



Backgrounder on the Proposed Changes to the Administrative Penalty Regime under RESA

September 15, 2020

The Office of the Superintendent of Real Estate (OSRE) and Real Estate Council of British Columbia (RECBC) are requesting feedback on amendments to the administrative penalty regime under the Real Estate Services Act. These changes will make the regulatory discipline process more efficient for RECBC and licensees.

Administrative monetary penalties are a common tool used by regulators to deal efficiently and effectively with minor misconduct. The proposed rule changes are intended to speed up the outcomes of enforcement processes, making it less stressful for the complainants and licensees involved, and allowing RECBC's investigative and legal teams to increase their focus on more complex and serious cases.

Administrative penalties provide licensees with more predictable outcomes for certain types of infractions and fill the gap between letters of advisement and a full discipline process.

The proposed rule changes do not change any licensee obligations or requirements. They expand the current list of infractions that are eligible for an administrative penalty. The changes would create four separate categories of administrative penalties with increasing penalty amounts corresponding to the level of seriousness and public risk.

The proposed new Rules will:

- Encourage greater compliance, while eliminating the uncertainty and delay of a full discipline process and its potentially greater penalties (e.g. fines up to \$250,000 for individuals, suspensions, enforcement costs)
- Expedite relatively minor complaints and disciplinary matters, with the continuing protection of a subsequent review process if requested
- Maintain RECBC's discretion to refer matters to full discipline and hearing when warranted, and continue to protect the public interest by ensuring serious contraventions go through the full discipline process

See the FAQs and draft RECBC Administrative Penalty Guidelines for more information. These documents can be found on the [consultation website](#).

Consultation on Proposed Changes to the Administrative Penalty Regime under RESA: Publication Policy

September 15, 2020

The Real Estate Council of British Columbia (RECBC) has enacted a publication related bylaw and maintains a publication policy respecting discipline decisions. Under its current practice, administrative penalty decisions are not published, though RECBC currently compiles and publishes some aggregated statistical data on administrative penalties.

If the [Proposed Changes to the Administrative Penalty Regime](#) proceed, RECBC may amend its publication policy with respect to administrative penalty decisions. It is specifically considering the publication of all administrative penalties.

RECBC's considerations with respect to expanded publication of administrative penalties focus on the following:

- Balancing potential licensee reputational concerns with public interest and consumer protection goals.
- The proposed rule changes significantly expand the designated rules, including rules that are fundamental to the purposes of regulating real estate services (e.g. sections 3-3 and 3-5 of the Rules). It is expected that administrative penalties under the proposed new rules would be applied in matters which presently are subject to discipline proceedings, often concluded by Consent Orders, which are published and linked to the online licensee search function.
- Publication of decisions generally promotes transparency, accountability and public confidence in the regulatory system and better meets standards of good regulatory practice for regulators. Many other regulators publish administrative penalty decisions.
- Publication of decisions provides an additional educational opportunity for licensees and the public.



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ADMINISTRATIVE

PENALTY GUIDELINES

Real Estate Council of British Columbia

September 15, 2020

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Introduction

When the Guidelines Apply

These Administrative Penalty Guidelines (the **Guidelines**) are effective **XXXX**, 2020.

The Real Estate Council of British Columbia (**RECBC**) may amend the Guidelines from time to time by posting amended versions of the Guidelines on its website (www.recbc.ca). Readers should check the website to ensure they have the most recent version.

Purpose of the Guidelines

RECBC administers the *Real Estate Services Act* (**RESA**), and its regulations, administers rules and bylaws, and upholds and protects the public interest in relation to the conduct and integrity of its licensees.

The Guidelines will help to ensure that administrative penalties are applied in the public interest and in a manner that is transparent, fair and proportionate to the severity of specific contraventions.

The Guidelines set out the general process RECBC employs when considering whether to impose administrative penalties on a licensee for non-compliance with designated contraventions of the Real Estate Rules (**Rules**).

Administrative penalty provisions are set out in sections 56 and 57 of RESA and in sections 2-23 and 2-24 of the Rules. Under section 56 of RESA, the Superintendent of Real Estate has the authority to designate sections of the Rules as being subject to administrative penalties and establish the amount of the penalties. The Rule contraventions that may be eligible for administrative penalties are set out in **Appendix A**.

The Guidelines were developed to establish the criteria to be considered by RECBC in determining whether a contravention is eligible for an administrative penalty. The Guidelines were also developed to provide guidance on the process used in imposing administrative penalties.

The eligibility of each alleged contravention of the Rules for an administrative penalty will be considered on its own merits. The Guidelines do not fetter the discretion of decision-makers in how they may apply powers or fulfill duties in the context of specific facts.

Terminology

Where words used in the Guidelines are defined in RESA, they have the same definition as in RESA.

For additional clarity, the Guidelines define the following terms that may be relevant to imposing or calculating administrative penalties:

- “**extenuating circumstances**” are circumstances that are exceptional or unforeseen and are both compelling and outside the control of a licensee (brokerage, representative, managing broker or associate broker). See additional description and examples below.
- “**promptly**” means within 2 business days (e.g. promptly respond to inquiries from RECBC or a managing broker). However, RECBC can consider extenuating circumstances and/or the licensee’s due diligence efforts, provided this information is brought to RECBC’s attention.
- “**subsequent contravention**” refers to the contravention of a specific rule for which an administrative penalty or discipline penalty has previously been levied in the past five years for the purposes of imposing an escalated administrative penalty amount under Categories A, B and C as well as the base amount under Category D.

Sample Calculation 1: A Subsequent Contravention

Licensee Johnny A. Seed has the following administrative penalty history:

- *In July 2016, contravention of s. 2-22 [brokerage notice of business changes]*
- *In September 2016, contravention of s. 2-17 [mailing address for delivery]*

RECBC is satisfied that Mr. Seed contravened s. 2-22 again in December 2020 and that the circumstances of the matter met the administrative penalty eligibility criteria.

If this was his first contravention of that section of the Rules within five years, Mr. Seed would receive a \$1,000 penalty. However, because this is his second contravention within five years, RECBC imposes a \$2,000 penalty. The 2016 contravention of section 2-17 does not affect the 2020 penalty because they are different contraventions.

Sample Calculation 2: Not A Subsequent Contravention

Licensee Nancy Etticoat has the following administrative penalty and discipline history:

- *In January 2016, contravention of s. 3-4 [acting with reasonable care and skill] resolved by way of a consent order*
- *In June 2018, contravention of s. 2-17 [mailing address for delivery] resolved by the imposition of an administrative penalty*

RECBC is satisfied that Ms. Etticoat contravened s. 2-22 [brokerage notice of business changes] in December 2020 and that the circumstances of the matter met the administrative penalty eligibility criteria.

This was her first contravention of section 2-22 of the Rules within five years and RECBC imposes a \$1,000 penalty.

Background and Overview of Administrative Penalties

The administrative penalty regime was established in 2005 with the introduction of RESA as a replacement to the *Real Estate Act*. The purpose of the administrative penalty regime at that time was to provide for an efficient, non-punitive mechanism for RECBC to use to encourage compliance in cases where a designated contravention was unlikely to result in material harm to consumers. The introduction of administrative penalties did not create new or different compliance requirements. Instead, it expanded the enforcement options available to the RECBC in the regulation of real estate licensees in BC.

Administrative penalties are intended to promote compliance with legislative requirements. The administrative penalty regime supports RECBC's mandate by providing measured and proportionate response to particular instances of non-compliance and adds to a progressive discipline system. Administrative penalties function as an intermediate step between a letter of advisement (warning) and formal discipline proceedings initiated by a Notice of Discipline Hearing (generally resolved through consent orders or hearings, and can involve licence suspension and/or cancellation).

As of XXXX, 2020, the Superintendent of Real Estate significantly expanded the Rules captured in the administrative penalty regime and created different administrative penalty categories based on the relative severity and risk of harm to consumers a contravention would pose.

It is expected that the expanded administrative penalty regime will help encourage licensees of all licence levels (brokerage, managing broker, associate broker and representative) and all licence categories (rental property management, strata management, and trading) to adopt good risk management and business practices.

Section 2-23 of the Rules sets out four categories of contraventions that may be subject to administrative penalties. For a contravention to be eligible for an administrative penalty disposition, the circumstances must satisfy the Administrative Penalty Eligibility Test (described below). The four categories of administrative penalty contraventions are as follows:

- **Category A** – Contraventions in this category are mostly characterized as business management infractions with low risk of harm to consumers. A contravention of Category A is generally easily substantiated;
- **Category B** – The infractions involved in Category B are generally characterized as minor matters with no or immaterial harm to consumers, and where imposing an administrative penalty, rather than dismissing the file or proceeding to formal discipline, is in the public interest;

- **Category C** – Contraventions in this category contain substantial duties licensees owe to clients and are subject to the highest administrative penalty amounts. Contraventions in Category C may be easily substantiated, rely on the licensee acknowledging the committal of a contravention, or RECBC being otherwise satisfied that the contravention has occurred (e.g. whether the licensee was acting in the best interests of the client; whether the licensee took reasonable steps to avoid any conflict of interest). This category also includes a failure to act with reasonable care and skill under section 3-5 of the Rules, which can apply in a broad range of circumstances, including licensee interactions with non-clients; and
- **Category D** – Contraventions in this category are mostly characterized as minor matters that present a low risk of harm to consumers. The potential amount of the penalty will increase on a daily basis until compliance is achieved or RECBC has before then declared the compliance period over. The purpose of increasing the penalty amount on a daily basis is to encourage timely compliance and the provision of accurate information.

See **Appendix A** for a list of Rules in each category and their corresponding penalty amounts or the Rules published on RECBC's [website](#).

Pursuant to section 82 of RESA, RECBC may delegate to RECBC staff the authority to decide whether to impose an administrative penalty and the authority to reconsider the imposition of administrative penalties.

The amount of an administrative penalty imposed under section 57 of RESA is a debt owing to RECBC and may be recovered as such (s. 57(5) of RESA). Funds collected from administrative penalties may only be expended by RECBC for an education purpose referred to in section 44(3) of RESA.

A licensee's administrative penalty history may be relevant to future discipline sanctions.

Expectations and Compliance

RECBC and the Office of the Superintendent of Real Estate (**OSRE**) expect all licensees (both individuals and brokerages) to be aware of their obligations to consumers and to the regulators, and to have appropriate processes in place to ensure compliance with their obligations under the regulatory framework, including the Act, regulations, the Rules, and RECBC bylaws. Imposing administrative penalties is one way for RECBC to promote compliance with specific licensee obligations.

Among other things, RECBC and OSRE expect licensees to:

- be aware of and uphold their duties to their clients and to act with reasonable care and skill with all consumers;
- promptly inform RECBC of changes in their circumstances (including the existence of proceedings or criminal charges, and contact information);
- have processes and systems in place for the maintenance of records and to promptly respond to inquiries from RECBC;
- appropriately report improper conduct;
- follow the requirements related to home and personal offices, advertising and displaying of licences; and
- ensure that any financial statements, accountant's reports and brokerage activity reports are submitted in the form and manner prescribed and by the required due date.

The administrative penalty regime under RESA is grounded in the following principles:

1. **A focus on the public interest** – RECBC uses administrative penalties and other measures to promote compliance and reduce the risks to the public; RECBC considers the public interest in assessing whether matters are appropriate for administrative penalty resolution or another disposition.
2. **Transparency** – RECBC is transparent in the processes used to assess potential matters of noncompliance and the dispositions or outcomes, including decisions to impose administrative penalties. Administrative penalty decisions are published on RECBC's website pursuant to RECBC's Publication Policy.
3. **Proportionate** – RECBC's regulatory response is proportionate to the risks identified with due regard to the probability and impact of risk, and the unique circumstances of each matter.
4. **Consistency** – RECBC's approach to alleged contraventions is applied consistently and in a way that minimizes uncertainty about its likely response.
5. **Evidence based** – RECBC's assessment of risk and regulatory response will be informed by evidence gathered from appropriate sources.

Application of Administrative Penalty Guidelines

To levy an administrative penalty, three conditions must be met:

1. RECBC is satisfied that one or more contraventions have occurred.
2. The contravention(s) is (are) designated in the Rules as being subject to administrative penalties.
3. RECBC is satisfied that the circumstances of the contravention meets the eligibility criteria in the Administrative Penalty Eligibility Test (described below).

If all three conditions are met, RECBC may impose an administrative penalty. In applying discretion, RECBC will consider a variety of factors such as the public interest, the nature and gravity of the contravention, the licensee's intent and motivation, any attempts by the licensee to correct or remedy the contravention, and the principle of specific deterrence. RECBC may forego or delay assessing penalties where there are extenuating circumstances. A licensee should provide notice of extenuating circumstances to RECBC as soon as possible and in advance of any deadline or, to the extent possible, in advance of receiving a Notice of Administrative Penalty. Notification should be in writing and be accompanied by the reasons for the extenuating circumstances. See additional description and examples of extenuating circumstances below.

Assuming the result is to impose an administrative penalty, the amount of the penalty to be imposed is set out in the Rules. The amount of the penalty may be impacted by previously levied penalties. In the case of a contravention of a Category D administrative penalty, the method of calculation for daily administrative penalties is also set out in the Rules.

Criteria to Establish Eligibility

To establish whether a contravention is eligible for an administrative penalty, RECBC will use an Administrative Penalty Eligibility Test (APET). The APET sets out the assessment criteria RECBC will consider in making a decision to levy an administrative penalty.

The **APET** criteria are as follows:

- ✓ the contravention did not involve a material degree of harm to a client, consumer, or other member of the public,
- ✓ the contravention did not involve harm to the reputation of the real estate industry,
- ✓ the contravention was, or the collection of contraventions were, an isolated incident,
- ✓ the contravention is unintentional or inadvertent (no evidence to suggest otherwise) and an ordinary standard of care would have prevented its occurrence,
- ✓ when the contravention was brought to the licensee's attention, the licensee promptly took available and reasonable steps to correct or remedy the contravention,
- ✓ there is no evidence that the licensee was acting other than in good faith,

- ✓ the contravention is easily substantiated or the licensee has acknowledged committing the contravention,
- ✓ the licensee did not benefit materially from putting a client or consumer at risk,
- ✓ the licensee did not derive or would not reasonably have expected to derive, directly or indirectly, any economic benefit from the contravention,
- ✓ the imposition of an administrative penalty in the circumstances would serve the public interest and is likely to satisfy the aims of specific deterrence and general deterrence,
- ✓ imposing an administrative penalty rather than recommending the issuance of a Notice of Discipline Hearing is not likely to diminish public confidence in the regulatory framework, and
- ✓ where there are multiple administrative penalty eligible contraventions committed concurrently or in close proximity to one another, the cumulative effect of the collection of contraventions does not preclude the contraventions from satisfying any of the above criteria.

To further incentivize compliance, escalating penalties will be imposed in circumstances of subsequent contraventions. After five years of continuous compliance, the administrative penalty structure will reset to the initial contravention amounts. For further details about subsequent contraventions, please see Appendix A for the subsequent contravention penalty structure and the Terminology section of the Guidelines for what is considered a “subsequent contravention”.

Conduct that is Not Eligible for Administrative Penalties

Administrative penalties are not available where RECBC is of the opinion that there is evidence to support contraventions involving unethical conduct or indifference as to regulatory compliance. Examples of unethical conduct include dishonesty, threats of retaliation against a person for providing complaint information to RECBC, fraud, deceptive dealing and intentional non-compliance with the regulatory framework. Such matters are generally more appropriate for formal discipline proceedings and are not eligible for administrative penalties primarily because of their seriousness, the high likelihood of harm to consumers and the potential for harm to the reputation of the real estate industry.

Applying the APET to Part 3 of the Rules

The responsibilities in Part 3 of the Rules include meaningful obligations of licensees with respect to licensee ethics and professionalism. In applying its discretion, RECBC will also give an alleged contravention of any designated section under Part 3 of the Rules, particularly sections 3-3, *Duties to Clients*, and 3-5, *Duty to Act with Reasonable Care and Skill*, greater scrutiny because of their fundamental importance to the regulatory scheme and as part of RECBC’s fulfillment of its mandate to ensure that the interests of consumers are adequately protected.

Applying the APET to Unique Matters

RECBC may consult with the Office of the Superintendent of Real Estate (**OSRE**) on unique matters where there are questions about the eligibility for an administrative penalty disposition. The primary purpose of such consultations is to ensure continued common understanding and interpretation of the Rules and the Guidelines. Such consultations may also be helpful to alert RECBC and OSRE to an emerging trend or other consumer protection matters. Such consultations may result in a departure from the **APET** or revisions to the Guidelines, including to the **APET**.

Multiple Administrative Penalty Eligible Contraventions

In circumstances where RECBC is satisfied that a licensee has two or more contraventions of a rule or rules designated as being subject to administrative penalties, RECBC may impose an administrative penalty for each separate eligible contravention. Prior to doing so, RECBC will consider:

- whether the contraventions, when taken together, are sufficiently serious that they should be addressed through disciplinary action;
- whether the contraventions, considered together, indicate a level of carelessness on the part of the licensee that may pose a risk to members of the public; and
- whether the contraventions, considered together, otherwise results in one or more of the **APET** criteria not being met.

The maximum amount of administrative penalties imposed in respect of a contravention of a specified rule is \$50,000.

Notice of Administrative Penalty (AP Notice)

When RECBC is satisfied that a licensee has contravened a section of the Rules that has been designated as subject to administrative penalties and the contravention is eligible for an administrative penalty under the **APET**, RECBC will provide licensees with a notice of the penalty pursuant to section 57 of RESA (**AP Notice**).

The AP Notice will include:

- the rule that had been contravened;
- the amount of the administrative penalty that is imposed;
- brief reasons explaining the basis of the contravention and penalty; and
- information about the licensee's right to be heard respecting the matter.

RECBC may provide notice of more than one administrative penalty rule contravention in the same AP Notice.

Deadline to Comply with Section 2-19

If applicable, where RECBC is imposing an administrative penalty regarding information that was to be provided to RECBC by a licensee (e.g. s. 2-21 notice of proceedings, s. 2-22 brokerage notice of business changes) RECBC may also specify a date by which the licensee must provide additional information related to the circumstances that led to the contravention or to provide proof of compliance (e.g. s. 4-2 brokerage signs). The AP Notice may warn a licensee that a failure to provide the requested information, or proof of compliance, by the date specified may in addition lead to the imposition of daily administrative penalties for a contravention of Rules s. 2-19.

Effect of an AP Notice

Upon an AP Notice being delivered, the licensee receiving the notice has 14 days, or a longer period allowed by RECBC, to either pay the penalty or deliver a written notice to RECBC stating that they are disputing the imposition of the penalty. For additional information on disputing the imposition of an administrative penalty see the Reconsideration Process section of the Guidelines.

If a licensee does not make a request for reconsideration within 14 days, or a longer period allowed by RECBC, of delivery of the AP Notice, then the licensee will be deemed to have acknowledged contravening the rule, and the administrative penalty is then due and payable to RECBC.

In addition, once an administrative penalty has been imposed, neither RECBC nor the Superintendent of Real Estate can start proceedings under Part 4 of RESA [*Discipline Proceedings and Other Regulatory Enforcement*] in respect of the matter. However, an additional administrative penalty or proceedings could still apply in cases where RECBC is satisfied another contravention has occurred, including where there is repeat non-compliance with respect to the same provision under the Rules.

Imposition of Daily Penalties (Category D)

Administrative penalties for a contravention of a rule in Category D will be the base penalty amount and may also include a daily/per diem penalty amount. Prior to imposing an administrative penalty for a contravention of a rule in Category D, RECBC will engage in the standard process of being satisfied that there has been a contravention, and it is eligible for administrative penalty. In addition to the base penalty amount, RECBC may impose a daily penalty of \$250 for each day of non-compliance beyond the Compliance Warning Period, as defined below, up to the maximum penalty amount set by s. 56 of RESA (\$50,000 in respect of each contravention of a designated rule).

The base amount of the penalty is established in the Rules. This amount is intended to encourage compliance without the need for RECBC to expend resources to issue a non-compliance warning. Using a “per diem” amount is meant to encourage swift rectification of non-compliance. A primary purpose of

daily administrative penalties for specific contraventions is to encourage timely compliance and provision of accurate information to RECBC.

Non-Compliance Warning Letter for Category D

Prior to imposing an administrative penalty on an eligible category D contravention, RECBC will deliver to a licensee a letter (**Non-Compliance Warning Letter**) that contains:

- The rule(s) suspected of contravention (identified non-compliance).
- Details of the administrative penalty calculation (base penalty amount plus per diem amount).
- The period to come into compliance, generally 7 days after receipt of non-compliance warning letter (**Compliance Warning Period**).
- Notification that while RECBC has issued a Non-Compliance Warning Letter, after the expiry of the Compliance Warning Period, and any extension, RECBC may refer the matter to formal discipline (e.g. if the licensee has not come into compliance within the Compliance Warning Period or RECBC has become aware of other factors that may remove the conduct from being administrative penalty eligible).

The Non-Compliance Warning Letter is not an AP Notice.

The purpose of the Non-Compliance Warning Letter is to notify the licensee that RECBC is satisfied that a contravention of a Category D rule has occurred and to bring the matter to the attention of the licensee so that appropriate remedial action can be taken.

The Non-Compliance Warning Letter provides notice of regulatory action that can be taken by RECBC, including RECBC's discretion to impose an administrative penalty. At any time after the issuance of the Non-Compliance Warning Letter, RECBC can decide whether:

- a) the conduct remains administrative penalty eligible (e.g. licensee promptly came into compliance) and to issue an AP Notice,
- b) to refer the matter to formal discipline (i.e. issuance of a Notice of Discipline Hearing), or
- c) new information has changed RECBC's assessment and an advisement letter, dismissal, or an extension of the Compliance Warning Period are appropriate in the circumstances (e.g. licensee provided information about due diligence efforts to come into compliance, but due to circumstances beyond the licensee's control the licensee has not yet achieved compliance).

If a decision is made that an administrative penalty is still appropriate, RECBC will issue an AP Notice, described above.

Typically the decision on whether to impose an administrative penalty for a Category D contravention will be made after the licensee has satisfied RECBC that the licensee has come into compliance with the rule(s) set out in the Non-Compliance Warning Letter or the maximum penalty amount has been reached.

Administrative penalties may be assessed based on the number of days a licensee has been non-compliant based on the date the Non-Compliance Warning Letter was delivered. RECBC may also choose to declare a period for compliance over and assess administrative penalties based on the number of days from the expiry of the Compliance Warning Period to the date of the declaration.

It is recommended that a licensee who receives a Non-Compliance Warning Letter promptly responds to RECBC and, where possible, provides evidence of compliance prior to the expiry Compliance Warning Period.

Request for an Extension of the Compliance Warning Period

RECBC may grant an extension of the Compliance Warning Period or cancel the Non-Compliance Warning Letter if the licensee provides RECBC with sufficient information to satisfy RECBC that there are extenuating circumstances. What constitutes an extenuating circumstance is described in greater detail below.

If compliance is not achievable immediately or within the Compliance Warning Period because of extenuating circumstances, an extension of the Compliance Warning Period request should be made as soon as possible to RECBC. Where granted, administrative penalties will not be imposed during the extension period.

However, granting an extension of the Compliance Warning Period or cancelling the Non-Compliance Warning Letter does not prevent RECBC from taking action in the future. RECBC may issue a new Non-Compliance Warning Letter with respect to the matter if RECBC is of the opinion that the contravention has continued beyond a reasonable timeframe since the licensee advised RECBC of the extenuating circumstances, and the contravention remains eligible for an administrative penalty, or RECBC may choose to issue an administrative penalty for the base penalty amount.

Extenuating circumstances

There may be extenuating circumstances which do not allow for compliance with a licensee's regulatory obligations, such as timely filings and responses to inquiries. RECBC may be willing to forego imposing administrative penalties, where there are extenuating circumstances. Licensees should notify RECBC of any extenuating circumstances as soon as possible, and where applicable, in advance of any deadlines. In circumstances involving deadlines, licensees should contact RECBC directly with requests for an extension.

Extenuating circumstances are circumstances that are exceptional or unforeseen and are both compelling and outside the control of a licensee.

Examples of extenuating circumstances may be:

- significant disruption to a brokerage's computer system due to virus attacks, fire or flood;

- extraordinary work being undertaken by an external auditor;
- business disruption or absence caused by an industrial action, natural disaster, state of emergency;
- significant illness, accident or injury requiring hospitalization; and
- absence caused by jury duty.

Situations that will not normally be considered as extenuating circumstances include:

- staff changes or absences;
- minor computer problems, partial system disruption, lack of system back up or contingency plan;
- office closure due to statutory holidays;
- personal or domestic events, such as moving house or attending a wedding;
- holiday or travel arrangements;
- postal delivery delay or strike; and
- minor illness like a cough or cold.

Reconsideration Process (s. 57(4) opportunity to be heard)

Every licensee subject to an administrative penalty has the right to dispute the penalty as set out in section 57 of RESA. Below summarizes that process.

The focus of the reconsideration under section 57(4) of RESA is on whether the licensee exercised due diligence to prevent contravention of the rule.

Request for and Timing of Reconsideration

If a licensee is disputing the imposition of an administrative penalty, a licensee must submit a Reconsideration Request in writing (**Reconsideration Request**).

A Reconsideration Request must be received by RECBC no later than 14 days after the receipt of the Notice of Penalty or a longer period as allowed by RECBC. The Reconsideration Request must clearly articulate the reason for the dispute and the facts that RECBC should take into consideration as part of its review of the decision including any extenuating circumstances that prevented compliance from occurring.

Requests received after the 14 day deadline will normally not be considered unless allowed by the RECBC. Before the Reconsideration Request is considered, staff may seek clarification from the affected party on any points raised in the Reconsideration Request. Licensees may provide evidence for consideration of RECBC and it may be in the form of a statutory declaration.

Standard of Review

Upon receipt of a Reconsideration Request, RECBC will reconsider the administrative penalty decision. The licensee's Reconsideration Request should address how the licensee exercised due diligence (i.e. took reasonable steps or precautions) to prevent the rule contravention(s) at issue in the AP Notice.

As per s. 57(4) of RESA, RECBC may:

- cancel the penalty – if RECBC is satisfied that the licensee exercised due diligence to prevent contravention of the rule RECBC may cancel the penalty; or
- confirm the penalty specified in the AP Notice, in which case the administrative penalty imposed in the AP Notice will immediately become due and payable to RECBC.

Decision Maker

Reconsideration Requests may be considered by one of the following:

- *Director, Compliance*
- *Director, Legal Services*
- *Manager, Accounting and Audit*
- *Vice President Legal Services*
- *Senior Director, Accounting and Audit*
- *Chief Executive Officer*
- *Council Member(s)*
- *Such other person as to whom Council has delegated the appropriate authority*

The person considering the Reconsideration Request must not be the same person who issued the AP Notice.

RECBC will deliver written reasons for the disposition of the Reconsideration Request to the licensee and, where applicable, the complainant (redacted as appropriate).

Effect of the Reconsideration Process – All Administrative Penalties

Following reconsideration, if a decision is made that the licensee exercised due diligence to prevent contravention of the rule and the decision is cancelled, the entire administrative penalty is cancelled. For administrative penalties imposed under Category D (Daily), a decision to cancel the penalty includes the cancellation of the base penalty amount plus any per diem amount.

If a decision to impose an administrative penalty is confirmed, the amount of the penalty is immediately due and payable.

APPENDIX A: Administrative Penalty Categories and Penalty Amounts

CATEGORY	RULE CONTRAVENTION	ADMINISTRATIVE PENALTY AMOUNTS
A	2-5 [<i>residential brokerage offices</i>]	
	2-8.1 [<i>educational requirements on renewal</i>]	
	3-1(3) (except as it relates to the maintenance of trust accounts) [<i>managing broker responsibilities - accounts and records</i>]	
	5-2 [<i>delivery of written agreement to clients</i>]	
	5-4 [<i>acceptance of offer</i>]	
	7-7 [<i>annual financial statements, accountant's reports and brokerage activity report</i>]	\$1,000 for a first contravention
	8-4 [<i>general records</i>]	\$2,000 for a subsequent contravention
	8-5 [<i>trading records</i>]	
	8-5.1 [<i>records related to referral fees received by a licensee</i>]	
	8-5.2 [<i>records related to referral fees paid</i>]	
	8-6 [<i>rental property management records</i>]	
	8-7.1 [<i>strata management records</i>]	
	8-10 [<i>retention of records</i>]	
	8-11 [<i>brokerage obligations on winding up business</i>]	
B	2-20 [<i>brokerage must give immediate notice respecting solvency</i>]	\$2,500 for a first contravention \$5,000 for a subsequent contravention

CATEGORY	RULE CONTRAVENTION	ADMINISTRATIVE PENALTY AMOUNTS
	<p>2-21 [<i>licensee must give notice of discipline, bankruptcy or criminal proceedings</i>]</p> <p>2-22 [<i>brokerage must give notice of business changes</i>]</p> <p>2-22.1 [<i>personal real estate corporation must give notice of business changes</i>]</p> <p>3-1(4) [<i>managing broker responsibilities - notice to parties respecting deposits</i>]</p> <p>3-2(2) [<i>associate broker and representative responsibilities - keeping managing broker informed</i>]</p> <p>3-2(4) [<i>associate broker and representative responsibilities - supervision of employees</i>]</p> <p>3-2(5) [<i>associate broker and representative responsibilities - knowledge of improper conduct</i>]</p> <p>3-3.2 [<i>designated agency</i>]</p>	
C	<p>3-3(a) [<i>act in the best interests of the client</i>]</p> <p>3-3(b) [<i>act in accordance with the lawful instructions of the client</i>]</p> <p>3-3(c) [<i>act only within the scope of the authority given by the client</i>]</p> <p>3-3(d) [<i>advise the client to seek independent professional advice on matters outside of the expertise of the licensee</i>]</p> <p>3-3(e) [<i>maintain the confidentiality of information respecting the client</i>]</p>	<p>\$5,000 for a first contravention</p> <p>\$10,000 for a subsequent contravention</p>

CATEGORY	RULE CONTRAVENTION	ADMINISTRATIVE PENALTY AMOUNTS
	<p>3-3(f) <i>[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]</i></p> <p>3-3(g) <i>[communicate all offers to the client in a timely, objective and unbiased manner]</i></p> <p>3-3(h) <i>[use reasonable efforts to discover relevant facts respecting any real estate that the client is considering acquiring]</i></p> <p>3-3(i) <i>[take reasonable steps to avoid any conflict of interest]</i></p> <p>3-3(j) <i>[if a conflict of interest does exist, promptly and fully disclose the conflict to the client]</i></p> <p>3-5 <i>[duty to act with reasonable care and skill]</i></p>	
D (daily)	<p>2-17 <i>[mailing address for delivery]</i></p> <p>2-18.1 <i>[email address for licensees]</i></p> <p>2-19 <i>[licensee must reply promptly to council]</i></p> <p>3-2(1) <i>[associate broker and representative responsibilities - records]</i></p> <p>3-2(3) <i>[prompt response to managing broker inquiry]</i></p> <p>4-1 <i>[display and keeping of licences]</i></p> <p>4-2 <i>[brokerage signs required]</i></p>	<p>The administrative penalty will only be imposed once compliance is achieved.</p> <p>Base penalty amount:</p> <p>\$1,000 for a first contravention</p> <p>\$2,000 for a subsequent contravention</p> <p>AND if compliance is not achieved before the expiry of the Compliance Warning Period \$250/day thereafter (for clarity, the accrual of the daily amount will begin after the expiry of the Compliance Warning</p>

CATEGORY	RULE CONTRAVENTION	ADMINISTRATIVE PENALTY AMOUNTS
	4-3 <i>[restrictions relating to home and personal offices]</i>	Period, and any extensions granted by RECBC).
	4-5 <i>[licensee names must be indicated]</i>	Base penalty amount plus daily penalties to be applied to a maximum of \$50,000
	4-6 <i>[restrictions and requirements related to advertising generally]</i>	
	4-7 <i>[false or misleading advertising prohibited]</i>	
	4-8 <i>[advertising in relation to specific real estate]</i>	
	8-1 <i>[financial records]</i>	
	8-2 <i>[trust account and general account records]</i>	
	8-3 <i>[pooled trust account records]</i>	
	8-3.1 <i>[preparation of records after termination]</i>	
	8-9 <i>[records must be kept up to date]</i>	
	8-9.1 <i>[electronic records]</i>	

FAQs on the Proposed Changes to the Administrative Penalty Regime

September 15, 2020

Question: What are administrative penalties?

Answer: Administrative penalties function as an intermediate step between a letter of advisement (warning) and formal discipline proceedings started by a Notice of Discipline Hearing.

The administrative penalty regime provides RECBC with an additional opportunity to encourage compliance with the regulatory framework. The amendments will also help ensure that minor contraventions can be dealt with quickly.

Currently, the most frequent administrative penalty is imposed for late filing of annual accountants' reports by brokerages.

Further Information

Under section 56 of RESA, the Superintendent may, by rule, designate contraventions of specific rules as being subject to administrative penalties and establish the amount of administrative penalty that may be imposed, up to a maximum of \$50,000.

The proposed changes to the rules and RECBC's Administrative Penalty Guidelines will help provide predictability to both licensees and RECBC in terms of the likely outcome of many minor contraventions.

Question: Why are administrative penalties important?

Answer: Administrative penalties are an efficient way to promote fair practices, monitor compliance and protect the public.

Further Information

Many regulatory sectors use administrative penalties (provincially and federally) as a routine part of encouraging compliance and other provinces are expanding their use for the real estate profession (e.g.: Ontario, Alberta).



They are a critical feature of modern, efficient regulation, providing certainty and consistency for licensees and a clear message for the public about the consequences of non-compliance.

Question: How long have administrative penalties been around? How many are there?

Answer: Administrative penalties were introduced with the *Real Estate Services Act* in 2005 with eight designated contraventions, growing to what are now 25.

The proposed amendments expand the list of designated contraventions to include several common contraventions and allow RECBC to divert minor matters away from the formal notice of discipline hearing process.

Further Information

When administrative penalties were introduced in 2005, the purpose of the regime was to provide for an efficient mechanism for RECBC to encourage compliance in cases where a designated contravention was unlikely to result in material harm to consumers.

The current list of designated contraventions that may be eligible for an administrative penalty are contained in section 2-23 of the Rules and are largely clerical, business-management sorts of infractions.

Question: Which licence categories do the proposed rule changes apply to?

Answer: The rules regarding the administrative penalty regime apply to all licence categories (rental property management services, strata management services and trading services).

Question: Are licensee obligations and requirements changing under the new rules?

Answer: No, the proposed rules do not add or remove any licensee obligations or requirements.

Question: What is the intent of the new rules? What are they meant to do?

Answer: The rule amendments are focused on providing RECBC with more flexible tools to address most minor matters of rule contraventions where there is no or immaterial consumer



harm. The new administrative penalty regime is also designed to give licensees more predictable outcomes for most minor contraventions.

Question: If licensee requirements are not changing, then what would change?

Answer: The proposed changes to the rules and RECBC's Administrative Penalty Guidelines will help provide predictability to both licensees and RECBC in terms of the likely outcome of many minor contraventions. The amendments will also help ensure that minor contraventions can be dealt with quickly.

By expanding the types of misconduct ("designated contraventions") that are eligible for administrative penalties, several matters which are now being resolved through consent orders, can instead be resolved by administrative penalties.

Further Information

The current list of contraventions, contained in s. 2-23 of the Rules, consists largely of clerical, business-management sorts of infractions, rather than substantial professional misconduct which is the usual subject of public complaint and RECBC investigation. Diverting appropriate files to administrative penalties can lead to quicker dispositions of many minor contraventions and free up RECBC compliance resources to investigate and discipline serious and unethical conduct by licensees.

The proposed changes to the rules expand the list of designated contraventions that may be eligible for an administrative penalty, update the administrative penalty amounts, and create four separate categories of administrative penalties that have increasing penalty amounts corresponding to the level of public risk. To simplify the application of the proposed new administrative penalty regime, the amendments include a change to separate the two requirements in the current section 3-4 of the Rules (duty to act honestly and the duty to act with reasonable care and skill). There is also a consequential amendment to the definition of "accountant" based on changes to other provincial legislation.

Question: When will administrative penalties be used by RECBC? What kind of conduct?

Answer: Currently, the most frequent administrative penalty is imposed for late filing of annual accountants' reports by brokerages.

Administrative penalties are not available for contraventions involving unethical conduct, such as dishonesty, fraud, deceptive dealing or intentional non-compliance.

Before RECBC can levy an administrative penalty, three conditions must be met:

1. One or more contraventions have occurred
2. The contravention(s) is (are) designated in the Rules as being subject to administrative penalties
3. The circumstances of the contravention(s) meet the eligibility criteria described in the Guidelines as the *Administrative Penalty Eligibility Test (APET)*

Further Information

Some of the APET criteria are:

- The contravention did not involve material harm to a consumer or harm the reputation of the real estate industry
- The contravention was unintentional
- The licensee did not benefit from putting a client or consumer at risk
- When the contravention was brought to the licensee's attention, the licensee promptly took available and reasonable steps to correct or remedy the contravention
- There is no evidence that the licensee was acting other than in good faith

See the draft RECBC Administrative Penalty Guidelines for a full list of eligibility criteria, available on the [consultation website](#).

Question: Will administrative penalty decisions be published like consent orders?

Answer: RECBC is planning to publish statistical information on all administrative penalty decisions as well as considering publishing the decisions themselves for public viewing.

In determining the appropriate approach to publication, RECBC is considering:

- balancing potential licensee reputational concerns with public interest and consumer protection goals;
- the proposed rule changes significantly expand the designated rules, including rules that are fundamental to the purposes of regulating real estate services (e.g. section 3-3) and that often appear in Consent Orders, which are published and linked to the licensee search; and
- publication promotes transparency and accountability as well as provides an educational opportunity for licensees and the public.



See more details in the RECBC Publication Policy on Administrative Penalties document on the [consultation website](#).

Question: How would the changes benefit licensees and consumers?

Answer: The new administrative penalty regime is in the public interest; it will allow RECBC to use administrative penalties, along with other measures, to promote compliance and reduce risks to the public.

The proposed changes to the rules and RECBC's Administrative Penalty Guidelines will help provide predictability to both licensees and RECBC in terms of the likely outcome of many minor contraventions. The amendments will also help ensure that minor contraventions can be dealt with quickly.

RECBC's approach to assess administrative penalties will be transparent, through the publication of the Guidelines.

Further Information

The new regime will help RECBC to resolve minor contraventions quickly and efficiently. Resolving matters faster will lead to more meaningful results because administrative penalties can be timely. Increasing efficiency will allow more resources to be devoted to serious, unethical conduct, enhancing consumer protection and the reputation of the real estate industry.

The proposed rules help to recognize that mistakes happen and not all contraventions warrant issuing a notice of discipline hearing and subsequent order of a discipline committee. Expanded administrative penalties help ensure that RECBC's response is proportionate to identified risks and other unique circumstances of each matter.

Question: What difference would the rule amendments make to law-abiding licensees?

Answer: We've heard from licensees and the public that they want complaints of misconduct resolved faster. In general, the proposed changes will add flexibility and efficiency to RECBC's



process for responding to complaints and non-compliance. The changes will help speed up the investigation and resolution of all kinds of complaints, including those that are not eligible for administrative penalties (e.g. serious and unethical).

The creation of a category of administrative penalties that apply daily will be a useful tool for RECBC to gain compliance by providing licensees with an incentive to quickly fix non-compliance (e.g. rectify contraventions of section 4-7 which prohibits false or misleading advertising).

Question: Can a licensee dispute an administrative penalty?

Answer: Yes, the *Real Estate Services Act* (RESA) has specific provisions allowing a licensee to request reconsideration of a RECBC decision to impose an administrative penalty.

Further Information

Under section 57(4)(a) of RESA, RECBC may cancel an administrative penalty if it is satisfied that the licensee exercised due diligence to prevent contravention of the rule.

The deadline to make a reconsideration request is within 14 days of the date on which the administrative penalty decision was issued.

See the draft RECBC Administrative Penalty Guidelines for more information on the reconsideration process.

Before RECBC decides to impose an administrative penalty, its compliance or audit staff may ask you for information about a matter.

Question: Why are the administrative penalty amounts going up?

Answer: The administrative penalty amounts are being updated to reflect changing licensee, public and government expectations. We have heard from licensees and the public that penalties for contraventions need to be meaningful and not seen as the cost of doing business.

Further Information

Administrative penalties are another tool to encourage compliance. In order to encourage compliance, the penalty amounts need to have sufficient deterrent impact.

In determining what would be appropriate for the new administrative penalty amounts, OSRE and RECBC considered the risk of consumer harm of each designated section, reviewed recent past discipline decisions for simple contraventions that would be eligible under the new regime and recognized the penalty amounts ought to encourage compliance and not be seen as a cost of doing business.

The penalty amounts also reflect a portion of RECBC's costs for imposing and collecting administrative penalties.

Although the maximum amount of an administrative penalty is \$50,000 under RESA, the penalty amounts established by the proposed Rules are generally much lower. In order for a contravention of category D to reach the \$50,000 maximum, the contravention would have to continue for more than six months after RECBC issued a Non-Compliance Warning Letter.

After five years without a contravention the administrative penalty structure will reset. Any subsequent non-compliance by a licensee that results in an administrative penalty will be subject to the initial contravention amounts.

Question: Will this new regime apply retroactively?

Answer: No, the Superintendent can only make rule changes effective on the date it is made or on a future specified date (section 89.2(6) of RESA).

The expanded list of designated contraventions and the updated penalty amounts cannot be applied retroactively. However, where a contravention would be eligible for an administrative penalty, but for it having occurred before the proposed rules came into force, a licensee may find the updated administrative penalty amounts helpful to inform a consent order proposal.

Question: Will RECBC levy an administrative penalty in response to every breach of a designated contravention?

Answer: No, not every breach demands an administrative penalty. Under the proposed changes, RECBC will continue to exercise discretion as to whether an administrative penalty is an appropriate disposition. There may be conduct that is not eligible for an administrative penalty and RECBC proceeds by issuing a Notice of Discipline Hearing. There may also be unique circumstances where RECBC decides to issue a letter of advisement (warning).

Further Information

The exercise of RECBC's discretion will be guided by the draft RECBC Administrative Penalty Guidelines, which set out RECBC's process for levying an administrative penalty, the criteria for a designated contravention to be eligible for an administrative penalty and the reconsideration process.

To levy an administrative penalty, three conditions must be met:

1. RECBC is satisfied that a contravention has occurred.
2. The contravention is designated in the rules as being subject to administrative penalties.
3. RECBC is satisfied that the circumstances of the contravention meet the eligibility criteria in the *Administrative Penalty Eligibility Test (APET)*, which is set out in the Guidelines.

The APET criteria include that the contravention was unintentional, the licensee was acting in good faith, the licensee promptly took available and reasonable steps to correct the contravention when it was brought to their attention, and the licensee did not benefit materially from putting a client or consumer at risk.

Question: What consultation about these proposed changes has already taken place?

Answer: OSRE and RECBC conducted early engagement with a few key stakeholders, including BCREA, PAMA, SPABC, and LandlordBC. As a result of that early engagement, changes were made to the proposed rules and draft RECBC Administrative Penalty Guidelines, such as reducing the penalty amounts for subsequent contraventions.

The current opportunity to provide feedback is open to licensees and the public from September 15, 2020 to October 30, 2020. If you haven't submitted feedback already, please do so using the anonymous online survey, available on the [consultation website](#).

Question: How does the work towards a single regulator for real estate in BC impact these proposed rules?

Answer: The proposed rules, whether administered by RECBC or BCFSA, are part of an efficient and proportionate mechanism to address complaints and licensee misconduct.

The transition to the single regulator for real estate in 2021 may provide an opportunity to assess the effectiveness of the proposed changes to the administrative penalty regime, and



Office of the
Superintendent
of Real Estate



consider whether changes could be made to improve its functioning (e.g. further expanding the designated contraventions).