



Office of Policy, Research and Regulatory Reform

2012 Sunrise Review: Common Interest Community Association Managers

March 2, 2012





Executive Director's Office

Barbara J. Kelley
Executive Director

John W. Hickenlooper
Governor

March 2, 2012

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

Dear Members of the General Assembly:

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

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

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

Sincerely,

Barbara J. Kelley
Executive Director



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Background

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

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

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

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

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

Registration

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.

Title Protection

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.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunrise Process

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

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

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

Methodology

DORA has completed its evaluation of the proposal for regulation of common interest community association managers (community managers). During the sunrise review process, DORA performed a literature search, contacted and interviewed representatives of the applicant, reviewed licensure laws in other states, received comments from and interviewed citizens/homeowners, and interviewed representatives of associations who frequently interact with community managers. In order to determine the number and types of complaints filed against community managers in Colorado, DORA contacted and received information from the Colorado Division of Real Estate and the Colorado Civil Rights Division. To better understand the practice of community managers, DORA staff observed community managers in a variety of settings.

¹ § 24-34-104.1(4)(b), C.R.S.

Profile of the Profession

Common interest community association managers (community managers) are frequently also known as:

- Homeowner association managers;
- Community association managers;
- Association business managers; and
- Property managers.

To understand the tasks performed by community managers, it is first necessary to understand the context in which they work.

A common interest community is defined as,

real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. Ownership of a unit does not include holding a leasehold interest in a unit of less than 40 years, including renewal options.²

Common interest communities vary considerably in size and complexity. Some common examples include condominium complexes or buildings and covenant-controlled communities of single-family homes.

A common interest community association (community association) is a legal entity created to govern and operate a particular common interest community. Some common examples include homeowners' associations or condominium owners' associations.

Like the communities they govern, community associations vary in size and complexity. A community association may cover only two properties, such as a townhouse, or it may cover many thousands of properties, such as in a planned community. In larger developments, a community association may contain sub-associations, each one of which is a community association in its own right. They can also contain commercial properties, in addition to residential properties.

In general, the owners of the properties within the geographical boundaries of the community association are members of the community association. They generally pay dues for the operation of the community association. They also elect a board of directors to govern the community association. In general, one need only be a member of the community association to be elected to the board of directors.

² § 38-33.3-103(8), C.R.S.

In addition to any applicable laws, community associations are governed by their own, individual governing documents, such as declarations, covenants and bylaws, to which all members, at least tacitly, agree to abide when they purchase a property within the community association.

Regardless of the size or complexity of the community association, there are many day-to-day operational needs of such an association. They can include:

- Recordkeeping, such as taking and keeping minutes of the meetings of the board of directors, filing any necessary corporate reports, maintaining financial records, and maintaining homeowner files;
- Bookkeeping, such as receiving, recording and depositing dues payments, keeping track of delinquencies, monitoring operational and reserve accounts, paying taxes and vendors, and preparing financial statements;
- Maintenance and enforcement, such as inspecting the community for maintenance needs and for compliance with community association-approved standards (i.e., holiday displays/decorations, painting, architectural modifications, and landscaping);
- Securing necessary services, such as trash removal, snow removal, landscape care and maintenance, and routine maintenance; and
- Participating in the transfer of property, such as providing buyers and their lenders with governing documents, status letters and other documents necessary to close on a real estate transaction.

To assist in the day-to-day operations of running the community association, the board of directors has several options. It may choose to “self-manage.” This can take several forms and can consist of something as simple as a community member(s) volunteering to perform some or all of the above-enumerated duties, or it can consist of directly employing staff to perform these duties.

A common alternative to self-management is to contract with an individual community manager or with a community association management company (management company), which may, in turn, employ community managers. In this type of arrangement, the contract between the community association and the management company enumerates the responsibilities of the management company, which generally include the above-enumerated duties of the community association.

In addition, the management company will typically assign a single community manager to work with a community association. Typically, the community manager works closely with the board of directors to ensure that the needs of the community are satisfied.

Depending on the structure of the management company, the community manager may, or other staff may, perform many of the aforementioned duties. Typical duties that are performed by other staff include bookkeeping and the maintenance of the community association's financial records, as well as the preparation of documents necessary for the transfer of real estate.

Typical duties that the community manager may perform personally include inspecting the community for maintenance needs and compliance with community association-approved standards, supervising maintenance activities, securing bids for the provision of services, interacting with homeowners as a representative of the community association, attending board meetings, presenting financial statements at board meetings, and providing advice to board members.

Very often, the community manager becomes the face of the community association and many community members have a difficult time distinguishing between the two.

Community Associations Institute (CAI) is an international organization that purports to be "dedicated to fostering vibrant, competent, harmonious community associations," the members of which include members of community association boards of directors and other volunteer leaders, community managers, management companies and other professionals and companies that provide products and services to community associations.³

CAI offers four types of credentials to community managers:⁴

- Certified Manager of Community Associations (CMCA);
- Association Management Specialist (AMS);
- Professional Community Association Manager (PCAM); and
- Large-Scale Manager (LSM).

³ Community Associations Institute. *About Us: Building Better Communities*. Retrieved January 16, 2012, from www.caionline.org/about/Pages/default.aspx

⁴ Community Associations Institute. *CAI Designations – For New and Experienced Community Managers*. Retrieved January 16, 2012, from www.caionline.org/career/designations/Pages/managers.aspx

To obtain the CMCA credential, a candidate must successfully complete CAI's "The Essentials of Community Association Management" or "M-100" course,⁵ which covers:⁶

- The legal documents and statutes that enable a community association to operate;
- Roles and responsibilities of managers, owners, committees and the board of directors;
- Management ethics for professional community managers;
- Steps for developing and enforcing community association rules;
- Community manager's role in organizing, assisting, and conducting board meetings, and in preparing budgets and funding reserves;
- Effective assessment collections policies and procedures;
- Remedies available for collecting delinquent payments from owners;
- Overview of financial statements, reporting methods, and operations;
- Characteristics of an effective risk management and insurance program;
- Methods for implementing and evaluating a maintenance program;
- Criteria for deciding whether to use association staff or contract work out;
- How to prepare a bid request and key contract provisions;
- Recruiting, screening, selecting and managing personnel; and
- Basic areas of employment addressed by federal, state and local law.

A candidate may complete the M-100 course by attending a seminar, taking the course online or via home study. In 2012, the two and a half-day seminar will be offered in Colorado three times: twice in Denver and once in Colorado Springs. The cost of the seminar is \$445 for CAI members and \$545 for non-members.⁷

Candidates opting to complete the course online must do so within 90 days of beginning the course. The cost of the online course is \$395 for CAI members and \$445 for non-members.⁸

⁵ Community Associations Institute. *CAI Designations – For New and Experienced Community Managers*. Retrieved January 16, 2012, from www.caionline.org/career/designations/Pages/managers.aspx

⁶ Community Associations Institute. *M-100: The Essentials of Community Association Management – Seminar*. Retrieved November 14, 2011, from www.caionline.org/events/managers/pmdp/Pages/M100.aspx

⁷ Community Associations Institute. *M-100: The Essentials of Community Association Management – Seminar*. Retrieved November 14, 2011, from www.caionline.org/events/managers/pmdp/Pages/M100.aspx

⁸ Community Associations Institute. *M-100 Online: The Essentials of Community Association Management*. Retrieved November 14, 2011, from www.caionline.org/events/managers/pmdp/Pages/M100OL.aspx

Candidates opting to complete the course via home study must do so within 90 days of ordering the course. The cost of the home study course is \$345 for CAI members and \$395 for non-members.⁹

Successful completion of the M-100 course also requires the candidate to pass a 90-minute, multiple-choice examination.¹⁰

Candidates for the CMCA credential must also complete the CMCA examination,¹¹ which is owned by the National Board of Certification for Community Association Managers (NBC-CAM). The CMCA examination is a three-hour, 120 question multiple-choice examination covering the following topics in the indicated percentages:¹²

- Meetings (11 percent);
- Governance and legal issues (22 percent);
- Budgets, reserves, investments and assessments (15 percent);
- Financial controls (12 percent);
- Risk management and insurance (10 percent);
- Property maintenance (8 percent);
- Contracting (14 percent); and
- Human resources management (8 percent).

NBC-CAM has contracted with Laser Grade for administration of the CMCA examination,¹³ and Laser Grade maintains six test centers in Colorado: Centennial, Fort Collins, Colorado Springs, Pueblo, Grand Junction and Durango.¹⁴

The cost of the CMCA examination is \$300 for candidates who take the computer-based version and \$250 for those who take the pencil and paper version.¹⁵

⁹ Community Associations Institute. *M-100 Home Study: The Essentials of Community Association Management*. Retrieved November 14, 2011, from www.caionline.org/events/managers/pmdp/Pages/M100HS.aspx

¹⁰ Community Associations Institute. *M-100: The Essentials of Community Association Management – Seminar*. Retrieved November 14, 2011, from www.caionline.org/events/managers/pmdp/Pages/M100.aspx

¹¹ Community Associations Institute. *CAI Designations – For New and Experienced Community Managers*. Retrieved January 16, 2012, from www.caionline.org/career/designations/Pages/managers.aspx

¹² *CMCA Handbook*, NBC-CAM, 7th Edition (2010), p. 16.

¹³ *CMCA Handbook*, NBC-CAM, 7th Edition (2010), p. 11.

¹⁴ Laser Grade. *Nearest Testing Centers*. Retrieved November 14, 2011, from www.lasergrade.com/cgi/locatepsi.cgi

¹⁵ *CMCA Handbook*, NBC-CAM, 7th Edition (2010), p. 10.

To obtain the AMS credential, a candidate must have:¹⁶

- Successfully completed the M-100 course and at least one M-200 series course;
- Passed the CMCA examination;
- Obtained two years of experience in financial, administrative, and facilities management of at least one community association; and
- Paid the fee of \$150 for CAI members and \$250 for non-members.

To obtain the PCAM credential, a candidate must have:¹⁷

- Successfully completed the M-100 course and all six of the M-200 series courses;
- Passed the CMCA examination;
- Obtained five years of direct community association management experience;
- Completed a comprehensive “case study” exercise; and
- Paid the fee of \$195 for CAI members and \$295 for non-members.

To obtain the LSM credential, a candidate must have, among other things, obtained the PCAM credential and be the manager of a large-scale community (a single, contiguous community association with an on-site, full-time community manager; at least 1,000 units or 1,000 acres; and an annual operating budget of at least \$2 million). The fee for the LSM credential is \$95 for CAI members and \$195 for non-members.¹⁸

¹⁶ Community Associations Institute. *CAI Designations – For New and Experienced Community Managers*. Retrieved January 16, 2012, from www.caionline.org/career/designations/Pages/managers.aspx

¹⁷ Community Associations Institute. *CAI Designations – For New and Experienced Community Managers*. Retrieved January 16, 2012, from www.caionline.org/career/designations/Pages/managers.aspx

¹⁸ Community Associations Institute. *CAI Designations – For New and Experienced Community Managers*. Retrieved January 16, 2012, from www.caionline.org/career/designations/Pages/managers.aspx

To maintain these credentials, CAI requires that individuals pay annual fees and adhere to its Standards of Professional Conduct which require CMCA credential holders to:¹⁹

- Be knowledgeable of, act, and encourage clients to act in accordance with any and all federal, state and local laws applicable to community association management and operation;
- Be knowledgeable of, comply and encourage clients to comply with the applicable governing documents, policies and procedures of the client association to the extent permitted by that client;
- Not knowingly misrepresent material facts, make inaccurate statements or act in any fraudulent manner while representing client community associations or acting as a CMCA;
- Not provide legal advice to client community associations or any of their members, or otherwise engage in the unlicensed practice of law;
- Refuse to accept any form of gratuity or other remuneration from individuals or companies that could be viewed as an improper inducement to influence the community manager;
- Promptly disclose to client community associations any actual or potential conflicts of interest that may involve the community manager;
- Participate in continuing professional education and satisfy all requirements to maintain the CMCA;
- Act in a manner consistent with his or her fiduciary duty;
- Conduct themselves in a professional manner at all times when acting in the scope of employment, in accordance with the terms and conditions of any contractual agreements and in accordance with local, state and federal laws;
- Recognize that the original records, files and books held by the community manager are the property of the client community association to be returned to the client at the end of the community manager's engagement; and
- Maintain the duty of confidentiality to all current and former client community associations.

¹⁹ Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute, *Sunrise Application*, November 4, 2011, p. 30.

Proposal for Regulation

The Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute (Applicant) has submitted a sunrise application to the Department of Regulatory Agencies (DORA) for review in accordance with the provisions of section 24-34-104.1, Colorado Revised Statutes (C.R.S.). The application identifies state licensure of common interest community association managers (community managers) as the appropriate level of regulation to protect the public.

The Applicant's proposal would require that candidates for licensure possess the Certified Manager of Community Associations (CMCA) credential²⁰ and:²¹

- Be at least 18 years old;
- Hold at least a high school diploma;
- Demonstrate knowledge of Colorado's laws governing common interest communities, such as the Colorado Revised Nonprofit Corporation Act and the Colorado Common Interest Ownership Act; and
- Agree to abide by a standard of professional conduct.

Additionally, the Applicant proposes excluding from licensure those who have been convicted of a felony within the previous 10 years and those who have failed to cooperate with any law enforcement or regulatory agency in any investigation of any law enforcement or regulatory investigation.²²

Community managers who currently hold the CMCA or Professional Community Association Manager certifications would not be required to re-certify as such, but would be required to comply with all other licensing requirements.²³

To maintain a community manager license, the Applicant further proposes that licensees be required to obtain continuing professional education. However, the Applicant does not specify the number of hours or the types of continuing education that should be mandated.

²⁰ Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute, *Sunrise Application*, November 4, 2011, p. 11.

²¹ Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute, *Sunrise Application*, November 4, 2011, p. 18.

²² Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute, *Sunrise Application*, November 4, 2011, p. 18.

²³ Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute, *Sunrise Application*, November 4, 2011, p. 19.

Rather than proposing sanctions for failure to obtain the mandated continuing education, the Applicant provides examples of the sanctions in other states as well as those pertaining to three other professions currently regulated in Colorado. These examples, generally, consist of non-renewal of the license until such time as the continuing education requirement is fulfilled.²⁴

Finally, the Applicant proposes a unique scheme whereby the National Board of Certification for Community Association Managers (NBC-CAM), a private entity, would administer the licensing process under the auspices of the Colorado Division of Real Estate (DRE). All fees would be determined and payable to NBC-CAM. However, the DRE would have the authority to investigate complaints and to take disciplinary action.²⁵

²⁴ Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute, *Mandatory Continuing Education Application*, November 4, 2011, Chart 1.

²⁵ Colorado Legislative Action Committee Community Associations Institute, *Licensure of Common Interest Community Association Managers: A White Paper*, Working Draft, November 2011, pp. 6-8.

Summary of Current Regulation

The Colorado Regulatory Environment

Common interest community association managers (community managers) are not regulated in Colorado, not at the local, state or federal levels.

However, the common interest community associations (community associations) with which they contract are subject to a variety of Colorado laws, including, but not limited to:

- The Colorado Revised Nonprofit Corporation Act (CRNCA);
- The Condominium Ownership Act (COA); and
- The Colorado Common Interest Ownership Act (CCIOA).

Most community associations are nonprofit corporations, and as such, are subject to the provisions of the CRNCA. In general, CRNCA addresses topics such as:

- Incorporation;²⁶
- Purposes and powers;²⁷
- Members and membership;²⁸
- Members' meetings and voting;²⁹
- Directors and officers;³⁰ and
- Records, information and reports.³¹

As its title implies, COA's applicability is limited to condominiums, and, in general, enumerates the required contents of a condominium association's declarations and bylaws.³² However, COA's applicability is further limited to those condominium associations created prior to July 1, 1992.³³ Condominium associations created after this date are subject to the provisions of CCIOA.

CCIOA is a complex law, the applicability of which can be difficult to determine. Applicability is, in most cases, predicated on the date on which a community association was created, with July 1, 1992 being a key date.

²⁶ § 7-122-101, *et seq.*, C.R.S.

²⁷ § 7-123-101, *et seq.*, C.R.S.

²⁸ § 7-126-101, *et seq.*, C.R.S.

²⁹ § 7-127-101, *et seq.*, C.R.S.

³⁰ § 7-128-101, *et seq.*, C.R.S.

³¹ § 7-136-101, *et seq.*, C.R.S.

³² §§ 38-33-105.5 and 38-33-106, C.R.S.

³³ § 38-33.3-115, C.R.S.

However, many of CCIOA's more substantive provisions apply to all community associations, regardless of the date of creation.³⁴ Some examples include:

- Definitions of key terms;³⁵
- Remedies;³⁶
- The construction and validity of community association declarations and bylaws;³⁷
- Required public disclosures, including budgets, financial statements, certain information relating to insurance policies, bylaws, rules and regulations, the name of the community association's community manager, and the minutes of board meetings;³⁸
- The imposition of responsible governance policies, including the requirement to maintain accurate and complete accounting records and the adoption of policies concerning collection of unpaid assessments, handling of conflicts of interest involving board members, enforcement of covenants and rules (including notice and hearing procedures), inspection and copying of community association records by community members, investment of reserve funds and procedures for addressing disputes between the community association and community members;³⁹ and
- The powers of a community association, including the power to adopt and amend bylaws and rules, to adopt budgets, to collect assessments, to hire and terminate managers and other contractors, to make contracts and incur liabilities, to impose charges for late payment of assessments, and recover attorney fees and other legal costs.⁴⁰

Importantly, community managers are subject to CCIOA to the same extent as their community association clients. A community association's contract with a community manager is terminable for cause without penalty to the community association.⁴¹

³⁴ § 38-33.3-117, C.R.S.

³⁵ § 38-33.3-103, C.R.S.

³⁶ § 38-33.3-114, C.R.S.

³⁷ § 38-33.3-203, C.R.S.

³⁸ § 38-33.3-209.4, C.R.S.

³⁹ § 38-33.3-209.5, C.R.S.

⁴⁰ § 38-33.3-302(1), C.R.S.

⁴¹ § 38-33.3-302(3), C.R.S.

CCIOA also requires community associations organized under CCIOA to register with the Colorado Division of Real Estate (DRE).⁴² Within the DRE is the HOA Information and Resource Center (HOA Information Office), the head of which is the HOA Information Officer.⁴³ The HOA Information Officer is tasked with acting as a clearing house for information concerning the basic rights and duties of owners under CCIOA, as well as tracking community association-related inquiries and complaints.⁴⁴ Neither the HOA Information Office nor the HOA Information Officer has any investigatory or enforcement authority.

Indeed, none of these laws is enforced by any state entity. Rather, community members who desire to enforce a provision of any of them, must bring suit in civil court.

Finally, though not related to the governance of a community association, there are other laws with which community associations must comply, and with which community managers must be familiar, including laws covering insurance, labor, land use, foreclosure, debt collections and anti-discrimination.

Regulation in Other States

At least eight states regulate community managers: Alaska, California, Connecticut, Florida, Georgia, Illinois, Nevada and Virginia.

Most of these states require some combination of education and the passage of an examination prior to obtaining a license, though the amount of education varies considerably from one state to the next.

Alaska requires community managers to be licensed as real estate brokers. As such, the level of education and the examination required depends upon the type of real estate broker license held by the individual.

California requires candidates to obtain 30 hours of pre-licensure education and to pass a knowledge, skills and aptitude examination.

Connecticut requires community managers to maintain a separate fidelity bond for each community association the community manager manages. The bond must cover the maximum amount of funds that will be in the custody of the community manager at any time.

⁴² § 38-33.3-401, C.R.S.

⁴³ § 12-61-406.5(1), C.R.S.

⁴⁴ § 12-61-406.5(3), C.R.S.

Florida requires candidates to have a criminal history background check completed, complete 18 hours of education and pass an examination. Florida also requires the completion of 20 hours of continuing education every two years.

In Georgia, in addition to passing an examination, a candidate must complete either a 25-hour course or complete four quarter hours, or two semester hours, of course work that is eligible for a major in real estate. Additionally, licensed community managers must be covered by a fidelity bond or fidelity insurance. Georgia also requires the completion of 24 hours of continuing education every four years.

Illinois requires candidates to complete 20 hours of education, pass an examination and be of good moral character. Additionally, licensed community managers must have fidelity insurance.

Nevada requires candidates to complete either 60 hours of education or possess four years of active experience in community management, and passage of a fingerprint-based criminal history background check. Nevada also requires the completion of 18 hours of continuing education every two years.

Virginia has several paths to licensure:

- Possession of the Certified Manager of Community Associations credential;
- Possession of the Association Management Specialist credential;
- Possession of the Professional Community Association Manager credential; or
- Completion of a 16-hour training course.

In addition, Virginia requires two years of experience and requires licensees to have a fidelity bond of at least \$10,000.

Although the scope of practice of community managers varies from state to state, some common elements include:

- Performing duties for compensation;
- Providing financial services, such as the preparation of budgets and financial statements, and receiving and collecting dues;
- Contracting for maintenance or repair operations, and insurance;
- Supervising the day-to-day operations of the community association; and
- Assisting in the conduct of community association meetings.

The grounds for discipline also vary from state to state, but some common examples include:

- Committing deeds of dishonesty;
- Having criminal convictions;
- Failing to account for or remit community association funds;
- Commingling funds; and
- Failing to complete any required continuing education.

Analysis and Recommendations

Public Harm

The first sunrise criterion asks:

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

This criterion implies that regulation is only justified if the public is being harmed in the absence of regulation, or if the potential for harm is clear.

What constitutes harm must be evaluated on a case-by-case basis in each sunrise review. In the present review, given the scope of what common interest community association managers (community managers) do, harm can reasonably be expected to take the form of financial harm and the less tangible, infringement of rights of owners.

One challenge in looking for and analyzing the examples of harm during this sunrise review arose from the fact that it is often difficult to distinguish between the actions of a common interest community association's (community association's) board of directors, which are not the subject of this sunrise review, and the community managers with which they contract, which are the subject of this sunrise review.

To determine whether harm is occurring, the Department of Regulatory Agencies (DORA) requests that sunrise applicants submit examples of harm as part of the sunrise application process. Additionally, DORA independently sought such examples through research and contacts made during the course of this sunrise review. Further, DORA received information from the Colorado Division of Real Estate (DRE) and the Colorado Civil Rights Division (CCRD).

The sunrise application submitted by the Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute (Applicant) contains general information related to 13 examples of harm. The application breaks harm into four somewhat overlapping categories: mismanagement/bad practices; failure to perform; missing funds; and accounting failures. The level of detail provided is minimal.

Representatives of DORA proactively sought examples of harm and also received citizen comments via email, in-person meetings, and telephone calls. DORA received input from approximately 70 individuals, including property owners, community managers, attorneys, real estate brokers and representatives of management companies, lenders, and others.

In January 2012, the DRE's HOA Information and Resource Center (HOA Information Office) released its first annual report. Of the 478 complaints the HOA Information Office received between June 2010 and December 2011, 157 (33 percent) were either about the community manager or the community manager was involved.⁴⁵

According to a representative of the HOA Information Office, these complaints, in general, include failure to provide access to community association records (17 percent), aggressive collection and foreclosure practices (6 percent), lack of transparency and poor communication (13 percent), harassment and selective enforcement (19 percent), and the unauthorized practice of law. These proportions track, relatively consistently, with complaints that did not involve a community manager.

DORA also contacted the CCRD. Between fiscal years 09-10 and 10-11, the CCRD closed 25 housing cases involving community associations. Twenty-one of these cases resulted in investigations and the issuance of a letter of determination (LOD), and four settled prior to the issuance of an LOD, so information is of minimal value to this review.

A community manager was a named respondent in all but 4 of the 21 cases actually investigated, but the role the community manager played was clear in only five. In three of those cases, the community manager seemed to have played a positive role. The manager seemed to have played a negative role in two cases.

To present all of these examples in this review, while providing detail, would be somewhat repetitive. Many stories contain multiple and overlapping issues. As a result, the types of harm discovered during this sunrise review are summarized here, in no particular order:

- **Advice to aggressively pursue lien foreclosures.** A community association may obtain a lien on a property when the property owner, for example, fails to pay dues or fines. While these are funds that may be legitimately owed, the liens are a source of considerable discontent, as many believe that community associations pursue this avenue of recourse for sums that are so low that such drastic action appears unjustified. While it is the community association that determines whether to obtain a lien, many contend that community managers play a large role in advising community associations as to whether to pursue this course, or other, more "customer friendly" routes. This type of harm can be both financial (for the community association and the property owner) and can result in a property owner losing his or her home.

⁴⁵ 2011 Annual Report of the HOA Information and Resource Center, Colorado Division of Real Estate, p. 13.

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- **Imposing excessive fees.** Management companies/community managers generally charge two types of fees: management fees and duty-specific fees. Management fees are those paid by the community association on a monthly basis, usually based on some combination of the number of units in the community association and the services to be provided. Duty-specific fees are typically paid by individual property owners for specific items, such as a status letter when a property is to be sold or transferred, or copies of community association records. Duty-specific fees can also include extraordinary items to be paid by the community association, such as litigation management (for example, foreclosure proceedings or construction defect proceedings) or project management. While these fees are payable to the management company, they are generally spelled out in the contract between the management company and the community association. During this sunrise review, representatives of DORA heard many stories of “excessive” duty-specific fees (such as \$1,000 fee for a status letter, where the industry norm is approximately \$300), as well as allegations that community managers encourage litigation so as to collect additional fees.
 - **Lack of transparency.** This type of harm takes many forms, some of which are directly attributable to a management company/community manager, and some of which are, allegedly, based on community manager-advice. Examples include failing to hold meetings of the board of directors, failing to provide notice of such meetings, failing to permit property owners to attend or participate in such meetings, failing to provide boards of directors with current and/or accurate financial statements, and failing to permit property owners access to community association records (such as financial statements, board of director meeting minutes, names of vendors, and the like). Unfortunately, where community manager advice is involved, it is not clear whether such advice is predicated on a lack of knowledge of legal requirements, or disregard of those requirements. This type of harm infringes on property owner rights.
 - **Theft of community association funds.** The examples of theft discovered during this sunrise review can be generally categorized as theft by a community manager and theft by a management company back office employee (such as an accountant). Although theft is a crime, and regulation is inherently ill suited to addressing such conduct, absent regulation, even convicted thieves can resume their activities upon release from incarceration. This is true of, for example, a Colorado-licensed real estate broker who had her license revoked for stealing funds from rental property clients, and who immediately opened a management company.

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- **Poor customer service.** Examples of poor customer service include failing to return phone calls, excessive delay in preparing documents necessary for a real estate closing, and being rude to and intimidating property owners. While the delivery of poor customer service is generally not a reason to discipline a licensee in other practices, in the context of community managers, such conduct can infringe on a property owner's ability to sell his or her property or to enjoy that property.
 - **Undisclosed conflicts of interest.** One of the more intriguing examples of undisclosed conflicts of interest discovered during this sunrise review has been characterized by some as a "kickback scheme." One management company in metro Denver receives invoices from at least one vendor, and places its own invoice on top of the vendor invoice, including 100 percent of the cost on the vendor's invoice. The management company then submits this to the community association's board. The community association pays the management company 100 percent of the invoice, but the management company pays only 90 percent of the price listed on the invoices, retaining the remaining 10 percent.
 - **Differing interpretation of community association governing documents.** One of the more contentious issues that arose during this sunrise review pertained to property owners interpreting a community association's governing documents (such as bylaws and covenants) differently than either the board of directors or the community manager. It is not clear what role regulation could play in such disputes, but such disputes appear to be common and the parties passionate.
 - **Mismanagement of community association contracts.** Several stories were heard of community managers/management companies failing to renew insurance policies, or allowing certain insurance coverages, such as hail damage coverage, to lapse. The affected community associations then suffered financial harm when the policies did not cover damage that occurred.
 - **Accounting failures.** Examples of this type of harm are so numerous, it is easiest to simply enumerate them:
 - Community association checking or savings accounts with only one signature (either that of a single board member or of the community manager) necessary to open, close, transfer, freeze or empty such accounts;
 - Accounts payable with no supporting documentation;
 - Invoices that do not match the disbursement account;
 - Unrecorded and undocumented expenses;
 - Unreconciled financial statements;
 - Accounts receivable ledgers with undocumented miscellaneous charges or unsubstantiated charges;

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- Accounts receivable ledgers with late charges not supported by a delinquency policy or inconsistent with that policy;
 - In the case where a community association purchases preprinted checks, missing groups of undocumented checks;
 - Payment from reserves for operating costs; and
 - Unreconciled petty cash funds.

The examples of harm highlighted above are but examples of the types of harm complained of during the course of this sunrise review. Types of harm include:

- Theft of funds;
- Mismanagement of funds;
- Undisclosed conflicts of interest;
- Inadequate accounting and recordkeeping practices; and
- Lack of transparency in terms of board meetings and access to community association records.

That harm occurs is clear. That harm occurs at the hands of community managers is less clear. Many of the instances of harm highlighted above, and heard during the course of this sunrise review, could be attributed to management companies and some of their non-community manager employees, as well as to the community associations themselves.

Need for Regulation

The second sunrise criterion asks:

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

In short, this criterion asks whether the harm identified above is attributable to a lack of competency.

Of the various types of harm identified above, only three can arguably be attributed to lack of competency, or knowledge of certain legal requirements:

- Undisclosed conflicts of interest;
- Inadequate accounting and recordkeeping practices; and
- Lack of transparency.

The Colorado Common Interest Ownership Act (CCIOA) addresses all of these issues, in one form or another.

An assurance that community managers are aware of the legal requirements imposed upon community associations could serve to enhance consumer protection.

Alternatives to Regulation

The third sunrise criterion asks:

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

The Applicant has proposed licensing community managers, but the third sunrise criterion demands that DORA explore alternatives. Since licensure is the highest form of regulation, obvious alternatives include certification and registration of community managers.

The Applicant's proposal for licensure, in essence, amounts to little more than a certification program. The Applicant proposes that licensees obtain the CMCA credential and pass an additional examination on Colorado-specific law. Therefore, certification is not actually an alternative.

Registration is not a viable alternative either, since some of the examples of harm illustrated above actually pertain to knowledge of laws or possession of certain skills.

However, an analysis of the harm discovered during this sunrise review suggests that harm can be, and often is, inflicted by management company employees who are not necessarily community managers.

Many of the tasks associated with managing a community association need not, and frequently are not, performed by the community manager personally. Rather, they are performed by other staff. Examples include:

- Accounting;
- Bookkeeping;
- Recordkeeping;
- Preparation of financial statements; and
- Processing accounts receivable and payable.

In a smaller management company, the individual community managers may perform these duties. However, in larger and mid-size management companies, the community manager may be responsible for oversight of these functions, but other employees actually perform these tasks.

Therefore, it is reasonable to explore, as an alternative to licensing community managers, regulating management companies. Regulation of management companies would impose greater accountability for back office functions, such as those enumerated above. Additionally, any regulation could require management companies to ensure that the property managers they employ are properly trained.

Additionally, community associations typically contract with a management company, not an individual community manager. Since so much of what community managers do is driven by the contract, it is logical to regulate the signatory to the contract, rather than an employee of the signatory. This will provide a clear line of accountability.

Thus, all of the types of harm identified earlier in this report could be addressed by imposing responsibility on management companies for the people they employ.

Conclusion

There is no shortage of horror stories related to common interest community living. The media is replete with them, and many were heard during the course of this sunrise review. However, it is often difficult to discern whether these horrors are attributable to the management company, the community manager, the community association's board of directors or individual directors, the individual doing the complaining, or some combination thereof.

The issues at the hearts of these stories can also be difficult to discern. Some arise from community association boards failing to perform their fiduciary duties. Some arise from differing interpretations of community association governing documents or applicable laws. Some arise from poor customer service or poor business practices. Some arise from community association members not fully understanding what it means to live in a community governed by a community association. Finally, of course, some arise from interpersonal conflicts or criminal intent.

Regulation of community managers may address some of these issues, such as knowledge of governing documents, applicable laws and the hierarchy among them. Additionally, regulation of community managers could serve to impose some accountability on community managers and help to ensure that they have a minimum knowledge base.

Proponents also argue that regulation will serve to instill greater professionalism among community managers. While this may have some merit, it is irrelevant to a sunrise analysis, where the focus is on consumer harm, not professional advancement or status.

Importantly, and despite all the horror stories, community managers and community association members are far from unanimous in their support for regulation. Some argue that community association boards of directors, though comprising volunteers with diverse backgrounds, are well equipped to determine their needs and the qualifications of the community managers they hire.

Another primary concern is the cost of regulation. The cost to each community manager will be approximately \$1,000 to comply with the Applicant's proposal for initial licensure, including the cost of the M-100 course, the Certified Manager of Community Associations (CMCA) examination, criminal history background checks, and license and application fees. The fear among many is that these costs will be passed through to client community associations, and this will likely be the case.

However, the typical portfolio for a community manager working for a management company is approximately six to eight community associations. So, the cost to individual community association members should be negligible.

The true cost of regulation, though, may lie in the more theoretical realm of supply and demand. While no one knows for certain how many community managers are working in Colorado today, the Colorado Legislative Action Committee Licensing Task Force of Community Associations Institute (Applicant) estimates the number to be approximately 1,250. There are only 565 community managers who currently hold the CMCA credential. Therefore, approximately half of all community managers in Colorado would either need to obtain the credential or cease business. This can reasonably be expected to drive up the cost of contracting with community managers.

Finally, representatives of DORA heard from many individuals who favor regulation of community managers, management companies, or both, but who oppose the Applicant's proposal. These individuals would prefer to see a regulatory program housed in and operated entirely by a state entity, such as the Colorado Division of Real Estate, as opposed to the Applicant. They further argue that any educational and examination requirements should be established by the regulator; no specific organization or examination should be articulated in statute.

In the end, regulation is justified and widely supported. Given the types of harm identified during the course of this review and the legitimate concerns surrounding the cost of regulation, it is logical to conclude that the best course of action is to regulate management companies.

As such, this recommendation should not be interpreted as an endorsement of the Applicant's proposal. Rather, it is presented as an alternative.

For the most part, community associations contract with management companies, not individual community managers. As such, management companies are ultimately responsible to their client community associations for the acts and omissions of all of their employees, including, but not limited to, community managers. Regulating the management company, therefore, would help to address many of the concerns that arise from the fulfillment of the terms of that contract, such as fees to be assessed and the scope of the work to be performed. The affirmative obligation to employ qualified people, including, but not limited to community managers, should rest with the management company. Regulation of the management companies will provide a clear line of accountability, both to those with whom the management companies contract, and with the regulating entity.

Recommendation – Regulate management companies.

