Real Estate Council of Ontario (RECO) Response to the Ontario Government's Consultation Paper: Regulating Real Estate Brokerages, Brokers and Salespersons in Ontario

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Real Estate
Council of Ontario

This submission represents RECO's preliminary comments in response to the topics for discussion in the Ministry of Government and Consumer Services' (Ministry) consultation paper.

Many of the items discussed will require further detailed consideration in terms of implementation and consequential impact on related provisions of the *Real Estate and Business Brokers Act, 2002* (REBBA) and its regulations.

RECO welcomes the opportunity to provide its public feedback.

March 15, 2019

Hon. Bill Walker
Minister of Government and Consumer Services
College Park 5th Floor
777 Bay Street
Toronto, ON M7A 2J3

Dear Minister,

The Real Estate Council of Ontario (RECO) is pleased to have the opportunity to respond to the government's January 2019 consultation paper regarding the regulation of real estate brokerages, brokers and salespersons in Ontario.

As the administrative authority responsible for administering the *Real Estate and Business Brokers Act, 2002* (REBBA), RECO supports the need for REBBA reforms.

RECO's response addresses the specific topics and questions raised in the consultation paper and puts forward suggestions for related substantive changes for consideration.

RECO looks forward to continuing to support the Ministry in its public engagement and following, on possible REBBA reforms.

A copy of this paper has been submitted electronically to REBBA@ontario.ca.

Jody Lavoie, Chair
Real Estate Council of Ontario

Michael Beard, CEO
Real Estate Council of Ontario

Introduction

The Ontario government is consulting on various areas that might form part of a REBBA reform package, based on public and registrant input to date. In the two decades since REBBA was last reviewed, the real estate sector has changed dramatically. Advances in technology alone have significantly altered the way in which businesses and consumers interact in all sectors. The consultation paper seeks feedback on a range of matters that touch on protecting consumers; enhancing professionalism; modernizing regulation; supporting a strong business environment; and reducing unnecessary burdens on consumers, registrants and the regulator.

RECO is a not-for-profit corporation that is delegated responsibility, by the provincial government, to administer and enforce REBBA. This includes regulating the activities of more than 85,000 brokerages, brokers and salespersons trading in real estate in Ontario. In addition, RECO has clear obligations under its Administrative Agreement with government to provide strategic advice on potential or proposed legislative or regulatory changes and the operational effectiveness of REBBA. The Ministry of Government and Consumer Services is responsible for REBBA, as well as having general oversight of RECO.

RECO's comments include considerations that might impact the discussion on particular items. While different topics are discussed individually, many will impact each other, as well as provisions in REBBA or regulations that are not specifically referenced. These overlapping and consequential impacts would be further considered as part of any reform package.

While this document frequently uses the word "consumer," in particular when the issue revolves around a residential real estate transaction, this is not intended to limit the comments to only those circumstances or a particular type of party to a trade in real estate. The definition of trade is broad and captures a wide range of real estate transactions. Consideration is given to the potential impact of proposed reforms on all types of transactions (e.g., commercial, residential, purchase, lease), those in urban and rural areas, and on the parties to transactions (e.g., buyers, sellers, lessors and lessees). Market conditions where buyers or sellers are favoured remain an important consideration.

The Ministry has invited feedback and input related to a number of specific topics. RECO remains committed to working with government to find solutions and improvements, leveraging existing processes where possible, and minimizing or reducing regulatory burden without compromising consumer protection.

As previously noted, some of the topics can be considered as discrete topics while others are interrelated. Where there is overlap or consequential impact this is noted in RECO's response.

For ease of reference, the comments in this response are aligned with the headings used in the consultation paper.

A. Consumer Protection

1. Transparency in the offer process

Disclosure of Details of Competing Offers

It's been suggested by different stakeholder groups that the disclosure of details of offers in multi-offer situations might enhance consumer protection. This proposed approach to increasing transparency in real estate transactions appears simple; however, these changes may have complex and broader implications, beyond the transaction itself. There are practical implications that will impact the discussion depending on how such a change might be made. Different levels of disclosure and the respective impact are discussed below.

Questions related to how offer information is disclosed, when it is disclosed, to whom it is disclosed, and whether the disclosure is mandatory in all multi-offer situations or if the seller retains the right to choose how the sale of their property is conducted are relevant to the discussion.

LIMITED OFFER DISCLOSURE

One approach might be to permit the registrant representing the seller to disclose the details of offers when the seller directs that the sale be an open bid process. This approach would impact subsection 26(1) of the Code of Ethics, which places restrictions on the disclosure of the details of offers. Accompanying regulations could deal with the disclosures required if a seller elects to engage in an open bid process in order to ensure prospective buyers are aware it is an open bid process before an offer is submitted.

The disclosure of offer details to others who are submitting offers might be described as a sort of "slow auction" or "silent auction" type of trade. There are practical issues associated with the disclosure of details of offers to a large number of parties in a multi-offer situation, a situation that is typically quite fluid, particularly if the disclosure must be relayed to each party through each party's representative, and done each time a new offer is submitted, or an offer is resubmitted. While this type of open bid process appears to have many similarities to an auction process, on its own it lacks some of the norms and efficiencies of an auction that lend credibility to the process.

PUBLIC AUCTION APPROACH

Another approach that is more public is an open bid process that is more closely aligned with the public auction process. The processes, rules and regulations and experiences in jurisdictions where this type of trade is more common than in Ontario would be helpful to consider.

In Australia, for example, when a property is sold by auction, buyers are responsible for completing property inspections, surveys, financing and other matters in advance. The contract the buyer will be required to sign is available for review prior to the auction. The contract includes details such as the deposit amount (typically 10% of the purchase price) and closing date, which is normally between 30 and 90 days following the auction. Prospective buyers register in advance. All parties are present at the auction and aware of each bid as it is made. It is clear in this process that the highest bid will be the successful bid as there are no other details to evaluate. At the close of the auction, the successful bidder signs the contract and pays the deposit—there are no further negotiations.

MAKING OFFER DISCLOSURE OR AN AUCTION PROCESS MANDATORY

When considering whether it should be mandatory for all multi-offer trades to require the disclosure of the details of offers or proceed through an auction process, several related questions arise.

- Would the scope of REBBA expand to regulate the conduct and choices of sellers or would the rules only apply to sellers who choose to work with a registrant?
- Would an assumption have to be made at the outset that multiple offers will be received, based for example, on market conditions and the location of

the property, and consequently the transaction will require disclosure or an auction process?

+ In the absence of defined types of transactions, are there impacts on commercial and other types of trades in real estate that need to be considered?
+ Does the desire for a publicly transparent process take precedence over the seller's right to choose how the sale of their property is conducted and the buyer's right to choose which type of process they wish to participate in?

These are complex and interrelated issues that will impact the discussion on this item.

OTHER CONSIDERATIONS

Other considerations also relevant to the open bid discussion are the provisions of related legislation, including the Conveyancing and Law of Property Act, RSO 1990 c. C.34, in particular sections 1 and 55 to 58, the Mortgages Act, RSO 1990 c. M.40, in particular section 24, the Public Lands Act RSO, 1990 c.P.43, in particular sections 15 and 39, and the Trustee Act, RSO 1990 c. T.23, in particular section 17. The *Conveyancing and Law of Property Act* provisions are interesting in that they speak to the role of a "puffer" (a person appointed to bid on the part of the seller) and to the rules that apply to sellers setting reserve bids and being able to bid themselves.

The introduction of auction characteristics to a trade in real estate may require that the auctioneer and financial institutions exemptions in section 5 of REBBA be amended.

Escalation Clauses

In terms of the use of escalation clauses, that is, a clause where an offer is for a certain amount more than the next highest offer, restricting their use through amendments to REBBA may engage beyond regulating the conduct of registrants. The use of an escalation clause, if a potential buyer accepts the risk associated with it, is not a registrant conduct issue. Such a restriction would regulate the conduct of buyers and terms of contracts. To prevent a buyer from including an escalation clause in an offer could be viewed as an inappropriate interference in the market. It might also encourage work-arounds that could create other issues.

Pre-Emptive Offers

A separate practice is that of communicating to potential buyers that offers will not be accepted before a specified date. The seller may elect to do this in order to create a situation that generates multiple offers or to create an environment that promotes pre-emptive offers (often referred to as "bully offers") from very motivated buyers. The seller's representative is required to obtain clear written direction from the seller about delaying offers to a specific date and time, including how the seller's representative is expected to handle pre-emptive offers if they are received before that date. The seller retains the right to provide new direction at any point in time. To prevent a seller from accepting offers submitted before the expiry of the "no-offer period" could be viewed as inappropriately interfering in the market. It might also encourage work-arounds that could create other issues.

Other Comments

Both overregulation and interference in the economics of the market place have the potential to create a shadow market where consumers choose not to work with registrants in order to avoid the obligations and restrictions contained in REBBA.

2. Relationships with Consumers

Clients and Customers

RECO believes changing how "customer" is defined and eliminating the current requirement for a customer agreement in Ontario would be one of the most significant advances in consumer protection achieved by REBBA reform.

Under REBBA's General Regulation, a customer is defined as a person who has an agreement with the brokerage under which the brokerage provides services to the person, and who is NOT represented under a representation agreement. For most consumers, the distinction between client and customer in Ontario is difficult to understand. Both clients and customers sign an agreement; both believe the registrant is there to help them; both place reliance on the registrant to guide them through the process; and both are seeking help to get the best deal for themselves.

A consumer who has signed a customer agreement is unlikely to understand they have agreed to be an unrepresented party, that is, that the registrant is not going to look after the customer's best interests. In registrant town halls and meetings throughout the province, even registrants acknowledge that if the distinction between client and customer was properly understood, most consumers would not agree to be a customer.

Alberta rules are clear in that they define a customer as "a person who has contacted, but not engaged or employed, an industry member to provide services." The customer acknowledgement form consumers are required to sign in Alberta makes it very clear that the consumer has chosen to represent themselves in the real estate transaction, rather than work with a registrant; the registrant will NOT act in the customer's best interests; and no fees will be charged by the brokerage for any service they might choose to provide to the customer. The registrant does not enter into a contract with a customer. British Columbia has a similar document that identifies the risks of being an unrepresented party in a transaction.

If the current definition of customer is modified to match the Alberta model, a consumer would either be a client or an unrepresented party who is not party to a contractual agreement for services provided by a registrant. This distinction is clearer and more easily understood than what is currently in place in Ontario. They are either represented or not represented.

The question of whether to redefine customer and eliminate the current requirement for a customer agreement is inextricably connected to proposed changes regarding multiple representation. A continuation of what is currently in place in terms of the client and customer distinctions could potentially have a negative impact on consumer protection advancements around multiple representation.

The above discussion highlights the importance of considering whether certain forms/agreements should be developed or approved by the regulator, as is the case in many other jurisdictions.

This is discussed further in the section below.

Mandatory Agreements or Acknowledgements

Requiring that an agreement be in place before a registrant is permitted to provide services is one way to establish a clear reference point in terms of what services are to be provided and at what cost. The agreement defines the relationship and provides clarity to the individual seeking services. It would clearly describe the duty that the registrant has to the client. If a registrant is prohibited from providing services to a client unless an agreement is signed, the potential for misunderstandings and consumer harm can be reduced.

There may be some reluctance on the part of buyers to commit to a buyer representation agreement. Some of the concerns about mandatory agreements could be addressed, for example, by terms that limit the buyer representation agreement to a specific geographic area or that do not allow the agreement to extend beyond a certain time measured in weeks and not months.

An alternative approach to an agreement is a mandatory disclosure document that similarly explains the relationship between the registrant and the individual seeking services and the duty, if any, the registrant has to the individual.

Subsection 10(2) of O. Reg. 580/05: Code of Ethics requires that a brokerage, "at the earliest practicable opportunity and before an offer is made use the brokerage's best efforts to obtain from the buyer or seller a written acknowledgement that the buyer or seller received all the information referred to in subsection (1)." If an approach is adopted that would require that an agreement be in place before providing services, this provision of the regulations could be amended to make such an agreement mandatory. Some sectors also prohibit a licensee from being paid unless an agreement is in place, which could also be considered for this sector. An updated definition of "trade" discussed later in this submission would assist in clarifying services for purposes of such as provision.

Other Comments

STANDARDIZED AND SIMPLIFIED DOCUMENTS

Improving the consumer experience could also be supported by simplifying and bringing consistency to the various agreements used by the sector. For example, in the residential tenancy world, consumers have access to a Residential Tenancy Agreement Standard Form of Lease. A similar approach could be adopted in the real estate sector. Standardized agreements can make it easier to provide plain language guides to understanding the agreements and can allow consumers to have some basis to compare when choosing whether to work with one registrant over another. Introducing specific minimum requirements for agreements between buyers and their brokerage and sellers and their brokerage could help consumers by reducing uncertainty and increasing transparency.

Most regulators have some authority to provide for standard forms or specific clauses or content in order to ensure consumers are aware of their rights and responsibilities and are adequately protected.

INFORMATION AND AGREEMENTS

A related question is what information should be provided to consumers when engaging with the registrant. RECO has suggested that a plain language guide should be available, one that touches on the key points of concern for a consumer, such as the nature of the relationship, types of services, and the rights and obligations of the consumer. The plain language guide approach has been adopted in other sectors and it may be a beneficial model to pursue.

Another approach might be to require a critical information summary document, similar to what's required in the cellphone and mobile services sector. For example, Part C of the Wireless Code states that an agreement for services must include a Critical Information Summary

document with the agreement. The Critical Information Summary document summarizes the most important elements of the contract for the consumer. A similar approach might be helpful in the real estate sector, recognizing that for most consumers, the transaction of buying or selling a home is not a frequent occurrence and can be complex with serious financial and other liabilities falling on consumers if things go wrong. A Critical Information Summary would be a consumer facing document that is unique to their agreement. A Critical Information Summary document could be used to complement the agreement signed with the brokerage.

A Critical Information Summary document would not preclude the development of a generic plain language guide. RECO or some other organization could be responsible for developing the guide and a corresponding obligation to make the guide available to consumers free of charge introduced as a mandatory requirement under REBBA.

3. Relationships with consumers: multiple representation

REBBA was amended in 2017 to allow regulations to be made to address the conflict of interest concern that arises in a multiple representation situation. Different jurisdictions have addressed the matter in different ways. For some, there is an outright prohibition on a brokerage representing more than one party to the trade. For others, such as British Columbia, there is a prohibition but with limited exceptions and accompanying disclosure obligations.

Agreements are with brokerages and not individual salespersons or brokers, and multiple representation is currently prohibited in Ontario unless the parties agree that the brokerage, through one or more individual registrants, can enter into a multiple representation situation.

It is when one individual represents more than one party to the same transaction that conflicts of interest are most pronounced and present the greatest risk of consumer harm. With this in mind, RECO would support the implementation of a Mandatory Designated Representation (MDR) regime, with limited and specific exceptions.

Designated representation would permit a brokerage to have multiple clients in a single transaction, but each would have to be represented by a different salesperson or broker ("designated representatives"). The brokerage would be obliged to have processes in place to ensure that client information is not exchanged between designated representatives. Designated representatives would provide services exclusively to one client in a transaction. The representatives within the brokerage would effectively be treated the same as if they were representatives from different brokerages. This would assist in addressing the conflict of interest concerns.

British Columbia adopted new rules around dual agency (multiple representation) effective June 15, 2018. There is no client/customer divide as in Ontario and in the limited circumstances where the same licensee acts for both the buyer and seller, there is clear disclosure of the risks inherent in such a situation.

British Columbia's approach to strengthening consumer protection around dual agency was to introduce a strict prohibition on acting for both a buyer and a seller except in very limited and clearly defined circumstances. The limited circumstances include: that the real estate is in a remote location, the location of the real estate is under-served by licensees, or it is impracticable for the parties to be provided trading services by different licensees. In those limited circumstances where dual agency is permitted, the listing agent for the property must present a disclosure form to every unrepresented potential buyer who approaches them for advice. The form's title clearly communicates what it is about—"Disclosure of Risks Associated with Dual Agency" form. The brokerage must submit a copy of each dual agency disclosure form to the BC regulator.

In Ontario, multiple representation issues are complicated by the current customer relationship. As noted earlier in this submission, there is an inherent conflict of interest when a registrant represents more than one client in a trade in real estate. There is also the potential for a perceived conflict of interest, if not an actual conflict of interest, when a registrant represents one party (a client in today's world) and provides services to the other (a customer in today's world). Currently, a brokerage, or an individual registrant, can have a seller client and one or more buyer customers in a real estate transaction and it is not treated as a multiple representation situation.

DOUBLE-ENDING AND OTHER REMUNERATION

New multiple representation rules might also need to address the issues associated with the financial incentive of 'double-ending'. For example, if the current customer definition and requirement for an agreement is retained, rule changes would be needed to prevent registrants from using customer agreements with buyers to avoid triggering designated representation requirements, essentially continuing the status quo. Financial incentives related to the compensation of closely linked individuals, such as spouses, family members and "teams"; referral fee arrangements within and between brokerages; and similar types of remuneration issues would also need to be considered.

BC also made changes to the rules related to the disclosure of remuneration. Remuneration includes any commission, fee, gain or reward, whether the remuneration is received, or is to be received, directly or indirectly.

Each time a registrant presents an offer to their seller client, they must include a completed disclosure form that informs the client about the remuneration the licensee's brokerage will receive. The form explains to the seller: the total payment that the listing brokerage would receive if the offer is accepted; how the payment would be shared with any cooperating brokerage; the payment that would be kept by the listing brokerage; and any other payment the registrant will receive, or expects to receive, as a result of the trade.

This information helps ensure that sellers are fully informed of the expected remuneration that the brokerage(s) will receive if the seller accepts the offer. Similar provisions might be appropriate in the context of new Ontario rules dealing with multiple representation.

LIMITED EXCEPTIONS

If a decision is made to proceed with new rules that prohibit multiple representation, another consideration would be whether to include limited exceptions such as in British Columbia. With increasing use of technology and mobile and internet-based transactions, the difficulty in securing representation may be more perceived than actual. Reviewing the extent to which registrants engage with clients via mobile and internet-based applications might be helpful in providing data to support a discussion about possible exemptions, if any, from a general prohibition rule.

There has been some support for exempting certain types of transactions, including commercial and leasing transactions. If there are to be exemptions, consideration might be given to introducing definitions for specific types of exempt transactions.

Both Alberta and British Columbia offer good examples of approaches that seek to protect consumers and ensure full and clear disclosures are made to consumers.

4. *Real Estate and Business Brokers Act* scope and exemptions

Trades of Newly Built and Yet to be Built Homes by Employees

Purchasing a home is a daunting experience for many. It is equally daunting whether it is the purchase of an existing and previously occupied home (a resale), a newly-built home, or a home that is yet to be built. Only in the case of resale homes does the person selling on behalf of the owner need to be registered under REBBA. For newly-built homes and homes that are planned but not yet built, the owner has the choice of engaging a registered brokerage on the trade or having a full-time salaried employee of the seller (the builder) act on their behalf when dealing with a potential or actual buyer. In some cases, full-time employees will also be registrants. This can present challenges given that acting in a different capacity while also a registrant, does not relieve the person of their obligations as registrant.

The fact that some sellers of newly-built and yet to be built homes work directly with brokerages or hire registrants as employees, while others have a full-time employee acting on their behalf, or even a combination of both, can be confusing and potentially misleading to a consumer.

Potential buyers of newly-built homes and yet to be built homes are at a disadvantage when dealing with an employee salesperson who has a duty to their employer and no corresponding duty to the buyer. Notwithstanding the disadvantage, buyers may engage in a trade without representation by choice. Buyers of newly-built homes and yet to be built homes are not precluded from having a registered salesperson attend with and act on their behalf. The general practice in the new home industry has been for the sellers to pay a commission in circumstances where the buyer is first introduced to the seller by the registrant, generally only if the registrant attends with the buyer at the initial viewing or meeting.

As noted above, some sellers of newly-built and yet to be built homes will choose to have registrants sell on their behalf, in some cases, providing exclusive rights to a registrant.

While this puts in play a registrant's duties and obligations, it does not address the imbalance in knowledge or negotiating position faced by the buyer or the reality that the registrant only has one duty, and that is to the seller on whose behalf they are acting.

These different relationships and agreements regarding agency and commissions can appear to have a developer of newly-built and yet to be built homes seeming to act as a brokerage but without having to be registered as a brokerage.

If the issue to be addressed is buyers who are at a disadvantage in not knowing their rights, additional mandatory disclosure requirements and clear and realistic cancellation clauses that provide purchasers with an opportunity to consult with a lawyer or other adviser might provide some relief. Given that the purchase of a home can be such an emotional decision, as evidenced by the common refrain of buyers "falling in love with the home," it is particularly important that clients receive the right information at the right time.

The idea of the informed consumer has underpinned much of the consumer protections that are in place. The assumption is that given the correct information, the "informed consumer" will be able to evaluate the choices and the implications of each and make a decision that is in their best interests. Additional measures beyond disclosures, might also be warranted to support positive outcomes.

There is already a 10-day cooling off period for new condominium purchases. There may be value in considering a similar provision for non-condominium newly-built and yet to be built homes.

A requirement for the seller's employee to clearly explain to a potential buyer that the person they are dealing with is the agent for the seller and owes the potential buyer no duty of representation and is acting solely on behalf of the seller might assist purchasers in evaluating with a critical eye the information that the seller's employee is providing to them. These obligations might need to be addressed through other legislation if sellers continue to have the ability to have non-REBBA registrant employees act on their behalf.

Some believe that what disadvantages the buyer as much as the lack of representation is the fact that new home purchase agreements, in particular those used for condominium purchases, are complex, lengthy and written to advantage the seller and not to protect the buyer. Good arguments can be made for standardized purchase agreements that could be developed with input from a variety of perspectives including lawyers for sellers and buyers, municipal representatives, registrants, lenders, new home buyers, and the sellers themselves. While a cooling off-period to consult with a lawyer seems like a consumer protection, when a buyer needs advice on a condominium agreement and related documents that are hundreds of pages, the costs may deter the buyer from seeking legal advice. Standardized agreements could have a positive impact on increasing the likelihood of a buyer seeking the appropriate advice.

Auctioneer Exemption

Current REBBA exemptions include auctioneers, "if the trade is made in the course of and as part of the auctioneer's duties as auctioneer." REBBA auctioneer exemption s. 5(1)b Unlike Alberta and some other jurisdictions, Ontario does not licence auctioneers. There may be some form of local licensing requirement for an auctioneer business, but this is not the same as a licensing or regulatory regime. At one time Ontario did licence some auctioneers under the Provincial Auctioneers Act RSO 1990 c. P. 31. However, this was a licence for purposes of the sale of pure-bred livestock at public auction. The licence was issued by the Agricultural Licensing and Registration Review Board then under the *Ministry of Agriculture and Food Act*. That Act was repealed December 9, 1994.

Without some clarification to the auctioneer exemption, it is arguable that someone could get an auctioneer's business licence at the local level, set up a website and auction off properties without providing consumers any of the protections offered under REBBA.

There may be value in reviewing the auctioneer exemption, particularly if new rules introduce a trade process that is akin to an auction through

open offers and similar rules. BC's Real Estate Regulations provide a detailed exemption for auctioneers, but with limits on what the auctioneer is permitted to do in relation to the auction of real estate. For example, they are prohibited from showing the property or providing any information to any party to the trade about the real estate. If the auctioneer exemption is retained, similar limitations might be appropriate.

Exemption for Certain Lawyers

Also exempt from REBBA are lawyers, if they are "a solicitor of the Superior Court of Justice who is providing legal services" and "if the trade in real estate is itself a legal service or is incidental to and directly arising out of the legal services." REBBA solicitor exemption ss. 5(1)g This is a broad exemption that might benefit from being more specific.

Some law firms advertise the services of selling real estate generally. Where unrelated to other legal services, this is arguably beyond the original intention of the exemption, which was to capture trades in real estate that were incidental to the services being provided by the lawyer, such as the transfer of property in an estate or the transfer of a matrimonial or other home as part of a separation or divorce settlement. The rationale for the exemption was that the real estate activity was ancillary to other activity and was not itself the primary activity for which the lawyer was retained.

Notwithstanding that lawyers are generally exempt from the Collection and Debt Settlement Services Act, subsection 18.1 (6) of R.R.O. 1990, Reg. 74: General made under that Act does apply certain provisions to lawyers and employees of lawyers in circumstances such as where the lawyer has "acquired the debt through purchase, assignment, transfer or any other means and is seeking to collect the debt on his or her own behalf and not in the regular practice of the lawyer's professional business on behalf of a client".

Clarifying language around the circumstances of the lawyer exemption might be appropriate and would benefit from discussion with the Law Society of Ontario.

B. Enhanced Professionalism

5. Code of Ethics

Currently 22 statutes make provision for a "code of ethics" though not always in respect of licencees and registrants. The Retirement Homes Act, 2010, S.O. 2010, c. 11 provides for a code of ethics for the Retirement Homes Regulatory Authority itself. Some 19 statutes make provision for a "code of conduct". Lawyers and paralegals are subject to Rules of Professional Conduct. Ethical obligations are subsumed in the Rules, for example, a lawyer has an ethical obligation to ensure that the client's interests are not abandoned. A code of "conduct" may be a more appropriate description for what is intended to be captured under REBBA, with ethics being one aspect of conduct.

The existing Code of Ethics under REBBA O. Reg. 580/05: Code of Ethics is extensive. It has 53 sections of which 40 speak directly to the duties and obligations of registrants. They touch on a range of conduct from obligations in respect of business records to a prohibition on abusing or harassing anyone in the course of trading in real estate. There are detailed provisions that speak to the content of various agreements and the obligations in respect of same. Clearly there are substantive provisions in the Code of Ethics that might more appropriately be addressed as part of the regulations under REBBA, conditional, of course, on breaches of the regulations and of REBBA being conduct that may be referred to the Discipline Committee under REBBA as discussed in the last paragraph of this section.

Of the 40 provisions, several use various terms to describe what they apply to including "in respect of a trade" and "in the course of a trade." This restrictive language may not always be appropriate to the conduct being addressed.

A Code of Ethics provision that speaks to conflict of interest would provide additional clarity on that issue. It has been a troubling one for the real estate sector and the public and would benefit from a provision that speaks directly to the

matter. A specific provision prohibiting conduct that puts the registrant in a conflict of interest, similar to what is in place under the Law Society of Ontario's conflict of interest rule, might be appropriate. The ultimate objective of consumer protection relies in part on the public having confidence in the sector and in the regulator. Such a provision would allow for broader oversight of registrants.

RECO believes that a confidentiality provision should be added to the Code of Ethics. Alberta rules specifically prohibit the sharing of information obtained in confidence without the consent of the client. While a fiduciary obligation imposes ongoing responsibilities including confidentiality obligations, it can be difficult to enforce. A regulated prohibition would support enforcement of confidentiality obligations.

A complementary addition to the Code of Ethics would be a general provision that a breach of REBBA or its regulations is also a breach of the Code. This would allow for breaches to be directed through the related discipline process. Certain breaches of REBBA might be more effectively and efficiently addressed through the Code's discipline process rather than through a *Provincial Offences Act* prosecution.

6. Education/qualifications for real estate brokers and salespersons

RECO supports the principle of enhanced professionalism and has promoted this most recently through its partnering with Humber College and NIIT Canada, a company offering learning management and training delivery solutions, to provide a new approach to real estate education in Ontario. RECO's new Real Estate Salesperson Program will launch in 2019 and will support aspiring registrants in becoming practice-ready from day one when they enter the profession.

The new Real Estate Salesperson Program will provide many benefits, including:

+ A new learning path that follows the flow of a real estate transaction, providing learners with a practical understanding of the key aspects of real estate trades. The new program includes relevant course content, examinations and practical simulation sessions with coaching and support from expert facilitators.
+ A new knowledge management system (KMS) that will provide learners of the new program, as well as all registrants, with an online databank of searchable, just-in-time reference materials—for example, job aids, checklists and guides.
+ Optional in-person or virtual classroom facilitated review sessions to discuss challenging key concepts covered in the eLearning modules with other learners and receive support from expert facilitators.
+ Mandatory in-person simulation sessions that will assess learners' application of course content. Learners will have the opportunity to practice important elements of a transaction in a structured and interactive classroom environment, and receive coaching and support from expert facilitators, in preparation for providing compliant and high-quality service to consumers.

RECO would like to emphasize that the new education requirements are significantly different from the current requirements and further changes are planned in the coming years. In addition, considerable consultation and background work was involved in the process. We look forward to further stakeholder comments and suggestions after the new program launches in 2019.

The real estate marketplace is continually changing, and it's critical that registrants remain current on the latest rules. RECO needs the flexibility to adapt its educational requirements quickly. RECO would encourage consideration of amending the language related to education requirements to broaden authority, for example, to include more educational tools that are available in the marketplace.

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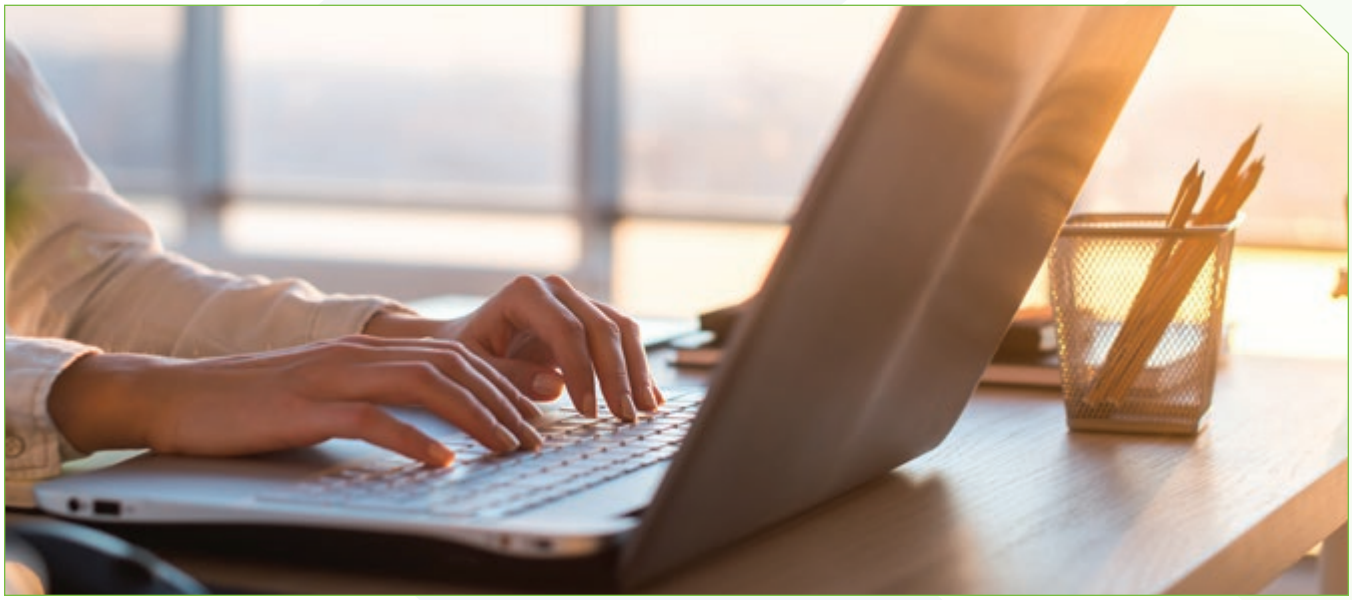
More specifically, RECO would encourage consideration of adopting language similar to that in the *Funeral, Burial and Cremation Services Act, 2002* (FBCSA) regarding educational requirements. The language of the FBCSA provides clearer authority for the Registrar to "require particular programs of study, training programs, internship programs, apprenticeship programs, courses, seminars, lectures, tutorials or other educational resources, may require that persons take them from particular providers and may require that persons take particular examinations or tests." It would allow RECO to be nimble in addressing some issues that arise through education and to take advantage of different education tools and approaches not currently afforded under REBBA.

RECO also recommends providing broader authority to the Registrar under REBBA to establish education requirements for various registration classes. Brokers of record, branch managers and brokers do not have distinct continuing education requirements. They are aligned with the requirements for a salesperson. For example, the training currently required to become registered as a broker (someone who has the training to manage a brokerage) would be more appropriate as the qualifying criteria to fill the role of broker of record or branch manager. Regulatory requirements to become a branch manager ought to be reflective of the role they play in managing a branch and not the role of salesperson. Salespersons do not have the training to run and manage a brokerage provided through salespersons training, and it may be more appropriate to require that only brokers be permitted to manage branches.

The Registrar can set education requirements for registrants, but not for staff of registrants. In some cases, non-registrant staff are engaged in activity that can have serious implications for consumers. It may be appropriate to consider allowing the Registrar to require that certain qualifications or standards be met, either initially or in response to an identified problem. The requirement would not seek to impose regulatory control of the non-registrant staff, but rather for the Registrar to be able to require that a registrant ensure that persons to whom they delegate responsibility have the necessary skills and competencies and have completed such education as is required by the Registrar, including providing proof of completion.

Providing the Registrar with the authority to establish the education requirements for each class of registrant would assist in addressing existing gaps and in ensuring that educational and other requirements are properly aligned with the responsibilities of the registrant or individual.



C. Modern Regulation

7. Updated processes and tools of regulation

Oversight, enforcement and compliance, are best supported if the regulatory system has a range of tools available to meet those responsibilities. A robust complaint process is one such tool. Inspections and filing obligations are just two other examples of common tools used. Additional measures might be appropriate to enhance RECO's oversight and enforcement and compliance in the sector.

Rule Making Powers Under REBBA

Ontario's real estate marketplace is continually evolving. Rule-making authority would provide the flexibility to respond to changing circumstances quickly and effectively.

Modern regulators need to have flexibility to address and manage emerging trends and issues that might hinder or compromise consumer protection. RECO would support consideration of measures that would provide it with an enhanced ability to update rules to reflect, and respond to, the marketplace. REBBA is prescriptive legislation. Rules and practice standards are addressed by regulation. Some other sectors delegate the setting of rules and practice standards to the regulator. To ensure a flexible and responsive regulatory regime, consideration could be given to giving the Registrar rule making authority to set the detail of some aspects of regulations under REBBA. For example, the details of what needs to be kept and for how long as evidence of the brokerage having satisfied its obligation under s.26 of the Code of Ethics in terms of disclosing the number of competing offers would lend itself to being addressed under rule-making authority rather than requiring additional regulatory provisions.

Other Canadian jurisdictions provide the regulator with the authority to make specific rules beyond what is set out in statute and regulations to deal with very specific issues. Advertising is one example of an area that would benefit from rule-making authority.

RECO Approval of Key Documents

As noted earlier, the complexity of agreements presents challenges to consumers many of whom rarely make more than a few purchases or sales of a home and usually with large amounts of time passing between transactions. The costs of securing legal and other advice can be high, leaving buyers and sellers heavily dependent on registrants for advice and to protect their interests.

There may be value in considering an amendment to allow RECO to develop, or approve the content of, key relationship defining documents being used such as the listing agreement and the buyer representation agreement as well as disclosure documents and possibly the agreements of purchase and sale themselves. This has been done in other jurisdictions and can be a valuable measure in protecting consumers.

Enhanced Sanctions Available to Discipline and Appeals Committees

The current discipline and appeals committees have a range of sanctions that can be imposed. These could be enhanced with the additional measure of being permitted to suspend or revoke a registration.

Currently, if conduct warrants both a fine and suspension, the fine is before the Discipline Committee and the suspension is with the Registrar, who must issue a proposal to suspend or revoke, which can be appealed to the Licence Appeal Tribunal (LAT). LAT is now part of the cluster of tribunals known as the Safety and Licensing Appeals and Standards Tribunals. One body cannot issue both of those sanctions notwithstanding that they might both be appropriate responses to the conduct in question.

LAT may decide that the revocation does not apply, but a suspension does or that neither apply. There is no option for LAT to order a fine. The Discipline Committee in turn may determine that a fine is appropriate, but does not have the jurisdiction to consider a suspension or

revocation. RECO's proposal is intended to improve the range of responses to conduct warranting disciplinary action.

Administrative Penalties

Administrative penalties have become common across various administrative and regulatory regimes. They seek to address conduct that does not necessarily rise to the level of discipline. The objective is compliance, with penalties intended to discourage non-compliance. Allowing for administrative penalties can provide a short, sharp and early response to non-compliance. Provisions could allow for an appeal of an administrative penalty to the Discipline Committee. Any administrative penalty regime would identify the provision of REBBA and its regulations that would be subject to the regime. The penalty amounts would be carefully determined to ensure no constitutional law concerns.

Regimes currently in place for other regulated sectors can provide guidance on these issues. For example, subsection 59 (6) of the *Payday Loans Act, 2008*, S.O. 2008, c. 9 provides that "An order made under subsection (1) imposing an administrative penalty against a licensee applies even if, (a) the licensee took all reasonable steps to prevent the contravention on which the order is based; or (b) at the time of the contravention, the licensee had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent." The penalty amounts under the *Payday Loans Act, 2008* are amounts fixed in regulations while the corresponding provisions under the *Environmental Protection Act*, RSO 1990, c.E.19 allow for due diligence efforts to be considered in the penalty amount assessed. Whether it would be the Registrar or an "assessor" as in the *Payday Loans Act, 2008*, who determines whether to apply an administrative penalty, would need to be determined.

There is further discussion below under the heading "Enforcement of Orders of Discipline and Appeals Committees". Providing for the enforcement of administrative penalties in the same manner as a court order would ensure that the seriousness of the administrative penalty sanction is recognized, and the credibility of the regulator enhanced through strong recovery measures.

Move Appeals of Proposals to Refuse, Suspend or Revoke from LAT to Discipline/Appeals Committees

Proposals to refuse, suspend or revoke a registration are appealable to LAT. A new approach might consider removing the appeal of Registrar's proposals from LAT and directing them to the Discipline Committee. It would be the Discipline Committee that determines whether the Registrar's proposal is accepted. The Discipline and Appeals Committees are currently in place and familiar with the sector rules. Members are experts in the subject area. As the responsibilities of LAT expanded, and

with the recent amalgamations of the tribunals into SLASTO, the subject matter expertise that underpinned the original justification for a licence appeal tribunal has arguably diminished. The current environment for appeals is significantly different from the one in place when the Commercial Registration Appeal Tribunal, LAT's predecessor, was first given responsibility to hear appeals from Registrar proposals.

RECO Board members are prohibited from sitting on Discipline and Appeals Committees. The hearing panels comprise two registrants and one public member, with outside legal counsel engaged to assist the panel. Consideration could be given to changing the composition of the panel to require a qualified adjudicator to sit as chair of the panel. This could potentially reduce the need for engaging outside independent legal counsel for every hearing, though the Committee could seek independent legal advice as may be necessary from time to time.

Enforcement of Orders of Discipline and Appeals Committees

The process for enforcement of Discipline and Appeals Committee orders is cumbersome. The Registrar is required to issue a notice of proposal to suspend or revoke registration if the registrant fails to comply with the Committee's order. A potential solution is a provision that provides for an automatic suspension of registration for failure to comply. The objective is for quick action to be taken without the need for a Registrar's proposal. This change could include provision for the Committee to provide an extension of time for compliance. The process would require timely exchange of information between the Committee and the Registrar.

This would strengthen RECO's oversight and emphasize the seriousness of the measures being taken at discipline.

Orders to Forfeit Proceeds of Unethical Behavior

On the separate question of whether to give the Registrar authority to order a brokerage, broker or salesperson to forfeit some or all of the proceeds obtained in the course of "unethical activity" where a determination has been made that there was a breach of the Code of Ethics, RECO's preliminary response is that all processes that discourage unlawful enrichment should be considered.

Given that caps on fines, while necessary, do not necessarily equal the value of the unjust enrichment, it is possible that there are proceeds remaining after a fine is paid. A fine should not simply be a cost of doing business. Also, the fines are payable to RECO and not to the person who suffers the loss at the hands of the registrant. However, increased fines and new forfeiture provisions could potentially reduce the funds available to a victim in the event they pursue civil recovery against the registrant.

Strong Business Environment

8. Incorporation of Salespersons and Brokers

The question of whether to allow salespersons and brokers to incorporate can be viewed as a revenue and money flow issue rather than a regulatory issue. Currently, salespersons and brokers must be individuals in order to be registered. Commissions are paid to a brokerage and are held in trust by the brokerage. Individual registrants must be employed by a brokerage, and the definition of employment in REBBA is broad. Employ is defined as "to employ, appoint, authorize or otherwise arrange to have another person act on one's behalf, including as an independent contractor".

There may be value in considering allowing an individual registrant, who is entitled to receive payment of a commission from the brokerage, to direct that the funds be paid to a corporation controlled by the registrant (e.g., by ownership of 100 percent or at minimum a majority of shares). Whether this approach would allow for income splitting or "sprinkling" of income to third parties is a provincial and federal financial/taxation question that would need to be addressed.

The alternative of allowing a corporate entity to apply for registration as a salesperson or a broker is both problematic and complex. It would give rise to questions regarding the liability of the corporation versus that of the individual. It would also invite the need for provisions to ensure that the corporation, which is now the registrant, has the obligation to ensure that the individual who owns/controls the corporation and is actually doing the work of salesperson or broker, meets all the requirements of registration, including meeting education requirements. This is an added layer of complexity that could have negative implications for enforcement and oversight obligations of RECO.

To some extent, the industry has already actively implemented a work around to the rules. Some individual registrants have established and registered what might be viewed as a "micro-brokerage." It is a registered brokerage but one that operates in cooperation with another brokerage. The "micro-brokerage" subcontracts for all the services it needs from another brokerage with which it has a service agreement. This is typically a larger brokerage. The "micro-brokerage" has its own trust account and listing and other agreements are signed with the "micro-brokerage." Compensation is paid directly to the "micro-brokerage" and not the individual registrant, with the consequential tax advantages of this arrangement.

From a consumer perspective these arrangements are not transparent. The consumer may be under the impression that the larger brokerage is responsible when the reality is that they are only providing services to support a micro-brokerage. There is a lack of clarity as to who they are dealing with. From the registrant perspective, it imposes an unnecessary burden to achieve a result that can otherwise be achieved by permitting a direction of funds to a corporation owned and controlled by the individual registrant entitled to the commission.

RECO has and continues to champion burden reduction. With this in mind, and assuming salespersons and brokers are permitted to set their financial arrangements up through a personal corporation, the strong preference would be to avoid creating a separate class of registration for a personal corporation.

While British Columbia has allowed for individual licencees to operate through a personal real estate corporation, it is at a cost to the licencee. The regulator requires "two sets of licensing fees, E&O fees, Superintendent of Real Estate assessment fee and Compensation Fund fees (one for the controlling individual and one for the personal real estate corporation) to be paid every two years." (See Real Estate Council of British Columbia)

RECO would prefer an approach that would permit a registrant to direct payment to a corporation owned and controlled by the individual registrant and for a brokerage to make the payment as directed. Some consideration of the minimum control requirements for the corporation would be needed. These could be reflected in the regulations. The personal liability of the broker and salesperson and that of the brokerage should remain. The contracts are with the brokerage itself and this should not change. Whatever measures are put in place, they should not allow the brokerage, broker or salesperson to avoid liability in place today.

9. Designated areas of specialization

Specialization has become the norm in many fields of professional practice, from law to medicine through to the financial sector. It exists currently in the real estate sector, but without any legislative recognition either through unique educational requirements or identification on a registration. For the most part, registrants simply self-identify or advertise with a particular area of specialization or expertise. A model of designated areas of specialization would be developed with sector input and would benefit from sector support.

There is existing authority in subsection 51 (1) 3 of the Act to make regulations establishing areas of specialization and prescribing different educational requirements for each area, as well as establishing a certification process in respect of each area of specialization. RECO

would support a specialization program that is not dependent on the creation of separate categories of registrant such as registered for condominium trades only, or for commercial trades only.

D. Burden Reduction

10. Regulatory barriers

Modern business practices and the adoption of innovative approaches or technologies can ensure that the regulator and the sector remain efficient and effective. The comments that follow are premised on approaches that avoid imposing new regulatory burdens where possible and instead leverage existing processes to optimize the efficient and effective use of data.

Enhanced Collection of and Access to Data

Enhanced collection of, and access to, data can support RECO in continuing to move in a modern and progressive direction. Data collection and data sharing improvements, subject always to privacy concerns being addressed, can strengthen regulation in the sector. From a risk management perspective, having access to more data, and current data, can allow for real time analysis and assessment not currently available. The role of and obligations on brokerages, other registrants, and other entities would need to be identified and the process for sharing data clarified, including whether it could be done through third parties who have access to or control of the required data.

Related administrative matters could be addressed as part of enhancing access to data. For example, current section 24 of O. Reg 567/05 General made under REBBA requires that a registrant keep the registrant's business records in Ontario if they relate to trading in real estate in Ontario. In a world of Cloud storage and international data storage, this requirement may present challenges. Whether the obligation is for the hard copy of a record or the server itself to be located in Ontario or instead for the Ontario location to be able to readily access the records could be clarified. For example, O. Reg. 166/11: General made under the *Retirement Homes Act, 2010*, places the emphasis on being able to produce and provide access to documents rather than the location of the documents themselves. Section 56 of the regulation requires that documents be kept in a readable and useable format that allows a complete copy of the record to be reproduced. Subsection 59 (2) does specify specific documents that must be kept on the premises of the retirement home. A similar approach might be used for records under REBBA.

Electronic access to individual transaction files and brokerage records at the brokerage level would be one improvement that could support enhanced compliance and oversight. This would support an efficient use of resources through virtual inspections and audits with resultant enhanced compliance and consumer protection.

E. Other

Moving from Registration to Licensing

With a view to communicating the importance of the obligations and duties that accompany what might be considered a privilege of registration, there may be value in considering a shift to a licensing approach rather than a registration approach. Changing from the registration entitlement process to a licensing approach would more accurately reflect the authority of the Registrar in determining whether to grant "permission" to an applicant to engage in and continue to engage in the practice of trading in real estate. With a licensing approach, the administrative process itself would not change significantly, but it would more accurately describe and reflect the authority of the Registrar.

RECO had previously suggested, as part of a move to a licensing, that consideration be given to implementing changes that would make employment a requirement to trade but not a requirement to maintain registration or licence.

However, given the potential impact on consumer protection if an inactive registration class were established, in addition to the potential financial and structural impact on the real estate brokerage industry in Ontario, RECO is recommending employment as a requirement to maintain a registration/licence be continued.

Regulation of Business Brokers

The extent to which REBBA applies to business transactions is not clear. For example, whether it applies to share sales and investments has been the subject of extensive litigation. The courts have struggled with the ambiguity in the current definition. See, for example: *Roche v. Marston*, [1951] S.C.R. 494; *Market Leadership Inc. v. Loretta Foods Ltd.,* [2005] O.J. No. 5430; *Neiman v. Duffmits Holdings Inc.,* 2010 ONSC 4643; *Huber v. Way*, 2014 ONSC 4426; and *Windrock Associates Ltd. v. Minucci*, 2016 ONSC 4504.

As recently as 2017, the Court in *Swiss Tech Incorporated v. 2316543 Ontario Limited*, determined that section 9 of REBBA does not apply to transactions in real estate that are a part of an ongoing business venture. Section 9 of REBBA provides that "No action shall be brought for commission or other remuneration for services in connection with a trade in real estate unless at the time of rendering the services the person bringing the action was registered or exempt from registration under this Act and the court may stay any such action upon motion". In determining that section 9 did not apply to the business transaction in question, the Court distinguished between a prospective buyer and a prospective investor.

Other jurisdictions have limited the reach of their REBBA equivalent legislation to business brokerage activity that includes real property. Until 2005, business brokerage activity in British Columbia (BC) was regulated in a manner like Ontario. The BC Real Estate Act previously had a definition of business that included any undertaking conducted for profit and the definitions of trade and real estate captured businesses, whether or not there was an interest in real property.

In Alberta, changes to legislation and regulations effectively eliminating the coverage of the Act to businesses without real property came into effect in 2008. A subsection of the definition of real estate that read, "(iii) a business, whether with or without premises, and the fixtures, stock in trade, goods or chattels in connection with the operation of the business" was repealed. As a consequence of this amendment, Alberta's legislation no longer covers the sale of businesses that do not include real property.

There is no separate registration class or type "business brokerage" or "business broker" under REBBA. Rather, there is one brokerage registration that applies regardless of whether a brokerage engages in the activity of business brokerage and one "broker" registration class. There are no separate qualification criteria for brokerages or brokers intending to engage in business brokerage activity. If it is determined that business brokerage activity that does not involve real estate is to be excluded from REBBA, the name of REBBA would necessarily change, possibly simplified to the *Real Estate Brokers Act* or *Real Estate Act*.

Given the interpretation difficulties and considering the changes in BC and Alberta, it may be timely to review the extent to which business brokerage transactions should be regulated under REBBA.

Terminology—Registrant Descriptions

RECO would be interested in stakeholder views on the terms used to describe registrants. In particular, the terms salesperson and sales representative do not accurately reflect the role of a registrant who is representing a buyer or providing other services that do not involve selling a property. Under REBBA, the agency relationship is with the brokerage and not at the salesperson level. It can be misleading for salespersons to be called agents, despite many consumers referring to them as "real estate agents." In British Columbia, the equivalent of a salesperson is called a representative. In Alberta, the equivalent of a salesperson is called an associate.

Changing the terms used to more accurately reflect the services provided by registrants and the role they play, may better assist consumers.

Terminology—Clarification of Meaning of "Trade" and "Other Services Provided"

What is captured and what is not captured as a trade in real estate could benefit from some clarification. Clearer language on what constitutes a "trade" in real estate and specificity on what services are not included as part of the definition of "trade" might be appropriate.

For example, in Alberta's legislation, "trade" is defined with some specificity to include any of a long list of matters, but also specifies matters that are not to be treated as an offering, advertisement, listing or showing of real estate for the purposes of the definition of trade. These include, the provision of information, forms and signs; the creation of a web page to market properties; the publication of a list of properties for disposition or acquisition.

A clear understanding of services that a registrant is permitted to provide to clients and newly defined customers would assist in determining when a written agreement or acknowledgement document is required. This clarification would be particularly important if the current customer definition and requirement for a customer agreement remain in place.

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