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REVIEW

Colorado Department of Regulatory Agencies  
Office of Policy, Research and Regulatory Reform

Colorado Real Estate Commission  
and the Division of Real Estate,  
including the Function of Making  
Available Errors and Omissions  
Insurance to Licensees and the  
Service of Process Requirements



October 15, 2007

# STATE OF COLORADO



Bill Ritter, Jr.  
Governor

D. Rico Munn  
Executive Director

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October 15, 2007

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 sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of the Colorado Real Estate Commission (Commission) and the Colorado Division of Real Estate (Division), including the function of making errors and omissions insurance available to licensees and certain service of process requirements. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2008 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination...

The report discusses the question of whether the regulatory program provided under Parts 1, 2, 4, 6 and portions of 3, of Article 61 of Title 12, C.R.S., serves to protect the public health, safety or welfare. The report also discusses the effectiveness of the Commission and Division staff in carrying out the intent of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

D. Rico Munn  
Executive Director



**2007 Sunset Review  
Colorado Real Estate Commission and the  
Colorado Division of Real Estate**

Department of Regulatory Agencies

Bill Ritter, Jr.  
Governor

D. Rico Munn  
Executive Director

**Executive Summary**

**Quick Facts**

**What is Regulated?** Real estate brokers, who facilitate real estate transactions, and subdivision developers, which include developers of timeshares, condominium conversions and raw land subdivisions.

**Who is Regulated?** In fiscal year 05-06 there were 32,546 active regulated individuals and entities:

- 32,335 real estate brokers
- 211 subdivision developers

**How is it Regulated?** The Colorado Real Estate Commission is a Type 1 commission housed in the Division of Real Estate of the Department of Regulatory Agencies. In practice, the Commission licenses real estate brokers and registers subdivision developers. To become licensed, a real estate broker must complete a prescribed course of education, pass a written examination and undergo a fingerprint-based criminal history background check. To become registered, a subdivision developer must provide documentation demonstrating its compliance with relevant statutes. Real estate brokers and subdivision developers are subject to disciplinary action if they violate Colorado laws or Commission rules.

**What Does it Cost?** The fiscal year 05-06 expenditure to oversee this program was \$3.3 million and there were 37 full-time equivalent employees associated with this program.

In 2007, license costs were:	New	Renewal
Real Estate Brokers	\$150	\$84
Subdivision Developers	\$739	\$151

**What Disciplinary Activity is There?** Between fiscal years 01-02 and 05-06, the Commission's disciplinary proceedings consisted of:

Complaints Filed	3,651
Revocations	73
Suspensions	55

**Where Do I Get the Full Report?** The full sunset review can be found on the internet at:  
<http://www.dora.state.co.us/opr/oprpublications.htm>

**Key Recommendations**

**Continue the Colorado Real Estate Commission, the Colorado Division of Real Estate and the regulation of real estate brokers and subdivision developers for nine years, until 2017.**

Without question, the purchase of a home is, for most Coloradans, the single largest purchase they will ever make. Considering the complexities involved in a real estate transaction, an incompetent or unscrupulous real estate broker could cause severe financial hardship to his or her clients, as well as other parties involved in the transaction, through theft, fraud, misrepresentation, negligence and improper title work resulting in clouded title to the subject real estate. Most of the Commission's regulatory authority over subdivision developers pertains to ensuring that subdivision developers make the proper disclosures to purchasers. Therefore, continued regulation of real estate brokers and subdivision developers is justified.

**Continue to mandate that licensed real estate brokers maintain errors and omissions insurance, and repeal the Commission's involvement in procuring a group policy and the sunset provision pertaining to errors and omissions insurance.**

Since the General Assembly first mandated that licensed real estate brokers obtain errors and omissions insurance, over \$16 million has been returned to consumers through claims filed with the Commission's group errors and omissions insurance policy. Therefore, the mandate to obtain errors and omissions insurance should be continued. However, since the state mandates that other professions obtain liability insurance but makes no provision in law for the state to assist those professions in complying with such mandates, and since the Commission's group policy may, indirectly, encourage incompetent practitioners to remain in practice, the Commission's involvement in procuring a group errors and omissions policy should be repealed.

### *...Key Recommendations Continued*

#### **Repeal all statutory provisions relating to licensed real estate salespeople.**

The General Assembly prohibited the Commission from issuing any new real estate salesperson licenses after December 31, 1996, and on that date, there were 9,062 active real estate salesperson licenses. Since that time, holders of real estate salesperson licenses have been able to remain on inactive status or convert to real estate broker licenses. In June 2007, there were 942 inactive salesperson licenses. Since these individuals have had over 10 years to convert their licenses to real estate broker licenses, it is reasonable to conclude that if they have not already done so, they never will. Therefore, the statutory provisions relating to real estate salespeople should be repealed.

#### **Require an annual, four-hour Commission Update Course and require the Commission to approve all other continuing education courses.**

Active real estate broker licensees must complete 24 hours of mandatory continuing education every three years, eight of which must consist of the Commission Update Course. The Commission Update Course is designed by the Commission, consists of two, four-hour courses, and focuses on current statutes and rules. Since the laws impacting real estate transactions, and thus real estate brokers, are constantly evolving, the Commission Update Course should be expanded to include annual, four-hour courses. Additionally, since there are relatively few restrictions on who may teach the remaining continuing education courses, the Commission should be charged with approving course content.

#### **Alter the composition of the Commission by replacing the individual with subdivision development experience with a member of the general public.**

Five members comprise the Commission: three licensed real estate brokers; an individual with experience in subdivision development and a public member. Since the primary mission of the Commission is to license and discipline, when warranted, real estate brokers, and since there have been relatively few instances in which the Commission has needed the expertise of the Commission member with subdivision experience, the Commission member with subdivision experience should be replaced by another member of the general public.

#### **Major Contacts Made During This Review**

American Resort Development Association  
Association of Real Estate License Law Officials  
Building Owners and Managers Association of Metro Denver  
Colorado Association of Mortgage Brokers  
Colorado Association of Mortgage Lenders  
Colorado Association of Realtors  
Colorado Bureau of Investigation  
Colorado Department of Higher Education, Division of Private and Occupational Schools  
Colorado Division of Real Estate  
Colorado Real Estate Commission  
Land Title Association of Colorado  
National Land Council  
Office of the Colorado Attorney General, Consumer Protection Section  
Office of the Colorado Secretary of State, Business Division

#### **What is a Sunset Review?**

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are Prepared by:  
Colorado Department of Regulatory Agencies  
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## ***Background***

### *The Sunset Process*

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.

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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.



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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.

The regulatory functions of the Colorado Real Estate Commission (Commission) and the Colorado Division of Real Estate (Division), including the function of making available errors and omissions insurance to licensees and certain service of process requirements, in accordance with Parts 1, 2, 4, 6, and portions of 3 of Article 61 of Title 12, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2008, unless continued by the General Assembly. During the year prior to this date, it is the duty of the Department of Regulatory Agencies (DORA) to conduct an analysis and evaluation of the Commission and the Division pursuant to section 24-34-104, C.R.S. Importantly, this review does not address real estate appraisers (Part 7), brokerage relationships (Part 8) or mortgage brokers (Part 9), since each of these Parts, except Part 8, is scheduled for future sunset review.

The purpose of this review is to determine whether the Commission, the Division, the currently prescribed regulation, or all three should be continued for the protection of the public and to evaluate the performance of the Commission and staff of the Division. During this review, the Commission and the Division must demonstrate that the Commission, the Division and regulation serve to protect the public health, safety or welfare, and that the regulation is the least restrictive regulation consistent with protecting the public. DORA's findings and recommendations are submitted via this report to the legislative committee of reference of the Colorado General Assembly. Statutory criteria used in sunset reviews may be found in Appendix A on page 80.

### *Methodology*

As part of this review, DORA staff attended Commission meetings, interviewed Division staff and Commission members, reviewed Commission records and minutes including complaint and disciplinary actions, interviewed officials with state and national professional associations, reviewed Colorado statutes and Commission rules, and reviewed the laws of other states.

The Commission and the Division regulate the real estate industry in Colorado. Pertinent to this sunset review are the Commission's regulatory functions relating to real estate brokers and subdivision developers, and provisions relating to pre-owned housing home warranty service contracts. Although the Division is also charged with regulating real estate appraisers and mortgage brokers, those occupations lie beyond the scope of this review. Similarly, statutory provisions addressing brokerage relationships are beyond the scope of this review.

### Real Estate Brokers

Real estate is "land and anything permanently affixed to the land, such as buildings, fences, and those things attached to the buildings."<sup>1</sup>

Real estate brokers, very simply, assist buyers and sellers in completing real estate sales or lease transactions. These transactions can involve residential, commercial, agricultural or undeveloped real estate.

To become a licensed real estate broker, an interested person must complete a course of study from an approved real estate training program and then pass a licensing examination.

In Colorado, there are three, legally recognized types of real estate brokers: associate, independent and employing. An associate real estate broker is one who has been licensed for less than two years and works under the supervision of an independent or employing broker. This can be thought of as an apprentice period.

An independent real estate broker requires no supervision, so the independent real estate broker may work for a real estate brokerage firm and may supervise associate real estate brokers, or he or she may be independent of a real estate brokerage firm.

An employing real estate broker requires no supervision and very likely supervises a large number of associate and independent real estate brokers in a real estate brokerage firm.

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<sup>1</sup> *Black's Law Dictionary*, Sixth Edition, West Publishing Co., 1990, p. 1263.

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Real estate brokers may work independently or they may be affiliated with a larger brokerage. Real estate brokerages are often, though not always, recognizable brands, such as Coldwell Banker or Re/MAX. These real estate brokerages do not employ real estate brokers, *per se*. Rather, real estate brokers are independent contractors to the real estate brokerage and often share a portion of their commissions with the real estate brokerage and may pay a “desk fee” in order to maintain a desk at the real estate brokerage’s offices. An employing real estate broker is typically responsible for the real estate brokers affiliated with a particular real estate brokerage.

Real estate brokers typically work on commission, which is generally paid by the seller. A typical commission in Colorado is six percent of the actual closing price. If two real estate brokers are involved – one representing the seller and one representing the buyer – the two real estate brokers typically split this commission such that each earns three percent of the closing price. If the same real estate broker represents both the buyer and the seller, which is allowable under a transaction broker arrangement, the real estate broker is said to have “double ended” the deal and the single real estate broker earns the entire six percent commission, or the real estate broker may offer a discount of one or two percent.

However, when a real estate broker is affiliated with a real estate brokerage, a portion of the commission is paid to the real estate brokerage. Depending on the experience and level of sales closed by a particular real estate broker, the real estate brokerage may retain up to two percent of the real estate broker’s three percent commission, leaving the real estate broker with only one percent.

A real estate broker may represent a seller in a real estate transaction, in which case the real estate broker is often referred to as “seller’s agent.” Alternatively, a real estate broker may represent a buyer in a real estate transaction, in which case the real estate broker is often referred to as “buyer’s agent.” Importantly, although the term “agent” is used, the law of agency is not strictly applicable to real estate brokers. Rather their duties are defined in statute.

These relationships must be established early in the relationship with the client and the Commission has promulgated disclosure forms that must be provided by the real estate broker and signed by the prospective client.

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Finally, a real estate broker may become a transaction broker, with the consent of the parties to the transaction. In such a situation, the real estate broker ceases acting as an agent for either party and merely facilitates the transaction. This situation typically arises when a seller's agent encounters a buyer who does not already have a buyer's agent but wants to make an offer on the seller's property. In such a situation, the seller must consent to the real estate broker ceasing to be the seller's agent and becoming a transaction broker. This is accomplished through the completion of a Commission-promulgated disclosure form.

A seller's agent will often conduct a market analysis, which involves examining recent sales of similar real estate in the surrounding area, to assist the seller in determining a reasonable asking price for the particular piece of real estate.

Additionally, the real estate broker, with the seller's assistance, will complete a number of statutorily required disclosures. These disclosures pertain to, but are not necessarily limited to, the seller's knowledge of structural defects, whether the property was used as a methamphetamine laboratory and not properly remediated and the presence of lead-based paint and radon.

If the seller's agent has access to a multiple listing service (MLS), the seller's agent will post, or list, the property. The MLS listing includes a detailed description of the property, including, in the case of residential real estate, the address, square footage, number and types of rooms, school districts, property taxes, homeowner associations and fees (if applicable), and the asking price.

The seller's agent may also engage in a number of activities to market the property and to generate interest in it. These activities may include, but are not limited to, holding open houses, printing and distributing direct mail post cards and running newspaper or other advertising. The real estate broker pays for most of these items directly, so the real estate broker has a greater incentive to sell the property and recoup these costs through the commission.

A buyer's agent helps a potential buyer find real estate to purchase. If the buyer has not already done so, the real estate broker may direct the buyer to obtain a pre-qualification letter from a mortgage lender or mortgage broker. This will assist both the buyer and the buyer's agent in identifying properties that fall within the buyer's price range.

Additionally, the buyer's agent will query the buyer as to the type of property desired, preferred locations and other relevant factors.

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If the real estate broker has access to an MLS, the MLS may be accessed and a list of potential properties is generated. The buyer may review this list and narrow the field down to a handful of properties for which the buyer's agent will contact the seller's agent (or, more likely, the real estate brokerage with which the seller's agent is affiliated) to schedule a showing.

Once the buyer identifies a property to purchase, the buyer's agent works with the buyer to draft a contract, or "offer." Again, the Commission has promulgated form contracts that must be used by licensed real estate brokers.

Included in the buyer's offer are the purchase price, a proposed closing date and a number of tasks that must be completed by specified dates. These other tasks may include, but are not limited to, obtaining title documents, having the property inspected, having a survey performed, etc.

If everything goes smoothly, the parties close on the property, usually at the offices of a title company, when the buyer provides the required funds, and the seller deeds the property to the buyer and turns over the keys.

### Subdivisions

In general, a subdivision is any real estate that is divided into 20 or more interests intended solely for residential use.<sup>2</sup>

In a more practical sense, subdivisions include:

- Timeshares;
- Condominium conversions; and
- Raw ground developments (lots of 35 acres or more where no buildings are included in the purchase price).

Colorado law requires subdivision developers to register with the Division and to make certain disclosures such that prospective buyers can make informed decisions regarding whether to purchase.

### Pre-owned Housing Home Warranty Service Contracts

Pre-owned housing home warranty service contracts (service contracts) are statutorily included in this sunset review, although neither the Commission nor the Division has any regulatory authority over such agreements.

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<sup>2</sup> § 12-61-401(3)(a), C.R.S.

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Service contracts are typically provided by the seller of real estate to the buyer. Put simply, they offer limited warranty protection to the buyer over elements of the property that are included in the individual service contract. Typically, service contracts cover items such as structural components of the property (i.e., roof, foundation, basement, walls, ceilings, floors, etc.), utility systems (i.e., electrical systems, heating and cooling systems, plumbing systems, etc.), and appliances (i.e., stoves, washers, dryers, dishwashers, etc.).

Importantly, a service contract can exclude many of these items, but such exclusions must be clearly listed.

### *History of Regulation*

The real estate industry has been regulated in Colorado since 1925, when the General Assembly created the Real Estate Brokers Board (Board) in the Office of the Secretary of State. The Board initially regulated real estate brokers and real estate salespeople.

The Board consisted of three Governor-appointed members and was renamed the Colorado Real Estate Commission (Commission) in 1963. That same year, the General Assembly enacted legislation that placed subdivision developers under the Commission's jurisdiction.

Under the Administrative Organization Act of 1968, the Commission was transferred to DORA's Division of Registrations as a Type I agency.

In 1971, the General Assembly created the Real Estate Recovery Fund (Recovery Fund), thereby allowing injured clients who won claims against licensed real estate brokers or salespeople who were not able to pay the judgments entered against them, to be made whole. Once judgment had been entered, a claim was filed with the Commission to receive funds from the Recovery Fund.

In 1975, the General Assembly established formal educational requirements that had to be satisfied in order to become licensed as a real estate salesperson or real estate broker.

In 1979, the Commission's size was increased to five members and it was transferred to the Division of Real Estate (Division) in DORA. That same year, the Commission and the Division became cash funded.

In 1990, the General Assembly enacted laws regulating real estate appraisers and creating the Board of Real Estate Appraisers (BOREA). The Division was charged with providing day-to-day administrative support to BOREA, just as the Division does to the Commission.

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The licensing of real estate salespeople ceased in 1996. Those previously licensed as such were required to become inactive or, if they desired to continue practicing, to become licensed real estate brokers.

In 1998, the General Assembly enacted legislation requiring licensed real estate brokers to obtain errors and omissions insurance and further provided that the Commission should contract with an insurance carrier for a group policy under which any licensee could obtain coverage.

In 2003, the General Assembly substantially rewrote the laws governing brokerage relationships between real estate brokers and their clients by clearly defining the various roles that real estate brokers can and may play in various types of real estate transactions.

In 2006, the General Assembly, following a 2005 sunrise review, enacted legislation that imposed regulation on mortgage brokers by creating a registration program.

The following year, the General Assembly enacted at least five additional bills directly impacting the mortgage lending industry, including the licensure of mortgage brokers.

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## *Legal Framework*

The real estate industry in Colorado is governed by both state and federal laws. The federal Real Estate Settlement Procedures Act (RESPA) primarily addresses lending practices, but is worth mentioning here, as it serves as a guidepost for many real estate closing practices.

In general, RESPA prevents lenders from charging excessively high settlement charges on federally guaranteed loans and requires lenders to fully disclose all costs and fees associated with the loan. More importantly, in terms of the regulation of the real estate industry, RESPA requires that certain disclosures be made at various stages of the real estate transaction process. Some of these disclosures include, but are not limited to, closing costs, escrow costs, property taxes, etc. All of these provisions are intended to provide the buyer with important information prior to closing.

More pertinent to this sunset review, however, are Colorado's statutes governing real estate. The statutes creating the Colorado Real Estate Commission (Commission) and setting forth the duties and responsibilities of the Commission and the Colorado Division of Real Estate (Division) can be found in Article 61 of Title 12 of the Colorado Revised Statutes (C.R.S.). These statutes are divided into nine Parts:

- Part 1: Brokers and Salespersons
- Part 2: Brokers' Commissions
- Part 3: Recovery Fund
- Part 4: Subdivisions
- Part 5: Rental Location Agents (repealed)
- Part 6: Pre-owned Housing Home Warranty Service Contracts
- Part 7: Real Estate Appraisers
- Part 8: Brokerage Relationships
- Part 9: Mortgage Brokers

The following discussion is limited to those Parts (1, 2, part of 3, 4 and 6) that are within the scope of this sunset review. The regulation of real estate appraisers under Part 7 is scheduled to repeal on July 1, 2013. The regulation of mortgage brokers under Part 9 is scheduled to repeal on July 1, 2011. The laws pertaining to brokerage relationships under Part 8 are not scheduled to repeal.



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## Real Estate Brokers and the Commission

To oversee the regulation of real estate brokers, the General Assembly has created the five-member, Governor-appointed Commission.<sup>3</sup> The Commission comprises three members who are licensed real estate brokers, one member with expertise in subdivision development and one member to represent the general public.<sup>4</sup>

Commission members serve three-year terms<sup>5</sup> and are compensated at the rate of \$50 per day of actual service, plus actual and necessary expenses.<sup>6</sup>

The Commission has sole authority to deny, suspend and revoke all real estate broker licenses.<sup>7</sup> To assist the Commission in carrying out its duties, and to administer and enforce the statutes, DORA's Executive Director employs a division director and staff.<sup>8</sup>

A real estate broker is, in very general terms, a person or business entity that sells, exchanges, buys, rents or leases, or that offers or negotiates to sell, exchange, buy, rent or lease real estate in consideration of compensation by fee, commission, salary or anything of value.<sup>9</sup>

Importantly, exemptions to this definition are codified and include, but are not limited to those engaging in the above referenced activities when they or their employer own the real property at issue.<sup>10</sup>

The Commission is authorized to promulgate standard forms for use in real estate transactions.<sup>11</sup> Towards this end, the Commission has promulgated 43 distinct forms covering a wide range of issues:<sup>12</sup>

- Listing contracts;
- Sales contracts;
- Addenda to contracts;
- Disclosure documents;
- Counterproposals;
- Agreements to amend/extend contract;
- Closings;
- Exchange contracts;
- Deeds of trust; and
- Promissory notes.

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<sup>3</sup> § 12-61-105(1), C.R.S.

<sup>4</sup> § 12-61-105(1), C.R.S.

<sup>5</sup> § 12-61-105(1), C.R.S.

<sup>6</sup> §§ 12-61-105(2) and 24-34-102(13), C.R.S.

<sup>7</sup> § 12-61-105(3), C.R.S.

<sup>8</sup> § 12-61-106, C.R.S.

<sup>9</sup> § 12-61-101(2), C.R.S.

<sup>10</sup> § 12-61-101(4), C.R.S.

<sup>11</sup> § 12-61-803(4), C.R.S.

<sup>12</sup> Commission Rule F-7.

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There are two basic paths to licensure as a real estate broker in Colorado: by examination and by reciprocity.

To become licensed as a real estate broker by examination, a candidate must be at least 18 years old,<sup>13</sup> be legally present in the United States,<sup>14</sup> and submit a set of fingerprints for the conduct of a state and national criminal history background check utilizing the records of the Colorado Bureau of Investigation (CBI) and the Federal Bureau of Investigation.<sup>15</sup>

Additionally, a candidate for licensure must have received a degree from an accredited degree-granting college or university with a major in real estate, or successfully complete a course of study from an accredited college or university or a school approved by the Division of Private and Occupational Schools (DPOS).<sup>16</sup> This course of study must consist of at least:

- 48 hours in real estate law and practice;<sup>17</sup>
- 48 hours in understanding and preparing Colorado real estate contracts;<sup>18</sup> and
- 72 hours as follows:<sup>19</sup>
  - 24 hours in real estate closings;
  - 8 hours in trust accounts and recordkeeping;
  - 8 hours in current legal issues; and
  - 32 hours in practical applications.

On a quarterly basis,<sup>20</sup> the Commission is required to compile and publish the licensing examination pass rates for each educational institution approved to provide real estate courses of study.<sup>21</sup>

Finally, candidates for licensure by examination must take and pass a licensing examination prepared by or under the supervision of the Commission. The Commission may contract with a vendor to develop, administer and grade examinations and to administer licensee records.<sup>22</sup>

The licensing examination consists of a general portion and a Colorado portion. Candidates must pass both portions of the examination, but not necessarily on the same date.<sup>23</sup>

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<sup>13</sup> § 12-61-103(4)(a), C.R.S.

<sup>14</sup> § 24-34-107(1)(a), C.R.S.

<sup>15</sup> § 12-61-103(1)(b)(I), C.R.S.

<sup>16</sup> § 12-61-103(4)(a), C.R.S.

<sup>17</sup> § 12-61-103(4)(a)(I), C.R.S.

<sup>18</sup> § 12-61-103(4)(a)(II), C.R.S.

<sup>19</sup> § 12-61-103(4)(a)(III), C.R.S., and Commission Rule A-17.

<sup>20</sup> § 12-61-108.5(3), C.R.S.

<sup>21</sup> §§ 12-61-108.5(1) and (2), C.R.S.

<sup>22</sup> § 12-61-103(6)(a), C.R.S.

<sup>23</sup> Commission Rule A-5.

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The examination must include the following topics:<sup>24</sup>

- Ethics;
- Reading;
- Spelling;
- Basic mathematics;
- Principles of land economics;
- Appraisal;
- Financing;
- Colorado law pertaining to deeds, trust deeds, mortgages, listing contracts, contracts of sale, bills of sale, leases, agency, brokerage, trust accounts, closings and securities; and
- Preparation of a real estate closing statement.

A person who completes these steps is then eligible to be licensed as an associate real estate broker.

A person who is a licensed real estate broker in another jurisdiction may obtain a Colorado license by reciprocity if:<sup>25</sup>

- the other jurisdiction requires passage of a real estate broker licensing examination;
- the real estate broker has been licensed in that jurisdiction for at least two years;
- the real estate broker possesses credentials and qualifications that are substantially equivalent to the requirements in Colorado for licensure by examination; and
- the other jurisdiction will issue real estate broker licenses to applicants from Colorado in a similar manner.

Additionally, a candidate for licensure by reciprocity who possesses a real estate broker's license in another jurisdiction must complete 48 hours of instruction in understanding and preparing Colorado real estate contracts<sup>26</sup> and 24 hours in real estate closings.<sup>27</sup>

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<sup>24</sup> § 12-61-103(6)(a), C.R.S.

<sup>25</sup> § 12-61-103(6)(b), C.R.S.

<sup>26</sup> § 12-61-103(4)(b), C.R.S.

<sup>27</sup> § 12-61-103(4)(b), C.R.S., and Commission Rule A-17(a).

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A candidate for licensure by reciprocity who possesses a real estate salesperson license in another jurisdiction must complete courses covering:

- 48 hours in understanding and preparing Colorado real estate contracts;<sup>28</sup> and
- 72 hours as follows:<sup>29</sup>
  - 24 hours in real estate closings;
  - 8 hours in trust accounts and recordkeeping;
  - 8 hours in current legal issues; and
  - 32 hours in practical applications.

A real estate broker license may be issued to a business entity, but in its application for licensure, the business entity, or brokerage, must designate an individual real estate broker who will be responsible for managing and supervising all of the licensed activities of the brokerage.<sup>30</sup> This broker is commonly referred to as the employing broker. A 90-day temporary license may be issued to a real estate brokerage to prevent hardship.<sup>31</sup>

To convert from an associate real estate broker to an independent real estate broker, the real estate broker must have held an active associate real estate broker license for two years.<sup>32</sup>

To convert from an associate real estate broker or an independent real estate broker to an employing real estate broker, the real estate broker must complete a 24-hour course in brokerage administration.<sup>33</sup>

Prior to 1997, Colorado also licensed real estate salespeople.<sup>34</sup> These licenses were valid for three years, and any licensed real estate salesperson seeking renewal in 2000 had three options: allow the license to lapse, go on inactive status<sup>35</sup> or become a licensed real estate broker.<sup>36</sup> If the licensed real estate salesperson opted to go on inactive status, to come off of such status, the licensee must become a licensed real estate broker.<sup>37</sup>

To convert a real estate salesperson license into an associate real estate broker license, the candidate must pass the Colorado portion of the real estate broker licensing examination or complete a 24-hour course of study that must include closings and contract preparation.<sup>38</sup>

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<sup>28</sup> § 12-61-103(4)(c), C.R.S.

<sup>29</sup> § 12-61-103(4)(c), C.R.S., and Commission Rule A-17.

<sup>30</sup> § 12-61-103(7)(a), C.R.S.

<sup>31</sup> § 12-61-103(7)(c), C.R.S., and Commission Rule A-26.

<sup>32</sup> § 12-61-103(6)(c)(I), C.R.S.

<sup>33</sup> § 12-61-103(6)(c)(II), C.R.S.

<sup>34</sup> § 12-61-103.5(1), C.R.S.

<sup>35</sup> § 12-61-103.5(3), C.R.S.

<sup>36</sup> § 12-61-103.5(2), C.R.S.

<sup>37</sup> § 12-61-103.5(3), C.R.S.

<sup>38</sup> § 12-61-103.5(2), C.R.S.

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Every licensed real estate broker must maintain an errors and omissions insurance policy.<sup>39</sup> The Commission is required to make such insurance available to all licensees by contracting with an insurance carrier for a group policy,<sup>40</sup> the terms and conditions of which are to be determined by the Commission.<sup>41</sup> If the Commission is unable to obtain such insurance at a reasonable premium, licensees must obtain their own insurance.<sup>42</sup>

Among other things, the Commission has determined that the group policy must provide, at a minimum:<sup>43</sup>

- Coverage for all acts for which a real estate broker's license is required, excluding any illegal or fraudulent acts;
- That the coverage cannot be cancelled by the insurance carrier except for non-payment of the premium;
- At least \$100,000 of coverage for each real estate broker per covered claim;
- An annual aggregate of at least \$300,000 per real estate broker;
- A deductible that does not exceed \$1,000 for claims, and no deductible for legal expenses;
- That the insurance carrier is obligated to defend all covered claims and the ability of the insured to select counsel of choice;
- Coverage of a real estate broker's use of lock boxes, which coverage shall not be less than \$25,000 per occurrence; and
- The ability of a real estate broker to obtain higher or excess coverage, upon payment of an additional premium.

Licensed real estate brokers that do not reside in Colorado are not required to maintain a place of business in Colorado so long as they maintain a place of business in another state.<sup>44</sup>

Real estate broker licenses are valid for three years<sup>45</sup> from the date of issuance.<sup>46</sup> Renewal is contingent upon completion of statutorily mandated continuing education<sup>47</sup> and a criminal history background check.<sup>48</sup>

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<sup>39</sup> § 12-61-103.6(1), C.R.S.

<sup>40</sup> § 12-61-103.6(1), C.R.S.

<sup>41</sup> § 12-61-103.6(3), C.R.S.

<sup>42</sup> § 12-61-103.6(2)(a), C.R.S.

<sup>43</sup> Commission Rule D-14.

<sup>44</sup> § 12-61-107(1), C.R.S.

<sup>45</sup> § 12-61-110(1)(f), C.R.S.

<sup>46</sup> Commission Rule B-1.

<sup>47</sup> § 12-61-110.5, C.R.S.

<sup>48</sup> § 12-61-110(4)(a), C.R.S., and Commission Rule A-15.

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A licensee has two options with respect to completing the mandated continuing education requirement: retaking and passing the Colorado portion of the licensing examination or completing 24 hours of continuing education, eight of which must include the Commission Update Course.<sup>49</sup> The Commission Update Course has been divided, by Commission rule, into two, four-hour courses.<sup>50</sup>

The Commission Update Course is developed by the Commission and is designed to ensure reasonable currency of real estate knowledge and includes an update of current statutes and rules.<sup>51</sup> At the conclusion of the Commission Update Course, a written examination is given<sup>52</sup> and must be passed with a score of 70 percent or better.<sup>53</sup>

The remaining 16 hours of continuing education must address one or more of the following subjects.<sup>54</sup>

- Real estate law
- Property exchanges
- Real estate contracts
- Real estate finance
- Real estate appraisal
- Real estate closing
- Real estate ethics
- Condominiums and cooperatives
- Real estate time-sharing
- Real estate marketing principles
- Real estate construction
- Land development
- Real estate energy concerns
- Real estate geology
- Water and waste management
- Commercial real estate
- Real estate securities and syndications
- Property management
- Real estate computer principles
- Brokerage administration and management
- Agency
- Any other subject matter approved by the Commission

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<sup>49</sup> § 12-61-110.5(1)(c), C.R.S.

<sup>50</sup> Commission Rule B-3(a).

<sup>51</sup> § 12-61-110.5(2), C.R.S.

<sup>52</sup> § 12-61-110.5(2), C.R.S.

<sup>53</sup> Commission Rule B-3(c).

<sup>54</sup> § 12-61-110.5(3), C.R.S.

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Additionally, the Commission has expressly excluded the following types of courses from qualifying for continuing education credit:<sup>55</sup>

- Sales or marketing meetings conducted in the general course of a real estate brokerage practice;
- Orientation, personal growth, self-improvement, self-promotion or marketing sessions;
- Motivational meetings or seminars; and
- Examination preparation or examination technique courses.

The Commission may, upon its own motion, and shall, upon receipt of a complaint, investigate any licensee. After a hearing and a finding that a licensee has violated the statute or Commission rules, the Commission may impose a fine not to exceed \$2,500 per offense, impose a censure, place the licensee on probation, suspend or revoke the license.<sup>56</sup>

Grounds for discipline include:<sup>57</sup>

- Engaging in most conduct that involves fraud, deceit or misrepresentation;
- Violating any provision of the Colorado Consumer Protection Act;
- Acting for more than one party in a transaction without the knowledge of all parties thereto;
- Failing to account for or remit, within a reasonable time, any money coming into the possession of the real estate broker and failing to keep records relative to such money;
- Converting, diverting or commingling funds;
- Failing to provide the buyer or seller with a closing statement of the transaction;
- Paying a commission or other valuable consideration for performing any of the functions of a licensed real estate broker to a person not duly licensed;
- Violating any provision of Article 61 of Title 12, C.R.S., or any rule of the Commission;
- Being convicted of or entering a plea of guilty or *nolo contendere* to any of a number of enumerated crimes under state law, or their equivalents under federal law or the laws of other states, or failing to notify the Commission of such in a timely manner;

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<sup>55</sup> Commission Rule B-5.

<sup>56</sup> § 12-61-113(1), C.R.S.

<sup>57</sup> § 12-61-113(1), C.R.S.

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- Violating or aiding and abetting in the violation of the Colorado or federal fair housing laws, or failing to notify the Commission of such in a timely manner;
  - Having demonstrated unworthiness or incompetency;
  - Failing to exercise reasonable supervision of licensed real estate brokers;
  - Claiming, arranging for, or taking any secret or undisclosed amount of compensation in connection with any acts for which a license as a real estate broker is required;
  - Having a license as a real estate broker, real estate salesperson or subdivision developer suspended or revoked in any jurisdiction;
  - Failing to keep records documenting proof of completion of mandated continuing education; and
  - Violating any statutory provision relating to affiliated business arrangements.

Additionally, an employing real estate broker can be held accountable for those under his or her supervision only if the employing real estate broker had actual knowledge of the unlawful act or violation, or had been negligent in the supervision.<sup>58</sup>

Employing real estate brokers are responsible for:<sup>59</sup>

- Maintaining all trust accounts and trust account records;
- Maintaining all transaction records;
- Developing office policies and periodically reviewing those policies with all employees;
- Taking reasonable steps to ensure that violations of statutes, rules and office policies do not occur or reoccur; and
- Providing adequate supervision of all real estate brokers employed by, and all offices operated by, the employing broker.

An affiliated business arrangement is, generally, an arrangement in which a provider of settlement services has either an affiliate relationship with or a direct beneficial ownership interest of more than one percent in another provider of settlement services, and the provider of settlement services or an associate thereof, directly or indirectly refers settlement business to another provider of settlement services.<sup>60</sup>

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<sup>58</sup> § 12-61-118, C.R.S.

<sup>59</sup> Commission Rule E-30.

<sup>60</sup> § 12-61-113.2(1)(a), C.R.S.



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Settlement services include a wide range of services, such as those related to titles, mortgages, real estate brokering, real estate appraisals, and inspections.<sup>61</sup>

Affiliated business arrangements are permissible, so long as the licensed real estate broker discloses the relationship to the parties at the time of closing,<sup>62</sup> the use of an affiliated business is not required,<sup>63</sup> the licensed real estate broker does not give or receive any fee or kickback to or from the affiliated business<sup>64</sup> and the real estate broker discloses all of his or her affiliated business arrangements to the Commission on an annual basis.<sup>65</sup>

All money collected by the Commission and the Division is deposited in the Division's cash fund.<sup>66</sup>

### Real Estate Recovery Fund

The Real Estate Recovery Fund (Recovery Fund) existed to provide reimbursement of actual and direct out-of-pocket losses, court costs and reasonable attorney fees that remained unpaid on judgments entered against licensed real estate brokers.<sup>67</sup>

However, the General Assembly repealed the Recovery Fund, effective May 27, 2005, and mandated that no claims against the Recovery Fund could be made unless the civil action was commenced within 30 days thereafter.<sup>68</sup> As a result, the statutory provisions governing the Recovery Fund will repeal when the last claim has been paid.<sup>69</sup>

If a claimant is unable to provide personal service on a real estate broker in order to file a suit that could generate a claim under the Recovery Fund, the claimant may serve the Colorado Secretary of State.<sup>70</sup>

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<sup>61</sup> § 12-61-113.2(1)(c), C.R.S.

<sup>62</sup> § 12-61-113.2(2)(b), C.R.S.

<sup>63</sup> § 12-61-113.2(2)(c), C.R.S.

<sup>64</sup> § 12-61-113.2(2)(d), C.R.S.

<sup>65</sup> §§ 12-61-113.2(3) and (4), C.R.S.

<sup>66</sup> §§ 12-61-111, 12-61-113(7), 12-61-404(3) and 12-61-405(3), C.R.S.

<sup>67</sup> § 12-61-302(4), C.R.S.

<sup>68</sup> § 12-61-302(2), C.R.S.

<sup>69</sup> § 12-61-302(11)(b), C.R.S.

<sup>70</sup> § 12-61-303(6)(a), C.R.S.

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## Subdivision Developers

A subdivision is any real property that is divided into 20 or more interests intended solely for residential use and offered for sale, lease or transfer.<sup>71</sup> Specifically excluded from the definition of subdivisions are:<sup>72</sup>

- Memberships in campgrounds;
- Bulk sales and transfers between developers;
- Property, the sales price of which includes the cost a residential building; and
- Property that, at the time of closing:
  - Is situated on a street or road that is improved to the standards of the county, city or town in which the property is located;
  - Has a feasible plan to provide potable water and sewage disposal; or
  - Has adequate telephone and electricity facilities installed and in place.

Before selling, leasing or transferring, or agreeing or negotiating to sell, lease or transfer, any subdivision or any part thereof, the developer of the subdivision must register with the Commission.<sup>73</sup>

To register, the subdivision developer must submit to the Commission, among other things:<sup>74</sup>

- The names and addresses of all natural persons possessing a 24-percent or greater financial or beneficial interest in the business of the subdivision developer;
- The length of time and the locations where the subdivision developer has been engaged in the business of real estate sales or development;
- Any felony of which the subdivision developer has been convicted in the preceding 10 years; and
- Information concerning the subdivision to be developed, including:<sup>75</sup>
  - The location of the subdivision;
  - The name of the subdivision;
  - Evidence that the subdivision has been registered or will be registered in accordance with local requirements;
  - Evidence of title or other interest in the subdivision;

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<sup>71</sup> § 12-61-401(3)(a), C.R.S.

<sup>72</sup> § 12-61-401(3)(b)(II), C.R.S.

<sup>73</sup> § 12-61-402(1), C.R.S.

<sup>74</sup> § 12-61-403(2)(a), C.R.S.

<sup>75</sup> § 12-61-403(3), C.R.S.

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- A statement that standard Commission-approved forms will be used for contracts of sale, notes, deeds, etc.;
  - A statement regarding the availability of legal access, sewage disposal, water, electricity, gas and telephone in the subdivision;
  - A statement as to whether survey monuments are in place; and
  - A statement as to whether a common interest community has been or will be created.

All subdivision developer registrations expire on December 31 of each year.<sup>76</sup>

The Commission may impose an administrative fine not to exceed \$2,500 per violation, issue letters of admonition, place a subdivision developer registrant on probation, refuse to issue a registration and suspend or revoke a subdivision developer registration, after finding that a violation of the statutes or Commission rules has occurred.<sup>77</sup>

Grounds for discipline against a subdivision developer include:<sup>78</sup>

- Engaging in most conduct involving fraud, deceit or misrepresentation;
- Being convicted of, or pleading guilty or *nolo contendere* to a crime involving fraud, deceit, false pretense, theft, misrepresentation, false advertising, or dishonest dealing;
- Disposing of, concealing, diverting, converting or failing to properly account for any funds or assets of any purchaser or any homeowners' association under the control of the subdivision developer;
- Failing to comply with any stipulation or agreement made with the Commission;
- Failing to comply with or violating Colorado law pertaining to subdivisions or any rule of the Commission;
- Refusing to honor a buyer's request to cancel a contract for purchase when the request was made within five days after execution of the contract;
- Violating the Colorado Consumer Protection Act;
- Using documents not approved by the Commission; and
- Failing to disclose encumbrances to prospective buyers.

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<sup>76</sup> § 12-61-404(2), C.R.S.

<sup>77</sup> § 12-61-405(1), C.R.S.

<sup>78</sup> § 12-61-405(1), C.R.S.

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## Pre-owned Housing Home Warranty Service Contracts

A pre-owned housing home warranty service contract (service contract) is any contract where a person undertakes, for a predetermined fee, with respect to a specified period of time, to maintain, repair or replace any or all of the following elements of a specified pre-owned home:<sup>79</sup>

- Structural components (i.e., the roof, foundation, basement, walls ceilings or floors);
- Utility systems (i.e., electrical, plumbing and heating/cooling systems); and
- Appliances (i.e., stoves, washers, dryers and dishwashers).

Neither a service contract company, nor a lending institution may require any buyer or seller, or person refinancing a home, to purchase a service contract.<sup>80</sup>

Every service contract must contain:<sup>81</sup>

- A specific list of all limitations in coverage and all items or elements excluded from coverage;
- The procedure to follow to obtain repairs or replacements;
- The time period within which repairs will be made or replacements provided;
- The specific duration of the service contract, including the exact date of termination;
- Whether the service contract is transferable; and
- A statement that actions under a service contract may be covered by the Colorado Consumer Protection Act or the Unfair Practices Act.

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<sup>79</sup> § 12-61-602(6)(a), C.R.S.

<sup>80</sup> §§ 12-61-611 and 12-61-614, C.R.S.

<sup>81</sup> § 12-61-611.5, C.R.S.

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## ***Program Description and Administration***

The Colorado Real Estate Commission (Commission) is charged with administering and enforcing the regulatory programs pertaining to real estate brokers and subdivision developers, both of which fall within the scope of this sunset review.

The Colorado Division of Real Estate (Division) is charged with providing support to the Commission and the Colorado Board of Real Estate Appraisers (BOREA), and with administering and enforcing the regulatory program pertaining to mortgage brokers. Although neither the real estate appraiser nor mortgage broker program is the subject of this sunset review, some figures are provided herein so as to give a better picture of the Division's overall workload.

The five-member, Governor-appointed Commission generally meets on the first Tuesday of each month. Attendance of Commission members is generally good and a handful of members of the public often attend.

Table 1 illustrates, for the five fiscal years indicated, the Division's overall expenditures and staffing levels.

**Table 1**  
**Agency Fiscal Information**

<b>Fiscal Year</b>	<b>Total Program Expenditures</b>	<b>Full-Time Equivalent Employees</b>
01-02	\$3,508,328	37.0
02-03	\$3,953,316	37.0
03-04	\$3,798,301	37.0
04-05	\$4,116,100	37.0
05-06	\$3,267,155	37.0

Due to various statutory changes resulting in additional staff, as of the time of this writing, the Division has 44.5 full-time equivalent (FTE) employees. These employees are organized into four main sections, the Office of the Director, Investigations and Compliance, Licensing and Operations Support, and Education and Consumer Outreach.

The Office of the Director consists 2.0 FTE and includes the Division Director (1.0 FTE Management), who heads the Division, and the Director's assistant (1.0 FTE Program Assistant II).

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The Investigations and Compliance section consists of 26.5 FTE, is headed by the Investigations and Compliance Director (1.0 FTE General Professional VI) and is itself organized into four units or “programs”: Real Estate Program (9.0 FTE), Appraiser Program (4.5 FTE), Mortgage Broker Program (5.0 FTE) and Program Support (7.0 FTE).

The Real Estate Program is headed by the Real Estate Program Manager (1.0 FTE General Professional V) and is staffed by 3.0 FTE Criminal Investigator I, 3.0 FTE Compliance Investigator I, 2.0 FTE Financial/Credit Examiner III. This program is charged with investigating complaints relating to real estate brokers and subdivision developers and conducting audits of such.

The Appraiser Program is headed by the Appraiser Program Manager (1.0 FTE General Professional V) and is staffed by 2.5 FTE Compliance Investigator II and 1.0 FTE Compliance Investigator I. This program is charged with investigating complaints relating to real estate appraisers.

The Mortgage Broker Program is headed by the Mortgage Broker Program Manager (1.0 FTE General Professional IV) and is staffed by 4.0 FTE Compliance Investigator I. This program is charged with investigating complaints relating to mortgage brokers.

The Program Support unit is headed by the Program Support Manager (1.0 FTE General Professional IV) and is staffed by 3.0 FTE Program Assistant I, 1.0 FTE Program Assistant II and 2.0 FTE Program Assistant III. This program is charged with providing general administrative support to the rest of the Investigations and Compliance section.

The Licensing and Operations Support section is headed by 1.0 FTE Office Manager II and is staffed by 1.0 FTE General Professional III, 1.0 FTE Program Assistant I, 4.0 FTE Administrative Assistant III, 6.0 FTE Administrative Assistant II, 1.0 FTE Accounting Technician I and 1.0 FTE Technical Support. This unit is responsible for processing license applications and issuing licenses once applications are complete, and for ensuring the smooth operation of the Division by answering telephone calls, photocopying and ordering supplies.

Finally, the Education and Consumer Outreach section is staffed by 1.0 FTE General Professional V. This section is responsible for overseeing the continuing education programs and for coordinating the Division’s community outreach efforts.

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## Licensing

### Real Estate Brokers

An individual or business entity may obtain licensure as a real estate broker by following one of three paths: by examination; by reciprocity; or by conversion from a salesperson license.

Table 2 illustrates, for the fiscal years indicated, the number of real estate broker and real estate appraiser licenses issued by examination, reciprocity and renewal, as well as the total number of active licenses.

**Table 2**  
**Licensing Information by License Type**

Fiscal Year	Number of Licenses							
	Examination		Reciprocity		Renewal		TOTAL ACTIVE	
	REB	REA	REB	REA	REB	REA	REB	REA
01-02	3,002	840	105	32	7,653	1,302	29,132	4,147
02-03	4,218	1,686	145	28	14,034	781	31,178	3,542
03-04	4,441	1,152	187	32	15,096	1,980	31,963	5,538
04-05	4,848	733	215	57	16,339	1,457	37,544	5,345
05-06	5,002	577	242	55	15,236	1,698	32,335	5,771

REB = Real Estate Brokers

REA = Real Estate Appraisers

Although the number of active real estate broker licensees has gradually increased over time, there was a noticeable decrease between fiscal years 04-05 and 05-06. Although no one can say for certain why this occurred, Division staff attributes the decline to the corresponding difficulties of the real estate market in Colorado during this time. Given the turbulent market conditions, a greater number of real estate brokers left the business than in previous years.

Clearly, though, the most common route to licensure as a real estate broker is by examination, and the number of people seeking such licensure has steadily increased over the period indicated.

To obtain a real estate broker license by examination, a candidate must: 1) have a degree in real estate from an accredited college or university or complete 168 hours of education from a school approved by the Colorado Division of Private and Occupational Schools (DPOS); 2) submit a set of fingerprints to the Colorado Bureau of Investigation (CBI) for a criminal history background check of CBI and Federal Bureau of Investigation (FBI) records; 3) take and pass the licensing examination; and 4) pay the required fees.

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The 168-hour, DPOS-approved real estate educational programs must cover:

- 48 hours in real estate law and practice;
- 48 hours in understanding and preparing Colorado real estate contracts;
- 32 hours in practical real estate applications;
- 24 hours in real estate closings;
- 8 hours in trust accounts and recordkeeping; and
- 8 hours in current legal issues.

Since July 1, 2005, all current real estate broker licensees and all applicants for new licenses have been required to submit fingerprints to CBI for a criminal history background check. For new licensees, this is done at the time of license application. For renewing real estate brokers, this is done at the time of renewal. Regardless of whether it is a new or renewing real estate broker, the fingerprints are submitted directly to CBI and a fee of \$39.50 (\$17.50 for CBI and \$22 for FBI) is paid directly to CBI. Results of the criminal history background checks are then electronically sent directly to the Division.

Since implementation of the fingerprint-based criminal history background check process, at least two problems have arisen. First, it can easily take up to three or four months from the time the fingerprints are submitted to CBI for the Division to receive the results. This can cause unanticipated delays in renewing licenses.

Another problem has been unreadable fingerprints. This has caused additional delays and has inadvertently caused some licenses to lapse, since the Division cannot renew a license until the criminal history background check has been completed. Some licensees and license candidates have submitted fingerprints to CBI numerous times. In some instances, the fingerprints are unreadable because they were taken incorrectly. In other instances, the fingerprints simply lack discernable, identifying characteristics. As a result, the Division has been in a quandary as to whether and how it can issue licenses to such individuals since sections 12-61-103(1)(b)(I) (addressing new licenses) and 12-61-110.8(1) (addressing renewal licenses), Colorado Revised Statutes (C.R.S.), require fingerprint-based criminal history background checks.

In addition to licensing individual real estate brokers, the Commission also licenses real estate brokerages, which are business entities. In the case of real estate brokerages, however, the brokerage merely needs to employ a responsible broker, typically an employing real estate broker, who is licensed as an individual.



Table 3 illustrates, for the fiscal years indicated, the number of real estate brokerages licensed by the Commission.

**Table 3  
Real Estate Brokerages**

<b>Fiscal Year</b>	<b>Number of Real Estate Brokerages</b>
01-02	3,761
02-03	4,193
03-04	4,163
04-05	4,391
05-06	4,560

Finally, once a person has been licensed for two years, during which time the licensee is often referred to as an associate real estate broker, the licensee can upgrade to an independent real estate broker simply by applying to the Commission and paying a \$5-fee. Alternatively, the associate real estate broker could upgrade to an employing real estate broker by completing a 24-hour course in brokerage administration and paying a \$5-fee to the Commission.

Table 4 illustrates, for calendar years 2000 through 2006, the number of licensed real estate brokers who have converted to another type of real estate broker license.

**Table 4  
Real Estate Broker License Conversions**

<b>Calendar Year</b>	<b>Associate to Independent</b>	<b>Associate to Employing</b>	<b>Independent to Employing</b>	<b>Total Conversions</b>
2000	178	159	78	415
2001	217	166	87	470
2002	297	225	127	649
2003	297	226	96	619
2004	364	286	126	776
2005	488	486	180	1,154
2006	506	455	197	1,158
<b>TOTAL</b>	<b>2,347</b>	<b>2,003</b>	<b>891</b>	<b>5,241</b>

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As this data reflects, a significant number of individuals convert to a higher level of licensure, but compared to the overall number of real estate broker licensees, relatively few pursue conversion.

The manner in which a candidate obtains a Colorado real estate broker's license by reciprocity depends, in part, on the jurisdiction that issued the original license. In short, someone holding a real estate license from another jurisdiction can obtain a license in Colorado, provided the other jurisdiction's licensing requirements are substantially equivalent to Colorado's (typical for an endorsement provision) *and* that original jurisdiction will issue a license to a Colorado licensee based on similar criteria (typical for a reciprocity provision).

This has led the Commission to enter into recognition agreements with other jurisdictions. As of the time of this writing, the Commission has entered into such agreements with 26 other jurisdictions: Alabama, Alberta, Arkansas, Connecticut, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, West Virginia and Wyoming.<sup>82</sup>

In addition, the Commission has limited recognition agreements with 10 states: Florida, Illinois, Indiana, Maine, Missouri, Maryland, Rhode Island, South Carolina, Virginia and Washington.<sup>83</sup>

Table 5 illustrates the various requirements a licensee from a jurisdiction with which the Commission has a recognition agreement must satisfy in order to receive a license in Colorado.

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<sup>82</sup> "License Recognition," downloaded from [Hwww.dora.state.co.us/real-estate/licensing/recognition.htm](http://www.dora.state.co.us/real-estate/licensing/recognition.htm) on January 16, 2007.

<sup>83</sup> "License Recognition," downloaded from [Hwww.dora.state.co.us/real-estate/licensing/recognition.htm](http://www.dora.state.co.us/real-estate/licensing/recognition.htm) on January 16, 2007.

**Table 5  
Colorado Licensing Requirements for  
License Holders from Other Jurisdictions**

<b>License Held and Type of Jurisdiction</b>	<b>Requirements for Colorado Associate Real Estate Broker License</b>	<b>Requirements for Colorado Independent Real Estate Broker License</b>	<b>Requirements for Colorado Employing Broker Real Estate License</b>
Real Estate Salesperson – Limited Recognition	<ul style="list-style-type: none"> <li>o Salesperson license in other jurisdiction.</li> <li>o Colorado portion of examination</li> </ul>	<ul style="list-style-type: none"> <li>o Salesperson license in other jurisdiction.</li> <li>o Colorado portion of examination.</li> <li>o 2 years active licensure.</li> </ul>	<ul style="list-style-type: none"> <li>o Salesperson license in other jurisdiction.</li> <li>o Colorado portion of examination.</li> <li>o 2 years active licensure.</li> <li>o 24 hours education in brokerage administration.</li> </ul>
Real Estate Salesperson – Full Recognition	<ul style="list-style-type: none"> <li>o Salesperson license in other jurisdiction.</li> </ul>	<ul style="list-style-type: none"> <li>o Salesperson license in other jurisdiction.</li> <li>o Colorado portion of examination.</li> <li>o 2 years active licensure.</li> </ul>	<ul style="list-style-type: none"> <li>o Salesperson license in other jurisdiction.</li> <li>o Colorado portion of examination.</li> <li>o 2 years active licensure.</li> <li>o 24 hours education in brokerage administration.</li> </ul>
Real Estate Broker – Limited Recognition	<ul style="list-style-type: none"> <li>o Broker license in other jurisdiction.</li> <li>o Colorado portion of examination.</li> </ul>	<ul style="list-style-type: none"> <li>o Broker license in other jurisdiction.</li> <li>o Colorado portion of examination.</li> <li>o 2 years active licensure.</li> </ul>	<ul style="list-style-type: none"> <li>o Broker license in other jurisdiction.</li> <li>o Colorado portion of examination.</li> <li>o 2 years active licensure.</li> </ul>
Real Estate Broker – Full Recognition	<ul style="list-style-type: none"> <li>o Broker license with equivalent level of authority from other jurisdiction.</li> </ul>	<ul style="list-style-type: none"> <li>o Broker license with equivalent level of authority from other jurisdiction.</li> <li>o 2 years previous licensure.</li> </ul>	<ul style="list-style-type: none"> <li>o Broker license with equivalent level of authority from other jurisdiction.</li> <li>o 2 years previous licensure.</li> </ul>

Source: Colorado Real Estate Broker Application

This scheme is somewhat complicated by the fact that Colorado does not license salespeople, but most other jurisdictions do.

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An individual holding a real estate broker license from Ohio must complete the Commission Update Course, complete 24 hours of education in real estate closings and pass the Colorado portion of the Commission's licensing examination.

Licensees from 27 other jurisdictions, including 10 Canadian provinces and the U.S. territories of Guam, Puerto Rico and the U.S. Virgin Islands,<sup>84</sup> with which the Commission has no type of license recognition agreement must satisfy all of Colorado's requirements for initial licensure by examination.

Finally, as of January 1, 1997, the Commission ceased renewing and issuing new real estate salesperson licenses. As a result, all real estate licenses issued prior to this date either lapsed or were placed on inactive status, at the request of the licensee, by January 1, 2000.

As of June 30, 2007, there were 942 inactive salesperson licensees. These individuals cannot reactive their licenses as real estate salespeople, but they can convert their licenses into real estate broker licenses. To do this, an individual must: 1) complete a 24-hour course of study on closings and contract preparation; and 2) take and pass the Colorado portion of the Commission's licensing examination.

Table 6 illustrates, for calendar years 2000 through 2006, the number of inactive salesperson licenses that converted to real estate broker licenses, and the types of real estate broker licenses to which the salesperson licensees converted.

**Table 6**  
**Real Estate Salesperson License Conversions**

Calendar Year	Conversion to Associate Broker	Conversion to Independent Broker	Conversion to Employing Broker	Total Number of Conversions
2000	1,167	99	41	1,307
2001	655	61	27	743
2002	236	49	11	296
2003	194	38	5	237
2004	114	45	5	164
2005	73	34	6	113
2006	25	5	3	33
TOTAL	2,464	331	98	2,893

Additionally, for the first four months of 2007, five additional real estate salesperson licenses converted to real estate broker licenses: four became associate real estate brokers and one became an independent real estate broker.

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<sup>84</sup> "License Recognition," downloaded from [Hwww.dora.state.co.us/real-estate/licensing/recognition.htm](http://www.dora.state.co.us/real-estate/licensing/recognition.htm) on January 16, 2007.

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It is not surprising to see the largest number of conversions occurring in 2000, since that was the year in which all salesperson licenses either lapsed or went on inactive status, meaning that if a licensed real estate salesperson wanted to continue to practice, he or she had to convert to a real estate broker license.

Similarly, it is not surprising to see that since 2000, the number of conversions has declined dramatically from year to year. The longer a person has been out of practice the more difficult it becomes to re-enter the field.

In 2007, the license fees for real estate brokers were \$150 for a new license and \$84 for renewals.

Regardless of how the real estate broker obtains a license, errors and omissions insurance is required. The Commission has entered into a contract with Rice Insurance Services Company (Rice) for a group policy to cover all real estate brokers in Colorado. However, real estate brokers may also obtain errors and omissions insurance on their own.

According to Division staff, there are at least 27 different insurance carriers writing errors and omissions insurance for Colorado real estate brokers. Regardless, two companies, Rice and Williams Underwriting (Williams), have dominated the real estate errors and omissions market in Colorado from the beginning.

Table 7 illustrates what the Commission's group policy must cover and compares such requirements to what an independently obtained errors and omissions insurance policy must cover.

**Table 7**  
**Required Errors and Omissions Policy Requirements**

Provision	Commission's Group Plan	Independently Obtained Insurance
Coverage for all acts for which a real estate license is required, except those illegal, fraudulent or other acts which are normally excluded from such coverage.	X	X
Coverage is for not less than \$100,000 for each licensed individual and entity per covered claim, regardless of the number of licensees or entities to which a settlement or claim may apply, with an annual aggregate of not less than \$300,000 per licensed individual or entity.	X	X
Coverage of a licensee's use of lock boxes, which coverage shall not be less than \$25,000 per occurrence.	X	X
An option, upon payment of an additional premium, to obtain an extended reporting period of not less than 365 days.	X	X
That the insurance carrier cannot cancel the coverage unless the licensee does not pay the required premium, becomes inactive, has his or her license revoked or, in the case of an applicant, is denied a license.	X	
Pro-ration of premium for coverage that is purchased during the course of a calendar year, but with no refunds of unused premiums.	X	
The obligation of the insurance carrier to defend all claims and the ability of the insured licensee to select counsel of choice subject to the written permission of the carrier, which shall not be unreasonably withheld.	X	
The ability of the insured licensee, upon payment of an additional premium, to obtain higher or excess coverage or to purchase additional coverage from the group carrier as may be determined by the carrier.	X	
That coverage is individual and license-specific and will cover the licensee regardless of changes in employing broker.	X	
A conformity endorsement allowing a Colorado resident licensee to meet the errors and omissions insurance requirement for an active license in another group mandated state without the need to purchase separate coverage in that state.	X	
The insurance carrier cannot cancel coverage, except pursuant to and in conformance with section 10-4-109.7, C.R.S.		X
Payment of claims by the insurance carrier shall be on a first dollar basis and the carrier shall look to the insured for payment of any deductible.		X
That the insurance carrier execute an affidavit in a form specified by the Commission attesting that the independent policy is in force and, at a minimum, complies with all relevant conditions set forth in the Commission's rules and that the carrier will immediately notify the Commission, in writing, of any cancellation or lapse in coverage of any independent policy.		X

An independently obtained insurance policy, therefore, must match the Commission's group policy in terms of coverage and limitations. Differences may arise in terms of cancellation and portability.

The popularity of the Commission's group policy has waned in recent years. Table 8 provides data, for calendar years 1998 through 2006, regarding the number of licensed real estate brokers who have opted to purchase the Commission's group policy.

**Table 8  
Participation in the Commission's Group Policy**

<b>Calendar Year</b>	<b>Number of Covered Real Estate Brokers</b>
1998	32,095
1999	32,477
2000	31,605
2001	33,090
2002	35,271
2003	37,132
2004	21,695
2005	22,865
2006	21,358

Williams had the contract for the Commission's group policy until 2004. Williams bid on and won the contract for that year and subsequent years, but backed out at the last minute claiming that it was having difficulties with its underwriter and the promised premium. The Division put the contract out for bid again, and both Williams and Rice bid on the contract. This time, the contract was awarded to Rice. Since Williams already had a relationship with Colorado's real estate brokers and was able to continue to offer insurance outside of the Commission's group policy, many real estate brokers elected to remain with Williams, thus the decline in participation in the Commission's group policy that began in 2004.

Table 9 provides historical data regarding the premiums for this policy.

**Table 9  
Errors and Omissions Insurance  
Historical Premiums for Commission's Group Policy**

<b>Calendar Year</b>	<b>Group Policy Premium</b>
1998	\$68
1999	\$68
2000	\$68
2001	\$75
2002	\$75
2003	\$100
2004	\$230
2005	\$215
2006	\$230
2007	\$239

The premiums for the group policy have increased dramatically in the 10 years since the General Assembly first imposed the errors and omissions insurance requirement.

Table 10 illustrates the claims history under the Commission’s group policy.

**Table 10**  
**Historical Claims Data for the Commission’s Group Policy**

Calendar Year	Total Claims	Open Claims	Closed Claims	Open Loss Reserves	Paid Losses	Open Expense Reserves	Paid Expenses	Total Open & Incurred
1998	304	0	304	\$0	\$1,203,059	\$0	\$1,136,764	\$2,339,823
1999	410	0	410	\$0	\$1,439,013	\$0	\$1,658,039	\$3,097,052
2000	345	4	341	\$35,000	\$1,825,311	\$62,130	\$1,918,567	\$3,841,008
2001	598	0	598	\$0	\$2,087,920	\$0	\$2,483,714	\$4,571,634
2002	581	4	577	\$200,150	\$2,872,534	\$0	\$3,404,918	\$6,477,602
2003	562	4	558	\$5,680	\$3,970,344	\$0	\$2,702,897	\$6,678,921
2004	272	13	259	\$100,000	\$1,087,215	\$75,973	\$1,448,902	\$2,712,090
2005	274	41	233	\$744,000	\$1,149,705	\$288,949	\$1,160,903	\$3,343,557
2006	206	71	135	\$217,566	\$689,889	\$298,968	\$209,046	\$1,415,469
2007	43	28	15	\$85,750	\$4,000	\$32,000	\$0	\$121,750
TOTAL	3,595	165	3,430	\$1,388,146	\$16,328,990	\$758,020	\$16,123,750	\$34,598,906

Columns in Table 10 addressing “reserves” indicate dollar values not yet paid. These are the carriers’ estimates as to what the actual costs will be. Columns addressing “expenses” reflect, for the most part, legal fees.

Because it takes time to process a claim, the more recent the claims data, the more likely the data will reveal a higher number of open cases and higher reserve amounts, relative to paid amounts. As claims are processed and closed, the dollar amounts paid under the policy can reasonably be expected to increase.

It is also important to note that the Commission’s group policy is a “claims made” type of policy, meaning that the carrier providing the errors and omissions insurance during the year in which a claim is made, not necessarily the year in which the loss occurred, is responsible for processing the claim. For example, if the incident leading to the loss occurred in 2006, but the claim is filed in 2008, the carrier of the policy in effect for 2008 processes the claim.

As Table 10 demonstrates, the Commission’s group policy has returned over \$16 million to injured Colorado residents in the past 10 years. Similarly, however, the group policy has paid over \$16 million in attorney fees, court costs and other expenses.



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To ensure compliance with the errors and omissions insurance requirement, the Commission requires real estate brokers to attest to their compliance at the time of initial licensure and when licenses are renewed.

Additionally, all licensed real estate brokers must complete 24 hours of continuing education every three years. The three-year cycle is based on the licensee's license renewal cycle. These 72 hours of continuing education must include eight hours of the Commission Update Course and 16 hours of electives.

The Commission Update Course has been divided into two, four-hour courses and licensees must take one course in two of the three years in the renewal cycle. The update courses, generally, cover changes in Colorado law, Commission rules and Commission-approved forms. A written examination is given at the end of each update course.

The remaining 16 hours of mandated continuing education must address one or more of the following:

- Real estate law
- Property exchanges
- Real estate contracts
- Real estate finance
- Real estate appraisal
- Real estate closings
- Real estate ethics
- Condominiums and cooperatives
- Real estate time-sharing
- Real estate marketing principles
- Real estate construction
- Land development
- Real estate energy concerns
- Real estate geology
- Water and waste management
- Commercial real estate
- Real estate securities and syndications
- Property management
- Real estate computer principles
- Brokerage administration and management
- Agency
- Any other subject approved by the Commission

Prior to 2005, the Division maintained an Education Unit that approved course content and audited licensee records to ensure compliance with the continuing education requirements.

However, the Education Unit was abolished in 2005, and with it the Division's approval of continuing education courses. Additionally, statutory changes in 2007 further reduced control over real estate continuing education by removing restrictions on who could provide the Commission Update Course. At present, virtually anyone can provide any continuing education course to licensees, so long as those courses are related to the subjects enumerated above.

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Additionally, prior to 2005, the Division's Education Unit randomly audited 1,000 real estate broker licensees each year (500 in the spring and 500 in the autumn) for compliance with the continuing education requirements. According to Division staff, these audits typically revealed that approximately 10 percent of those audited had failed to comply with the mandated requirements. No such audit has been completed since Spring 2005.

To ensure compliance with the continuing education requirement, the Commission requires real estate brokers to attest to their compliance at the time of license renewal. No other efforts are undertaken to ensure compliance.

As an alternative to satisfying the continuing education requirement, licensees are able to retake the Colorado portion of the Commission's licensing examination. Although most licensees opt to complete continuing education, between January 1, 2006, and April 1, 2007, 15 licensees opted to retake the examination. Of these, two failed, resulting in a pass rate of 84.6 percent.

Finally, all licensees and license applicants must attest to the fact that they are legally present in the United States. In addition, if the Commission receives a complaint against a licensee, the licensee is required to submit documentary verification that the licensee is legally present in the United States.

### Subdivision Developers

Subdivisions primarily consist of timeshares that are marketed in Colorado, regardless of where the property is located, condominium conversions and raw land subdivisions with lots over 35 acres. A raw land subdivision is one that does not include a home, and very often these projects lack infrastructure (i.e., water, roads, electricity, telephone, etc.) as well.

Table 11 illustrates, for the five fiscal years indicated, the number of new subdivision developer registrations, supplemental filings and registration renewals.

**Table 11**  
**Subdivision Registration Information**

<b>Fiscal Year</b>	<b>New</b>	<b>Supplemental</b>	<b>Renewal</b>	<b>TOTAL ACTIVE</b>
01-02	39	35	190	190
02-03	22	61	188	188
03-04	32	44	168	168
04-05	22	44	182	182
05-06	29	40	211	211

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Although the Commission registers subdivision developers, not individual projects, Division staff estimates that there are approximately 300 active projects in Colorado at any given time.

To register as a subdivision developer, an applicant must submit the following information to the Commission:

- The names and addresses of all natural persons owning 24 percent or more of the subdivision developer;
- The length of time and the locations where the subdivision developer has been engaged in the business of real estate sales or development;
- Any felony of which the subdivision developer has been convicted in the preceding 10 years;
- The states in which the subdivision developer is licensed or registered as such; and
- Information concerning the subdivision to be developed, including:
  - The location of the subdivision;
  - The name of the subdivision;
  - Evidence of title;
  - Evidence that Commission-approved forms will be used;
  - Evidence of disclosures that will be provided to purchasers regarding legal access and utilities; and
  - Evidence of whether there is or will be a homeowners' association and information pertaining thereto.

The Commission must complete its review of the application for registration within 60 days.

If the subdivision developer alters its offering (i.e., if a timeshare offering changes from sales of a 1/52 interest to a 1/12 interest), a supplemental filing must be made. These are generally approved within 14 days.

Finally, all subdivision developer registrations must be renewed annually. As a result, the numbers for renewals and total active registrations reported in Table 11 are identical.

Once a project has been sold out, or, in the case of timeshares, the subdivision developer ceases its marketing activity in Colorado, the registration may be allowed to lapse.

The initial subdivision developer registration fee is \$739, and the renewal fee is \$151. If a supplemental filing is made, the fee is \$243.

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Finally, the Division also registers mortgage brokers.<sup>85</sup> As of June 30, 2007, the Division had 5,520 active mortgage broker registrations. The mortgage broker registration program is not part of this sunset review, but this figure is reported for informational purposes and to give an overall picture of the Division's workload.

Taking into account real estate salespeople, real estate brokers, real estate appraisers, subdivision developers and mortgage brokers, the Division is involved in the regulation of almost 50,000 individuals and entities.

### *Examinations*

The Commission's real estate broker licensing examination consists of a national portion and a Colorado portion. The national portion is approved by the Association of Real Estate Licensing Law Officials (ARELLO), must be completed in 120 minutes and consists of 80 multiple-choice items covering.<sup>86</sup>

- Property ownership (7 items);
- Land use controls and regulations (7 items);
- Valuation and market analysis (6 items);
- Financing (7 items);
- Laws of agency (10 items);
- Mandated disclosures (7 items);
- Contracts (10 items);
- Transfer of property (6 items);
- Practice of real estate (10 items);
- Real estate calculations (6 items); and
- Specialty areas, such as property management, landlord/tenant, subdivisions, commercial/income property and business opportunities (4 items).

The Colorado portion is approved by the Commission, must be completed in 110 minutes and consists of 74 multiple-choice items covering.<sup>87</sup>

- Duties and powers of the Commission (2 items);
- Licensing requirements (3 items);
- Requirements governing the activities of licensees (10 items);
- Additional topics, such as property management, landlord/tenant, water rights, surface versus subsurface rights, taxes, mortgage brokers and lenders, Colorado Fair Housing Act, securities, redemption and

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<sup>85</sup> Pursuant to Senate Bill 07-203, all active mortgage broker registrations will convert to licenses on January 1, 2008.

<sup>86</sup> *Real Estate Candidate Information Bulletin*, PSI licensure:certification, January 11, 2007, pp. 3-5.

<sup>87</sup> *Real Estate Candidate Information Bulletin*, PSI licensure:certification, January 11, 2007, pp. 3-5.

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foreclosure processes, Colorado Homestead Exemption and statutory power of attorney (9 items);

- Colorado forms and contracts (20 items);
- Recordkeeping and trust accounts (6 items);
- Closings and settlements (13 items); and
- Brokerage relationships (11 items).

To pass the national portion, the examinee must answer 60 items correctly, and to pass the Colorado portion, the examinee must answer 52 items correctly.<sup>88</sup>

Between January 1, 2006, and April 1, 2007, the pass rates for first-time Colorado license candidates were 76.91 percent on the national portion and 70.47 percent on the Colorado portion.

Although candidates must pass both portions of the examination to become licensed, both portions need not be passed on the same day and a passing score is valid for one year.

The Commission has contracted with PSI licensure:certification (PSI) to administer the real estate broker licensing examination. Candidates may register for the examination on-line, by fax, by mail or over the telephone.

The examination is administered via computer, and candidates can take it at any of PSI's seven Colorado testing centers, which are located in Colorado Springs, Durango, Fort Collins, Grand Junction, Greenwood Village, Pueblo and Wheat Ridge.

The initial examination fee is \$71 to take both portions of the examination. For those candidates needing to retake either or both portions, the fee is \$66.

Additionally, candidates can have their fingerprints taken at a PSI testing center and PSI then submits the fingerprints to CBI. The fee for this is \$59.50.

### *Inspections*

Because many licensed real estate brokers manage trust accounts, receive client money (i.e., earnest money or rents), etc., and since subdivision developers must comply with certain recordkeeping and other financial obligations, the Division routinely audits the financial records of licensed real estate brokers and registered subdivision developers.

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<sup>88</sup> *Real Estate Candidate Information Bulletin*, PSI licensure:certification, January 11, 2007, p. 3.

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An audit may be conducted as the result of the Commission's receipt of a complaint, or on a random basis. Table 12 illustrates, for the fiscal years indicated, the number of financial audits Division staff has conducted.

**Table 12**  
**Financial Audit Information**

Fiscal Year	Number of Financial Audits	
	REB	SUB
01-02	551	16
02-03	690	5
03-04	411	11
04-05	416	41
05-06	462	3
Total	2,530	76

REB = Real Estate Brokers

SUB = Subdivision Developers

Although the number of audits conducted of real estate brokers dropped significantly between fiscal years 02-03 and 03-04, in each year since then, the Division has conducted an increasing number of audits.

In addition to financial audits, until Spring 2005, Division staff also audited real estate broker licensees for compliance with the continuing education requirements. When these audits were conducted, Division staff reports, approximately 10 percent of licensees were found to have been out of compliance.

### *Complaints/Disciplinary Actions*

The Commission receives complaints against real estate brokers and subdivision developers, and the Board of Real Estate Appraisers (BOREA) receives complaints against real estate appraisers. Complaints may come from members of the public, or the Commission or the BOREA may initiate complaints on their own motion.

Regardless of the origin of the complaint, Division staff is charged with investigating it. As a result, Table 13 illustrates, for the fiscal years indicated, the number of complaints originated against each license type.

**Table 13  
Complaint Information by License Type**

License Type	FY 01-02	FY 02-03	FY 03-04	FY 04-05	FY 05-06
Real Estate Brokers	721	768	700	741	702
Real Estate Appraisers	123	115	231	171	184
Subdivision Developers	4	6	4	2	3
TOTAL	848	889	935	914	889

Put into the context of the relative number of licensees/registrants, these figures are not surprising. With over 32,000 active real estate broker licenses, it is to be expected that this license category would generate the largest number of complaints.

These complaints can be broken down into various categories, as depicted in Table 14.

**Table 14  
Complaint Information  
Real Estate Brokers and Subdivision Developers**

Nature of Complaints	FY 01-02		FY 02-03		FY 03-04		FY 04-05		FY 05-06	
	REB	SUB	REB	SUB	REB	SUB	REB	SUB	REB	SUB
Advertising	7	0	22	0	14	0	6	0	34	0
Breach of Fiduciary Duty	31	0	25	0	14	0	10	0	7	0
Civil Rights	0	0	1	0	0	0	1	0	1	0
Continuing Education Non-Compliance	87	0	149	0	108	0	119	0	3	0
Criminal Conviction	10	0	15	0	34	0	35	0	175	0
Dishonest Dealing	58	0	45	0	61	0	42	0	37	0
False Promise	36	1	22	2	34	1	22	2	8	1
Falsified Application	58	0	75	0	47	0	54	0	11	0
Failure to Disclose Acting for More than One Party	8	0	3	0	0	0	0	0	1	0
Failure to Disclose Interest in a Transaction	7	0	2	0	1	0	7	0	3	0

Nature of Complaints	FY 01-02		FY 02-03		FY 03-04		FY 04-05		FY 05-06	
	REB	SUB	REB	SUB	REB	SUB	REB	SUB	REB	SUB
Failure to Keep a Record of a Transaction	0	0	0	0	0	0	1	0	0	0
Failure to Present Offer	7	0	15	0	7	0	10	0	17	0
Failure to Supervise/Train	2	0	8	0	14	0	13	0	10	0
Fee Dispute	22	0	15	0	7	0	34	0	28	0
Misrepresentation, Negligent	36	0	44	0	47	1	36	0	53	1
Misrepresentation, Willful	145	3	111	4	47	0	54	0	18	0
Paying a Valuable Consideration to an Unlicensed Person	0	0	0	0	0	0	0	0	1	0
Practicing w/o a License	7	0	7	0	19	0	25	0	45	1
Representing a Real Estate Broker other than the Broker with whom the Licensee is Licensed	1	0	1	0	0	0	4	0	1	0
Sign Crossing	2	0	6	0	8	0	14	0	4	0
Standard of Practice	174	0	171	0	196	0	214	0	195	0
Stipulation Violation	0	0	0	0	1	0	2	0	4	0
Theft/Conversion/Commingling	2	0	7	0	14	0	11	0	10	0
Trust Account Violations	21	0	24	0	27	2	27	0	36	0
<b>TOTAL</b>	<b>721</b>	<b>4</b>	<b>768</b>	<b>6</b>	<b>700</b>	<b>4</b>	<b>741</b>	<b>2</b>	<b>702</b>	<b>3</b>

REB = Real Estate Brokers  
SUB = Subdivision Developers

Advertising complaints include allegations concerning false advertising, failing to note the name of the employing brokerage in advertising and advertising without a valid brokerage agreement in place (i.e., advertising a home for sale before the seller has agreed to use that real estate broker for the sale).

Falsified applications typically involve failure to disclose a past criminal conviction.



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Sign crossing occurs when a real estate broker enters into a brokerage relationship with a client that already has such a relationship with another real estate broker.

Disturbingly, as Table 14 reflects, the greatest number of complaints against real estate brokers pertains to standards of practice.

The sharp increase in complaints between fiscal years 04-05 and 05-06 involving criminal convictions can be directly attributed to the requirement that, effective with renewals in 2005, renewing real estate brokers were required to submit fingerprints for criminal history background checks.

Notably, there have been relatively few complaints involving subdivision developers. With such low numbers, it is difficult to identify any actual trends, but most complaints seem to center around false promises and misrepresentations.

When Division staff receives a complaint, standard practice is to send a letter to the licensee to provide notice that a complaint has been received, and to provide the licensee with an opportunity to respond. Additionally, the licensee is required to provide documentary evidence that the licensee is legally present in the United States.

Depending on the response, some investigations end there. Other investigations may proceed to the point where documents are requested and records audited. In the end, these complaints result in either dismissal or disciplinary action, as depicted in Table 15.

**Table 15**  
**Final Agency Actions**  
**Real Estate Brokers and Subdivision Developers**

Type of Action	FY 01-02		FY 02-03		FY 03-04		FY 04-05		FY 05-06	
	REB	SUB	REB	SUB	REB	SUB	REB	SUB	REB	SUB
Revocation	12	0	31	0	12	0	3	0	15	0
Surrender of License	0	0	0	0	N/A	0	5	0	6	0
Suspension	11	0	13	0	7	0	10	0	14	0
Probation / Practice Limitation	4	0	4	0	5	0	1	0	6	0
Alternative Discipline (Education and/or Fine/Administrative Fee)	79	0	126	0	92	2 <sup>89</sup>	12	0	26	0
Letter of Admonition	0	0	3	0	8	0	0	0	0	0
License Granted with Probation / Practice Limitations	5	0	9	0	10	0	20	0	20	0
License Denied	2	0	2	0	4	0	7	0	14	0
Injunction	0	0	0	0	0	0	0	0	0	0
Fine <sup>90</sup>	N/A	1	N/A	0	N/A	0	13	0	40	0
Public Censure	66	1 <sup>91</sup>	8	0	21	0	9	0	25	0
TOTAL DISCIPLINARY ACTIONS	179	1	196	0	159	2	80	0	166	0
Negotiated Settlements	30	1	32	1	30	0	N/A	1	N/A	1
TOTAL DISMISSALS <sup>92</sup>	609	3	635	6	537	2	145	2	428	1

REB = Real Estate Brokers  
SUB = Subdivision Developers

Data regarding the surrender of licenses is not available for fiscal year 03-04 because Division staff made no distinction between revocations and surrenders in its recordkeeping for that year. As a result, the 12 revocations reported for fiscal year 03-04 may include some instances where a license was voluntarily surrendered.

<sup>89</sup> Sanctions in both cases included a \$1,000-administrative fee.

<sup>90</sup> Prior to fiscal year 04-05 Division staff did not track or maintain statistics regarding the number and value of fines imposed.

<sup>91</sup> The Public Censure included a \$2,000 fine.

<sup>92</sup> Figures for total dismissals include negotiated settlements.

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A negotiated settlement occurs when the licensee and complainant settle their differences and the result of that settlement nullifies the underlying complaint. For example, if a licensee promises to give the complainant a refrigerator and fails to deliver a refrigerator, the complainant may file a complaint alleging false promise. However, if the licensee subsequently delivers a refrigerator, the promise is no longer false, so Division staff dismisses the case as a negotiated settlement.

To ensure that a particular licensee does not develop a practice of fulfilling such promises only when a complaint is filed, and thereby harming additional consumers, the Division tracks such information and will take disciplinary action if a pattern develops.

Statistics regarding such cases were not maintained as a separate classification of dismissal after fiscal year 03-04, so data is not available for subsequent fiscal years. Similarly, figures provided for total dismissals may include negotiated settlements for fiscal years 04-05 and 05-06.

Since there were relatively few complaints involving subdivision developers, it is not surprising to see that there are relatively few disciplinary actions against them.

It is clear from the figures reported in Table 15 that the Commission is willing to revoke or suspend a license when appropriate. It is equally clear that the Commission is just as likely to issue a public censure, issue a fine or impose some type of alternative discipline.

Uniquely, the Commission has the authority to issue public censures, which are published in the Commission's newsletter, as well as letters of admonition. When a letter of admonition is issued, the licensee may request that the letter be vacated and that the case proceed to hearing. However, such is not the case with a public censure. This is primarily because the Commission routinely makes a public censure part of a stipulation, along with a fine. Since the licensee agrees to the public censure, there is nothing to appeal or vacate.

As a result, the Commission tends to issue far more public censures than letters of admonition. This practice has an additional benefit in terms of deterrence. While most licensees do not know what a letter of admonition is, most seem to be well aware of the meaning of a public censure and seek to avoid receiving one.

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The subject of “alternative discipline,” or “diversion,” is intriguing. The Commission tends to use this tool for minor offenses where there is no direct public harm and the behavior can be easily corrected. The Commission typically requires the licensee to take some kind of remedial coursework and couples that requirement with an “administrative fee.” Like public censures, most alternative discipline is meted out through stipulation. Division staff tracks alternative discipline so that if a pattern of behavior develops with respect to a particular licensee, more formal disciplinary action can be taken.

Finally, the Commission is also authorized to issue fines up to \$2,500 per violation. Table 16 illustrates the degree to which the Commission has utilized this disciplinary tool.

**Table 16**  
**Fines – Real Estate Brokers**

<b>Fiscal Year</b>	<b>Number of Fines Imposed</b>	<b>Total Value of Fines Imposed</b>
01-02	Not Available <sup>93</sup>	Not Available
02-03	Not Available	Not Available
03-04	Not Available	Not Available
04-05	13	\$11,250
05-06	40	\$42,500

Division staff did not track the number or value of fines imposed prior to fiscal year 04-05, so such figures are not available.

Unlike in most regulatory programs, the fines imposed by the Commission and collected by the Division are deposited into the Real Estate Cash Fund, as opposed to the state’s General Fund. This situation is the result of the General Assembly’s repeal of the Real Estate Recovery Fund (Recovery Fund) in 2005. Prior to this repeal, money collected from fines went into the Recovery Fund.

Finally, an important measure of agency efficiency, as well as an agency’s success at public protection, is the amount of time that elapses between when a complaint is received and when final agency action occurs.

The length of time that a complaint remains open is a concern for both consumers and licensees. From the licensee perspective, this is the length of time during which a licensee who perhaps did nothing wrong must live and work under the specter of possible disciplinary action. This can, understandably, be quite stressful, so the quicker the agency can dispose of the matter, the better.

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<sup>93</sup> Prior to fiscal year 04-05 Division staff did not track or maintain statistics regarding the number and value of fines imposed.

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From a consumer protection perspective, the longer a case remains open, the longer a potentially incompetent or dishonest practitioner can continue to practice, thereby inflicting additional harm.

Timely, thorough investigations, therefore, are essential to all concerned.

Table 17 illustrates the average time to closure for the fiscal years indicated.

**Table 17**  
**Average Time to Closure**

<b>Fiscal Year</b>	<b>Average Time to Closure (Days)</b>
01-02	123
02-03	105
03-04	133
04-05	236
05-06	163
06-07	74

Of paramount concern is the average time to closure identified for fiscal year 04-05. Division staff attributes this figure to an enormous backlog of cases and admits that this is an unacceptable figure. As a result, steps were implemented that reduced the average time to closure to a six-year low of 74 days in fiscal year 06-07. Division staff now attempts to close cases within 180 days of receipt.

#### *Real Estate Recovery Fund*

Although the General Assembly effectively repealed the Real Estate Recovery Fund (Recovery Fund) as of July 1, 2005, it merits some discussion here because of the manner in which it was repealed and because section 12-61-303(6), Colorado Revised Statutes (C.R.S.), directs DORA to address an aspect of the Recovery Fund in this sunset review.

The Recovery Fund is a mechanism whereby consumers who win judgments against licensed real estate brokers who are unable to pay such judgments can recover those judgments by making claims against the Recovery Fund.

The repeal of the Recovery Fund was designed such that no claims may be made against the Recovery Fund unless the underlying civil action was commenced on or before June 30, 2005. However, the statute does not make it clear that potential claimants are required to notify the Division of such suit.

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As a result, in August 2005, Division staff mailed letters to the 41 parties with open claims directing these parties to respond to the Division or their claims would be closed. Thirteen parties responded.

By May 2007, only two open cases remained. Division staff estimates that these two open claims, if awarded, will total no more than approximately \$55,000.

However, Division staff is uncomfortable with the enforceability of closing 28 of the 41 cases in 2005. As a result of this and due to the fact that the parties to the two open claims have until June 2010 to perfect their claims on the Recovery Fund, the Recovery Fund cannot yet be completely repealed.

An additional reason for addressing the Recovery Fund in this sunset review is the service of process provision contained in section 12-61-303(6), C.R.S. If a party seeking to file a lawsuit against a licensed real estate broker cannot locate that real estate broker for service of process purposes, then, by law, the real estate broker is deemed to have appointed the Colorado Secretary of State (SOS) as agent for such purpose.

The SOS reported to DORA that no such service has occurred, or if it has, the SOS has no way to determine the number or the parties involved without knowing the names of the parties involved. This is due to the computer systems maintained by the SOS.

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## ***Analysis and Recommendations***

*Recommendation 1 – Continue the Colorado Real Estate Commission, the Colorado Division of Real Estate and the regulation of real estate brokers and subdivision developers for nine years, until 2017.*

The first sunset criterion asks whether regulation is necessary to protect the public health, safety or welfare. As applied to this sunset review, it is necessary to address the consumer protection aspects of:

- The regulation of real estate brokers
- The regulation of subdivision developers
- The Colorado Real Estate Commission (Commission)
- The Colorado Real Estate Division (Division)

Without question, the purchase of a home is, for most Coloradans, the single largest purchase they will ever make. Considering the complexities involved in a real estate transaction, an incompetent or unscrupulous real estate broker could cause severe financial hardship to his or her clients, as well as other parties involved in the transaction, through theft, fraud, misrepresentation, negligence and improper title work resulting in clouded title to the subject real estate.

Most consumers seem to recognize these complexities and have expressed a willingness to pay real estate brokers to help them navigate through their real estate transactions. This is evidenced by the fact that, in 2006, 77 percent of homebuyers used a real estate broker in their real estate transactions.<sup>94</sup> In 2005 alone, consumers are estimated to have spent more than \$60 billion on real estate brokerage services.<sup>95</sup>

Thus, consumers have spoken – the services offered by real estate brokers are in demand. But have real estate brokers actually caused harm?

Among the regulatory duties of the Commission and the Division are those of receiving and investigating complaints against real estate brokers and taking disciplinary action when warranted.

As Tables 2, 13 and 15 on pages 25, 41 and 44, respectively, show, in fiscal year 05-06, 32,335 Colorado-licensed real estate brokers generated 702 complaints resulting in 166 disciplinary actions. Since real estate brokers can cause public harm, it is reasonable to conclude that regulation of them is justified.

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<sup>94</sup> *The 2006 National Association of Realtors Profile of Home Buyers and Sellers*, The National Association of Realtors (2006), p. 46.

<sup>95</sup> P. Woodall and S. Brobeck, "State Real Estate Regulation: Industry Dominance and its Consumer Costs," Consumer Federation of America, July 2006, p. 2.

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However, Tables 11, 13 and 15 on pages 36, 41 and 44, respectively, show that, in fiscal year 05-06, 211 registered subdivision developers generated only three complaints resulting in no disciplinary actions. It is reasonable to conclude, therefore, that subdivision developers cause little actual harm. But is the potential for harm sufficient to justify continued regulation?

Subdivision developers must register if their projects include not only raw land subdivisions, but also condominium conversions and timeshares. Most of the Commission's regulatory authority over subdivision developers pertains to ensuring that subdivision developers make the proper disclosures to purchasers. Absent regulation, it is possible that many of these disclosures would not be made or would be incomplete, thereby harming the public.

Both real estate brokers and subdivision developers can cause harm to consumers. As a result, it is reasonable to conclude that the public interest is served by the continued regulation of real estate brokers and subdivision developers.

However, the means by which real estate brokers and subdivision developers are regulated lead to additional questions. Is regulation best effected by the Commission, or could the Division adequately protect the public without the expertise offered by the Commission? A secondary question is whether the Division should continue as a division of state government, or whether its mission could be more effectively conducted by merging it into another division of state government, such as the Division of Registrations.

As currently constituted, three licensed real estate brokers, an individual with experience in developing subdivisions and a member of the public comprise the Commission. These individuals bring with them the expertise necessary to examine evidence and determine whether a violation of the statutes or Commission rules occurred and whether disciplinary action is warranted.

The Commission, therefore, should be continued.

Finally, the question of whether the Division should continue or sunset must be addressed. Since regulation is necessary to protect the public, the functions of the Division cannot be allowed to sunset. However, the fourth sunset criterion requires an analysis of whether the agency performs its statutory duties efficiently and effectively. In other words, can the functions of the Division be more efficiently performed in another manner?

To answer this question, the Department of Regulatory Agencies (DORA) explored whether any efficiencies or cost savings could be realized by merging the Division into another division of state government.



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DORA's Division of Registrations (Registrations) seemed a logical merger candidate. Since both the Division and Registrations regulate individual practitioners they face many of the same issues with respect to examination development and administration, licensing, complaint processing, investigations and enforcement.

However, considering the workload of both divisions, any cost savings to be realized through a reduction in workforce would be minimal. Registrations would need additional staff to take on the added work that regulating real estate brokers, subdivision developers, mortgage brokers and real estate appraisers would entail.

Similarly, minimal cost savings would be realized from merging information technology systems. Both divisions rely heavily on vendors to perform many license application, examination development and examination administration functions. Since these are minimal costs to the state to begin with, very little in terms of cost savings could be realized.

In the end, therefore, the apparent reasons for merging the two divisions are less convincing. Furthermore, the two divisions are different in at least one respect – although they both regulate individuals, the Division also regulates an industry.

Like the Division of Banking regulates the banking industry, the Division of Financial Services regulates the credit union industry, the Division of Insurance regulates the insurance industry and the Division of Securities regulates the securities industry, the Division regulates Colorado's real estate industry.

Taking these comparisons even further, the Divisions of Insurance and Securities also regulate individuals, just as does the Division. It is reasonable to conclude, therefore, that since the Division more closely resembles the Divisions of Insurance and Securities than it does Registrations, the Division should continue as a division.

However, the current regulatory structure is not perfect. As a result, this report contains numerous statutory and administrative recommendations to improve consumer protection without unnecessarily burdening the regulated communities. Since none of these recommendations represent major policy shifts, nine years seems an appropriate length of time for which to continue regulation, the Commission and the Division.

Since the regulation of real estate brokers and subdivision developers is necessary to protect the public health, safety and welfare, and since the Commission and the Division are the best vehicles to implement and oversee that regulation, regulation, the Commission and the Division should be continued for nine years, until 2017.

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*Recommendation 2 – Continue to mandate that licensed real estate brokers maintain errors and omissions insurance, and repeal the Commission’s involvement in procuring a group policy and the sunset provision pertaining to errors and omissions insurance.*

All licensed real estate brokers must obtain and maintain errors and omissions insurance.<sup>96</sup> Furthermore, the Commission is charged with contracting with an insurer for a group errors and omissions policy.<sup>97</sup> If the Commission is unable to obtain such a policy at a premium that it considers to be reasonable, licensed real estate brokers must obtain such insurance independently.<sup>98</sup>

Additionally, sections 12-61-103.6(5) and 24-34-104(39)(b)(VI), Colorado Revised Statutes (C.R.S.), specifically direct DORA to address the issue of the Commission’s role in obtaining the group policy in this sunset review.

Inherent in determining the level of Commission involvement in obtaining a group policy is the degree to which errors and omissions insurance is necessary to protect the public.

As Table 10 on page 34, demonstrates, since the General Assembly first mandated that licensed real estate brokers obtain errors and omissions insurance, over \$16 million has been returned to consumers through claims filed with the Commission’s group errors and omissions insurance policy.

However, this \$16 million-figure may not capture the entire story. Recall that licensed real estate brokers need not obtain errors and omissions insurance through the Commission’s group policy. They may obtain insurance independently. Unfortunately, the Division was unable to obtain accurate enrollment figures from the Commission’s group policy insurance carrier, so it is not possible to determine the percentage of licensed real estate brokers that obtain coverage under the Commission’s group policy. This, in turn, makes it impossible to estimate the total dollar value of all claims paid to Colorado consumers by virtue of errors and omissions insurance.

Regardless, at least \$16 million was returned to consumers. The public protection value of the mandate, therefore, is clear and the mandate should be continued.

However, should the Commission contract for a group policy?

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<sup>96</sup> § 12-61-103.6(1), C.R.S.

<sup>97</sup> § 12-61-103.6(1), C.R.S.

<sup>98</sup> § 12-61-103.6(2)(a), C.R.S.

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One reason to retain the Commission's group policy relates to the availability of affordable errors and omissions insurance in certain geographic regions of the state, as well as for certain types of real estate practice. Anecdotally, members of the real estate broker community reported to DORA that without the Commission's group policy, the premiums for errors and omissions insurance in certain rural areas would be prohibitively high. Similarly, these individuals contend that certain types of practice, for example real estate brokers that specialize in deals involving ranches, would face similar cost issues.

Additionally, imposing a mandate without any assistance in complying with that mandate and without any mechanisms to ensure compliance with the mandate would likely create an atmosphere where noncompliance with the mandate becomes attractive. Many licensees, it is feared, unable to afford or obtain the mandated errors and omissions insurance, would continue to practice without errors and omissions insurance. Since the Division verifies compliance with the mandate merely by requiring an attestation of compliance upon license renewal, it becomes clear why the incentive to skirt the mandate would be attractive.

Furthermore, at least 14 other states mandate that real estate professionals<sup>99</sup> obtain and maintain errors and omissions insurance.<sup>100</sup> Additionally, and more importantly to the debate on the Commission contracting for a group policy, all but two of these states contract for a group policy.<sup>101</sup>

However, there is considerable evidence that argues in support of repealing the Commission's involvement in procuring the group policy. Such arguments focus on cost, consistency and consumer protection.

Of the 14 states mandating errors and omissions insurance, the annual premium for Colorado is the highest, at \$239 per year, and is \$13 higher than the next highest state (Louisiana) and \$105 higher than the least expensive state (North Dakota).<sup>102</sup> These differences can be attributed to several factors, including, differences in mandated coverage, claims history and property values.

With respect to the issue of cost, some argue that by repealing the requirement that the Commission procure a group policy and by allowing the free market to operate, insurance premiums can be expected to decrease for many licensees.

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<sup>99</sup> The term "professionals" is used here since most other state license not only real estate brokers, but also real estate salespeople.

<sup>100</sup> "Errors and Omissions Insurance – Part Two," *ARELLO – Digest of Real Estate Laws and Current Issues*, Association of Real Estate License Law Officials, 2007, p. 158.

<sup>101</sup> "Errors and Omissions Insurance – Part Two," *ARELLO – Digest of Real Estate Laws and Current Issues*, Association of Real Estate License Law Officials, 2007, p. 158.

<sup>102</sup> "Errors and Omissions Insurance – Part Two," *ARELLO – Digest of Real Estate Laws and Current Issues*, Association of Real Estate License Law Officials, 2007, p. 158.

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Additionally, the General Assembly has mandated that at least four other professions (acupuncturists, podiatrists, chiropractors and optometrists<sup>103</sup>) maintain some form of malpractice insurance. In none of these instances is the state involved in obtaining a group policy or otherwise assisting licensees in complying with the requirement. In this sense, the Commission's group policy is inconsistent with other regulatory models in Colorado.

Finally, it is reasonable to question whether the requirement that the Commission procure a group policy encourages the continued practice of incompetent real estate brokers, thereby jeopardizing public protection. Since the market is not allowed to raise premiums on those licensees with extensive claims histories, such individuals can continue to practice with subsidized insurance and, at least potentially, harm additional consumers. If the free market were allowed to operate, such individuals could be denied coverage – leading them to cease practice or to practice without the mandated coverage – or their premiums could be adjusted accordingly – leading them to cease practicing due to high premiums or, at a minimum, potentially lowering the premiums for other real estate brokers with better claims histories. In the end, the Commission's group policy may actually increase the very public harm that the group policy aims to mitigate.

Since the mandate to obtain and maintain errors and omissions insurance has returned at least \$16 million to Colorado consumers over the life of the mandate, the mandate to obtain errors and omissions insurance should be continued. However, since the Commission's group policy is unique among state-mandated malpractice insurance provisions, since rates may decrease if the free market is allowed to operate and since the Commission's group policy may serve to undermine public protection, the statutory provisions requiring the Commission to procure a group policy should be repealed.

Additionally, since this type of issue would be explored in a sunset review absent a specific direction from the General Assembly to do so, the repeal and sunset review provisions found in section 12-61-103.6(5), C.R.S., should be repealed.

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<sup>103</sup> Pursuant to section 12-40-126(1)(a), C.R.S., optometrists must fulfill certain financial responsibility requirements, which may be satisfied by obtaining malpractice insurance.

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*Recommendation 3 – Amend the service of process provisions to allow service on licensed real estate brokers who cannot be located, by registered or certified mail, return receipt requested, to the last known address of the real estate broker.*

Two provisions in the real estate statutes address service of legal process on licensed real estate brokers who cannot be located. Both of these provisions state that such service may be made on the Colorado Secretary of State (SOS).

First, section 12-61-107(2), C.R.S., provides that all licensed real estate brokers consent to service of process on the SOS.

Second, section 12-61-303(6)(a), C.R.S., provides that any licensed real estate broker upon whom personal service cannot be made in connection with a claim against the Real Estate Recovery Fund (Recovery Fund) is deemed to have consented to service of process on the SOS. This provision goes on to provide that such service of process is to comply with the requirements of section 7-105-104, C.R.S.

Importantly, sections 12-61-303(6)(b) and 24-34-104(39)(b)(VII), C.R.S., explicitly direct DORA to address the service of process provision relating to the Recovery Fund.

Sections 12-61-107(2) and 12-61-303(6)(b), C.R.S., are problematic for several reasons. First, the SOS prefers not to be involved in such issues. The SOS has made a concerted effort to change the business filing statutes, as well as various other specific statutes, such as those discussed here, to allow service of process by certified or registered mail, return receipt requested. The date of service is then deemed to be the earlier of the date of receipt by the person being served, the date of the signature on the return receipt if signed by someone other than the person being served, or five days after mailing.

An additional problem, with respect to the provision pertaining to the Recovery Fund, is that the SOS has no way of determining how often the SOS has been served. To determine whether the SOS has been served and the statutory provision under which such service was made would require a manual search of SOS records for each entity registered with the SOS. As a result, it is not possible to easily determine the extent to which the service of process provision relating to the Recovery Fund has been utilized.

Finally, the General Assembly repealed section 7-105-104, C.R.S., the service of process provision referenced in the Recovery Fund provision, in section 347 of House Bill 03-1377 (HB 1377). Section 217 of HB 1377 enacted the service of process procedures envisioned by this Recommendation 3.

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The purpose of provisions such as these is to ensure that a party to a lawsuit receives proper notice of that lawsuit so that a defense can be mounted. When the party can be located, service of process is relatively easy. The problem arises when the party cannot be located, but justice and court rules demand that notice be given in some manner. Thus, some service of process provisions allow service on the SOS, which essentially acts as an agent for the party that cannot be located. By allowing service in this manner, the party bringing the lawsuit can demonstrate to the court that reasonable steps were taken to notify the opposing party.

However, an alternative to service on the SOS, and one preferred by the SOS, and previously authorized by the General Assembly in section 7-90-704, C.R.S., is to allow service of process to that party's last known address by certified or registered mail, return receipt requested. This allows the party attempting to serve the process to demonstrate that a reasonable attempt was made. Additionally, such service is recognized to have been made on the earlier of the date of actual receipt by the party being served, the date the return receipt is signed by someone other than the party being served, or five days after mailing.

If the party being served is still at that location, then process has been served and there are no problems. If the party being served is no longer at that location, then the service is returned and service is effective five days after mailing, thus allowing the party serving the process to move forward.

Since the General Assembly has previously approved, in other statutory provisions, service of process by certified or registered mail, return receipt requested, sections 12-61-107(2) and 12-61-303(6)(a), C.R.S., should be amended in a similar manner.

Additionally, since it currently is, and will be with the recommended amendments, impossible to determine whether the service of process provision pertaining to the Recovery Fund has been used, the repeal and sunset review provisions in section 12-61-303(6)(b), C.R.S., should be repealed.

*Recommendation 4 – Repeal all statutory provisions relating to licensed real estate salespeople.*

Prior to 2000, the Commission licensed not only real estate brokers, but also real estate salespeople. In short, licensed real estate salespeople could do all of the things that licensed real estate brokers can do, but they had to be employed by licensed real estate brokers.<sup>104</sup> Real estate salespeople could not work independently.

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<sup>104</sup> § 12-61-101(3), C.R.S.

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The General Assembly prohibited the Commission from issuing any new real estate salesperson licenses after December 31, 1996.<sup>105</sup> Furthermore, the General Assembly prohibited the Commission from renewing any active real estate salesperson licenses after December 31, 1999.<sup>106</sup>

As a result, licensed real estate salespeople were faced with three choices: 1) convert to a real estate broker license; 2) allow the license to lapse or 3) place the license on inactive status.

According to Commission records, on December 31, 1996, the last date on which a new real estate salesperson license could be issued, there were 9,062 active real estate salesperson licenses.

To convert to a real estate broker license, a real estate salesperson licensee must either pass the Colorado portion of the Commission's licensing examination or complete a 24-hour course addressing real estate closings and contract preparation.<sup>107</sup>

As Table 6 on page 30 demonstrates, 2,893 real estate salesperson licensees converted to licensed real estate brokers between 2000 and 2006.

Not surprisingly, the largest number of conversions (1,307) occurred in 2000, the year in which real estate salesperson licensees were forced to decide what to do with their licenses. Additionally, the number of conversions has steadily declined since then, to a low of 33 in 2006, indicating that the longer the real estate salesperson licensee is out of the real estate business, the less likely that individual is to seek license conversion.

More importantly, however, is the fact that approximately 32 percent of real estate salesperson licensees have converted to licensed real estate broker licensees.

Additionally, by June 30, 2007, Commission records reveal that there were 942 inactive real estate salesperson licenses.

All of this means that in the 10½ years since the Commission issued the last real estate salesperson license, approximately 90 percent of those licensees have either allowed their licenses to lapse or have converted to real estate broker licensees, leaving approximately 10 percent still on inactive status.

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<sup>105</sup> § 12-61-103.5(1), C.R.S.

<sup>106</sup> § 12-61-103.5(2), C.R.S.

<sup>107</sup> §§ 12-61-103.5(2), C.R.S.

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These 942 individuals have had over 10 years to convert their licenses to real estate broker licenses. It is reasonable to conclude that if they have not already done so, they will never convert, or if they do, very few will do so. This theory is proven by the declining number of conversions demonstrated in Table 6.

Alternatively, if these individuals have not participated in a real estate transaction for over 10 years, it is reasonable to question whether passing the Colorado portion of the Commission's licensing examination or taking a 24-hour course is enough to ensure that such individuals are competent enough to practice as real estate brokers.

By repealing all references to real estate salespersons, those on inactive status would still be able to obtain licensure as real estate brokers, they would simply have to comply with all of the requirements for initial licensure.

Since only approximately 10 percent of licensed real estate salesperson licensees remain on inactive status and since allowing these individuals to convert to real estate broker licensees after almost 11 years presents a potential risk to the public, all references to real estate salesperson licenses should be repealed.

*Recommendation 5 – Require an annual, four-hour Commission Update Course and require the Commission to approve all other continuing education courses.*

Active real estate broker licensees must complete 24 hours of mandatory continuing education (MCE) every three years, eight of which must consist of the Commission Update Course.<sup>108</sup> The Commission Update Course must focus on current statutes and rules, and licensees must take and pass a written test.<sup>109</sup> The Commission, through the Division, creates the Commission Update Course. As a practical matter, these eight hours are obtained by completing two, four-hour courses. The remaining 16 hours are considered electives.

Alternatively, a licensee may opt to take the Colorado portion of the Commission's licensing examination.<sup>110</sup> According to Commission records, between January 1, 2006, and April 1, 2007, 15 licensees opted to take the Colorado portion of the Commission's licensing examination rather than obtain the required MCE credits. Of these, 13 passed the examination.

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<sup>108</sup> §§ 12-61-110(4)(a) and 12-61-110.5(1)(c), C.R.S.

<sup>109</sup> § 12-61-110.5(2), C.R.S.

<sup>110</sup> § 12-61-110.5(1)(c), C.R.S.



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Thus, the vast majority of licensees opt to obtain MCE credits to satisfy this requirement of licensure.

However, there are several concerns with respect to the MCE required of licensed real estate brokers. These concerns surround the issues of what is taught, who is teaching and how compliance is being assured.

Licensed real estate brokers are required to complete 16 hours of MCE in one or more of the following topics:<sup>111</sup>

- Real estate law
- Property exchanges
- Real estate contracts
- Real estate finance
- Real estate appraisal
- Real estate closings
- Real estate ethics
- Condominiums and cooperatives
- Real estate time-sharing
- Real estate marketing principles
- Real estate construction
- Land development
- Real estate energy concerns
- Real estate geology
- Water and waste management
- Commercial real estate
- Real estate securities and syndications
- Property management
- Real estate computer principles
- Brokerage administration and management
- Agency
- Other subjects approved by the Commission

Additionally, the Commission has determined, by rule, that the following types of courses do not satisfy the MCE requirement:<sup>112</sup>

- Sales or marketing meetings conducted in the general course of a real estate brokerage practice;
- Orientation, personal growth, self-improvement, self-promotion or marketing sessions;
- Motivational meetings or seminars; and
- Examination preparation or technique courses.

Thus, the range of subjects that qualify for MCE credit is vast.

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<sup>111</sup> § 12-61-110.5(3), C.R.S.

<sup>112</sup> Commission Rule B-5.

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These 16 hours of MCE must be “acquired from educational programs contributing directly to the professional competence of a licensee.”<sup>113</sup>

Thus, there is no real control over who provides MCE courses.

Additionally, prior to 2005, the Division audited approximately 1,000 real estate broker licensees each year (500 in the spring and 500 in the autumn) for compliance with the MCE requirements. However, no such audit has been conducted since Spring 2005.

Rather, the Division now seeks to ensure compliance with the MCE requirement by asking for verification of compliance by requiring licensees to attest that they are in compliance on their license renewal applications.

In short, aside from the Commission Update Course, virtually anyone can teach any subject and no one is looking to ensure that licensees are in compliance, and, as of 2007, virtually anyone can teach the Commission Update Course.

Without question, the Commission Update Course is valuable and its completion should continue to be a requirement of licensure. The laws impacting real estate transactions, and thus real estate brokers, are constantly evolving. In the 2007 legislative session alone, at least 15 real estate-related laws were enacted.

The Commission Update Course, as a Commission-designed course that informs licensees regarding the latest statutory and rules changes, as well as changes to Commission-promulgated forms, is vital to consumer protection. Without this assurance that real estate brokers remain current on the laws of the state, the public is put at risk.

Indeed, since the laws, rules and forms change every year, real estate broker licensees should be required to attend an annual four-hour Commission Update Course.

However, the remaining hours of MCE electives remain problematic because the Commission has no assurance that only approved subjects are being taught. As a result, licensees may find out, after the fact, that they are not in compliance with the MCE requirement if the Commission determines that a particular course should not be counted as satisfying the MCE requirement.

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<sup>113</sup> § 12-61-110.5(2), C.R.S.

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To correct this situation, and to enhance public protection by ensuring that only those courses that increase practitioner competence are counted toward satisfying the MCE requirement, the Commission should be directed to approve all elective MCE courses.

Since the Commission Update Course is valuable in that it ensures that licensed real estate brokers receive information, at least on an annual basis, about changes in the laws, rules and forms that impact them and the clients they serve, and since the Commission designs the course, the required eight hours over three years should be expanded to four hours each year, or 12 hours over three years.

Additionally, since the remaining electives can be taught by virtually anyone on virtually any subject, the Division should be directed to approve all MCE course offerings.

In the end, then, the statutes should be revised such that licensed real estate brokers complete 24 hours of continuing education every three years, 12 of which must consist of the Commission Update Course and 12 of which are electives approved by the Commission.

*Recommendation 6 – Alter the composition of the Commission by replacing the individual with subdivision development experience with a member of the general public.*

Five members comprise the Commission: three licensed real estate brokers; an individual with experience in subdivision development and a public member.<sup>114</sup> Traditionally, one of the licensed real estate brokers has been an individual engaged in commercial real estate transactions.

Since the primary function of the Commission is to license and discipline, when warranted, real estate brokers, the experience and expertise of the three licensed real estate brokers on the Commission is essential.

Similarly, since the primary mission of the Commission is to protect the public health, safety and welfare, a member of the public must serve on the Commission to ensure that the voice of consumers is heard.

However, it is reasonable to question the degree to which the public is served by reserving a seat on the Commission for an individual with subdivision development experience.

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<sup>114</sup> § 12-61-105(1), C.R.S.

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Although the Commission registers subdivision developers, as Table 13, on page 41, clearly shows, very few complaints are filed against subdivision developers. In fact, during the five-year period examined during the course of this review, only 19 complaints were filed with the Commission. Furthermore, according to the information provided in Table 15 on page 44, only one of these complaints resulted in any kind of disciplinary action by the Commission, and that was minimal, entailing only a public censure and a \$2,000-fine.

The question, then, becomes whether the public is better served by retaining on the Commission the rarely needed expertise of an individual with subdivision experience, or by replacing this member with another licensed real estate broker or another member of the public.

With three licensed real estate brokers serving on the Commission and no noticeable lack of subject matter expertise, it is reasonable to conclude that an additional licensed real estate broker is not necessary to the Commission's function of licensing and disciplining real estate brokers.

With only one member of the public serving on the Commission, the primary mission of which is to protect the public, the Commission is arguably deficient in this area.

At least 42 other states have real estate regulatory boards or commissions.<sup>115</sup> The average number of public members serving on such bodies is 1.7.<sup>116</sup> Thus, with only one public member, the Commission already has fewer public members than its peers in other states.

More importantly, during the course of this review, a representative of DORA attended Commission meetings and observed Commission deliberations regarding disciplinary actions. At the January 2007 Commission meeting, a case arose involving a licensed real estate broker who had pleaded guilty to conspiracy to commit mail and wire fraud in 1998 and who failed to disclose this fact until 2006. The real estate broker had stolen over \$1.6 million in a non-real estate-related fraud scheme, and when ordered to appear in court, fled the country for almost two years before returning so that a co-conspirator could receive treatment for terminal cancer.

The Commission's deliberations on this case reveal why additional public members are necessary. One of the licensed real estate broker members of the Commission placed a great deal of emphasis on the letters of recommendation submitted on behalf of the licensee because the Commission member was personally familiar with the authors of those letters.

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<sup>115</sup> "Board/Council/Commission Structure," *ARELLO – Digest of Real Estate License Laws and Current Issues*, Association of Real Estate License Law Officials, 2007, p. 13.

<sup>116</sup> "Board/Council/Commission Structure," *ARELLO – Digest of Real Estate License Laws and Current Issues*, Association of Real Estate License Law Officials, 2007, p. 13.

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The Commission's sole public member, however, expressed grave concerns over allowing such a licensee to continue practicing.

Regardless, the Commission voted to enter into a stipulated agreement with the licensee. The stipulation that was offered, but which had not yet been accepted by the licensee as of this writing, would require the licensee to accept a public censure and probation for five years.

The seventh sunset criterion asks, in pertinent part, "whether final disposition of complaints are in the public interest or self-serving to the profession."<sup>117</sup> It is clear that this particular licensee poses a threat to consumers, but the Commission set aside this risk in favor of the licensee.

From this, it is reasonable to conclude that additional public representation on the Commission is necessary to ensure the public health, safety and welfare.

Since the Commission does not regularly require the expertise offered by an individual with subdivision development experience and since consumers will be better protected by the addition of additional public representation on the Commission, the Commission seat reserved for an individual with subdivision development experience should be replaced by an additional public member seat.

*Recommendation 7 – Reform the process by which out-of-state real estate brokers obtain licensure in Colorado by replacing the licensure by reciprocity statutory scheme with a licensure by endorsement scheme.*

A real estate broker licensed in another jurisdiction can obtain a license in Colorado, without having to satisfy Colorado's educational and examination requirements, if the jurisdiction in which the real estate broker is licensed: 1) requires passage of a licensing examination; 2) the original jurisdiction's licensure requirements are substantially equivalent to those of Colorado; 3) the real estate broker has been licensed for two years; and 4) the original jurisdiction issues licenses to Colorado licensees in the same manner as is outlined here.<sup>118</sup>

This provision is relatively unique in Colorado law in that the first three points are typical of a licensure by endorsement provision. The fourth point, however, is more typical of a licensure by reciprocity provision.

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<sup>117</sup> § 24-34-104(9)(b)(VII), C.R.S.

<sup>118</sup> § 12-61-103(6)(b), C.R.S.

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The vast majority of Colorado's licensing statutes contain licensure by endorsement provisions. The advantage of such provisions is that they ensure that the public is protected, because only an individual who has a license from a jurisdiction with substantially similar licensing requirements as Colorado can obtain a Colorado license through this expedited manner, while not conditioning the licensure of such individuals on whether the original jurisdiction will similarly issue a license to a Colorado licensee. Public protection is assured with a minimal barrier to entry.

Reciprocity provisions, on the other hand, are often protectionist and do little to enhance public protection. Whether another state will issue a license to Colorado licensee based on similar criteria is irrelevant to protecting Colorado consumers. Rather, such a scheme only serves to limit the supply of practitioners in Colorado. Thus, these types of provisions are both protectionist and fail to enhance public protection.

Since reciprocity provisions do not enhance public protection, and since endorsement provisions provide adequate protection, the reciprocity provision should be amended to repeal the reciprocity clause and to retain the endorsement clause.

*Recommendation 8 – Include in the grounds for discipline having had a Colorado-issued license to engage in certain, enumerated professions, suspended or revoked for engaging in conduct constituting fraud, deceit, breach of a fiduciary duty or misrepresentation.*

The Commission has the authority to discipline a Colorado-licensed real estate broker if that individual is licensed in another jurisdiction(s) and the license(s) in the other jurisdiction(s) has been disciplined.<sup>119</sup> However, if a Colorado-licensed real estate broker also holds, for example, a Colorado-issued mortgage broker registration<sup>120</sup> or securities broker-dealer license, disciplinary action against such a license, no matter the grounds, do not constitute grounds for disciplinary action by the Commission.

This is particularly problematic in an era when many individuals hold many types of licenses to provide clients a sort of “one-stop-shopping” experience. For example, a licensed real estate broker could hold a mortgage broker license, thereby being able to assist a client with financing, and an insurance producer license, thereby being able to assist a client in obtaining hazard insurance.

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<sup>119</sup> § 12-61-113(1)(v), C.R.S.

<sup>120</sup> Pursuant to Senate Bill 07-203, all active mortgage broker registrations will convert to licenses on January 1, 2008.

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According to Commission and Division records, as of March 21, 2007, of the 4,670 registered mortgage brokers, 995 were also licensed real estate brokers.

When the General Assembly first enacted regulation of mortgage brokers in 2006, it recognized the problem raised in this Recommendation 8 and directed the Director of the Division to deny a mortgage broker registration to an individual who has held one of the following types of licenses (regardless of the jurisdiction that issued the license) that was suspended or revoked based on fraud, deceit, material misrepresentation, theft or the breach of a fiduciary duty:<sup>121</sup>

- Mortgage broker
- Real estate broker
- Real estate salesperson
- Real estate appraiser
- Insurance producer
- Attorney
- Securities broker-dealer
- Securities sales representative
- Investment advisor
- Investment advisor representative

In short, the grounds for the initial suspension or revocation are demonstrative of an individual's trustworthiness. If an individual committed fraud as a securities broker-dealer, for example, that individual should not be afforded the opportunity to commit fraud as a mortgage broker.

Similarly, the types of licenses that are enumerated pertain to professions and occupations that pertain to real estate and other financial transactions.

However, none of these provisions apply to the Commission with respect to real estate brokers, and they should.

For all of these reasons, the grounds for discipline by the Commission should be amended to include the suspension or revocation of a license to practice one of these professions when that suspension or revocation was based on fraud, deceit, material misrepresentation, theft or the breach of a fiduciary duty.

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<sup>121</sup> § 12-61-905(1)(c), C.R.S.

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*Recommendation 9 – Include in the grounds for discipline being convicted of or pleading guilty or nolo contendere to certain enumerated crimes, including computer crimes, crimes involving controlled substances, and crimes involving moral turpitude.*

Before granting a real estate broker license to an individual, the Commission is authorized to determine “the truthfulness, honesty, and good moral character of any applicant.”<sup>122</sup>

The primary mechanism the Commission utilizes to make this determination is the fingerprint-based criminal history background check.<sup>123</sup> Additionally, the Commission requires, by rule, candidates to provide documentation regarding any convictions or pleas of guilty or *nolo contendere* entered in any case involving a felony, or any like municipal code violation, within 10 years prior to application.<sup>124</sup>

As a result, if the crimes of which a candidate was convicted or entered a plea indicate a lack of truthfulness, honesty or good moral character, the Commission could deny a license to the applicant. This is a broad standard and the Commission has a considerable amount of discretion in making these determinations with respect to issuing a license.

However, the enumerated list of grounds upon which the Commission can discipline a license contain no similar provisions.<sup>125</sup> In fact, the grounds for discipline include a specific list of criminal convictions upon which the Commission may take disciplinary action. Table 18 provides a summary of the crimes, the conviction of which and upon which the Commission may base discipline.

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<sup>122</sup> § 12-61-103(3), C.R.S.

<sup>123</sup> § 12-61-103(1)(b), C.R.S.

<sup>124</sup> Commission Rule A-12(a).

<sup>125</sup> § 12-61-113, C.R.S.



**Table 18**  
**Criminal Violations Constituting Grounds for Discipline**

<b>Title</b>	<b>Article</b>	<b>Part</b>	<b>Description</b>
18	3	1	Homicide and Related Offenses
18	3	2	Assaults
18	3	3	Kidnapping
18	3	4	Unlawful Sexual Behavior
18	4	1	Arson
18	4	2	Burglary and Related Offenses
18	4	3	Robbery
18	4	4	Theft
18	5	1	Forgery, Simulation, Impersonation and Related Offenses
18	5	2	Fraud in Obtaining Property or Services
18	5	3	Fraudulent and Deceptive Sales and Business Practices
18	5	4	Bribery and Rigging of Contests
18	5	5	Offenses Relating to the Uniform Commercial Code
18	5	7	Financial Transaction Device Crime Act
18	5	8	Equity Skimming and Related Offenses
18	8	3	Bribery and Corrupt Influences
18	15	1	Making, Financing or Collection of Loans
18	17	1	Colorado Organized Crime Control Act

Source: § 12-61-113(1)(m), C.R.S.

Because the statute specifically enumerates these offenses, the rules of statutory construction dictate that this list is exhaustive of the criminal convictions upon which the Commission can base discipline.

However, there are additional crimes that relate to whether an individual can be expected to practice safely and which can serve as grounds for denying a license, but not as grounds for disciplining a license. These crimes include those listed in Table 19.

**Table 19**  
**Criminal Violations Exempt from Disciplinary Action**

Title	Article	Part	Section	Description
18	5	9	All	Identity Theft and Related Offenses
18	5.5	1	All	Computer Crime
18	6	1	All	Criminal Abortion
18	6	3	All	Incest
18	6	4	All	Wrongs to Children
18	6	6	All	Harboring a Minor
18	6	7	All	Contributing to Delinquency
18	6	8	All	Domestic Violence
18	7	1	All	Obscenity - Offenses
18	7	3	All	Public Indecency
18	7	4	All	Child Prostitution
18	7	5	All	Sexually Explicit Materials Harmful to Children
18	7	6	All	Visual Representation Containing Actual Violence
18	7	7	All	Sexual Conduct in Penal Institutions
18	7	8	All	Criminal Invasion of Privacy
18	18	4	404	Unlawful Use of a Controlled Substance
18	18	4	405	Unlawful Distribution, Manufacturing, Dispensing, Sale or Possession
18	18	4	406	Felony Offenses Relating to Marijuana and Marijuana Concentrate
18	18	4	411	Keeping, Maintaining, Controlling, Renting, or Making Available Property for Unlawful Distribution or Manufacture of Controlled Substances
18	18	4	412.5	Unlawful Possession of Materials to Make Methamphetamine and Amphetamine.
18	18	4	412.7	Sale or Distribution of Materials to Manufacture Controlled Substances
18	18	4	412.8	Retail Sale of Methamphetamine Precursor Drugs
18	18	4	415	Obtaining Controlled Substances by Fraudulent or Deceitful Means
18	18	4	416	Inducing Consumption of Controlled Substances by Fraudulent Means
18	18	4	422	Imitation Controlled Substances
18	18	4	423	Counterfeit Controlled Substances

All of the offenses listed in Table 19 involve truthfulness, honesty and good moral character, and as such, could serve as grounds for the denial of a real estate broker license. However, since they are not included in the enumerated offenses constituting grounds for discipline, the Commission could not take disciplinary action against a licensee convicted of one of these crimes.

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This creates an absurd situation where the Commission can deny a license to such an individual, but once licensed, an individual could not be disciplined for the very same offense.

Importantly, all of the crimes enumerated in Table 19 relate to the practice of real estate brokers, either directly or indirectly. For example, real estate brokers have access to sensitive personal and financial information, thereby legitimizing concerns over individuals who have been convicted of identity theft or computer crimes having access to such information.

Real estate brokers transport clients to showings of prospective home purchases. Public protection is enhanced by ensuring that the licenses of individuals who have been convicted of selling or manufacturing controlled substances are scrutinized.

Similarly, during a showing, a real estate broker may accompany a single client into an empty building. Public protection is enhanced by ensuring that the licenses of individuals who have been convicted of certain sex-related and other violent crimes are scrutinized.

Therefore, the criminal offenses enumerated in Table 19 should be added to the grounds upon which the Commission can base disciplinary action.

*Recommendation 10 – Authorize the Commission to accept, for purposes of licensure, name-based criminal history background checks when the Colorado Bureau of Investigation confirms that a license candidate’s fingerprints are unreadable.*

All applicants for initial and renewal licensure as real estate brokers must submit their fingerprints to the Colorado Bureau of Investigation (CBI) for a criminal history background check.<sup>126</sup> No accommodation is made for those individuals whose fingerprints are unreadable, or, more technically, “unclassifiable.”

According to Division staff, approximately seven percent of applicants who submit fingerprints for criminal history background checks have been deemed to have unclassifiable fingerprints. Rather than deny or place on inactive status, as appropriate, the licenses of such individuals, the Commission passed an emergency rule in March 2007 that would have placed a license on inactive status unless the applicant or licensee could show: 1) that CBI had determined that the licensee’s fingerprints were unclassifiable; 2) that the licensee had complied with CBI procedures regarding name-based criminal history background checks; and 3) the licensee or applicant made a good faith effort to comply with the law.

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<sup>126</sup> §§ 12-61-103(1)(b), 12-61-110(4)(a) and 12-61-110.8, C.R.S.

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The name-based criminal history background check then became the background check used for licensure or renewal purposes.

However, the Office of Legislative Legal Services (LLS) determined, during its annual review of agency rules, that the Commission lacked the statutory authority to promulgate such a rule because the statutes authorizing criminal history background checks expressly require fingerprint-based criminal history background checks and make no allowance for any alternatives.

As a result, LLS informed the Commission that the rule would be disallowed. Rather than challenge the conclusions of LLS, the Commission allowed the emergency rule to expire in June 2007.

To deny a license or to place an active license on inactive status, thereby rendering that individual unable to practice, simply because the applicant attempts to comply with the law, but through no fault of his or her own, his or her fingerprints are unclassifiable, borders on the unconscionable.

Therefore, a statutory change is necessary so as to avoid the unwarranted denial or placement on inactive status of such licenses.

In the 2007 legislative session, the General Assembly passed House Bill 1294. This bill, which addressed a similar problem encountered by the emergency medical technician regulatory program at the Colorado Department of Public Health and Environment, included the following language:

The [D]epartment may acquire a name-based criminal history record check for a certificate holder or an applicant who has twice submitted to a fingerprint-based criminal history record check and whose fingerprints are unclassifiable.

Since real estate broker licensees and license applicants have had problems with unreadable fingerprints and since the General Assembly has previously addressed this issue with respect to the emergency medical technician certification program, the Commission should be authorized to accept name-based criminal history background checks if the CBI determines that the individual's fingerprints are unclassifiable and the individual complies with the CBI procedures relating to name-based criminal history background checks.

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*Recommendation 11 – Direct that all money collected by the Division and Commission as the result of the imposition of fines or administrative fees be deposited in the state’s General Fund.*

At least three statutory provisions relating to the Commission, the Division and regulation of real estate brokers and subdivision developers direct that all money, including fines, collected by the Commission, the Division or both, be credited to the Division of Real Estate Cash Fund (Cash Fund).<sup>127</sup>

Sections 12-61-113(7) and 12-61-405(3), C.R.S., require that all money collected as fines be credited to the Cash Fund. Prior to 2005, however, and the repeal of the Recovery Fund, all fine money went to the Recovery Fund. House Bill 05-1264 amended these sections to direct this money from the mostly defunct Recovery Fund to the Cash Fund.

Ordinarily, when an agency is given fining authority, any funds generated by such fines are credited to the state’s General Fund. This is done so that the agency has no incentive to impose fines, other than taking legitimate disciplinary action.

Additionally, the title of section 12-61-111, C.R.S., reads, “Disposition of fees.” However, it requires “all moneys” collected by the Commission be credited to the Cash Fund. Since the title of this section is “Disposition of fees,” this section should be amended to include only fees collected by the Commission.

In addition, the statutes should be amended to also address any “administrative” or other pseudo-disciplinary mechanisms that require a licensee-respondent to pay what looks like a fine.

Many stipulated agreements that the Commission enters into with licensee-respondents, for relatively minor violations, require the payment of “administrative fees” in addition to other sanctions, such as the taking of remedial coursework and the imposition of “diversion.”

Since these stipulated agreements essentially constitute dismissals by the Commission and require the consent of the licensee-respondent, the fact that the Commission lacks the express statutory authority to engage in such a practice is less troubling than it otherwise could be.

What is troubling, however, is that in imposing an administrative fee the Commission is essentially imposing a fine, but under a different name.

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<sup>127</sup> These provisions include, but may not necessarily be limited to, sections 12-61-111, 12-61-113(7) and 12-61-405(3), C.R.S.

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Given the current statutory framework where all money collected by the Commission is credited to the Cash Fund, this distinction is less important than it will be when this Recommendation 11 is adopted. At that time, the General Assembly should specify that administrative fees and any other imposition of a monetary penalty be credited to the state's General Fund.

Some may argue that fees and fines should be credited to the Cash Fund to prevent an increase in license fees. However, the data contained in Table 16 on page 46, reveals that the Commission collected approximately \$42,500 in fines in fiscal year 05-06 from licensed real estate brokers. Table 2 on page 25, reports that the Commission issued or renewed 15,236 real estate broker licensees that same year. To make up for this loss of funding, license fees can be expected to increase by approximately \$2.80 per license, or with a license valid for three years \$0.93 per year. This is not an exorbitant sum.

Finally, with few exceptions, when the General Assembly empowers a regulatory program with the authority to impose fines, those fines are credited to the state's General Fund. Examples of such regulatory programs include, but are not limited to, accountants,<sup>128</sup> audiologists,<sup>129</sup> hearing aid providers,<sup>130</sup> collection agencies,<sup>131</sup> pharmacists and pharmacies,<sup>132</sup> electricians,<sup>133</sup> engineers,<sup>134</sup> professional land surveyors,<sup>135</sup> architects,<sup>136</sup> chiropractors,<sup>137</sup> lay midwives,<sup>138</sup> physical therapists,<sup>139</sup> plumbers<sup>140</sup> and veterinarians.<sup>141</sup> That fines imposed by the Commission are credited to the Cash Fund, therefore, is inconsistent with other regulatory programs in Colorado.

For all of these reasons, the General Assembly should direct that all fines collected by the Commission be credited to the state's General Fund.

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<sup>128</sup> § 12-2-123(5)(b), C.R.S.

<sup>129</sup> § 12-5.5-105(4), C.R.S.

<sup>130</sup> § 12-5.5-205(4), C.R.S.

<sup>131</sup> § 12-14-136(2), C.R.S.

<sup>132</sup> § 12-22-125.2(5), C.R.S.

<sup>133</sup> § 12-23-118(7), C.R.S.

<sup>134</sup> § 12-25-105(9), C.R.S.

<sup>135</sup> § 12-25-205(8), C.R.S.

<sup>136</sup> § 12-25-308(4)(b), C.R.S.

<sup>137</sup> § 12-33-117(1.5), C.R.S.

<sup>138</sup> § 12-37-107(2), C.R.S.

<sup>139</sup> § 12-41-122(2), C.R.S.

<sup>140</sup> § 12-58-116.5(4), C.R.S.

<sup>141</sup> § 12-64-111(4), C.R.S.

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*Recommendation 12 – Clarify that the Director of the Division is the appointing authority for Division staff.*

Under Colorado’s Constitution,

The head of each principal department shall be the appointing authority for the employees of his office and for heads of divisions, within the personnel system, ranking next below the head of such department. Heads of such divisions shall be the appointing authorities for all positions in the personnel system within their respective divisions.<sup>142</sup>

Since the Division is a division of DORA, the Executive Director of DORA appoints the Division Director and the Division Director, in turn, appoints the Division’s staff. This is how the process should work according to the Colorado Constitution and this is how the process works in practice.

However, section 12-61-106(1), C.R.S., clearly conflicts with the Colorado Constitution and current practice:

The executive director of the department of regulatory agencies is authorized by this section to employ, subject to the provisions of the state personnel laws of the state, a director for the commission and such attorneys, deputies, investigators, clerks, and assistants as are necessary to discharge the duties imposed by [the provisions of this article].

According to this statutory provision, DORA’s Executive Director is the appointing authority for the Division Director and the staff of the Division.

Since this conflicts with the Colorado Constitution, this statutory provision should be amended to clarify that the Executive Director of DORA is the appointing authority for the Division Director, and that the Division Director is the appointing authority for Division staff.

*Administrative Recommendation 1 – Randomly audit real estate broker licenses for compliance with continuing education, errors and omissions insurance and legal presence requirements.*

Recall that all licensed real estate brokers must: 1) complete a certain number of hours of continuing education; 2) maintain errors and omissions insurance; and 3) be legally present in the United States. Not only are these requirements of licensure, but they are also important consumer protection provisions.

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<sup>142</sup> Colo. Const. Art. XII, § 13(7).

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As addressed in earlier sections of this sunset report, continuing education in the form of the Commission Update Course is crucial to ensuring that licensed real estate brokers remain up to date with current law, Commission rules and Commission-approved forms. Failure to stay current on such issues could result in consumer harm.

Additionally, errors and omissions insurance is crucial to protecting consumers. It is vital that licensees obtain and maintain adequate coverage in the event a client is economically harmed and needs to be made whole.

Finally, the General Assembly convened in special session in 2006 to enact laws requiring all licensees to demonstrate that they are in the United States legally.

However, to ensure compliance with these licensing requirements and public protection provisions, the Commission merely requires real estate brokers to attest to their own compliance at the time of initial licensure or when renewing a license, as the case may be.

In the case of legal presence, the Commission requires a licensee to submit documentary verification if a complaint is ever filed against that licensee. This same practice was instituted for errors and omissions insurance, on a go forward basis, effective July 25, 2007, after a series of questions from DORA of Division staff regarding this issue.

Aside from the initial attestation on the renewal application, the Division undertakes no additional efforts to ensure compliance with the continuing education requirement.

More can be, and in the past was, done to ensure compliance with these important consumer protection requirements. Prior to Spring 2005, Division staff routinely audited the records of real estate broker licensees to verify compliance with the continuing education requirements. The Commission terminated this process when the Division abolished its Education Unit.

In addition, prior to Spring 2007, the insurance carrier that provided coverage under the Commission's group errors and omissions policy, as well as the other dominant errors and omissions carrier, reported to the Commission, electronically, those real estate brokers to whom it provided errors and omissions coverage. Licensees that obtained coverage independently were required to submit verification of such coverage directly to the Commission. The Commission terminated this process when the Division determined that, after trying for over a year, the vendor with whom the Division had contracted for examination and license records management services could not reliably process these data streams.



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Although an electronic match of insurance and license information would seem to be the most efficient mechanism for verifying compliance with the errors and omissions insurance requirement, considering the vendor's lackluster past performance, and considering the fact that the Commission has not, until very recently, required licensees to verify coverage unless a complaint is filed, reinstating the electronic reporting process seems unjustified.

However, simply requiring licensees to verify compliance with the errors and omissions insurance requirement when a complaint is filed seems inadequate. If a consumer is harmed and files a complaint, and only then does the Commission discover that the licensee does not have errors and omissions insurance, it is too late for that consumer.

Therefore, to ensure that licensees are true in their attestations and to verify that licensees continue to comply with the continuing education, legal presence and errors and omissions insurance requirements, the Commission, through the Division, should immediately begin auditing licensee records for verification of compliance with these requirements.

*Administrative Recommendation 2 – Ensure that the Commission's licensing examination is revised such that it tests for knowledge of current law.*

Recall that the Commission's licensing examination consists of two portions: a national portion developed by the Association of Real Estate License Law Officials (ARELLO) and the Colorado portion. The Division has contracted with an outside vendor, PSI licensure:certification (PSI), to administer the entire examination and to develop the Colorado portion of the examination.

According to a representative of PSI, the Colorado portion of the examination is reviewed and updated, as necessary, every 18 months.

However, the laws to which Colorado-licensed real estate brokers must adhere and have knowledge of change on an annual basis. For example, during the 2007 legislative session, the General Assembly enacted at least 15 laws that will have some impact on the practice of real estate brokers in this state, yet the issues presented in these new laws will not appear on the Commission's licensing examination until well after their effective dates.

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This presents both consumer protection and licensee competency issues, as well as examination validity concerns. The consumer protection concern is self-evident: individuals are receiving real estate broker licenses based on their knowledge of old law and based on their potential ignorance of new law. Can consumers depend on a newly licensed real estate broker to know the law? The fact that the real estate broker holds a license represents that the state has found this individual to be minimally competent, but is he or she?

The licensee competency issue is equally troubling. In order to pass the Commission's licensing examination, a candidate must master his or her knowledge of the laws upon which the examination is based, rather than the laws under which the candidate will practice. This requires a newly licensed real estate broker to unlearn what he or she just mastered to pass the examination and then to master what the law actually requires. It is reasonable to conclude that individuals in this situation will become confused as to which laws are applicable and which are not.

Finally, can the Commission's licensing examination be considered valid if it tests on obsolete material? A license issued by the Commission represents to the public that the licensee is minimally competent. However, is this a legitimate assertion given the facts stated herein?

In order to avoid all of this, the Division should require PSI to revise the Commission's licensing examination on a more frequent basis so that it adequately reflects the laws, rules and other requirements under which license candidates will actually be expected to practice competently.

*Administrative Recommendation 3 – When the Division's contract with the current examination services and license records management vendor expires, do not renew the contract and instead identify a vendor that can perform more satisfactorily.*

In 2005, the Division contracted with PSI to develop and administer the Commission's licensing examination and to maintain licensee records, including disciplinary actions and whether a licensee has errors and omissions insurance. However, according to DORA's information technology section, the Division's interactions with PSI were problematic from the very beginning and continue to be so.

As outlined in various sections throughout this report, PSI was unable to receive and reliably process electronic data concerning errors and omissions insurance, and it reviews the test items on the Commission's licensing examination every 18 months, despite the fact that the laws, rules and forms upon which that examination is based change at least annually if not more frequently.

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In addition to these issues, there are other problems. Various tables in this report contain data relating to licensing statistics. As basic government accountability measures, these data should have been relatively easy to extract from PSI's computer systems. However, Division staff expressed concern upon receipt of DORA's requests for such statistics. This concern was rooted in the fact that such statistics are not easily extracted from PSI's systems.

To its credit, Division staff has managed to work around many of PSI's inabilities. However, as a vendor to the State of Colorado, PSI's performance leaves much to be desired.

For these reasons, when the Division's contract with PSI expires in 2008, the Division should actively seek a different vendor to provide the required services.

*Administrative Recommendation 4 - Explore the possibility of specifically creating the Division as a Type 2 agency, and pursue legislation if appropriate.*

In very general terms, Colorado state government is organized into principal departments which consist of Type 1 and Type 2 divisions and Type 1 and Type 2 boards and commissions.

A Type 1 agency is one that exercises,

its prescribed statutory powers, duties, and functions, including rulemaking, regulation, licensing, and registration, the promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications, independently of the head of the principal department.<sup>143</sup>

Thus, Type 1 agencies are generally recognized as policy-autonomous. That is, they operate, by and large, outside the direct control of the executive director.

Regardless, even with Type 1 agencies, the principal department directs and supervises the agencies' budgeting, purchasing, planning and related management functions.<sup>144</sup>

With respect to Type 2 agencies, all of these powers are vested in the principal department itself.<sup>145</sup>

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<sup>143</sup> § 24-1-105(1), C.R.S.

<sup>144</sup> § 24-1-105(1), C.R.S.

<sup>145</sup> § 24-1-105(2), C.R.S.

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With respect to the Commission and the Division, however, this issue is complicated. Under the Administrative Organization Act of 1968, the Commission was transferred to DORA under a Type 1 transfer (meaning it became a Type 1 agency), as a division.<sup>146</sup> As a result, there is no clear statutory distinction between the Commission as a five-member commission, and the Division that consists of staff. In short, there are no statutory provisions specifically creating the Division, although the Division and the Division Director are referenced throughout the real estate statutes.

Thus, the Commission, as a commission, is clearly a Type 1 commission, but the status of the Division and its staff has not been clearly and specifically addressed in statute. This situation was, in all likelihood, a technical oversight that should be corrected.

Out of all of the other divisions in DORA, only the Public Utilities Commission was also transferred to DORA as a division.<sup>147</sup> The Banking Board was transferred to DORA as a Type 1 board and allocated to the Division of Banking, which is created in the same section as that in which the transfer occurs, but the Division of Banking is not designated as a Type 1 or Type 2 agency.<sup>148</sup>

The transfer language with respect to all other divisions makes a distinction between the relevant board or commission and the relevant division, and most of them are Type 1 agencies and all are Type 1 boards or commissions.

By way of comparison, most other divisions in state government are Type 2 agencies. Additionally, most boards and commissions are Type 1 boards and commissions.<sup>149</sup> However, relatively few divisions outside of DORA have governing boards or commissions.

Having a Type 1 agency supporting a Type 1 board or commission can be problematic in terms of clear roles and responsibilities and clean lines of accountability.

For example, if the Commission is a Type 1 entity and the Division, too, is a Type 1 entity, problems can arise when the Commission sets a policy course that conflicts with the ideals of the staff of the Division.

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<sup>146</sup> § 24-1-122(2)(k), C.R.S.

<sup>147</sup> §§ 24-1-122(2)(a) and 40-2-103, C.R.S.

<sup>148</sup> § 24-1-122(2)(d), C.R.S.

<sup>149</sup> See, generally §§ 24-1-111 through 24-1-128.7, C.R.S.

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The most reasonable solution to this problem is to create a Division of Real Estate and make it a Type 2 agency, while retaining the Commission as the Type 1 governing body of the Division. Such a change would make a clear distinction between the Commission and the Division staff and would more clearly delineate the relative roles, responsibilities and accountabilities of each.

This approach has precedence both in and out of DORA. Within DORA, the Division of Financial Services is a Type 2 agency, and the Financial Services Board is a Type 1 board.<sup>150</sup> Similarly, in the Department of Natural Resources, the Division of Wildlife is a Type 2 agency, and the Wildlife Commission is a Type 1 commission.<sup>151</sup>

This recommendation is made to clarify the roles, responsibilities and accountability of the Commission and staff of the Division. It is a good government-type of recommendation and, in the future, when DORA identifies similar types of situations, similar recommendations will likely be made. This is most easily evidenced by a similar recommendation in the sunset report of the Colorado Public Utilities Commission, which, like this sunset report, is presented to the General Assembly for consideration during the 2008 legislative session.

However, this is an issue that arose late in the sunset process, and, as a result, it was not possible to obtain the input of interested parties and stakeholders. So as to avoid potentially serious unintentional consequences, therefore, this recommendation is made to the principal department (DORA, in this case), the Division and the Commission. DORA, the Division and the Commission should explore this issue, determine the consequences such a change would have on operations and the relationship between the Commission and Division staff, and, if appropriate, pursue legislation at a later date.

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<sup>150</sup> § 24-1-122(2)(c), C.R.S.

<sup>151</sup> § 24-1-124(3)(h), C.R.S.

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## ***Appendix A – Sunset Statutory Evaluation Criteria***

- (I) Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- (II) If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- (III) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- (IV) Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- (V) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- (VI) The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- (VII) Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- (VIII) Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- (IX) Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.