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Re: Consultation on Changes to BCFSA's Administrative Penalty Framework

### **BCREA Response to the Consultation on Changes to BCFSA's Administrative Penalty Framework**

Thank you for the opportunity to participate in your consultation on the proposed amendments to the Real Estate Services Rules ("the Rules"). We support the BC Financial Services Authority's (BCFSA) objective to create evidence-based rules and decision-making to help protect British Columbians while buying or selling property. Below is the BC Real Estate Association's (BCREA) response to the Consultation on Changes to BCFSA's Administrative Penalty Framework ("the Consultation").

#### **Overview**

As you know, BCREA is committed to promoting a high standard of professionalism and ethics within the real estate industry. We understand the importance of effective regulation and believe it is crucial for the long-term success of the sector. We are grateful for the chance to provide insight and feedback to help shape the regulatory framework.

We expect that any changes made to the current system will be fair, proportional, and clear, while also preserving the principles of natural justice. We believe that by working together, we can create a regulatory framework that will promote fairness, transparency, and trust in the real estate sector.

#### **Definitions**

The following definitions will be used in BCREA's consultation response. While we note that the term "licensee" is not defined in the *Real Estate Services Act* (RESA), the Regulation, or the Rules, we understand it is a term most commonly used in provincial licensing regimes. For clarity, however, in this response, we will refer to each licensing category as Representative, Brokerage, and Managing Broker.

**Representative:** means a person licensed as a representative

**Brokerage:** means a person licensed as a brokerage

**Managing Broker:** means a person licensed as a managing broker

### Housekeeping Amendment

“The proposed amendments to s. 26 (2) (a) of the Rules will expand the number of administrative penalty categories set out in the Rules from four to six. They are also intended to align with the amendments in s. 26 (1) by changing language from ‘rules’ to ‘provisions’. Finally, the amendment to subsection c is intended to remove the contravention of s. 75 of the Rules from Category A as it is proposed that this contravention is moved to Category D.”

**BCREA Response:** We take the position that to ensure administrative penalties (APs) are applied fairly, BCFSAs must be as transparent as possible regarding their process for investigating contraventions that could result in APs, as well as the process for applying the penalties themselves. There should be a clear and transparent framework to ensure consistency in the application of APs and other disciplinary measures. As BCFSAs [has noted](#), the most frequently imposed AP is for contravention of s. 75 of the rules. As such, to ensure penalties for these contraventions are applied fairly, it is critical that BCFSAs provides the utmost clarity for brokerages regarding the process by which BCFSAs will investigate contraventions and apply penalties associated with contraventions of s. 75 under Category D.

### Additions to Category B

“The proposed amendments to s. 26 (2) (b) of the Rules are adding specific sections from RESA, its Regulations, and the Rules to Category B of the Administrative Penalty Framework. Category B infractions are generally characterized as minor matters with no or immaterial harm to consumers, and where imposing an administrative penalty is in the public interest. Proposed additions to Category B relate to licensee responsibilities to keep BCFSAs and others informed, and improper use of several consumer disclosures which are required by the Rules.”

**BCREA Response:** While we understand there is currently a duty to inform under Category B, we have heard feedback from members questioning whether the responsibility to inform under the proposed additions that lack this designation of responsibility is in reference to the managing brokers’ or the representatives’ responsibility. As such, the designation of this responsibility, along with the term, “licensee,” require clarification to ensure the entity responsible for informing is specified. Furthermore, because infractions of Category B are inherently matters with no or immaterial harm to consumers, there exists confusion about how contraventions of this Category could be discovered under a complaints-driven process. Thus, greater clarity regarding the process of discovering contraventions (e.g., audit process) of Category B is required.

### Additions to Category C

“The proposed amendments to s. 26 (2) (c) of the Rules are adding specific sections from RESA, its Regulations, and the Rules to Category C of the Administrative Penalty Framework. Currently,

contraventions in this category apply to a broad range of circumstances, including licensee interactions with non-clients. Proposed expansions to this category would include certain disclosures involving a greater risk of harm to consumers.”

**BCREA Response:** In reference to the “disclosures involving a **greater** risk of harm to consumers,” we have heard confusion from our members about how BCFSA differentiates between Categories B and C regarding the severity of harm to consumers and how disclosures are categorized with respect to the level of harm posed to consumers. In addition, our members desire greater understanding of BCFSA's process of deciding the weight of penalties associated with contraventions that pose different severities of harm to consumers. As such, more clarification and rationale are needed to explain the additions proposed under Category B.

### Additions to Category D

“The proposed amendments to s. 26 (2) (d) of the Rules are adding specific sections from RESA, its Regulations, and the Rules to Category D of the Administrative Penalty Framework. Additions to Category D include contraventions that involve time-sensitive requirements or otherwise have a temporal element. Contraventions in this category contain a mix of brokerage and individual licensee requirements. Administrative penalties under this category consist of a base amount plus an additional amount calculated on a daily basis until compliance is achieved. The purpose of increasing the penalty amount on a daily basis is to encourage timely compliance and the provision of accurate information. More information on the administration of daily penalties can be found on BCFSA's website.”

**BCREA Response:** In the October 24, 2023, information session on the proposed Administrative Penalty Framework Amendments, BCFSA confirmed that the maximum AP has never been imposed in the history of the AP framework. As such, we have heard confusion from our members regarding the need to add new contraventions to Category D. We note that no specific timeframe to provide information is outlined in the Rules, so would it be reasonable for us to expect that more specific information would be provided. Category D penalties should allow a reasonable minimum timeframe (i.e., at least five business days) to obtain the necessary documents and information to comply with investigations before being initiated, particularly with the proposed additional contraventions subject to the daily penalty amount. Without evidentiary information that supports the need to add contraventions that would be subject to the prospect of daily penalties, we do not support adding these contraventions. Greater justification for additions to this category is needed.

### New Category E

“The proposed addition of s. 26 (2) (e) to the Rules would establish a new Category E in the Administrative Penalty Framework. This category is focused on cooperation with BCFSA investigations and is intended to motivate persons who are compelled to provide information to

comply promptly, which will improve investigative efficiency as well as the overall effectiveness of the framework. The addition of these contraventions gives BCFSAs tools to encourage timely cooperation with an investigation where there is failure or reluctance to comply.”

**BCREA Response:** We support the objective of Category E penalties to ensure that both unlicensed and licensed persons comply with BCFSAs investigations. We are concerned that Category E penalties may capture activity that is not an intentional lack of compliance, but also activity where the party is attempting to cooperate but is struggling to comply with the investigation for any number of reasons (e.g., sickness, vacation, familial obligations). Therefore, Category E penalties should allow a reasonable minimum timeframe (i.e., at least five business days) to obtain the necessary documents and information to comply with investigations before being initiated, particularly with the increased daily penalty amount proposed. “Prompt” compliance is not defined under the *Act* or the Rules, and varying guidance is provided on the website regarding adherence (e.g., “within two [2] business days” versus “without delay”). As such, BCFSAs should clearly and consistently define the timelines of what they consider to be “prompt” compliance.

### **New Category F**

“The proposed additions of s. 26 (2) (f) and (g) to the Rules would establish a new Category F in the Administrative Penalty Framework. This category is focused on unlicensed and restricted activity. The requirement to be licensed goes to the heart of regulation and is fundamental to consumer protection and the reputation of the real estate industry. Unlicensed activity puts consumers at risk. Thus, these additions are intended to protect consumers from persons conducting work for which they are not licensed.”

**BCREA Response:** We generally support the new Category F for APs. Category F furthers the Independent Advisory Group’s (IAG) 2016 recommendation to consider the impact of new policies on private sales, rather than solely focusing on organized real estate. For Sale By Owner (FSBO) transactions are often exempted from regulations and rules, which can harm representatives and consumers alike. The IAG report noted that FSBO activity conducted at high volumes may pose a greater risk to consumers that would otherwise have risks mitigated by the regulatory requirements imposed on a representative. BCREA is generally supportive of regulatory enforcement of unlicensed activity provided that it is broad enough to capture activity such as non-disclosure requirements under the Home Buyer Rescission Period (HBRP) around rescission rights where it not only applies to representatives but applies to all transactions that fall under the HBRP. However, we advise BCFSAs to provide a clearer definition of “unlicensed and restricted activity,” and “acting for unlicensed persons prohibited.” While some examples of “restricted activity” are provided in the discussion paper footnote, greater clarification of this activity should be provided to representatives in a more explicit manner.

### Amount of AP for new Category E

“The proposed addition of s. 27 (5) is intended to provide a framework for allowable minimum and maximum penalty amounts for the new proposed Category E (cooperation with BCFSAs investigations). BCFSAs is proposing that this new category provide for daily penalty amounts, similar to the existing Category D. Penalties under the proposed new Category E would consist of a base amount of \$1,000 for a first contravention or \$5,000 for subsequent contravention plus an additional amount of \$1,000 for each day that the designated convention continues, up to a maximum of \$100,000. Creating a new administrative penalty category with a greater daily penalty amount than exists in Category D creates a strong incentive to cooperate with investigations. It will remain open to a person to request an extension of time by demonstrating any extenuating circumstances.”

**BCREA Response:** Similar to our response to Additions to Category D, given the more onerous daily penalties associated with contraventions in Category E, greater justification for these daily penalties is needed. Without evidentiary information that supports the need to increase the daily penalties from \$250 to \$1,000, we do not support this substantive increase of daily penalties. As also previously noted, we are concerned that Category E penalties may capture activity that is not an intentional lack of compliance, but also activity where the party is attempting to cooperate but is struggling to comply with the investigation for any number of reasons (e.g., sickness, vacation, familial obligations). Category E penalties should allow a reasonable minimum timeframe (i.e., at least five business days) to obtain the necessary documents and information to comply with investigations before being initiated.

### Amount of AP for new Category F

“The proposed addition of section 27 (6) is intended to provide a framework for allowable minimum and maximum penalty amounts for the new proposed Category F (unlicensed and restricted activity). The flexible penalty amount under this category reflects the broad range of unlicensed activity that may be captured, and level of harm posed by each case. To determine the appropriate penalty amount for Category F, BCFSAs will consider the unique circumstances of each case, similar to other Canadian regulatory administrative penalty frameworks, such as:

- The scale and scope of the conduct;
- The promptness with which non-compliant activity is ceased;
- The level of cooperation with BCFSAs; and
- The person’s compliance history”

**BCREA Response:** Given the broad range of activity potentially captured under Category F, as well as the great flexibility provided to BCFSAs regarding the severity of penalties that can be imposed, a clearer rationale and understanding of BCFSAs process for determining the severity of harm to consumers is needed. In addition, our members desire greater understanding of BCFSAs process

of deciding the weight of penalties associated with contraventions that impose different severities of harm to consumers under this category.

### **General Comments and Recommendations**

While some of these are outside of the scope of the consultation, we would ask the regulator to consider the following additional recommendations.

#### **Recommendation 1: Redact names associated with Administrative Penalties.**

By definition, contraventions subject to APs are minor and do not cause material harm. While we understand the importance of transparency and accountability, publishing the names associated with APs could have unintended consequences that may outweigh any benefits. Publishing the names of those who receive APs could damage their reputation and professional standing, even if the penalty is minor. This could lead to significant financial and personal consequences that could be disproportionate to the minor infraction. We respectfully ask BCFSAs to reconsider your policy of publishing the names of individuals or brokerages who receive APs by increasing or removing the threshold and consider alternative means of ensuring transparency and accountability in a way that does not unfairly harm the reputations of those involved.

#### **Recommendation 2: Copy managing brokers on all notices and non-compliance warning letters.**

Copying the managing broker on all notices and non-compliance warning letters that representatives receive is important for ensuring that the brokerage is aware of any issues that may impact them, and this practice is something most real estate regulators already do. This also helps the managing broker to provide guidance and support to their representatives, address any compliance concerns, and maintain a culture of regulatory compliance within the brokerage.

#### **Recommendation 3: Increase the timeliness in BCFSAs responding to complaints and investigations.**

Timely responses to complaints are crucial for all parties involved in the regulatory process. Even as noted where a person subject to an investigation may have multiple opportunities to come into compliance, we anticipate that there may be pushback from REALTORS® on the introduction of Category E penalties with respect to representative cooperation with BCFSAs investigations. REALTORS® are likely to take issue with being penalized for not responding to inquiries fast enough when they feel that BCFSAs response times are often prolonged, with many complaint or investigation processes taking months or even years to resolve. This is not only a source of frustration and stress for the individuals involved but also undermines the perception of regulatory effectiveness. Responding promptly demonstrates accountability, promotes trust and confidence in the regulatory system, and helps to ensure consumers are protected.

**Recommendation 4: Provide clear guidance and resources to help ensure awareness of rules and how to comply.**

Proactively providing clear guidance and educational resources to help ensure consumers are protected is an essential aspect of effective regulation. For example, BCFSAs should reiterate and clarify their process for investigations to confirm whether they are solely complaint-driven, or whether they will be in part audit-based. Given that an objective of these changes is to increase compliance and enhance consumer protection, we recommend more supports for representatives to help them correct unintentional mistakes or prevent contraventions before they occur. Providing clear guidance and expectations for representatives to follow will help to promote a culture of compliance and can improve sector standards overall. In contrast, a reactive approach that relies heavily on disciplinary measures can be less effective, as it often requires harm to have already occurred before action can be taken. Furthermore, disciplinary action can be costly and time-consuming for both the regulator and the representative. By prioritizing proactive clear guidance that is easily searchable on its website, BCFSAs can better protect consumers while also reducing the burden of enforcement.

**Recommendation 5: Provide clear expectations regarding managing brokers' responsibilities under the modified AP framework.**

With the proposed changes creating additional possible contraventions to most AP categories as well as two new AP categories, managing brokers are concerned about the possibility of increased expectations being imposed upon them to proactively provide information indicating contraventions that could result in the imposition of APs. If such an expectation is placed upon managing brokers, they are also concerned about the possibility of, and lack of clarity about, possible penalties associated with managing brokers' noncompliance. If managing brokers are expected to engage in such proactive reporting, this comes with the associated risk that the representatives working in their brokerage will avoid consulting their managing brokers for guidance for fear of being reported, thereby deteriorating professionalism and compliance within the regulatory framework. As such, BCFSAs would be wise to provide managing brokers with greater clarity about any new/additional responsibilities they may have under the proposed AP framework.

If you have any immediate questions or concerns, please reach out to me at [thargreaves@bcrea.bc.ca](mailto:thargreaves@bcrea.bc.ca) or 236.333.4572.

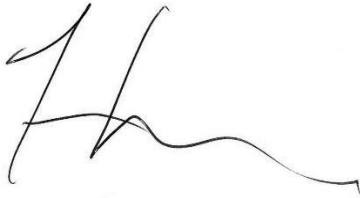
As you know, BCREA is a professional association representing eight real estate boards with more than 26,000 REALTORS® in BC, focusing on provincial issues that impact real estate. BCREA provides continuing professional development, advocacy, economic research, and standard forms



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to help REALTORS® provide value for their clients. BCREA supports policies that help ensure economic vitality, provide housing opportunities, help mitigate the impacts of climate change on homeownership and protect property owners.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'T. Hargreaves', with a long horizontal flourish extending to the right.

Trevor Hargreaves

Senior VP Government Relations, BC Real Estate Association

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