



Dora
Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

2008 Sunrise Review: Closing Agents

January 11, 2008



STATE OF COLORADO

DEPARTMENT OF REGULATORY AGENCIES

Office of the Executive Director

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Bill Ritter Jr.
Governor

January 11, 2008

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunrise reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed its evaluation of the sunrise application for regulation of Closing Agents and is pleased to submit this written report. The report is submitted pursuant to section 24-34-104.1, Colorado Revised Statutes, which provides that the Department of Regulatory Agencies shall conduct an analysis and evaluation of proposed regulation to determine whether the public needs, and would benefit from, the regulation.

The report discusses the question of whether there is a need for regulation in order to protect the public from potential harm, whether regulation would serve to mitigate the potential harm, and whether the public can be adequately protected by other means in a more cost-effective manner.

Sincerely,

D. Rico Munn
Executive Director

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The Sunrise Process

Background

Regulation, when appropriate, can serve as a bulwark of consumer protection. Regulatory programs can be designed to impact individual professionals, businesses or both.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation. Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection – only those individuals who are properly licensed may use a particular title(s) – and practice exclusivity – only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements – typically non-practice related items, such as insurance or the use of a disclosure form – and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency – depending upon the prescribed preconditions for use of the protected title(s) – and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

As regulatory programs relate to businesses, they can enhance public protection, promote stability and preserve profitability. But they can also reduce competition and place administrative burdens on the regulated businesses.

Regulatory programs that address businesses can involve certain capital, bookkeeping and other recordkeeping requirements that are meant to ensure financial solvency and responsibility, as well as accountability. Initially, these requirements may serve as barriers to entry, thereby limiting competition. On an ongoing basis, the cost of complying with these requirements may lead to greater administrative costs for the regulated entity, which costs are ultimately passed on to consumers.

Many programs that regulate businesses involve examinations and audits of finances and other records, which are intended to ensure that the relevant businesses continue to comply with these initial requirements. Although intended to enhance public protection, these measures, too, involve costs of compliance.

Similarly, many regulated businesses may be subject to physical inspections to ensure compliance with health and safety standards.

Regulation, then, has many positive and potentially negative consequences. Colorado law, section 24-34-104.1, Colorado Revised Statutes (C.R.S.), requires that individuals or groups proposing legislation to regulate any occupation or profession first submit information to the Department of Regulatory Agencies (DORA) for the purposes of a sunrise review. The intent of the law is to impose regulation on occupations and professions only when it is necessary to protect the public health, safety or welfare. DORA must prepare a report evaluating the justification for regulation based upon the criteria contained in the sunrise statute:¹

- (I) Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety, or welfare of the public, and whether the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument;
- (II) Whether the public needs, and can reasonably be expected to benefit from, an assurance of initial and continuing professional or occupational competence; and
- (III) Whether the public can be adequately protected by other means in a more cost-effective manner.

Any professional or occupational group or organization, any individual, or any other interested party may submit an application for the regulation of an unregulated occupation or profession. Applications must be accompanied by supporting signatures and must include a description of the proposed regulation and justification for such regulation.

Methodology

DORA has completed its evaluation of the proposal for regulation of Closing Agents. During the sunrise review process, DORA performed a literature search, contacted and interviewed representatives of the Land Title Association of Colorado, reviewed licensure laws in other states, interviewed members of the Colorado Association of Certified Closers, and contacted the Office of the Attorney General Consumer Protection Section.

¹ § 24-34-104.1(4)(b), C.R.S.

Profile of the Profession

Closing Agents are responsible for a variety of administrative functions in real estate transactions. The Closing Agent handles the legal transfer of title and ownership of a property from the seller to the buyer.²

According to information provided by an interested party who operates an independent Closing Agent business in Colorado, Closing Agents perform a variety of functions, including, but not limited to:

- Initiating research on the title of the property being sold;
- Preparation and presentation of closing documents (real estate and loan);
- Disbursement of various funds in a real estate transaction; and
- Notarization of documents in the real estate transaction.

Prior to moving forward in a real estate transaction, a Closing Agent will request preliminary title work on a property.³ This process entails a title professional searching and examining public records for information related to the property's title.⁴ Researching public records to identify potential flaws in a property's title allows any flaws to be addressed prior to the formal closing of the property. Flaws in a title could include:⁵

- The previous owner may have failed to pay local or state taxes.
- There may have been an outstanding mortgage or judgment on the property.

Additionally, Closing Agents are responsible for preparing and presenting closing documents at a real estate closing. There are several documents parties must sign at a typical real estate closing, including:

- The U.S. Department of Housing and Urban Development (HUD)-1 settlement statement;
- The deed;
- The mortgage;
- The deed of trust;
- The promissory note;

² InvestorWords.com. *Closing Agent*. Retrieved on October 30, 2007, from http://www.investorwords.com/902/closing_agent.html

³ HomeClosing101.org – Protecting Your American Dream. *Closing Process*. Retrieved December 20, 2007, from <http://www.homeclosing101.org/closing.cfm?print=1>

⁴ HomeClosing101.org – Protecting Your American Dream. *Closing Process*. Retrieved December 20, 2007, from <http://www.homeclosing101.org/closing.cfm?print=1>

⁵ HomeClosing101.org – Protecting Your American Dream. *Closing Process*. Retrieved December 20, 2007, from <http://www.homeclosing101.org/closing.cfm?print=1>

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- The Truth-in-Lending statement;
 - The initial escrow statement; and
 - The mortgage servicing disclosure statement.

The HUD-1 settlement statement is a standard form used by HUD that details the costs of a home loan.⁶ This form must be signed by both the seller and the buyer of the property.⁷

Closing Agents also present the deed at a real estate closing. The deed is the legal document that transfers title to real property.⁸ The deed should contain an accurate description of the property, be signed and witnessed where the property is located and should be delivered to the purchaser.⁹

During a real estate closing, the Closing Agent also ensures that the mortgage is presented and signed by the buyer. The mortgage is a lien on the property that gives the lender the right to foreclose on the property if the buyer defaults on the loan.¹⁰

The deed of trust transfers legal title of the property to the trustee until the loan is paid off, giving the trustee the power to sell the property and satisfy the debt in the case of default on a loan.¹¹

The promissory note is the legal debt document on a property, and a legal promise to pay according to the terms of the loan.¹²

The Truth-in-Lending statement is required if there have been any changes in the terms of the property loan since the loan application.¹³ The Truth-in-Lending statement must include the following:¹⁴

- Terms of the loan;
- Interest rate;

⁶ Ameriprise Financial. *Credit & Lending Glossary*. Retrieved December 23, 2007, from <http://www.ameriprise.com/amp/individual/products/banking/information-center/glossary.asp#h>

⁷ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

⁸ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

⁹ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

¹⁰ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

¹¹ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

¹² *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

¹³ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

¹⁴ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

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- Loan amount;
 - Annual percentage rate; and
 - Total payments required to pay off the loan.

The initial escrow statement lists the estimated costs to be paid from the escrow account for the ensuing year, the escrow payment amount and any subsequent cushion required.¹⁵

Finally, the mortgaging servicing disclosure statement must be completed in order for a real estate transaction to be complete. The mortgaging servicing disclosure statement tells the borrower whether the lender will be servicing the loan or transferring it to another lender.¹⁶

A Closing Agent is also responsible for the disbursement of all funds that are deposited with the Closing Agent. Closing Agents send payoffs by wire or check. The funds include, but are not limited to:

- Seller's proceeds;
- Lender/broker fees;
- Title company fees;
- Underwriter fees,
- Appraisal fees;
- Broker fees;
- Any third party fees to be paid through closing;
- Taxes to be paid through closing; and
- Insurance to be paid through closing.

Although not required, many Closing Agents also serve as a notary in a real estate closing.

¹⁵ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

¹⁶ *What is the Procedure at the Loan Closing?* Retrieved December 20, 2007, from http://www.vlender.com/p/paramount/closing_process.html

Colorado Association of Certified Closers (CACC) Certifications

The CACC is a trade organization composed of professionals from all aspects of the real estate industry. The primary focus of CACC is to offer educational opportunities on real estate and loan transactions.

CACC currently offers Real Estate Closer and Loan Closer certifications.

In order to receive a Real Estate Closer or Loan Closer certification offered by CACC, a candidate must pass an examination. The examination consists of two parts: the written examination and the oral interview. The written portion of the examination includes 150 multiple-choice questions.

The oral interview serves as practice for an actual closing presentation. A candidate is presented with a variety of scenarios, and graded on how each situation is handled.

The minimum qualifications for being eligible to take the certified Real Estate Closer or Loan Closer examination are as follows:¹⁷

- Three years of closing experience within the immediate preceding four years and completion, with a passing grade, of 120 hours of classroom instruction approved by CACC;
- Five years closing experience within the immediate preceding seven years and completion, with a passing grade, of 72 hours of classroom instruction;
- Seven years closing experience within the immediate preceding nine years and completion, with a passing grade, of 48 hours of classroom instruction; or
- Nine years closing experience within the immediate preceding 12 years.

CACC also accepts various alternatives to the required classroom instruction, including:

- Graduate Realtor Institute certification;
- Valid Real Estate Broker's license;
- Paralegal certificate in Real Estate;
- Law degree; or
- Real Estate degree.

The CACC currently charges \$50 to take the examination and \$25 to retake it.

¹⁷ Colorado Association of Certified Closers, Inc. *Application Requirements for a Professional Designation Certified Real Estate/Certified Loan Closer*. Retrieved December 23, 2007, from <http://www.cacc-closers.org/education.htm>

Proposal for Regulation

The Land Title Association of Colorado (Applicant) has submitted a sunrise application to the Department of Regulatory Agencies (DORA) for review in accordance with the provisions of section 24-34-104.1, Colorado Revised Statutes (C.R.S.). The application identifies state licensure of Closing Agents as the appropriate level of regulation to protect the public.

Licensure typically entails a demonstration of competency in order to practice in a specified profession or occupation. Although the Applicant seeks to license Closing Agents, the Applicant did not provide information as to how competency should be determined. For example, the sunrise application did not detail minimum education or examination requirements.

However, according to the Applicant, licensure of Closing Agents will increase:

- Accountability;
- Oversight; and
- Consumer protection.

The Applicant's sunrise application also states that regulation would provide some assurance that Closing Agents possess a minimum level of competency to conduct real estate closings.

According to the application, there are currently no tests available that establish minimum competency in order to practice as a Closing Agent in Colorado. The application indicates that there is an examination designed to measure competency for Certified Title Insurance Specialists, but the test is not considered an entry-level examination.

Further, the application states that the Colorado Association of Certified Closers offers Certified Real Estate Closer and Certified Loan Closer examinations, but in order to qualify to take either examination, a candidate must have a minimum of three years of industry experience and a minimum level of education prior to taking the examination.

Additionally, the Applicant outlines several types of harm that could potentially occur in the absence of regulation of Closing Agents, including:

- Erroneous preparation of the conveyance deed could effectively void a client's ownership interest in real estate property;
- Potential litigation as a result of erroneous preparation of documents or disbursement of money;
- Potential greater opportunity for theft of money due to the lack of oversight or regulation; and
- Inconvenience and anxiety when the closing process is not handled accurately or competently.

The Applicant's sunrise application also details the minimum competencies necessary to operate as Signing Agents and Closing Agents. Signing Agents work for Closing Agents; they are involved only with the signing portion of the Closing Agent's duties.¹⁸ As outlined in the application, the minimum competencies for a Signing Agent are as follows:

- Commissioned notary in the state of Colorado;
- Ability to effectively communicate orally and in writing, in person and by telephone;
- Knowledge of the purpose and use of title insurance and of related services and of the purpose and terminology of legal instruments involved in escrow transactions and in the insuring of title to real property;
- Knowledge of local escrow procedures, regulations and terminology;
- Ability to determine necessary forms to complete escrow transactions, to complete forms accurately, to follow instructions and to meet and deal with the public effectively; and
- Knowledge of lender documents and forms and ability to concisely explain forms to parties in a transaction.

¹⁸ Frequently Asked Questions by Notaries and Signing Agents. Retrieved December 23, 2007, from <http://www.halitek.com/FAQs%20by%20notaries%20and%20signing%20agents.htm>

As outlined in the application, the minimum competencies related to Closing Agents are as follows:

- Commissioned notary in the state of Colorado;
- Ability to effectively communicate orally and in writing, in person and by telephone;
- Knowledge of the purpose and use of title insurance and of related services and of the purpose and terminology of legal instruments involved in escrow transactions and in the insuring of title to real property;
- Ability to determine and prepare necessary forms to complete escrow transactions, to complete forms accurately, to follow instructions, and to meet and deal with the public effectively;
- Knowledge of lender documents and forms and ability to concisely explain forms to parties in a transaction;
- Analytical ability sufficient to perform varied tasks of limited complexity guided by general company escrow procedures and escrow supervisor instructions;
- Considerable ability to perform mathematical calculations, to interview escrow principals, review preliminary title reports, ascertain needed information from title plant, plan and conduct escrow closing program, and to meet and deal with escrow principals effectively;
- Thorough knowledge of the purpose and use of title insurance, sales and service techniques, of legal descriptions and legal documents related to the sale of real property, escrow procedures and terminology, and of computing interest and pro-rating taxes;
- Considerable knowledge of the local techniques, procedures and regulations involved in the escrow closing of real property, reviewing preliminary title reports and the principles of mortgage lending and underwriting; and
- Considerable ability to establish and maintain harmonious and effective relationships with other employees and the public.

Summary of Current Regulation

The Colorado Regulatory Environment

Federal Regulations

There are several federal laws in place that provide consumer protection in real estate transactions. Specifically, the Real Estate Settlement Procedures Act (RESPA), which is a consumer protection statute, was enacted by Congress in 1974. RESPA was designed to help consumers become better shoppers for settlement services and eliminate kickbacks and referral fees that could unnecessarily increase the costs of certain settlement services.¹⁹

RESPA also requires an Affiliated Business Arrangement (AfBA) disclosure when a Closing Agent refers a consumer to a provider with whom the referring party has an ownership or other beneficial interest.²⁰

RESPA requires that a U.S. Department of Housing and Urban Development (HUD)-1 settlement statement is completed prior to a real estate transaction. RESPA also allows the borrower to request to see the HUD-1 settlement statement one day before the actual settlement.²¹

The Truth-in-Lending Act provides additional consumer protection related to real estate transactions. Specifically, 12 C.F.R. Part 225, Regulation Z requires lenders to make certain disclosures on loans within three business days after receipt of a written application.²² The disclosure statement is provided at the time of closing and includes the following information:²³

- Name and address of creditor;
- Amount financed;
- Itemization of amount financed;
- Finance charge;
- Annual percentage rate;
- Variable interest rate information;

¹⁹ U.S. Department of Housing and Urban Development. *More information About RESPA*. Retrieved December 23, 2007, from <http://www.hud.gov/offices/hsg/sfh/res/respamor.cfm>

²⁰ U.S. Department of Housing and Urban Development. *More information About RESPA*. Retrieved December 23, 2007, from <http://www.hud.gov/offices/hsg/sfh/res/respamor.cfm>

²¹ U.S. Department of Housing and Urban Development. *More information About RESPA*. Retrieved December 23, 2007, from <http://www.hud.gov/offices/hsg/sfh/res/respamor.cfm>

²² Loan Biz. *Truth in Lending Act 'Regulation Z.'* Retrieved December 23, 2007, from <http://www.loanbiz.com/regz.htm>

²³ Loan Biz. *Truth in Lending Act 'Regulation Z.'* Retrieved December 23, 2007, from <http://www.loanbiz.com/regz.htm>

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- Payment schedule;
 - Total of payments;
 - Demand feature;
 - Total sales price;
 - Prepayment policy;
 - Late payment policy;
 - Security interest;
 - Insurance requirements;
 - Certain security interest charges;
 - Contract reference;
 - Assumption policy; and
 - Required deposit information.

Colorado Regulations

There are also several state laws that provide protection to Colorado consumers in real estate closing transactions, including the disbursement of funds. Section 38-35-124, Colorado Revised Statutes (C.R.S.), outlines the requirements for satisfaction of indebtedness on real estate property. The important elements within section 38-35-124, C.R.S., are outlined below:

- When all indebtedness is satisfied, unless the debtor requests in writing that the lien not be released, the creditor or holder (Closing Agent) must record (within 90 days) with the appropriate clerk and recorder the documents to release or satisfy the lien of record.
- If the debtor requests in writing, or fails to request in writing that the lien not be released, then the debtor's request or the actual release cancels any obligations on the part of the creditor or holder to make any further loan or advance that would be secured by the lien.
- Upon satisfaction of indebtedness, the creditor or holder must return all papers and personal property of the debtor that may have been held by the creditor or holder in connection with the indebtedness.
- Creditors or holders who fail to comply with these requirements are liable to the owner of the real property encumbered by such indebtedness and to any other person liable on such indebtedness for all actual economic loss incurred enforcing the rights provided under this section, including reasonable attorney fees and costs.

Additionally, section 38-35-124.5, C.R.S., addresses the payoff statement on real estate loans. Salient parts of section 38-35-124.5, C.R.S., are summarized below:

- Any person or entity providing closing and settlement services in a real estate transaction and to whom a payoff statement is addressed are entitled to reasonably rely on the amounts that are set forth on the payoff statement and are not liable to the creditor or holder of the indebtedness or its agent for any omitted amounts, unless a written amendment is received.
- Any creditor or holder who fails to comply with the indebtedness release provisions is liable to persons or entities to whom the written payoff statement was addressed or any actual economic loss.

Finally, section 38-35-125, C.R.S., includes provisions regarding the disbursement of funds in a real estate closing. Key provisions within section 38-35-125, C.R.S., include:

- No person or entity providing closing and settlement services in a real estate transaction can disburse funds until those funds have been received and are available for immediate withdrawal.
- The person or entity providing closing and settlement services may advance funds, not exceeding \$500, on behalf of interested parties for the transaction to pay incidental fees for such items as tax certificates and recording costs or to cover minor changes in the closing adjustments.
- A seller who requests as part of written closing instructions in advance of closing is entitled to receive the proceeds of closing in a cashier's check or in funds electronically transferred to an account specified by the seller.
- Failure to comply with the provisions of this section is deemed a deceptive trade practice, and the Attorney General or a district attorney may apply to the appropriate district court within Colorado for an order to effect the purposes of this section.

Regulation in Other States

According to the sunrise application submitted by the Land Title Association of Colorado (Applicant), 19 states regulate Closing Agents. There are a variety of tools each of the 19 states employ in an attempt to provide adequate protection to the consumer. Some states (three) require background checks prior to working as a Closing Agent, while others require minimum financial net worth (four). However, the majority (10 of the 19) required one or more of the following:

- Surety bond;
- Fidelity bond; or
- Errors and omissions insurance.

The most widely used form of regulation among the 19 states is the requirement of a surety bond. In fact, 12 of the 19 states require Closing Agents to possess a surety bond prior to conducting business as a Closing Agent. There is not a uniform surety bond amount in each of the 12 states. Instead surety bond requirements range from \$10,000 to \$25,000.

Additionally, three states require a fidelity bond prior to working as a Closing Agent. A fidelity bond is an insurance bond that is obtained to protect against financial loss from dishonest acts of persons entrusted with authority to manage funds.²⁴ The three states that require fidelity bonds require various amounts of coverage. The coverage ranges from \$25,000 to \$200,000. All three states that require a fidelity bond also require Closing Agents to possess a surety bond.

There are currently three states that require errors and omissions insurance prior to working as a Closing Agent. Two of the three states require a minimum of \$50,000 errors and omissions insurance coverage, while the remaining state requires Closing Agents to possess a minimum of \$100,000 of errors and omissions insurance.

²⁴ Chase. *Mortgage Glossary*. Retrieved December 27, 2007, from <http://mortgage02.chase.com/alt/altdel/glossary.jsp?index=f>

Analysis and Recommendations

Public Harm

The first sunrise criterion asks:

Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, and whether the potential for harm is easily recognizable and not remote or dependent on tenuous argument.

Before moving forward in the analysis of harm to the public, it is important to identify what harm, or potential harm, could be caused by Closing Agents. The potential harm the Department of Regulatory Agencies (DORA) identified during conversations with the Land Title Association of Colorado (Applicant), as well as interested parties and stakeholders, was financial in nature.

The Applicant submitted one incident to DORA attempting to show harm. DORA, through conversations with interested parties and stakeholders, identified an additional incident of potential harm.

The incident provided by the Applicant alleges that an independent Closing Agent instructed a borrower to sign his signature so that it was legible.

The Applicant alleges that this instruction constituted the unlicensed practice of law, but acknowledges it did not result in any loss or damage to the borrower. However, the Applicant states that such events create the belief of potential material harm to the general public by allowing non-lawyers to give legal advice without authority.

If a Closing Agent violated existing laws in Colorado pertaining to the unlicensed practice of law, the Closing Agent could have been sanctioned under existing law.

The second incident attempting to identify harm regarding Closing Agents involves an independent Closing Agent and her company. DORA's Division of Insurance (DOI) is actively investigating the case. Due to the fact that there is an on-going investigation, details of the case cannot be discussed.

The two incidents attempting to identify harm presented in this sunrise review do not demonstrate any harm to Colorado consumers. Given the fact that there are a large number of real estate closings annually in Colorado, the lack of evidence of harm illustrates that current laws, as well as the Closing Agents employed by title companies and independent Closing Agents, are operating very well.

Need for Regulation

The second sunrise criterion asks:

Whether the public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional or occupational competence.

This criterion addresses the proposition of whether the state should require a certain level of education and/or impose a requirement that Closing Agents pass an examination before being licensed to practice in Colorado.

From the information provided to DORA by the Applicant as well as interested parties, no evidence has been presented that Closing Agents do not possess adequate skills, education or competence necessary to practice safely. In fact, this review uncovered no evidence of harm to the public resulting from lack of education of practitioners.

As a result, the public cannot expect to benefit from an assurance of competency.

Alternatives to Regulation

The third sunrise criterion asks:

Whether the public can be adequately protected by other means in a more cost-effective manner.

As outlined earlier in this report, the Colorado Association of Certified Closers (CACC) offers two certifications: Real Estate Closers and Loan Closers.

Therefore, it is clear that an alternative to government regulation is already available to Closing Agents.

Enacting a licensing program could potentially cause an unnecessary barrier to entry. This sunrise review identified no recognizable harm to the public. Therefore, licensing Closing Agents would create unnecessary regulation and potentially have adverse effects on the consumer.

Conclusion

The Applicant submitted one example of harm to the public in its sunrise application. In an attempt to uncover additional examples of harm, DORA contacted a variety of resources. For example, the author of this sunrise review met with the Division of Insurance (DOI) staff to explore the possibility of identifying harm to the public caused by unregulated Closing Agents. DOI staff spoke with members of the CACC, and encouraged them to contact the author of this sunrise review with examples of harm to include in this sunrise review. The author of this sunrise review did not receive any additional information from the CACC regarding harm to the public by Closing Agents.

Additionally, DOI staff emailed various industry contacts requesting examples of harm. DOI staff did not receive any responses to the email inquiry.

The author of this sunrise review also gave a presentation to the DOI's Title Advisory Council (Council), which was established to provide a sounding board for professionals in the title insurance industry. The Council is composed of industry members who are interested in sharing ideas with other industry members as well as DOI staff. At the time of this writing, DORA had not received any additional examples of harm from this group of stakeholders.

OPRRR also contacted staff within the Office of the Attorney General Consumer Protection Section. Staff indicated that no complaints specific to Closing Agents have been investigated in the last four years; however, there are two current active investigations related to mortgage fraud including mortgage brokers who have established affiliated closing agencies.

It is possible that Closing Agents could inflict harm on the consumer. Closing Agents are responsible for a variety of administrative tasks in a real estate transaction, including holding and disbursing funds. If a Closing Agent absconds with closing funds, the entity that is listed on the U.S. Department of Housing and Urban Development (HUD)-1 settlement statement form is ultimately responsible for re-paying funds. For example, if a title company that contracted with an independent Closing Agent is on the HUD-1 settlement statement, it is responsible for the actions of its contracted Closing Agent. In this scenario, if the contracted Closing Agent absconds with closing funds, the title company is the responsible party to the consumer.

Conversely, if an independent Closing Agent is listed on the HUD-1 settlement statement, he or she is the responsible party to the consumer, and is ultimately responsible for re-paying funds. As a result, the potential for harm to the consumer exists.

Based on the potential for financial harm to the consumer and to add a layer of consumer protection, the General Assembly should either impose a bond requirement on Closing Agents or impose liability and/or responsibility on a title company by operation of law for the actions of the Closing Agents with which they contract.

Recommendation – The General Assembly should impose a bond requirement on Closing Agents or impose liability and/or responsibility by operation of law on title companies for the actions of the Closing Agents with which they contract.