

HAAS AND DAWE

AN ACCOUNTANCY CORPORATION
CERTIFIED PUBLIC ACCOUNTANTS
FOUNDED 1949

731 NORTH HOLLYWOOD WAY • BURBANK, CALIFORNIA 91505
TELEPHONE (818) 552-2384 • FACSIMILE (818) 552-3501 • www.h-dcpas.com

MICHAEL C. HAAS, C.P.A.
MICHAEL W. DAWE, C.P.A.

MORTON ALAN HAAS, C.P.A.
(1921-1995)

GARY B. HAAS

February 18, 2021

Department of Financial Protection and Innovation

Via e-mail: regulations@dfpi.ca.gov

Via facsimile transmission: (213) 897-8860

Ladies and Gentlemen:

I am responding to the invitation to comment on the Notice of Proposed Regulatory Action concerning the Escrow Law.

1. Changes to Section 1732

The proposed changes seem inconsequential relative to current language. However, while the perceived goal seems to be to modernize some of the practices in maintaining escrow books and records, a more ambitious opportunity has been missed to clean up the remaining ambiguities of the original language. For example, the term “escrow liability controlling account” is confusing unto itself not only here but in other sections of the regulations.

2. Changes to Section 1737.3(a)

The proposed changes add more ambiguities and confusion to the existing language. By adding “...or longer as required by any other applicable laws or regulations” is an open-ended qualifier that could leave licensees in a quandary of regulatory morass with no assurance of a statute of limitations ever expiring.

Requiring front and back images of check could be burdensome on the licensee as many banks do not produce such images in the ordinary course of their processing. This concern also appears in the proposed changes to Section 1741.5 in requiring CPAs to examine the back side of check images that may not be available from the licensee’s bank.

The proposed changes would give an opportunity for certain language to be clarified. For example, setting forth a definition of “The Statement of Account” as it applies here and clarifying consistency in other uses of the term such as in proposed section 1737.3(c).

It is recommended that Section 1737.3(a)(7) either be stricken or be better defined as it is vague in its present state.

3. Changes to Section 1737.3(b)

It is suggested that the word “printed” in the proposed addition to subsection (2) be replaced with the work “producible” as many companies in their attempt to be paperless avoid printed copies and have established efficient internal systems to maintain all required records pertaining to escrow files and escrow accounting.

4. Changes to Section 1741.5

The history of the past eight years seems to have caused a wanton complete rewrite of this section. It was at that time when one CPA's submission was rejected by the DFPI as not satisfying the requirements of this section (and the accompanying establishment of the annual audit in Financial Code Section 17406). The meat of the issue was not in what that certain CPA did (and now subsequently additional CPAs do) but in the report the CPA prepared and submitted to the DFPI.

In hindsight, the easier solution would have been the DFPI opening a dialogue directly with the CPA to find out the reasons for his submitting what was submitted and then requesting the CPA to invoke Section 1741.5(a)(9) to request a variance from what had evolved into the "norm" in the DFPI's perception.

There is nothing in the current section that defines the format of the report a CPA prepares. There is language on what the DFPI wants to know about so that it can get a comfort level as to the sanctity of the escrow trust account and the escrow activity of the licensee.

Hence, in perhaps a simplistic response to the current proposed changes, I do not believe that the regulations need to be re-written at all. There already has been an acceptance, much greater than just an acquiescence, by the DFPI of reports submitted by CPAs that are segregated into two distinct engagements: an audit of the financial statements and accompanying notes and an agreed upon procedures report of findings.

There is nothing in the current section that provides specific guidance on how a CPA formats the report that gets or reports that get submitted to the DFPI. The current section provides guidance on the DFPI's expectations. I believe the DFPI has no basis for replacing the role of the CPAs standard setters, in this case the Auditing Standards Board, by writing expansive regulations that define what standards the CPA is to follow and how those standards are to be followed.

The proposed changes to this section raise further concerns beyond defining the reporting requirements. The proposed changes greatly expand what the current section contains relative to what is expected from the CPA in preparing the annual report. Without getting into a subsection-by-subsection analysis, the proposed changes give the appearance that the DFPI is delegating the performance of its own regulatory examination onto the CPA.

Several of the proposed subsections are confusing and use terms that are vague and/or ambiguous. Further, there are certain proposed subsections that contradict with CPAs' professional standards and are not workable in that regard. For example, proposed section 1741.5(a)(2)(A) is such a subsection that conflicts with current professional standards.

Certain expectations, such as CPAs identifying characteristics of fraud (proposed subsection (c)(3)(C)(ii)) are not realistic and are not part of CPAs' professional standards or guidance. Proposed subsection (c)(6)(B)(iv) is not a procedure. This is an example of language that is not appropriate in the DFPI's attempt to expand CPAs' responsibilities.

Proposed subsection (c)(6)(B)(x)(V) uses the term “unusual transaction” which is not defined and cannot be expected of CPAs to report on outside of their normal following of professional standards.

5. Addition of Section 1741.5.1

The addition of proposed changes regarding what presently is referred to as the “closing audit” is welcome but not well written. The proposed regulations are vague and written in such a way that would not allow CPAs to comply with the DFPI’s requirements without violating the CPAs’ own professional standards.

6. Addition of Section 1741.7

Financial Code section 17420 has long been the standard bearer regarding illegal referral fees, also known as kickbacks. In addition, licensees have been held accountable to the provisions of RESPA. This proposed section appears to detail specific concerns of the DFPI in an attempt to curb potentially illegal activities.

An immediate perception of these proposed subsections is that the DFPI is pushing to begin regulating escrow fees. This would be an unwarranted position in that it would be injurious to the independent escrow industry in its need to compete in the overall escrow community in California.

The intent of the DFPI for the longest time in discussing marketing and advertising and discount activities is that a licensee only can cater to the principals in escrow: buyers and sellers and borrowers and lenders.

The proposed regulations seem to go too far in attempting to stifle the perceived illegal kickback and discount activities. History supports that advertising in a board of realtors’ publications or marketing to the general public (such as having an open house in one’s office in which the entire community is invited and welcome) do not rise to the level of violations that are causing the DFPI to author this proposed section.

Discounts should be permitted as long as they are offered to the general public and are applicable to everyone within a certain class. For example: veterans, senior citizens, repeat customers, or builders.

Any non-equal distribution of escrow fees already is required to be disclosed in escrow instructions. It does not seem necessary to have to issue a proposed regulation to memorialize this already known and respected position.

It is suggested that DFPI revisit the language and structure of this proposed section to arrive at a more focused product.

Department of Financial Protection and Innovation
February 18, 2021

Page four

7. Conclusions

Having been involved with the escrow industry for over 40 years, I have seen many changes to the regulations. But the way we accomplished these changes was by sitting down together with other members of the CPA profession, of the escrow industry, and with the DFPI to hash out a workable solution. I recommend that this happen again regarding these proposed changes. Even after the public hearing, it is hoped that the DFPI would be willing to establish ad hoc committees to work on fine-tuning, revising, amending, tweaking, and whatever it takes to arrive at a finished product that is a compromise that everyone can work with into the future. I further suggest that there be separate ad hoc committees to work on the different concerns of the proposed regulations: one for discounts and kickbacks and one for books and records and one for the CPA audit.

Department of Financial Protection and Innovation, thank you for allowing me to submit these comments.

Very truly yours,

HAAS AND DAWE

By 
MICHAEL C. HAAS

MCH/mf