

DEPARTMENT OF
FINANCIAL PROTECTION AND INNOVATION

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



VIRTUAL TRANSCRIPT OF PROCEEDINGS

Via Zoom

Thursday, November 4, 2021

Reported by:

SHELLY COFFEY
CSR No. 6808

Job No. :
34385DFPI

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2 FINANCIAL PROTECTION AND INNOVATION
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16 VIRTUAL TRANSCRIPT OF PROCEEDINGS,
17 taken via Zoom, commencing at 10:00 a.m.
18 and concluding at 10:57 a.m. on Thursday,
19 November 4, 2021, reported by Shelly Coffey,
20 CSR No. 6808, a Certified Shorthand Reporter
21 in and for the State of California.
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1 APPEARANCES:

2

3 EMILY GALLAGHER, Counsel

4 CASSANDRA DiBENEDETTO, Moderator

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10 PUBLIC SPEAKERS:

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11 P.J. Garcia

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12 Tricia Vagt

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13 Patrick Felde

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14 Jennifer Felten

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18 Donna Inman

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19 Rosie Mares

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20 Nancy Silberberg

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21 Matthew Davis

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1 Thursday, November 4, 2021

2 10:00 a.m.

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5 MS. GALLAGHER: So, my name's Emily Gallagher.
6 I work with Sherri. I'm also an attorney. And you've
7 already met your moderator, Cassandra DiBenedetto. So,
8 before we turn it over to her, I will just go over a few
9 guidelines.

10 Today we will be hearing public comments on
11 modifications to the proposed regulations package for
12 personal property, prohibited compensation, escrow books
13 and records, and the annual and closing audit reports
14 that were issued by the Department on August 27, 2021.
15 The modifications to the proposed regulations may be
16 found on the Department's website.

17 Everyone who would like to speak during the
18 public hearing must, using the Zoom software
19 functionality, raise their hand, and they will be called
20 upon by the moderator when it is their time to speak. No
21 person may speak more than once. Speaking time will be
22 limited to five minutes. The moderator will advise when
23 a speaker's five minutes have elapsed. And in order to
24 help make sure everyone has time to speak, please adhere
25 to the time limits; the moderator reserves the right to

1 mute those who do not and move on to the next speaker.

2 Today's hearing will end at 12:00 p.m., Pacific
3 Standard Time, or earlier if there are no persons waiting
4 to speak.

5 The time period for written comments on the
6 August 27th modifications closed on September 13th, 2021.

7 And additional written comments will only be
8 accepted where time restraints -- where time restraints
9 today prevent an intended speaker from providing oral
10 comments during this hearing.

11 If you do not get a chance to speak today due to
12 time constraints, written comments on the proposed
13 regulations may be submitted via email to
14 Regulations@DFPI.CA.GOV, no later than 11:59 p.m. today.

15 The public hearing is being transcribed. This
16 means that a transcript of the hearing, including the
17 comments of everyone speaking today, will become part of
18 the public record. This information will eventually be
19 posted on the Department's website.

20 Please state your name clearly for the record
21 when your time to speak comes up.

22 MS. DIBENEDETTO: Thank you, Emily.

23 First in queue, we have PJ Garcia.

24 PJ, you're up.

25 THE REPORTER: Excuse me. This is the court

1 reporter. I cannot hear Ms. Garcia.

2 MS. GARCIA: I forgot to unmute myself. Let me
3 start over.

4 MS. DIBENEDETTO: Just to let you know, for
5 housekeeping purposes, if someone starts to speak, I will
6 let them know that they're on mute and then start their
7 time once they start speaking.

8 Thank you.

9 MS. GARCIA: Good morning, Ms. Kaufman.

10 I am PJ Garcia, president of the Escrow
11 Institute of California, and I'm pleased to make comments
12 on behalf of the EIC to the revised regulations.

13 We thank the Department for holding this hearing
14 for the purpose of providing additional input from
15 licensees and the professionals that represent us
16 regarding the Department's proposed escrow regulations.
17 Thank you for rescheduling this hearing to allow our CPAs
18 to provide substantive comments.

19 We respectfully request the regulations be
20 withdrawn due to a number of substantive and material
21 factors, including questionable legal authorization, that
22 cannot be resolved in an expedited regulatory hearing.
23 The issues are complex and substantive. The regulations
24 will unquestionably create a great deal of confusion,
25 differing interpretations and application, which is

1 something all of us want to avoid.

2 Licensees and subject matter experts can only
3 offer brief comments today on these complex matters. We
4 believe that a superior approach would be to immediately
5 convene a meeting of interested parties to work through
6 each regulation change. We don't know of any other way
7 this can be effectively accomplished.

8 My comments today will primarily focus on the
9 impact to licensees. Unfortunately, our focus, along
10 with others, cannot be just to the changes that were made
11 since the last hearing because each proposed change in
12 regulation is based on another proposed change or
13 existing regulation. They are too interconnected to do
14 otherwise.

15 I want to focus today on our major concerns
16 relating to fees and charges and will leave the comments
17 on the more technical aspects of the proposed audit
18 requirements to the CPAs I expect will speak today. In
19 attempting to limit my comments to the very short five
20 minutes allowed, I will refer you to our prior comment
21 letters for fuller articulation.

22 Regulation Section 1741.7, prohibited
23 compensation, remains an anathema to licensees because we
24 do not see the necessity or statutory authority for it.
25 We understand the Department is addressing the complaints

1 of a few licensees which have focused on the division and
2 allocation of the escrow fee. Further exploration of
3 these issues is merited. This is a complicated and
4 substantive issue that deserves a more full and open
5 discussion between licensees and the Department outside
6 of an expedited regulatory hearing, where the fullness of
7 the issue cannot be explored.

8 This discussion should include the other escrow
9 regulators, such as DOI and DRE, and their licensees to
10 provide uniformity to the California consumers we serve.

11 It has been customary for escrow companies to
12 offer different rates to various types of consumers in
13 escrow transactions. Rates are based on a complex
14 formula, and that includes location, transaction size,
15 complexity, and other risk factors. These different
16 rates are legitimate and compassionate, and many
17 businesses follow this model. Licensees take great pride
18 in assisting the most vulnerable consumers in our
19 communities, such as seniors and veterans. We believe we
20 should help our senior citizens and support our veterans
21 and first-time homebuyers by offering different rates.
22 We have no information there is evidence that these
23 different rates offered by licensees harm rather than
24 help those consumers, as well as others. To gloss over
25 this extremely important matter does not -- does a

1 disservice to licensees and consumers.

2 The current proposed regulations go much further
3 than prohibiting kickbacks. They have the effect of
4 regulating escrow fees, which is not statutorily
5 authorized.

6 Regulation Section 1741.17, prohibited
7 compensation, addresses financial consideration. State
8 and federal law fully protects consumers in this area
9 and, therefore, this section should be deleted.

10 Regulation Section 1747.2, prohibited
11 advertising, the purpose -- the purpose of the
12 prohibitions on advertising are vague, confusing, and
13 redundant. Thus, this section should also be deleted.

14 The State provides itself on Uniform Law, which
15 is the ultimate consumer --

16 MS. DIBENEDETTO: Thirty seconds.

17 MS. GARCIA: We ask the Department that changes
18 in the Escrow Law follow changes in law that affect any
19 entity providing escrow services. We have submitted two
20 comment letters to date this year and ask they be
21 incorporated in the record.

22 We thank you for your time and consideration and
23 look forward to working with the Department.

24 MS. DIBENEDETTO: Thank you, PJ.

25 Up next we have Tricia Vagt.

1 Tricia.

2 MS. VAGT: Good morning, everyone.

3 I am the 2021 California Escrow Association
4 president, and we totally support what the Escrow
5 Institute of California, PJ Garcia, said.

6 And I would like to add that the proposed new
7 Section of 1741.7, prohibited compensation, exceeded the
8 Department's authority to enforce prohibitions on rebates
9 or kickbacks for the referral of escrow services and
10 instead amounted to unauthorized regulation of fees
11 themselves.

12 While we know that some changes were made to the
13 first draft, we respectfully suggest that the revised
14 draft continues to micromanage fees and business
15 practices which do not amount to violations of Financial
16 Code 17420 and that this section should, therefore, be
17 deleted.

18 More troubling is the language in proposed
19 Section (a)(5) which making the offering of a free escrow
20 service to one or more parties to the escrow as perceived
21 violation.

22 We are aware of escrow licensees whose business
23 model is based upon no fees to sellers, and we do not
24 believe that this business model violates the spirit of
25 Section 17420. Parties should be free to contract with

1 escrow providers where no fee is charged to sellers as
2 long as that fee provision applies as all sellers
3 equally, is properly disclosed, and agreed to by all
4 parties to the transaction.

5 So, finally, we propose Subdivision (a)(6), all
6 discount prohibited, offering services, all rates below
7 the escrow agent's fee schedule, unless certain
8 conditions are met; we are aware of no requirement to
9 create, publish, post, or submit fee schedules -- so --
10 to a regulatory. So, we believe that this language
11 exceeds any authority granted by the Financial Code.

12 Thank you for the opportunity to speak and for
13 giving us the hearing that we requested.

14 Thank you.

15 MS. DIBENEDETTO: Thank you.

16 Up next, we have Patrick Felde.

17 Patrick, to you.

18 MR. FELDE: Hi, I'm Patrick Felde, CPA, managing
19 partner of Felde & Company, CPAs.

20 The proposed, agreed-upon procedures engagement
21 relating to the annual report contains procedures that do
22 not comply with the CPA Professional Standards relating
23 to such engagements.

24 I want to emphasize that the Department of
25 Financial Protection and Innovation is the author of the

1 proposed agreed-upon procedures engagement. Therefore,
2 the DFPI is solely responsible for making sure that the
3 AUP engagement complies with the applicable CPA
4 standards. It is not the responsibility of the
5 independent escrow industry to make sure the procedures
6 contained in the proposed engagement comply with the
7 applicable standards. It is not the responsibility of
8 the CPAs that service the independent escrow industry to
9 make sure the procedures contained in the proposed
10 engagement comply with the applicable CPA standards. It
11 is the sole responsibility of the DFPI to make sure the
12 procedures are in compliance with the CPA Professional
13 Standards.

14 The DFPI is taking the position that the
15 proposed rule and proposed procedures contained therein
16 do not appear to violate the CPA Professional Standards
17 and puts the responsibility on the escrow industry and
18 CPAs to offer specific reasons as to why specific
19 procedures do not comply with the CPA Professional
20 Standards.

21 This is not how this works. This cannot be done
22 in five minutes of testimony. In creating the CPA
23 Professional Standards, CPAs and users of financial
24 statements and the related reporting spent a lot more
25 time than that, invited comments from all stakeholders,

1 and took those comments seriously. This is the process
2 used when professional standards are created or changed.

3 The CPA profession, including the CalCPA
4 Accounting and Assurance Committee, has offered their
5 assistance in crafting an agreed-upon procedures
6 engagement that will comply with the CPA Professional
7 Standards.

8 You are going to see the CalCPA Accounting and
9 Assurance Committee become more involved in this process
10 since it appears that the DFPI is pushing this
11 substandard engagement to a final conclusion. Yes, this
12 will be a substandard engagement created by the DFPI that
13 CPAs will not be able to perform.

14 The California CPA profession over the years has
15 assisted other California government agencies in the
16 development of agreed-upon procedures engagements that
17 are compliant with the professional standards. These
18 other government agencies welcomed the help.

19 We have been through this process now for eight
20 and a half years with countless drafts that are not
21 compliant with the CPA Professional Standards. There
22 have been countless written comments and suggestions that
23 have been ignored.

24 If the DFPI finalizes the current proposed
25 regulation and related procedures, California CPAs will

1 not perform the engagements and the DFPI will have a
2 bigger mess on their hands than they do now.

3 The California State Board of Accountancy will
4 not let California CPAs perform such engagements that do
5 not comply with the CPA Professional Standards.

6 Camico, a professional insurance carrier, who
7 insures most of the California CPAs that perform such
8 engagements will not insure such CPAs who perform such
9 substandard engagements.

10 The California CPA profession is offering to
11 help to draft this proposed rule correctly. The DFPI
12 should take it and develop a working group to sit down
13 with the California CPA profession. The CalCPA
14 profession can give the answers the DFPI is seeking and
15 assist in developing a workable rule and compliant
16 procedures. However, it will take more than five minutes
17 and a more welcoming attitude from the DFPI toward the
18 CPA profession.

19 Thank you.

20 MS. DIBENEDETTO: Thank you.

21 Up next we have Jennifer Felten.

22 Jennifer.

23 MS. FELTEN: Yes. My name is Jennifer Felten.
24 I am a real estate attorney in California. Our firm
25 represents several hundred escrow companies, independent

1 companies that are regulated by the DFPI, and we have
2 significant concerns regarding the proposed regulations.

3 Based upon the time limits afforded by this
4 hearing, I'm going to limit my points to the new reg,
5 1741.7.

6 Our position is that if this regulation is
7 passed it will have significant negative impacts for
8 independent escrow companies and consumers in California.
9 We have raised these concerns on multiple occasions,
10 including speaking at the March hearing. Some of the
11 concerns were addressed in the revision that we have
12 received, but still significant issues remain. The risk
13 to consumers is great with this new proposed regulation.
14 It goes significantly against previous rules and guidance
15 from the DFPI, specifically the January 2007 DBO Bulletin
16 delineating the rules and regulations and the
17 Department's understanding of how discounts were allowed
18 in the industry.

19 As the bulletin states: Nothing in this
20 bulletin is intended to preclude the free negotiation of
21 escrow fees by escrow agent licensees and their
22 principals to escrows where the escrow was not induced by
23 the offer of a reduced discount or escrow fee.

24 This has been the guidance based upon the
25 Financial Code for -- since 2007 and well before, and

1 these new regs go starkly against that. Instead, they
2 would attempt to regulate discounts; specifically,
3 1741.7(a)(6), those rules would take away the ability to
4 negotiate fees between the parties, as specifically
5 authorized.

6 Area customs differ. And it's particularly hard
7 to deal with and negotiate these fees in one flat way.

8 Second, the bulletin, as I mentioned, from 2007,
9 again, confirms that the DFPI is aware that they do not
10 have broad authority to regulate fees.

11 As the bulletin states: Traditionally, escrow
12 fees have been subject -- have not been subject to
13 regulation, but instead are determined by the competitive
14 rate established in a market.

15 These rules are antitrust, anticompetitive, and
16 would take all of that away from the consumers and the
17 escrow companies that service them.

18 They would take away the ability to do things
19 like resolve a complaint. If there was an issue and a
20 need to compensate someone for something that happened,
21 taking away the specific traditional discounts authorized
22 in the January 2007 Bulletin, like builders, repeat
23 business, others, senior citizens, first responders, many
24 of those discounts are currently available and would all
25 be taken away by these new regulations.

1 These are not in accord with the DFPI's own
2 guidance or with Section 17420. That rule has very
3 specific regulations; where it's a departure made from a
4 fee schedule resulting from negotiation, it is completely
5 allowed and legal, and that was stated in the DFPI's own
6 bulletin.

7 Another area of significant concern is the
8 uneven playing field that these new regulations would
9 provide. There seems to be a misunderstanding on the
10 part of the regulator as to their role in the industry.
11 The DFPI only regulates one small fraction of the
12 industry that does settlement services.

13 Pursuant to Financial Code 17006, banks, trust
14 companies, billing and loan and savings companies,
15 insurance companies, attorneys, title agents, and real
16 estate brokers are all exempt from the Escrow Law. All
17 of those different people perform escrow services and are
18 not subject to the Financial Code or the regulations
19 proffered by the DFPI. As a result, the one industry
20 that actually does have specific rules and regulations is
21 being over-regulated, where others are not being
22 regulated or controlled in any way.

23 You know, when another area of this industry did
24 regulate in this area, in the anti-kickback space, the
25 Department of Insurance, they did so in the proper way

1 via a Senate Bill, SB-133, in 2008. That is where this
2 regulation should be handled and managed because that's
3 where the regulatory authority is, with the legislature,
4 not with the DFPI.

5 Specifically relative to 1741.7, the Financial
6 Code specifically regulates the ability of escrow
7 companies to pay -- specifically "any other persons" is
8 the language. However, the new proposed Regulation --

9 MS. DIBENEDETTO: Thirty seconds.

10 MS. FELTEN: -- 1741.7, (1), (3), and (4) would
11 prohibit any person, not just other persons, which would
12 impact employees.

13 1741.7, as amended, takes away the ability to
14 advertise at all because it takes out the reference to
15 "on behalf of." And other areas of this language are
16 confusing, hard to interpret. As a lawyer, I can't
17 interpret them, let alone the average consumer or escrow
18 company.

19 So --

20 MS. DIBENEDETTO: Time.

21 Rose, you're currently muted.

22 (There was a pause in the proceedings)

23 Rose, you're still muted.

24 MS. POTHIER: Am I now unmuted?

25 MS. DIBENEDETTO: You are.

1 MS. POTHIER: Okay. Thank you. I'm sorry. The
2 Zoom just left the -- all of you just left my monitor,
3 but you're back. Thank you.

4 My name is Rose Pothier. My law firm now and
5 has for many years represented licensed escrow companies.
6 Although the commissioner published a number of proposed
7 regulations, the focus of my comments today pertain to
8 the proposed regulation to add new CCR Section 1741.7
9 regarding prohibited compensation.

10 The commissioner recites the authority of the
11 60-year old Financial Code Section 17420, amended in
12 1961, as support for the enactment of the new CCR 1741.7.
13 For the reasons set forth in the written comments I filed
14 with the commissioner and presented today, the extent of
15 the present iteration of the proposed CCR 1741.7 is well
16 outside the provisions of the Government Code at
17 Government Code Sections 11342.1 and 11342.2, which state
18 that no regulation can be adopted as valid or effective
19 provisions unless consistent and not in conflict with the
20 statute and reasonably necessary to effectuate the
21 purpose of the statute.

22 For the reasons set forth herein, we propose
23 that the commissioner withdraw CCR Section 1741.7, given
24 the lack of authority for the form and content of the
25 proposed regulation.

1 The provisions of the proposed regulation
2 prohibiting compensation exceeds the authority of the
3 commissioner, who is relying on the limited provisions of
4 Financial Code Section 17420.

5 Government Code Sections 11342.1 and 11342.2
6 make it clear that the commissioner does not have
7 unfettered power to impose regulations outside the
8 statutory delimitation upon which it relies. This point
9 was confirmed by the California Supreme Court in the 2017
10 case of Association of California Insurance Companies
11 versus Jones.

12 The effect -- excuse me.

13 The effort of the commissioner to prohibit
14 compensation paid to licensed escrow companies disallow
15 them to offer free or discounted escrow fees to public
16 members and to limit the parties to the real estate
17 contracts from changing the manner in which they pay
18 escrow fees where different from the contract they
19 signed. These are not consistent with the provisions of
20 Financial Code Section 17420 and, thus, in violation of
21 Government Code Sections 11342.1 and 11342.2.

22 Financial Code Section 17420 in its first
23 sentence states that except for the normal compensation
24 of his own employees, it shall be a violation of this
25 division for any person subject to the division to pay

1 over to any other person any commission fee or other
2 consideration as compensation for referring, soliciting,
3 handling, or servicing escrow customers or accounts.

4 There is no delimitation on licensed escrow
5 companies providing free or discounted escrow fees to
6 public members or otherwise operating a business,
7 including providing marketing concessions with de minimis
8 values.

9 The second sentence in Financial Code Section
10 17420 provides that fees, commissions, and compensation
11 contingent upon the performance of the act, such as the
12 close of escrow, not be paid prior to anyone until the
13 closing.

14 Notwithstanding, there is no requirement under
15 the Financial Code for the setting of escrow fees or the
16 maintenance of an escrow-fee schedule or prohibiting
17 parties to the escrow to amend the manner of payment of
18 escrow fees.

19 The commissioner appears to be acting without
20 compliance with the provisions of the referenced
21 government codes to impose regulations in the proposed
22 form without proper statutory authority identified under
23 new CCR 1741.7 and its various proposed subdivisions.

24 As the California Supreme Court held in the 2017
25 case of Association of California Insurance Companies

1 versus Jones, among other things, it stated --

2 MS. DIBENEDETTO. Thirty seconds.

3 MS. POTHIER: -- the test to determine the
4 validity of the regulation is further set forth in the
5 Government Code, which states that no regulation adopted
6 as valid or effective unless consistent and not in
7 conflict with the statute and reasonably necessary to
8 effectuate the purpose of the statute.

9 In summary, Commissioner, please withdraw the
10 new CCR 1741.7.

11 Thank you.

12 MS. DIBENEDETTO: Thank you.

13 We currently have no hands raised. Is there
14 anyone else who would like to speak at this time?

15 MR. DAVIS: Ms. Kaufman, it's Art Davis with
16 AEA. I can't figure how to raise my hand on this. Could
17 I just be recognized?

18 MS. DIBENEDETTO: All right, Art. I'll
19 recognize you. Your time starts now.

20 MR. DAVIS: Thank you.

21 I've got a written statement that would run over
22 five pages. I'm going to read the first two and then,
23 with your permission, send in the rest. The last three
24 pages are primarily a legislative history of RESPA.

25 So, my comments are as follows: I'm speaking

1 only with regard to the modification and its underlying
2 foundational record to the previously proposed Title 10
3 CCR new 1741.7, any comments as the National Trade
4 Association, but some members of California directly
5 affected by this rulemaking.

6 Our comments and concerns are limited to the
7 DFPI's reliance as authority on the Federal Statute known
8 as RESPA, Title 12, U.S.C. Section 2601, et seq.

9 Although in isolation it's possible to find improvements
10 to the wording of certain provisions such as
11 1741.7(a)(2), advertising, our core point is that the
12 entire section as constructed to not rely on RESPA for
13 the reasons that follow:

14 The reliance on RESPA is contained in the DFPI's
15 initial statement's reasons. From 2020, it includes a
16 deemed-violation approach, as stated on page 30, the date
17 of those reasons.

18 On page 39 in the key language, the DFPI states
19 that the prohibited -- proposed prohibited activities are
20 common RESPA violations reported to the Department by the
21 escrow industry. While we understand that RESPA
22 (inaudible) violations through, quote, tattletale
23 enforcement, meaning within the industry, provides most
24 leads, that's been true for decades at the federal level,
25 but that does not lead to the conclusion that a lead is

1 self-proving as a violation, especially not a per se
2 violation.

3 Some may be, essentially, obvious on their face
4 or what's called in the federal arena an easy-to-prove
5 violation, such as a hypothetical hundred dollar charge
6 if it were stated on the closing statement as additional
7 cost for a referral fee, but a consumer-benefiting
8 discount would not be in that category. There has to be
9 an enforcement investigation to support any action on
10 almost any (inaudible), with development of a record,
11 that is to say, substantial evidence and findings
12 supported by the law and the evidence to conclude a
13 violation -- excuse me -- a violation has occurred.

14 I apologize. I caught a cold. My throat's a
15 little bit sore today.

16 That's the way RESPA and Reg X have always been
17 handled by HUD and the CFPB. The rest of the paragraph
18 on 39 is summarized by a proper purpose, namely,
19 anti-kickback purposes.

20 So, while we commend the DFPI on its goals,
21 we're convinced you gravely erred in reliance on RESPA,
22 the statute, and Reg X for its deemed-violation approach.

23 Now, on the technical point, I think I'm similar
24 to Rose. I may be different. But we were initially
25 confused by the RESPA references to the statement reasons

1 beyond their obvious connection with Section 425 --
2 17425. A RESPA violation could include charging the fee
3 for the preparation of the uniform settlement statement,
4 which is now the closing disclosure, or making a false
5 statement in connection with its preparation. That would
6 presumably also be 17425 violations. However, as the
7 content of the actual proposed regulation is specific
8 only to the prohibited compensation, anti-kickback,
9 Section 17420, it raised the question of whether the
10 Section 17425 discussion was mere surplusage only.
11 Beyond that and stated otherwise, the question was
12 whether the interpretive authority cited, 17400, for this
13 new regulation was solely relying on RESPA to give more
14 rule-of-law content to 17420 or whether 17420 on its own
15 could support 1741.7.

16 So, ultimately, given the extent of that linkage
17 discussion, we concluded that the Department is actually
18 asserting it can use as interpretive authority under
19 17400 to articulate certain business practices as per se
20 violations of RESPA and apply that conclusion directly to
21 both 17420 and 17425, without regard to whether there's a
22 finding that a thing of value --

23 MS. DIBENEDETTO: Thirty seconds.

24 MR. DAVIS: Excuse me. -- has been exchanged
25 for the referral of business. It's impossible to support

1 this approach. And, as I said, the rest of it is
2 legislative history that I'd like to submit for the
3 record.

4 I apologize. My throat has failed me today.
5 But I think you'll find it interesting.

6 In conclusion, we ask that the regulation be
7 withdrawn.

8 Thank you.

9 MS. DIBENEDETTO: I don't see any additional
10 hands. Is there anyone else who would like to be
11 recognized?

12 MR. TREPETA: Yes. This is Ken Trepeta, with
13 the Real Estate Services Providers Council.
14 T-r-e-p-e-t-a is my last name spelling. I couldn't find
15 the raised-hand button either.

16 MS. DIBENEDETTO: That's fine. You're
17 recognized.

18 MR. TREPETA: Thank you.

19 I would just like to associate myself with the
20 previous comments, particularly Art Davis's comments,
21 PJ'S comments.

22 RESPRO -- at RESPRO we are -- we specialize in
23 the Real Estate Settlement Procedures Act. We believe
24 that you should focus on enforcing that Act and its
25 well-established best practices and rules, as has been

1 done over the past 40 years, rather than try to narrow
2 down and focus on various activities that in many cases
3 do not constitute RESPA violations.

4 So, I mean, our recommendation is that you focus
5 on Section 8(a), (b), and (c) of RESPA and -- including
6 the provisions in (a), (c) that allow payments for
7 services rendered and other arrangements and not -- and
8 dispense with 1741.7.

9 Just one last thing, with regard to fee setting,
10 I think the sections -- I guess it would be (5) to (8)
11 now deal with fee setting. And RESPA has never been a
12 fee-setting statute, and I think it's important to avoid
13 this because the experience -- at least our experience
14 across the country has been when folks do this, you wind
15 up harming consumers because it, essentially, winds up
16 either establishing rates at a higher level to cover the
17 worst-case scenarios. And then people don't have the
18 flexibility to alter those rates or to accommodate, and
19 it tends to force prices up, rather than down. And, so,
20 that's been our experience at least, not necessarily with
21 escrow but with other industries that come under RESPA,
22 such as title. So, I mean, that -- so, the
23 recommendation is to avoid locking people into fee
24 structures because it turns out to be not pro consumer.

25 I'll, you know, save folks time here. Everyone

1 else did a great job of highlighting the concerns with
2 this. We share those concerns, and we hope you
3 reconsider Section 1741.7.

4 I'm happy to submit more detailed comments.
5 I've already done that in writing before, but I'm happy
6 to resubmit them. And we do appreciate the changes that
7 you did make to this section already. I think those were
8 good changes, but I think the section as it stands still
9 needs a lot of work. And we think we should stick with
10 enforcing RESPA. It has all the tools you need in it
11 already.

12 Thank you so much.

13 MS. DIBENEDETTO: Thank you.

14 Up next we have Donna Inman.

15 Donna, you're recognized.

16 MS. INMAN: Thank you so much. I appreciate the
17 opportunity to speak to you today.

18 I am the current president of the American
19 Escrow Association, a past president of the California
20 Escrow Association, and I work here in Southern
21 California in escrow, as well.

22 I want to thank all the previous speakers. They
23 have done an excellent job. And I just urge you to
24 withdraw the proposed 10 CCR Section 1741.17, and you
25 may -- for so many reasons. And that code -- oh, I can't

1 read my notes. Sorry about that.

2 That Code Section 17420, which is referral fee
3 contact, that increases the cost of closing through
4 advisories, enforcement bulletins, and enforcement
5 investigations, and actually were never warranted.

6 Again, we just urge you that you withdraw
7 1741.7, and I thank you for your consideration of our
8 comments and all the previous comments.

9 MS. DIBENEDETTO: Thank you.

10 MS. MARES: Hello, this is Rosie Mares here from
11 RMA Accounting Services, and we provide accounting
12 services and consulting services to approximately a
13 hundred independent escrow companies. I'd like an
14 opportunity to provide input on behalf of them. Is that
15 fine?

16 MS. DIBENEDETTO: Yes. You're recognized.

17 MS. MARES: Thank you.

18 So, the companies that we represent are smaller
19 in nature, and they do look to myself and my company for
20 guidance on how to be compliant in the various areas of
21 the independent Escrow Law. And 17420 has been
22 sufficient for me to be able to advise them on, you know,
23 not doing kickbacks and referral fees. They understand
24 that they are limited on what they can do; that their
25 consumer should be their client, not the brokers and

1 agents. So, I think, for the most part, the smaller
2 companies and all the companies, licensed companies,
3 understand 17420. And that this new regulation, the
4 1741.7, is really aimed toward the rogue owners and
5 marketers for certain companies, small, you know,
6 under -- I think they're small in nature or a small
7 number in nature, and that this is going to harm --
8 actually not -- it's going to harm the compliant
9 companies more than it's going to stop those who are
10 rogue and trying to drum up business every way they can.

11 So, I also agree with everybody, all the
12 esteemed speakers, that went before me, that Section
13 1741.7 should be withdrawn, and there should be just more
14 strict enforcement of 17420. And I believe that one way
15 is to constantly put out publications from DFPI through
16 their newsletters explaining what can and cannot be done,
17 what it means, because the publication, the newsletter,
18 as quoted by Jennifer Felten, from 2007, well, that's 14
19 years ago. That's -- and in that time there have been a
20 number of new companies licensed, and they need guidance.
21 And they need guidance and the newsletters on a more
22 periodic basis than once a year. I don't even know the
23 last time we got a newsletter. So, more public
24 information, education to the licensees, that's what's
25 needed, not something that's going to restrict them and

1 could cause harm to the public.

2 So thank you very much for letting me make this
3 statement.

4 MS. DIBENEDETTO: Thank you.

5 Is there anyone else who would like to be
6 recognized today?

7 Up next we have Nancy Silberberg.

8 Nancy, over to you.

9 MS. SILBERBERG: My name is Nancy Silberberg,
10 president and owner of Altus Escrow, Inc. I would like
11 to thank the Department of Financial Protection and
12 Innovation, Sherri Kaufman, for the opportunity to
13 provide oral comments this morning.

14 I fully support those comments articulated this
15 morning and the written submissions by PJ Garcia, with
16 the Escrow Institute of California; Tricia Vagt, with the
17 California Escrow Association; Art Davis, with the
18 American Escrow Association; Ken Trepeta, with RESPRO
19 industry attorneys, regarding the proposed new Section
20 1741.7, prohibited compensation.

21 I would also like to state that I believe the
22 proposed regulations in Section 1741.7 appear to be
23 outside the commissioner's authority granted in Section
24 17420 and 17425.

25 Furthermore, Section 1741.7(a)(5)(6)(7) are an

1 attempt to regulate escrow fees, which the DFPI has
2 clearly stated verbally and in writing on the DFPI's
3 website under the FAQ section, question 13, that DFPI
4 does not regulate escrow fees.

5 The Escrow Law does -- I'm quoting -- the Escrow
6 Law does not restrict the fees that escrow agents charge
7 for services. The amounts escrow agents charge for their
8 services vary depending on the location of the escrow
9 agent, type of transaction, and the competition in the
10 area, end quote.

11 The inability of a licensee to discount their
12 fees, perhaps for a veteran or senior citizen, or to
13 price match another escrow company's escrow rate limits
14 licensees from a competitive marketplace and ultimately
15 harms the consumer, as stated in prior testimony.

16 Regarding the proposed audit changes, as some of
17 the CPAs have stated herein, I encourage the DFPI to work
18 with the industry's CPAs, CalCPA, and AICPA to provide
19 clarity to the proposed regulations, whether it be in
20 defining terms or developing an agreed-upon procedures
21 engagement.

22 I respectfully request the regulations be
23 withdrawn.

24 Finally, having served on the Escrow Law
25 Advisory Committee as president and immediate past

1 president of the Escrow Institute of California, I found
2 it tremendously productive and beneficiary to all
3 stakeholders when we work together. I strongly suggest
4 the DFPI work with industry stakeholders to further work
5 on these regulations.

6 Thank you for your consideration.

7 MS. DIBENEDETTO: Thank you.

8 Is there anyone else who would like to be
9 recognized?

10 At this point, we'll wait five minutes; and if
11 no one has been recognized, we'll move to close the
12 meeting.

13 (There was a pause in the proceedings)

14 MS. DIBENEDETTO: Matthew Davis, you're
15 recognized to speak.

16 MR. DAVIS: Hi. Can you hear me? I've been
17 having trouble with my microphone and computer.

18 MS. DIBENEDETTO: I can.

19 MR. DAVIS: Great.

20 My name is Matthew Davis. I am an attorney at
21 Davis & Davis Law Group. We are a law firm that has
22 represented various entities over the course of 75 years.
23 I strongly want to put on the record my support to the
24 statements made by the Escrow Institute, California
25 Escrow Association, Art Davis, and Ken Trepeta, as well

1 as the attorneys who have previously spoken. They very
2 well articulated the concerns of our firm, as well as
3 many of my clients within the industry, that the proposed
4 regulation of 1741.7 is not only not justified by the
5 commissioner's authority but, as indicated by Art Davis,
6 seems to be attacking issues and deeming things as per se
7 violations rather than doing a regulatory enforcement
8 action with a factual analysis to determine whether or
9 not a violation factually occurred under Financial Code
10 17420 or under RESPA.

11 In California, there are numerous federal cases
12 which have interpreted that the deeming of a per se
13 violation is not the appropriate procedure.

14 The case of Schuetz versus Banc One Mortgage
15 Corporation in 2002, 292 F.3d 104, and the Elaine versus
16 Residential Funding case, the same year, at
17 323 F.3d 739, each in the context of determining
18 kickbacks under HUD, indicated by the court that a
19 factual analysis of the issues is required and that under
20 HUD that the courts are to conduct an analysis
21 recognizing the HUD test and that this is really the
22 appropriate way for regulatory regulation and
23 interpretation of a kickback statute.

24 The comments about the structure of 1741.7 is of
25 particular concern given its vagueness. There are a

1 number of sections, in an overreach to regulate certain
2 issues, that lack clarity or will create unintended
3 consequences, likely causing the industry to be forced to
4 challenge the regulation through the court processes.

5 Ultimately, what I'd like to leave with the
6 Department is that there are many entities and
7 individuals that work within the industry that have
8 offered and remain ready, willing, and able to assist in
9 meeting with the Department in order to address the
10 Department and the industry's concerns as it may relate
11 to the unauthorized kickbacks, benefits, and favors that
12 certain entities may offer in exchange for business.

13 I had an opportunity to review the underlying
14 legislative history, as well as, ironically, my
15 grandfather's own personal notes from 1961 for AB-55,
16 which is the underlying legislative statute that created
17 Financial Code 17420, as we know it. And the notes and
18 the legislative history demonstrate that the substantial
19 changes made to the Escrow Law in this section were
20 through a joint venture between the Corporations
21 Commissioner at the time and the Escrow Institute of
22 California, and that the bill was drafted through a joint
23 session of numerous committees between the two entities
24 and, therefore, was presented to the legislature with
25 virtually no opposition and no issue. This was a joint

1 venture, and the history of that section and the joint
2 cooperation between the two sides, being the regulator
3 and the industry, resulted in a bill that has -- and a
4 statute that has remained consistent --

5 MS. DIBENEDETTO: Thirty seconds.

6 MR. DAVIS: -- and unchanged.

7 So, in conclusion, what I would ask is that the
8 commissioner withdraw the current reiteration of 1741.7
9 and engage in a joint venture between the Department and
10 the escrow industry in order to craft a legislative
11 amendment or a recrafting of Financial Code 17420 that
12 would address the real issues of --

13 MS. DIBENEDETTO: Time.

14 MR. DAVIS: Thank you.

15 MS. DIBENEDETTO: At this time, is there anyone
16 else who would like to be recognized?

17 We'll begin a five-minute-time period at the end
18 of which if no one has asked to speak, we will conclude
19 the meeting.

20 (There was a pause in the proceedings)

21 MS. DIBENEDETTO: We have 30 seconds left in our
22 period with no speaking. So, here in about 30 seconds if
23 the DFPI attorney would like to speak and close out the
24 meeting, we should be good to go, unless there are any
25 final words.

1 MS. GALLAGHER: Cassandra, should I do that now?

2 MS. DIBENEDETTO: Yep. You're good to go.

3 MS. GALLAGHER: Okay. Great.

4 So, on behalf of Sherri and the Department, I
5 want to thank everyone for your comments.

6 Also, I have one correction to my introduction.
7 We will accept and add to the record the written comments
8 submitted during this hearing.

9 The transcript for this hearing will be
10 available on the Department's website, and your comments
11 will be considered and responded to in the final
12 statement of reasons for the rulemaking.

13 And I believe that's it and we can close the
14 hearing.

15 MS. DIBENEDETTO: Thank you. Closing it now.

16 (Hearing concluded at 10:57 a.m.)
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1 REPORTER'S CERTIFICATION

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

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

12 I further certify I am neither financially
13 interested in the action nor a relative or employee of
14 any attorney or party to this action.

15 IN WITNESS WHEREOF, I have this date subscribed my
16 name.

17 Dated: November 9, 2021

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21 Shelly Coffey, CSR #6808
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