

REPORT *of the* INDEPENDENT ADVISORY GROUP

On Conduct and Practices in the *Real Estate Industry* in British Columbia

// JUNE 2016





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I // ACKNOWLEDGEMENTS

The formation of the Independent Advisory Group and the discharge of its mandate occurred in a short timeframe, just fifteen weeks, and under intense public scrutiny. A small team of people have dedicated many hours over those fifteen weeks to supporting the Advisory Group in preparing this report and deserve our sincere gratitude. They include Alison Dempsey, secretary to the Independent Advisory Group, and staff of the Office of the Superintendent of Real Estate.

The Advisory Group also wishes to acknowledge the willing cooperation and considerable effort of the staff of the Real Estate Council of British Columbia, and the submissions prepared by the eleven Real Estate Boards and the British Columbia Real Estate Association of BC.

We also thank the many members of the public who made their voices heard by speaking out and by submitting their comments and feedback in writing, and through our public email address.

Finally, the IAG wishes to acknowledge the important role the media played in uncovering issues, making them public, and consequently bringing pressure for action.

II // EXECUTIVE SUMMARY

Current conditions in British Columbia's real estate market, in particular a prolonged period of extreme price escalation, are extraordinary. They are attracting attention locally and globally. The causes of these conditions, whether they will continue, and what should be done to respond, are all topics of diverging views and passionate debate.

Among the many challenges that have emerged as a consequence of these conditions is the ability of the regulatory regime governing real estate licensees to respond, and to continue to protect the public interest. This report responds to that challenge.

It begins with a brief overview of the history of real estate licensee regulation to assist the reader in understanding how we got to where we are today. The report then describes how the current regulatory regime works and the key players in that regime. Next it addresses the weaknesses and limitations of the current regime and finally, makes recommendations for improvement.

In recent months some members of the public have questioned whether the real estate industry should continue to self-regulate. Ultimately that is a decision that only government can make.

The key recommendations contained in this report, 28 in total, focus on improving the existing regulatory regime, and the regulator, to act in the public interest.

The recommendations are directed toward the Real Estate Council of British Columbia and Government of British Columbia, and will require a coordinated effort by both to be implemented quickly and effectively. Through this coordinated effort, the Independent Advisory Group believes that public trust and confidence in the regulation of real estate licensee conduct in British Columbia can be restored.

III // ABOUT THE INDEPENDENT ADVISORY GROUP

How we were appointed

In February 2016, the Real Estate Council of British Columbia (Real Estate Council) asked the Superintendent of Real Estate (Superintendent) to convene and chair an independent review process in response to concerns raised about real estate licensee conduct reported by the media.

The Independent Advisory Group (IAG) was established on February 22, 2016 by the Superintendent. The members of the IAG were selected for their expertise drawn from service across a broad range of public and private organizations, and for their independence, diversity of perspectives and clear understanding of good governance and the public interest.

(See Appendix 1 – List of IAG members)

Our Terms of Reference

While the initial concerns that prompted the creation of the IAG were focused on specific practices related to assignment of real estate purchase contracts, dubbed “shadow flipping” by the media, the IAG deliberately set its Terms of Reference with a broader focus on whether the current regulatory regime adequately protects consumers and the wider public interest from real estate licensee misconduct. *(See Appendix 2 – IAG Terms of Reference)*

Our Approach

In fulfilling our mandate, the IAG acted as an independent body to conduct its review within a specific and limited timeframe. We began our review on March 9th, 2016, released our Terms of Reference on March 15th, 2016, issued an interim report on April 8th, 2016, and concluded our review on June 17th, 2016.

In the first stage of our review, the IAG focused on collecting facts and information about the existing regulatory regime and the current practices of the Real Estate Council and real estate licensees. Sections IV through VI of this report summarize the results of this phase of the review.

The second stage of the review focused on analyzing the current regulatory regime and determining its strengths, weaknesses and limitations. A summary of this stage and our findings can be found in section VII of the report.

The third and final stage of our review involved formulating recommendations designed to address the weaknesses and limitations identified in the second stage. Those recommendations can be found in section VIII of the report.

The IAG's review was conducted in less than fifteen weeks and was therefore necessarily limited. The recommendations are delivered to reflect general principles, rather than prescriptive detail. Our review focused on residential real estate as this was felt to present the most pressing concerns. However, in most cases the principles, findings and recommendations apply to real estate licensee conduct and practices in all segments of the industry.

Over the course of our review, the IAG received and considered written submissions from all eleven Real Estate Boards (Boards) in the province and written and email submissions from members of the public, including individuals in the real estate industry. We also received presentations from the Real Estate Council and the British Columbia Real Estate Association (BCREA).

The IAG's review focused on the concerns relating to real estate licensee conduct from an independent, unbiased perspective. The recommendations contained in this report are intended to strengthen the current regulatory regime and enable it to better respond to the evolving real estate environment. In formulating our recommendations, we have considered how they might apply to different economic cycles including a weak housing market. We also considered the impact of increased regulation on compliance costs and the industry's ability to innovate and adapt to change; and we are satisfied that the changes are warranted to advance the public interest.

IV // THE CURRENT REAL ESTATE ENVIRONMENT IN BRITISH COLUMBIA

RISING REAL ESTATE PRICES

Over the past fifteen years, British Columbia's large urban centres, particularly those in the lower mainland, have seen dramatic increases in real estate prices. There are a number of interrelated factors that figure prominently in public commentary and analysis:

- ▶ a strong economy;
- ▶ ongoing migration into the lower mainland from other parts of Canada, as well as from other countries;
- ▶ external investment into lower mainland housing motivated more by investment considerations, than by residency considerations;
- ▶ physical constraints (for instance, mountains, water and an international border);
- ▶ policy constraints (for instance, the Agriculture Land Reserve) and zoning constraints on the supply of new additions to the housing stock; and
- ▶ the self-reinforcing market psychology that takes over in a period of rapidly rising housing prices.

This price escalation has led the Metro Vancouver region, in particular, to be one of the most expensive real estate markets globally. The situation has, in turn, raised some serious concerns about housing affordability and availability, speculative investment and the dangers of an unsustainable or overheated market. Members of the public, the business community and all levels of government share these concerns.

“ It is important to understand that the recommendations in this report are unlikely to have a material effect on housing prices and issues of affordability.

It is important to understand that the recommendations in this report, if implemented, are unlikely to have a material effect on housing prices and issues of affordability. The price of housing is determined by the factors of high demand and limited supply. The work of the IAG and the recommendations contained in this report are focused on the conduct of real estate licensees. Ensuring people buying and selling homes are fairly treated is critical to public confidence, but it does not affect housing supply and demand.

REAL ESTATE LICENSEE CONDUCT

Extreme increases in real estate prices have put pressure on the existing regulatory regime which governs the provision of real estate services in the province. In a market where the prospects for profit on real estate transactions are considerable, some individuals will seek to exploit opportunities to gain unfair advantage.

In recent months reports of conduct of real estate licensees, and unlicensed parties engaged in exploitative activity, have increased public concern, including:

- ▶ licensees failing to disclose the assignment of contracts for personal gain;
- ▶ licensees putting their own interests ahead of those of their clients; and
- ▶ licensees failing to comply with federal and provincial tax laws and anti-money laundering reporting requirements, including collusion with clients to avoid reporting requirements.

Critiques by the public, the media and some elected officials suggest that the regulator:

- ▶ is passive in identifying risks to the public and not intervening to prevent harmful practices;
- ▶ does not levy sufficiently large penalties and sanctions to create meaningful deterrents and consequences for misconduct;
- ▶ lacks adequate investigative and enforcement capabilities;
- ▶ interprets its jurisdiction narrowly; and
- ▶ is not accessible and responsive to the public.

Alleged misconduct, combined with the perception that the Real Estate Council is unable or unwilling to take strong action to address it, has resulted in a loss of public trust.

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V // CURRENT OVERSIGHT OF REAL ESTATE INDUSTRY IN BRITISH COLUMBIA

SELF-REGULATION AND THE PUBLIC INTEREST

Self-regulation is an approach commonly used in Canada and elsewhere to regulate the conduct, practices and standards of members of an established profession or industry. It operates through a formal agreement between government and the profession or industry. That agreement stipulates that the industry will be directly responsible for regulating its members' activities and for holding those members accountable to high standards of conduct, practice and service to the public.

Self-regulation is a privilege, not a right or entitlement. The profession or industry group must protect the public interest or risk losing that privilege, along with the confidence of government and the public.

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Self-regulation is delegated by government. When effective, it recognizes the responsibility to protect the public interest through control over the conduct and practices of licensees. At the same time, it provides the specialist knowledge and expertise that is needed to understand and effectively regulate the provision of services to the public.

The authority and responsibilities that are delegated by government to self-regulatory bodies usually include:

- ▶ establishing education, experience and other qualification standards that must be met to enter the profession;
- ▶ setting standards of conduct and practice for those working in the profession;
- ▶ investigation, compliance and disciplinary processes that enforce the rules and standards; and
- ▶ creating rules and procedures for sanctioning and removing licence to practice from individuals who have failed to adhere to the standards of conduct.

An important part of ensuring that the public interest is served by a self-regulating profession is the ability for the public to be heard when they have questions or complaints. Consequently, most self-regulatory bodies have public inquiry and complaints mechanisms, as well as a mandate to educate the public.

SELF-REGULATION AND THE REAL ESTATE INDUSTRY IN BRITISH COLUMBIA

How It Started

After fifty years of increasing delegation of regulatory authority from the Superintendent of Real Estate to the Real Estate Council, the province's real estate industry was granted self-regulation in 2005. In that year, the *Real Estate Services Act* (Act), the *Real Estate Services Regulation* (Regulation) and the *Real Estate Council Rules and Bylaws* came into force.

The Real Estate Council was given primary responsibility for administering and enforcing these instruments as they relate to the conduct and practices of real estate licensees in the province. The Superintendent retained responsibility for regulating unlicensed persons engaged in real estate services.

Other Bodies

The Act also continued three corporations: the Real Estate Foundation, the Real Estate Errors and Omissions Insurance Corporation and the Real Estate Compensation Fund Corporation. Each of these organizations has a distinct role in the public accountability and protection aspect of the self-regulatory regime. More information on each can be found in [Appendix 3](#).

THE ROLE OF THE PROVINCIAL GOVERNMENT

The Act and the Regulation provide the overarching framework for the regulation of real estate services in British Columbia and prescribe important elements such as:

- ▶ when a real estate license is required;
- ▶ types of licensees and the relationship between brokerages and licensees;
- ▶ licensees' duties and standards of professional conduct;
- ▶ discipline and sanctions;
- ▶ governance and structure of the Real Estate Council and its committees; and
- ▶ investigative powers and authorities of the Real Estate Council and the Superintendent.

Within the Provincial Government, it is the Ministry of Finance that ensures this framework remains efficient and effective at protecting the public interest. The Minister of Finance is the Minister responsible for both the Real Estate Council and the Superintendent of Real Estate, whose Office is housed with the Financial Institutions Commission, a regulatory agency of the Government.

The Act creates the Real Estate Council as the self-regulating body and grants it broad powers to develop and enforce its own rules and bylaws. It is important to note that Section 130 of the Act gives Government the power to make regulations that take precedence over any rules or bylaws created by the Real Estate Council. In this way, the Government retains ultimate authority over the regulation of real estate in the province. This power enabled the Government to recently introduce a new regulation, on contract assignment terms, in a real estate contract of purchase and sale.

“ The Act gives Government the power to make regulations that take precedence over any rules or bylaws created by the Real Estate Council.

THE ROLE OF THE SUPERINTENDENT OF REAL ESTATE

Amendments to the Act in 2005 provided the real estate industry with full self-regulatory powers, and limited the scope of the Superintendent's oversight over the Real Estate Council. The Act empowers the Superintendent to issue a notice and conduct a hearing into licensee conduct in urgent circumstances, where a licensee is acting in a way that is seriously detrimental to the public and the Real Estate Council has not issued a notice of hearing or order. The Superintendent also has the authority to appeal to the Financial Services Tribunal where it disputes orders issued in relation to disciplinary processes conducted by the Real Estate Council.

“ Amendments to the Act in 2005 provided the real estate industry with full self-regulatory powers, and limited the scope of the Superintendent's oversight over the Real Estate Council.

The Superintendent maintains regulatory responsibility for unlicensed real estate services. The Act sets out its authority to investigate the activity of individuals engaged in providing real estate services for, or in expectation of, remuneration, without having a licence to do so. Following a hearing, the Superintendent may require unlicensed individuals to cease the activity, carry out specified remedial actions and pay penalties of up to \$10,000 for an individual and \$20,000 in the case of a partnership or corporation.

THE ROLE OF THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA

The Real Estate Council is a statutory corporation continued under the Act to regulate the real estate industry. The Act establishes the objectives of the Real Estate Council to:

- ▶ administer the Act and the Regulation, Rules and Bylaws;
- ▶ maintain and advance the knowledge, skill and competency of its licensees; and
- ▶ uphold and protect the public interest in relation to the conduct and integrity of its licensees.

The Council is responsible for regulating all aspects of licensee conduct in the province, from initial qualification, licensing and education, to the day-to-day activity of licensees. Its authority covers all aspects of compliance, ongoing monitoring and review, the investigation of complaints and the enforcement and discipline of licensee misconduct.

The Real Estate Council fulfills its legislative mandate by administering and enforcing the Act and Regulation and by establishing and enforcing its own Rules and Bylaws. The Act provides the Real Estate Council broad authority to make whatever Bylaws or Rules it considers necessary or advisable for the conduct of its business and affairs.

The Regulations prescribe procedural requirements the Real Estate Council must follow in establishing its bylaws and rules, including:

- ▶ 30 days before making the bylaw or rule, the Real Estate Council must notify licensees of the proposed bylaw or rule and provide them with an opportunity to comment;
- ▶ the Real Estate Council must send a copy of the proposed bylaw or rule to the Minister and the Superintendent; and
- ▶ in order to make or change a bylaw or rule, 75% of members of the Real Estate Council must vote to approve the new or changed Rule or Bylaw.

The Real Estate Council Rules and Bylaws cover important matters, such as:

- ▶ qualifications for a person to obtain or renew a licence;
- ▶ duration of licenses;
- ▶ different categories of licence and conditions and restrictions applicable to each category;
- ▶ the relationships between and among brokerages and their related licensees and rules respecting the supervision of associate brokers and representatives by managing brokers;
- ▶ requirements for licensees to undertake continuing professional education;
- ▶ standards of conduct and business practice standards for licensees;
- ▶ requirements for operation of trust accounts by licensees;
- ▶ the use of business names by licensees and the form and content of advertising carried out by licensees;
- ▶ the required use of standard forms in providing real estate services;
- ▶ disclosures required by licensees in the provision of real estate services; and
- ▶ records, reports and other information that must be retained by licensees and/or filed with the Real Estate Council.

Structure of the Real Estate Council

The Real Estate Council is governed by a seventeen member board. The size and composition of the board and certain committees of the board is prescribed by the Act.

Of the seventeen members:

- ▶ thirteen are real estate licensees and are elected by fellow licensees;
- ▶ three are public members, who are not real estate licensees, and are appointed by Government; and
- ▶ one is appointed by the Real Estate Council to represent the interests of strata property owners.

The thirteen elected board members represent seven different geographical areas across the province; nine of the thirteen must be either managing or associate brokers. All members serve two year terms.

The Council has a number of board committees that act on its behalf with delegated authority and fulfill important responsibilities. These include the Complaints Committee, Consent Order Review Committee, Discipline Committee, and the Hearing Committee.

The Council has a staff of forty-seven full and part time employees.

Investigation and Complaint Handling

The Real Estate Council has authority and responsibility to investigate possible contraventions by licensees of the Act, the Regulation, and the Real Estate Council's own Rules. Council may initiate an investigation in response to a range of events including:

- ▶ upon receipt of a complaint by a consumer;
- ▶ upon receipt of a complaint by a licensee;
- ▶ in response to a referral from the Office of the Superintendent of Real Estate;
- ▶ as part of Council's brokerage office and records inspections; and
- ▶ on Council's own initiative.

Complaints or other matters that proceed to investigation are prioritized based on an assessment of risk of harm to the public. If sufficient evidence is found to support disciplinary action, a summary of the file is presented to the Complaints Committee that is responsible for making the decision whether to advance the matter to a discipline hearing. If the Committee decides to proceed, a notice of hearing is issued at which point the licensee may submit a proposal for a consent order or continue to a hearing.

- ▶ **A HEARING** is a formal regulatory enforcement proceeding, where evidence is provided by both parties and decisions are made by an independent committee.
- ▶ **IN A CONSENT ORDER** the licensee admits misconduct and agrees to a penalty.

If a licensee is willing to admit misconduct he or she has the legal right to propose a settlement of the matter by way of a consent order. A proposal includes an agreed statement of facts, admissions, a waiver of appeal rights, and a request as to acceptable sanctions. Draft proposals are reviewed by the Council’s legal staff, and then independently considered by the Consent Order Review Committee. This committee may accept the proposed Consent Order, propose amendments, or reject it, in which case a disciplinary hearing may be held.

Consent orders are used commonly in regulatory regimes because they promote both fairness and efficiencies in the regulatory system in that they can be settled more quickly and with considerably less resources.

If a licensee is not prepared to admit misconduct a Hearing Committee is struck from among the Council members and each party is given the opportunity to present evidence to support their decision. The Hearing Committee makes a decision based on the evidence it hears, including what penalties or sanctions should be applied, if any.

In all cases, except those involving anonymous complaints, complainants are advised of the result of the assessment and, as applicable, the process and eventual outcomes that ensue.

TABLE 1 *Real Estate Council Complaint Statistics*

YEAR	NUMBER OF COMPLAINTS RECEIVED	NUMBER OF CONSENT ORDERS ISSUED	NUMBER OF DISCIPLINARY HEARINGS HELD	NUMBER OF QUALIFICATION HEARINGS HELD
2012/2013	538	95	3	6
2013/2014	413	98	3	4
2014/2015	536*	88	1	2

* 100 of these from one individual in respect of the same complaint. (See Appendix 5 for complaints handling process)

Discipline and Enforcement

As part of its self-regulatory authority, the Real Estate Council has the power to impose penalties and sanctions on licensees that contravene the Act, the Regulation or Council’s own Rules and Bylaws. The range of sanctions and the size of penalties are set out in the Act and the Regulation and range from reprimands and required education or training, to conditions or limitations on licences and licensee activity, licence suspensions or cancellations, fines and monetary penalties.

Financial penalties fall into two categories and the size of the penalties are prescribed by Regulation:

- ▶ **ADMINISTRATIVE PENALTIES** – apply in instances where licensees or brokerages contravene a specific list of rules set out in the Regulation. The rules are generally technical or operational in nature and are not related to licensee conduct. The amount of penalty imposed for each contravention may vary according to the level or category of licence and first or subsequent contraventions. The maximum administrative penalty is \$1,000.
- ▶ **DISCIPLINARY PENALTIES** – apply in instances where licensees have committed professional misconduct or conduct unbecoming a licensee. The maximum disciplinary penalty that the Council may impose on an individual licensee is \$10,000, and \$20,000 on a brokerage.

The Act also creates the power to impose penalties on individuals and corporations that are found guilty under criminal prosecution, of committing certain offences specified in Section 118 of the Act, including:

- ▶ providing real estate services without a licence;
- ▶ failures in respect of payments in or withdrawals from trust accounts;
- ▶ interference with investigation;
- ▶ failure to comply with an order of the Real Estate Council, a discipline committee or the Superintendent; and
- ▶ making a false or misleading statement in records that are filed, submitted, provided or delivered under the Act.

Corporations can be fined up to \$50,000 for a first conviction and a maximum of \$100,000 for each subsequent conviction. Individuals may be fined up to \$50,000 or imprisoned up to two years for first convictions, and up to \$100,000 and two years' imprisonment for subsequent convictions.

The Real Estate Council publishes summaries of all consent orders and disciplinary hearings on their website and complete versions are also published on CANLII, an online resource dedicated to free, open, online publication of case law and legislation.

Funding

The Real Estate Council is funded entirely from fees and assessments paid by licensees. Individual and brokerage license fees and assessments apply on a two year cycle. Table 2 sets out the current fees and assessments.

TABLE 2 *Real Estate Regulation Fees and Assessments*

LICENSE ASSESSMENT	\$450	
ERRORS AND OMISSIONS INSURANCE ASSESSMENT	\$700	
SUPERINTENDENT OF REAL ESTATE*	\$50	
REAL ESTATE COMPENSATION FUND	\$100 INDIVIDUAL LICENSEE	(\$250 BROKERAGE/SOLE PROPRIETOR)
FEE FOR RENEWALS, TRANSFERS AND CHANGES OF LICENCE LEVEL OR CATEGORY	\$30	
TOTAL – PAID BIENNIALY BY LICENSEES FOR RENEWAL	\$1,330 FOR INDIVIDUALS (\$1,360 FOR NEW OR RE-LICENSING)	\$1,480 FOR BROKERAGE/SOLE PROPRIETOR (\$1,510 FOR NEW OR RE-LICENSING)

*Portion remitted to the Superintendent of Real Estate to fund its responsibilities.

Revenues from penalties

Under the Act, monies collected from disciplinary penalties cannot form part of the Real Estate Council’s general revenue. Instead, they must be directed to a dedicated education fund for the purpose of educating the public, licensees and other industry participants, about the operation and regulation of the industry and issues related to real estate and real estate services.

THE ROLE OF INDUSTRY ASSOCIATIONS

British Columbia Real Estate Association and Canadian Real Estate Association

The British Columbia Real Estate Association (BCREA) (www.bcrea.bc.ca) and Canadian Real Estate Association (CREA) (www.crea.ca) are trade associations whose members include the province’s local Real Estate Boards and their counterparts across the country. BCREA operates provincially and CREA operates nationally.

A three-way agreement among the CREA, BCREA and local Boards establishes a structure that requires membership at all three levels – locally in one of the province’s Boards, provincially in the BCREA and nationally in the CREA. Membership dues are collected locally where a portion is retained and the balance is remitted to the provincial and national associations. These dues fund a variety of activities set out in Table 3.

TABLE 3 *Real Estate Industry Associations Roles and Activities*

<p>CREA</p>	<ul style="list-style-type: none"> » LOBBY THE FEDERAL GOVERNMENT AND REPRESENT THE REAL ESTATE INDUSTRY NATIONALLY AND INTERNATIONALLY. » CONTROL AND PROTECT TRADEMARK AND CERTIFICATION MARK STANDARDS AND USE. » MAINTAIN THE REALTOR®¹ CODE AND OTHER STANDARDS. » PROVIDE ARBITRATION SERVICES FOR DISPUTES BETWEEN MEMBERS AND ASSOCIATIONS IN DIFFERENT PROVINCES.
<p>BCREA</p>	<ul style="list-style-type: none"> » LOBBY THE PROVINCIAL GOVERNMENT AND REPRESENT THE REAL ESTATE INDUSTRY PROVINCIALLY. » MAINTAIN LOCAL BOARD JURISDICTIONS AND MEMBERSHIP PROCESSING IN NON-BOARD JURISDICTIONS. » PROVIDE DISPUTE RESOLUTION BETWEEN MEMBERS AND BOARDS IN DIFFERENT BOARD JURISDICTIONS. » DEVELOP STANDARD FORMS FOR USE IN REAL ESTATE SERVICES. » PROVIDE CONTINUING EDUCATION COURSES.
<p>REAL ESTATE BOARDS</p>	<ul style="list-style-type: none"> » LOBBY MUNICIPAL GOVERNMENTS AND REPRESENT THE REAL ESTATE INDUSTRY LOCALLY. » PROCESS MEMBERSHIP, SET MEMBERSHIP REQUIREMENTS AND COLLECT MEMBERSHIP DUES. » OPERATE AND CONTROL THE MLS® SYSTEM. » DEVELOP AND IMPLEMENT RULES THAT SUPPORT CREA'S NATIONAL POLICIES. » APPLY THE REALTOR® CODE AND OTHER STANDARDS. » PROVIDE DISPUTE RESOLUTIONS FOR DISPUTES BETWEEN MEMBERS.

There is no requirement for an individual who is licensed by the Real Estate Council to be a member of a local Board or the two associations. However, since only members of a Board can access MLS® (Multiple Listing Service), a critical tool in the provision of real estate services in the province, close to 95% of all real estate licensees in British Columbia are members of a local Board and, correspondingly, the provincial and national associations.

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1 The term REALTOR® and the REALTOR® logo are trademarks owned by REALTOR® Canada Inc., a corporation jointly owned by the National Association of REALTORS® and CREA. The trademarks can only be used by licensees who are members of CREA.

Real Estate Boards

There are 11 Real Estate Boards operating locally across the province (*See Appendix 4*).

As industry trade associations, the province's Boards are not created by the Act or any other statute and are not directly regulated by the Real Estate Council or the Superintendent. However, the Boards' members, who are all real estate licensees, are under the Real Estate Council's regulatory authority.

As noted in the functions outlined in Table 3, the Boards have influence in the conduct and practices of their members. They do this by requiring members to follow the REALTOR® Code of Ethics (the Code) and the Standards of Business Practice (the Standards).

The REALTOR® Code and Standards are established by CREA as a national standard that is applied locally through the Boards, with some limited regional variation. The REALTOR® Code and Standards apply to all members as a mandatory condition of their initial and continued membership in their local Boards, provincial and national associations and, in British Columbia, access to MLS®.

Real Estate Boards and the Regulator

It is important to distinguish between the REALTOR® Code and Standards and the regulatory regime established pursuant to the Act, the Regulation and the Real Estate Council Rules. Only the latter creates the legally enforceable standards for licensee conduct and practice, and is intended to serve the public interest. In comparison, the REALTOR® Code and Standards are created by and for association members for their collective interests and are not subject to public oversight or scrutiny.

“ Only the regulatory regime creates the legally enforceable standards for licensee conduct and practice.

Public Engagement with the Real Estate Industry

The Real Estate Council publishes brochures such as “Buying a Home in British Columbia” and “Selling a Home in British Columbia”. It also publishes resources relating to strata ownership and management. .

The Council website provides consumer information and resources including a licensee search tool and information on how to make a complaint to Council about licensee conduct or competency. In 2015, the website received just over 73,300 visits each month, up from just over 62,200 in 2014.

In 2015, a survey of real estate consumers conducted on behalf of the Real Estate Council revealed that 30% of consumers knew how to register a complaint with Council about a licensee. In that year, Council received 536 complaints against licensees with 65% of those complaints coming from members of the public.

VI // CURRENT RULES AND REQUIREMENTS FOR REAL ESTATE LICENSEES IN BRITISH COLUMBIA

Consistent with other self-regulatory regimes, much of the current regulatory oversight of professional conduct and practice within the real estate profession relies on:

- ▶ self-reporting, beginning with the application and qualifications process through to re-licensing;
- ▶ positive disclosure obligations owed by licensees to their clients and to their brokerages, and by brokerages and licensees to the regulator;
- ▶ brokerage based internal controls and supervision of licensee conduct;
- ▶ record keeping and filing of key disclosure and transaction documents by brokerages with aggregated data or reports filed with the regulator; and
- ▶ licensee and public initiated complaints and reports to the Real Estate Council of concerns relating to licensee conduct and practices.

This system of self-regulation places considerable trust and responsibility with real estate licensees to ensure their own and others' conduct and practices meet regulatory requirements and expectations. As with all self-regulatory systems, it requires that members of the profession take an active role in protecting and ensuring the ethics, standards and professionalism that define their industry.

“ Self-regulation requires that members of the profession take an active role in protecting and ensuring the ethics, standards and professionalism that define their industry.

PROFESSIONAL CONDUCT REQUIREMENTS

The Real Estate Council Rules establish many of the legal duties and responsibilities of real estate licensees to their clients. The Rules include the broad and overarching statement that “when providing real estate services, a licensee must act honestly and with reasonable care and skill”. They also include a list of specific requirements that a licensee must:

- ▶ act in the best interests of the client;
- ▶ act in accordance with the lawful instructions of the client;
- ▶ act only within the scope of the authority given by the client;
- ▶ advise the client to seek independent professional advice on matters outside of the expertise of the licensee;
- ▶ maintain the confidentiality of information respecting the client;

- ▶ disclose to the client all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate;
- ▶ communicate all offers to the client in a timely, objective and unbiased manner;
- ▶ use reasonable efforts to discover relevant facts respecting any real estate that the client is considering acquiring;
- ▶ take reasonable steps to avoid any conflict of interest; and
- ▶ promptly and fully disclose any conflict to the client.

Definition of Misconduct

Professional misconduct is defined in the Act to include the contravention by a licensee of any provision in the Act, the Regulation, or the Real Estate Council Rules, or if the licensee does one or more of the following:

- ▶ “wrongful taking” and “deceptive dealing” as defined in the Act;
- ▶ demonstrating incompetence in performing any activity for which a licence is required;
- ▶ making a false or misleading statement (including an omission) in any document required under the Act;
- ▶ failing to cooperate with an investigation; or
- ▶ failing to comply with an order of the Council.

In addition to the wide range of professional misconduct, the Act establishes the concept of “conduct unbecoming a licensee” defined as conduct that, in the judgment of a discipline committee of the Council:

- ▶ is contrary to the best interests of the public;
- ▶ undermines public confidence in the real estate industry; or
- ▶ brings the real estate industry into disrepute.

Taken together, the Council’s Rules and the Act establish a clear baseline above which licensees must conduct themselves or be held to account.

“ Taken together the Council’s Rules and the Act establish a clear baseline above which licensees must conduct themselves or be held to account.

QUALIFICATION AND SUITABILITY

The Real Estate Council is responsible for all procedures relating to licensing of individuals and brokerages under the Act. This responsibility extends from determining the suitability or qualification of all first time licence applicants, to the review of suitability on re-licensing applications which are required on a 24 month cycle.

The Council administers a number of processes in connection with determining suitability of all licence applicants, including a review of the information submitted in the application and conducting criminal record and credit history checks on all individual applicants. In the case of brokerages, the Council also ensures that each brokerage has a qualified managing broker in place, and that brokerages maintain a proper place of business.

In cases where suitability is at issue, applications are referred to the Council's Executive Officer, the Legal Department, or both for further review. This further review may lead to licensing, licensing with conditions, or withdrawn applications. In some cases, reviews may lead to Qualification Hearings. In a Qualification Hearing the onus is on the applicant to prove to a hearing panel that they are of suitable character and qualification to apply for a licence.

LICENSING EDUCATION

The Act also gives the Real Estate Council authority and responsibility for determining the appropriate education for individuals seeking to be licensed to engage in real estate services in the province.

The preparation and administration of real estate education courses for those seeking to become real estate licensees in the province was delegated to the University of British Columbia in the 1950s, and is now part of the Real Estate Division of the University's Sauder School of Business. The Sauder School of Business is responsible for licensing course design and development under the direction of, and in consultation with, the Real Estate Council. There are currently four licensing courses designed for the different licence categories.

The completion of a course and examination administered through the Sauder School of Business satisfies part of the educational pre-requisite for qualification to hold a licence to provide real estate services. The final examination must be taken and passed with a grade of 65% or higher within two years of completing the course assignments and with a maximum of two attempts. In the period from January 1, 2015 to February 29, 2016, licensing examinations were taken by 4,570 students with a 68% pass rate.

Applied Practice Requirements

Following completion of the licensee course and examination, applicants must begin the Applied Practice Course and they must complete a portion of the course before they are eligible for a temporary license. Temporary licensees may conduct real estate services while they complete the remaining portions of the course. The Applied Practice Course was extensively redesigned and relaunched in January 2015.

RE-LICENSING EDUCATION

All real estate licensees must complete the Real Estate Council's six-hour Re-licensing Education Program (REP) during each twenty-four month licensing period, as a condition for license renewal. Currently, there is no additional REP requirement on an individual who holds more than one type of real estate license (for example, trading services and strata property management); however, this is under review by Council.

Real estate licensees who are members of one of the 11 local Real Estate Boards must also complete eighteen Professional Development Program credits during each two year licence term for continued membership in their industry trade association and local Boards. The program is designed and administered by the BCREA.

VII // SUMMARY OF FINDINGS

Early in its review, the IAG focused in on several areas that appeared to be most problematic in the media related to licensee misconduct. These areas were set out as part of our interim report sent on April 12, 2016. They included:

Transparency and Ethics

Licensees who were failing to disclose the assignment of purchase and sale contracts for personal gain and putting their own interests ahead of the interests of their clients.

Compliance and Consequences

The perception that the Real Estate Council regulated with a “light hand” or narrow interpretation of its jurisdiction and responsibilities, and that the penalties administered for non-compliance were too small to provide any credible deterrence to misconduct.

Industry Structure and Governance

The overlapping roles between Real Estate Boards, industry associations and the Real Estate Council were creating consumer and industry confusion and diluting accountabilities. In addition, the Council itself and a number of its key committees were dominated by industry participants.

Public and Licensee Education

The public perception, shared by some in the real estate industry, that the entry level qualification and education standards for licensees had been lowered and narrowed over time such that they no longer served to keep unqualified or unscrupulous players out of the sector.

The IAG did not accept as fact everything that had been reported prior to beginning our review. We challenged the perceptions and probed for more evidence wherever possible. We were conscious of separating problems from symptoms and facts from allegations. We focused on recurring themes in public and industry feedback, and on those issues that are systemic and fundamental to good regulation. At the end of our review, however, the issues we identified early in the process continued to be those we feel are most in need of change. In this section we elaborate further on each of the four areas above and what we see as the fundamental changes that are needed.

TRANSPARENCY AND ETHICS

While it is true that in parts of British Columbia and other major cities around the world real estate has become an investment, for most people real estate transactions are about buying and selling a home. It is something most of us only do a few times in our lives so we need the help of experts. We rely on a qualified real estate agent to guide us through the important decisions, trusting that they are keeping our best interests in mind.

For many of us a home purchase is one of the largest financial transactions we will make in our lives and also one of the most emotional. Add to this that real estate purchases and sales usually involve big decisions made under tight deadlines and the entire experience can be intimidating and make consumers feel vulnerable. They hire a licensed real estate agent to help them through this. Trust and competence are the fundamental ingredients that make this relationship work.

Ethics and transparency are the foundation of public trust. Regulators across the financial spectrum and around the world are acutely aware of this. They have absorbed the lessons of the last financial crisis. The importance of ethics on behaviour, and the relationship between transparency and ethics is being translated into new standards and increased expectations in every facet of the financial industry.

“ We rely on a qualified real estate agent to guide us, trusting that they are keeping our best interests in mind.

Transparency

In certain ways, the real estate sector is ahead of other parts of the financial sector in transparency. Embedded compensation and undisclosed conflicts are increasingly seen as practices that create risks for consumers and that should be eliminated. In real estate, disclosure of commissions and conflicts of interest have been required as part of the regulatory regime for many years. There are still parts of the financial sector where no such disclosures are required.

There are also parts of the real estate industry where transparency remains a problem. The full extent to which a licensee may benefit from a transaction is not always fully disclosed, or it may not be disclosed in a way that is easy for consumers to understand. Consumers also need more information that is stated in clear and plain language and enables them to understand what they are entitled to in their dealings with a licensee, and what their remedies are if they are not treated fairly.

The current practice in a real estate transaction is for licensees to provide consumers with most information and disclosure at the beginning of a transaction, when the listing agreement or buyer agency agreement is signed. This is a good first step, but it is not enough. Real estate transactions evolve and circumstances or market conditions can change. Consumers need to be provided with continual disclosure at points in the transaction when the information is most relevant to their decisions.

It is also not enough for licensees to simply provide consumers with documents to fulfil their obligations for disclosure and information. They must identify when a consumer would most benefit from information throughout the duration of a transaction and be proactive in providing and fully explaining that information.

For example, the decision to include or exclude assignment provisions from a contract is one that a seller may wish to consider more than once in the life of a transaction. In the case of the buyer, determining the “subject to” clauses they will include in an offer is a significant decision and one that can change, particularly in competitive bid situations. These are decision points when a licensee has an obligation to deliver information, advice and disclosure competently and in a manner that consumers can understand.

The public would also benefit from information supplied by the regulator that helps them understand how real estate agent compensation programs work in practice. Incentive structures can enable conflicts of interest to become profitable and entrenched in business practices, particularly when they are not readily apparent or easily understood by the customers who are paying them.

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Ethics

Most professions, including self-regulated professions, maintain a code of ethics. Most codes are a blend of principles and rules. Principles describe high-level expectations, and their intended outcomes and rules support the principles with more detail and direction.

Striking an appropriate balance between principles and rules is important. It encourages compliance with the spirit of codes of conduct, not just a strict adherence to rules, and it puts the onus on the individual to exercise good judgment. An effective code of conduct compels a profession and the individuals operating in it to do the right thing, above and beyond following the rules.

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The IAG found that overall, the Act, Regulation and the Real Estate Council's Rules are comprehensive and provide a good balance of principles and rules to guide ethical conduct by licensees.

However, they do not exist in one place, in a single document, where they can be easily accessed and understood by licensees, the public, and industry. Information and guidance on conduct expectations is dispersed in three different places (the Act, the Regulation and Real Estate Council Rules) and as a result is difficult to navigate for both licensees and the public.

The IAG also determined that, in some cases, the existing rules for licensee conduct may be too general or abstract, failing to make them practical enough to guide licensee behaviour or be administered by the regulator.

In the absence of a clear and easy to interpret code of conduct maintained by the Real Estate Council, the REALTOR® Code of Ethics developed by industry associations and various codes maintained by local Boards appear to take precedence for most licensees. In some cases these rules reinforce those maintained by Council. But in other instances, they are contradictory. This duplication and contradiction results in inconsistent enforcement and the IAG found it is diluting the effectiveness of the regulatory regime.

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The IAG also found the Real Estate Council does not consistently make use of the principles and rules that already exist, to effectively deter misconduct and unethical behaviors that impact on the reputation and confidence in the industry. In some instances the Real Estate Council interprets its jurisdiction narrowly and appears reluctant to intervene, where it needs to be proactive and authoritative to head off problems earlier. An example of this is Council's response to licensees who were found to be not complying with other regulatory standards such as anti-money laundering requirements. The IAG agrees that it is not Council's role or jurisdiction to regulate anti-money laundering, but as the self-regulating body for real estate licensees we believe that Council's own Rules enable it to take a more assertive stand on this issue than it has taken to date.

The willingness and ability of licensees to comply with all regulatory requirements goes to their suitability to hold a licence. Council needs to send a stronger message to licensees regarding compliance with all regulatory requirements and ethical standards. This will, in turn, reassure the public that licensees are held to a high standard of conduct and ethics.

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Dual Agency and Double Ending

The topics of dual agency and double ending received considerable discussion by the IAG. Often these terms are used interchangeably but they in fact, refer to two different things.

- ▶ ***Dual agency***, also known as limited dual agency, occurs when a licensee acts for both a buyer and a seller, or for more than one buyer, in a single transaction. The term “limited” is used because a licensee effectively contracts out of some of their obligations owing to one or both parties in the transaction.
- ▶ ***Double ending*** refers to a licensee receiving both the buyer and seller portion of the commission on a transaction. This occurs most often when a licensee acts for both buyer and seller in limited dual agency but it can also occur when either the buyer or seller is unrepresented by a licensee.

Limited dual agency and double ending are both allowed under current rules and regulations.

The IAG found limited dual agency to be a significant source of existing and potential conflicts of interest. The ability of licensees to serve parties with potentially divergent or conflicting interests runs contrary to the fundamental concept of agency. It changes the nature of the established agency relationship by limiting the obligations originally owed by a licensee to his or her client, in order to enable the licensee to offer services to another party to the transaction.

While we acknowledge this change in relationship can only be effected with the consent of both parties, it creates a very real potential for conflicts of interest between the parties which could compromise the ability of licensees to act in accordance with the duties owed to both.

The IAG noted that not all instances of dual agency fail to serve the interests of both parties. There are instances where the interest of the buyer and seller may be aligned. This could occur, for example, when an owner has agreed to sell a home to another party for a price and other conditions have already been mutually agreed, such as when a person wishes to transfer a property to another member of his or her family.

The IAG also considered feedback that in remote regions of the province, where there are fewer licensees, dual agency may serve a legitimate need.

Notwithstanding these considerations, the IAG determined the risks to consumers of continuing to allow dual agency outweigh its limited advantages. We believe that continuing to allow dual agency has the potential to erode clear expectations and strong enforcement of licensee conduct and ethics because it is fundamentally inconsistent with a licensee's duties and responsibilities to their client.

“ Continuing to allow dual agency has the potential to erode clear expectations and strong enforcement of licensee conduct and ethics because it is fundamentally inconsistent with a licensee's duties and responsibilities to their client.

We are mindful that a ban on limited dual agency will not eliminate double ending, and that double ending is something many in the industry and the public find distasteful.

A licensee may still retain all of the commissions on a transaction if only one party is represented by a licensee. The IAG also considered the possibility that a ban on dual agency may actually incent licensees to encourage consumers to remain unrepresented in a transaction. Our recommendations, found in the next section of the report, are designed to mitigate that risk by requiring a licensee to advise a consumer of the right to engage their own agent, and the advantages of doing so.

COMPLIANCE AND CONSEQUENCES

Regulatory regimes require credible deterrence to be effective. Credible deterrence requires a visible and concerted effort to identify those who do not comply with the principles and rules and then ensuring they suffer meaningful consequences. Those consequences must deter the individual from repeating the misconduct, and more generally deter others who may consider similar conduct.

“ A self-regulatory regime works when members of the profession hold themselves and each other to an ethical standard that is higher than anyone else does.

Compliance

Most real estate licensees act honestly and in the best interest of their clients. This is an opinion expressed publicly by members of industry and by others in recent months and it is one that the IAG agrees with. That does not mean that we should dismiss what has occurred as simply “a few bad apples”.

A self-regulatory regime works when members of the profession hold themselves, and each other, to an ethical standard that is higher than anyone else does. It is not enough for individual licensees to act ethically; they must also hold each other to a high standard. Each member of a self-regulating industry needs to be part of the compliance regime and report misconduct promptly. The IAG found this culture is lacking in the real estate industry and that more needs to be done to reinforce the obligation for licensees to report misconduct.

The IAG found that the Real Estate Council places a high reliance on complaints to identify licensee misconduct. While complaints are one indicator of problems they can be a lagging indicator. More proactive investigation is needed.

We also found that the Real Estate Council's brokerage audit program is heavily focused on financial compliance with not enough focus placed on conduct of licensees. We appreciate the importance of auditing brokerage trust accounts and do not suggest shifting resources away from this important function. However, more resources need to go into proactive monitoring of licensee conduct.

Consequences

For consequences to work, they have to be both meaningful and transparent. When meaningful consequences are effectively communicated to the industry and to the public, they act to deter future misconduct and reassure consumers. The IAG found that the Real Estate Council is significantly limited in its ability to apply meaningful consequences in two important ways.

The first limitation involves the maximum financial penalties and sanctions they can administer. These are outside of the Council's control because they are set by Government. The Real Estate Council has been asking for several years to have these penalties and sanctions increased and for Government to enable them to have more discretion and flexibility to apply them, but few changes have been made.

Every regulator must apply proportionality when making enforcement decisions and administering penalties, or they risk their decisions being overturned by appeal bodies. This compels them to reserve the upper boundary of allowable penalties and sanctions for the most egregious behaviors and breaches.

When the upper boundary for penalties is too low, it has the effect of reducing penalties and sanctions across the board. The general public and many people in the industry no longer view the penalties and sanctions administered by the Real Estate Council as credible. This problem is compounded by the fact that the commissions in real estate services have steadily increased along with the price of housing. Large commissions and low penalties for licensee misconduct combine to create the perception that regulatory penalties are simply a transaction cost for otherwise profitable behaviours. This significantly undermines the effectiveness and credibility of the regulator, and the regulatory regime.

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The second area where the Real Estate Council is limiting the credibility of consequences is in how they are communicated to the public. Council's approach to publishing the results of their disciplinary decisions does not make them easy to understand, nor inspire confidence in their impact. Summaries of consent orders and hearing decisions need to be given more context and explanation to make them meaningful to the public and to make them effective at deterring licensee misconduct.

The use of consent orders versus hearings, and administrative penalties versus disciplinary penalties, without a plain explanation of the purposes and impact of the different approaches, has left the public with the impression that licensees are being given the opportunity to “cut a deal”. Council needs to work much harder at communicating the consequences it administers for misconduct in a way that is seen as credible, fair and serving the public interest.

We want to stress that improving communication alone, without increasing the size of penalties and severity of sanctions, will not result in more credible consequences and will not restore the credibility of the regulator or the regulatory regime. It is critical that Government and Council work together in this area.

Council must be enabled by Government to significantly increase the size of its penalties and the severity of sanctions. Once that occurs, Council must be accountable for using these new powers to impact industry behaviour. Public confidence will be sustained through effective application of these powers and clear communication of their outcome.

INDUSTRY STRUCTURE AND GOVERNANCE

Government allows an industry to self-regulate because it believes that industry has the necessary expertise to design and administer rules and standards of conduct that will keep pace with industry change and adequately protect the public. A fundamental tenet of self-regulation is the active participation of industry in setting standards and best practices and in administering the regulatory regime.

The challenge that can develop over time in these regimes is the ability to ensure the interests of the industry do not outweigh the interest of the public. Problems develop when the self-regulatory agency is too heavily influenced by industry or feels pressure to respond to industry concerns at the expense of the public interest. This is a classic problem in consumer regulation, and not just in self-regulation.

The real estate industry in British Columbia is large, well-resourced and very influential. They use this influence to do many worthwhile things. Local Real Estate Boards are active community members, donating time and money to local initiatives. The real estate industry and the Real Estate Council have a collaborative relationship and work together on important programs like consumer and licensee education. Collaborative efforts like these should continue wherever they serve the public interest.

However, the IAG found that parts of the industry governance and structure are lacking, and in some cases are undermining, the self-regulatory regime and therefore the public interest. Most concerning to us was the Real Estate Boards' involvement in consumer complaints and licensee discipline. The IAG considered whether this involvement by the Boards had evolved to fill a void left by the Real Estate Council, or whether it developed with the expansion and influence of the Boards and industry associations. In other words had the Boards taken the role from the Real Estate Council, or had the Council handed it to them? We ultimately determined it was a combination of both.

The Role of Boards

As private member organizations, Boards have the right to establish and enforce member codes of conduct and we also acknowledge that they have done so with good intentions and a desire to maintain professionalism among their members. Over time, however, the overlapping functions of the Boards and the Real Estate Council have resulted in contradictions and confusion.

Both consumers and licensees are confused about who has responsibility to regulate misconduct and to deal with consumer complaints. One result is that misconduct can go unreported to the regulator and discipline may not be delivered with the public interest as a paramount consideration. Equally concerning is the closed nature of the Boards' discipline process. Transparency is fundamental to credible consequences and public confidence.

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The IAG is aware that Real Estate Boards are considering a large-scale restructuring that would see consolidation of the Boards and rationalization of the services they offer. This initiative creates an opportune moment for industry to address overlap and confusion. A decision by the Boards to exit all quasi-regulatory functions that impact the consumer, and leave those functions to the Real Estate Council, would be the right thing to do for industry, and for consumers.

The money saved by Boards that is no longer needed to fund discipline and consumer complaint handling could be directed to provide a more proactive and consumer-oriented regulatory regime at the Real Estate Council.

“ A decision by the Boards to exit all quasi-regulatory functions that impact the consumer, and leave those functions to the Real Estate Council, would be the right thing to do for industry, and for consumers.

The Role of Brokerages and Managing Brokers

A second problem of governance and structure identified by the IAG is the evolving business models in the real estate industry and the role of managing brokers. This is an example of where the regulatory regime has not kept pace with the growth and evolution of the business. It is also an example where rules were relaxed in response to the interests of industry, and as a result no longer serve the interest of consumers and the public.

The real estate industry has seen a shift in the standard business model from one where the brokerage functioned as a central hub, and licensees were under the active supervision of their managing broker, to one where licensees have a direct service relationship with their clients and only a nominal, contractual relationship with the brokerage. Changes made to the Act and Regulation, such as allowing individual licensees to be classified as independent contractors and allowing individual licensees to incorporate, made business more efficient for licensees but made it more difficult and complex for managing brokers to exercise their duty to supervise the conduct of licensees.

The Role of Superintendent of Real Estate

A third problem of structure and governance we identified was the division of responsibility between the Real Estate Council and the Superintendent. The Real Estate Council has jurisdiction to regulate the activities of licensees. The Superintendent and its Office has jurisdiction over unlicensed individuals and entities that engage in real estate services and are not exempt from licensing under the Act.

The division of responsibilities between the Council and the Superintendent can, in some cases, make proactive detection of breaches more difficult, and does not facilitate the most efficient use of investigative resources for either the Real Estate Council or the Superintendent.

Like the Real Estate Council, the Superintendent relies heavily on complaints to detect problems and does not communicate enforcement sanctions and penalties as well as it could, or make itself as known and accessible to the public as it could. Unlike the Real Estate Council, the Superintendent and its Office are an agency of the Provincial Government, have no rule-making authority, and face operational constraints that do not apply in the case of the Real Estate Council. These constraints include limits on hiring of staff, limits on travel and on public advertising.

The IAG also noted that senior staff in the Superintendent's Office are shared across a number of regulatory responsibilities housed within the Financial Institutions Commission, some of which are larger in scope than the Office's real estate responsibilities. This creates the risk that real estate issues could be put on the back burner in preference to areas where the agency has a greater scope of responsibilities.

The capacity and powers of the Superintendent also need to change if Government and the public expect to rely on it as a check and balance to the self-regulatory role of the Real Estate Council. The current oversight powers of the Superintendent are both limited and reactive. If Government considers that the Superintendent's role is to monitor the overall effectiveness of the Real Estate Council's delivery on its public interest mandate, the legislation needs to provide for powers that allow the Superintendent to gather more information and to intervene in a more proactive and substantive way.

Representation on the Real Estate Council Board

Finally, the most important change to governance that the IAG recommends is a rebalance of the Real Estate Council itself. The ratio of industry to non-industry members that make up the governing body of the Real Estate Council, currently at fourteen to three, is not in keeping with modern governance principles.

Industry members are elected to Council by their peers and many have previously served on a local Real Estate Board. Licensees elected to Council bring industry experience to their role, but may also perceive that they owe a duty to the peers who elect them, rather than a duty to the public.

The composition of the Real Estate Council's governing board and the requirement for, and design of, the election process is set by Government and not by Council itself. The IAG acknowledges that industry participation is a fundamental principle of self-regulation. But our view is that the Council's board composition, as currently designed, creates both a perception and a risk that industry views and interests outweigh those of consumers and the broader public.

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PUBLIC AND LICENSEE EDUCATION

Two types of public education must exist, and be effective for a regulatory regime to serve the public interest. The first is education that helps the public understand what conduct and behaviours they can expect from licensees and what remedies are available if they are treated unfairly. The second is general education about the industry that equips consumers to understand more complex issues and empowers them to make decisions in their own interest.

Both are important. The first type, education about licensee conduct, is the responsibility of the regulator. The second type, education about the business, is a responsibility that can be shared by the regulator and industry.

Public Education on Licensee Conduct

In British Columbia, Real Estate Boards and industry associations have a much higher profile and stronger relationship with the public than the regulator does. Public comments received by the IAG demonstrate widespread confusion about the role of the Boards, BCREA, and the Real Estate Council in dealing with complaints and disciplining licensee conduct. The Real Estate Council's own survey data suggests that only 30% of consumers identify the Council as the place to take concerns or complaints related to real estate licensee conduct.

This confusion, and the lack of consumer awareness, is perhaps inevitable given the historic role Boards have played in handling complaints and discipline, and the difference in resources available to the Boards compared to those available to the Real Estate Council. Both are problematic.

Boards and industry associations are member run organizations, and unlike the Real Estate Council which has a duty to place the public interest first, these organizations owe their duty to their members. This is not to say that Boards do not serve the public or add value. Rather it acknowledges the fact that Boards have a vested interest in the resolution of complaints that may, in some cases, be at odds with the public interest. When they involve themselves in triaging consumer complaints, determining what is reported to the regulator, and in creating an additional layer of conduct requirements and discipline, they undermine the regulatory regime.

General Education for the Public

When it comes to general education for the public on the business of real estate, the Real Estate Council collaborates with BCREA on a number of fronts, and in many cases the IAG views this collaboration as effective in serving the public.

There are instances though, where the IAG thinks the Real Estate Council needs to be more proactive and not rely on the industry to educate the public. For example, where market conditions such as rapidly escalating prices, or industry practices such as the use of bonuses and incentives, create risks to consumers, it is incumbent on the Council to alert consumers to these risks.

For the Real Estate Council to be effective in public education and to make the Council's complaint process more accessible to the public, the Council must increase its profile and become significantly more consumer friendly. The Council's complaint process can be cumbersome. Preparing and submitting a complaint requires considerable effort by the complainant, and both members of the public and industry told us they were met with skepticism when they initially contact the Council to file a complaint. Council has recently made changes to its staffing structure to add resources and focus to the complaint process, but the IAG expects considerably more effort will be necessary, including a shift in culture, to make the process more open and receptive to the public.

Licensee Education

Many in the public and industry have commented on what they view to be a low bar of entry into the real estate profession. It is not unusual for those in a profession who have gained knowledge through years of experience to consider entry requirements to be lacking. It is also not unusual for those that are already qualified in a profession to then advocate for higher barriers to entry. However, it is also true that industries change over time, and in some cases they become more complex and more demanding of those who provide advice. For this reason it is important that qualification standards are regularly reviewed.

The Real Estate Council has placed considerable focus and resources on education in recent years. That focus has been primarily on revisions to the Applied Practice Course which is delivered as part of post-licensing education requirements. This course, along with the new Strata Manager's Licensing Course, received recognition from the Association of Real Estate License Law Officials (ARELLO®), an international organization of regulatory agencies. Both courses were launched in 2015.

The IAG thinks that a similar focus must now be placed on entry level education. Real estate licensees handle what is, for most people, the largest financial transaction they will make. Compared to other professions that handle financial transactions and give advice on those transactions, the entry level education standards for real estate licensees are low. We also think that revisions to licensing education must include a greater focus on conduct and ethics as foundational elements.

“ Compared to other professions that handle financial transactions and give advice on those transactions, the entry level education standards for real estate licensees are low.

Lastly, the IAG found room for improvement on continuing education and testing. Licensees are required to renew their license every two years and like many professions, must complete ongoing training in order to maintain their license and qualify for renewal. There is room to increase these requirements and to ensure proficiency levels are tested. Finally, similar to licensing education, a greater focus on conduct and ethics is needed as part of the required continuing education for licensees.

VIII // RECOMMENDATIONS

The IAG has developed a comprehensive set of recommendations to address the regulatory gaps and weaknesses it identified in Section VII. There are 28 primary recommendations and in some cases secondary recommendations that are meant to support and strengthen the application of the primary recommendations.

The recommendations are organized under the same key areas of concern set out in Section VII of the report. Most recommendations are delivered to reflect the principles or outcomes we expect them to achieve. We encourage the Real Estate Council, and in some cases Government or the Superintendent, to implement the recommendations in a manner that best achieves the intended outcome.

TRANSPARENCY AND ETHICS

1. The Real Estate Council create a comprehensive Code of Ethics and Professional Conduct and require licensees to affirm, in writing, their compliance with the Code as part of regular relicensing requirements.

The Real Estate Council Rules set out the overarching duties that licensees owe to their clients. The duties include acting in the best interest of clients, taking reasonable steps to avoid conflicts of interest, and acting honestly and with reasonable care and skill. The Rules apply to all licensees and are administered by a body whose core mandate is protection of the public.

Real Estate Boards administer the CREA Code of Ethics. That Code applies only to licensees who are also members of Boards and is administered by bodies whose core mandate is to promote the interests of industry members. Parts of the Code appear to be inconsistent with a public protection mandate, for example, the duty to “avoid controversies” with other REALTORS®.

The existence of two sets of ethics rules creates confusion and potential consumer protection gaps. The authority over the ethics and conduct of all licensees is, and must be clearly understood to be, the jurisdiction of the Real Estate Council. An explicit Code of Ethics and Professional Conduct for licensees developed, maintained and published by the Real Estate Council would serve to embed this.

To reinforce the importance of a licensee’s ethical obligations, **THE IAG RECOMMENDS** that licensees be required to affirm their compliance with the statutory regime, fulfillment of their duties, and compliance with the Code of Ethics and Professional Conduct every two years when they apply for re-licensing.

THE IAG ALSO RECOMMENDS that both pre-licensing education and mandatory continuing education be strengthened with improved content about ethics and a licensee’s duties to consumers (see Licensee and Public Education recommendations).

2. The Real Estate Council amend its Rules to no longer permit licensees engaged in trading services to offer dual agency.

When a licensee enters into a real estate agency relationship with a client it gives rise to important duties and responsibilities that the licensee owes to the client exclusively, including the duty to act in the best interests of the client, the duty of confidentiality, and the duty to take reasonable steps to avoid any conflicts of interest.

The IAG considers that the ability of licensees in trading services to offer dual agency to parties with differing, potentially divergent or conflicting interests runs contrary to the fundamental concept of agency. The idea that a lesser form of agency can be offered to two clients in a transaction suggests, on its face, that a licensee is not fulfilling their duty to act in the best interests of their client nor taking steps to avoid conflicts of interest. It also gives rise to consumer confusion and opportunities for abuse by unscrupulous licensees.

The IAG acknowledges the potential risk that with the elimination of dual agency one party to a real estate transaction may have no representation, as opposed to limited representation. There is also a risk that a licensee will dissuade the other party from seeking representation, to retain a full commission from the seller.

To mitigate these risks **THE IAG ALSO RECOMMENDS** that the Real Estate Council implement requirements for licensees to clearly disclose the nature and limitations of the services being provided to the parties and a positive obligation to inform an unrepresented party of the opportunity and benefits of seeking their own professional services and advice of an independent licensee.

The IAG also notes that there will be circumstances where existing conflicts mean that licensees should not be acting for either party. **THE IAG RECOMMENDS** that the Real Estate Council develop guidance to direct licensees in these situations, in a manner that continues to place the interests of consumers first.

We also note that dual agency in the provision of rental and strata management services is more controlled than trading services and therefore our recommendations relate only to trading services.

3. The Real Estate Council require licensees to fully disclose and explain their financial and non-financial incentive structures, prior to and on entering into a client relationship.

Clear and full disclosure of compensation and benefits that the licensee receives from the seller, buyer, and their brokerage assists consumers to understand the full range of influences acting on a licensee when they provide advice. Greater transparency will reinforce a licensee's duties to act in their client's best interests, and reduce the risk that advice is compromised by the licensee's own interest in the transaction.

THE IAG RECOMMENDS that improvements to disclosure include an explanation of all commissions, fees, bonuses, volume incentives, rewards, and other forms of benefits and incentives, both financial and non-financial, that licensees receive by virtue of their participation in the transaction. Disclosure should also include how commissions may vary depending on the representations (for instance, double ending) and the ways that a licensee may be compensated by facilitating assignments of a contract for purchase and sale.

4. The Real Estate Council require licensees to provide information to consumers which clearly explains the duties owed to consumers by licensees, and how consumers can protect their own interests, before, during, and after they enter a relationship with a licensee.

BCREA's "Working with a Realtor" brochure is the most commonly used document that equips consumers with information about the nature of their relationship with a licensee. The brochure was developed by industry, for industry, and not the regulator who has a public interest and consumer protection mandate. The brochure is heavily focussed on the agency relationship, and in the IAG's view, not written in way that is clear and accessible to consumers.

We believe that the Real Estate Council is in the best position to equip consumers with information about their relationship with a licensee, and how to protect their own interests before, during, and after they enter a relationship with a licensee.

THE IAG RECOMMENDS that Real Estate Council take ownership for producing the information provided to consumers before they engage a licensee, and prescribe the requirements for all licensees to make this information available to consumers. The information should have a strong consumer protection focus and reinforce a licensee's duties to his or her client. It should provide information about fees and incentives, information about the agency relationship and the services being provided, important decisions for consumers (for example, on contract assignments), questions to ask your licensee, and what to do if the relationship changes (for example, a licensee subsequently declares a conflict of interest). It should also include information about how to file a complaint with the Real Estate Council.

THE IAG ALSO RECOMMENDS that the Real Estate Council require licensees to provide additional and ongoing information throughout a transaction and whenever there are changes in the relationship, so the consumer clearly understands the impact on them and their decisions.

The IAG believes that handing over a document should not, by and of itself, discharge a licensee's responsibility to fully explain the services being offered and their duties to a client.

THE IAG RECOMMENDS that the Real Estate Council develop complementary guidance and education for licensees to ensure any documentation provided to consumers is fully explained and understood.

5. The Real Estate Council focus more attention on the forms and contracts used by licensees, to ensure they reflect an appropriate emphasis on consumer protection and the public interest.

The IAG is concerned that listing agreements and contracts of purchase and sale, developed by industry for industry, may not have the public interest and consumer protection focus that documents developed and disseminated by the regulator may have.

The Real Estate Council has the authority to establish standard forms for use by licensees in providing real estate services and, in the IAG's view, an overarching obligation to intervene in the public interest to ensure forms and disclosure used by licensees reflect the public interest.

THE IAG RECOMMENDS Council exercise this authority more assertively to ensure that documents used by real estate licensees in connection with the provision of real estate services are clear to consumers, understandable, and that consumers appreciate how the information provided may impact their decisions. For example, Council should ensure the listing agreement includes an explanation of, and makes explicit, the seller's choices regarding contract assignments.

The standard form contract of purchase and sale is not a document between a licensee and a buyer and seller; rather it is a contract directly between a buyer and seller. For this reason it is not a standard form the Real Estate Council has clear authority to prescribe under the Act. In British Columbia the standard form contract of purchase and sale used by most licensees is one that was developed by BCREA in conjunction with the Canadian Bar Association, for exclusive use by members of the province's Real Estate Boards.

While it is not clear that the Act gives the Real Estate Council authority to prescribe changes to the standard form contract of purchase and sale, Government recently intervened to change the terms of the standard form to address concerns over abuse of contract assignment provisions.

THE IAG RECOMMENDS that the Real Estate Council closely monitor consumer protection issues that may arise from the standard form contract of purchase and sale including the recent changes prescribed by Government.

If significant gaps are identified by Council in these forms and they are not addressed proactively by industry bodies, Government may need to intervene and clarify whether the Real Estate Council's regulatory authority to establish the content of specific forms used by licensees extends to contracts between real estate buyers and sellers.

6. Government implement the changes it made to contracts used by licensees, requiring seller consent to contract assignments by the buyer, to all forms of contract for trades in real estate whether or not the contracts are prepared by licensees.

Government recently took action to ensure sellers have an informed choice whether to permit buyers to assign contracts. While this was a positive step, the IAG is concerned that contract assignment requirements only apply to transactions that are facilitated by a licensee.

This may have the unintended consequence of driving the practice of “shadow flipping” to an unregulated part of the market, for example, “for sale by owner” business enterprises.

THE IAG THEREFORE RECOMMENDS extension of the recently issued contract assignment requirements to forms of contract for trades in real estate where a licensee is not involved.

7. The Real Estate Council require all licensee disclosures of interests in trade be reviewed and approved by a licensee’s managing broker and subsequently filed at regular intervals with the Real Estate Council.

Licensees have inside knowledge of the real estate market and when they benefit from personal transactions in addition to the services they provide to consumers, it can leave the impression that licensees are taking advantage of that inside knowledge to the detriment of the wider public.

The current regulatory regime requires that licensees disclose when they are acquiring an interest in a transaction, for example, buying or selling a property. These disclosures must be filed with their managing broker. The Real Estate Council can review these files when they attend a brokerage for an audit.

THE IAG RECOMMENDS that managing brokers be required to review and approve these disclosures, promptly and in any case before any agreement for the acquisition or disposition is entered into, and that managing brokers must file the disclosures on a regular basis with the Real Estate Council.

This review and approval would equip both managing brokers and the Real Estate Council to identify any potential trends (for example, increased filings from a particular broker during a rising market) and by asking questions, identify within reason whether the licensee is treating the other party to the transaction fairly.

THE IAG ALSO RECOMMENDS that the Real Estate Council review the disclosure of interest in trade form to ensure it captures all potential interests and that its contents are clear and easy for consumers to understand.

8. The Real Estate Council amend its Rules to prohibit a licensee from acquiring a direct or indirect interest in their own listing.

The practice of licensees acquiring an interest in their own listing places consumers at considerable risk of unscrupulous licensee behaviour, for example, below market offers. The IAG regards the practice as an irreconcilable conflict of interest.

THE IAG RECOMMENDS that Real Estate Council amend its Rules to prohibit a licensee from acquiring an interest, by contract of purchase and sale or by an assignment of the contract, in a transaction for which the licensee is the designated agent.

9. The Real Estate Council require that all offers received by a seller's agent in relation to a trade in real estate, be promptly filed with that agent's managing broker and be retained at the brokerage for review by the Real Estate Council on demand.

The IAG is aware of reports that some licensees are not disclosing all received offers to sellers, and favouring offers from particular buyers, in a manner that may compromise the licensee's duty to act in the best interests of their client. We are also aware of reports that claims of multiple offers, that in some cases may be exaggerated, are used by some licensees to encourage buyers to increase their offers.

To ensure transparency and a paper trail for the Real Estate Council to identify misconduct, including possible price manipulation, **THE IAG RECOMMENDS** that brokerages be required to maintain records of all offers made during the sale process.

Longer term, **THE IAG RECOMMENDS** that the Real Estate Council implement a real-time multiple offer registry where buyers can monitor, with appropriate privacy protections, all offers that are made on the property. This will enable buyers to confirm that their offer has been submitted and confirm that, in fact, there are multiple bids that have been received on the property.

COMPLIANCE AND CONSEQUENCES

10. The Real Estate Council apply more stringent suitability assessment criteria to prospective licensees.

The most effective way to prevent misconduct and protect the public is by preventing "at risk" individuals from becoming licensed.

THE IAG RECOMMENDS that the Real Estate Council commit greater resources and place a higher priority on suitability assessments for new licensees. That renewed focus should include a review of key indicators that are predictive of higher risk licensees. (Should also include a review of any misconduct in other regulated industries).

Robust entry requirements are particularly important in a rising market, where some new licensees may be focussed on short term profit rather than the best interests of their clients and associated duties.

The IAG supports the principle that applicants should bear the costs of qualification hearings in appropriate circumstances.

11. The Real Estate Council impose an explicit duty on managing brokers to report licensee misconduct to the Council, and explicit duty on licensees to report misconduct to their managing broker, when that misconduct places the public at risk.

For self-regulation to work, a profession must hold itself to higher standards than any independent regulator would hold the profession. The privilege of self-regulation demands that members of the profession take an active interest in their own conduct, and the conduct of other members. Reporting of misconduct, particularly misconduct that is harmful to the public, lies at the heart of self-regulation.

The IAG review found that more licensees and managing brokers are aware of reportable issues than are actually bringing these issues to the regulator's attention. That may in part be due to the considerable confusion within industry and the public about where to report licensee misconduct and the steps that are taken to deal with the misconduct.

The IAG recognizes the important role the Real Estate Boards have played in establishing consumer protection expectations for its members, both before and after the establishment of the Real Estate Council. However, over time the role of Boards in complaints handling has evolved to a point where they are interpreting the Real Estate Council's jurisdiction and triaging consumer complaints. That is properly the role of the regulator.

The Real Estate Council is the only regulator established by legislation with a clear public protection mandate and it must be able to do its job without duplication or interference by the Boards.

The IAG does not see mandatory reporting to Real Estate Council as completely displacing the complaints handling and discipline role of Boards. The Real Estate Council, licensees, or managing brokers may remit complaints to Boards that are more properly characterized as licensee-to-licensee disputes and involve limited to no consumer protection or public interest issues. Boards have every right to manage the conduct of their members; however, it is the IAG's view that their role must be subordinate to the role of the regulator.

We also do not see mandatory reporting of misconduct by managing brokers as necessarily displacing a managing broker's power under the Rules to make reasonable attempts to resolve an issue. We believe that managing brokers need to play a greater role in identifying and acting on reports that suggest industry practices that are harmful to consumers.

To ensure managing brokers are appropriately performing their responsibilities to detect and report misconduct, **THE IAG RECOMMENDS** that managing brokers be required to file an annual report with the Real Estate Council that includes information on the number of files involving actual or potential misconduct that were handled and how they were resolved.

The IAG recognizes that restructuring the current complaints handling and reporting structure between the Real Estate Council, Real Estate Boards, managing brokers, and licensees will take time. Transparent processes, procedures, and decision making criteria will be important components of the new system.

In the interim, **THE IAG RECOMMENDS** that the Real Estate Council enter into formal information sharing arrangements with the Boards who currently do not share information regarding public complaints and discipline actions with the regulator.

Finally **WE RECOMMEND** that Real Estate Council make clear that non-compliance with the requirement to report misconduct to Council constitutes professional misconduct that may be sanctioned.

12. The Real Estate Council implement confidential reporting channels (for example, reporting hotlines or whistle-blower programs) for industry and the public, to facilitate reporting of licensee misconduct.

Some licensees may be reticent to report concerns involving colleagues or peers through regular channels due to the relationship-based nature of the real estate industry and the perception that to do so is disloyal or will invite retaliation. Members of the public may have a similar reticence to report to the regulator. However, the industry and the interests of individuals and the public suffer when conduct and practice issues go unreported and unaddressed.

Confidential reporting channels encourage proactive identification of conduct and practice issues and risks, and early investigation and intervention by the regulator to prevent harm.

To be successful, confidential reporting channels must be well known to the public and industry participants. Accordingly, the IAG recommends that channels established by the Council be widely promoted and publicized.

The IAG understands that some contracts for real estate services, particularly strata management services, include clauses that dissuade clients from lodging complaints with the Real Estate Council, for example, by imposing the costs of defending allegations of misconduct on clients. **WE RECOMMEND** that the Real Estate Council take assertive action to address any industry practices that prevent, or make it more difficult, for the public and industry to lodge complaints with Council.

13. The Real Estate Council use existing regulatory powers to encourage licensee compliance with all rules that govern their conduct, including those of other legal and regulatory regimes.

Selective licensee compliance with the law that governs their conduct, even where that law is outside the direct jurisdiction of the Real Estate Council, raises questions about the ongoing suitability of a licensee to hold a license. Assisting clients to avoid their own legal obligations also raises concerns about a licensee's ongoing suitability to hold a license. Both of these practises place consumers at risk, undermine public trust, and undermine the integrity of other regulatory regimes.

The IAG believes that the Real Estate Council's existing regulatory mandate and powers provide it with the authority to encourage licensee compliance with legal and regulatory requirements outside of its direct jurisdiction. If Council believes its authority is unclear, it can amend its Rules to confirm that licensee non-compliance with other legal and regulatory requirements, or aiding and abetting non-compliance by a client, is within Council's authority to discipline or sanction.

THE IAG ALSO RECOMMENDS that Government amend the Act to permit the Real Estate Council to disclose information to other regulatory and law enforcement authorities, in compliance with the *Freedom of Information and Protection of Privacy Act*. This would facilitate improved cooperation with regulatory partners to better protect the public.

14. The Real Estate Council increase its proactive detection and deterrence efforts for licensees who engage in, aid, or abet aggressive marketing and sales practices that target vulnerable members of the public.

The public has a heightened distaste for any misconduct that targets vulnerable British Columbians, for example, new immigrants, seniors, less sophisticated real estate market participants, and unrepresented individuals.

In a market environment where licensees are aggressively soliciting listings and transactions are completed in a matter of days, sellers do not have the benefit of a "cooling off period" for sober reflection. Licensees focussed on sales volumes may add to a sense of urgency and impulsive seller behaviour.

In this environment the Real Estate Council must focus additional resources, including timely consumer alerts, on preventing and disciplining aggressive and predatory marketing practices that target vulnerable individuals.

15. The Real Estate Council increase the focus on licensee conduct examinations in its brokerage auditing program.

The Real Estate Council's current brokerage audit program is focussed primarily on a brokerage's financial records, related internal controls, and the protection of trust funds. Without minimizing the importance of financial examinations, the IAG recommends that the audit program be expanded to include greater examination of business practices and licensee conduct. Proactive market conduct reviews would assist Council to identify actual and potential misconduct and undertake earlier intervention to protect consumers.

16. Government increase maximum disciplinary penalties available to the Real Estate Council to \$250,000 for individual licensee misconduct and \$500,000 for brokerage misconduct, and increase administrative penalties to a maximum of \$50,000.

Penalties for regulatory misconduct must serve as a specific deterrent against repeating the misconduct, and general deterrent to industry to discourage similar misconduct. Given the size of the potential rewards for misconduct in the current real estate market, current penalties under the Act (\$10,000 for licensees and \$20,000 for brokerages) may represent little more than the cost of doing business. Maximum administrative penalties (\$1,000) have also not kept pace with the market.

The increased penalties proposed will equip the Real Estate Council to take more compelling enforcement action and more effectively influence industry behaviour. The IAG also supports having the penalties apply per regulatory contravention and **WE RECOMMEND** Government give the Real Estate Council the power to designate particular regulatory contraventions for administrative sanction. This power would equip Council to respond to emerging and priority conduct issues that may arise during different markets conditions, rather than requesting, and potentially waiting for, periodic changes to the Regulations.

Disciplinary processes and penalties should be reserved for more serious issues of licensee misconduct or conduct unbecoming and not issues of technical non-compliance which are properly dealt with by administrative penalties. To ensure transparent and fair deployment of a wider range of penalties, **THE IAG RECOMMENDS** that the Real Estate Council publish guidelines on how sanctions will be determined, including administrative sanctions and disciplinary sanctions.

17. Government amend the Act to enable the Real Estate Council to disgorge the proceeds of misconduct from licensees and brokerages.

In addition to increased fines and penalties, the IAG supports the taking back of proceeds of misconduct. The combination of disgorged proceeds gained through misconduct and paying financial penalties makes it unprofitable to engage in misconduct and serves as a strong deterrent.

THE IAG RECOMMENDS that, longer term, the Real Estate Council review ways to return disgorged proceeds to compensate the victims of misconduct.

18. The Real Estate Council improve the transparency of its complaints and disciplinary process, and the resulting outcomes.

To improve transparency and public participation in the regulatory process, the IAG recommends that more information on complaint and discipline procedures and outcomes be made available to the public on the Real Estate Council website and that the information be presented in a manner that is accessible and easy for consumers to use and to understand.

GOVERNANCE AND STRUCTURE

19. Government amend the Act to require that 50% of Council members be non-industry members.

Currently, of Council's seventeen members, thirteen are industry members elected by their peers, one is appointed by the Real Estate Council to represent the interests of strata property owners, and three are non-industry members.

Industry members are elected to Council on a regional basis, and those regions may include one or multiple Real Estate Boards. Many industry members elected to Council by their peers have previously served on a Board, and the mandate of Boards is to represent the interests of their members. Council, by contrast, has a public interest mandate and consumer protection focus.

It is our view that some industry members voted to Council may not fully appreciate that their role is to serve the Council's public interest mandate, and not the interests of their peers or local Board. In addition, elected members serve as little as a single two year term if they are not re-elected. Two years is likely not a sufficient time to develop competence, and effectively function as a member of the regulator's governing board..

An overwhelming majority of industry members with relatively short tenures at the Council may have had the unintended consequence of causing Council to interpret its jurisdiction narrowly, be tentative when bold action is required, and adopt a reactive rather than proactive regulatory focus.

The IAG appreciates that as a self-regulatory organization, Council needs industry expertise and experience to execute on its mandate. However, we believe the time has come to rebalance that industry voice with other perspectives on regulatory and governance best practices, and more public perspectives on the Council's governing board.

The IAG favours a definition of "non-industry" Council member that refers to an individual who is not currently generating income from the regulated industry. The IAG also remains in favour of renewable two year tenures for Council members, which equips Council to retain capable and competent members.

THE IAG ALSO RECOMMENDS that Government amend the Act to increase non-industry participation in Council's disciplinary committees.

WE FURTHER RECOMMEND that the process for selecting non-industry representatives be more transparent and follow established good governance principles including the use of competency based skills and experience assessments.

20. Government amend the Act to make the regulation of both licensed and unlicensed real estate services the responsibility of a single regulator, the Real Estate Council.

Placing both licensed and unlicensed activity under the jurisdiction of a single regulator would provide that regulator with responsibility for the full spectrum of real estate services activity. It would better equip the regulator to respond to emerging real estate business models that involve both licensed and unlicensed parties. It would provide the public and industry with a single point of contact and a unified public education and awareness raising capability.

Compared to the Superintendent, the Real Estate Council has wider jurisdiction over real estate services, the ability to make rules, and has more operational autonomy and flexibility than the Superintendent and its Office. The IAG therefore believes that the Real Estate Council is best positioned to regulate both licensed and unlicensed real estate services activity.

With wider jurisdictional responsibilities for both licensed and unlicensed real estate services activity given to the Real Estate Council, the IAG recommends a corresponding strengthening of the Superintendent's oversight over Council (*see recommendation 21*).

In relation to unlicensed activity, the IAG notes that "for sale by owner" activity is exempted under legislation from licensing requirements and therefore is not regulated by either the Superintendent or the Real Estate Council. This exemption exists on the premise that owners should be able to dispose of their own property as they see fit, without a license.

However, "for sale by owner" activity conducted at high volumes may pose greater risks to consumers. This is the activity that has become known as "wholesaling". In some cases it involves individuals in the business of buying multiple properties and then assigning the purchase contract or reselling or leasing those homes to be occupied by others.

Opportunistic and high volume "for sale by owner" business activities in a rising real estate market may expose consumers to risks that would otherwise be mitigated by the regulatory requirements imposed on a licensee, for example, minimum qualification requirements, the duty to act in the best interest of their client, and appropriate disclosure of conflicts of interest.

THE IAG THEREFORE RECOMMENDS that "for sale by owner" activity, conducted at high volumes or for business purposes, be subject to licensing under the Act. For clarity, the IAG is not recommending that individual owner-occupiers selling their own property be subject to licensing.

21. Government increase the Superintendent of Real Estate's oversight of the Real Estate Council including periodic independent assessments of Council's performance against its mandate.

The Superintendent's office has limited oversight powers over the Real Estate Council which did not equip it to detect or respond to issues that resulted in the establishment of the IAG.

If Government intends the Superintendent to oversee the Real Estate Council's exercise of its mandate, **WE RECOMMEND** enhancements to legislation in respect of the Superintendent's powers and relationship to the Council, including:

- ▶ providing the Superintendent with the power to require Council to investigate a particular matter;
- ▶ requiring Council to implement a committee to review file closure decisions without disciplinary action, and reports these to the Superintendent;
- ▶ requiring Council to include more information to be part of the record of consent order proceedings, including investigation reports, that can inform decisions and exercise of appeal rights by the Superintendent; and
- ▶ requiring Council to provide periodic and on-demand reports to the Superintendent regarding emerging risks to consumers, responses to those risks, complaints data, examinations data and enforcement data.

The IAG believes these additional measures balance the self-regulatory authority of the Real Estate Council and leave its powers largely unfettered, but also improve the Council's accountability for performance against its mandate.

WE ALSO RECOMMEND the Superintendent be empowered to require periodic independent assessments of Real Estate Council's effectiveness in the exercise of its mandate. The terms of reference of those assessments should be determined by the Superintendent as he or she sees fit, and carried out by resources independent of the Real Estate Council. The resulting reports from these assessments should be made available to the public.

WE FURTHER RECOMMEND that the first such assessment take place in a year to eighteen months and be used as a progress report against the recommendations of the IAG.

22. The Real Estate Council strengthen the requirements for managing brokers to have active and direct oversight over licensees.

To reinforce managing broker oversight of their licensees, the IAG recommends that the Real Estate Council implement increased managing broker supervisory responsibilities over licensees engaged by the brokerage. Proper oversight of licensees is essential to ensure appropriate adherence to regulatory requirements, ethical requirements, and competent provision of service to the public. This report includes numerous recommendations that place the managing broker in a greater oversight role, including the requirement to report misconduct, to approve disclosure of interest in trade forms, to retain offers, and other record keeping requirements.

THE IAG RECOMMENDS the Real Estate Council identify and implement ways to improve managing broker supervisory effectiveness, including a maximum ratio of licensees per supervising managing broker.

In circumstances where the suitability or solvency of a brokerage is in question and the public is otherwise at risk, **THE IAG RECOMMENDS** that Government provide the Real Estate Council with authority to establish a custodianship of the brokerage for a limited time, to facilitate the orderly winding down or transfer of a business where the managing broker is not able to discharge their responsibilities.

THE IAG ALSO RECOMMENDS that the Council undertake a thorough review of new business models to ensure appropriate governance and oversight of licensees and public protection. Extra regulatory vigilance is important in circumstances where new business models may not fit within a regulatory framework designed for more traditional models. New business models may necessitate the imposition of additional duties and responsibilities on owners, managing brokers, and potentially licensees.

23. Government implement a “fit and proper” standard for brokerage ownership.

The ownership of a brokerage influences the culture and conduct of managing brokers and licensees, and accordingly, ownership should be subject to a suitability assessment and approval by the Real Estate Council.

24. The Real Estate Council require record keeping and reporting that would assist it to identify industry practices that may be placing consumers at risk.

Earlier recommendations in this report identified numerous new record keeping and reporting requirements for brokerages, including:

- ▶ managing broker reporting on the handling of misconduct complaints;
- ▶ approval and retention of disclosure of interests in trade forms, and provision of copies to the Real Estate Council; and
- ▶ retention of all offers in relation to a transaction.

IN ADDITION WE RECOMMEND that the Real Estate Council impose a requirement on licensees and brokerages that all contract assignments during a closing period, in which a licensee participates as agent or acquires an interest, must be received, reviewed, and filed by the licensee’s managing broker.

THE IAG RECOMMENDS that all records be kept in a manner that makes them immediately available to regulator when requested, and that failure to retain the above records constitutes a disciplinary offence.

The IAG also encourages the Real Estate Council to identify other data and records that would assist it in proactively identifying market conditions and licensee conduct that pose potential risks to consumers.

25. The Real Estate Council undertake a comprehensive review of licensing education and testing requirements to raise entry standards.

The public's expectation is that all licensees are competent, trustworthy, and act in a consumer's best interests at all times. A regulator's first opportunity to meet those expectations is in its establishment of entry standards for new licensees. In a rising real estate market robust entry standards are even more important, as prospective licensees may be seeking short term profit rather than making a longer term commitment to the industry.

The IAG recommends the Real Estate Council undertake a comprehensive review of licensing education requirements to ensure licensees fully understand their duties to consumers, responsibilities as members of a regulated industry, and are competent in the performance of their services.

The review must consider the role of language proficiency and comprehension. English is not the first language of many British Columbians and the real estate industry has responded with service offerings in multiple languages. Indeed, many licensees do not speak English as their first language and provide the majority of their services to clients in another language.

On the other hand real estate education, regulatory information and guidance and standard forms are all provided in English. This creates a risk that licensee's education and ongoing proficiency will be impacted by language proficiency or comprehension issues. This is a risk that the regulator cannot ignore.

26. The Real Estate Council implement mandatory continuing education with content and testing that reinforces a licensee's ethical obligations, conduct requirements, and duties to consumers.

In addition to strengthening education requirements for new licensees, the IAG recommends that regulatory expectations of licensees be reinforced every two years with a mandatory regulatory update that reminds licensees of their key duties to consumers and ethical obligations.

WE FURTHER RECOMMEND that licensees be subject to a competency based assessment that fully tests their understanding of, and ability to apply, the content of the update.

27. The Real Estate Council make its complaints process more publicly accessible and easier to navigate.

The IAG appreciates that the Real Estate Council, like all regulators, has jurisdictional limits, makes decisions based on evidence and precedence, and must follow the principles of natural justice in the execution of its duties. However, regulators must balance these limits and responsibilities with their obligation to remain open and accessible to the public.

There are opportunities for the Council to learn from best practices that other regulators are using to improve its public interface, and to ensure the complaints process does not put an unnecessary burden on consumers.

Elsewhere in this report, the IAG has recommended that the Real Estate Council implement a committee to review file closure decisions that did not result in disciplinary action (*see recommendation 21*). The IAG believes this is an important step to ensure complaints are being appropriately reviewed at intake, and that higher risk files are being identified and escalated. This committee will also be well positioned to ensure the process is consumer friendly.

The IAG also recommended improved transparency of consent orders, (*see recommendations 18 and 21*) to enable Council's committee to make fully informed decisions on files, and the Superintendent to make a fully informed decision whether to appeal. This added transparency should also assist in building public confidence in the disciplinary process and outcomes.

28. The Real Estate Council significantly increase and improve its public education and awareness efforts.

The Real Estate Council has suffered a loss of public confidence. Rebuilding that confidence will require a significant investment in effort and resources.

WE RECOMMEND that Council consider retaining professional communication advisors or additional staff with experience in consumer education and literacy, to assist with developing and implementing a comprehensive plan to increase consumer education and awareness and to restore public confidence.

WE ALSO RECOMMEND that the Council make increased use of timely consumer alerts, which equip consumers to identify, avoid, and report licensee misconduct.

IX // MOVING FORWARD

THE REAL ESTATE COUNCIL deserves credit for inviting the Independent Advisory Group to undertake this review, for giving it full authority to set the terms of the review, and for agreeing to make the entire process public.

Implementing the recommendations contained in this report will be a major undertaking. It will require time and additional resources. It will also require that Government, the Superintendent of Real Estate, Real Estate Boards and industry associations, and individual licensees all support the recommendations and the Real Estate Council's implementation plan. If the different players do not cooperate and coordinate there is a risk that problems persist and the public is not appropriately protected.

The different players in the real estate sector and its regulatory regime have been the subject of intense scrutiny and criticism in recent months, and some of that criticism is deserved.

The time has come to focus forward and to make the changes that the public deserves.

X // APPENDICES

APPENDIX 1: *Independent Advisory Group Members*

CAROLYN ROGERS (CHAIR), Superintendent of Real Estate and Chief Executive Officer, Financial Institutions Commission

HOWARD KUSHNER, Barrister and Solicitor, Kushner Law Group

DON WRIGHT, President and Chief Executive Officer, Central 1 Credit Union

AUDREY T. HO, Commissioner, British Columbia Securities Commission

BRUCE D. WOOLLEY Q.C., Stikeman Elliott

CAROL GEURTS, Associate Broker, Century 21 Veitch Realty, Creston, British Columbia

TONY GIOVENTU, Executive Director, Condominium Home Owners' Association of British Columbia

RON USHER, General Counsel, The Society of Notaries Public of British Columbia

Biographical information on the Advisory Group members can be found at:

www.advisorygroupbc.ca

APPENDIX 2: *IAG Terms of Reference*

On February 22, 2016, the Independent Advisory Group (IAG) was established to examine and review real estate licensee conduct and practices and the effectiveness of existing licensee regulation in the light of important issues brought to the attention of the Real Estate Council of British Columbia (RECBC) and the Superintendent of Real Estate.

The Advisory Group's mandate is to examine whether the current regulatory regime adequately protects consumers and the wider public interest from real estate licensee conduct that is inconsistent with the duties and standards of conduct required of licensees. It will make recommendations on ways to enhance consumer protection and strengthen public confidence in the regulation and practices of real estate licensees in British Columbia.

The Advisory Group has approved Terms of Reference that clarify the scope and focus of its work.

The Advisory Group recognizes that there are other issues of importance and concern to British Columbians with respect to the province's real estate market that fall outside the Advisory Group's mandate and Terms of Reference. Issues that the Advisory Group identifies, but are beyond the scope of the Group's work, will be referred to the relevant authorities for consideration and appropriate action.

In the exercise of its mandate, the Advisory Group will:

1. Examine issues identified in recent public commentary relating to the conduct and practices of real estate licensees and their associates that pose risks to consumers and the wider public interest;
2. Examine the existing rules and requirements relating to the licensee conduct identified in (1), including those relating to:
 - ▶ Contract assignments;
 - ▶ Working in a client's best interest, and the role of limited dual agency;
 - ▶ Working honestly and with reasonable care and skill;
 - ▶ Disclosure and mitigation of conflicts of interest;
 - ▶ The duty to abide by all licensee legal obligations;
 - ▶ Misleading advertising; and
 - ▶ Coercive or predatory sales practices;

- 3.** Examine information and written submissions received by the IAG, the Superintendent of Real Estate and the RECBC on the conduct, practices and related activity that are the subject of the review;
- 4.** Recommend any necessary improvements to the existing rules and requirements relating to licensee conduct to better protect consumers;
- 5.** Examine the administration of the rules, requirements and professional standards for licensees, including:
 - ▶ RECBC’s processes and procedures for identifying and responding to risks to consumers;
 - ▶ RECBC’s market intelligence, investigative, and enforcement capabilities;
 - ▶ RECBC’s governance structures;
 - ▶ The interaction between RECBC, real estate boards, the Superintendent of Real Estate, and other bodies that administer licensee conduct requirements and otherwise oversee real estate practices in the province;
 - ▶ Ongoing professional conduct and ethics training and accountability mechanisms; and
 - ▶ Other initiatives to influence industry behavior and compliance, for example, licensee and public education;
- 6.** Recommend any necessary improvements to the administration and enforcement of the existing rules and requirements, to better protect consumers;
- 7.** Examine the public’s access to and engagement with the RECBC; and
- 8.** Recommend any necessary improvements to strengthen the relationship between the public and the RECBC.

The Advisory Group reserves the right to modify these terms to include issues that are subsequently identified or brought to its attention, where such issues fit within the Group’s overall mandate.

APPENDIX 3: *Other Real Estate Corporations established under the Act*

THE REAL ESTATE FOUNDATION

The Real Estate Foundation is created by the Act to serve specific purposes relating to education, research and related activities with the goal of continuous improvement and evolution in the real estate services industry.

The Foundation is funded primarily by money received by Council on account of administrative and disciplinary penalties and from or on behalf of brokerages of the interest earned on trust accounts. The Foundation's operation is overseen by a board of governors consisting of up to seven members. Each of the Real Estate Council of BC, the British Columbia Real Estate Association and the Real Estate Institute of British Columbia appoint one member. One member who is not a licensee is appointed by the Minister of Finance, one or two members are appointed in accordance with the Regulation, if any, and one member is the Minister of Finance or another individual appointed by the Minister.

THE REAL ESTATE ERRORS AND OMISSIONS INSURANCE CORPORATION

The Real Estate Errors and Omissions Insurance Corporation is responsible for the administration of the Real Estate Errors and Omissions Insurance Fund (the Fund) – a pooled fund that is used to pay the costs of defending and indemnifying licensees against professional liability claims. Such claims arise from findings that a licensee has made negligent errors or omissions in the provision of real estate services. The Act requires that all real estate licensees participate in the program and to pay assessments into the Fund at the time of initial licence issue and each subsequent re-licensing, which occurs every two years.

THE REAL ESTATE COMPENSATION FUND CORPORATION

The Real Estate Compensation Fund Corporation is responsible for the Real Estate Compensation Fund. The Fund was established in 2005 with the purpose of providing protection to members of the public who are found to have suffered compensable loss, as defined in the Act. Such losses arise in circumstances where money entrusted to a real estate licensee or an unlicensed individual related to a brokerage has been misappropriated or wrongfully converted, where there has been a failure to pay over or to account for money, or where money has been obtained by fraud in relation to the provision of real estate services.

APPENDIX 4: *Real Estate Boards in the Province of British Columbia*

BC NORTHERN REAL ESTATE BOARD

2609 Queensway
Prince George, B.C. V2L 1N3

FRASER VALLEY REAL ESTATE BOARD

15463 – 104th Avenue
Surrey, B.C. V3R 1N9

KOOTENAY REAL ESTATE BOARD

208 – 402 Baker Street
Nelson, B.C. V1L 4H8

POWELL RIVER SUNSHINE COAST REAL ESTATE BOARD

PO Box 307
Powell River, B.C. V8A 5C2

SOUTH OKANAGAN REAL ESTATE BOARD

101 – 365 Van Horne Street
Penticton, B.C. V2A 8S4

VICTORIA REAL ESTATE BOARD

3035 Nanaimo Street
Victoria, B.C. V8T 4W2

CHILLIWACK AND DISTRICT REAL ESTATE BOARD

1 – 8433 Harvard Place
Chilliwack, B.C. V2P 7Z5

KAMLOOPS AND DISTRICT REAL ESTATE ASSOCIATION

101 – 418 St. Paul Street
Kamloops, B.C. V2C 2J6

OKANAGAN MAINLINE REAL ESTATE BOARD

112 – 140 Commercial Drive
Kelowna, B.C. V1X 7X6

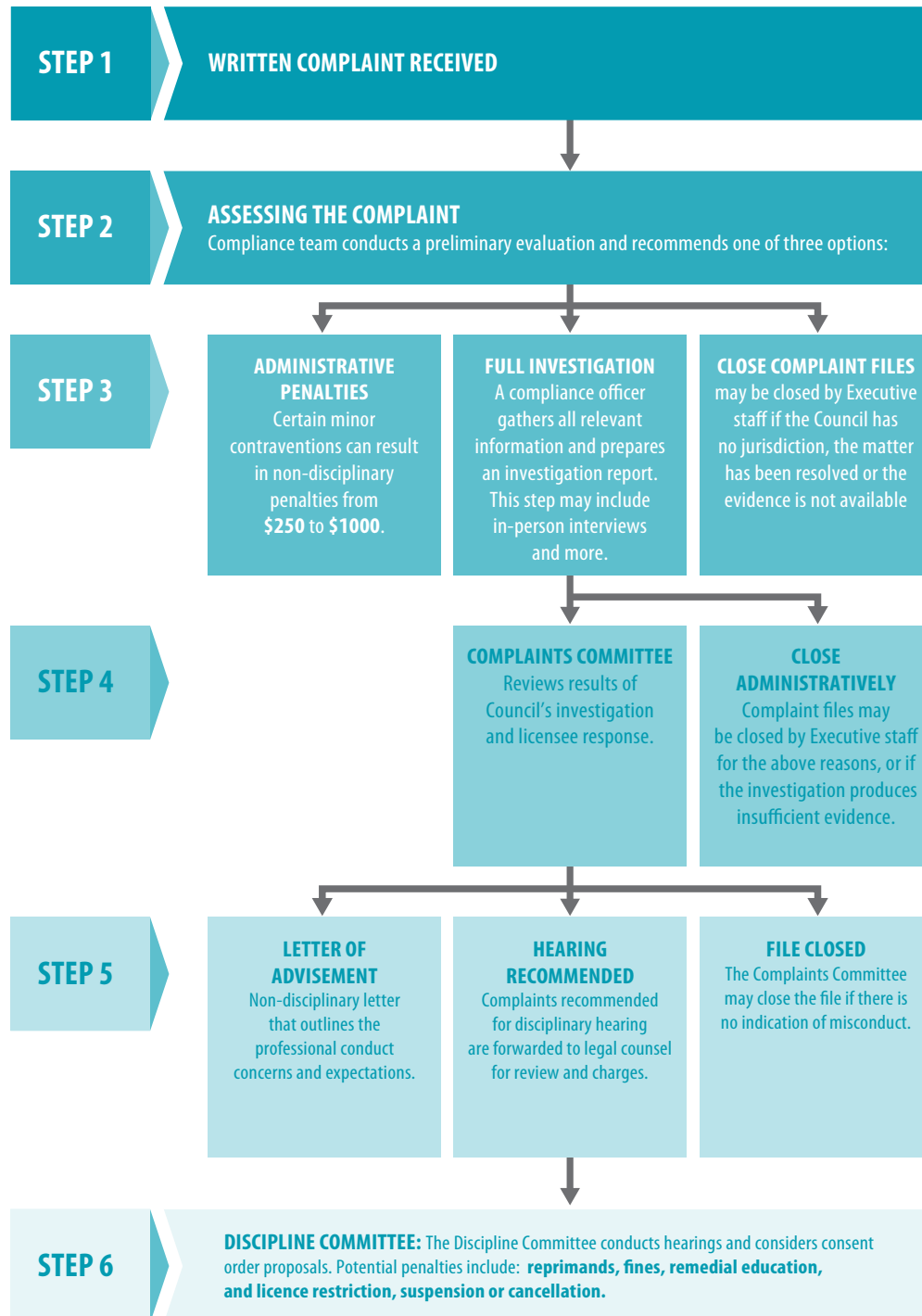
REAL ESTATE BOARD OF GREATER VANCOUVER

2433 Spruce Street
Vancouver, B.C. V6H 4C8

VANCOUVER ISLAND REAL ESTATE BOARD

6374 Metral Drive
Nanaimo, B.C. V9T 2L8

APPENDIX 5: How Complaints Are Handled



XI // SCHEDULE OF RECOMMENDATIONS

TRANSPARENCY AND ETHICS

- 1.** The Real Estate Council create a comprehensive Code of Ethics and Professional Conduct and require licensees to affirm, in writing, their compliance with the Code as part of regular relicensing requirements.
- 2.** The Real Estate Council amend its Rules to no longer permit licensees engaged in trading services to offer dual agency.
- 3.** The Real Estate Council require licensees to fully disclose and explain their financial and non-financial incentive structures, prior to and on entering into a client relationship.
- 4.** The Real Estate Council require licensees to provide information to consumers which clearly explains the duties owed to consumers by licensees, and how consumers can protect their own interests, before, during, and after they enter a relationship with a licensee.
- 5.** The Real Estate Council focus more attention on the forms and contracts used by licensees, to ensure they reflect an appropriate emphasis on consumer protection and the public interest.
- 6.** Government implement the changes it made to contracts used by licensees, requiring seller consent to contract assignments by the buyer, to all forms of contract for trades in real estate whether or not the contracts are prepared by licensees.
- 7.** The Real Estate Council require all licensee disclosures of interests in trade be reviewed and approved by a licensee's managing broker and subsequently filed at regular intervals with the Real Estate Council.
- 8.** The Real Estate Council amend its Rules to prohibit a licensee from acquiring a direct or indirect interest in their own listing.
- 9.** The Real Estate Council require that all offers received by a seller's agent in relation to a trade in real estate, be promptly filed with that agent's managing broker and be retained at the brokerage for review by the Real estate Council on demand.

COMPLIANCE AND CONSEQUENCES

- 10.** The Real Estate Council apply more stringent suitability assessment criteria to prospective licensees.
- 11.** The Real Estate Council impose an explicit duty on managing brokers to report licensee misconduct to the Council, and explicit duty on licensees to report misconduct to their managing broker, when that misconduct places the public at risk.
- 12.** The Real Estate Council implement confidential reporting channels (for example, reporting hotlines or whistle-blower programs) for industry and the public, to facilitate reporting of licensee misconduct.
- 13.** The Real Estate Council use existing regulatory powers to encourage licensee compliance with all rules that govern their conduct, including those of other legal and regulatory regimes.
- 14.** The Real Estate Council increase its proactive detection and deterrence efforts for licensees who engage in, aid, or abet aggressive marketing and sales practices that target vulnerable members of the public.
- 15.** The Real Estate Council increase the focus on licensee conduct examinations in its brokerage auditing program.
- 16.** Government increase maximum disciplinary penalties available to the Real Estate Council to \$250,000 for individual licensee misconduct and \$500,000 for brokerage misconduct, and increase administrative penalties to a maximum of \$50,000.
- 17.** Government amend the Act to enable the Real Estate Council to disgorge the proceeds of misconduct from licensees and brokerages.
- 18.** The Real Estate Council improve the transparency of its complaints and disciplinary process, and the resulting outcomes.

GOVERNANCE AND STRUCTURE

- 19.** Government amend the Act to require that 50% of Council members be non-industry members.
- 20.** Government amend the Act to make the regulation of both licensed and unlicensed real estate services the responsibility of a single regulator, the Real Estate Council.
- 21.** Government increase the Superintendent of Real Estate's oversight of the Real Estate Council including periodic independent assessments of Council's performance against its mandate.
- 22.** The Real Estate Council strengthen the requirements for managing brokers to have active and direct oversight over licensees.
- 23.** Government implement a "fit and proper" standard for brokerage ownership.
- 24.** The Real Estate Council require record keeping and reporting that would assist it to identify industry practices that may be placing consumers at risk.

LICENSEE AND PUBLIC EDUCATION

- 25.** The Real Estate Council undertake a comprehensive review of licensing education and testing requirements to raise entry standards.
- 26.** The Real Estate Council implement mandatory continuing education with content and testing that reinforces a licensee's ethical obligations, conduct requirements, and duties to consumers.
- 27.** The Real Estate Council make its complaints process more publicly accessible and easier to navigate.
- 28.** The Real Estate Council significantly increase and improve its public education and awareness efforts.



