UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

October 6, 2004

Representative Paul Kujawski
House of Representatives
Commonwealth of Massachusetts
State House, Room 174
Boston, MA 02133-1054

Dear Rep. Kujawski:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition,[1] and the United States Department of Justice, Antitrust Division, are pleased to submit this letter in response to your June 29, 2004, letter requesting our analysis of House Bill No. 180 ("HB 180"). HB 180 would amend Chapter 221 § 46 of the General Laws of Massachusetts by authorizing non-attorneys to perform certain real estate settlement services, such as drafting deeds, mortgages, leases and agreements, examining titles, issuing title certification or policy of title insurance, and representing lenders as their closing agents. The bill is pending with the Massachusetts Legislature.

In your letter, you specifically asked the FTC staff to comment on "the pro-competitive aspects and public interest aspects of this legislation."[2] In brief, we believe that HB 180, if passed, likely would benefit Massachusetts consumers. Our comments may be summarized as follows:

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[1] This letter expresses the views of the FTC's Office of Policy Planning, Bureau of Economics, and Bureau of Competition. The letter does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

[2] Letter from Rep. Paul Kujawski to Todd Zywicki, Director, Office of Policy Planning (June 29, 2004).

- Competition produces lower prices, as well as better goods and services. Absent evidence that restrictions on competition are necessary to protect consumers, policy makers should not deprive consumers of the benefits that flow from competition.
- Allowing non-attorneys to compete with attorneys in the provision of settlement services is likely to provide Massachusetts consumers with lower prices for settlement services, whether provided by a title company or an attorney. HB 180, moreover, would benefit consumers by improving their ability to choose their preferred mix of cost, convenience, and quality.
- Other state supreme court decisions and scholarly studies that have addressed the topic suggest that allowing non-attorneys to perform settlement services is not likely to subject Massachusetts consumers to any additional risk of harm.

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

The FTC is charged by statute with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[3] The United States Department of Justice has been entrusted with enforcing this nation's antitrust laws for over 100 years, since the passage of the Sherman Antitrust Act. The FTC and Justice Department work to promote free and unfettered competition in all sectors of the American economy. As the United States Supreme Court has observed, "[t]he heart of our national economic policy long has been faith in the value of competition."[4]

Consistent with their mission to protect consumers, the Justice Department and FTC have become increasingly concerned about efforts to prevent non-lawyers from competing with attorneys in the provision of certain services through the issuance of opinions by state bar agencies and the adoption of laws and regulations by state courts and legislatures relating to the unauthorized practice of law. Through letters and amicus curiae briefs, the FTC and Justice Department have urged the American Bar Association, Virginia, Rhode Island, Kentucky, North Carolina, Georgia, West Virginia and Ohio to reject such restrictions on competition between attorneys and non-attorneys.[5] Separately, the Department of Justice has brought suits for

[3] Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

[4] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

[5] Letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al*. (June 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al*. (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Association (June 10, 1999 and Sept. 10, 1997), available at http://www.usdoj.gov/atr/public/comments/comments.htm; letter from the Justice Department and the FTC to

violating the antitrust laws against bar associations that attempted to restrain competition from non-lawyers.[6]

II. Description of HB 180

Current Massachusetts law prohibits corporations that are not law firms from practicing law, other than representing themselves.[7] In *Mass. Conveyancers Ass'n, Inc. v. Colonial Title & Escrow*, the Suffolk Superior Court (Suffolk County, Massachusetts) held that a title company violated G.L.M. Ch. 221 § 46 when it performed real estate settlement services.[8] Although the defendant used an attorney to supervise its title work and to perform some of its closings, the court enjoined the title company from engaging in the following conduct:

Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996); Brief *Amicus Curiae* of the Federal Trade Commission in *Cleveland Bar Association v. CompManagement, Inc.*, No. 04-0817 (filed Aug. 3, 2004), available at http://www.ftc.gov/os/2004/08/040803amicusbriefclevbar.pdf**;** Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission in *Lorrie McMahon v. Advanced Title Services Company of West Virginia,* No. 31706 (filed May 25, 2004), available at http://www.usdoj.gov/atr/cases/f203700/203790.htm and http://www.ftc.gov/be/V040017.pdf; Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at http://www.ftc.gov/os/2003/07/georgiabrief.pdf and http://www.usdoj.gov/atr/cases/f201100/201197.htm; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n in Kentucky Land Title Ass'n v. Kentucky Bar Ass'n, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at http://www.usdoj.gov/atr/cases/f4400/4491.htm. The letters to the American Bar Association, Rhode Island, North Carolina, Georgia, and Virginia may be found on the FTC's web site, http://www.ftc.gov, and the Department of Justice's website, http://www.usdoj.gov/atr/public/comments/comments.htm.

[6] In *United States v. Allen County Indiana Bar Ass'n,* the Justice Department obtained a judgment against a 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. Civ. No. F-79-0042 (N.D. Ind. 1980). *See also United States v. New York County Lawyers Ass'n*, No. 80 Civ. 6129 (S.D.N.Y. 1981); *United States v. Coffee County Bar Ass'n*, No. 80-112-S (M.D. Ala. 1980).

[7] G.L.M. Ch. 221 § 46 reads:

> No corporation or association shall practice or appear as an attorney for any person other than itself in any court in the commonwealth or before any judicial body or hold itself out to the public or advertise as being entitled to practice law, and no corporation or association shall draw agreements, or other legal documents not relating to its lawful business, or draw wills, or give legal advice in matters not relating to its lawful business, or practice law, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular; provided, that nothing herein shall prohibit a corporation or association from employing an attorney in regard to its own affairs or in any litigation to which it is or may be a party or the insurer of a party. Any corporation or association violating this section shall be punished by a fine of not more than one thousand dollars; and every officer, agent or employee of any such corporation or association who, on behalf of the same, directly or indirectly, engages in any of the acts herein prohibited, or assists such corporation or association to do such prohibited acts, shall be punished by a fine of not more than five hundred dollars.
>
> The provisions of this section shall not apply to a professional corporation organized to practice law under chapter one hundred and fifty-six A or to a limited liability company, whether domestic or foreign, or a general partnership, including a registered limited liability partnership registered pursuant to the laws of any state, the partners or professional employees of which company or partnership who practice law in the commonwealth do so in accordance with the requirements of the supreme judicial court.

[8] 2001 Mass. Super. LEXIS 431 (Super. Ct. Mass. June 5, 2001).

1. Evaluating title to real estate to determine the interest created, transferred or terminated and communicating that evaluation to any interested party to a residential real estate transaction.
2. Evaluating and ensuring that parties to a real estate transaction have complied with their agreements.
3. Preparing, drafting or reviewing legal documents that affect title to real estate or affect the obligation of the parties to the real estate transactions.
4. Explaining at the closing any documents relating to the interest in the real estate being created, transferred or terminated and relating to the agreement of the parties.
5. Issuing title certification or policy of title insurance premised on [defendant's] evaluation of title to real estate.
6. Holding itself out to lenders, title insurance companies or members of the public as willing and able to perform the functions enumerated in paragraphs 1-5 herein.
7. Representing lenders as their closing agents.[9]

Further, the court held that although a title insurance company could not hire a title company – even one that employed an attorney – to perform title work involved with issuing a title insurance policy or perform the closing, it could hire an attorney to act as its agent in the settlement process.[10]

HB 180 would add a new Ch. 221 § 46E so as to allow non-attorneys to offer real estate settlement services:

> The provisions of section 46 shall not apply to a corporation, or its agents, which has been organized under the provisions of chapter 156 as a corporation, in the performance by such corporation, or its agents of drafting deeds, mortgages, leases and agreements in connection with sales or leases made or negotiated, in examining the title and removing exceptions to such title, in representing lenders as their closing agents and in issuing title certification or policy of title insurance premised on evaluation of title to real estate.[11]

III. Analysis of HB 180

Competition is the hallmark of America's free market economy. As the United States Supreme Court has observed, "ultimately competition will produce not only lower prices, but also better goods and services."[12] The benefits competition brings to consumers of services

[9] *Id*. at *24-25.

[10] *Id*. at *23-24.

[11] HB 180.

[12] *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 (citation omitted).

provided by the "learned professions" are no different from the benefits derived from competition in manufacturing and service industries.[13] When non-lawyers are permitted to compete with lawyers to provide real estate services, consumers are able to choose for themselves their preferred mix of cost, convenience, and the degree of assurance that the service is performed adequately. Indeed,

> [t]he 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.[14]

In a majority of states, non-lawyers compete with lawyers to provide services related to the preparation and execution of a deed, including title searching and issuing title reports, the answering of non-legal questions during the closing process, witnessing the signatures at closing, and the disbursement of funds.[15]

A. Competition between non-attorneys and attorneys in the provision of real estate settlement services will benefit consumers

HB 180 will allow Massachusetts consumers to hire non-attorneys to perform settlement services. This increase in competition is likely to benefit consumers in a variety of ways.

First, HB 180 would benefit consumers who, but for the current restrictions on non-attorneys, would choose to hire non-attorneys to perform settlement services. These consumers currently are unable to choose the combination of price, quality, and service that they prefer. For example, lay settlement services have operated in Virginia since 1981, when the state rejected a proposed bar opinion declaring lay settlements to be the unauthorized practice of law. In 1997, Virginia codified the right of consumers to continue using lay settlement services by enacting the Consumer Real Estate Settlement Protection Act.[16] Proponents of that enactment pointed to survey evidence suggesting that lay settlements – including title examinations – in Virginia were substantially less expensive than attorney settlements:

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[13] *See id.* at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

[14] *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695; *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

[15] *See*, *e.g.*, Joyce Palomar, *The War Between Attorneys & Lay Conveyancers – Empirical Evidence Says "Cease Fire!*," 31 CONN. L. REV. 423, 487-88 (1999) (noting that there are more states in which non-attorneys perform real estate transactions than in which attorneys perform them); Michael Braunstein, *Structural Change & Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 264-65 (1997) (reporting that in only eight states is it customary for an attorney to be involved in settlement).

[16] VA. CODE ANN. §§ 6.1-2.19 to 6.1-2.29 (Michie 2003).

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

[17]

It is reasonable to expect that consumers in Massachusetts also will pay lower prices.

In addition to charging lower prices, some lay service providers compete with attorneys on the basis of convenience to close loans at non-traditional times (such as evenings and weekends) and locations (such as the consumer's home).[18] Thus, HB 180 also would benefit consumers by granting them the right to choose a lay service provider that offers a combination of services that better meets their needs.

Second, non-attorneys are likely to provide a competitive constraint on the fees that attorneys are able to charge for their services. This means that HB 180 is likely to allow even consumers who otherwise would choose an attorney over a title company to enjoy lower prices. For example, the New Jersey Supreme Court – after a 16-day evidentiary hearing conducted by a special master – found that real estate closing fees were much lower in southern New Jersey, where lay settlements were commonplace, than in northern New Jersey, where lawyers conducted almost all settlements. Specifically, southern New Jersey buyers unrepresented by counsel paid no legal fees as a part of closing costs, while unrepresented sellers paid about $90; southern New Jersey buyers represented by counsel throughout the entire transaction – including closing – paid on average $650, while sellers paid $350. This was in sharp contrast to northern New Jersey, where buyers and sellers represented by counsel paid on average $1,000 and $750, respectively.[19]

The Supreme Court of Kentucky also has observed that title companies provide a competitive restraint on attorneys' pricing. In the course of rejecting a Kentucky Bar opinion that would have greatly restricted the ability of title companies to perform settlement services, the court noted that "before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher – in some areas as

[17] Media General, *Residential Real Estate Closing Cost Survey*, at 5 (Sept. 1996).

[18] *See Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 100 (Wash. 1999) ("permitting mortgage lenders to prepare loan documents in the way the CTX does relieves borrowers of the cost and inconvenience of having attorneys prepare their loan documents"); *State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978) ("The uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money."). *See also* Palomar, 31 CONN. L. REV. at 439-40 ("Home buyers, sellers, realtors, and title professionals also are reluctant to involve attorneys in residential real estate transactions because they fear the attorney will slow the transaction.").

[19] *See In re Op. No. 26 of the Comm. on the Unauthorized Practice of Law*, 654 A.2d 1344, 1349 (N.J. 1995).

much as 1% of the loan amount plus additional fees."[20] Further, the court noted that "the presence of title companies encourages attorneys to work more cost-effectively."[21]

Third, HB 180 is likely to encourage competition from out-of-state lenders and title companies. Lenders outside of Massachusetts – such as online lenders – that compete with in-state lenders for Massachusetts consumers' business may lack facilities in Massachusetts. Instead, these lenders may hire out-of-state providers to prepare deeds and may contract with lay providers in Massachusetts to facilitate the closing of the real estate transaction. By helping facilitate competition among lenders, HB 180 can lead to the availability of lower loan rates for Massachusetts consumers. Further, to the extent that HB 180 encourages competition from online lenders, Massachusetts consumers who value the convenience of conducting their entire loan application and approval process via the Internet also will benefit.

B. HB 180 is unlikely to result in any consumer harm

Courts and scholars that have examined the issue have found scant evidence that allowing non-attorneys to perform settlement functions results in consumer harm. For example, opponents of allowing lay settlements often express a concern that buyers and sellers will have questions about the transaction and the documents that a lay settlement provider cannot or should not answer.[22] However, with regard to the Kentucky Bar's assertion that attorneys need to be present at closing to answer legal questions, the Kentucky Supreme Court found that "few, if any, significant legal questions arise at most residential closings."[23] Further, with regard to a list of questions the Kentucky Bar alleged were likely to arise at closing, the court noted that "most of the witnesses conceded that questions of the nature of those [questions] listed . . . are asked, if ever, before the closing, when there is time to resolve any problems."[24] Other state

[20] *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003).

[21] *Id*.

[22] *See*, *e.g.*, *Mass. Conveyancers*, 2001 Mass. Super. LEXIS 431 at *20-21.

[23] *Countrywide Home Loans,* 113 S.W.3d at 119.

[24] *Id*.

courts that have considered this issue also have found no evidence of consumer harm from lay settlement services,[25] and we are aware of no case to the contrary.[26]

Scholarship also supports the conclusion that consumers face no additional risk of harm from turning to lay providers to perform real estate settlement services. One study, for example, compared five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibit lay provision of these settlement services. The specific "goal" of this study was to determine "the threshold question . . . whether members of the public *suffer actual harm* from lay provision of real estate settlement services."[27] Based on her empirical findings, the author found "[t]he only clear conclusion" to be "that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law."[28]

[25] *See Perkins*, 969 P.2d at 100 ("[T]he risk of public harm is low. Indeed, the Perkinses have never alleged that their loan documents were deficiently drafted or that their legal rights were prejudiced in the least."); *In re Op. No. 26*, 654 A.2d at 1346 ("The record fails to demonstrate that the public interest has been disserved by the South Jersey practice [of allowing non-attorneys to perform settlement services, including title examinations and closings] over the many years it has been in existence."); *Guardian Abstract & Title*, 575 P.2d at 949 (in county where title companies handled approximately 90 percent of the real estate closings and had been performing service for 20 years, "[t]here was no convincing evidence that the massive changeover in the performance of this service from attorneys to the title companies during the past several years has been accompanied by any great loss, detriment or inconvenience to the public"); *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 312 P.2d 998, 1007 (Colo. 1957) ("we must make note of the fact that the record is devoid of evidence of any instance in which the public or any member thereof, layman or lawyer has suffered injury by reason of the act of any of the defendants sought to be enjoined").

[26] Although the Georgia Supreme Court recently held that real estate closings are the practice of law, it reached its conclusion without any analysis of the benefits or costs to the public of such a prohibition. *In re UPL Advisory Opinion 2003-2*, 588 S.E.2d 741 (Ga. 2003). Instead, the court merely asserted that prohibiting lay closings was in the public interest. *Id.* at 742. Nor do other states' decisions to prohibit lay settlement services contain any evidence that non-attorneys are any more likely than attorneys to harm consumers with shoddy or dishonest service. *See*, *e.g.*, *Ex parte Watson*, 589 S.E.2d 760 (S.C. 2003); *Doe v. McMaster*, 585 S.E.2d 773 (S.C. 2003); *Mass. Conveyancers Ass'n*, *supra*; *In re Mid-Atl. Settlement Servs., Inc*., 755 A.2d 389 (Del. 2000) (unpublished op.); *State v. Buyers Serv. Co., Inc*., 357 S.E.2d 15 (S.C. 1987).

[27] Palomar, 31 CONN. L. REV. at 477 (emphasis added).

[28] *Id*. at 520; *accord* Braunstein, 62 MO. L. REV. at 274-75 (discussing a 1989 Ohio study that "indicate[d] that increased lawyer involvement does not have a beneficial effect on outcomes of home purchase transactions").

IV. Conclusion

By allowing non-attorneys to compete with attorneys in the provision of settlement services, HB 180 is likely to provide Massachusetts consumers with lower prices, greater convenience, and increased choice. At the same time, HB 180 is unlikely to cause Massachusetts consumers to suffer any additional risk of harm. The Justice Department and FTC staff appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding our analysis.

Respectfully submitted,

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