

August 30, 2023

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Re: Consultation on Proposed Amendments to Real Estate Data Collection Rules

BCREA Response to the Consultation on Proposed Amendments to Real Estate Data Collection Rules

Thank you for the opportunity to participate in your consultation on the proposed amendments to the Real Estate Services Rules (“the Rules”). Within the broad context of data usage in the British Columbia real estate regulatory environment, we support the BC Financial Services Authority’s (BCFSA) objective to create evidence-based rules and decision-making to help protect British Columbians while buying or selling property.

Below is the BC Real Estate Association’s (BCREA) response to the Consultation on Proposed Amendments to Real Estate Data Collection Rules (“the Consultation”).

Overview

After seeking outside legal and privacy policy opinion from Allen / McMillan Litigation Counsel along with additional review by the legal department of our national body, The Canadian Real Estate Association (CREA)—unanimous consensus is that as currently framed the BCFSA’s proposed amendments are extremely broad, and lacking specific detail around intent, usage, and data disposal practices. Our collective solicited legal and policy opinions suggest that the broad structure you are pursuing has a high likelihood of contravening Canadian federal privacy law.

We are conditionally willing to collaborate and assist with facilitating provision of data under pre-defined best-practice structured conditions and adequate written demonstration of the legal permissibility of the proposed amendments. This usage, however, should be for clearly defined regulatory purposes, with the data set requested, used, and disposed of following rigorous pre-defined standards of practice. We consider BCFSA’s current structure as outlined to be lacking the following: necessary rigour of specifically stated data-need; adequate demonstrative case-law or

Privacy Commission opinion supporting BCFSA's intent to pursue the ask as structured; adequate structured best-practices for implementation; and adequate protection measures for individual privacy. BCFSA are charting new territory with this ask in a country with some of the strongest individual data privacy protection laws globally. To assist us in assuring the interests of our membership, we request to see additional information around the due diligence BCFSA have undertaken to justify this broad data approach.

As structured, the proposed amendments additionally appear to us to contravene established regulatory data usage best-practices regarding transparency, usage, and consumer protection employed by multiple G7 countries in addition to Canada. We recognize that while BCFSA are not legally bound to adopt such practices, we suggest that in the efforts of being progressive and balanced in terms of consumer protection while additionally recognizing the needs of the sector under regulation, it is our sincere hope that BCFSA endeavour to research other regulatory data usage structures and consider adoption of prevailing best-practice models as they very clearly do exist. If it would benefit BCFSA research and design models around regulatory data usage, we would be happy to provide findings from our environmental scan around established regulatory data-use best-practices upon request.

Making a broad request for vastly increased access to personal data, without explicit intent, usage, and disposal measures, for undefined regulatory intent, is by our approximation, problematic both legally, and in regard to regulatory data usage best-practices. Our immediate ask is that BCFSA consult with British Columbia's and Canada's Privacy Commissioner's to attain and demonstrate written legal agreement with BCFSA's current planned approach.

As you will note from the majority of the feedback below, our commentary mainly regards scope, structure, and process. We encourage ongoing consultation with the industry and BCREA as you refine your approach to data collection moving forward. BCREA are additionally committed to assisting directly or as intermediaries with communications, and sectoral change management around new data-gathering and provision practices that ensure REALTORS® and brokers throughout the province understand what is expected of them and they have the resources necessary to comply.

We suggest you work with us directly to structure processes that ensure understanding and consistency related to where responsibility lies for compliance with requests put forward to the industry by BCFSA. Careful thought on processes needs to be undertaken to assure systems of efficiency for the sector can be put into practice to facilitate additional measures of data gathering, digital storage, submission, etc. There is broad benefit that any data call should be made through the brokerage and not directly to licensees. However, as specific scope and intent of desired data has yet to be clarified we recognize this may not be possible. Regardless, we

recommend careful joint planning is undertaken with BCREA to build out new efficiencies in potential data collection and submission practices that will help facilitate compliance.

Definitions

The following definitions will be used in BCREA's consultation response. We refrain from using the word "licensee," as the term's definition is unclear, and it is not defined under the *Real Estate Services Act* (RESA). Note that not all these definitions are consistent with RESA, but we provide these definitions to ensure clarity.

Representative: means a person licensed as a representative

Brokerage: means a person licensed as a brokerage

Managing Broker: means a person licensed as a managing broker

Section 1 Amendment

"The proposed house-keeping amendment will add a definition of "personal information" to s. 1 of the Rules. Specifically, it is proposed that the Rules adopt the definition of 'personal information' provided in the Personal Information Protection Act ('PIPA')."

BCREA Response: BCFSA should clarify and outline the specific intended uses of this personal information so representatives, managing brokers, and consumers have transparent awareness of how any requested information will be used, stored and disposed of.

BCFSA should be cognizant of the fact that Section 27(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) requires that "a public body must collect personal information directly from the individual the information is about" unless one of the listed exceptions applies. Per BCREA's legal consultation, BCFSA's data calls may involve the indirect collection of personal information contrary to FIPPA, because the BCFSA is collecting information from brokerages, not property owners. We encourage BCFSA to consult with the Privacy Commissioner to ensure legal and legislative certainty that the proposed information collection methods are legally permissible and will adequately protect the interests and privacy of consumers.

Section 26(2) Amendment

"The proposed house-keeping amendment to s. 26 (2) of the Rules will add contraventions of the requirements to be established under proposed s. 75.1, 93.1 and 93.2 to the list of designated contraventions. This means that if the proposed amendments are approved, failure to comply with a request for information by the Superintendent could result in an administrative penalty."

BCREA Response: BCREA has heard from our members that the mandatory data collection requirements are likely to be onerous. As per above, consideration of process needs to be jointly undertaken. We have also heard from our members that there exists a need for BCFSA to ensure more consistently effective methods of providing all brokerages with data collection notices. Given these current obstacles to the data collection requirement, and to proactively help minimize the

use of disciplinary measures and promote compliance, we recommend that there is adequate notice (six months) of data requests, in addition to provision of clear specifications of need, process and practices for any requested data sets. Lastly, as part of the change management process, a collaborative BCFSA/BCREA communications plan would need to be developed and implemented.

Section 30(j) Amendment

“The proposed amendment to s. 30 (j) of the Rules includes a new requirement for licensees to make disclosures of conflicts of interest in writing, separately from a contract of purchase and sale or a written service agreement. This proposed requirement will enable clients and licensees to refer to the content of the disclosure.”

BCREA Response: As BCFSA is likely aware, there are other forms for disclosing previously determined conflicts of interest (e.g., Disclosure to Seller of Expected Remuneration, Disclosure of Interest in Trade, Agreement of Conflicts of Interests between Clients, etc.). BCREA would like BCFSA’s clarification on what other conflicts this new reporting requirement is attempting to resolve.

Given the different definitions and degrees of “conflicts of interest,” it is vital that the term “conflicts of interest” be clearly defined in this requirement to ensure managing brokers and representatives understand precisely what is required of them. For example, the difference between duties to clients and conflicts of interest is not well understood. BCFSA should only consider implementation of this rule once the definition and intention are clear to ensure managing brokers and representatives are adequately educated regarding BCFSA’s understanding of “conflicts of interest.” Furthermore, BCREA would require an expanded timeline of implementation to ensure effective support is developed to promote BC REALTORS® compliance with this requirement.

Section 75.1 Amendment

“The proposed s. 75.1 of the Rules would create an explicit authority for BCFSA to collect data on a periodic basis. Periodic data collection would require brokerages to submit information from their records, and/or copies of original documents, as specified by the Superintendent, at regular intervals (e.g., monthly or quarterly), in addition to existing annual filing requirements.”

BCREA Response: Given the likely onerous nature of this data collection process for many brokerages, it is vital to ensure the number of data collection periods annually is no more than is strictly necessary and that the notice of the data collection is circulated six months prior to the data submission deadline. BCREA recommends that to ease the data collection process for brokerages, data collection calls should be as consistent as possible from one call to the next and that new processes are jointly designed, developed, and implemented to facilitate efficient systems of compliance.

Section 83(1) Amendment

“The proposed house-keeping amendment to s.83 (1) of the Rules will add a requirement for brokerages to retain copies of written disclosures of conflicts of interest made under s. 30 (j) and copies of brokerage activity reports filed under s.75.1 as part of their prescribed brokerage records.”

BCREA Response: The specified data retention period should meet legal privacy requirements to ensure the data is retained no longer than is both legally permissible and necessary, and the data is only retained for the purposes it has been legally collected for.

Section 84(1) Amendment

“The proposed amendment to s.84 (1) of the Rules includes a new requirement for brokerages to retain copies of any offers for the purchase and sale of real estate, or the assignment of a contract for the purchase and sale of real estate, that a related licensee of the brokerage delivered or received on behalf of a party to a trade in real estate. This proposed amendment will strengthen record-keeping requirements and support brokerage reporting.”

BCREA Response: The penalties for contravening the responsibility for submission and retention should be separate. In the event of non-performance of their representatives, brokerages should not face penalties if they have appropriate policies and procedures in place, as brokerages may be unaware of offers of purchase and sale.

Section 93(c) Amendment

“The proposed amendment to s.93 (c) of the Rules will add a requirement for a brokerage to provide copies of any period brokerage activity reports filed with BCFSa under the proposed s.75.1 when the brokerage winds up its business.”

BCREA Response: The number (or number range) of reports per category required under section 75 and 75.1 as well as the timeframe during which these reports could be required, should be clearly defined and specified.

Section 93.1 Amendment

“The proposed s.93.1 of the Rules would create an explicit authority for BCFSa to collect data on an ad hoc basis. Ad hoc data collection would require licensees to provide information and/or documents in the possession or control of a brokerage or a related licensee of the brokerage from time to time, as requested by the Superintendent (e.g., through a data call).”

BCREA Response: Notices of ad hoc data collection should be sent six months in advance of the data submission deadline. Additionally, notices should outline specific intent, usage and disposal practices of said data. BCFSa should ensure circulation of these notices is done using consistently effective methods of providing data collection notices to ensure brokerages and representatives receive these notices in a timely manner.

If the proposed amendments to the Rules set out in this consultation are legally permissible under existing privacy laws, brokerages should be responsible for providing all data from future data calls to BCFSa, rather than placing the responsibility on individual representatives. If BCFSa decides to place this responsibility on individual representatives, representatives' brokerages should receive the same notification of data collection at the same time that the individual representative receives such notice.

Section 93.2 Amendment

"The proposed s.93.2 of the Rules would create an explicit authority for BCFSa to collect data on a contingent basis. Contingent data collection would require licensees to submit certain information, and/or documents, within a specified period after a triggering event, as specified by the Superintendent (e.g., filing copies of certain consumer disclosure forms within five days of making the disclosure)."

BCREA Response: The proposed amendment should be more explicit on what BCFSa is trying to achieve and provide more clarity on the types of information to be collected and processes associated. To ensure all brokerages and representatives receive timely notice of contingent data collection, the "specified period after a triggering event" should be informed with consultation from the sector.

General Comments and Recommendations

Recommendation 1: Targeted Approach for Data Access

Adopt a specific, transparent and targeted approach to data access, focusing on specific data points relevant to direct and specific regulatory objectives. The current approach as outlined is likely to be significantly resource-intensive and puts potentially undo pressure upon brokerages. These are structural market realities that deserve due consideration in terms of designing structured data calls along with revised processes that are reasonable based on available resources necessary to comply.

Recommendation 2: Collaborate with Stakeholders for Data Purpose and Use

Work closely with stakeholders, including BCREA, to define the purpose and intended use of the data to be collected. By engaging in this collaboration, we can ensure that the data collected is relevant, necessary, effective based on the stated goals, and aligns with regulatory objectives.

Recommendation 3: Specify Detailed Data Collection Guidelines

Provide more detailed guidelines on the types of data to be collected, the frequency of data requests, the data fields that will be collected, and the specific data fields. Additionally, to help ensure transparency and protect privacy rights, clarifying the reasons of the data collection and its intended uses.

Recommendation 4: Clarify the Data Sources

In the event that BCFSa consults with the Privacy Commissioner and confirms the legal permissibility of the proposed Rule changes to data collection methods, confirm whether the identification of the data source will be brokerages, or representatives.

Recommendation 5: Strengthen Data Security and Privacy

Incorporate robust data security and privacy safeguards to protect the personal information collected and transmitted from brokerages. Consider if using IRIS may be more secure than email transmissions.

Recommendation 6: Define a Conflict of Interest

Define what qualifies as a conflict of interest and provide specific guidance on the required content of the written disclosures.

Recommendation 7: Education on Conflicts of Interest

Provide comprehensive education for managing brokers and representatives to understand the concept of conflicts of interest and how to identify and disclose them appropriately, in advance of rules taking effect. Training will help managing brokers and representatives comply with the new disclosure requirements effectively.

Recommendation 8: Clear Communications and Sufficient Time Frames

Work on providing clear and comprehensive communication to all stakeholders, including brokerages, about the data collection, time frames, data sets. Allow sufficient time for brokerages, managing brokers, and representatives to adapt their processes to help them comply with the rules. Work in collaboration with BCREA on a jointly devised communications and change management planning model.

Recommendation 9: Periodic Review

Commit to periodic reviews of the amended rules to assess their effectiveness and any unintended consequences. Regular reviews will allow for adjustments and improvements based on real-world experiences and changing regulatory needs.

Recommendation 10: Create Advisory Panel for Data Interpretation

To ensure that the most accurate and evidence-based conclusions are derived and to support any reports and/or recommendations to government, create an advisory panel to assist in the analysis and interpretation of the data collected from the mandatory data calls.

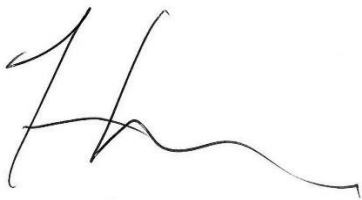
Recommendation 11: Clarify Application of Category D Administrative Penalties

To ensure brokerages, representatives, and managing brokers understand their responsibilities under the new data collection requirements, clarify the entity to which any application of Category D administrative penalties might apply in the case of rule contraventions.

If you have any immediate questions or concerns, please reach out to me at thargreaves@bcrea.bc.ca or 236.333.4572.

As you know, BCREA is a professional association representing eight real estate boards with more than 26,000 REALTORS® in BC, focusing on provincial issues that impact real estate. BCREA provides continuing professional development, advocacy, economic research and standard forms to help REALTORS® provide value for their clients. BCREA supports policies that help ensure economic vitality, provide housing opportunities, help mitigate the impacts of climate change on homeownership and protect property owners.

Yours sincerely,



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