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Department of Financial Protection and Innovation

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

Ladies and Gentlemen:

I am responding to the invitation to comment on the Notice of Modifications to Text of Proposed Regulations under the Escrow Law.

1. Changes to Section 1737.3(a)

The proposed change of adding “or the last escrow activity date” is unclear and unnecessarily lengthens the record retention requirement. For example, an escrow agent that merely reissues a check after escrow closes because a payee either lost the check or discovers it as being uncashed for a long period of time should not its record retention extended to five years from the reissuance date. This is only one of many examples where the proposed language will be a burden onto the licensee.

Requiring the back images of checks is burdensome on the licensee if the licensee’s financial institution does not transmit such images to the licensee. 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 modified proposed change to Section 1737.3(a)(7) expands the existing language too far; the section should not be a “one-size fits all” type of laundry list as there are many other examples of what can be covered under the intent of this section.

2. 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.

The solution should 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.

It still would be a simple solution to leave the current regulations alone. 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.

It is difficult to comment on the modified proposed regulations on a section-by-section basis as they continue to violate CPA professional standards. In addition, the modified proposed regulations do not take into consideration the revisions to the agreed upon procedure standards release by the AICPA (Statement on Attestation Engagement Standards 19, 20, 21).

The modified proposed changes to this section continue to raise further concerns beyond defining the reporting requirements. The modified 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. And many of the expected procedures are inefficient while at the same time being burdensome and unnecessarily time consuming.

As with many other sections of the modified proposed regulations, the expansion of the CPA reporting will add significant costs to the licensees. Our initial analysis indicates at least a twenty five percent increase in our audit fees to licensees.

3. Addition of Section 1741.5.1

The addition of modified proposed changes regarding what presently is referred to as the “closing audit” is welcome but still is not well written. The modified proposed regulations still 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.

4. Addition of Section 1741.7

The continuing perception with the modified 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.

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.

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

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

5. Conclusions

I continue to recommend that an ad hoc committee of the ELAC be formed so that there can be a collaborative effort to re-work the modified proposed regulations into a more workable and pragmatic existence. This will allow for a compromise that everyone can work without having to go back and forth with proposed regulations and comments over and over. I suggest that there be a committee comprised of two members from the DFPI, two members from the Escrow Institute, two CPA members, and two attorney members. There is a lot of history in the escrow industry and all of these potential committee members can bring that history to the table that will result in a productive and positive result.

Once again, I thank you for allowing me to submit these comments.

Very truly yours,

HAAS AND DAWE

By 

MICHAEL C. HAAS

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