



Real Estate
Council of Ontario

Response to Phase 1 of the Real Estate and Business Brokers Act, 2002 (REBBA) Review: Multiple Representation and Other Matters

Submission date:

July 31, 2017

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Submitted to:

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Executive Summary

RECO supports the Ministry of Government and Consumer Services' review of the *Real Estate and Business Brokers Act, 2002* (REBBA) and its regulations. RECO agrees with the Ministry's proposed two phase approach to allow for full consideration of potential improvements and with the goals of increasing consumer confidence by addressing conflict of interest situations including: multiple representation arrangements; assisting consumers in understanding the nature of the process and agreements they may sign; and of strengthening consumer protection, by modernizing penalties for unethical behaviour.

RECO recognizes the strong support from the industry for the sector to be well regulated, for RECO to be provided with new and enhanced compliance and regulatory tools to ensure consumers are protected in real estate transactions, and for misconduct, when it occurs, to be appropriately addressed to maintain the integrity of the marketplace and the profession.

RECO is pleased that, consistent with recommendations it made to the Minister in January 2017 addressed in the Background section following, Phase 1 is considering a mandatory designated representation model with limited exceptions.

RECO is also pleased that, and fully supportive of, the proposal for a requirement for mandatory use of standardized disclosure obligation language.

The third proposal, of increasing maximum fines for Code of Ethics violations is consistent with RECO's view that enhanced compliance measures are required.

Additional input and information is provided in response to the specific questions posed by the Ministry in the consultation document.

Preliminary feedback is also provided on matters that might be considered as part of the broader review of REBBA in Phase 2. This preliminary feedback is not intended to be a comprehensive list of all changes that might be considered during a comprehensive review and additional matters may be raised before and during the Phase 2 consultations. Many of the items put forward for discussion will require, and benefit from, further analysis and public consultation.

Importantly, it should be stressed that any changes will need to be carefully monitored and evaluated to ensure that conflicts of interest and other consumer concerns are appropriately addressed and that consumers are protected with clear language in all communications and through strong compliance and enforcement measures.

Background

RECO provided preliminary recommendations for REBBA reforms to the Minister of Government and Consumer Services in January 2017. Those recommendations followed a November 4, 2016, CBC Marketplace segment about situations in which Ontario real estate registrants were allegedly trying to benefit from multiple representation (collection of both the seller and buyer commissions) by manipulating transactions to the detriment of consumers. RECO publicly condemned the conduct of the registrants and committed to developing recommendations to address the practices in question.

RECO's January 2017 recommendations to the Minister were based on the following consumer protection principles:

- Conflict of interest situations should be prevented or prohibited from arising;
- Financial incentives to act unethically should be eliminated or significantly reduced;
- Consumers should be provided with clear, consistent information regarding the nature of the relationship and services provided; and
- Appropriate tools and penalties should be available to respond to consumer harm.

In its January 2017 letter to the Minister, RECO recommended that a conflict of interest provision be added to REBBA, akin to what is in place for Ontario lawyers; that a system of designated representation be introduced providing for separate representation of clients within a brokerage with appropriate exceptions; that there be standardized mandatory disclosure set or approved by RECO; and that RECO's enforcement and compliance provisions be reviewed and stakeholders engaged on possible new and enhanced compliance and enforcement provisions.

RECO continues to support the consumer protection principles noted above and has been guided by those principles in this response to the Ministry.

Responses to Proposals for Potential Changes

Establish a new mandatory designated representation requirement at the individual registrant level with limited exceptions

RECO is supportive of the government's proposal to introduce a Mandatory Designated Representation (MDR) regime, with limited and specific exceptions with consumer and industry sector consultations on the final design details.

Designated representation permits a brokerage to have multiple clients in a single transaction, but each must be represented by a different salesperson or broker ("designated representatives"). The brokerage is obliged to have processes in place to ensure that client information is not exchanged between designated representatives. Designated representatives provide services exclusively to one client in a transaction. The representatives within the brokerage are to be treated the same as representatives from other brokerages. This assists in addressing conflicts of interest.

While designated representation would apply to most multiple representation scenarios, there may be necessary exceptions. There are situations, such as in some remote communities with a limited number of registrants, where there may be few options to address conflicts of interest. Regulations could address such situations as exceptions.

RECO would be interested in input from a variety of sectors including consumer and industry sectors, but also the financial, insurance and legal sectors, in identifying the nature of the exceptions and mechanisms that could be in place to reduce risk in those situations.

QUESTIONS:

1.1. What are the implications of implementing the potential MDR approach for the real estate industry?

Agreements are with brokerages and not individual registrants. Multiple representation is currently prohibited unless the parties agree the brokerage, through one or more individual registrants, can enter into a multiple representation situation. Given the structure of the real estate marketplace, consumers and registrants would not necessarily benefit from a ban on multiple representation at the brokerage level. It is when an 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.

Regardless of the personal integrity of the registrant, an inherent conflict of interest arises when an individual registrant represents more than one party to a transaction, particularly where they are acting for the seller and one or more buyers. A seller representative should be seeking the highest price for the seller they are representing. A buyer representative should be attempting to obtain the property for their buyer at the lowest

possible price. In RECO's view, it is not possible for one individual to do both at the same time in a single transaction.

Permitting a registrant to represent multiple parties in a transaction fosters an environment that creates other issues. This would include perceived conflicts of interests arising when other parties who are not represented by the registrant are involved in the transaction.

Notwithstanding an MDR model, there remains the continued risk of conflicts of interest between the brokerage and its clients/customers. The brokerage stands to benefit financially by representing both the seller and the buyer. Brokerages must maintain the appropriate firewalls to effectively implement the MDR model and prevent the exchange of information from one designated representative to another within the same brokerage. The broker of record must make certain that he/she does not engage in any confidential discussions with only one designated representative.

As with two lawyers from the same firm acting on both sides of the transaction, a designated representative must still act with discretion in determining whether there is a conflict of interest in their representation of the one party. Prior to any MDR arrangement the brokerage should be required to ensure that the designated representatives have confirmed they are not in a conflict of interest situation vis-à-vis the client.

Any new rules should include restrictions and obligations on designated representatives, the brokerage and all other salespersons and brokers employed by the brokerage to ensure that information, whether personal, financial or confidential, is not disclosed to the other party without informed consent. This would include a prohibition on disclosing information about a person's motivation in a transaction, what they might be prepared to accept as a seller, what they might be prepared to pay as a buyer, and where they stand on items such as financial and other terms.

The obligation to have consent must include an obligation of full disclosure and explanation. Where there is any hesitation or doubt on the part of a client, the client should be encouraged to seek advice before proceeding. This might be advice from a lawyer or a financial institution for example. There may be situations where a client should be provided with the option of engaging through another brokerage.

There is a strong consumer-protection argument to be made for reviewing and reassessing the intent and ongoing relevance of the distinction between client and customer. Specifically, how a buyer or seller would benefit from being a customer and not a client, or conversely, how they would be disadvantaged by being a client and not a customer. Clients should not be reduced to customers as a means of permitting a registrant to provide services to both the seller and buyer. RECO has included a review of client and customer definitions and duties for consideration in Phase 2.

Regarding the differing levels of duty of care owed to clients as opposed to its customers, it may be necessary to have one or more of the obligations on a designated representative in respect of a client also apply to the customer/representative

relationship. In part, this would address the lingering risk of a conflict of interest at the brokerage level. It's possible that a customer relationship may change to one of client because of a deliberate choice by the consumer or because of conduct on the part of the representative that leads to the conclusion that they are treating the individual as a client and not a customer.

Similarly, though an MDR arrangement may be permitted, a brokerage might choose not to proceed with representing both parties if, for example, it is apparent that there is an elevated risk of a contentious outcome. This might be the case if the sellers are spouses and the transaction is part of a settlement of a matrimonial dispute.

1.2. What, if any, are the implications of using MDR for small versus large brokerages?

The MDR approach will necessarily be easier for larger brokerages to implement. And practically speaking, there may be small brokerages, including sole proprietorships, for whom the numbers simply do not permit the efficient and effective implementation of the MDR model, within the brokerage. This would necessitate a brokerage to allow a buyer or seller to find alternate representation with another brokerage, which likely should be the case for any buyer or seller who is faced with the choice, even one working with a brokerage with many salespersons.

1.3. Do the implications, if there are any, change in different geographic areas?

There may be a mid-size brokerage in a remote community that could adequately implement an MDR approach. Issues might arise however in remote communities where access to services is limited.

1.4. How should brokerages that are sole proprietors be treated?

A sole proprietor should be treated in the same manner as any other small brokerage.

1.5. What are the implications for salespersons and brokers that work as teams?

The concept of working as a team within a brokerage is not referenced in the legislation, but is an operational approach to delivery of services. In any MDR arrangement, it is important not only that conflicts of interest be addressed but that they are seen to be addressed. Where team arrangements are in place, any protocols regarding the choice of designated representative should be mindful of this principle. As well, measures may need to be introduced to deal with compensation arrangements as some may provide financial incentives at a team level that might negatively impact the obligation of the designated representative.

1.6. What circumstances would require specific exceptions to allow an individual registrant to represent more than one party in a transaction?

In the context of legal services, an individual lawyer cannot act for or otherwise represent both the transferor and the transferee except in limited and defined circumstances. Even

if permitted, the lawyer is still bound by the rules regarding conflict of interest. It should remain clear that allowing an MDR approach does not relieve the representatives of their fiduciary obligation to their clients. Determining appropriate exceptions from MDR for real estate professionals would benefit from consideration of the equivalent exemptions for lawyers.

The limited circumstances for purposes of a lawyer acting for both the purchaser and the vendor include, for example, a transfer where the transferor and the transferee are the same and the change is being made to effect a change in legal tenure; a transfer where the transferor and the transferee are one and the same and the transfer is being made to effect a severance of land; a transfer from an estate trustee, executor or administrator to a person who is beneficially entitled to a share in the estate; and importantly, a transfer where the lawyer practices law in a remote location where there are no other lawyers and retaining the services of another lawyer would give rise to undue inconvenience. See further at <http://www.lsuc.on.ca/with.aspx?id=2147499397>. Similar criteria might be used to determine when it would be appropriate to allow an individual registrant to represent more than one party in a transaction.

In commercial transactions, it may be feasible to allow one registrant to represent both sides of the transaction. It would be necessary to define what is captured as a commercial transaction and possibly limit it to situations that are more “transactional” and less a relationship of representation.

If a brokerage has an ongoing relationship with a client or had a pre-existing ongoing relationship with a client, whether a seller or buyer, then before proposing an MDR arrangement with a new client, the brokerage could be required to advise the potential client of the existing or pre-existing relationship and possibly be required to recommend that the client seek independent advice (e.g. legal advice) about the proposed MDR arrangement and the implications the existing or pre-existing ongoing relationship may have on the services provided to the new client.

1.7. Are there any alternative approaches that you think the government should consider?

As noted in the executive summary, any changes should be carefully monitored and assessed to ensure that the desired outcomes of strong consumer protection and prevention of harm are met. The sector should remain open to considering alternatives at a later date including the possibility of prohibiting dual agency completely (without the MDR option) except in very limited circumstances or prohibiting a registrant receiving compensation from both ends (buyer and seller) of a trade.

Requiring the use of mandatory standardized disclosure clauses

RECO would support amendments to REBBA to provide authority for regulations to require the use of specific representation disclosure language through the implementation of specific standard written disclosures. RECO would also support a requirement that the

standardized disclosure be developed or approved by RECO in consultation with consumer, industry and other sector representatives.

The use of standardized disclosure language increases the likelihood that a consumer's understanding of representation obligations and services is complete, written in plain language and that there is informed consent to an MDR arrangement on the part of a potential buyer or seller. Standardized disclosure language can help consumers appreciate the limitations on representation that may result even in an MDR situation and can support information that gives a consumer clear evidence on the benefits of individual representation.

Where an agreement is for the provision of services only and not representation, i.e. a customer relationship and not a client relationship where a fiduciary duty is owed, standardized language that speaks clearly to the limitations of the services being provided can support a consumer to make an informed choice on what relationship best suits their needs and what their rights and protections are under that arrangement.

QUESTIONS:

2.1. What considerations should be taken into account if this approach is adopted?

The existing regulatory regime addresses conflict of interest in part by creating "clients" (full representation, including advice) and "customers" (services only without representation or advice). However, many buyers and sellers are confused about representation services and the distinction between client and customer relationships. It is challenging for a consumer to understand the substantive, but nuanced differences of the possible relationships. An MDR approach requires that there be clarity in terms of the status of client and status of customer.

Obligations that would be implemented for MDR, such as confidentiality between a buyer's designated representative and a seller's designated representative, may be required to apply to customer relationships. Real estate professionals will need to consider the duty of confidentiality that may be owed to third parties, specifically customers. In the lawyer/client context, the Rules of Professional Conduct provide that a lawyer owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge. This duty can arise whether or not the lawyer has billed the client and whether or not the lawyer has agreed to represent the client. Similar concerns would apply in the real estate professional context in particular as it relates to customers.

The fact that representation disclosure language can vary from one brokerage to another should be addressed as part of any MDR proposal. While REBBA requires explicit representation disclosure, the language registrants use to describe the nature of the services provided or the nature of the relationship is not specified in regulations. Other jurisdictions require that disclosure, in many cases specific forms or clauses set or approved by the regulator, be used by registrants. Disclosure language describing the

relationship of a representative and client in an MDR is a critical part of addressing the conflict of interest concerns. Accordingly, it should be consistent across all brokerages to minimize any misunderstanding or miscommunication from one brokerage to another and to ensure that the implications of an MDR and any limitations it might give rise to are communicated consistently to a client or customer.

Having standardized language that is set or approved by the regulator can ensure that the emphasis is on consumer protection and the public interest.

Regarding the relationship of customer rather than client, there must be clarity on what circumstances involve services without representation and the implications of not having representation. A clearer description of "services" and what they might be would assist. For example, the service of identifying properties that meet a consumer's specifications can potentially be provided to either a customer or a client. It needs to be clear to the customer, what services do not follow from identifying the properties, such as an opinion on the price or market value. Critically, the consumer must appreciate that unless the regulations are amended to provide otherwise, there is no duty of confidentiality to the customer, particularly problematic in a circumstance where the registrant also has a client to whom they owe a fiduciary duty involved in the same transaction.

2.2. Are there any challenges with using standardized clauses for disclosures to consumers in agreements?

Even with a mandatory designated representation (MDR) regime, the positions of a buyer and of a seller are inherently in conflict, in that generally the buyer wants to pay as little as possible and the seller wants to receive as much as possible for the property. Full disclosure requirements to inform a prospective seller or buyer of the brokerage's relationship to another party (other buyer or seller) and to explain in detail the implications of MDR and the fact that they do not remove the conflict of interest at the brokerage level, but assist in mitigating the conflict.

The disclosure should clearly articulate the brokerage's interest in both the buyer and the seller aspect of a trade and the brokerage's responsibility to supervise and be accountable for the actions of its employee registrants.

Standardized clauses and language should be written in plain language and disclosure requirements should be in stand-alone documents and not obscured in some other longer document. Requiring a separate document may need a regulatory requirement in addition to authority to specify the standard language that is to be used.

The disclosure document should be accompanied by a requirement to review with and explain the document to a prospective client. It should be signed by the client. The legislation should provide that where there is no such document, the presumption is that the relationship between the person and the representative/brokerage is one of client (fiduciary and advisory duties) with no other buyer or seller being represented in the transaction in question.

2.3. Are there other disclosures that should be standardized to provide consistency and clarity for consumers (for example, disclosure of interest)?

A registrant (the brokerage, broker or salesperson) may have a direct financial or personal interest in a matter. RECO would support standardized disclosure language on these matters as well. The objective is to provide the same protection to consumers regardless of where they live in the province. Standardized language can assist with preparing educational and other material for consumers and can assist when advice is being sought from another professional such as a lawyer.

As was recommended by the Independent Advisory Group report of June 2016 dealing with real estate concerns that arose in British Columbia, it may be appropriate to consult on whether registrants should be required to have all disclosures of interests reviewed and approved by a registrant's broker of record and filed at regular intervals with the registrar.

Increase the current maximum fine of \$25,000 for Code of Ethics violations to \$50,000 for individual salespersons and brokers and \$100,000 for brokerages

RECO continues to recommend and support a more fulsome review of current REBBA enforcement provisions, procedures and penalties in conjunction with consideration of new rules related to multiple representation. Assessing and identifying the optimum amount would benefit from additional data on practices in other jurisdictions and information on the amount of improper enrichment.

QUESTIONS:

3.1. What considerations should be taken into account if this approach is adopted?

There are challenges to detecting the conduct because a successful seller and buyer are unlikely to report the conduct or support a complaint submitted to RECO by another party. It is almost impossible to monitor the day-to-day conduct of registrants and their everyday conversations.

Prevention of harm should remain the focus with continued promotion of regulatory measures that support compliance. Where these measures fail, RECO believes that the consequences should be commensurate with the harm caused. Higher fines would be one approach.

Increased fines, as proposed, can help to deter unethical conduct, but should be accompanied by new and enhanced enforcement measures to respond to the conduct.

Increased fines can support new rules around conflict of interest and representation by having the risk of a higher financial penalty act as a stronger disincentive to engage in the unethical behaviour in question.

3.2. Are the proposed fine amounts adequate to act as an effective deterrent?

Currently for prosecutions, the maximum fine on conviction for a breach of the Act or regulations other than a Code of Ethics breach is \$50,000 for an individual and \$250,000 for a corporation. If consideration is being given to increase the maximum fine for a breach of the Code of Ethics to \$50,000 for an individual (bringing it equivalent to the fine on conviction), there may be an argument to increase the maximum fine for a corporation to \$250,000 rather than \$100,000.

Other jurisdictions such as BC have higher fine amounts for individual breaches. The June 2016 report of the Independent Advisory Group in BC had recommended that Government increase maximum disciplinary penalties to \$250,000 for individual licensee misconduct, \$500,000 for brokerage misconduct, and increase administrative penalties to a maximum of \$50,000.

3.3. Should the government link a fine to the commission amount to encourage compliance and reduce the financial incentive to violate the rules? This could be like the power of the court in prosecutions for violations of REBBA.

RECO would support a proposal that includes higher fines, potentially linked to commission amounts. There may be an argument for aligning fine amounts to the greater of the amount of commission earned because of the breach or a maximum of \$50,000 for an individual and \$100,000 or \$250,000 for a corporation. An issue that remains, however, is that unlike a prosecution situation with a restitution or compensation award, the increased penalty amounts are revenue to the regulator and would not compensate an aggrieved client or customer without additional legislative changes. This item could be considered in the context of a Phase 2 proposal that consideration be given to establishing a compensation fund with the possibility of fine amounts being targeted to such a fund.

3.4. Should the rules be subject to prosecution by the court instead of the discipline committee?

Currently, an alleged breach of REBBA, other than the Code of Ethics, can lead to a provincial offence prosecution. An alleged breach of the Code of Ethics can only be addressed in the context of discipline proceedings.

Rather than a shift to relying on provincial offence prosecutions, RECO recommends that on its own or as part of enhanced compliance and enforcement powers, the powers of its Discipline and Appeals Committees be enhanced. While there is a certain appeal to enhanced prosecution activity and the ability to seek restitution and compensation orders, the data indicates that generally the fines imposed by the courts are lower than the fines

imposed by Discipline and Appeals Committees. RECO's Disciplinary Committee now has 16 years of experience in adjudicating disciplinary matters. The panels include public members who, combined with sector expertise, bring a broad consumer-protection perspective. Any new or enhanced compliance measures should continue to leverage this expertise and experience.

As part of Phase 2, and related to the question of increased fines and who has responsibility for what, it may be appropriate to review the current provisions of the Code of Ethics Regulation 580/05; Educational Requirements, Insurance, Records and Other Matters Regulation 579/05; and General Regulation 567/05 and where various items are placed to confirm that the specific behaviour being targeted is properly identified and treated as an ethical or fitness-for-practice matter. For example, the disclosure obligation that must be satisfied before entering into an agreement with a client or customer is in fact a right of and protection for a client or customer. Similarly, the contents of agreements that are spelled out in the Code of Ethics regulations are rights of and protections for clients and customer. It is arguable that these critical and foundational measures, which are integral components of any effort to address conflict of interest should be treated as rules rather than a Code of Ethics requirement. Consideration of this item would benefit from a more detailed review of compliance and enforcement data, the behaviours that have given rise to proceedings and input from industry and other stakeholders. This item is also noted in the part of the submission dealing specifically with Phase 2 suggestions.

Regarding the functions of the Discipline and Appeals Committees, there may be value in considering, as part of Phase 2, whether the Discipline and Appeals Panels should have expanded powers to allow them to revoke or suspend registrations when the conduct is such that the panel determines consumers are at risk. Suspensions, in particular, might be appropriate in cases where it appears additional training or education is required to ensure the individual does not continue to act in a manner that might expose additional consumers to risk.

3.5. Any further comments or suggestions about penalties for Code of Ethics violations?

As noted in item 3.3 above, increased fines do not directly benefit a client or customer as would occur with a restitution or compensation order made in the context of a successful prosecution and conviction.

Other Proposals for Consideration: Phase 2 of the REBBA Review

The following suggestions are not intended to be an exhaustive list of all changes RECO recommends the Ministry consider and are in addition to matters referenced in the submissions in respect of Phase 1 above. RECO recommends that public input and consultations be part of the Phase 2 process for considering any of the items identified below. Some may require in depth analysis and stakeholder consultation.

The proposals are grouped in categories covering: Consumer Protection; Flexible and Responsive Legislation; and Streamlining Regulatory Processes.

Consumer Protection

Clarification of Trade and Other Services Provided

There is a lack of clarity regarding the relationship a registrant has with a client as compared to a customer. Some of that lack of clarity might be addressed in part with 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”.

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.

It may be timely to review the definitions in REBBA and its regulations to ensure clarity on the meaning of “trade” and “services” as they relate to activity for a client and activity for a customer.

Client and Customer Relationships

There is a strong consumer-protection argument to be made for reviewing and clarifying the distinction between client and customer and reassessing the need for the distinction.

In Ontario, client and customer are defined as follows:

“client” means,

- (a) with respect to a brokerage and a trade in real estate, a person who, in the trade, is represented under a representation agreement by the brokerage, and*

(b) with respect to a broker or salesperson and a trade in real estate, a person who, in the trade, is represented under a representation agreement by the brokerage that employs the broker or salesperson, if the broker or salesperson represents the person pursuant to the agreement; ("client représenté")

"customer" means,

(a) with respect to a brokerage and a trade in real estate, a person who, in the trade,

(i) has an agreement with the brokerage under which the brokerage provides services to the person, and

(ii) is not represented under a representation agreement by the brokerage or any other brokerage, and

(b) with respect to a broker or salesperson and a trade in real estate, a person who, in the trade, obtains services under an agreement, other than a representation agreement, from the brokerage that employs the broker or salesperson, if the broker or salesperson provides services to the person pursuant to the agreement; ("client non représenté")

The language is much clearer in some other Canadian jurisdictions, for example, in Alberta client and customer are defined as follows:

"client" means a person who has entered into a service agreement with an industry member in accordance with these rules, whether or not that service agreement is in writing;

"customer" means a person who has contacted, but not engaged or employed, an industry member to provide services;

There are also questions to be considered regarding the distinction in Ontario and how it benefits a consumer. Specifically, how a buyer or seller would benefit from being a customer and not a client, or conversely, how they would be disadvantaged by being a client and not a customer.

Consumer Awareness

Consumer awareness matters most when consumers are planning to engage in, or are engaged in, a real estate transaction. To enhance consumer knowledge and understanding, RECO is recommending that consideration be given to an amendment that would require registrants to provide a RECO publication to consumers and obtain a signed acknowledgement or electronic confirmation of receipt by the consumer. This publication would include, among other things, plain language information about the types of relationships and services provided by registrants.

Conflict of Interest Provision

Some professional regulatory regimes include a specific prohibition on conflict of interest.

For example, the Law Society of Upper Canada's Rule 3.4-1 states:

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Rule 3.4-2 permits a lawyer to act in a conflict in certain circumstances with consent. It is the client, not the lawyer, who is entitled to decide whether to accept risk of impairment of client representation and loyalty. However, Rule 3.4-2 provides that client consent does not permit a lawyer to act where there would be impairment rather than merely the risk of impairment.

Conflict of interest is defined as the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client or a third person.

RECO would support the addition of a provision to the legislation that includes a definition of conflict of interest.

Underquoting

Underquoting of selling prices is often connected to heated real estate markets and often cited as the root cause of bidding wars. It may be timely to consider whether similar rules should be introduced for Ontario to bolster the prohibition on false, misleading or deceptive statements in advertising and other publications. This would need to be carefully considered to determine the impact on the marketplace in both seller's and buyer's markets and the interests of both buyers and sellers.

Flexible, Responsive Legislation

Realignment of Rule-Making Authority

As a general comment, REBBA is prescriptive legislation that addresses rules and practice standards by regulation rather than allowing one or more of them to be "as determined by the regulator". To ensure a flexible and responsive regulatory regime, consideration could be given to moving additional authority for the detail of some aspects of regulation to the registrar.

As well, consideration might be given to operationalizing the delegated regulation-making powers, subject to the approval of the minister or creating RECO rule-making authorities. In many jurisdictions, the policy elements are retained in the legislation and regulations and the more prescriptive matters are addressed through the regulator's rule-making authority. This might include the specific language to be used in standard forms.

Other Canadian jurisdictions provide the regulator with the authority to make specific rules beyond what is set out in statute and regulations.

Registration Categories & Educational Requirements

RECO supports a review of the current registration category structure. The training currently required to become registered as a broker would be more appropriate as the qualifying criteria to fill the role of broker of record or branch manager. In addition, brokers of record, branch managers and brokers do not have distinct continuing education requirements. They are aligned with the requirements for a salesperson.

Regulatory requirements to become a branch manager are inconsistent with the role the individual is expected to perform. Salespersons do not have the training to run and manage a brokerage and it might be more appropriate to require branch managers to be brokers.

While not operationalized, there was an unproclaimed provision in REBBA allowing for specialization of registrants that was removed. There may be value in consulting on whether to reintroduce the provision and allow for designation of registrant by area of specialization, for example commercial, agricultural and others, and allowing the registrar to set the educational and other requirements.

Move to a Licensing Regime from a Registration Regime

RECO also recommends that consideration be given to implementing a licensing regime in place of the current registration regime. This would make employment a requirement to trade, but not a requirement to maintain registration and could significantly reduce the administrative burden associated with the termination and transfer of registrations for both RECO and registrants.

RECO notes the *Condominium Management Services Act, 2015* and the *Home Inspection Act, 2017* have adopted a licensing regime approach rather than a registration approach.

Insurance

An analysis of the similarities and differences between RECO's group insurance program and those delivered by similar regulatory bodies should be conducted to ensure that any real or perceived conflicts of interest arising as a result of the legislated requirement for RECO to arrange and administer the group insurance program are identified and appropriately addressed.

Education

RECO recommends that consideration be given to amending the language related to education requirements to adopt language consistent with that used in the *Funeral, Burial and Cremation Services Act, 2002* (FBCSA). 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 more nimble in addressing some issues that arise through education.

Business Brokers

RECO believes that the removal of business brokers from REBBA regulatory oversight should be considered. A business broker is generally defined as a person who assists individuals in selling or buying a business and who may engage in activities that extend well beyond a trade in real estate. RECO notes that other Canadian jurisdictions have removed business brokers from oversight by the real estate regulator and would be interested in stakeholder views on this matter.

Streamlining Regulatory Processes

Appeals of Registrar's Proposals to Refuse, Revoke or Suspend Registration

The current structure of REBBA involves an appeal to the Licence Appeal Tribunal on all matters related to entitlement to registration (i.e. suspensions, refusals and revocations and conditions of registration). These are appeals from decisions of the registrar who, under REBBA, has statutory decision making in respect of individual registration matters. It may be appropriate to consider whether the appeal of some of these registration decisions might be better addressed by RECO's Discipline and Appeals Committees, which are statutory tribunals governed by the *Statutory Powers Procedure Act*. This might also include allowing an appeal of any decision made by RECO's Tribunals to LAT. However, this could have significant impact on the structure of REBBA and its feasibility will need to be assessed.

A panel, such as the Discipline and Appeals Committees, with sector expertise and public representation, may be well positioned to make a determination, or alternatively a recommendation, on an individual's entitlement or suitability to remain registered or have conditions applied to their registration as a result of the conduct that brought the matter to the attention of the Discipline or Appeals Committee. Importantly, any changes must not compromise or undermine the authority of the registrar who has a statutory mandate to carry out or introduce a risk of conflicting decision making. It is important to note that under section 21 of REBBA, members of the committees are appointed by the Board.

As noted earlier, RECO's Disciplinary Committee now has 16 years of experience in adjudicating disciplinary matters. The panels include public members who, combined with sector expertise, bring a broad consumer-protection perspective.

Administrative Penalties

The authority to impose administrative penalties would enhance compliance in respect of potentially minor infractions or technical breaches, such as failing to use the proper terminology in an advertisement or failing to complete monthly trust account

reconciliations and would allow for infractions to be addressed more expeditiously. RECO has been actively engaged in pursuing this compliance and enforcement measure since 2010 and remains interested in administrative penalties as an efficient and effective enforcement tool.

Enforcement of Discipline/Appeals Committee Orders

The process for the enforcement of committee orders is cumbersome as the registrar is required to prepare and issue a notice of proposal to suspend or revoke registration if the registrant fails to comply. In RECO's view, given the nature of the issue, a potential solution is a more streamlined process of suspension of registration for failure to comply with or ensure compliance with the order of a Discipline or Appeals Committee.

This might work for an order that is specific about the time for compliance. It would not readily apply to orders that speak to something being done "in a reasonable time" or similar language as this would call for an inquiry into what was reasonable in the circumstances, an inquiry that the registrar would have to make before a decision is made to give notice of proposal to suspend based on the failure to comply. Where a specific outside date for compliance is provided in an order, the order of the committee could be deemed to be a notice of proposal to suspend in case of non-compliance, shortening the time for reacting to a failure to comply, and resulting in an automatic suspension. A reasonable minimum period of time to comply with an order would also need to be established.

Withdrawal of Complaints or Agreements Preventing a Complaint

RECO would support a provision that prohibits a registrant from making a payment to a complainant in exchange for the complaint being withdrawn or prevents a registrant from attempting to restrict a consumer from submitting a complaint to RECO as a result of payment. Attempts to bargain away the regulatory responsibility of RECO could compromise the regulatory and complaints process under REBBA, particularly for serious breaches of the law. Complaints may raise issues of public importance beyond just the private interests of the parties involved, in particular about the registrant's competence or conduct that should be looked at from a broader perspective as it relates to the public interest and trust. Members of the public must be able to trust the work of the real estate professionals they retain. Part of that trust relies on the expectation that if a real estate professional is in breach of the rules or the Code of Ethics, that person will be properly disciplined.

The complaint process may ultimately provide a low-cost alternative to litigation for a consumer who has suffered a loss because of the registrant's misbehaviour as it may lead to a settlement of the dispute of which the regulator is aware. This can assist in ensuring that the registrant has acted in good faith and supports the objective of protecting the public.

For example, the College of Physicians and Surgeons of Ontario does not allow a member of the College to make payments to a complainant in exchange for the withdrawal of a complaint. Similarly, the Association of Professional Engineers and Geoscientists of British Columbia (APEGBC) considers such a payment or proposed payment to be unprofessional conduct and contrary to its Code of Ethics.

Voluntary Withdrawals from Registration

In a number of Canadian jurisdictions, the equivalent to the registrar has the ability to accept a permanent voluntary withdrawal from registration from a registrant as an outcome of potential disciplinary action. The registrant has the option of voluntarily permanently withdrawing from registration as an alternative to the process of a disciplinary proceeding. The regulating body addresses the issue without the necessity of processing formalized disciplinary action. The desired outcome – removing the registrant from the industry to protect consumers – is still achieved. In Alberta, for example, these withdrawals are a matter of public record. RECO would support consulting on the option of amending REBBA to allow the registrar to accept and permit permanent and irrevocable voluntary withdrawals from registration.

Other matters for Phase 2 Consideration

RECO has provided its preliminary feedback on matters that might be considered as part of the broader review of REBBA in Phase 2. This preliminary feedback is not intended to be an exhaustive list of all changes that might be considered during a comprehensive review. Additional matters may be raised before and during the Phase 2 consultations.