DEPARTMENT OF

FINANCIAL PROTECTION AND INNOVATION

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

CERTIFIED COPY

VIRTUAL TRANSCRIPT OF PROCEEDINGS

Via Zoom

Thursday, November 4, 2021

Reported by:

SHELLY COFFEY
CSR No. 6808

Job No.:
34385DFPI

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VIRTUAL TRANSCRIPT OF PROCEEDINGS,

taken via Zoom, commencing at 10:00 a.m. and concluding at 10:57 a.m. on Thursday, November 4, 2021, reported by Shelly Coffey, CSR No. 6808, a Certified Shorthand Reporter in and for the State of California.

APPEARANCES:

EMILY GALLAGHER, Counsel
CASSANDRA DiBENEDETTO, Moderator

Thursday, November 4, 2021

10:00 a.m.

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

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

Everyone who would like to speak during the public hearing must, using the Zoom software functionality, raise their hand, and they will be called upon by the moderator when it is their time to speak. No person may speak more than once. Speaking time will be limited to five minutes. The moderator will advise when a speaker's five minutes have elapsed. And in order to help make sure everyone has time to speak, please adhere to the time limits; the moderator reserves the right to mute those who do not and move on to the next speaker.

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

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

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

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

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

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

MS. DIBENEDETTO: Thank you, Emily.

First in queue, we have PJ Garcia.

PJ, you're up.

THE REPORTER: Excuse me. This is the court reporter. I cannot hear Ms. Garcia.

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

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

Thank you.

MS. GARCIA: Good morning, Ms. Kaufman.

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

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

We respectfully request the regulations be withdrawn due to a number of substantive and material factors, including questionable legal authorization, that cannot be resolved in an expedited regulatory hearing. The issues are complex and substantive. The regulations will unquestionably create a great deal of confusion, differing interpretations and application, which is something all of us want to avoid.

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

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

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

Regulation Section 1741.7, prohibited compensation, remains an anathema to licensees because we do not see the necessity or statutory authority for it. We understand the Department is addressing the complaints of a few licensees which have focused on the division and allocation of the escrow fee. Further exploration of these issues is merited. This is a complicated and substantive issue that deserves a more full and open discussion between licensees and the Department outside of an expedited regulatory hearing, where the fullness of the issue cannot be explored.

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

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

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

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

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

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

MS. DIBENEDETTO: Thirty seconds.

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

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

MS. DIBENEDETTO: Thank you, PJ.

Up next we have Tricia Vagt.

Tricia.

MS. VAGT: Good morning, everyone.

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

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

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

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

We are aware of escrow licensees whose business model is based upon no fees to sellers, and we do not believe that this business model violates the spirit of Section 17420. Parties should be free to contract with escrow providers where no fee is charged to sellers as long as that fee provision applies as all sellers equally, is properly disclosed, and agreed to by all parties to the transaction.

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

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

Thank you.

MS. DIBENEDETTO: Thank you.

Up next, we have Patrick Felde.

Patrick, to you.

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

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

I want to emphasize that the Department of Financial Protection and Innovation is the author of the proposed agreed-upon procedures engagement. Therefore, the DFPI is solely responsible for making sure that the AUP engagement complies with the applicable CPA standards. It is not the responsibility of the independent escrow industry to make sure the procedures contained in the proposed engagement comply with the applicable standards. It is not the responsibility of the CPAs that service the independent escrow industry to make sure the procedures contained in the proposed engagement comply with the applicable CPA standards. It is the sole responsibility of the DFPI to make sure the procedures are in compliance with the CPA Professional Standards.

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

This is not how this works. This cannot be done in five minutes of testimony. In creating the CPA Professional Standards, CPAs and users of financial statements and the related reporting spent a lot more time than that, invited comments from all stakeholders, and took those comments seriously. This is the process used when professional standards are created or changed.

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

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

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

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

If the DFPI finalizes the current proposed regulation and related procedures, California CPAs will not perform the engagements and the DFPI will have a bigger mess on their hands than they do now.

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

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

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

Thank you.

MS. DIBENEDETTO: Thank you.

Up next we have Jennifer Felten.

Jennifer.

MS. FELTEN: Yes. My name is Jennifer Felten. I am a real estate attorney in California. Our firm represents several hundred escrow companies, independent companies that are regulated by the DFPI, and we have significant concerns regarding the proposed regulations.

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

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

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

This has been the guidance based upon the Financial Code for -- since 2007 and well before, and these new regs go starkly against that. Instead, they would attempt to regulate discounts; specifically, 1741.7(a)(6), those rules would take away the ability to negotiate fees between the parties, as specifically authorized.

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

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

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

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

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

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

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

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

You know, when another area of this industry did regulate in this area, in the anti-kickback space, the Department of Insurance, they did so in the proper way via a Senate Bill, SB-133, in 2008. That is where this regulation should be handled and managed because that's where the regulatory authority is, with the legislature, not with the DFPI.

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

MS. DIBENEDETTO: Thirty seconds.

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

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

So --

MS. DIBENEDETTO: Time.

Rose, you're currently muted.

(There was a pause in the proceedings)

Rose, you're still muted.

MS. POTHIER: Am I now unmuted?

MS. DIBENEDETTO: You are.

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

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

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

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

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

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

The effect -- excuse me.

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

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

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

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

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

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

As the California Supreme Court held in the 2017 case of Association of California Insurance Companies versus Jones, among other things, it stated --

MS. DIBENEDETTO. Thirty seconds.

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

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

Thank you.

MS. DIBENEDETTO: Thank you.

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

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

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

MR. DAVIS: Thank you.

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

So, my comments are as follows: I'm speaking only with regard to the modification and its underlying foundational record to the previously proposed Title 10 CCR new 1741.7, any comments as the National Trade Association, but some members of California directly affected by this rulemaking.

Our comments and concerns are limited to the DFPI's reliance as authority on the Federal Statute known as RESPA, Title 12, U.S.C. Section 2601, et seq. Although in isolation it's possible to find improvements to the wording of certain provisions such as 1741.7(a)(2), advertising, our core point is that the entire section as constructed to not rely on RESPA for the reasons that follow:

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

On page 39 in the key language, the DFPI states that the prohibited -- proposed prohibited activities are common RESPA violations reported to the Department by the escrow industry. While we understand that RESPA (inaudible) violations through, quote, tattletale enforcement, meaning within the industry, provides most leads, that's been true for decades at the federal level, but that does not lead to the conclusion that a lead is self-proving as a violation, especially not a per se violation.

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

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

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

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

Now, on the technical point, I think I'm similar to Rose. I may be different. But we were initially confused by the RESPA references to the statement reasons beyond their obvious connection with Section 425 -- 17425. A RESPA violation could include charging the fee for the preparation of the uniform settlement statement, which is now the closing disclosure, or making a false statement in connection with its preparation. That would presumably also be 17425 violations. However, as the content of the actual proposed regulation is specific only to the prohibited compensation, anti-kickback, Section 17420, it raised the question of whether the Section 17425 discussion was mere surplusage only. Beyond that and stated otherwise, the question was whether the interpretive authority cited, 17400, for this new regulation was solely relying on RESPA to give more rule-of-law content to 17420 or whether 17420 on its own could support 1741.7.

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

MS. DIBENEDETTO: Thirty seconds.

MR. DAVIS: Excuse me. -- has been exchanged for the referral of business. It's impossible to support this approach. And, as I said, the rest of it is legislative history that I'd like to submit for the record.

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

In conclusion, we ask that the regulation be withdrawn.

Thank you.

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

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

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

MR. TREPETA: Thank you.

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

RESPRO -- at RESPRO we are -- we specialize in the Real Estate Settlement Procedures Act. We believe that you should focus on enforcing that Act and its well-established best practices and rules, as has been done over the past 40 years, rather than try to narrow down and focus on various activities that in many cases do not constitute RESPA violations.

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

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

I'll, you know, save folks time here. Everyone else did a great job of highlighting the concerns with this. We share those concerns, and we hope you reconsider Section 1741.7.

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

Thank you so much.

MS. DIBENEDETTO: Thank you.

Up next we have Donna Inman.

Donna, you're recognized.

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

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

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

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

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

MS. DIBENEDETTO: Thank you.

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

MS. DIBENEDETTO: Yes. You're recognized.

MS. MARES: Thank you.

So, the companies that we represent are smaller in nature, and they do look to myself and my company for guidance on how to be compliant in the various areas of the independent Escrow Law. And 17420 has been sufficient for me to be able to advise them on, you know, not doing kickbacks and referral fees. They understand that they are limited on what they can do; that their consumer should be their client, not the brokers and agents. So, I think, for the most part, the smaller companies and all the companies, licensed companies, understand 17420. And that this new regulation, the 1741.7, is really aimed toward the rogue owners and marketers for certain companies, small, you know, under -- I think they're small in nature or a small number in nature, and that this is going to harm -- actually not -- it's going to harm the compliant companies more than it's going to stop those who are rogue and trying to drum up business every way they can.

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

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

MS. DIBENEDETTO: Thank you.

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

Up next we have Nancy Silberberg.

Nancy, over to you.

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

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

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

Furthermore, Section 1741.7(a)(5)(6)(7) are an attempt to regulate escrow fees, which the DFPI has clearly stated verbally and in writing on the DFPI's website under the FAQ section, question 13, that DFPI does not regulate escrow fees.

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

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

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

I respectfully request the regulations be withdrawn.

Finally, having served on the Escrow Law Advisory Committee as president and immediate past president of the Escrow Institute of California, I found it tremendously productive and beneficiary to all stakeholders when we work together. I strongly suggest the DFPI work with industry stakeholders to further work on these regulations.

Thank you for your consideration.

MS. DIBENEDETTO: Thank you.

Is there anyone else who would like to be recognized?

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

(There was a pause in the proceedings)

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

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

MS. DIBENEDETTO: I can.

MR. DAVIS: Great.

My name is Matthew Davis. I am an attorney at Davis & Davis Law Group. We are a law firm that has represented various entities over the course of 75 years. I strongly want to put on the record my support to the statements made by the Escrow Institute, California Escrow Association, Art Davis, and Ken Trepeta, as well as the attorneys who have previously spoken. They very well articulated the concerns of our firm, as well as many of my clients within the industry, that the proposed regulation of 1741.7 is not only not justified by the commissioner's authority but, as indicated by Art Davis, seems to be attacking issues and deeming things as per se violations rather than doing a regulatory enforcement action with a factual analysis to determine whether or not a violation factually occurred under Financial Code 17420 or under RESPA.

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

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

The comments about the structure of 1741.7 is of particular concern given its vagueness. There are a number of sections, in an overreach to regulate certain issues, that lack clarity or will create unintended consequences, likely causing the industry to be forced to challenge the regulation through the court processes.

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

I had an opportunity to review the underlying legislative history, as well as, ironically, my grandfather's own personal notes from 1961 for AB-55, which is the underlying legislative statute that created Financial Code 17420, as we know it. And the notes and the legislative history demonstrate that the substantial changes made to the Escrow Law in this section were through a joint venture between the Corporations Commissioner at the time and the Escrow Institute of California, and that the bill was drafted through a joint session of numerous committees between the two entities and, therefore, was presented to the legislature with virtually no opposition and no issue. This was a joint venture, and the history of that section and the joint cooperation between the two sides, being the regulator and the industry, resulted in a bill that has -- and a statute that has remained consistent --

MS. DIBENEDETTO: Thirty seconds.

MR. DAVIS: -- and unchanged.

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

MS. DIBENEDETTO: Time.

MR. DAVIS: Thank you.

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

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

(There was a pause in the proceedings)

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

MS. GALLAGHER: Cassandra, should I do that now?
MS. DIBENEDETTO: Yep. You're good to go.
MS. GALLAGHER: Okay. Great.
So, on behalf of Sherri and the Department, I want to thank everyone for your comments.
Also, I have one correction to my introduction. We will accept and add to the record the written comments submitted during this hearing.
The transcript for this hearing will be available on the Department's website, and your comments will be considered and responded to in the final statement of reasons for the rulemaking.
And I believe that's it and we can close the hearing.
MS. DIBENEDETTO: Thank you. Closing it now.
(Hearing concluded at 10:57 a.m.)

REPORTER'S CERTIFICATION

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

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

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

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

Dated: November 9, 2021

[redacted]

Shelly Coffey, CSR #6808