

For the

RECOrd



NOVEMBER 2005

ANNOUNCEMENT

Real Estate and Business Brokers Act, 2002 will come into effect March 31, 2006

Registrants have approximately 5 months to become familiar with the new legislative requirements. On March 31, 2006 the *Real Estate and Business Brokers Act, 2002 (REBBA 2002)* will become law in Ontario.



The new regulations are available online at www.reco.on.ca in the "REBBA 2002" section of the website. Links to the Ministry of Government Services and e-Laws are also provided.

REBBA 2002 and its regulations will replace the current *Real Estate and Business Brokers Act* and create a new legislative framework for the registration and regulation of real estate brokerages, brokers and salespersons.

What does all of this mean for registrants? With respect to the rules that registrants must follow in practicing as real estate professionals, the new Act and its regulations will introduce a number of changes. This edition of *For the RECOrd* provides an overview of the most notable of these changes, which include:

- Enhanced disclosure requirements related to multiple representation
- New requirements related to the operation of real estate trust accounts
- New prohibitions regarding registrants falsifying information
- New brokerage ownership provisions
- New requirement for insured status of registrants to become public information
- Increased information required to be contained in trade record sheets
- New requirements related to record retention
- Revised Code of Ethics

RECO encourages registrants to familiarize themselves with the new Act, revised Code of Ethics and other regulations to ensure they understand the provisions and can conduct their business in accordance with the new requirements. Over the course of the coming months, additional information about the new Act and regulations will be added to the "REBBA 2002" section of RECO's website.

Modernized Structure

The legislative structure of the new Act has been modernized. Many of the rules of trading found in the current Act have been moved to regulations under the new Act. The RECO Code of Ethics, complaints process and rules regarding related discipline and appeals

panels will now be found in regulations under the new Act and not, as they are currently, under RECO Bylaws.

The new Act also creates the ability to delegate certain regulatory powers to the Minister and gives the Minister the authority to delegate the power to make regulations to RECO. Regulations developed by RECO must be made in accordance with a consultation process agreed to by the Minister and must ultimately be approved by the Minister.

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An Overview of the Regulation on the Code of Ethics

After the proclamation of REBBA 2002, the Code of Ethics will be found in the new Act's regulations as opposed to RECO Bylaws. While the general purpose and emphasis of the Code of Ethics will remain the same, there are a number of changes registrants will need to be aware of.

The new Code looks a lot different than its predecessor. Almost every Code provision has been reworded. It is considerably shorter and does not include the guiding principles that form part of the current Code. Some provisions of the current Act and regulations have been moved into the new Code of Ethics.

Additional information about the new Code of Ethics will be provided over the next several months to help ensure registrants are aware of the new rules, understand why certain rules no longer appear in the Code and are familiar with any changes that will affect their day-to-day activities.

The following provides a brief overview of the new Code of Ethics.

The word "agency" has been replaced with "represent" in the new Code and the duties for disclosure are more detailed. Further, advertising requirements have not been dramatically changed in intent but there are changes to designations. Real estate firms are called brokerages or real estate brokerages, the principal operating broker is called broker of record or real estate broker of record and registrants working for a real estate firm are called sales representative, real estate sales representative, salesperson, real estate salesperson, associate broker, broker, or real estate broker, as applicable.

Definitions – Clients, Customers & Representation

Although the number of definitions in the new Code of Ethics is significantly reduced, a number of definitions found in the Act and general regulations are relevant to the new Code of Ethics.

Three definitions that registrants need to fully understand are the definitions of "client", "customer" and "representation agreement". Under REBBA 2002, a client is someone who is represented under a representation agreement with a brokerage. With respect to brokers and salespersons, persons are clients if the person has a representation agreement with the brokerage that employs the broker or salesperson and they are providing services to the person or representing the person on behalf of the brokerage in the transaction.



Under the new Act and regulations, registrants are required to make several disclosures to clients and customers regarding the services they provide.

Representation agreements can be written, oral or implied. The key determinant is that the brokerage and the person have agreed that the brokerage will represent the person in respect of the trade. Although, the Act and its regulations do not define the term "represent" explicitly, it is meant to apply to situations when the registrant is acting as a fiduciary "agent" of the person from the perspective of the common law. In other words, the registrant has fiduciary obligations toward the person and is acting in their best interests in the transaction in terms of the advice and services that are provided.

A customer is a person who has entered into a service agreement with a brokerage related to a real estate transaction, but who is not being represented by that brokerage as a client. This might apply to a situation in which a brokerage has entered into an agreement with a person to facilitate a real estate transaction, but the brokerage or its representatives are not providing any financial or fiduciary advice to the person as part of that agreement.

It is important that registrants understand the distinction between clients and customers as they read through the Code of Ethics. While the Code requires registrants to deal honestly with all persons in real estate transactions and a num-

ber of specific Code requirements are relevant to both customer services and client representation, registrant obligations with respect to customers and clients are different. In general, the Code imposes more obligations on registrants when they are dealing with clients; particularly in situations where multiple clients are represented by a single brokerage.

Representation, Multiple Representation and Disclosure:

Under the new Act and regulations registrants are required to make several disclosures to clients and customers regarding the services they provide. These disclosures are intended to ensure that buyers and sellers have a good understanding of the services that will be provided to them when entering into representation and customer service agreements with registrants.

In particular, it is hoped that new disclosure requirements related to multiple representation situations will minimize consumer confusion about registrant conduct in situations where a registrant is representing or providing services to more than one party in a particular real estate transaction.

Section 10 of the Code of Ethics establishes minimum disclosures that must be made to buy-

An Overview of the Regulation on the Code of Ethics

continued from page 2

ers and sellers prior to entering into agreements with them. Registrants are required to describe the services that will be provided and the alternatives available to the potential client or customer.

With respect to multiple representation, registrants are required to inform prospective buyers and sellers about the possibility of multiple representation, including a description of the services the brokerage would provide in those situations. Registrants also have to make it clear to buyers and sellers that they cannot represent multiple clients in a transaction unless all of

the potential clients consent in writing to that representation.

Section 16 of the Code, requires further disclosures regarding multiple representation at the point in time where a registrant might enter into a multiple representation situation. Registrants are obligated to describe how the services provided to the client will differ from a single representation situation including any differences in the disclosure of information made to the client. Section 17 of the Code requires the registrant to make these disclosures

at the earliest practical opportunity and in all cases before an offer to purchase is made.

Sections 10, 16 and 17 of the Code operate in conjunction with Section 22 of REBBA 2002 general regulations which states:

A registrant shall not represent more than one client in respect of the same trade in real estate unless all of the clients represented by the registrant in respect of that trade consent in writing.

Together these provisions establish the new Act's framework for disclosures in multiple representation situations.



RECO UPDATE

The Registrar's Complaints and Inquiries (RCI) Process

Under REBBA 2002, the Code of Ethics and the related Complaints, Compliance and Discipline process will be set by regulations rather than RECO By-laws. All complaints under the new Code will be handled by the Office of the Registrar. The current Complaints, Compliance and Discipline Process will be replaced by a new complaints process – the Registrar's Complaints and Inquiries (RCI) Process.

During the drafting of the new RCI Process, many approaches and models were analyzed, and multiple drafts of the new RCI process were reviewed and revised before the final version was approved.

The new RCI Process is based on five philosophical principles:

1. Compliance with the *Real Estate and Business Brokers Act, 2002*.
2. Fairness to all participants.
3. Consistency in handling concerns regardless of how the concern came to the Registrar's attention.
4. Balancing a consistent overall process with recognition that each concern is unique and that the specific inquiry steps that are appropriate to a particular case will vary.
5. The RCI process is part of the administration of justice conducted by RECO and the Registrar shall make all decisions in the public interest.

More information about the RCI Process will be available in the near future.

Trust Accounts

REBBA 2002 contains a number of new requirements related to the operation of real estate trust accounts that are outlined below.

Interest Disclosure

Brokerages must disclose to persons providing moneys to be deposited in trust the terms on which the brokerage deposits the money. If the brokerage deposits the money in an interest bearing account, it must disclose to the person who gave the deposit the interest rate that the brokerage receives on the money. Unless contracts specify otherwise, all interest accruing to the trust money must be paid to the beneficial owner of the trust money.

Deposit/Disbursement of Trust Moneys

Under REBBA 2002 the time that brokerages have to deposit trust moneys once they have received them has been extended from two banking days to five. Under the new Act, brokerages are also required to make requested disbursements from trust accounts as soon as practicable subject to the terms of the trust.

Trust Account Record Keeping

Under REBBA 2002, brokerages must designate the trust account they operate for the purposes of section 27(1) of the Act as their "real estate trust account". Regulations under REBBA 2002 specify the minimum information that brokerages must record regarding the receipt and disbursement of any trust money that they collect or pay out. Brokerages must also prepare monthly reconciliation statements regarding trust accounts. All trust account disbursements and reconciliation statements must be authorized and signed by the brokerage's broker of record. If a brokerage at any time determines there is a shortfall in its real estate trust account, the brokerage is required

to immediately deposit sufficient funds in the account to eliminate the shortfall.

Unclaimed Trust Money

REBBA 2002 contains new provisions related to unclaimed trust money. As with the current statute, after a one year period, brokerages are required to forward unclaimed trust money to RECO if the person who was entitled to the money could not be located. In addition, REBBA 2002 also requires brokerages (after a period of two years) to forward unclaimed trust money to RECO where entitlement to the money has not been determined or is not clear. This provision might apply to a situation where a potential buyer and seller did not sign mutual releases related to return of a trust deposit and neither has attempted to resolve entitlement through a court process.

Brokerages forwarding unclaimed trust money to RECO must provide RECO with as much information as the brokerage has in order for RECO to determine who is or may be entitled to the trust money. A Registrar's Bulletin related to unclaimed trust money, outlining the minimum information the Registrar expects to receive, will be made available when the new Act comes into effect.

After a period of five years, RECO is required to forward unclaimed trust money received from brokerages to the Minister of Finance. The payment of unclaimed trust money to RECO or the Minister of Finance does not in any way prejudice the rights any person or persons may have to claim entitlement to these funds.



Some Changes to Note in the General Regulation

Information Available to the Public Concerning Brokerages

Under REBBA 2002, more information about registrants will be publicly available than is the case under the current Act.

General Information

RECO will continue to provide the public with information that enables them to determine whether an individual or corporation is registered. RECO will also provide the registration category of the individual, such as broker of record, broker, or salesperson; business contact information for the registrant and the date the registrant is required to renew. RECO will also indicate whether registrants are in compliance with requirements to pay insurance premiums.

Proposals

Under the new regulations, RECO will indicate if a proposal to revoke, suspend or apply conditions to a registration has been made but not yet disposed of. Information about refusals, revocations or suspensions of registration and terms and conditions applied by the Licence Appeal Tribunal to a registration through the notice of proposal process or orders issued by the Registrar will also be made available to the public.

Charges, Convictions & Freeze Orders

RECO will publish information regarding false advertising, freeze orders and all charges and convictions made under REBBA 2002, including a description of the charge or conviction and description of any sentence imposed including any order to pay compensation or make restitution. This information will be made available on the RECO website for a period of at least 57 months from the date of the conviction or, in the case of freeze orders, from the date of the freeze order.

Ownership:

Under REBBA 2002 brokerages are no longer required to be 51 percent owned by registered brokers. The restrictions limiting non-registrants to holding no more than 10 percent of the voting shares of a corporate brokerage have also been eliminated. Corporate brokerages can be owned by non-registrants provided that all the conditions for successful registration are met.

The current Act's restrictions limiting salespersons and brokers from holding ownership in a brokerage that they are not employed by have been eliminated.

Broker of Record:

All brokerages are required to designate a broker as its broker of record. The broker of record is responsible for managing the brokerage's affairs, properly supervising its employees and ensuring that it complies with the Act and regulations. In the case of sole proprietorships, the sole proprietor must be the broker of record even if the brokerage employs other brokers.

Termination of a Brokerage:

Under the current Act, there are no explicit guidelines regarding what a brokerage must do when winding down its operations. REBBA 2002 includes specific steps that brokerages must follow when it winds down its business. Brokerages that know they will cease to be registered are required to inform the Registrar of the date their business will cease operation. They are also required to provide the Registrar with information designed to ensure their business will be wound down in an orderly fashion. This information includes such things as a comprehensive financial statement, a list of the trades in real estate that are pending when the brokerage ceases operation and a copy of the brokerage's letters to clients informing them of the impending termination. A Registrar's Bulletin will provide more detail on the information the Registrar expects to receive when brokerages are shutting down business.

Falsifying Information and False Advertising

Falsifying Information:

Under REBBA 2002, it is an explicit offence for a registrant to falsify or counsel others to falsify any information or document related to a trade in real estate. It is also an offence for a registrant to furnish, or counsel another to furnish, false or deceptive information regarding a trade in real estate.

While this type of conduct may have been considered a breach of a registrant's duty to act with honesty and integrity under the current Act, it will now be an explicit offence for a registrant to act in this manner. A registrant knowingly participating in a mortgage fraud scheme, which involved false information, could be charged with an offence under this REBBA 2002 provision.

False Advertising Provisions:

REBBA 2002, like the current Act, contains a provision prohibiting registrants from making false or deceptive statements in advertising related to trading in real estate. The Registrar will have a number of new powers under REBBA 2002 regarding false advertising. In addition to ordering the cessation of false advertising, which the Registrar can do under the current Act, the Registrar will also be able to order registrants to retract statements or publish corrections. The Registrar also has the power under REBBA 2002 to require pre-approval of a registrant's advertising for a period of up to one year if the registrant is found in violation of the false advertising prohibition.



Public Trust In The Real Estate Marketplace

Do you have any comments or inquiries about For the RECOrd newsletter?

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