



Escrow Institute of California

Established 1947

September 13, 2021

[Via E-Mail to DFPI]

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

Re: Proposed Escrow Regulations (PRO 13/13)

Dear Ms. Kaufman and Regulations Coordinator,

The Escrow Institute of California (EIC) appreciates the opportunity to comment to the California Department of Financial Protection and Innovation (DFPI) proposed changes to the Escrow Law Regulations, CCR Title 10, Chapter 3, Subchapter 9, noticed by the DFPI on August 27, 2021.

When DFPI proposed a similar set of regulations earlier this year, EIC convened a highly specialized and knowledgeable committee consisting of independent escrow company owners, attorneys, and CPA's. That committee recently reconvened within two days of publication regarding the latest set of proposed regulations.

EIC respectfully submits the following comments based on its committee analysis and board of director's action. The comments are substantive and focus on core issues that will materially affect the small business activity of escrow companies. Additionally, the effect of the proposed changes will adversely affect the ability of DFPI licensed escrow companies to compete with exempt escrow practitioners such as real estate agents and title insurance companies when providing escrow services to the public because those entities will not be burdened with similar requirements. EIC firmly believes that the result of the proposed regulations would effectively and unnecessarily disadvantage licensed independent escrow companies and hurt consumers. We ask DFPI to actively engage industry experts prior to publishing the final regulations.

Background

Our February 18, 2021 letter to DFPI traced the collaborative working environment we have enjoyed over the past 12 years. Amendments to the regulations regarding audits, CPA procedures that followed GAAP, and improvements to the business operations of licensed independent escrow companies was achieved working together, not apart. Industry experts sat down with Department staff. Issues were identified and necessary and qualitative changes were made to the regulations as a result.

We strongly believe that history should be repeated. We must work together in order to properly identify and resolve issues. Further, we suggest the proposed changes do not require immediate action. They require proper execution. Our recommendation should not be perceived as a stalling technique because we are of the firm belief that we must work together simply because it makes sense.

The reasons for our opposition outlined in this letter include the following.

EIC's Responses to the Proposed Regulations

1. Prohibited Compensation

§ 1747.7 et sec. The Legislature has not authorized the DFPI to regulate escrow fees. Thus, the proposed regulations exceed the statutory authorization (See Financial Code 17420).

In addition, the proposed regulations would diminish protections and opportunities afforded to consumers by unduly regulating fees and the discounts that may be provided to them within the confines of the federal Real Estate Settlement Procedures Act (RESPA) and the related TILA/RESPA Integrated Disclosure (TRID) regulation. As you know, RESPA is a federal anti-kickback statute that prohibits payments for the referral of business in most residential sales situations where there is a mortgage involved. TRID is a federal consumer protection regulation specifically designed to encourage consumers to shop for services and provide guarantees for timely and accurate disclosures. These laws do not set fees that may be charged, or discounts provided.

Due to inconsistency of the proposal, it also conflicts with Section 12 U.S.C. §2616 which states in pertinent part:

“This chapter does not annul alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. . . in making these determinations the Bureau shall consult with the appropriate Federal agencies.”

The proposed regulations would deem all listed acts, including negotiated fees and discounts to a consumer, as a violation, instead of requiring a determination if the act or discount is in fact a violation. The regulations will create a conflict with the RESPA statues, and with the intent of the TRID rules which are designed to encourage consumers to shop and negotiate pricing for settlement services.

The proposed regulation would also establish an unequal playing field between licensees and exempt escrow practitioners creating a detriment to consumers that contravenes the intent of the legislature regarding kickbacks in SB 133 (a measure directed at the marketing practices of title insurers) pursuant to RESPA.

Finally, the proposed regulations run counter to the California Buyer's Choice Act.

§1741.7. Prohibited Compensation

Section §17420 of the Financial Code states: "Except for the normal compensation of his own employees, it shall be a violation of this division for any person subject to this division to pay over to any other person any commission, fee, or other consideration as compensation for referring, soliciting, handling, or servicing escrow customers or accounts."

§1741.7 (a) seeks to define the activities that constitute consideration and expand the scope of the legislative intent of §17420, going well beyond its statutory authority and beyond the Federal RESPA anti-kickback limitations.

Given that there is ample state and federal law on this matter, and that the DFPI has authority to enforce RESPA, we recommend striking this language. The language is unnecessary and is not authorized by statute.

The proposed language is also overly broad, for instance a kickback it is not, and should not be, defined as providing the listed services to consumers and to the community at large, but should properly be limited to referral sources such as licensed real estate brokers, lenders and mortgage brokers, who should be defined as a "covered person or entity".

2. Prohibited Advertising

§ 1747.2 As written, this appears to prohibit all advertising. We recommend the following language.

(2) Paying or offering to pay, advertising or paying for an advertisement for a covered person or entity, in any newspaper, newsletter, magazine, publication, broadcast television, podcast, online video or online media.

(3) Paying or offering to pay, expenditures or foods, beverages, and entertainment, including catering an event, for a covered person or entity.

(4) Furnishing or offering to furnish all or any part of the time or productive effort of any employee of the escrow agent to a covered person or entity for any service unrelated to the escrow business

(5) EIC recommends striking this language entirely, as it infringes on a licensee's constitutionally protected rights to contract with its customers and its employees.

(6) (A) (B) (C) (D) We recommend this language be stricken.

Escrow licensees are not required to post their escrow fees, nor does the DFPI have statutory authority to regulate escrow fees. There seems to have developed in the DFPI and the industry at large, the concept that there is a seller's escrow fee and a buyer's escrow fee, due in large part to the customer and practice of quoting rates that way because of how contracts are written. In reality there is one escrow fee for the transaction and the allocation of that cost should be a contractual negotiation between the parties.

There is no statutory authority for the requirements in this section, except the Buyer's Choice Act and RESPA requirements that prohibit a property seller from requiring the use of a specific service provider when the Buyer is paying a fee for the service.

(8) no comment

(9) Offering a discounted rate to a covered person or entity, except to the extent that covered person or entity actually qualifies for the publicly offered discount.

(9) (b) We recommend this language be stricken as vague and overbroad and unnecessary.

3. Records to be Preserved

§ 1737.3 (a) is ambiguous which will lead to inconsistent interpretation and application. Looking at the front and back of a check due to innovations within the banking industry is not necessary and is rapidly becoming irrelevant and impractical.

We recommend striking §1737.(a)(7) because documents are already defined and without a definitive list and standard for compliance due to the many and varying types of escrows that licensees handle will lead to inconsistent interpretation.

4. Escrow Books

§ 1732.2 The terms are not consistent with the Accounting Standards Board, California Escrow Law, and case law. Attorneys, licensees, and CPA's do not use named forms. This leads to irregular and inconsistent interpretation and application. This, like several proposed changes affecting accounting should be deferred until an expert panel is convened by DFPI to work through the proposed accounting changes.

5. Annual Reports

§ 1741.5 (a)(1)(A) This section raises questionable procedures as delineated and will adversely affect consumers.

The new definition of “dormant escrow balance” in § 1741.5 (a) (1) (D)(i) is unnecessary because existing regulation § 1741.5(H) provides sufficient protection for consumers and the interest of DFPI.

The definition in **§1741.(5)(1)(G)** is confusing to CPA’s. There should be a better approach to ensure compliance.

§1741.5(a)(2)(A) violates the CPA’s Ethical Standards and is in direct conflict with §1741.5(a)(2)(B) and therefore the EIC respectfully request that it be stricken.

§ 1741.5(b)(2)(A)(C)(2)(A) and ((B)

Pending outcome of pending legislation, this section may need to be revised.

§1741.5 (c)(1)(F) Due to the continuing interests of the legislature on consumer privacy we suggest that it should be stricken from the proposed regulations.

The procedure contained in **§1741.5(c)(3)(C)(ii)** violates the CPA Professional Standards because it is subjective and lacks clear definition. There is no standard as to what the “characteristics of fraud” are. In an agreed upon procedures agreement, the CPA can only perform procedures and report on the findings. The CPA cannot editorialize on the characteristics of documentation or speculate whether something is likely to contain fraud. Additionally, the proposed regulations conflict with the California Consumer Privacy Act and other state laws.

§1741.5(c)(6)(iv) cannot be performed by the CPA because it is not a procedure. We encourage the Department to work with industry CPAs to create a procedure.

The procedures described in **§1741.5(c)(6)(B)(x) through §1741.5(c)(6)(B)(x)(V)** are broad and vague, for example as previously noted, the depository financial institution is responsible for and determines if and how checks are endorsed, and therefore these are not procedures CPA’s can perform.

There is no definition of an “unusual” transaction. The number of checks to be examined is arbitrary and may not make sense in all cases. We do not believe these procedures as written add sufficient value to justify the added time and cost.

§1741.5(d)(2) states the report is solely for the use of the Commissioner, therefore the EIC recommends it not be made a part of the public record. Further we recommend the public records act language be stricken, given the direction of the California Legislature regarding consumer privacy controls.

6. Closing Procedures

We recommend the department work with the industry to refine CPA procedures to be consistent with accountancy practices and requirements. We should avoid placing licensees in a position of not be able to obtain a closing report.

The changes are overly broad and vague concerning accountancy procedures.

7. Conclusion

Everyone would benefit from additional and productive discourse. Everyone will benefit from working through the issues in a thoughtful and collaborative way. After all, there is no rush to adopt standards that do not comport with accountancy standards and practices or regulating licensees beyond statute.

Sincerely,

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PJ Garcia, 2021 President

Cc: Christopher S. Shultz, Acting Commissioner
Ed Gill, Senior Deputy Commissioner
Sheila Oliver, Deputy Commissioner