an alternative. *In re Opinion No. 26*, 654 A.2d at 1360. Rather, the choice of hiring a lawyer or a non-lawyer should rest with the consumer. *Id.*

Less Restrictive Measures May Protect Consumers

Rhode Islanders will likely face substantially higher closing costs if competition from non-lawyers is forbidden by the bill. These costs should not be imposed without a convincing showing not only that lay closings have injured consumers, but also that less drastic measures cannot remedy any perceived problem. Rhode Island consumers can be protected by measures that restrain competition far less than extensive bans on lay closing work. For example, in permitting lay closings, the New Jersey Supreme Court required written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney. *See In re Opinion No.*

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[8] The bill requires counsel to represent the buyer in supervising the disbursement of funds. The disbursement of funds is done by the lender and its representative. It is not clear what function the buyer's lawyer would have with regard to this task.

[9] The bill excepts home equity lines of credit but not closed-end home equity loans.

26, 654 A.2d at 1363. This measure permits consumers to make an informed choice about whether to use lay closing services. Virginia, confronted with similar issues, adopted the Consumer Real Estate Protection Act in 1997, *Va. Code Ann.* §§ 6.1-2.19 - 6.1-2.29 (West 2001), which permits consumers to choose lay closing providers, but requires the state to regulate them, providing safeguards through licensure, registration, and the imposition of financial responsibility and rules for handling closing funds. Though more regulatory than the New Jersey approach, the Virginia approach is also more pro-competitive than the approach in the Rhode Island bill.[10]

Interstate Commerce Clause Issues

In assessing the proposed legislation, the House of Representatives may also wish to consider whether it may violate the **I**nterstate **C**ommerce **C**lause of the Constitution of the United States, Article I, § 8, Clause 3. The bill would define the tasks involved in closing real estate transactions as the practice of law and prohibit anyone from performing them other than lawyers and others who fall within the bill's specific exceptions. Thus, the bill would prevent all non-lawyers from competing to provide closing services (other than those acting on behalf of title insurance companies) and prevent employees of corporations not owned entirely by Rhode Island lawyers from competing to do so.[11] In *National Revenue Corp. v. Violet*, the First Circuit found that a Rhode Island statute declaring debt collecting to be the practice of law was unconstitutional under the interstate commerce clause. 807 F. 2d 285 (1st Cir. 1986). The United States Court of Appeals held that:

> [b]y defining all debt collection as the practice of law, and limiting this practice to members of the Rhode Island bar, Rhode Island effectively bars out-of-staters from offering a commercial service within its borders and confers the right to provide that service--and to reap the associated economic benefit--upon a class largely composed of Rhode Island citizens. . . .[T]he statute deprives the citizens of Rhode Island of any benefits arising from competition. . . . In this circumstance it might appear that the local purpose, rather than being legitimate, is, in substantial

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[10] The Virginia approach carries some additional risk of consumer harm, since licensing regulation itself can be used to thwart competition. *See* Cox and Foster, *supra* n. 3.

[11] The legislation lists 10 practices permitted to corporations and associations that might otherwise be considered the practice of law. Five of these relate specifically to real estate closings. The final practice, in the provision numbered 10, states that "domestically chartered title insurance" companies may conduct closings. This language appears to duplicate a smaller part of the exception granted by provision 1, which would allow any corporation lawfully engaged in the insuring of title to real property to continue closing if that was part of its business. Provision 10 specifically states that a "domestically chartered title insurance company," that is "lawfully engaged in performing real estate closings" may continue to conduct its business. Provision 1 does not refer to real estate closings specifically. If provision 10 is intended to allow domestically-chartered firms to perform more real estate closing tasks than other title insurance companies, then this exception may also raise separate Commerce Clause problems.

> part, to benefit the local bar. This appearance can be rebutted only by showing a legitimate purpose that could not be served as well by non-discriminatory means.

807 F.2d at 290. The court concluded that no such showing had been made. We would urge the House of Representatives to consider whether the proposed legislation could similarly burden interstate commerce in violation of the U.S. Constitution.

Conclusion

By imposing extensive prohibitions on lay closings, H. 7462 will reduce competition and will likely raise closing costs for Rhode Island consumers by requiring them to hire lawyers in circumstances where they may not be necessary.

Other states' experience suggests that the bill will likely cause consumers to pay significantly more for real estate closings. For example, in Virginia, median lay closing costs were $150 less. In parts of New Jersey where lay closings are prevalent, buyers represented by counsel paid $350 less, on average, and sellers paid $400 less. Even consumers who chose attorney closings paid less as a result of the competition attorneys face from non-lawyer closings. Currently, Rhode Island consumers pay $200-500 more if they choose to hire their own title lawyers; the bill would likely raise costs by that amount or more for consumers who would otherwise choose not to hire a lawyer. In addition, the bill could curtail competition from out-of-state and Internet-based lenders, potentially increasing costs and reducing the convenience of the loan application and approval process. There has been no showing of harm to consumers from lay closings that would be substantial enough to justify these reductions in competition. Rather, the bill could harm Rhode Island consumers substantially. We respectfully recommend that the House of Representatives reject the bill.

The Justice Department and the Federal Trade Commission appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

/s/

Charles A. James
Assistant Attorney General

/s/
Jessica N. Butler-Arkow
Attorney
United States Department of Justice
Antitrust Division

By Order of the
Federal Trade Commission,

/s/

Timothy J. Muris
Chairman

/s/
Ted Cruz, Director
Office of Policy Planning

DEPARTMENT OF JUSTICE
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June 30, 2003

The Honorable William V. Irons
President of the Senate
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The Honorable Joseph A. Montalbano
Majority Leader of the Senate
Majority Leader's Office
State Senate
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The Honorable Dennis L. Algiere
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Members of the Senate Commerce, Housing,
and Municipal Government Committee
c/o The Honorable John A. Celona, Chairperson
State Senate
Providence, Rhode Island 02903

Members of the Senate Judiciary Committtee
c/o The Honorable Michael J. McCaffrey, Chairperson
State Senate
Providence, Rhode Island 02903

Re: House Bill No. 5936, Proposed Restrictions on Competition
From Non-Attorneys In Real Estate Closing Activities

Dear Mr. President and Members of the Senate:

We understand that the Rhode Island House of Representatives recently passed a bill that would amend the definition of "practice of law" to require lawyers to represent buyers in virtually all aspects of the real estate closing process. House Bill No. 5936, entitled, "An Act Relating To Criminal Offenses - Law Practice," was referred to the Senate Commerce, Housing, and Municipal Government Committee June 26, 2003. It is presently scheduled to be heard on Tuesday, July 1, 2003.

This bill is very similar to House Bill No. 7462, considered by the House of Representatives last year. The Department of Justice and the Federal Trade Commission urged the House to reject that bill because it would have restrained competition between lawyers and nonlawyers for real estate closing business, likely resulting in increased costs for Rhode Island consumers. The current bill raises many of the same concerns as House Bill No. 7462 did. Accordingly, we urge the General Assembly to reject the current legislation for the reasons stated in our March 29, 2002 letter.[1] A copy of our 2002 letter is attached.

Sincerely yours,

/s/
R. Hewitt Pate
Assistant Attorney General
United States Department of Justice
Antitrust Division

[1] The bill primarily differs from the old bill in one respect. The new bill will allow realtors to answer questions about purchase and sale agreements and other issues that the old bill would have forbidden. This change does not diminish our concerns about the potential anticompetitive impact of the bill and we urge its rejection.