

STATE OF CALIFORNIA
DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION

IN THE MATTER OF THE)
PUBLIC HEARING OF:)
)
PROPOSED ESCROW)
REGULATIONS (PRO 13/13))
)
)
_____)

TRANSCRIPT OF REMOTE PROCEEDINGS,
all parties appearing remotely via Zoom,
commencing at 1:01 p.m. and concluding at
1:57 p.m. on Monday, March 1, 2021, reported by
Justyne Johnson, Certified Shorthand Reporter
in and for the State of California.

Reported by:

JUSTYNE JOHNSON,
CSR No. 14301

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1 APPEARANCES:

2 SHERRI KAUFMAN, Senior Counsel

3 CASSANDRA DIBENEDETTO, Moderator

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5 PUBLIC SPEAKERS:

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1 March, March 1, 2021

2 1:01 p.m.

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4 MS. KAUFMAN: Okay. Great. Thank you. So I'd like
5 to say good afternoon and welcome everyone to the public
6 hearing on proposed regulations for the escrow lots
7 labeled PRO 13-13 on this Monday, March 1st, 2021. And
8 I'd like to introduce myself. First, I am (audio
9 interference) -- senior counsel (audio interference) --
10 and the Financial Protection and Innovation. I would also
11 like to introduce Cassandra DiBen -- sorry --
12 DiBenedetto. She will be the moderator for the hearing
13 today.

14 And, also, I'd like to just to note that
15 Paul Liang, our escrow licensing special administrator,
16 and Gary Suzuki, our escrow regulatory special
17 administrator will also be attending today. So we can all
18 hear your comments. During the --

19 MR. FELDE: (Inaudible)

20 MS. KAUFMAN: You can't hearing anything?

21 MR. DAVIS: Can you hear anything?

22 MR. FELDE: No.

23 MS. KAUFMAN: Can everyone else hear? Is there -- can
24 anyone else not hear?

25 MS. DIBENEDETTO: We can hear you, Sherri.

1 UNIDENTIFIED SPEAKER: I can hear you.

2 MS. KAUFMAN: Okay. Great. Thanks. Okay. So
3 during --

4 UNIDENTIFIED SPEAKER: I can hear you.

5 MS. KAUFMAN: -- today's public -- during -- during
6 the public hearing today, we're going to request that
7 certain guidance be followed. So the proposed -- we're
8 going to be accepting public comments on the proposed
9 regulatory package for modifications in the following
10 areas of the escrow law, and that's in the meaning of
11 "personal property" and "prohibited compensation" as well
12 as some updates to maintaining books and preserving
13 records and also in regards to preparing the annual
14 report.

15 The documents that are related to this proposed
16 rule making are posted on our website. And there was a
17 little delay in getting comments posted, trying to get
18 them ADA compliant first, but we will try to post
19 everything as quickly as possible.

20 So now for some -- some guidelines. Anyone who
21 would like to speak during the hearing must, using Zoom
22 software functionality, raise your hand. So not just
23 raise your hand normally, but with the Zoom functions,
24 that way Cassandra will know who's raising their hand in
25 what order.

1 Also, Cassandra will call upon you in the order
2 that you've raised your hand. And our rule is that
3 everyone only speaks once. You may not speak more than
4 once. Speaking time for each participant will be limited
5 to five minutes. Cassandra will advise when the speaker's
6 five minutes have elapsed. And in order to allow that
7 everyone has equal time to comment, if you have not
8 stopped speaking at the five-minute timeline, then
9 Cassandra will need to -- will go ahead and mute that
10 particular speaker.

11 The hearing is scheduled to end at 4:00. It may
12 end sooner, but if there's no one waiting to -- the -- if
13 everyone's (audio interference) done speaking, it could
14 end sooner. However, if we run out of time and not
15 everyone has been able to speak by 4:00 o'clock, then you
16 may also submit written comments to the -- the regular --
17 on the website at regulations@DFPI.ca.gov, which is the
18 normal way to submit comments, no later than 4:00 p.m.,
19 which will be at the end of the hearing today.

20 And just so you know, the hearing will be
21 transcribed and recorded today. The transcript with the
22 comments and everyone speaking will be the part of public
23 record for the rule making. And as soon as we're able, we
24 will be posting that information, the transcript -- the
25 transcripts on the website as well. When you do speak,

1 just a quick reminder to please state your name clearly
2 for the record and make sure you're speaking so it's
3 audible as -- as close to the -- your computer as
4 possible. And just an FYI, the despon- -- the Department
5 will not be responding to any comments during the hearing.
6 It's just for the -- the -- the hearing is just for the
7 purpose of receiving comments from the public to today.

8 And I will turn it over to Cassandra who will be
9 moderating, and I will -- thank you for your time today
10 everybody.

11 MS. DIBENEDETTO: Good afternoon. Thank you. First,
12 we have PJ Garcia. PJ?

13 MS. GARCIA: Sorry. I was -- could -- couldn't quite
14 get it to happen. Thank you. Ms. Kaufman, my name is
15 PJ Garcia, and I'm here in my capacity as President of the
16 Escrow Institute of California. The Escrow Institute
17 thanks the Department for holding this hearing to obtain
18 additional feedback from licensees and the professionals
19 that represent us regarding the Department's proposed
20 escrow regulations.

21 I offer these comments today in addition to and
22 to further articulate our concerns expressed in our
23 comment letter dated 2/18/2021. I want to focus today on
24 our major occurrence and will leave the comments on the
25 more technical aspects of the proposed audit requirements

1 to the CPA's I see here on screen and I expect will speak.

2 Escrow Institute members are greatly concerned
3 about the regulations in 14 -- excuse me -- 1741.7,
4 Prohibited Compensation. I do understand the genesis, I
5 believe, of this regulation. I know that many licensees
6 of the last number of years have contacted the Department
7 with concerns over companies whose business models
8 included flat and zero seller fees in real estate
9 transactions. The licensees concerns, I believe, arise in
10 part over an anxiety that there are hidden fee
11 arrangements or up-charges to buyers in those transactions
12 that would violate either RESPA or the Financial Code
13 Section fo- -- 17420.

14 And, also, in part from a lack of understanding
15 of just what the legal bright lines are in this arena for
16 licensees, I understand the perception many licensees have
17 that lead them to these concerns as well as the
18 frustration of the Department stemming from these issues.

19 I've practiced escrow at a licensed escrow
20 company for over 40 years. In that time it has been
21 customary for escrow companies to offer defined
22 discounts -- sorry -- to offer defined discounts for
23 various ti- -- very types of sellers and buyers in escrow
24 transactions.

25 Some discounts are based on volume by principals,

1 such as builders. Others -- the basis for other discounts
2 ranges from a principal being a repeat customer and,
3 therefore, a known factor and lower risk actor or a
4 civic-minded discounts such as senior citizens and
5 veterans discounts.

6 Licensees have understood these discounts given
7 to principals were compliant provided they were not tied
8 to the placement of business by a real estate agent or
9 broker and were offered to all similarly situated cus- --
10 consumers. Further, we understand that escrow fees can be
11 negotiated on a transactional basis if a consumer chose to
12 negotiate or ask for price matching.

13 The proposed regulations, however, go much
14 further that pro- -- prohibiting kickbacks. They're
15 tantamount to regulating escrow fees, which is something
16 not ever legislated by state or federal legislators.
17 Specifically, section 1741.7(a)2 and 3 on the social media
18 restrictions would exclude joint content or the sharing of
19 valuable consumer protection content created by a referrer
20 of business.

21 These social media provisions are too narrow to
22 be practical and ignore the way marketing is conducted
23 today especially under COVID-19 restrictions on in-person
24 interactions and would limit that information being
25 available to consumers.

1 Section 1741 -- excuse me -- 1741.7(a)6 would
2 infringe on the rights of the escrow company to adopt a
3 business model adapted to markets that -- where distressed
4 sellers are in need of low costs to sell such as in a
5 short sale. It wo- -- would also prevent companies from
6 offering free or discounted escrow services to employees
7 as an employee benefit.

8 We agree that the purchase agreement between the
9 parties should prevail, but we disagree that the terms of
10 that agreement are immutable. Terms can and are often
11 amended and the parties should be free to do so provided
12 there is appropriate disclosure in a written agreement for
13 the reallocation of costs.

14 We do not understand what constitutes a discount
15 of a size or nature that would affect the independence of
16 the escrow agent. That descriptor is vague, and
17 undefined, and disregards the duty of the escrow agent to
18 be a neutral third party regardless of the agreed upon
19 remuneration -- remuneration for its services.

20 Further, provided there is a mutual agreement for
21 the final allocation of the escrow fee charged by an
22 escrow agent in the entire transaction --

23 MS. DIBENEDETTO: You have 30 seconds.

24 MS. GARCIA: Times up?

25 MS. DIBENEDETTO: Thirty seconds.

1 MS. GARCIA: Okay. So I'll skip ahead and say that we
2 truly believe that licensees and the Department would best
3 serve consumers in cooperating with further study and
4 discourse regarding the matters at issue. The EIC
5 leadership and members stand ready to work with the
6 Department to achieve a mutually beneficial outcome.

7 Thank you.

8 MS. DIBENEDETTO: Thank you. I want to remind
9 everyone to use the raise hand function in Zoom in order
10 be called on next. Up next, we have Nancy Silberberg.

11 MS. SILBERBERG: I'm sorry. Can you hear me okay?

12 MS. DIBENEDETTO: We can, Nancy. Your time begins
13 now.

14 MS. SILBERBERG: Great. Good afternoon. I am
15 Nancy Silberberg, the President and owner of Altus Escrow,
16 Inc. I would like to thank the Department of Financial
17 Protection and Innovation and Sherri Kaufman for the
18 opportunity to speak today at this hearing.

19 I would first like to comment on the proposed
20 changes to the audit requirements. I encourage the DFPI
21 to work with CPA's to provide clarity to proposed
22 regulations, whether it be in defining terms or clarifying
23 proposed procedures. I am opposed to language contained
24 in proposed section 1741.5(a)2, capital A, which conflicts
25 with the CPA's current professional standards and appears

1 to hold the licensee responsible for malpractice by the
2 independent accountant. This is clearly inappropriate.

3 Regarding proposed Section 1741.7, Prohibited
4 Compensation, the Department has the authority to regulate
5 and force under Financial Code Section fourte- -- 17420,
6 which -- which prohibits licensees from paying money or
7 other forms of consideration for referring, soliciting,
8 handling, or servicing escrow companies or accounts and
9 the authority to enforce RESPA violations under Financial
10 Code Section 17425.

11 The proposed regulations Section 1741.7 appears
12 to be outside the authority given in sections 17420 and
13 17425 in attempt to regulate escrow fees, which the
14 Department clearly has stated verbally and is listed on
15 the DFPI's website that the DFPI does not regulate escrow
16 fees.

17 Section 1741.7 and subsections thereof are
18 ambiguous, vague, and, in some instances, borders on
19 restriction of commerce. For example, Section 1741.7(a)2,
20 the propose -- does not appear to speak to the Lit- -- a
21 Litmus test approach. Instead it appears that the DFPI
22 considers all internet and social media activity a
23 violation. There should be an applicable application
24 depending on the activity in, and we see that throughout
25 the subsections of 1741.7.

1 Also, the in- -- inability of a licensee to
2 discount their fees, perhaps to price match another escrow
3 company's rates, limits a licensee from competitive market
4 price and ultimately harms the consumer. If there is no
5 competition, how it -- then there will be limited sources
6 for the consumer to obtain their escrow -- escrow fees --
7 escrow -- their escrows, period.

8 Finally, having served on Escrow Law Advisory
9 Committee as President and the immediate President of the
10 Escus -- Escrow Institute of California, I found a
11 tremendously productive and beneficiary (phonetic)
12 unofficial to all stakeholders when we work together.

13 I strongly suggest that DFPI work with industry
14 stakeholders and to create a cohesive, and unambiguous,
15 and clear set of regulations. Thank you so much for
16 allowing me to speak at this time.

17 MS. DIBENEDETTO: Thank you, Nancy. Up next, we have
18 Jennifer Felten.

19 MS. FELTEN: Good afternoon. Thank you for allowing
20 me this time. My name is Jennifer Felten. I am a former
21 escrow officer. I'm an attorney. I'm formally the
22 attorney on the Escrow Law Advisory Committee, and my firm
23 is outside general counsel for a couple of 100 escrow
24 companies. Not only does that include escrow companies
25 regulated by the defense -- Department of Financial

1 Protection and Innovation, but it also represents
2 companies regulated by other regulators, Department of
3 Real Estate, Department of Insurance, and the State Bar,
4 all of whom which have exemptions from the escrow law.
5 I'm also a consumer.

6 The purpose of my comments is to effectuate my
7 concerns relative to these changes and -- and how they
8 will affect both consumers and the industry. Due to the
9 limited time I have, I'm going to limit my comments to the
10 regulations in section 1741.7.

11 These regulations can create significant impacts
12 for independent escrow companies and the consumers of
13 settlement services in California. My review leads me to
14 believe that some of the revisions proposed by the
15 Department of Financial Protection and Innovation will
16 weaken, not enhance, the protections of the Financial Code
17 afforded to consumers.

18 First, as far as the authority for this section,
19 the DFPI cites sections 17315, 17400 and 17406 of the
20 Financial Code. The first two sections only allow for the
21 revision or addition of regulations, and the third section
22 relates to auditing, not to prohibited compensation. I
23 believe that the Department intended to reference
24 Financial Code section 420 which does allow for and
25 discuss prohibited compensation, and I'm going to address

1 my comments based upon that presumption.

2 That language, specifically, states, "Except for
3 the normal compensation of his own employees, it shall be
4 a violation of this division for any person subject to
5 this division to pay over to any other person any
6 commission, fee, or other consideration as compensation
7 for referring, soliciting, handling, or servicing escrow
8 commerce. I believe that -- that the regulations proposed
9 would actually cause risks and limit the ability of
10 consumers to effectuate their transactions.

11 First of all, the -- the proposed regulations are
12 not supported by the Department's own guidance. In
13 particular, in 2007, the Department of Business Oversight
14 at the time put out a bulletin indicating what were
15 allowed and acceptable discounts. This document and these
16 revisions contravene -- contravene those statements in that
17 bulletin. In particular, I think there could be a limit
18 on free markets as a result of this.

19 As the bulletin states, nothing in this bulletin
20 is intended to preclude the free negotiation of escrow
21 fees by escrow agent licensees and their principles to
22 escrows wherein the escrow was not induced by the offer of
23 a reduced discount. The discount rules in these
24 regulations would take away -- away the ability to
25 negotiate fees between the parties especially in areas

1 where, again, the rates are different, the consumer
2 demographic is different, and specifically as it relates
3 to certain types of transactions.

4 The -- the supposition in the rights that there
5 would be a requirement of a fee schedule, again, goes
6 against the Department's guidance. Traditionally, as the
7 bulletin states, escrow fees have been subject to
8 regulation -- have not been subject to regulation but
9 instead are determined by the competitive rate established
10 by a te- -- particular market area.

11 The changes proposed are potentially antitrust
12 issues and -- and the requirement of a fee schedule and
13 those variances could absolutely be anti-competitive and
14 limit the rights of consumers to obtain and -- and
15 negotiate discounts in any particular transaction. It
16 also limits the ability of an escrow company to resolve or
17 compensate a consumer for a mistake. It takes away the
18 traditionally authorized discounts like builder discounts
19 and repeat customer discounts, as well as other
20 traditional discounts that we've seen like senior citizen
21 discounts or first responder discounts.

22 Moreover, exempt escrow holders, those who have
23 an exemption under the Financial Code, in particular the
24 Department of Real Estate and the Department of Insurance,
25 have no such limitade- -- limitations, create incentive,

1 and --

2 MS. DIBENEDETTO: Thirty seconds.

3 MS. FELTEN: -- great -- dividing consumers -- driving
4 consumers away from the DFPI regulated industries.

5 I have two specific concerns. 1741.7 does not
6 have the same descriptor of "other person," and so there's
7 concerns relative to who gets those benefits, and, in
8 particular, the section on sharing content with the
9 internet, I believe, is overbroad and poten- --
10 potentially violates first amendment. So I do believe
11 improvements are --

12 MS. DIBENEDETTO: Time. Up next, we have
13 Patrick Felde. Patrick.

14 MR. FELDE: Hi. This is Patrick Felde. Can everybody
15 hear me? Moderator, can you hear me?

16 MS. DIBENEDETTO: Yes. We can hear you.

17 MR. FELDE: Okay. Thank you. Patrick Felde, CPA. I
18 am encouraged that the Department of Financial Protection
19 and Innovation has decided that its needs and objectives
20 can be accomplished with an agreed upon procedures
21 engagement and that the DFPI has incorporated some of the
22 requirements of an agreed upon procedures engagement and
23 that the DFPI has incorporated some of the requirements of
24 an agreed upon procedures engagement contained in the CPA
25 professional standards statement on Standards for

1 Attestation Engagements Number 18.

2 Some of the procedures contained in the proposed
3 rule are well developed. However, there are some
4 procedures that are subjective, lack clarity, and do not
5 meet the criteria for an agreed upon procedures
6 engagement. Under an agreed upon procedures engagement,
7 the CPA practitioner determines that the procedures can be
8 performed and reported on in accordance with the CPA
9 professional standards.

10 The DFPI wants procedures to be applied to the
11 licensees trust accounting records that are expected to
12 result in reasonably consistent findings regardless of the
13 CPA performing the procedures. A CPA practitioner cannot
14 perform procedures that are open to varying
15 interpretations. Terms of uncertain meaning such as
16 "general review," "limited review," "check," "test,"
17 should not be used in describing the procedures unless
18 such terms are defined within the agreed upon procedures
19 engagement.

20 The procedures should not be vague, broad,
21 subjective, and open to interpretation. To avoid vague or
22 ambiguous language, the procedures to be performed are
23 characterized by the action to be taken at a level of
24 specificity (phonetic) sufficient for the reader to
25 understand the nature and extent of the procedures

1 performed.

2 Examples of acceptable descriptions of actions
3 are the following: "Inspect," "confirm," "compare,"
4 "agree," "trace," "inquire," "recalculate," "observe,"
5 "mathematically check." The following actions generally
6 are not acceptable because they are not sufficiently
7 precise or have an uncertain meaning: "Note," "review,"
8 "general review," "limited review," "evaluate," "analyze,"
9 "check," "test," "interpret," "verify," "examine." The
10 actions just mentioned are too broad and vague to provide
11 guidance to the CPA practitioner unless the specific
12 procedures are articulated further.

13 Some examples in the proposed rule that are not
14 appropriate procedures: "If a licensee has a dormant
15 trust account, the CPA is supposed to inspect
16 disbursements." Starts off well. "And confirm that the
17 following condition does not exist. The supporting
18 documentation contains a misstatement or fails to state a
19 material fact necessary to establish that the disbursement
20 was for an authorized reason."

21 Wow. What is a "material fact"? Is it defined?
22 The rule does provide definitions, but in a lot of cases,
23 the rule provides examples with the caveat that the
24 examples are not all inclusive. In other words, you, the
25 CPA figure it out with these few examples.

1 Another example: "The supporting documentation
2 from the escrow file has one or more of the
3 characteristics that suggest possible theft or fraud."
4 The rule gives examples of the characteristics of fraud
5 again, with the caveat that the examples are not all
6 inclusive. This procedure continues to ask the CPA to
7 uncover fictitious vendors, mail-drop addresses, internal
8 transactions. Whatever that is. A transfer to an
9 external account whose ownership cannot be confirmed
10 subjecting that the CPA has to confirm ownership of all
11 external accounts where monies have been transferred. The
12 procedure is more of a wish list of what the DFPI wants
13 the CPA to uncover. There are no procedures articulated.

14 Another procedure involving the selection of
15 escrow files wants more of the same as previously
16 suggested. The procedure wants the CPA to review
17 supporting documentation to make sure that --

18 MS. DIBENEDETTO: Thirty seconds.

19 MR. FELDE: -- to make sure that the documentation
20 does not contain characteristics that suggest possible
21 theft or fraud. I wouldn't even begin to understand how
22 to accomplish this and would probably have to write a set
23 of procedures with definitions. Next, the rule is going
24 to ask the CPA to look for the characteristics of
25 paranormal activities. How about asking the CPA to look

1 for the characteristics of bad -- bad fashion sense? I
2 know at this point you're laughing at the last two
3 procedures I have mentioned knowing it is lu- --

4 MS. DIBENEDETTO: That's your time. Up next, we have
5 Rose Pothier. Rose, your turn.

6 MS. POTHIER: Okay. Can you hear me?

7 MS. DIBENEDETTO: We can.

8 MS. POTHIER: You can?

9 MS. DIBENEDETTO: Yes, ma'am.

10 MS. POTHIER: Okay. Thank you. My name is
11 Rose Pothier, an attorney with Pothier and Associates. I
12 represent many escrow -- licensed escrow companies and
13 have over the past decades. I have read the several
14 written comments on file and agree with them, especially
15 where they comment upon the Department of Financial
16 Protection and Innovations meeting specific statutory
17 authority to base implementing regulations upon.

18 Additionally, I especially concur that the
19 withdrawal of proposed regulation 1741.7, Prohibited
20 Compensation, as the provisions of Financial Code
21 Section 17420 and any other stated statutory basis have no
22 provision to limit or prohibit escrow fees charged by
23 escrow companies or to delimit those escrow fees.

24 The DFPI has not regulated escrow fees, charged
25 for escrow services, and at its website so. States

1 persons looking for information under the frequently asked
2 questions area, at Item Number 13, states, "Are the fees
3 escrow agents charged for their services regulated?" The
4 answer the Department proposes is -- or sets forth is "The
5 escrow law does not restrict the fees that escrow agents
6 may charge for services. The amounts escrow agents charge
7 for their services vary depending upon the location of the
8 escrow agent, type of transaction, and the competition in
9 the area. The escrow agent is required to disclose all
10 fees on the closing statement that is prepared after the
11 transaction is completed. It is recommended that you
12 request that the escrow agent provide you with a fee
13 schedule that shows the charges for their services." This
14 came directly from the website of the DFPI.

15 At a point, the DFPI proposes that there could be
16 no change in the party's payment of escrow fees as they
17 may have originally agreed in the purchase and sale
18 agreement. It appears the DFPI supposes the parties are
19 essentially locked into the original terms of the purchase
20 sale agreement, albeit they may later wish to change the
21 arrangement of payment for escrow fees.

22 This position ignores that all provisions of
23 purchase sale agreements may be changed by mutual
24 agreement of the parties. For example, if the parties
25 mutually agree to reduce the purchase sale price from

1 800,000 to 600,000, we do not believe the DFPI would step
2 in to prohibit them from doing so. The same applies to
3 any other provision the parties mutually agree to change,
4 including how the escrow fees are to be paid, or if there
5 will be no escrow fee paid by one or the other of the
6 parties.

7 In addition, we -- we believe that the provisions
8 concerning the, quote, holding and dispersing funds under
9 an assisted reproduction agreement, end of quotes, be
10 withdrawn. As the proposed regulations are unclear as to
11 the extent of the involvement the DFPI proposes for
12 licensed escrow companies.

13 On page 2 of the initial statement of reasons for
14 proposed regulatory action, the DFPI comments that
15 Financial Code Section 17003 does not state that an escrow
16 includes the, quote, holding and disbursing funds under an
17 assisted reproduction agreement, end of quotes. Since
18 fund deposited for such matters do not involve real
19 property, they, by elimination, involve personal property.
20 It is the definition in Financial Code Section 1003 of an
21 escrow which includes real and personal property.

22 The basis the DFPI states that Family Code
23 Section 1 -- 1 -- excuse me 7961 requires that the holding
24 and dispersing funds under an assisted reproduction
25 agreement be by a licensed independent escrow company is

1 not inclusive of the language of the code itself. It
2 states that a non -- at item number sub A, "a nonattorney
3 surrogacy or donor facilitator shall direct the client to
4 deposit --

5 MS. DIBENEDETTO: Thirty --

6 MS. POTHIER: -- all client funds into either of the
7 following: "An independent...licensed...escrow company,
8 or a trust account maintained by an attorney." So I think
9 this section needs far more work. The Office of
10 Administrative Law established in July 1, 1980, assures
11 that the DFPI regulations are clear, necessary, legally
12 valid, and available to the public. We believe that the
13 com- -- comments made by the various contributors today
14 and at --

15 MS. DIBENEDETTO: That is your time. Up next, we have
16 Jeff Behm. Please remember to use the raise hand function
17 if you would like to speak. Jeff?

18 MR. BEHM: Hello. My name's Jeff Behm. I'm CPA'd,
19 performing audits for well over 100 escrow companies and
20 inserting myself in term as a CPA representative on the
21 DFPI Advisory Committee. I've chosen to keep my comments
22 today broad in scope. My comments concern the CPA annual
23 reporting in Section 1741.5.

24 These procedures are over the top. There's too
25 many procedures, and the samples are too large. When

1 Kathy Parten (phonetic), Richard Marmy (phonetic), and I
2 sat down at the prior administration at the DFPI, then the
3 DPO, when we sat down and wrote those procedures six years
4 ago, our final product was significantly less than the
5 current rewrite of Section 1741.5.

6 As an example, the large amount of files in the
7 closed file review for making large locations are extreme.
8 For one of my clients, the amount of escrows that would --
9 were we to perform the -- the thorough file review would
10 be 150 files for just one office. Agreed upon procedures
11 typically have a binary and ordinarical (phonetic) finding
12 not subjective findings. Some of the procedures need to
13 be readdressed as they cannot be performed as written by a
14 CPA.

15 With the massive rewrite, the 105-day timeline is
16 now clearly unreasonable. For comparison purposes,
17 Arizona re- -- only requires the financial statement
18 audit, the bank account name, number, and balance, and the
19 monthly escrow liabilities, but they allow 120 days. The
20 State of Oregon only requires the -- a financial
21 statement. It can be a compilation or an audit. No
22 supplementary comments, but they allow 150 days.

23 The -- the 105-day deadline is -- is unbearable
24 both for the CPA and nearly impossible these days for an
25 escrow company, and I think the 105 days should be moved

1 to at least 120 days. That's the end of my comments.

2 MS. DIBENEDETTO: Thank you. Up next, we have
3 Matthew Davis.

4 MR. DAVIS: Hello there. Can you hear me?

5 MS. DIBENEDETTO: We can. Thank you.

6 MR. DAVIS: Great. My name is Matthew Davis, and I'm
7 a principal at Davis and Davis Law Group. I thank you for
8 the opportunity to speak. I have been an escrow lawyer
9 for over 20 years serving as outside general counsel as
10 well as litigation counsel for dozens and dozens of
11 independent escrow companies as well as other escrow
12 companies that are managed under the Department of
13 Insurance or the Department of Real Estate.

14 My firm also has an experienced -- whereby my
15 father and grandfather have preceded as escrow lawyers in
16 working in the industry back to the early 50s which gives
17 us a bit of a perspective of the development of the rules
18 that the proposed regulations are seeking to amend. I
19 also intend to speak specifically on behalf of one entity
20 as it relates to the concerns and objections they have for
21 17417, Prohibited Compensation, and I will focus most of
22 my comments today generally and then perhaps, time
23 permitting, specifically to the structure of the
24 subsections as they relate to what appears to be an
25 attempt to address the ability of an escrow holder to

1 charge fees, how they can charge fees, and what, perhaps,
2 is Prohibited Compensation under Financial Code
3 Section 17420.

4 Now, a history into section fin- -- excuse me. A
5 history into Financial Code Section 17420 is exceptionally
6 important because the statute was amended and brought in
7 1953 by AB134. In reviewing my grandfather's files in
8 connection with the enactment of that statute, I find that
9 the common language of Prohibited Compensation of a known
10 employee and the inability to provide commissions,
11 referral fees, or other consideration of compensation for
12 referring customers is a simple concept that makes quite
13 clear what can and can't be done.

14 This early statute in 1953 was blessed by the
15 Division of Corporations then in identifying that it was
16 indue- -- introduced at the insistence of the Escrow
17 Institute of Los Angeles.

18 Based on my grandfather's file in this matter, it
19 reflects that the Escrow Institute of Los Angeles worked
20 directly with the Commissioner Erwin Dowry (phonetic) in
21 order to propose this legislation and simply -- that also
22 followed in 1961 with AB55 which was substantive changes
23 to the entire escrow law. But that was done through a
24 joint venture between the corporations commissioner at the
25 time and the Escrow Institute of California where the bill

1 itself with the proposed revisions to the statutes were
2 prepared and submitted to the legislature.

3 Therefore, the commissioner has worked many years
4 with the industry in order to devise legislation that
5 addresses concerns of not only industry but the
6 commissioner. Here, the commissioner purports to use his
7 powers to clarifying existing statutes of proposed
8 regulations to, in fact, create per se laws defining black
9 and white what is an unlawful conduct.

10 Here, we believe many of the comments submitted
11 in writing, in particular the escrow association of
12 Amer- -- excuse me -- the American Escrow Association,
13 RESPRO, and the Escrow Institute of California, in
14 writing, have indicated that their objections to the
15 statute and proposed reg of 17417 seeks to exceed the
16 commissioner's authority to circumvent the legislature by
17 amending the financial code itself.

18 In the language utilized to set forth 1741.7, it
19 appears to borrow from industries that are regulated
20 separately under the exemption of escrow law. And in
21 doing so, it fails to balance, as the legislature has,
22 certain terms and conditions of who the codes would apply
23 to. This section fails to identify who the proposed
24 persons are, and rather than conducting a balancing test
25 as has always been the direction of the commissioner into

1 a review of whether the conduct itself cons- --

2 MS. DIBENEDETTO: Mr. Dais, that is your time. Up
3 next, we have Tricia Vagt. Trisha?

4 MS. VAGT: There. Thank you, Cassandra. Can you
5 hear me? I am speaking today as the California Escrow
6 Association President. Can you hear me, Cassandra?

7 MS. DIBENEDETTO: I can.

8 MS. VAGT: Yes? Okay. Thank you. All right. So I'm
9 speaking today as a California Association President for
10 2021. I am also the proud owner of Covina Escrow Company
11 in Covina, the -- been in business over 70 years, coming
12 up, and we're very excited for that. These changes that
13 you're proposing in your rulemaking -- I'm going to speak
14 very broad. I don't quote numbers. I'm an escrow
15 officer. I don't know the regulations by heart.

16 I just know 1741.7 scares me. If I cannot
17 negotiate an escrow fee, how can I do business? I mean,
18 everything is negotiable in real estate, so you need to be
19 able to negotiate your fees and circumvent the way that
20 you want your business to be. You -- everybody has a -- a
21 business model that they are doing, and to take that away
22 from us and try to regulate it, I think 1741.7 should be
23 deleted in its entirety.

24 The social media not to click that you like
25 something, you know, I've heard that, and I haven't done

1 it, but, I mean, how would you monitor that? That's like
2 going to a party and, you know, like, in a social
3 situation, that you're going to actually violate them for
4 doing something in a social situation.

5 I do realize that social media does build
6 business, and it can promote a real estate agent, and some
7 real estate officers are totally built on social media.
8 Being an older 1950 licensee, you know, of course we still
9 do it all, kind of, old school. We are trying to go
10 paperless, but I think there's other ways to look at it
11 for -- as far as regulations so that we don't overstep
12 that way. If -- how many minutes? I --

13 MS. DIBENEDETTO: You're at three minutes.

14 MS. VAGT: Okay.

15 MS. DIBENEDETTO: Three --

16 MS. VAGT: Thanks. I -- I think there's other ways
17 that it could be regulated. If you look into more tech
18 savvy-type stuff, it just does -- it seems too broad. I
19 really think 1741.7 should be deleted in its entirety. I
20 think the electronic document storing and all of the other
21 things that you did, I was excited because there was
22 finally direction for an owner on how to do that along --
23 electronic storage and so on. So I appreciate all the
24 work that went into that because that is the kind of
25 regulation that I love to see changed. It needs to be

1 changed more to get into the future.

2 And other than that, thank you for your time,
3 consideration and please consider eliminating 1741.7,
4 Prohibited Consideration, from the rule-making proposal.
5 Thank you.

6 MS. DIBENEDETTO: Thank you. At this time, I'm going
7 to read into the record a question/comment that was sent
8 in by text -- by chat through the chat box.

9 "Please address the Fidelity/Bond...requirements.
10 Lloyds of London is no longer acceptable? Can you provide
11 a list of acceptable carriers that will write and comply
12 with your requirements. It has been near impossible to
13 find a Carrier that you approve of and taking a great deal
14 of time. I've requested this information from the DF-
15 (audio interference) -- and no one seems to have a
16 response. Thank (audio interference)."

17 This question was from Ester Seda- --
18 Ester Sadusky.

19 At this time we have no hands raised. Please
20 remember to use the raise hand function if you would like
21 to ask a question or leave a comment. Also remember DFPI
22 will not be responding to questions or comments during
23 this hearing.

24 Up next, we have Brad Cohen. Brad?

25 MR. COHEN: Thank you, Cassandra. Appreciate the --

1 the opportunity to address this group, the DFPI. I just
2 want to address a couple things. You know, we -- we're --
3 been in business going on 12 years. I've been in the
4 business 32 years. We've grown significantly, and
5 we've -- fortunate that we have every aspect of security
6 in place, the highest levels. We are sought (phonetic) 1,
7 2, and 3 at a station audited and have passed successfully
8 five years in a row. We understand the concerns of the
9 DFPI and to particularly looking out for the best
10 interests of the consumer. I think some of the concerns
11 regarding -- I think it was 1741.7.

12 Again, we're competing against title companies
13 who have negotiated fees, but I can tell you from
14 experience, they don't always follow them. We cons- --
15 we're competing against DRE licensees who really do their
16 own thing. The -- as we know, the -- the DRE is concerned
17 more about their real estate practices than their escrow
18 practices, and I think some of the concerns that came up
19 initially with this was the free escrow companies on a
20 seller's side. And I think that has probably led to some
21 of this -- these laws being created and were written.

22 And I will tell you, I have a couple of employees
23 that have worked for those employees. There is no
24 security or protection for the consumer. Zero. And so
25 I'm not opposed to having some sort of -- what's the

1 word -- you know, if someone wants to offer free escrow,
2 then disclose it to the other side.

3 If we want to give a discount, then, you know,
4 obviously buyers and sellers have different needs within
5 an escrow. One has loans, one doesn't. You know, a
6 builder might get a discount because we're doing the
7 repeat business on maybe 10, 50, 100 units. And so we
8 might give a slight discount to a buyer.

9 But there's got to be some thought and -- and --
10 and -- and -- and more careful planning on this because we
11 don't make our money off -- off paperwork. We make our
12 money off our fees. And so it's imperative that DFPI
13 really seriously exams this. But I think they do have to
14 examine, you know, the one-sided free escrows because I'm
15 not convinced that the consumer's truly being protected on
16 the buyer's side. And -- and -- and they should, in my
17 opinion, be disclosures to the parties there.

18 So I appreciate the time. I appreciate the
19 thought and efforts that have gone into this. And we look
20 forward to any additional feedback that we can provide.
21 Thank you.

22 MS. DIBENEDETTO: Thank you. At this time, we have no
23 hands raised. A reminder to all that you can use the hand
24 raise feature to be called upon or you can use the chat to
25 type in a comment that will be read for the record.

1 We have a move from Tricia Vagt to close the
2 hearing. In five minutes, if no one has responded to the
3 affirmative to need to speak, we will offer a -- closing
4 comments from Sherri Kaufman.

5 We have Karen Anapoell to make a comment.

6 MS. ANAPOELL: Hi. This is Karen Anapoell. Can you
7 all hear me?

8 MS. DIBENEDETTO: We can.

9 MS. ANAPOELL: Okay. Great. I'm general counsel at
10 Granite Escrow and Settlement Services. I have just a
11 quick comment to make about the social media implications
12 of the proposed changes. I've just -- in doing my
13 research have a real issue with the potential infringement
14 on first amendment rights, and, really, this is
15 unprecedented what the proposed measure changes are and
16 the, I guess, stifling of the ability for individuals to
17 go on to social media and interact socially as they would
18 in any other setting.

19 You know, we have friends that are outside of the
20 escrow business, real estate agents, other people.
21 Perhaps could that lead to business? Maybe. But to put
22 such a stronghold on the ability to socialize and engage
23 in, really, efforts that this is how we get our business.
24 We -- we network. We market. And part of that marketing
25 and networking is online. It just seems to be a real

1 infringement on our ability to, A, market in a way that is
2 both economically, socially, you know, in the realm of
3 what we do. It's accepted as a way of marketing
4 ourselves, our company and -- and maintaining business,
5 and just on a personal level.

6 So those are my comments. I would really like
7 some thought to be given to the first amendment
8 implications on our rights just to communicate in general.

9 MS. DIBENEDETTO: Thank you. At this point we will
10 begin another five-minute closing period. At the end of
11 five minutes, if no one has a comment, we will turn it
12 over to Sherri Kaufman for closing ar- -- closing
13 statements.

14 We have a comment from Heidi Birenbaum Cassel.

15 "I believe our industry has cha- -- has changed
16 the diversity -- so diversely since this proposal first
17 was drawn that we need to rewrite what is and not
18 acceptable in today's marketplace."

19 At this time, with no more hands and no more
20 comments, I'm going to turn it over to Sherri Kaufman for
21 closing statements.

22 MS. KAUFMAN: Hi. Can everyone hear me I hope?

23 MS. DIBENEDETTO: Yes. You can be heard.

24 MS. KAUFMAN: Okay. Thank you. I would just like to
25 thank everyone for your participation today and your

1 comments. The Depar -- the Department appreciates your
2 input. The comments will be considered in the remainder
3 of the rule-making process, and they will be responded to
4 in the financial statement of reasons. And thanks again.
5 We can close the hearing. You can still submit written
6 comments up until 4:00 today. Thank you.

7 MS. DIBENEDETTO: Thank you, Sherri. And thank you
8 everyone. I will be closing the meeting now.

9 (Proceedings adjourned at 1:57 p.m.)

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1 REPORTER'S CERTIFICATION

2
3 I, the undersigned, a Certified Shorthand
4 Reporter of the State of California, do hereby certify:

5 That the foregoing proceedings were taken before
6 me at the time and place herein set forth; that any
7 witnesses in the foregoing proceedings, prior to
8 testifying, were duly sworn; that a record of the
9 proceedings was made by me using machine shorthand, which
10 was thereafter transcribed under my direction; that the
11 foregoing transcript is a true record of the testimony
12 given.

13 Further, that if the foregoing pertains to the
14 original transcript of a deposition in a federal case,
15 before completion of the proceedings, review of the
16 transcript [] was [] was not requested.

17 I further certify I am neither financially
18 interested in the action nor a relative or employee of any
19 attorney or party to this action.

20 IN WITNESS WHEREOF, I have this date subscribed
21 my name.

22 Dated: March 8, 2021

23 
24 _____
Justyne Johnson,
25