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JOINT BULLETIN

Real Estate Commission Disbursements

The Department of Financial Protection and Innovation (DFPI) and Department of Real Estate (DRE) are concerned about a business practice in which a real estate broker instructs a settlement agent¹ through a Commission Disbursement Authorization (CDA) to pay the real estate broker's personal or business expenses or an unlicensed entity or individual who may have engaged in activity requiring a license in a real estate transaction.

California's Real Estate Law² and Escrow Law³ protects the interests of all parties and ensures transparency, fairness, and integrity in real estate and escrow transactions. However, as described in more detail below, disbursements of earned commissions to pay a real estate broker's personal or business expense, or to pay someone who may have engaged in unlicensed activity, contravenes the core principles of transparency, fairness, and integrity and may violate provisions of the Real Estate Law⁴ and Escrow Law.

The DFPI has found many independent escrow companies that have issued checks from their trust account to disburse a real estate broker's commission to pay third parties for the broker's personal or business expenses. These expenses include credit card bills, car payments, medical expenses, college tuition, entertainment, office rent, and utilities. Independent escrow companies made these payments following a broker's request in the CDA.

The Escrow Law prohibits escrow agents from permitting any person to add to, delete from, or alter an escrow instruction unless the change is signed or initialed by all persons who had signed or

¹ Also known as an escrow agent.

² Bus. & Prof. Code, § 10000 et seq.

³ Fin. Code, § 17000 et seq.

⁴ Bus. & Prof. Code, § 10130.

initialed the instruction before the change.⁵ Escrow agents are also prohibited from soliciting or accepting an escrow instruction containing any blank to be filled in after the instruction is signed or initialed.⁶ In addition, an escrow agent shall disburse trust funds deposited in escrow only in accordance with the written escrow instructions of the principals to the escrow transaction.⁷ The principals to the transaction are the buyer and seller or the borrower and lender.⁸ Real estate brokers are not principals to an escrow transaction. Thus, if a seller or buyer authorizes an escrow agent to pay a real estate broker commission on a written commission authorization, the escrow agent should follow the principal's instructions to pay the commission to the broker. To do otherwise is a violation of the Escrow Law.

DRE-licensed real estate brokers are exempt from the Escrow Law while performing acts in the course of or incidental to a real estate transaction in which the broker is performing an act for which a real estate license is required.⁹ Under the Real Estate Law, however, DRE licensees performing broker-controlled escrow activities are required to disburse any money deposited in a trust account or escrow account only in accordance with the written instructions of the party or parties paying the money into escrow.¹⁰ DRE licensees are also prohibited from claiming, demanding, or receiving a commission, fee, or other consideration, as compensation or inducement, for referral of customers to any escrow agent.¹¹ Such conduct may also violate RESPA's prohibition against kickbacks.¹²

The DFPI and DRE will investigate, whether individually or jointly, referral fee arrangements by their respective licensees to protect the interests of all parties involved in real estate and escrow transactions and to ensure transparency, fairness, and integrity.

⁵ Fin. Code, § 17403.2, subd. (a).

⁶ *Ibid.*

⁷ Cal. Code Regs., tit. 10, § 1738.2.

⁸ Cal. Code Regs., tit. 10, § 1738.5.

⁹ Fin. Code, § 17006, subd. (a)(4).

¹⁰ Bus. & Prof. Code, § 10145, subd. (a); Cal. Code Regs., tit. 10, §§ 2950, subd. (g), 2951.

¹¹ Bus. & Prof. Code, § 10177.4.

¹² 12 U.S.C. § 2607(a).