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Subject: 2019-08-20 Discussion Paper re Regulating Market Conduct v2
Attachments: 2019-08-20 Discussion Paper re Regulating Market Conduct v2.docx

Hi Folks,

Attached is a rough draft of the concept paper on expanding the regulatory framework to encompass market conduct for your consideration. Let's setup a workshop in the coming week(s) to further discuss? In the interim, written comments are welcome.

Thanks,

Jon

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REGULATING MARKET CONDUCT

Background and Context

The Office of the Superintendent of Real Estate (**OSRE**) and the Real Estate Council of BC (**RECBC**) are jointly responsible for the regulation of real estate in British Columbia and protecting consumers in real estate transactions. The *Real Estate Services Act* (**RESA**) currently establishes a co-regulatory model in which each of the regulators has distinct responsibilities for the various components of the regulation of real estate licensees under RESA. In addition, OSRE has regulatory responsibilities under the *Real Estate Development Marketing Act* (**REDMA**) and under the *Strata Property Act* (**SPA**). RESA explicitly mandates RECBC to “uphold and protect the public interest in relation to the conduct and integrity of its licensees”; OSRE’s legislation provides it with the implicit mandate to protect the public interest and to protect consumers from harm in the discharge of its statutory authority.

The combined legislative authority of both RECBC and OSRE allow them to regulate the following aspects of real estate in BC:

- Set entry requirements and education standards for real estate professionals (licensees) and licence them;
- Make rules to establish standards of conduct for real estate licensees (**Rules**);
- Enforce the standards of conduct that are established for licensees by RESA, the Regulations, and the Rules, including through investigating and disciplining licensees who are found to have committed misconduct or conduct unbecoming under RESA;
- Take enforcement action against individuals providing unlicensed real estate services;
- Provide support for consumers to make informed decisions when acquiring or disposing of real estate;
- Regulate the marketing of multi-unit residential real estate developments under REDMA; and
- Approve certain strata plan schedules under SPA.

While the current regulatory framework is designed to protect consumers of real estate services in real estate transactions, it predominately focuses on clients of licensees rather than consumers more generally. For example, section 3-3 of the Rules enumerates an expansive list of duties that licensees owe to clients, including acting in a client’s best interests, which are contrasted with the more limited duties owed to consumers more generally, such as the duty to act honestly and with reasonable care and skill (section 3-4).

Moving to Risk-based, Market Conduct Regulation

The current regulatory framework for real estate in BC is limited in scope and not as comprehensive as it could be. It largely focuses on individual real estate transactions as opposed to broader market trends and generally addresses market conduct issues reactively through the receipt and investigation of consumer complaints. It does not regulate market conduct more broadly and struggles to proactively regulate based on emerging risks. It also provides minimal or no regulation of several key market participants, including developers, For Sale By Owner (**FSBO**) activity, and the 11 local real estate boards (**Boards**) that comprise organized real estate in the province. Boards are particularly important as they influence industry culture and the terms of transactions, often possess dispute resolution functions

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outside of the regulatory framework, and hold significant amounts of data pertaining to real estate transactions. In addition, concerns have been raised about the possibility of board practices allowing real estate price manipulation and anti-competitive licensee remuneration practices.

Weaknesses in the BC real estate industry have been identified to include, among other things, poor brokerage governance and control structures; weak corporate culture, mind-set and behaviour; lack of transparency and disclosure; high consumer fee structures that have not been revised in light of rising markets in several major urban areas; poor understanding of obligations under anti-money laundering legislation; poor or reckless understanding of fiduciary duties; and, an inappropriate focus on sales over professionalism and ethics generally.

Through the Maloney Report and the ongoing regulatory governance review there have been increasing calls to regulate market conduct more generally, but there is little shared understanding of what this means in the context of BC's real estate industry. A 2008 report by the Canadian Council of Insurance Regulators may be instructive as it introduces a framework for understanding risk-based market conduct regulation that moves beyond micro-level outcomes such as fair treatment of consumers and claimants towards more systemic-level outcomes such as a stable marketplace and the proactive identification of issues. The report defines risk-based market conduct regulation as "directing regulatory efforts to the most significant issues that either have the greatest potential for consumer harm or that could weaken public confidence if left unchecked. In a risk-based approach, regulators prioritize issues based on their potential impact (risk) to the achievement of desired regulatory outcomes." [CCIR 2008 report](#)

The gaps in regulation, the industry weaknesses and the calls for greater regulation of market conduct suggest the need for a holistic and co-ordinated risk-based market conduct regulatory framework that applies consistently across BC's real estate sector. This may be achievable through the consideration of structural changes to the regulatory framework and the expansion of OSRE and RECBC's explicit legislative mandate. Through such changes, the regulators can move away from a rules-based, reactive, compliance approach that focuses on individual real estate transactions and licensees, to a principle-based, proactive, outcomes-focused and risk-based approach that more broadly considers market practices and industry trends that impact consumers.

Data Collection and the Regulation of Market Conduct

To effectively regulate market conduct, regulators would need access to significant new data streams to identify specific market conduct risks and trends. The limited data that is collected now is insufficient to support regulation of market conduct or a risk-based approach to regulation. Regulators require data management tools to monitor, manage and measure market conduct risk and must be able to analyze and interpret what the data is telling them.

With quality data and data management tools, regulators could:

- Increase regulatory efficiency and enhance regulator performance of current statutory authorities and mandate by enabling better regulation of licensees, including brokerages. For example, the regulator would have a better understanding of the prevalence of unrepresented

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parties in real estate transactions as well as the use of dual agency without having to rely on voluntary data disclosures (often not forthcoming) from the Boards.

- Augment the ability of regulators to engage in a risk-based approach to regulation and promote a better understanding of risks. Consistent and quality data would better enable the identification, monitoring and measuring of potential risks to consumers.
- Enhance market transparency and consumer protection more generally through enhanced regulation of real estate industry data and marketing. This could lead to outcomes that address greater perceived fairness in the marketplace; increased protections against market manipulation; and better entrenchment of the principles of fair treatment for real estate consumers.
- Effectively support and address anti-money laundering (AML) efforts.

Staff have identified two main approaches that could be taken to secure access to data:

1. Require licensees (brokerages) and/or developers to report specific data to the regulator; or,
2. Regulate the collection, use and reporting of data by local Boards and the provincial association.

As discussed below, preliminary analysis suggests that both approaches have advantages and potential drawbacks.

Data Collection Approaches

1. Require licensees (brokerages) and/or developers to report specific data to the regulator

One approach would require brokerages and/or developers with disclosure obligations under REDMA to report specific data to the regulator on both an ongoing basis as well as in response to specific data requests. Brokerages already have an obligation to report certain information to the regulator through the annual brokerage activity report as well as a requirement to respond to regulator requests for information. Developers are familiar with reporting real estate transaction data as a result of the implementation of the Condo and Strata Assignment Integrity Register (CSAIR).

A key component of this would be the routine reporting of real estate transaction data, which could include both pre-sale and re-sale activity. This approach could see the regulator collect information on a number of variables such as:

- Property information including address, strata lot number (if relevant), parcel identifier (PID) and MLS # (if listed through MLS);
- List price and date as well as sale price and date;
- Deposit amount, date and source of funds;
- Agency relationships between licensees and parties to transactions (e.g. sole agency, dual agency, unrepresented parties);
- Key transaction dates including date of contract of purchase and sale/purchase agreement, date conditions removed and/or closing date;
- Commission splits and/or other remuneration earned or shared (per Rules 5-11 and 5-11.1);

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- Developer Name (for pre-sales); and
- Development Name (for pre-sales).

The regulator could also collect data on principals to real estate transactions (i.e. buyers and sellers) to support AML and tax compliance efforts, but this would significantly increase the complexity of required reporting and raise privacy issues. Information collected could be similar to the identity and contact information currently required as part of CSAIR.

The systematic collection of this data would enable the regulator to more proactively address emerging industry trends and systemic consumer risks as well as provide a stronger understanding of real estate sales activity in the province. The data could be used in a number of applications, including:

- Public reporting of pre-sale and re-sale activity, providing a more accurate picture of residential and commercial real estate sales in the province than currently provided through MLS, thereby supporting a more transparent marketplace for consumers;
- Collecting information on transaction volumes by brokerage, developer and individual licensees, providing a better understanding of key industry metrics and potentially informing the development of risk profiles when cross-referenced with audit findings and consumer complaints;
- Greater understanding of industry remuneration models (e.g. average commission amounts) and assessment of the impact of remuneration on the integrity of sales data (e.g. assessing potential manipulation of sales data as a result of the use of licensee rebates);
- Greater understanding of changing industry business models, including information on licensees doing deals outside of the geographic location of their brokerage;
- Comparison of real estate deals undertaken in-house (i.e. both parties represented by separate licensees related to the same brokerage) versus those where parties are represented by two separate brokerages in order to assess any consumer protection concerns related to in-house transactions;
- Assisting with AML efforts, including providing regulators and law enforcement with a comprehensive database and related data to support investigations.

There are some identified advantages and drawbacks in pursuing this option.

Advantages:

- Helps address gaps in data / information that is currently available to regulators, in order to strengthen the evidence-base to identify risk factors;
- Direct access to real estate transaction data would allow the regulator to undertake research and issues analysis on an on-demand basis, rather than relying on third parties for access to data, as well as ensuring the collection of standardized and comparable data;
- Captures all licensed real estate activity, including residential, commercial, rental property management and strata management. Data on commercial, rental property management and strata management are not consistently reported out on by industry on a province-wide basis;

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- Has the potential to provide data from real estate developers regarding pre-sales;
- Enhanced data collection could form the basis for targeted professional guidance and/or new regulatory requirements for licensees and/or developers.

Drawbacks:

- Could be seen as duplicative with respect to trading service licensee reporting of information that is already captured by MLS;
- Requires the establishment and maintenance of a database with appropriate quality controls and staffing to analyze the data;
- Does not capture market activity that does not involve licensees and/or developers (e.g. FSBO, owner-managed rental units), although this is understood to be a relatively small proportion of the real estate market;
- Compared to the regulation of board data, does not provide a direct mechanism to restrict certain marketing practices through MLS that may be detrimental to consumer protection (see option 2 below for additional information).

2. Regulate the collection, use and reporting of data by local Real Estate Boards and the provincial association.

A second approach would be to regulate the collection, use and reporting of data by local boards and, by extension, the BC Real Estate Association (BCREA). Local boards already collect a broad range of information on real estate transactions conducted by their members (e.g. property address, price, listing agent and selling agent and their respective brokerage(s), sale date) through the Multiple Listing Service (MLS) system. Each local board has the latitude to collect additional data fields from its members, which may vary from board to board.

This information is aggregated and reported out by boards and the BCREA, which makes a selection of indicators available publicly (e.g. benchmark price, number of sales, number of properties listed for sale, months of inventory) with additional information and statistics available to board members (e.g. information on comparable sales). BCREA's statistics are broadly distributed to and referenced by third parties, including government, and are generally considered to be a reliable source of housing market information.

This approach contemplates creating new regulatory requirements in relation to the collection, use and reporting of data by local boards including, by extension, the regulation of MLS data and practices. The regulation of MLS data and practices could serve multiple purposes, including:

- (1) ensuring the accuracy and transparency of real estate market statistics; and
- (2) enabling regulators to more proactively address emerging industry trends and systemic consumer risks.

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As part of this approach, there could be a requirement that local real estate boards report specific information about real estate transactions to the regulator on an on-demand basis. Examples of data requirements could include:

- Property information including address, strata lot number (if relevant), parcel identifier (PID) and MLS #;
- List price and date, sale price and date;
- Buyers agent (selling agent) and sellers agent (listing agent) as well as related brokerages, or lack thereof;
- Key transaction dates including date of contract of purchase and sale/purchase agreement, date conditions removed and/or closing date;
- Buyers agent (selling agent) and sellers agent (listing agent) and their respective brokerage(s);
- Commission splits;
- Agency relationships between licensees and parties to transactions (e.g. sole agency, dual agency, unrepresented parties); and
- Whether the contract of purchase and sale identified conditions precedent (e.g. inspection, financing, title search, property disclosure statement, other).

The regulator could also explore requiring the collection and dissemination of data on principals to real estate transactions (i.e. buyers and sellers) to support AML and tax compliance efforts, but this would significantly increase the complexity of required reporting and raise privacy challenges, particularly through the involvement of third-party databases.

Through enhanced regulation of board data, regulators could also restrict certain practices which have the potential to mislead consumers as to the nature of real estate activity and markets in BC. This could include, for example, a prohibition on certain types of marketing activities, including:

- Posting a property for sale on MLS for which an accepted offer is already in place;
- Cancelling listings and relisting properties under a new MLS # (can be used to disguise the actual number of days on market for consumers); and
- Underquoting (the practice of intentionally listing a property for sale at a low price, in order to attract multiple offers, with no intention of accepting an offer at that price).

As with the first option, the systematic collection of this data would enable the regulator to more proactively address emerging industry trends and systemic consumer risks. The data could be used in a number of applications, including:

- Ensuring greater transparency and accuracy in industry-based real estate market statistics that are publicly reported;
- Collecting transaction volumes by brokerage and individual licensees, providing a better understanding of key industry metrics and potentially informing the development of risk profiles when cross-referenced with audit findings and consumer complaints;

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- Greater understanding of changing industry business models, including information on licensees doing deals outside of the geographic location of their brokerage;
- Comparison of real estate deals undertaken in-house (i.e. both parties represented by separate licensees related to the same brokerage) versus those where parties are represented by two separate brokerages in order to assess any consumer protection concerns related to in-house transactions; and
- Greater understanding of real estate market dynamics that may contribute to consumer risk (e.g. unconditional offers, market manipulation practices).

As with the previous option, there are some identified advantages and drawbacks in pursuing this approach.

Advantages:

- Helps address gaps in data / information that is currently available to regulators, in order to strengthen the evidence-base to identify risk factors;
- Helps broaden the scope of market regulation from individual transactions to broader market conduct issues that impact consumer protection;
- Helps ensure greater transparency and accuracy of MLS-based real estate market statistics.

Drawbacks:

- MLS data is primarily focused on residential re-sales. This means that there are significant gaps in what is currently recorded in the MLS database:
 - Reporting by boards would only capture the activities of those licensees who are members of local real estate boards (estimated to account for over 95% of all trading services licensees), thereby excluding data from a subset of real estate service providers;
 - Commercial properties for sale or lease may or may not be advertised in MLS, depending on the client's instructions. In some cases, sellers/lessors may not want to publicly advertise commercial properties for sale for business reasons and/or may prefer an exclusive listing agreement with a commercial brokerage;
 - MLS data, by nature, does not capture market activity that does not involve a licensee (e.g. FSBO, sales by employees of developers);
 - Similarly, MLS data does not capture the vast majority of residential pre-sales activity by developers or collect data pertaining to rental property management or strata management services.
- There would be a number of practical, technical hurdles to overcome in regulating the collection and use of board data. Currently, practices with respect to posting information on MLS vary significantly by board area, as does the IT capacity of boards as well as the data collected in the MLS databases that they administer. For example, some boards do not permit the posting of residential rental units for rent while others do. As a consequence, there may be challenges

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imposing standard regulatory requirements by region/board area as well as ensuring consistency in data collection and reporting between databases;

- Regulating the collection, use and reporting of board data would require significant legislative amendments to RESA as well as comprehensive engagement with the boards, which are likely to resist any regulation of their operations and databases.

Conclusion

This discussion paper has sought to identify some preliminary options for increasing regulator access to data on real estate transactions in order to support broader market conduct regulation and the adoption of a proactive, risk-based approach to the regulation of real estate services in BC. By systematically collecting, analyzing and sharing data, regulators, law enforcement and government would be better positioned to understand emerging real estate market practices and trends. This, in turn, would strengthen the ability of regulators to ensure compliance with the current regulatory framework while providing the data necessary to more broadly regulate market conduct for the benefit of all real estate consumers in BC.