



February 18, 2021

BY ELECTRONIC SUBMISSION

regulations@dfpi.ca.gov

Department of Financial Protection and Innovation
Attention: Sherri Kaufman, Senior Counsel and Regulations Coordinator
300 S. Spring Street, Suite 15513
Los Angeles, California 90013

RE: Proposed Escrow Regulations (PRO 13/13)

Dear Ms. Kaufman and Regulations Coordinator,

On behalf of the members of The Real Estate Services Providers Council, Inc. (RESPRO®), I appreciate the opportunity to comment on the proposal to alter the regulations governing escrow companies.

RESPRO® represents the largest and most successful settlement services companies operating throughout the United States. We are real estate brokerages, title insurance underwriters and agents, mortgage lenders and brokers, attorneys, technology companies, and other providers. Our members and their more than 600,000 employees and agents facilitate millions of real estate and mortgage transactions each year. RESPRO® is considered one of the top organizations when it comes to compliance with the Real Estate Settlement Procedures Act (RESPA) and other federal laws affecting real estate and mortgage transactions.

RESPRO® specific concerns in the current proposal are with elements of section 1741.7 dealing with “prohibited compensation.” We agree with fellow commenters that these provisions likely exceed the Department’s legislative authority. The Department’s own website unequivocally states that:

13. ARE THE FEES ESCROW AGENTS CHARGE FOR THEIR SERVICES REGULATED?

The Escrow Law does not restrict the fees that escrow agents may charge for services. The amounts escrow agents charge for their services vary depending on the location of the escrow agent, type of transaction and the competition in the area. The escrow agent is required to disclose all fees on the closing statement that is prepared after the transaction is completed. It is recommended that you request that the escrow agent provide you with a fee schedule that shows the charges for their services.¹

¹ <https://dfpi.ca.gov/escrow-law-frequently-asked-questions/>

The Department should either address the concerns underlying the provisions in 1741.7 in a separate proposal and rulemaking that is clearly within current authority or seek additional legislative authority and issue a new proposal then.

Concerns with Section 1741.7 Provisions

In an effort to provide additional context and background for our broader objection, we will address some specific concerns with the Section 1741.7 provisions.

Section 1741.7 (a) (1-5)

RESPRO® believes that the Department should enforce RESPA to prevent illegal payments for the referral of business rather than attempt to universally prohibit activities and control or set prices and fees.

In general, the actions discussed in 1741.7(a)(1) would violate RESPA if done in conjunction with an actual or implied agreement that referrals would be given (and the other elements of section 8² are met that are not relevant here). Section 8(c)2 creates an exemption for payment for services rendered but it is limited to the actual costs of services actually rendered. So paying rent for space unused is still a violation of RESPA.

Similarly, RESPA would prohibit paying for referrals via paying for the items in 1741.7(a)(2). Some of the items, if done jointly with expenses shared proportionately would not violate RESPA but that would be the only case. Simply paying another's expenses would violate RESPA assuming the other elements of the Section 8 test are met.

If content is given in exchange for referrals, RESPA violations might exist. However, we believe Section 1741.7 (a) (3) appears to prohibit the sharing of content without regard to any compensation or referral scheme. This seems unduly onerous and counterproductive. Much third party content is unambiguously pro consumer such as regulatory compliance documents, guides, as well as warnings and best practices to avoid like identity theft or wire fraud. In addition, this provision appears to ban sharing content generated by third parties that might actually be paid for by the sharer. There are any number of scenarios where content or features are generated by third party providers that have little or nothing to do with referrals or kickbacks, yet this provision seems to ban them nonetheless.

Section 1741.7(a)(4) might unduly inhibit reasonable marketing and business practices. For example, under RESPA, real estate agents and mortgage loan officers often would collaborate to jointly host open houses and share the costs of food. Potential buyers or borrowers are not required to use the services promoted in order to partake in the food and beverages. Similarly, settlement services providers sponsor lunches or other professional association events in order to promote their businesses. One is not required to recommend these firms in order to partake. It would seem this provision would ban such activities or at a minimum create a cloud over such practices if escrow agents are involved. This seems like an overreach. RESPA clearly bans using lunches, dinners, or

² "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."



other valuable events as payment for referrals and there have been numerous enforcement actions under these circumstances. The Department should enforce RESPA provisions in these circumstances as well.

Finally, RESPA would prohibit Section 1741.7(a)(5) activities assuming the other elements of the section 8 test were met and no Section 8 exemptions applied as discussed earlier.

Sections 1741.7 (a) (6-9)

These sections appear to de facto rate/fee setting and/or controlling competition. This is ultimately not pro-consumer. Allowing flexibility in pricing and the offering of services promotes competition. This is one reason Congress specifically avoided rate setting in creating RESPA. As noted earlier, we believe these exceed the current authority of the Department.

We believe that depending on the facts, some of the activities could violate RESPA section 8 if other elements of the Section 8a test were met and an exemption did not apply. We encourage using a Section 8 approach rather than attempting to set fees or control discounts. Fee flexibility is pro-consumer in general and allows firms to compete on pricing which tends drive prices and costs down (or at a minimum, prevent them from rising unduly in an inflationary environment). Discounts also tend to be pro-consumer even when passed on through an intermediary. Our experience is that when attempts have been made to limit pricing flexibility, prices have increased because providers revert to worst case scenario costs.

Conclusion

We believe the Department may be exceeding its authority in proposing section 1741.7. We believe the proposed provisions are too broad and will harm consumers. We believe the Department should withdraw section 1741.7 and use alternative means to address the concerns the provisions were attempting to address such as enforcement under RESPA.

Thank you for your time and consideration on this matter and many others that affect RESPRO®, its members, and their clients and customers. If we may be of any assistance, please do not hesitate to contact me at ktrepeta@respro.org or (202) 862-2051.

With best regards,

Kenneth R. Trepeta Esq.
President and Executive Director