

FAQs on the Proposed Changes to the Administrative Penalty Regime

September 15, 2020 (Updated October 26, 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 (updated): 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. To allow additional time for licensee and public feedback, the consultation period has been extended and will now close at 6pm on Friday, November 13, 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 consider whether changes could be made to improve its functioning (e.g. further expanding the designated contraventions).