BCFSA

Commercial Trading Services Applied Practice Course

Component One

Contents

Overview

Disclaimer

The materials in this course and the class discussions are for educational purposes and are general in nature. The content and the discussions do not constitute legal or other professional advice. Licensees are responsible for exercising their own professional judgement in applying information to particular situations. Be mindful of confidentiality requirements and keep any discussions generic. Contact British Columbia Financial Services Authority ("BCFSA") Practice Standards Advisors for further guidance.

Acknowledgments

British Columbia Financial Services Authority would like to thank the following who contributed their time and expertise. Your assistance in the creation of this course has been invaluable.

- Education Advisory Group
- Course Instructors
- UBC Sauder School of Business, Real Estate Division

Introduction

Congratulations on your successful completion of the Real Estate Trading Services Licensing Course. This Applied Practice Course is designed so that you can take what you've learned and develop the practical skills that you will then apply to your real estate trading practice.

You will learn how to execute a trade in real estate by participating in this course's practical exercises, engaging with learning partners in different scenarios, and exploring concepts and ideas in group discussions with your instructor and classmates. Before putting your skills to use in real life transaction under the guidance of your managing broker or another experienced licensee at your brokerage, you will learn how to identify risks, such as anti-money laundering and learn how to address conflicts that may arise.

Once you complete this course, you will be ready to protect your client's interests while guiding them through one of the most expensive transactions of their lives. You are embarking on an exciting new career in real estate, where you will be an ethical trusted advisor to your clients. Your role as an agent is to ensure that you are providing your client with all the information they need to make informed decisions.

Overview of The Residential Trading Services Applied Practice Course ("RTSAPC")

This course has four components that will take you approximately six months to complete.

This blended learning course offers both online and face-to-face ("virtual") instruction. As you progress through the modules, you will see each component builds upon the previous and provides you opportunities to enhance your knowledge, skills and abilities to achieve competence as a new licensee.

Component One of this course is offered online and is made up of five modules each with a distinct focus. Module One focuses on agency, Module Two on conflicts of interest, Module Three on disclosure, Module Four on contracts and Module Five on Anti-Money Laundering. You have 14 days to complete Component One of the APC course. Please see your course registration documentation and course emails from your instructors for more information on your progression through the course.

Component Two of this course is a two-day face-to-face class which focuses on practical application and developing skills through scenarios. These two days are designed to be highly interactive.

> ***Moving from Component Two to Component Three requires you to have a temporary licence from BCFSA.***

You are encouraged to apply for licensing now, so that you are prepared to start Component Three as soon as you complete Component Two. Do not delay! Please visit Real Estate Sales | BCFSA to find out more about trading services licensing.

Component Three requires you be licensed in a brokerage. With the guidance of your managing broker and/or appointed individual, you will complete a series of practical field assignments related

to a BC licensee's daily activities. The practical field assignments provide specific completion criteria and are supported by online resources. You will submit your self-assessments for the practical field assignments online.

The final course component, for Commercial licensees, Component Four takes the form of the Commercial version of Legal Update.

You must complete ALL activities – both online and in the classroom – within the timeframes set out in the course calendar to proceed from one component to the next. If you do not complete all activities, you may have to re-do the component(s).

Course Policies

We would like to remind you about the overall policies related to attendance, course completion and academic conduct. You agreed to the Applied Practice, Academic Non-Academic Misconduct and Classroom Participation policies when you registered for the course.

If you have any questions or difficulties related to the course, please contact:

For course content questions, please refer to the General Discussions area and/or email education@bcfsa.ca.

For course scheduling or other administrative questions, contact BCFSA at 604-660-3555/Toll free: 866-206-3030.

For technical support issues, please contact the Real Estate Division help desk at support@realestate.ubc.ca

Monitoring Your Progress

My Grades Legend

Please check in "My Grades" and refer to this legend:

A mark (such as 1/1) = activity has been completed.

Blue circle = activity is in progress (you still need to press the save and submit button).

Yellow exclamation = you have submitted something and it is waiting to be assessed.

– – Dashed line = activity has not been attempted.

Please note: Discussions will always appear as waiting to be assessed. Your instructors will email you by the 2nd Wednesday to update you on your progress.

Note: Discussions will always appear as waiting to be assessed. Your instructors will email you by the second Wednesday to update you on your progress.

You can track your progress in the "My Grades" tab on the left-hand side of the page.

Contacting Your Instructors

You are encouraged to post any general content questions in the "General Discussions" section as other learners will also benefit from the questions and responses. Alternatively, you are able to contact your instructors by emailing education@bcfsa.ca.

Technology

The following software is required for access to the course materials and completion of the course assignments. Most technical issues students encounter in the course can be resolved by ensuring that all the following are installed on your computer:

- A web browser capable of running Blackboard Learn, the virtual learning environment for the course. Blackboard Learn supports the following web browsers: Safari (version 6+), Firefox (version 31+), Chrome (version 36+), Edge (version 20+), and Internet Explorer (11+). Firefox and Chrome are highly recommended for this course.
- Adobe Reader (PDF reader). Most web browsers include a native PDF reader; however, the assignment forms in the course MUST be completed outside of your web browser using the full Adobe Reader program (http:// get.adobe.com/reader).
- An office application suite capable of opening and editing Microsoft Word and Excel documents. For example: Microsoft Office, Apple Productivity Apps, Google Docs.

Throughout the RTSAPC, you will be receiving emails from BCFSA through a platform called "Wavelength" and from your instructors and markers from this platform, called "Blackboard". Watch your junk mail to ensure these important emails do not end up there. Please add Blackboard and Wavelength to your safe list so that you do not miss important emails.

Introduction to Real Estate

In the welcome video Pamela Skinner, Vice-President of Regulatory Services, BCFSA introduced you to the course and the important skills and knowledge you will develop for a successful real estate practice. The following provides you with a brief overview of various members of the real estate industry.

Different Roles in the Real Estate Industry

Levels	Roles and responsibilities
Representative	• A licensee providing real estate services under the supervision of a managing broker; • Must be licensed with and engaged by a brokerage, and; • Must not provide real estate services except on behalf of that brokerage.
Associate Broker	• A licensee who meets the educational and experience requirements of a managing broker, but who provides real estate services under the supervision of a managing broker; • Must be licensed with and engaged by a brokerage; and • Must not provide real estate services except on behalf of that brokerage.
Managing Broker	• A licensee who meets the educational and experience required by the Real Estate Services Rules; • Is in active charge of a brokerage; • Responsible for exercising the rights conferred on the brokerage and for performing the duties imposed on the brokerage by its licence; and • Also responsible for the control and conduct of the brokerage's real estate business including supervision of the associate brokers and representatives who are licensed in relation to that brokerage.
Brokerage	• The brokerage is a licensed business on behalf of which its related licensees provide real estate services.

The Real Estate Services Regulation contains various exemptions from the requirement to obtain a licence before providing real estate services. For example, staff selling properties on behalf of the developer they are employed by, exemptions for caretakers employed by a strata corporation to provide some strata management services, working as an appraiser for an appraisal company. These exemptions do not apply and cannot be claimed by to those who are already licensed.

Any real estate services you provide as a licensee must be done through the brokerage you are licensed with, even if an exemption exists in the Regulation for that activity.

Organized Real Estate

The real estate industry is comprised of several organizations, each of which play an important role , looking out for the interests of licensees, and also several organizations who provide continuing education and technological tools that licensees can use during the course of a trade in real estate.

These organizations include federal trade associations such as CREA, provincial trade associations such as BCREA and local boards. And, of course, BCFSA, your regulator, charged with protection of the public interest.

Below is breakdown of some of the key players in the industry and how each influence you and your work.

BCFSA

Powers and Duties

BCFSA is crown corporation established by the provincial government. Its mandate is to protect the public interest by enforcing the licensing and licensee conduct requirements of *RESA*.

BCFSA is responsible for issuing and renewing all licences under *RESA*. You cannot trade in real estate without being licensed through BCFSA.

BCFSA is responsible for ensuring compliance with the requirements of *RESA,* the Regulations, and the Real Estate Services Rules ensuring that the interests of consumers who use the services of real estate licensees are adequately protected against wrongful actions by licensees. A wrongful action can be deliberate or may be the consequence of inadequate exercise of reasonable judgement by a licensee in carrying out the normal duties and responsibilities as a licensee while acting for the parties involved in the transaction. BCFSA can carry out investigations into complaints regarding the conduct of licensees and may hold a hearing to consider the complaint against the licensee.

BCFSA is responsible for licensing real estate representatives, associate brokers, managing brokers, and brokerages engaged in real estate sales, rental property management, and strata management. BCFSA also enforces entry qualifications, investigates complaints against licensees, and imposes disciplinary sanctions under *RESA*. BCFSA administers the educational and experience requirements as set out in the Rules, assesses all applications, and may conduct an investigation or hold a hearing before a licence is issued. BCFSA may refuse to issue a licence or may issue a licence with conditions.

BCREA and the Local Real Estate Boards

Unlike BCFSA, membership with CREA, BCREA, and a local board is completely voluntary and is not tied to licensing. BCREA is a provincial trade association which represents local real estate boards in the province and their approximately 23,000 REALTORS® on all provincial issues, providing an extensive communications network, government relations and advocacy, standard forms and economic research and analysis. BCREA's website (www.bcrea.bc.ca) contains current information and resources you will use in this course, and as a licensee in your ongoing practice.

You must be a member of BCREA and a local board to use the term REALTOR®, and to have access to the MLS® System which is a property database that many licensees utilize to market properties for clients and create market analyses to determine approximate property values for their clients.

Boards and the provincial association also provide many continuing education opportunities.

Module One: Agency

Module One: Agency

ONE: OVERVIEW

Agency is one of the most crucial components of your work as a licensee. Agency law governs every aspect of your actions as a licensee, and defines your relationships with parties in a trade in real estate.

Agency requirements carry great legal implications for licensees. While the fundamentals of agency remain unchanged, over the past few decades the model of how agency has been offered in the context of real estate trading services has evolved. You should reflect on the materials from your Real Estate Trading Services Licensing Course on the historical development of real estate agency in BC. This historical review will help you better understand the rationale behind the changes and enhance your knowledge of agency.

This module's goals are to understand the duties you owe to a client, to differentiate between represented and unrepresented parties, and how to speak with consumers about agency so they can determine the best representation for themselves in a real estate transaction.

This module is divided into focus areas to make it easier for you to understand the complexities of agency.

By the end of this module; you will be able to:

- Describe the different types of agency;
- Understand how an agency relationship is created;
- Demonstrate the use of the Disclosure of Representation in Trading Services form;
- Understand the complexities of the restrictions on dual agency;
- Demonstrate the use of the Disclosure of Risks to Unpresented Parties form; and
- Recognize the complexities of confidentiality and privacy.

A) Resources

In this module, you will use the following resources:

- Knowledge Base
- Real Estate Trading Services Licensing course
- BCFSA's Prescribed forms:
  - — Disclosure of Representation in Trading Services;
  - — Disclosure of Risks to Unrepresented Parties; and
  - — Disclosure of Risks Associated with Dual Agency.

TWO: INTRODUCTION TO AGENCY AND THE DUTIES IT CREATES

Agency is a relationship in which one person, the agent, is granted the authority to represent and act for another person, the principal, in dealings with others. An agent is authorized to act on behalf of the principal. Ideally, the agency relationship is created by a written contract where the authority of the agent is clearly laid out.

Once an agency relationship has been created, as an agent under common law, you have a fiduciary obligation of loyalty and to act in your client's best interest and to put your client's interests ahead of everything else. When you enter into an agency relationship, the Real Estate Services Rules further break down your fiduciary obligations into a number of duties owed to your client including:

- The duty of confidentiality;
- The duty to avoid a conflict of interest, and if a conflict does arise to disclose it to the client;
- The duty to obey all lawful instructions of the client; and
- The duty to make full disclosure of all material information.

With the exception of confidentiality which extends forever, all of the other duties expire at the end of the relationship. Confidentiality will be discussed in more detail later in this module.

Take note of the topics mentioned above as you will be asked to consider them further in the discussion forum.

THREE: TYPES OF AGENCY

A) Brokerage Agency models

There are two brokerage models that all real estate brokerages in BC operate under:

i. Designated agency

Under designated agency, the brokerage may designate one or more licensees engaged by the brokerage to provide the services on behalf of the brokerage.

ii. Brokerage agency

Under brokerage agency, when a brokerage enters into a service relationship with a consumer where the brokerage is appointed as that client's agent, all licensees engaged by the brokerage assume the agency obligations of the brokerage in relation to that client.

B) Agency under the designated agency model

i. Sole agency

Under the designated agency model, an agency relationship is created when the brokerage and the client agree that the brokerage will designate one or more licensees at the brokerage to provide real estate services as the designated agent for the client.

This means that two licensees working at the same brokerage who are designated agents for different clients can represent a buyer and a seller in a transaction, or two buyers competing for the same property, without a conflict of interest being created.

The duties owed to each client under the Real Estate Services Rules must be provided by each designated agent to that client.

Dual agency is only permitted under very restricted circumstances. When it is permitted, one licensee (or more acting as a team) at the brokerage may represent a buyer and seller in the same transaction, or two competing buyers for the same property, as long as the appropriate disclosures are made and forms are completed. You will learn more about the disclosures and forms later on in the course. Dual agency is only permitted when the real estate is in a remote location that is underserved by licensees, and it would be impracticable for the two parties to be represented by separate licensees.

iii. Teams

Because licensees who operate as part of a team act as the collective designated agent for all team clients, individual team members are unable to operate as designated agents apart from each other. When two or more team members act for a seller and buyer, or two competing buyers, in the same transaction, this is considered dual agency, which is restricted except under very limited circumstances.

C) Agency under the brokerage agency model

i. Sole Agency

Brokerage agency is created when the brokerage and all of its licensees provide real estate services to the client. This means the brokerage is the agent of the client, and all licensees engaged by that brokerage automatically assume the same agency obligations as the brokerage in relation to that client. When the brokerage only represents one client in a particular transaction, the brokerage is the agent of that client.

Brokerage agency is more often practiced by smaller brokerages where it is not feasible or realistic to keep client information completely confidential from other licensees at the brokerage. This can happen when everyone is sharing one small office, or one filing system.

Brokerage agency is also the only brokerage model for brokerages that deal in rental property management and strata management.

ii. Dual agency

Dual agency is permitted under very restricted circumstances. Under the brokerage agency model, dual agency would not only occur when one licensee represents a buyer and seller in a transaction, or two buyers competing for the same property, it will also occur when any two licensees at the brokerage represent competing parties.

As noted above, dual agency would only be permitted when the real estate is in a remote location that is underserved by licensees, and it would be impracticable for the two parties to be represented by separate licensees.

iii. Teams

Because all licensees who operate under brokerage agency cannot be designated from each other, there is no other restriction or requirement that is different for teams within that brokerage.

D) No agency (unrepresented party to a transaction)

You may provide limited trading services outside of an agency relationship to a consumer who is an unrepresented party to the transaction. An unrepresented party is a buyer or a seller who is NOT receiving agency representation in a real estate transaction. They are however, still owed the duties of honesty and reasonable care and skill. You will learn more about how this type of agency relationship must be communicated later in the module.

A consumer who chooses to be an unrepresented party must be made aware of the risks. There are forms that have been created to assist you with explaining the risks. You will learn more about the required forms you must use to disclose risks to unrepresented parties later in this module. The limited trading services that you may offer to an unrepresented party include:

- Providing the unrepresented party with general market information, contracts, and other relevant documents;
- Assisting the unrepresented party to complete a contract (without providing advice on appropriate terms); and
- Presenting the offers and counter-offers to or from the unrepresented party.

FOUR: CREATION OF AN AGENCY RELATIONSHIP

A) How an agency relationship is created

i. Agency by way of a written service agreement

An agency relationship is most often created expressly between an agent and a principal. The primary method is through a service agreement, such as a Listing Agreement or Buyer's Agency Exclusive Contract. You will explore these contracts further in Module Four.

Expressly – An agreement is made, either in writing or orally, between the agent and the principal. To adhere to the Real Estate Services Rules, if the service agreement relates to the sale of real estate, the agreement must be in writing unless otherwise waived by the client.

AML Consideration: It is important to always know who your client is and to gather the required FINTRAC information to verify your client's identity. Clients can include individuals, or entities such as corporations, trusts, partnerships, funds and unincorporated associations or organizations.

Remember that when there are unrepresented parties to a transaction, you must also take reasonable steps to identify the individual or confirm the existence of the entity that is unrepresented.

Ethical Consideration: When entering into an agency relationship with a client ask yourself, what am I to you? Becoming someone's agent brings great responsibility, and you need to ensure that your client understands what it means for you to be their agent.

Requirement for service agreement unless waived by the prospective client, a brokerage must have a written service agreement in accordance with the Real Estate Services Rules if:

(a) The brokerage is to provide trading services to an owner of real estate in relation to the offering of that real estate for sale or other disposition;

(b) The brokerage is to provide rental property management services to an owner of rental real estate; or

(c) The brokerage is to provide strata management services to a strata corporation.

Accordingly, this Rule means that all listing agreements must be in writing.

ii. Agency by way of an oral agreement

As noted in the Rule cited above, a consumer does have the right to waive the requirement for a written agreement. Not having a written service agreement, however, is fraught with risk as there is no way to ensure both you and the client understand the terms of the agency relationship or the services and duties owed.

Should a consumer request that no written service agreement be signed, speak with your managing broker to determine if the risks are too great for the brokerage before proceeding.

iii. Agency by way of an implied agreement

Courts have found, in some instances, that an agency relationship was created as a result of the conduct of the parties. Such agency relationships are often referred to as ''implied agency''.

If you are acting on behalf of a person who is not otherwise represented, your actions may lead to the party believing that you were acting as their licensee. An implied agency relationship may be found to exist, even when you did not intend to act as the party's agent.

In any transaction which involves an unrepresented party, if you do not intend to act in an agency relationship with that party, it is very important for you to confirm in writing with that party that he or she is being treated as an unrepresented party, not a client. It is also important that your conduct is consistent with such statements.

Ethical Consideration: Implied agency is tricky and often you might not realize you are acting as an implied agent. It doesn't matter what you think it is, how did you act and what would a reasonable person deduce from how you acted.

B) Discussing agency and representation with a consumer

It is important to always ensure that your clients, or potential clients, have all the information they need to make an informed decision about who they want to work with before entering into any agency agreement.

This includes the need to discuss agency, and how the agency relationship and duties owed under the relationship may impact them. The topic of agency can be technical, so it is important that consumers clearly understand the terms of the agency relationship.

There are many factors that can impact the type of agency relationship you can offer. This can range from your brokerage model impacting who has access to the private information, to teams and how the consumer's confidential particulars may be shared.

Beyond explaining the particulars of the agency relationship being proposed, explaining potential obstacles that could impact and change the agency relationship through the course of the transaction or relationship is important. Dual agency, in limited circumstances when permitted, and the impact of a past client on the other side of a transaction, are just a couple of examples that could require you and your client to modify your agency relationship by adjusting the duties owed to them.

Conflicts such as these will be discussed in greater detail in Module Two.

C) Disclosure requirements and the Use of the Disclosure of Representation in Trading Services Form

i. Disclosure requirements under the Real Estate Services Rules

Consumers rely on you to provide them with information they require in order to make an informed decision during a transaction. Mandatory disclosures ensure that licensees protect their client's

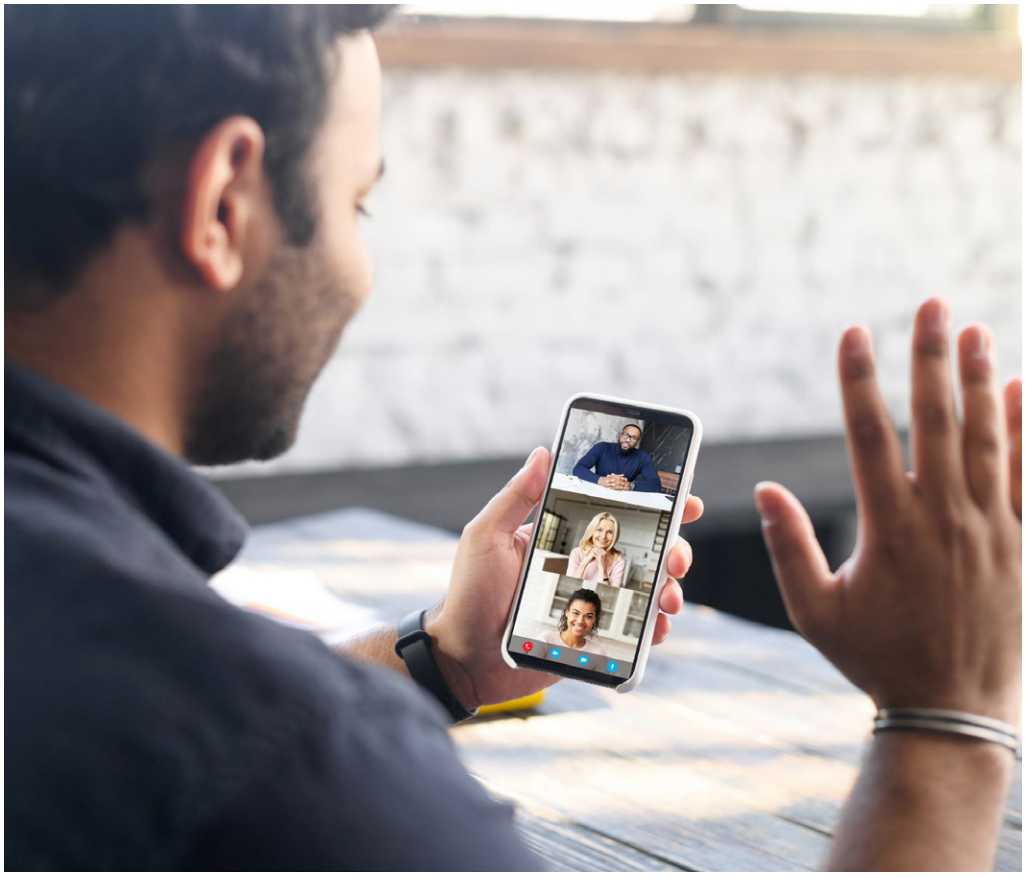
best interests by providing necessary information without being prompted for it. Disclosures must be made early and may be ongoing, when circumstances require additional disclosures. You must also ensure that the consumer understands the disclosure being made so they may provide informed consent.

Disclosures can be made in many different ways. Some must be made on forms prescribed by BCFSA, some need only be in writing, and some have no method of delivery outlined in the Real Estate Services Rules. Regardless of what the disclosure requirement is, a prudent licensee should always make the disclosure in writing and seek to obtain written confirmation that the disclosure has been made in the time and method required. This step will protect them should a dispute over the disclosure arise.

ii. Using the Disclosure of Representation in Trading Services form

When dealing with a consumer—whether you are entering into an agency relationship or not—you must fully disclose, in writing, the role and nature of the services you will be providing. This is also the case for unrepresented parties in a transaction, who aren't represented by other licensees. The Real Estate Services Rules require licensees to make this disclosure at the outset of the relationship.

Ethical Consideration: Make sure that you discuss risks to unrepresented parties, and remember what you just learned about implied agency. It is all in how you act. Make sure that you asses the unrepresented party's ability to give informed consent.



Consumers must both know and understand exactly what services/duties/obligations they should expect to receive from a licensee and their related brokerage before they can truly consent or agree to the relationship. In other words, before providing any trading services to a consumer, you must inform the consumer of the services and obtain their "informed" consent. Without informed consent, the spirit of these disclosure requirements will not be met.

In order to comply with the Real Estate Services Rules, you should begin by discussing the agency relationship with the consumer by using the agency relationship using the Disclosure of Representation in Trading Services form. This disclosure informs the consumer of the difference between being represented by a licensee as a client, and being an unrepresented party.

As you can see, the disclosure of the nature of the relationship must be made before providing any trading services, except exempted activities such as providing factual responses to general questions. The disclosure must also be made in a form approved by BCFSA.

As discussed, licensees may host open houses or provide general factual responses to questions without providing the Disclosure of Representation in Trading Services form. However, if you receive or solicit confidential information the form must be provided.

Resources: The Knowledge Base explains the duties owed under the different types of relationships. The Disclosure of Representation in Trading Services form provides an explanation of the difference to a consumer of being represented by a licensee as a client or as an unrepresented party.

For documenting the nature of the relationship, the Disclosure of Representation in Trading Services form must be provided prior to providing trading services to or on behalf of a party to trade in real estate and the disclosure must be made using this form.

The key purpose of the form is to explain to the consumer the difference between being a client (represented by a licensee in an agency relationship) and being an unrepresented party in a trade in real estate. The form highlights the key agency/fiduciary duties that a licensee will owe a client, such as the duty of loyalty, the duty of full disclosure, and the duty of confidentiality.

The form identifies that when a consumer chooses to be unrepresented, you will not be representing them as a client, and you will not owe them any special legal duties.

The form ends with a section for the licensee to complete, and a section for the consumer to initial their acknowledgment of their receipt of the form from the licensee.

The requirement to provide the Disclosure of Representation in Trading Services form is triggered before trading services are being provided to a party to a trade in real estate. The definition of "trading services" is quite broad and includes making representations about the real estate and showing the real estate. As such, when you have listed a property for sale and receive a phone call from a potential buyer who would like more information about the property, the factual information you provide falls within the definition of providing trading services to that buyer.

As long as the licensee does not solicit or receive personal information from the consumer such as about their motivation, financial qualifications or needs in respect of real estate, the licensee does not have to provide the form. If the licensee is only hosting an advertised open house or is providing factual responses to general questions from the consumer the form does not need to be provided.

If you and the consumer agree, and the Disclosure of Representation in Trading Services form states that the consumer will be an unrepresented party, and you are representing another party in the trade in real estate as a client, the Disclosure of Risks to Unrepresented Parties form, will need to be provided. That form is discussed later in the section.

D) Restrictions on dual agency and the exemptions

In British Columbia, dual agency is restricted, but there is an exemption that can be used in specific circumstances where a licensee is already representing two clients who end up with competing interests.

In the event that you find yourself representing two clients with competing interests, both consumers must be existing clients of the real restate licensee. The exemption cannot be used where you are representing one party and an unrepresented party to the transaction requests an agency relationship.

The exemption can only be used to provide dual agency to clients in remote and underserved locations where it is impracticable for the parties to be represented by different licensees. By using the exemption in these situations, you can provide your clients with limited representation when they would otherwise have to be unrepresented.

"Dual agency" is defined in the Real Estate Services Rules as the agency representation, by the brokerage, of clients who have conflicting interests in respect of a trade in real estate. Parties with conflicting interests in a given trade in real estate include:

- A buyer and a seller;
- A lessor and a lessee;
- An assignor and an assignee; and
- Two or more buyers, lessees or assignees who are interested in the same property.

The practice of limited dual agency raises a number of concerns for consumers, including that a licensee is not able to be completely loyal and impartial to two clients with competing interests, a licensee may not be able to properly advise those clients without improperly disclosing their confidential information to each other, and a licensee acting as a dual agent might prioritize his or her own interest in earning the whole commission, rather than acting in the best interest of his or her clients.

To decide if the exemption applies to a specific transaction, ask yourself the following questions:

- **Are there other licensees and brokerages operating near the property that could provide representation?**
  You should try to identify other licensees in the local area who may be available to represent a party in the transaction. You could, for example, try to contact other licensees in your brokerage (if the brokerage operates under designated agency) or other brokerages in the local area to ask if they are available. You may also suggest that your client contact other licensees. For niche properties, you may also want to consider who might have appropriate knowledge.

- **Are there licensees in other nearby communities who could provide representation?**
  If you cannot identify other licensees in the local area, you should try to identify licensees in other nearby communities who may be available to represent a party in the transaction. You may also suggest that your client contact other licensees in nearby communities. When identifying the range of other communities where you might find other licensees, you should consider how far they are located from the property and whether it is likely they would be able to visit the property in person or otherwise be knowledgeable about it.

- **Is it feasible to travel to and from the property?**
  Does it require significant travel time or special travel arrangements (e.g. by boat or plane charter) to reach the property? You should consider whether public roads or other public access is available. Other travel considerations, such as weather or seasonal factors (e.g. a public road that is closed in winter) may also be relevant.

- **Is the transaction urgent?**
  Your client may be under time constraints that make the transaction urgent (e.g. access to financing, limited availability) and may limit the ability to involve another licensee. You should distinguish client urgency from the convenience of completing a transaction quickly.

E) Using the Disclosure of Risks Associated with Dual Agency Form

In the cases in which dual agency may be offered to the parties in a trade in real estate, the Real Estate Services Rules require that, before providing any trading services to the parties, you must first provide all parties with a prescribed disclosure form known as the Disclosure of Risks Associated with Dual Agency form which must be signed by your managing broker. This form sets out why the brokerage believes the exception for dual agency is triggered, the duties owed to the parties by a dual agent, and the risks associated with a dual agency relationship.

Secondly, you need to enter into a written agreement of dual agency with each party to whom the dual agency services will be provided. Providing dual agency requires the consent of both clients.

Both clients must agree that the licensee acting for each of them will not owe either a duty of loyalty but rather will treat each equally when providing them with real estate services.

Ethical Consideration: Make sure your clients understand what they are signing. Don't just put the forms in front of them to sign, make sure they understand what dual agency is and the risks associated with it. Remember as a dual agent you have an obligation to remain neutral and not prefer one client's interest over the other.

FIVE: UNREPRESENTED PARTIES

A) What is an unrepresented party

An unrepresented party to a transaction is any party that does not have an agency relationship with a licensee acting in their best interest, in that transaction. In some cases, you may find that a sophisticated buyer or seller chooses to represent themselves in a transaction. In such cases, there are steps you need to take to ensure the unrepresented party understands that you are not acting on their behalf, and that you are only acting in the interests of the other party to the transaction. You will learn more about the prescribed form you are required to use to make this disclosure later in this module.

B) Steps you must take before treating a consumer as an unrepresented party

There are several steps to take before you can treat a consumer as an unrepresented party in a real estate transaction. First you need to have a discussion with your client about dealing with the unrepresented party and seek your client's consent to proceed. If your client consents to you proceeding with the unrepresented party then under the Real Estate Services Rules you will need to:

- Inform the consumer of the risks of being unrepresented in a real estate transaction;
- Disclose the limits to the services a licensee can provide to an unrepresented party; and
- Advise the consumer to seek independent professional advice.

You are required to disclose the risks associated with being an unrepresented party, when you are acting for another party to the trade. This helps ensure consumers can make informed decisions about whether to be represented by a licensee in a real estate transaction.

The disclosure must be completed on the mandatory BCFSA approved form which is discussed below.

C) Using the Disclosure of Risks to Unrepresented Parties Form

If the unrepresented party agrees and the Disclosure of Representation in Trading Services form states, that the consumer will be an unrepresented party, and that you are representing another party in the trade in real estate as a client, the requirement for the Disclosure of Risks to Unrepresented Parties form is triggered.

As noted above, the required disclosure form under the Real Estate Services Rules is called the Disclosure of Risks to Unrepresented Parties form. This is a required form that you cannot alter or change.

As with the Disclosure of Representation in Trading Services form, the Disclosure of Risks to Unrepresented Parties form is completed with a signatures and acknowledgement section for the licensee and the unrepresented party.

The brokerage is required to maintain a copy of all written disclosures and any related acknowledgements. The Real Estate Services Rules require an associate broker or representative to promptly provide to the managing broker the original or a copy of all records referred to in the Real Estate Services Rules. It is important that you know and understand your brokerage's policies and procedures for maintaining these forms.

More Information on Guide to Disclosure of Risks to Unpresented Parties form.

SIX: TERMINATION OF AN AGENCY RELATIONSHIP

A) How an agency relationship is terminated

The agency relationship is a voluntary relationship that depends upon the mutual consent of the principal and the agent; therefore, either party can terminate the relationship at will.

Once terminated, any authority for the licensee to act on the behalf of the principle will be revoked. However, it is important that you have discussions about the services that were outlined in the service agreement in the event that one of the parties decides to terminate the agency relationship. For example, if a principal terminates his or her agency relationship with the agent, the agent's authority to act on behalf of the principal will end (i.e., authority is revoked). There are three ways in which the agency relationship (and authority) can be terminated:

- **Express Termination:** The principal or agent can terminate the relationship expressly, orally or in writing. This is sometimes known as the revocation of agency authority.
- **Termination by Conduct:** An act of the principal that is inconsistent with the continuation of authority can terminate the agency relationship.
- **Operation of Law:** Through a provision within the agency contract (if one exists), or the death, incapability, or bankruptcy of either the principal or the agent, the agency relationship can be terminated.

B) Risks after termination

As stated above, once your authority is terminated, you will no longer have the authority to act on behalf of your client. Even though the agency relationship is terminated, both you and your client may still be bound to certain conduct. If the conduct of you and your client continues to suggest that you have the appropriate authority, there is a risk that, in reliance on this conduct, a third party continues dealing with you as a representative of the principal.

Also, remember that many agency relationships are created by express contract. Therefore, if an agency relationship is terminated in a way that is not permitted by the contract, the terminating party may still be liable for damages.

SEVEN: CONFIDENTIALITY AND PRIVACY

A) Confidentiality and the Real Estate Services Rules

Generally speaking, “confidential information” means any information about a client that is not available to the public. That can include the client’s finances, personal situation, motivations or needs.

The Real Estate Services Rules outline a number of duties which stem from the fiduciary obligations you owe to your client. One of those duties is to maintain the confidentiality of information respecting your client.

The execution of this duty can vary depending on factors such as whether your brokerage practices brokerage agency or designated agency. Regardless of the agency model, the key requirement to maintain your client’s confidentiality remains the same.

Confidentiality is the only duty owed to a client that continues forever. This means that even after your agency relationship terminates, you are prohibited from sharing information about your former client with third parties. Your brokerage’s agency model of providing designated or brokerage agency can also impact how confidential information is protected.

B) Protecting client confidentiality

Before agreeing to provide any information to any third party, you must have the consent of your client and it is always prudent to get your client's consent in writing. A client's confidential information may only be revealed if the client gives the licensee the express permission to do so. The permission should be obtained in writing. If a licensee does not know whether certain information is confidential, the best course of action is to ask your client for their permission to disclose it. If your client provides their permission you can disclose the information (provided it is in the best interests of your client).

There are some circumstances where you may provide confidential information without your client's consent such as when required by law or compelled by BCFSA.

Most fiduciary duties owed by the agent to the principal end when the agency relationship ends (e.g., the sale or purchase completes). The duty of confidentiality however, does not terminate when the agency relationship ends. It continues to apply until the parties agree otherwise. Because the duty of confidentiality extends beyond the transaction, a licensee may sometimes find himself or herself in a difficult position. This can be of particular relevance in transactions where a former client is on the other side of a negotiation.

If your brokerage is practising designated agency, you must not disclose confidential information about a client to another licensee in the same brokerage (or another brokerage) who is not representing that same client.

Maintaining client confidentiality includes ensuring sensitive documents are not shared or accessible to other licensees. That means, for example, you do not have phone conversations where sensitive and confidential information are being discussed in open areas.

If you are operating under brokerage agency, all the same rules of confidentiality apply in relation to sharing information outside the brokerage with third parties as is required under designated agency.

C) Privacy and tenants

In British Columbia, an individual's information and privacy rights are protected by law. There are many laws that protect all aspects of an individual's privacy and it important for you as a licensee to understand how privacy applies to you and your clients.

If you are assisting your landlord client in finding a suitable tenant to rent their property you should be aware of the information that you are able to request and obtain.

As a licensee, you must ensure that you comply with all of the provisions of *Personal Information Protection Act* (*"PIPA"*) which outline how you are to collect, use, store, disclose and protect personal information. *PIPA* defines personal information as any information about an identifiable individual, such as:

- Name;
- Date of birth;
- Income; and
- Physical characteristics.

In most circumstances you must obtain an individual's consent to collect and use their personal information. You must also remember that you can only use their information for purposes that a reasonable person would consider appropriate. Documentation must then be destroyed. More information can be found under Office of Information and Privacy Commissioner ("OIPC").

The *Act* and Real Estate Services Rules and other statutory requirements on licensees and brokerages (for record retention) interact with *PIPA*, in that they create requirements to collect and retain certain brokerage records, which may include personal information.

The office of the Information and Privacy Commissioner website also has a lot of information on when and how to destroy personal information you or your brokerage may collect after it's intended use has been satisfied. More information can be found under Office of Information and Privacy Commissioner (OIPC).

Module Two:
Conflicts of Interest

Module Two: Conflicts of Interest

ONE: OVERVIEW

This module is divided into seven focus areas to make it easier for you to understand the types of conflicts you may encounter, and how to address them. By the end of this module you will be able to:

- Demonstrate the importance of avoiding conflicts whenever possible;
- Recognize the risk personal conflicts can create;
- Understand the complexities of conflicts respecting former clients; and
- Address conflicts when acting for multiple clients.

A) Resources

In this module, you will use the following resource:

- Knowledge Base

TWO: INTRODUCTION TO CONFLICTS OF INTEREST:

A) What is a conflict of interest?

In agency law, a conflict of interest occurs when there is a substantial risk that an agent's representation of a client would be negatively affected by the agent's own interest or by the agent's duties to another current client, a former client, or a third party. Would a conflict of interest arise if a licensee's buyer client becomes interested in purchasing their seller client's property? What about when a licensee would like to purchase a seller client's property?

In many cases, through ongoing disclosures and discussions with your client, conflicts can be avoided. In some instances, however, where a conflict cannot be avoided, you and your client will have to determine whether to carry on with the agency relationship, walk away from the relationship, or modify the duties owed to the client.

Clients expect you to act in their best interests and put their interests ahead of yours when they engage your services. Your obligation is recognized in common law and under the provisions of *RESA* and the Real Estate Services Rules.

When it comes to addressing conflicts of interest your first obligation must always be to avoid the conflict. When this is not possible, you must disclose the conflict, consult with your client and explain all the options available to them along with the benefits or risks involved with each option. Your client will then provide you with a lawful instruction as to how to proceed.

B) Actual vs. perceived conflicts of interest

Conflicts of interest can be both actual or perceived. An actual conflict is a conflict that objectively exists and can be recognized by all parties. A perceived conflict is one that may or may not be a conflict but appears to be one in the mind of a client. Even when you believe your conduct does not create a conflict, if you think it is possible that your client may view it differently, a prudent licensee will follow the same disclosure requirements as you would for an actual conflict. This will reduce the risk of a complaint being filed by an unhappy client.

Conflicts are an unavoidable aspect of the practice, and as a licensee selecting the correct course of action is not always easy. At the very least, you must be able to identify a conflict of interest. Willfully ignoring conflicts of interest or failing to spot a conflict of interest can result in discipline and/or court action.

Ethical Consideration: Remember that what one person sees as a conflict another may not. When you are trying to determine if there is a conflict don't forget to consider perceived conflicts.

THREE: YOUR OBLIGATION TO AVOID CONFLICTS OF INTEREST

Avoiding conflicts of interest and working in the best interests of your clients have always been among the most important duties of a licensee. That means that managing the potential for conflicts of interest at the start of your relationship with a consumer will be very important.

Ethical Consideration: Remember first and foremost, as a real estate licensee you have an obligation to avoid all conflicts of interest. Make sure that is you find yourself in a conflict to disclose it immediately to your client and look for their guidance on how they would like you to proceed.

A) Communicate clearly, early, and often

Before you begin working for a client, clearly describe your duties, obligations, and the scope of the services you will be providing. Clearly discuss the types of conflicts that may arise, and options on how you and your client may resolve them. Let the client know what your obligations are under the Act, Real Estate Services Rules and Regulations.

Ensuring your clients are consistently mindful of both actual and perceived conflicts well in advance and having discussions about potential conflicts throughout the relationship will help to reduce concern for your client.

Ethical Consideration: Transparency is key! Make sure that you have ongoing conversations with your client(s) and that they fully understand what you are saying to them. You have an obligation to make sure they understand what you are saying so that they can appropriately decide how to proceed.

B) Standardize your processes and procedures

Run your business like a business. Mistakes and poor or untimely communications occur when things get busy and crucial steps are missed. Standardized processes and checklists can help ensure that this does not happen to you.

C) Promptly provide clear disclosure of conflicts of interest when they arise

You are a trusted advisor with special expertise. You must always act in your client's best interest, taking reasonable steps to avoid any conflicts of interest. If a conflict does arise, you must promptly and fully disclose it to the client.

In some instances, your client may instruct you to avoid the conflict all together. In other instances, it may not be possible to completely avoid the conflict, and your client may permit you, through a modification of duties owed, to proceed despite the conflict. Some conflicts are required to be disclosed in writing on prescribed forms, others are not. A prudent licensee should disclose all conflicts of interest in writing whether required or not. In some cases, you may not be able to resolve the conflict and will have to remove yourself from the transaction.

When a client opts to permit you to modify your duties owed to them in order to address a conflict of interest, appropriate amendments must be made to the service agreement.

D) Conflicts of interest may be unanticipated

Unanticipated conflicts of interest can arise. At the outset of your agency relationship you should discuss with your client the potential that a conflict of interest could arise. Speak with your managing broker as soon as a potential conflict is identified if you are unsure how to address it. Your brokerage should always be kept apprised of conflicts of interest that can impact any client relationship.

FOUR: PERSONAL CONFLICTS OF INTEREST

Personal conflicts of interest, like all conflicts, must be disclosed immediately to your client. As with all conflicts, a personal conflict puts protecting your own interests against the interests of your client. As noted above, in an agency relationship your fiduciary obligation is always to put your client's interests ahead of everything else, including you. Depending on the nature of the conflict, the disclosure may be required to be given in a form approved by BCFSA. Disclosures will be discussed further in Module Three.

Ethical Consideration: You have an obligation to put your client's interest before anyone else's, that includes yourself. Make sure that personal matters do not get in the way of you acting in the best interests of your client.

A) Buying a property you have listed

Should you personally become interested in a property you have listed, conflicts are likely to arise. Even if you release the client and stop acting for them, the conflicts that arise because of the confidential information you have would impede your ability to act impartially. You will learn more about this in module 3. If you do become interested in a property you have listed, you are not able to be impartial or objective, nor are you able to meet another obligation of a licensee: act in the best interests of the client. You must not let your own personal interests prejudice your client's interests.

Should a complaint be filed, you may be found to be in an indefensible conflict of interest.

Warning: if you choose to proceed and represent yourself in the transaction, you must notify your managing broker of your intentions and get their approval before proceeding. You must also provide the appropriate Disclosure of Interest in Trade form to the other party in the transaction before any offer is accepted.

Should your client not agree to be released from the agency relationship, you must cease representing both clients (this includes representing yourself) and all parties must get independent representation.

B) Selling your own property

You should always seek the advice and permission of your managing broker first if you choose to sell your property through your brokerage. Conflicts may arise as a result of former clients, or current clients of your brokerage being interested in that property.

Another licensee should act as the designated agent representing you in the sale of your property. The designated agent must take all the same steps in gathering information and completing required paperwork as they would with any other client. Remember that you must provide potential buyers with the appropriate disclosures including the Disclosure of Interest in Trade form. You will learn more about this in Module Three.

If you choose to represent yourself, your listing must be processed through the brokerage with which you are licensed and the Disclosure of Interest in Trade form is required. There are many

risks when you represent yourself and you should use your professional judgement to determine whether you want to take the risk. If you do act on your own behalf your errors and omissions insurance will not cover the transaction.

C) Representing a spouse

The same conflicts that arise when representing yourself in a transaction, can be present when representing your spouse. If you are not providing real estate services to your spouse, the property, by virtue of your relationship, may create an interest in that property for you that requires a disclosure.

You should also be aware that you must not consider representing a consumer on the other side of a purchase or sale, where your spouse is a party to the transaction. Doing so creates an indefensible conflict of interest since it would be impossible to put the needs of the client over that of your spouse.

If you are representing a client and the party on the other side of the transaction is someone with whom you have a personal relationship (for example: child, sibling, family friend, business partner, etc.), you must disclose this material information to your client and discuss with them whether you are able to continue to represent them.

D) Personal loans

Both loaning money to clients and accepting loans from clients can create unintended risks and conflicts.

You must always act in your client's best interest. Sometimes it may seem like providing a loan to a client towards a down payment or to cover some other expense during the transaction is a good idea. Loans, however, can create conflict in the agency relationship regardless of the circumstances, such as when there is a payment default. Problems around inflated interest charges etc. may also contribute to creating a conflict of interest that is best avoided.

Conversely, potential conflicts could be created if you accept a personal loan from your client.

Loans should never be made between a client and their licensee. Both you and your client should always seek external lenders to provide needed financial assistance.

FIVE: CONFLICTS WITH OTHER EMPLOYMENT

A) Providing more than one type of real estate service

If you are licensed for trading services, conflicts of interest can arise when you are also licensed to provide other types of real estate services under *RESA* (i.e. rental, strata). For example, if you are also licensed to provide rental property management services, and you represent a landlord in a rental, you may be inclined to sway a tenant to move out so that you can list the property for sale if the commission from the sale is a greater benefit to you.

Another example would be if you influence your buyer client to purchase an investment property

so that you can manage the property as a rental property manager. In this case your desire to earn additional income from a property your client purchases could be viewed as the driving force for the advice you are providing them and may not be advice that is in their best interests.

B) Working in affiliated professions that do not require a licence under *RESA*

While *RESA* does permit licensees to engage in other employment that is not governed under the legislation, you must still be mindful of potential conflicts that may arise. Individuals with supplemental employment such as mortgage brokers, insurance brokers, contractors, and developers can easily find themselves in conflicts of interest when acting in multiple capacities.

When a licensee is also employed in a supplemental industry, their desire to earn additional money through that industry may create the conflict. For instance, if you are working with a buyer to find a property, and you are also a mortgage broker, the potential for additional income from recommending your own lending services may influence the advice you give your client.

A similar conflict of interest can arise if you are employed as a contractor. Should a property you are selling, or assisting a buyer with, need renovations, you may recommend the client use your company to increase your income whether or not your company is best suited to do the work. While this may not be your intention, it is human nature to believe you are better able to meet your clients' needs, and your clients are more likely to heed your advice given the agency relationship they have with you. Even if your company is a good fit for the job, the potential for perceived conflict of interest presents a problem.

You must always remain vigilant not to allow your personal interests to negatively impact your client.

These examples are not intended to suggest that licensees are likely to engage in unethical behaviour. Rather, they show/illustrate that potential conflicts of interest are possible and must be addressed. Such conflicts can be handled by not providing services through your other employment to any client of your brokerage, or making a full disclosure as to the potential conflict of interest and allowing your client to determine if they are willing to accept the conflict.

SIX: CONFLICTS OF INTEREST RESPECTING FORMER CLIENTS

There may be times when you are acting for a client in a transaction and are approached by a former client who is seeking representation in that same transaction. The most common example of this conflict is where a licensee is listing a property for sale and is contacted by a former client who is interested in purchasing that property. In this case, the licensee must first advise the former client that they cannot represent him or her because the seller of the property is a current client. Whether you can continue acting for the current seller client requires an analysis of the confidential information that you have with respect to the former client. While you are early in your careers and may not encounter former client situations, these can be challenging to address. More information can be found under How Past Clients Can Impact Your Ability to Provide All Duties Owed to Your Current Client.

SEVEN: CONFLICTS WHEN ACTING FOR MULTIPLE CLIENTS

As discussed in Module One, there is a restriction on dual agency except in specified and limited circumstances. Dual agency occurs if you are representing competing parties in the same transaction. This can be a buyer and seller of the same property, or two competing buyers who want to purchase the same property.

Because of the competing interests of the clients, dual agency is a conflict of interest. If the exemption on dual agency applies to your situation you must consider how best to minimize the conflict so that one client's interests are not put above the other's. Some things you must ensure:

- You remain neutral. You cannot prefer the interests of one client over the other or give advice to one client that would disadvantage the other. If information is given to one party, that same information must be provided to the other party.
- You cannot act on your own behalf (or on behalf of a family member or any other party you have a personal relationship with) while also representing a competing party in the transaction. It is only natural that you could unintentionally prefer the interest of yourself, a family member or someone close to you. Even if you are able to remain neutral, the optics of a perceived conflict could create problems.

Conflicts can also arise when your clients' interests conflict with each other in a transaction. The interests of these clients may not have been in conflict when you began working with them; however, circumstances can change. For example, you are in a conflict of interest when two buyer clients become interested in purchasing the same property. Similarly, you are in a conflict of interest when a buyer client becomes interested in purchasing a seller client's property.

When such conflicts of interest arise, you must manage the conflict appropriately. It is clear that unless the situation falls within the exception to providing dual agency, continuing to act for both buyers, or for both the buyer and the seller, is not permitted. Doing so would be engaging in dual agency, which has been restricted as noted above.

The conflicts of interest that arise when your clients' interests conflict can be a common occurrence, especially if you are a well-established licensee with many clients, or practice real estate in a relatively small community. Your brokerage should have policies and procedures

respecting how conflicts of interest will be addressed. These policies should be communicated with your clients at the outset of an agency relationship so that the correct expectations can be set.

For example, while you may agree to act for a particular buyer client, you should tell the client that, in the event they become interested in a property in which you are the designated agent for the seller, you will ask the buyer if they will agree to find alternate representation because you will want to continue acting for the seller in listing the property. You may tell the buyer that, if this situation arises and they agree to allow you to continue representing the seller, you will provide a referral to another licensee that can assist him or her.

Despite this conversation with the client, you are always required to obtain a written agreement from all clients at the time that the potential conflict arises. This means that the buyer (and the seller) in this example must agree and sign the Agreement Regarding Conflict of Interest Between Clients form once the conflict arises.

More information can be found under Conflicts of Interest (with multiple clients) guidelines.

Options for managing conflict when dealing with multiple clients

To assist you to appropriately manage conflicts of interest when acting for multiple clients where dual agency is not appropriate, you have two options to manage the conflict:

- Stop providing trading services to both clients. In this case, you are ceasing to provide any further trading services to either party. Furthermore, you cannot continue to work with either client as an unrepresented party and should either refer the clients to separate licensees or instruct the clients to find separate representation themselves.
- Continue to represent only one client, if all clients agree in writing in a form approved by BCFSA. In this case, you are required to enter into the Agreement Regarding Conflict of Interest Between Clients form with each client. The Agreement Regarding Conflict of Interest Between Clients form is a mandatory form agreement created by BCFSA. This agreement must be entered into at the time the conflict arises, and must contain the following information:
    - A description of the conflict of interest;
    - A description of the duties and responsibilities the licensee will no longer have to the client with whom the licensee is terminating her or his client representation (the 'Released Client');
    - A statement that the licensee may have confidential information about the Released Client and the licensee is prohibited from disclosing any of that information;
    - A statement that the advice and information the licensee may provide to the client that the licensee will continue to represent (the 'Continuing Client') may be limited due to the licensee's ongoing duty to maintain the confidentiality of the information of the Released Client; and
    - A recommendation that the clients seek independent professional advice in respect of that trade in real estate.

It is your responsibility to ensure that all clients in the transaction fully understand the risks of entering into the Agreement Regarding Conflict of Interest Between Clients form, and to recommend that all clients seek independent professional advice.

When two clients sign the Agreement Regarding Conflict of Interest Between Clients form, one client must agree to be released by the licensee. This client is identified on the form as the Released Client.

After the clients have signed the agreement, you should:

- Give the Released Client a Disclosure of Representation in Trading Services form and a Disclosure of Risks to Unrepresented Parties form confirming that going forward, the licensee would be dealing with them as an unrepresented party.
- Encourage the Released Client to seek independent representation.

You can offer the Released Client a referral to another licensee. However, it is up to the Released Client to decide whether they want to be represented in the transaction and by whom. If the Released Client chooses to remain unrepresented, you may work with them as an unrepresented party.

However, you should consider the risks of working with a Released Client as an unrepresented party:

- A dissatisfied buyer may allege that the licensee still acted as though they were in an agency relationship.
- Alternatively, a dissatisfied seller client may allege that the licensee still acted as though they were in an agency relationship with the unrepresented buyer.
- Either party may allege that you shared their confidential information with the other party.

Module Three: Disclosures

Module Three: Disclosures

ONE: OVERVIEW

This module is divided into seven focus areas to make it easier for you to understand the types of disclosures you are required to make, and how to make the required disclosures. By the end of this module you will be able to:

- Discuss disclosures with your clients;
- Understand what your disclosure obligations are;
- Recognize which disclosures must be made in a form approved by BCFSA;
- Identify which disclosures can be made in any written form; and
- Understand, which disclosures can be made in any form.

A) Resources

In this module, you will use the following resources:

- Knowledge Base; and
- BCFSA approved forms.

TWO: INTRODUCTION TO DISCLOSURES

In this Module, you will explore some of the disclosure requirements set out in *RESA* and the Real Estate Services Rules:

- Disclosure of interest in trade;
- Disclosure to seller of expected remuneration;
- Agreement regarding conflicts of interest between clients;
- Disclosure of remuneration;
- Disclosure of material latent defects; and
- Disclosure of material information.

Remember that some of the required disclosures that must be made on a mandatory form such as the Disclosure of Representation, the Disclosure of Risks Associated with Dual Agency, the Agreement Regarding Conflicts Between Clients, and the Disclosure of Risks to Unrepresented Parties were already covered in Modules One and Two.

Often, consumer complaints to the BCFSA and lawsuits against licensees indicate the consumer felt she or he was being "kept in the dark" by the licensee, either intentionally or not. As a result, the consumer felt unable to make the best decisions possible. By fulfilling your disclosure obligations in a timely and meaningful way, you reduce the risk of consumer complaints and lawsuits down the road. When you make these disclosures this also ensures that you are being transparent with your clients.

Disclosure is important. The disclosure obligations you will explore in this module are mandatory. As you move through the module, you will learn why these disclosures are so important to you, and your clients. You will learn how to make effective disclosures and manage the risks associated with those disclosures.

Ethical Consideration: It is not enough to just have a consumer or client sign the required disclosure. You need to ensure that they fully understand what they are signing and how it will impact them and the transaction.

THREE: DISCUSSING DISCLOSURES WITH YOUR CLIENTS

Mandatory disclosures do more than advise consumers about important facts (such as when a licensee is selling their own property). They also provide consumers an opportunity to make an informed decision about how to proceed with a transaction based on the information provided. That is one of the reasons why disclosures must be made in a timely manner. While the Real Estate Services Rules outline specific circumstances in which a disclosure is required, any time you feel your client may benefit from information about a transaction and/or your role in it, it is always advisable to err on the side of caution and disclose that information early and often.

Examples of the kinds of circumstances when disclosures must be made to clients:

- Before an agreement is entered into (e.g. interest in trade; remuneration); and
- As soon as possible after you become aware of some fact (e.g. material latent defect, material information).
- Ethical Consideration: regarding acting in the clients best interest and never preferring the interests of yourself over those of your client

In addition to disclosing information to a consumer, you are obliged to ensure that the consumer understands the information being disclosed. They may need help understanding the language used in the form, potential conflicts that could be created as a result of the disclosure, and what alternatives they may have if the disclosure leads to a course of action they are not comfortable with.

With clients, at the outset of your agency relationship, you should inform them that in addition to the representation disclosure, there are other potential disclosures that may be required as things progress. You should tell your client that all disclosures will be made in writing to protect their interests and encourage your clients to ask questions about any disclosures you provide.

Every listing—and every client—is unique. It is a good practice to make sure you are familiar with your client's needs and understand what is important to them. Ask your clients if there are any issues you should be aware of, and be sure to document the conversation.

FOUR: DISCLOSURE OBLIGATIONS

A) Understanding your obligations under *RESA*

As a licensee, you must be fully aware of your disclosure obligations under *RESA* and the Real Estate Services Rules. You must understand the requirements of different kinds of disclosure, and know how to apply them correctly. The importance of proper, timely disclosure cannot be overstressed. Know how to apply them correctly. The importance of proper, timely disclosure cannot be overstressed.

When no specific format for the disclosure is required, it is always prudent to get written documentation of the disclosure to verify that it was not only made, but that the disclosure provided all the required information under the Real Estate Services Rules.

B) Failing to make mandatory disclosures

If you fail to fulfill your various obligations to disclose in accordance with the Real Estate Services Rules, you run the risk of a complaint, being investigated and subsequent discipline if you are found to have committed professional misconduct.

As you read onwards, keep in mind a very simple mantra: "A fully informed consumer is a better protected consumer".

When in doubt: Disclose, Disclose, Disclose.

Ethical Consideration: What if I did not disclose when I was supposed to? A late disclosure is better than no disclosure but you will still be offside and could be subject to discipline.

FIVE: DISCLOSURES THAT MUST BE MADE ON BCFSA FORMS

A) Disclosure of interest in trade

The Disclosure of Interest in Trade form is used any time a licensee, associate of the licensee (an associate is defined at the bottom of this section), directly, or indirectly acquires or disposes of real estate. Disposing of real estate includes both selling and leasing a property. An indirect acquisition or disposition can occur when an associate of the licensee is purchasing, selling or leasing real estate and the licensee is providing real estate services to the associate. This disclosure must be made prior to entering into any agreement with the consumer on the other side of the transaction.

Ethical Consideration: Talk about the optics of you acting on your own behalf. Transparency is key, think about hiring another real estate licensee to represent you.

The purpose of the disclosure is to ensure that any consumer on the other side of the transaction is aware that you, or your associate with your assistance, has an expertise in real estate transactions that they may not possess. This information allows the consumer to consider what your intention with the real estate is, and ensures they have an opportunity to seek assistance from an independent licensee or lawyer to protect their own interests.

When making this disclosure, you must use the Disclosure of Interest in Trade form required by BCFSA. You must indicate the name of the person to whom the disclosure is being made, your name and the name of the associate who may be entering into the transaction, the amount of remuneration being earned and who will receive it. The form must also indicate, for any acquisition, if the property is being held for personal use or being resold and if the resale has been negotiated, the terms of that resale. For the disposition of the real estate, you only need to indicate whether you or your associate is the owner or tenant of the real estate. This form must be signed by your managing broker.

You should be aware that your Real Estate Errors and Omissions Insurance Indemnity Plan excludes coverage for licensees when they are either buying or selling real estate and are representing themselves.

"associate in relation to a licensee means" a person who is any of the following:

(a) in the case of an individual licensee,

- (i) a spouse or family partner of the licensee,
- (ii) a trust or estate in which the licensee, or a spouse or family partner of the licensee, has a substantial beneficial interest or for which the licensee, spouse or family partner serves as trustee or in a similar capacity, or
- (iii) a corporation, partnership, association, syndicate or unincorporated organization in respect of which the licensee, or a spouse or family partner of the licensee, holds not less than 5% of its capital or is entitled to receive not less than 5% of its profits;

(b) in the case of a brokerage that is a corporation or partnership,

- (i) a director, officer or partner of the brokerage,
- (ii) a shareholder of the brokerage who holds more than 10% of the voting shares of the brokerage,
- (iii) a trust or estate
  - (A) in which the brokerage, or a director, officer or partner of the brokerage, has a substantial beneficial interest, or
  - (B) for which the brokerage, or a director, officer or partner of the brokerage, serves as trustee or in a similar capacity, or
- (iv) a corporation, partnership, association, syndicate or unincorporated organization in respect of which the brokerage, or a director, officer or partner of the brokerage, holds not less than 5% of its capital or is entitled to receive not less than 5% of its profits;

B) Disclosure to seller of expected remuneration

While information about remuneration was disclosed to your seller client in the listing contract at the time they hired your brokerage, your seller client might have forgotten this information because the listing contract may have been signed weeks or months prior, or they might not have actually understood how the commission rate outlined in the service agreement is converted to an actual dollar amount based on an offer they have received. The disclosure is most meaningful when given in context, i.e., when offers are being considered. This disclosure addresses this by requiring an additional disclosure at the time an offer is received.

While not every transaction expense can be anticipated, expenses around the remuneration being earned by your brokerage who has listed a property, and the amount that will be paid to a cooperating brokerage (who is representing the buyer) can provide valuable insight to your seller and assist them in negotiating a deal that is favourable to them. The disclosure ensures that such transparency is practiced effectively and consistently. By requiring this disclosure to accompany any offer that you present to your seller client, the seller will also be informed of the personal benefits to the brokerage (i.e., remuneration) at the time they are deciding on how to respond to an offer.

This disclosure must be made on the form prescribed by BCFSA, and must include information on every offer, and counteroffer from the buyer. This information includes:

- The amount being paid to your brokerage;
- The amount being paid to the cooperating brokerage;
- The amount being retained by your brokerage; and
- The amount of any remuneration you might receive or anticipate receiving other than commission paid by the client.

Additionally, you are required to provide the dollar figure on the form, not the percentage of the sale price that is often used in a service agreement. Providing the dollar figure will make the disclosure much more transparent for the seller to understand.

You must present this form to your seller client prior to them entering into any contract with a potential buyer. It is important to explain the form to your clients and ensure that they understand the disclosure.

This form must be retained in the brokerage file.

SIX: DISCLOSURES THAT MAY BE MADE IN ANY WRITTEN FORM

A) Disclosure of remuneration

RESA defines remuneration as “any form of remuneration, including any commission, fee, gain or reward, whether the remuneration is received, or is to be received directly or indirectly.” Remuneration includes commission payments, referral fees, gifts, discounts on future purchases or services, etc. The Real Estate Services Rules seek to ensure that the remuneration of brokerages and licensees is transparent to the consumer.

Ethical Consideration: Material information must always be disclosed to your client. This might not always be something as obvious as a referral or commission you may be receiving. Make sure to have open discussions with your client about what material information means to them.

Your clients should know and understand who will be paying you and how much. It is recommended that, before entering a relationship with a client to provide her or him with trading services, you first have an honest conversation about how you will be paid. This conversation is particularly important for clients who have not worked with a licensee before.

Before your buyer clients make an offer to purchase, you must disclose in writing the portion of the commission your cooperating brokerage expects to receive from the listing brokerage. Because of the principal and agent relationship, you have fiduciary obligations to your client, including an obligation to disclose any remuneration received from someone other than the client. If, in the process of representing a client, you expect to receive remuneration, directly or indirectly from someone other than your client, you must promptly disclose this to your client.

If, however the person on whose behalf you are acting is not a client, but is an unrepresented party (remember the distinction between client and an unrepresented party as discussed in Module One) you have no requirement to disclose remuneration. You don't act on behalf of an unrepresented party—you provide information to an unrepresented party but you do not owe fiduciary duties to an unrepresented party. However, you still have an obligation to act honestly with respect to that unrepresented party.

RESA states that, "a managing broker, associate broker or representative is not entitled to and must not accept remuneration in relation to real estate services from any person other than the

brokerage in relation to which they are licensed." In other words, a licensee must not accept remuneration from anyone other than his or her brokerage. That's why referral fees, bonuses, etc., must always be paid to your brokerage and not to you directly.

The disclosure must include the source of the remuneration, the amount of the remuneration (or the likely amount and method of calculation if the figure is not known), and any other relevant information. The disclosure must provide the total amount being earned by the brokerage, not just the amount you will receive after brokerage fees are paid. Since there is no mandatory form, ensure that the written disclosure is easy for your client to understand. You are encouraged to use the form provided by BCFSA.

Remuneration from a party other than a client can be disclosed in the service agreement and/or in a record (other than an agreement giving effect to a trade in real estate) that is separate from the service agreement. This means that while a disclosure of remuneration can be made in a listing contract or service agreement, the disclosure of remuneration cannot be made in a contract of purchase and sale, because that is an agreement giving effect to a trade in real estate. BCFSA has created a Disclosure of Remuneration – Trading Services form that you may use to fulfil this obligation.

The Real Estate Services Rules contain this disclosure requirement because a key fiduciary duty of an agent is to avoid conflicts of interest. Clearly, when someone other than the principal is providing the agent with remuneration, there is a possibility that the agent's conduct will be influenced by the source of that remuneration. If the client is aware of the conflict and consents, the agent may proceed to act. Otherwise, the agent must remove himself or herself from the conflict of interest and not accept the remuneration from the third party.

A copy of the disclosure must be provided to your managing broker and retained in the brokerage file.

B) Disclosure of material latent defects

When transacting in real estate, there are two types of defects to be aware of, patent defects, and latent defects. Patent defects are facts that are visible to the eye, or which are necessarily implied by something which is visible to the eye, and which the purchaser should have discovered by a reasonably careful inspection of the property.

Examples of patent defects could include:

- A mouldy wall due to leaking pipes; and
- Water stains on the ceiling.

Any patent defects are typically discovered during a viewing of the property, or through a subsequent inspection by a property inspector. As a licensee working with a buyer, you should discuss patent defects to ensure that the defects have been noted by the buyer and then they can decide if they want to investigate the cause of the defects or the costs to remedy the defects.

While there is no obligation for you or your seller to disclose the existence of patent defects, you should understand how they differ from latent defects.

Material latent defects are defined as a defect that cannot be discerned through a reasonable inspection of the property including a defect that renders the real estate:

- Dangerous or potentially dangerous to the occupants;
- Unfit for habitation; or
- Unfit for the purpose for which the party is acquiring it if:
  - The party has made the purpose known to their licensee; or
  - The licensee is otherwise aware of the purpose.

A material latent defect additionally includes:

- A defect that would involve great expense to remedy;
- A circumstance that affects the real estate in respect of which a local government or other local authority has given a notice to the client or the licensee, indicating that the circumstance must or should be remedied;
- A lack of municipal building permits and other permits respecting the real estate.

As a licensee representing a seller, you must disclose in writing, to the buyer, all known material latent defects respecting the seller's property, promptly and before any contract is entered into, if the defect has not already been disclosed, in writing, by the seller.

The general rule regarding the sale of property is "caveat emptor" (let the buyer beware) and buyers are under a general duty to inspect the property for defects before entering into a purchase agreement, or to make provision for inspection in the agreement. However, an inspection is often not sufficient to detect certain deficiencies in the product that can only be discovered through destructive testing or other means that a seller could not reasonably be expected to allow under normal conditions. For example, wood beams and interior brickwork often cannot be fully assessed without destructive testing, and it would be unreasonable for the seller to allow the buyer to remove drywall or dismantle structures.

Due to the onerous consequences of "caveat emptor" (buyer beware), buyers should be encouraged to have properties they are considering purchasing inspected by qualified professionals.

When representing a seller, you are not required to disclose a known material latent defect to a buyer if the seller has already disclosed all known material latent defects, in writing, to the buyer. For example, disclosing a material latent defect on the Property Disclosure Statement (PDS) may satisfy the requirements of the Real Estate Services Rules, as long as that disclosure is provided prior to entering into any agreement giving effect to a trade in real estate.

The Real Estate Services Rules provide that if your client instructs you not to disclose the material latent defect, you must refuse to provide further trading services to the client in respect of the trade in real estate.

Ethical Consideration: Remember that you have an obligation to follow your client's ***lawful*** instruction. If a client gives you an instruction that is unlawful or may be contrary to your brokerage's policies, you need to consider whether you will continue working with that client.

Conversations around material latent defects should occur at the outset of your agency relationship. Outlining the obligations right away will eliminate any concerns that may arise if a material latent defect is identified. Your seller client should also be aware that any defect that is discovered by you, whether through documentation or, a property inspection from a buyer who then does not proceed with the transaction, must also be disclosed to any potential buyers who are considering making an offer.

Some consumers believe that if you will not provide services without the required disclosure, another licensee might. Advising your client that all licensees are bound under the Real Estate Services Rules to make the same disclosures may resolve the misunderstanding.

SEVEN: DISCLOSURES THAT MAY BE MADE IN ANY FORM

A) Disclosure of all known material information

The Real Estate Services Rules provide a list of duties all licensees owe to their clients. On that list is an obligation to disclose all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate.

You are responsible to ensure that your client has all the information they need about the property, the real estate services you are providing, and the transaction to ensure they can make a fully informed decision about how to proceed.

This information may include facts you discover about a property that your client is considering acquiring such as zoning issues that may affect the property, unpermitted work, or information you obtain about the party on the other side of the transaction that may impact their ability to proceed. Material information, can however, also include any referral fees you may be paying out to another brokerage or third party. It is very important for you to conduct the appropriate due diligence on the property. Information about the property may not only relate to your disclosure obligations but are important considerations when drafting a contract.

Even though the disclosure of all known material information is not required to be writing or in any particular form, it is important for you to document all disclosures that are made so that should an issue arise, you are able to verify that the disclosure was made.

EIGHT: RISK MANAGEMENT IN COMMERCIAL TRANSACTIONS

A comprehensive list of representations and warranties from the seller/landlord, if included as part of the Commercial Contract of Purchase and Sale ("CCPS") or Offer To Lease ("OTL"), gives the buyer an ability to bring an action in court in the event that the seller/landlord breaches any of the representations or warranties made. The representations and warranties that should be included will vary depending on the specific transaction, and the buyer, along with their real estate professional, should seek to make such representations and warranties as extensive and detailed as possible. Where aspects of the transaction go beyond the mere purchase/lease of real estate, an example being the associated purchase and sale of a business or commercial undertaking, further representations and warranties will be required to protect the buyer/tenant, and the buyer/tenant should be encouraged to seek additional legal advice.

Where possible, you should not rely solely on the seller's/landlord's representations and warranties to mitigate the risk and should also perform detailed due diligence searches. In the CCPS/OTL, the seller/landlord should provide that satisfactory due diligence search results be a condition precedent to the buyer's/tenant's obligation to complete the transaction.

Buyers of commercial property should consider performing additional due diligence, including:

- Ordering and reviewing title searches;
- Ordering and reviewing copies of registered plans, legal notations and charges;
- Confirming whether a survey exists or whether one should be ordered;
- Considering a site inspection or building inspection by a qualified inspector;
- Ordering and reviewing a BC Assessment search to confirm the appraised value of the land (current and historic);
- Ordering and reviewing a property tax and utilities search;
- Researching zoning, permits, business licences, and bylaws with the local municipality;
- Conducting an archaeology registry search (if applicable);
- Inquiring with the Agricultural Land Commission (if applicable);
- Conducting a fire department and health department search;
- Conducting BC Safety Authority searches (gas safety, electrical safety, elevating devices, safety, and boiler and pressure vessels);
- Conducting an online contaminated site registry search;
- Considering carrying out an environmental preliminary site investigation – Phase One report, and determining whether a Phase Two report and/or detailed site investigation is recommended;
- Obtaining and reviewing copies of statements of operating expenses and revenues;
- Obtaining and reviewing a copy of the rent roll, copies of all leases (watch for an RFR or Option to Purchase) and copies of estoppel certificates from all tenants, if possible;

- Obtaining and reviewing copies of all material contracts (e.g., management contracts, service contracts, supply contracts, machinery and equipment contracts, construction and landscaping contracts, and cost sharing contracts);
- Obtaining and reviewing copies of as-built drawings, specifications and project documents;
- Obtaining and reviewing copies of engineering certificates or materials regarding development and soil condition;
- Obtaining and reviewing copies of licences, development permits, building permits, occupancy permits and servicing agreements;
- Obtaining a list of equipment to be conveyed so that a bill of sale can be prepared;
- Confirming whether there are any unregistered leases, licences, easements or rights-of-ways affecting or appurtenant to the property;
- Reviewing any recent appraisals;
- Conducting a bankruptcy search;
- Conducting a search of the court registry and bailiff's/sheriff's office;
- Conducting a search of the Personal Property Registry;
- Conducting a search of the Corporate Registry to ensure that a corporate seller (if applicable) is in good standing;
- Investigating the need to obtain a special resolution of the shareholders of a corporate seller (if applicable) if the property constitutes substantially all of the assets of the corporate seller; and
- Conduct a LOTR search.

This list is not exhaustive, and the additional due diligence searches that should be performed will vary depending on the needs of the specific transaction.

Module Four: Contracts

Module Four: Contracts

ONE: OVERVIEW

This module is divided into nine focus areas which will cover the varying types of contracts you will use throughout a trade in real estate. These contracts include service agreements, contracts to facilitate property sales, fee agreements and assignment contracts. Additionally, this module will speak to your document retention requirements. By the end of this module you will be able to:

- Understand service agreements including the multiple listing contract and buyer's agency exclusive contract and the use of fee agreements when one party is unrepresented;
- Understand what must be included in a contract of purchase and sale, and your role in drafting the contract;
- Understand what an assignment of a contract of purchase and sale is, and understand the notice required for assignments as described in the Regulation; and
- Recognize your brokerage's document retention requirements including what documents you must ensure you provide to your brokerage and when.

A) Resources

In this module, you will use the following resources:

- Knowledge Base.

TWO: INTRODUCTION TO CONTRACTS

There are two main categories of contracts you will encounter when working with clients who are involved in a real estate transaction: Agency contracts (listing/exclusive buyers) and the contract of purchase and sale.

Service agreements are between your brokerage and the client you are representing on behalf of your brokerage. Written service agreements are required under the Real Estate Services Rules when representing sellers, unless waived by the seller client, anytime you create an agency relationship with a seller. This agreement is in addition to the mandatory Disclosure of Representation in Trading Services form which was discussed in Module One.

Contracts effecting a trade in real estate such as contracts of purchase and sale, are contracts drafted and negotiated between a buyer and seller of a property. While you as a licensee play a part in the drafting and negotiating of the terms of the contract, neither you, nor your brokerage are a party to that agreement.

Any contract you facilitate the drafting of, whether your brokerage is a party to it or not, must be drafted with reasonable care and skill as per the Real Estate Services Rules. When you are unsure how to draft an effective contract or even a specific term in the contract, you should speak with your managing broker.

THREE: MULTIPLE LISTING CONTRACT

A) The purpose of the MLS Contract

As outlined in Module One, written service agreements between you and your clients are required, unless waived by your client. The Multiple Listing Contract is a standard form service agreement used by most trading services licensees when entering into an agency relationship with a seller client.

The MLS contract is between the seller and the real estate brokerage, listing the property for sale. It outlines the terms of the listing, including the time period, the listing price, the parties to the listing, the address and legal description of the property to be sold, the commission to be paid and obligations of the seller and the listing brokerage.

There are different versions of the Multiple Listing Contract available to use depending on whether your brokerage practices designated agency or brokerage agency. It is important to use the right contract to reflect the way in which your brokerage's services are offered. The real estate services you provide to a seller are usually set out in the schedule A of the Multiple Listing Contract. These represent contractual promises made to your client, and should be reviewed with your client as well as with your managing broker as you are providing these services on behalf of your brokerage.

B) Service agreement does not replace the Disclosure of Representation in Trading Services Form

The Disclosure of Representation in Trading Services, as noted in Module One, is a mandatory disclosure document created by BCFSA that outlines whether you will or will not be entering into an agency relationship with a consumer but does replace the requirement to create a contractual relationship with the client using the MLS contract or other service agreement. This disclosure is provided to all consumers who you may be assisting including buyers and unrepresented parties.

Service agreements (which are contracts) between your brokerage and a client include listing contracts, and buyer's agency contracts. These agreements are entered into once you and your client agree that you are going to create an agency relationship and work together and outline the obligations you, your brokerage and your client have under the contract.

If you are to provide trading services to an owner of real estate by offering that property for sale, a written service agreement must be entered into, unless waived by the client. The agreement must be executed prior to any real estate services being provided and must be signed by an authorized signatory of your brokerage and your client.

The service agreement must also include the following information:

- Your client's name, your name, and your brokerage name;
- The address of the property being listed;
- The date on which the service agreement begins and ends;
- A general description of the services being provided by your brokerage;
- The amount of remuneration being earned by the brokerage and the circumstances in which it will be payable;
- The amount of the total remuneration being paid to a cooperating brokerage if there is one;
- If there is no cooperating brokerage, the amount to be retained by your brokerage; and
- Provisions respecting use and the disclosure of your client's personal information

Should an amendment to the service agreement ever be needed, the changes must be in writing and signed by your brokerage and your client.

If your brokerage and your client enter into a service agreement, either the original or a copy of it must be delivered promptly to your brokerage. You must also submit a copy of the agreement to your client.

Before drafting a service agreement, it would be prudent to meet with your client to determine what services they are looking for, and what, if any concerns they want to ensure are addressed in the agreement (e.g., helping the client find a property that was never flagged as a grow-op). In doing this you can draft a service agreement that reflects your client's best interests and ensure that the services you are providing are tailored to them.

In some instances you, your brokerage and your client may deem it necessary to modify the service agreement because the nature of the services being offered have changed, new services are being added, or some services contracted for are being eliminated. Whenever there is a change to the agreement, it must be amended in writing and signed by all parties.

C) Remuneration

One of the key elements of the service agreement will be the remuneration being charged for the services you are rendering on behalf of your brokerage. It is important for you to have discussions pertaining to remuneration before any agreement is signed. Your client must understand how much they are being charged, and as a prudent licensee, you should also identify any potential or anticipated costs they may incur, such as for a property inspection, taxes or for legal fees, before the service agreement is signed.

There is no standard amount of remuneration that is charged in the industry. Advising your client that such a standard exists could put you offside of federal competition laws. Each client is free to negotiate their commission with the brokerage (through you).

D) Electronic Signatures

Electronic agreements and the use of signatures written onto an electronic tablet can create enforceable agreements, whether these are service agreements (e.g. a listing agreement, rental property management agreement) or contracts of purchase and sale of real estate, so long as all of the essential elements of a contract are in place (e.g. the parties to the contract are known, the terms of the contract are clear, and the parties have agreed to those terms).

The *Law and Equity Act* requires that in order for a contract of purchase and sale for real estate to be enforceable it must, in most circumstances, be in writing and signed by the party to be charged (the person against whom you are trying to enforce the contract). The courts have supported the view that, while the traditional form of writing is a paper document, the definition does not preclude other forms of expression, including electronic communications.

E) Inducement representation as to service agreements

An inducement representation is a promise you make to a potential party to a service agreement that you will engage in some act or provide some service so as to convince them to continue with or enter into a service agreement with you and your brokerage, such as an offer of a gift card to a consumer if they decide to use you as their licensee. You must not make an inducement representation unless at the time you deliver a statement to the consumer, you clearly set out the details of the inducement representation and:

- It is signed by you and the consumer you are inducing; and
- Sets out all the details of the inducement representation; and
- If a service agreement is entered into after the inducement is made, it must record the inducement representation.

FOUR: BUYER'S AGENCY EXCLUSIVE CONTRACT

A) The purpose of the buyer agency contract

The Real Estate Services Rules require written service agreements when selling a property, however, there is no Rule requiring one when assisting a buyer with the purchase of a property. While not mandatory, buyer agency agreements allow you to be clear and transparent with your clients about what services you and your brokerage will be offering, how remuneration will be determined and what amount will be earned by the brokerage.

Buyer agency agreements also allow for a buyer client to include terms that are important to them. These terms may reflect legal instructions requiring you to look into issues that may impact your client's interest in a property, such as deaths on a property, or whether a property was a former grow-op. A client may also want to include terms that limit their relationship with you to a certain geographic area in the province, allowing them to work with another licensee in a different area at the same time.

Like listing agreements, buyer agency agreements are service agreements, and protect you, the brokerage, and your clients. While there is no mandatory content that must be included in a buyer agency agreement, your managing broker should have approved the services you are proposing to offer on behalf of the brokerage. You should also note that regardless of whether a buyer agency agreement is entered into or not, your obligations to your clients under the Real Estate Services Rules must still be fulfilled.

B) Remuneration

As with a listing agreement, you should have discussions pertaining to remuneration before any buyer agency agreement is signed. Your client must understand under what circumstances they may be responsible for paying remuneration, and how much they will be charged.

There is no standard amount of remuneration that is charged in the industry. Advising your client that such a standard exists could put you offside of federal competition laws. Each client is free to negotiate their commission with the brokerage (through you).

FIVE: SELLER'S FEE AGREEMENT

The Seller's Fee Agreement acknowledges no agency representation between the seller and the brokerage and describes how the licensee will receive payment from the unrepresented seller. Sometimes people use a similar agreement for buyers.

When acting as a designated agent for a buyer in this situation, you should ensure that the seller is made aware that your Brokerage acts for the buyer and not the seller and that the payment of a fee by the seller to the Buyer's Brokerage does not create an agency relationship between the Buyer's Brokerage and the seller or between you and the seller. The Disclosure of Representation in Trading Services and the Disclosure of Risks to Unrepresented parties would also need to be provided to the unrepresented seller.

SIX: COMMMERCIAL CONTRACT OF PURCHASE AND SALE

A) Basics of contract law

Chapters Ten and Eleven in the Real Estate Trading Services Licensing Course Manual explored the law of contract and specifically contracts for real estate transactions. For the purposes of this module, it would be helpful to review:

- The essentials of a binding contract (chapter ten);
- The differences among a "void", "voidable" and "unenforceable" contract (chapter ten);
- The ways in which a contract can be terminated (chapter ten);
- The technical requirements of a CPS (chapter eleven); and
- How to waive a condition precedent from a CPS (chapter eleven).

As a licensee, you must be familiar with the form of contracts used in various circumstances and be knowledgeable about how and when to use the necessary clauses. You should carefully read the standard form Commercial Contract of Purchase and Sale ("CCPS") to ensure that you understand each and every term, so that you would be able to explain it to a client. Remember, you have an obligation to act with reasonable care and skill and thus you should recognize your limitations and refrain from negotiating or drafting contracts beyond the scope of your knowledge and experience.

B) Purpose of the CCPS and the OTL

Unlike the service agreements discussed above, neither you, nor your brokerage, are a party to a Commercial Contract of Purchase and Sale ("CCPS"). The Commercial Contract of Purchase and Sale ("CCPS") is a contract between a seller and buyer involved in the sale and purchase of real estate. The contract outlines all aspects of the transaction, including the price, the terms and conditions, the dates, the inclusions and exclusions, the deposit and other required information.

The purpose of the CCPS is to ensure all essential terms of the agreement between the buyer and seller are clearly set out, so the contract will be in accordance with common law and statutory requirements, and the contract will satisfy disclosure requirements set out in the *Real Estate Services Act* and the Real Estate Services Rules.

The CCPS is typically completed by the buyer's licensee based on the terms and conditions requested by the buyer. Once completed, it is presented to the seller by either the buyer's or the seller's licensee.

C) How does a contract of purchase and sale differ from a lease?

A contract of purchase and sale is an agreement in which property is transferred from a seller to a buyer for an agreed upon price. A lease is the written agreement under which the property owner allows the tenant to use the property for a period of time in exchange for the payment of rent. Both are contracts yet serve different purposes.

In real estate, there are three standard forms that are commonly used for these contracts. They are the Contract of Purchase and Sale (commonly used for residential properties), the Commercial Contract of Purchase and Sale (specifically for commercial properties) with accompanying Addendum/Schedules and the Offer to Lease with attached Addendum/ Schedules. Our focus will be primarily on the CCPS and the OTL and their accompanying documents. We will explore both documents further throughout this module.

D) Understanding the terms of the standard form contract

It is important that you completely understand what all the terms on the contract you are using mean so you are able to properly explain the terms to your client. This contract has pre-drafted terms which allow you to fill in information specific to your client such as their name, address, and the address of the property they are making an offer on.

Some terms are drafted in language that may be difficult for your client to understand. Before drafting an offer with your client, if you are unsure as to the meaning of language used in the contract, speak with your managing broker to ensure you are providing the right explanation to your client. Your client must understand everything on the contract as it is the only way for them to give informed consent to enter into that agreement and to know what they are being bound to.

You must ensure that contracts address all material issues to ensure that there is no confusion as to the nature of the contractual terms, and to make certain that all contracts are valid and enforceable. BCFSA reminds you that the parties are relying on you to ensure a contract is properly executed.

It is important to remember, as you complete the CCPS, to:

- Make sure that the signed CCPS reflects unambiguously the terms and conditions to which the parties have agreed;
- Ensure that all applicable clauses are included in the body of the contract to address all issues of importance to the parties. Brevity is not necessarily a virtue here, as accuracy and certainty are the goals. Please use the suggested clauses in the Knowledge Base, where applicable;

- Ensure that all required information regarding the identity of the buyers and the sellers is recorded on the CCPS;
- Ensure that the sellers' residency is recorded accurately and is current; and
- Make sure that you have accurately indicated who the licensee(s) is/are for each party (or indicate no licensee).

E) Your role in drafting the contract

One of your most important functions is to prepare an enforceable contract of purchase and sale that reflects the agreement between the seller and buyer. From a technical perspective, there are many considerations to take into account.

Some examples of how each party could suffer a loss or detriment if the contract is not drafted properly or legally enforceable include:

- The seller could suffer a loss if a contract were not enforceable in a declining market. By the time the seller had to put the property on the market again, the sale price could be lower.
- The landlord could suffer a loss if a lease was not enforceable in a declining market. By the time the landlord offers the property for rent, the rent could be reduced.
- The buyer could suffer a loss in a rising market, if the contract were not enforceable. If the transaction did not complete and the buyer had to look for another property, it would now cost more for a comparable property.
- The tenant could suffer a loss in a rising market if the lease was not enforceable. If the agreement did not complete and the tenant had to look for another property, it may cost more for a comparable property.
- You may also be found to have committed professional misconduct and to have acted contrary to the Real Estate Services Rules, if you fail to draft a legally enforceable contract contrary to the best interest of your client.

There are a number of steps you will need to consider and/or complete prior to drafting the CCPS:

- You must verify that your clients (buyers/sellers) are who they say they are.
  - Prior to drafting the CCPS, discuss with the parties the requirements of the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"). Explain that as a real estate licensee you are required by law to ask for, and verify, their personal information.
  - If the property is owned by a corporation, additional information will be required to verify who the owners of the corporation are.
  - You are required to obtain, record and retain on file the information given which must include proof of identity, birth date and occupation. The information will be recorded on the Individual Identity Information Record and kept on file.
  - The Proceeds of Crime (Money Laundering) and Terrorist Financing Act also requires the buyer's licensee to complete a report for all funds they receive during the real estate transaction. Therefore, if the buyers provide for a deposit on the CPS, a Receipt of Funds Record should be completed at the time the funds are received. The information collected will be retained on file by the brokerage for five years.
- Determine whether the buyers require financing for the purchase of the property they are considering.
- When representing a buyer, at the time you begin providing them trading services you will have presented to the buyer, the Disclosure of Representation in Trading Services form. It is a good idea, early on in the relationship, to provide them with a blank CPS to review so that they will be familiar with the forms when you begin to draft the offer with them.
- Then, at the time of drafting the CCPS:
  - Discuss with the buyers the purpose and content of the contract, and why it is important to conduct due diligence on the property;
  - Explain, in general, the process of writing and negotiating an offer, and advise the buyers that once accepted, the terms of the offer will become the terms of an enforceable contract;
  - Review the legal requirements and commitments the buyers will be making upon entering into a contract;
  - Review the FINTRAC form and the buyers' information; and
  - Make sure that everything the buyers want is written into the CPS. Have you discussed the subjects? Have you discussed the total closing costs of the transaction?

Using a standard form contract can help you in creating an enforceable contract as it includes pre-drafted terms that have been vetted through lawyers to ensure they are legally enforceable. You can also use additional pre-drafted subjects, or condition precedents drafted by BCFSA which are available to all licensees. Like the standard form contracts, these terms have been drafted

by lawyers to ensure that they are legally enforceable. However, it is your obligation to carefully consider the specific situation and ensure that the appropriate clause is used.

Should you need to draft a custom term or subject clause it is always advisable to discuss this with your managing broker or seek legal advice. Some words or sayings that are used colloquially in our everyday language may have a different legal meaning. Also, terms that are vague and confusing may not be enforceable and could put your client at risk.

SEVEN: ASSIGNMENT OF THE CONTRACT OF PURCHASE AND SALE

A) What is an assignment

An assignment is the transfer of benefits, interests and rights under a contract from one party (the assignor) to another party (the assignee).

In BC, without a contractual term to the contrary, contracts of purchase and sale ("CPS"), lease agreements, and third-party agreements are assignable without the consent of the other party to the contract. This may not apply to pre-sale contracts. The most common use of assignment in the real estate context occurs when a buyer, having entered into a CPS with a seller, transfers their benefits, interests and rights under the CPS to a third party, prior to the completion date.

In BC, two types of assignment are enforceable: legal assignments (also known as absolute assignments), and equitable assignments.

To qualify as a legal assignment:

- The assignment must be absolute, meaning that it is unconditional;
- The assignment must be in writing;
- The assignment must be signed by the assignor; and
- Express written notice of the assignment must be given to the other party to the contract.

Legal, or absolute, assignments require that written notification is provided to the other party to the contract. However, without a contractual term to the contrary, there is no requirement that the other party provide their consent to the assignment.

Assignments that do not fulfill the statutory criteria set out above, are known as equitable assignments. As a result, the only way equitable assignments may be enforced is by commencing a lawsuit against all parties to the contract, including the original parties and the assignee. Given the significant expense of litigation, it is important for you as a licensee to protect your client to ensure that all the requirements necessary for a legal assignment are met so that the assignor need not be involved in the litigation.

B) Regulation regarding assignments and the Notice to Seller Regarding Assignment Terms

The Real Estate Services Regulation requires that standard assignment terms ("Standard Assignment Terms") be included in every CCPS prepared by a licensee, except where the client

provides express written instructions to the contrary.

Unless otherwise instructed in writing by your buyer client, all purchase contracts you draft must include the following terms before the offer is presented to the seller or their licensee:

- The contract must not be assigned without the written consent of the seller; and
- The seller is entitled to any profit from an assignment of the contract by the buyer o**r any** subsequent assignee.

If you are using the standard form Contract of Purchase and Sale from BCREA the provisions above are included in section 20A of the contract. There will be further information later in this module on required terms related to assignments.

When you provide trading services to or on behalf of a buyer, or you are representing yourself in the purchase of real estate, and you do not include the assignment terms in the offer, you must include a Notice to Seller Regarding Assignment Terms which may be delivered directly to the seller or their licensee. This notice must be presented along with the contract and must:

- Advise the seller to obtain independent professional advice before signing a contract that does not have the required assignment terms as noted above or the terms have been altered;
- Be on the required Notice to Seller Regarding Assignment Terms form provided by BCFSA; and
- Must be separate from and not included as part of the contract.

The required notification to the seller when you do not include the required assignment terms must indicate:

- Whether the contract may be assigned; and
- If the contract may be assigned, it must advise about any conditions on the rights of assignment of the contract and the seller's entitlement to profit resulting from assignment.

The Rules surrounding assignments of contracts for the purchase and sale of real estate do not apply in relation to a contract for the sale of a development unit by a developer under the *Real Estate Development and Marketing Act* ("*REDMA*").

Please read the guideline on the *REDMA* and the legislation for more information on the assignment of pre-sale units.

When acting for a developer in the context of a pre-sale contract, licensees must ensure that that following provision is included in the pre-sale contract:

- Without the developer's prior consent, any assignment of this purchase agreement is prohibited.
- An assignment under *REDMA* is a transfer of some or all of the rights, obligations and benefits under a purchase agreement made in respect of a strata lot in a development property, whether the transfer is made by the purchase agreement to another person or is a subsequent transfer.
- Each proposed party to an assignment must provide the developer with the information and records required under *REDMA*.

In addition, the pre-sale contract must also include prescribed wording notifying assignors and assignees of the various types of information that will be collected from them in the event an assignment is agreed to. Please review *REDMA* for more information on the information a developer must collect.

EIGHT: COMMERCIAL OFFER TO LEASE

A) Essentials of leasing

At its heart, commercial leasing is the law of contracts. All contract law principles apply to the construction, modification, renewal, and interpretation of a commercial lease. Commercial leases are often in place or available for extended terms. Many may involve options to renew, subleases, amendments and/or assignments, which are all related contractual arrangements.

The key object when any of these contracts are being considered and implemented is to clearly define the parties' rights and obligations. Licensees need to ensure that all parties to the agreement are 'on the same page.' The more clearly defined the terms of these contracts are, the less likely disputes are to arise. The parties will also be able to look to their agreement to determine their rights and obligations.

It is a licensee's responsibility to ultimately create a binding and enforceable contract between the parties to the offer. Learning the fundamentals of leasing is of great importance to all commercial licensees, given that tenants and landlords will often seek this service. This is particularly true of commercial licensees who will likely be more involved in leasing early in their career.

B) What is a lease

A lease is the rental agreement of all or portions of a commercial building or land between a landlord and a tenant in a legally binding relationship. The parties to a lease make promises to each other on a number of terms, including length of term, rent obligations and the condition of the premises. Many market factors and building conditions will influence the specific terms agreed upon. This strengthens the need for commercial licensees to understand these dynamics in advising their clients throughout this process. Once a lease is in place, this income provides security over an extended period of time in deriving value in real estate for an owner.

NINE: SUBLEASING

Commercial tenants will sometimes sublease all or part of their leased premises to a subtenant. As a real estate licensee, you may be involved in preparing a sublease or representing a potential subtenant looking to enter into a sublease.

A sublease occurs when a tenant enters into an agreement to rent all or part of its leased premises to another party. In that case, the existing tenant becomes the sublandlord and the new tenant is referred to as a subtenant. When a tenant enters into a sublease, the tenant is still responsible for all of its obligations to the landlord ("called the head landlord") under the original lease ("called the head lease").

In a typical subleasing arrangement, the head landlord is not a party to the sublease and the subtenant is not a party to the head lease. This means that there is no direct landlord-tenant relationship or privity of contract between the head landlord and the subtenant. As a result, neither the head landlord nor the subtenant can enforce their rights under those agreements against the other ("but can do so against the tenant/sublandlord"). This issue may be addressed by an agreement between the head landlord and the subtenant.

Real estate licensees should take care to avoid conflicts of interest when representing subtenants. A real estate licensee can only represent one party in a given transaction: either the head landlord, the tenant/sublandlord, or the subtenant.

Subleases vs. Lease Assignments

Note that a sublease is distinct from a lease assignment. In a typical lease assignment, a new tenant ("sometimes called the assignee") steps into the shoes of an existing tenant ("sometimes called the assignor") and assumes the existing tenant's obligations under the lease.

A lease assignment creates a direct landlord-tenant relationship between the landlord and the new tenant. Depending on the assignment arrangement, the existing tenant might be released by the landlord from any further obligations under the lease. Contrast this with a sublease, where the tenant always remains directly liable to the landlord for the tenant's obligations under the lease,

even if those obligations are the responsibility of the subtenant under the sublease.

In a lease assignment scenario, the rights and obligations of the new tenant ("assignee") will be governed by the existing lease. However, it is important to note that at common law, a lease assignment does not necessarily transfer all of the rights and obligations under the existing lease. A common law lease assignment only transfers those obligations that can be said to "run with the land" or "touch and concern the land". Many key lease obligations do run with the land (for example, covenants to pay rent, pay taxes, repair, insure and restrict use of the premises), while others do not (for example, a tenant's covenant to pay accelerated rent in case of bankruptcy). Additionally, unless the lease provides otherwise, under a common law lease assignment the existing tenant ("assignor") will not automatically be released from its obligations under the lease. Both of these issues are addressed by the parties entering into a contractual arrangement ("usually called an assignment and assumption agreement") in which the landlord and new tenant ("assignee") each agree to be bound by all of terms of the existing lease and, optionally, the landlord agrees to release the existing tenant ("assignor") from its obligations under the lease.

In a subleasing scenario, the rights and obligations of the subtenant are only as provided in the sublease. The subtenant is not bound to the head lease and does not benefit from the sublease. For this reason, the subtenant and sublandlord will want to ensure that the terms of the sublease are consistent with and work in conjunction with the head lease.

Permission to Sublease

At common law, a tenant is permitted to sublease its premises unless the head lease says otherwise. Many, if not most, head leases prohibit subletting without the landlord's consent or impose conditions on sublets, such as the type of subtenant and permitted uses. The head lease may also entitle the head landlord to a fee for considering or consenting to a proposed sublease and reimbursement of the head landlord's related expenses. Real estate licensee representing potential subtenants should review the head lease to ensure that the tenant is allowed to sublease the premises, as well as to determine any conditions of the landlord's consent and that the subtenant's proposed use of the premises is permitted under the terms of the head lease.

Similarly, at common law a tenant is permitted to assign its interest in a lease unless the lease says otherwise ("but subject to the issues discussed above"). Where a lease prohibits subletting but is silent on assignment, a licensee representing a potential subtenant should consider whether a lease assignment is a viable alternative to a sublet.

Key Terms of Subleases

Real estate licensee's reviewing subleases should be aware of the key terms of a sublease:

- **Term:** The term of a sublease must be for ("at least") one day less than the term of the head lease. Otherwise, this is considered an assignment of the lease and not a sublease. In a lease assignment, the tenant gives up all of their rights in the lease and the assignee steps into the shoes of the tenant. A tenant might want to sublease rather than assign if it wants to remain in possession of part of the premises or to move back into the premises at the end of the sublease term.

- **Premises:** What premises are to be subleased? A sublease may be for the entire leased premises or only a portion.
- **Payment of rent and other expenses:** Draft or review these terms keeping the head lease in mind. Since the sublandlord remains responsible to pay all amounts owing to the head landlord under the head lease, the sublandlord will want to ensure that the sublease allows the sublandlord to pass on those expenses to the subtenant.
- **Covenants of the sublandlord:** A subtenant will want the sublandlord to agree to certain covenants in the sublease, including to:
    - Pay all amounts owing to the head landlord under the head lease.
    - Enforce the tenant's rights under the head lease for the benefit of the subtenant (e.g., enforcing the landlord's duty to repair), since the subtenant cannot enforce these rights against the landlord directly.
- **Covenants of the subtenant:** A sublandlord will want the subtenant to agree to certain covenants in the sublease, including not to do anything that would cause a default on the part of the tenant under the head lease.
- **Indemnity:** The sublandlord may require an indemnity from the subtenant against any liabilities arising from the subtenant's breach of its covenants under the sublease. Since the sublandlord is still legally responsible for the tenant's obligations under the head lease, this indemnity may help to protect the sublandlord if the subtenant causes a breach of those obligations. The subtenant may also wish to obtain an indemnity from the sublandlord.
- **Head Landlord Consent:** If head landlord consent to the sublease is required, then the sublease should be subject to the sublandlord obtaining that consent. Alternatively, the sublease may confirm that the head landlord's consent has been obtained ("and the head landlord may even be a signatory to the sublease for that purpose").

TEN: LEASE DEFAULTS AND OTHER BREACHES

Real estate licensees may encounter situations where either landlords or tenants fail to fulfil their obligations under the lease. Common examples include:

- Failure of the tenant to pay rent;
- Failure of the landlord to provide "quiet enjoyment" (i.e. the tenant's right to exclusive possession of the leased premises without interference by the landlord); and
- Failure to repair ("may be either the landlord's or the tenant's responsibility, depending on the lease and the specific repair responsibility").

Any breach of a party's obligations under a lease is a default. However, the lease may also specifically define other events of default (for example, a tenant becoming insolvent or filing for bankruptcy protection). In some cases, a timeline will be set out within which the breaching party can cure the breach before it becomes a default (called a "cure period").

Leases may set out what remedies are available to landlords and tenants in specific situations. Some remedies are also available at common law, which means they do not have to be written into the lease for a party to take advantage of the remedy. Remedies set out in the lease may include specific processes to follow. For example, the default provisions may require one party to give notice of the other party's default and allow a certain amount of time for the defaulting party to remedy their default (i.e., a cure period). These processes must be followed exactly, or else the non-defaulting party may cease to be entitled to the remedy and may be liable for damages ("see the case comment below regarding improper distress by a landlord"). In addition, pursuing a particular remedy may preclude the party from pursuing other remedies under the law. When acting for a party seeking to exercise a remedy under a lease, real estate licensees should advise their clients to obtain legal advice prior to taking steps to exercise the remedy.

Real estate licensee helping a client to purchase a tenanted property should recommend that their client review the existing lease or leases as part of the pre-acquisition due diligence process. This review should include a careful evaluation of the remedies available to each of the landlord and the tenant in the case of a default by the other. Similarly, a real estate licensee acting for a potential tenant or subtenant should recommend that their client review the proposed lease or sublease with an eye to these same issues. While default remedies will typically be biased in favour of the landlord, they should nevertheless fall within an acceptable range consistent with market standards and afford a tenant or subtenant a reasonable opportunity to correct a default.

Some of the most common rights available to a landlord when a tenant defaults or breaches the lease include:

- **Terminating the lease and re-entering the premises (i.e., evicting the tenant)**
  - This remedy is only available if the landlord has the right to terminate under the lease. If not, the landlord may have to apply for a court order to re-enter the premises.
  - Usually combined with suing the tenant for damages for unpaid rent to date and future rent for the remaining term of the lease.

- **Suing for unpaid rent, but keeping the lease alive**
  - — A landlord might want to take advantage of this option if the landlord wants to sue the tenant's guarantor for the unpaid rent. The landlord is usually not able to sue the tenant's guarantor if the lease has been terminated.
- **Re-letting the premises on the tenant's account**
  - — The new tenant's rent payments are credited to the account of the former tenant ("even if the new tenant is paying more rent than the former tenant").
  - — The duration of the new lease cannot exceed the remaining term of the original lease.
- **Distress**
  - — This is when a landlord, under supervision of the court, seizes and sells a tenant's personal property.
  - — There is a specific process that must be followed if the landlord exercises this remedy. If the process is not followed properly, the landlord may be liable for damages.

The lease may provide for additional contractual rights in the event of a tenant default. These contractual rights are only available if they are specifically included in the terms of the lease. Some examples of these additional contractual rights include:

- **"Self-help"**
  - — The landlord may take action to correct the tenant's default and charge back to the tenant any expenses incurred by the landlord in doing so.
  - — Often the landlord will charge an administration or supervisory fee on top of the expenses (e.g. 5% - 20% of the amount of the expenses).
  - — The landlord may be required to give the tenant notice of the default and allow the tenant an opportunity to fix it before the landlord can "self-help".

Accelerated Rent

- — The lease might provide that on default, future rent payable during the term becomes immediately due and payable.
- — Many leases provide for three months' rent to be accelerated on default, though often this remedy is specifically tied to a tenant becoming insolvent because it aligns with certain landlord rights under insolvency legislation.
- — Other leases may provide that all of the rent payable for the duration of the term becomes immediately due and payable on a tenant default.

Loss of Renewal or Extension Options

- — Oftentimes renewal or extension options are conditional upon the tenant not being in default under the lease at the time the renewal or extension option is to be exercised.
- — In other cases, the option is conditional upon the tenant having never defaulted under the lease, irrespective of whether or not the default has

since been remedied. Tenants and real estate licensees representing them should be very wary of provisions of this nature, as they may cause the tenant to lose its negotiated renewal or extension rights due to a very minor or technical default (e.g. paying rent one day late due to a bank transfer issue, etc.).

Some of a tenant's rights where the landlord breaches the lease include:

- **Legal action**
  - A tenant may sue the landlord for damages. For example, if the tenant paid to replace a broken window but it should have been the landlord's responsibility under the lease.
  - A tenant may also apply to court for an injunction ("a court order that requires a party to do some action or refrain from doing some action"). This could be done, for example, to stop the landlord of a strip mall from renting another unit in the mall to a competing tenant because the lease has a non-competition clause.

- **Terminate the lease**
  - This remedy is only available if the default is a fundamental breach of the lease ("where the tenant is deprived of substantially the whole benefit of the lease").
  - If the tenant chooses this option but no fundamental breach has occurred, the tenant may be liable for damages equal to the rent for the remaining term of the lease ("see case comment below").

A lease may include additional contractual rights available to the tenant in the case of a landlord's default (e.g. a tenant "self-help" remedy). However, special rights of this nature are often only available to tenants with substantial bargaining power.

A tenant may be tempted to withhold rent when a landlord is in breach of the lease. However, withholding rent may be extremely risky for a tenant and is not permitted under most leases. In some cases, withholding rent may entitle the landlord to terminate the lease for non-payment. A court could also find that the landlord's actions did not amount to a breach in the first place, and that the tenant is liable for the unpaid rent ("similar to the case comment below") and other damages. If representing a tenant who is considering withholding rent, a real estate licensee should recommend that their client seek legal advice before withholding rent or any other amounts payable under the lease.

ELEVEN: DOCUMENT RETENTION

All brokerages in BC are required to retain transaction records relating to trades in real estate for seven years. These documents are typically provided to the brokerage by the licensees who draft them with their clients. It is important for you to understand that many of the transaction documents must be provided promptly to the brokerage. This means it would be a violation of the Real Estate Services Rules to only turn in the required documents once a transaction has completed, or an agency relationship has terminated. It is your responsibility to ensure you are aware of the requirements set out below as well as be familiar with how you will work with your brokerage to comply with these requirements.

Read below for more information on document retention.

A) General records

The Real Estate Services Rules require that you, as a licensee, provide original or copies of records to your brokerage as your brokerage is required to retain these records under the Real Estate Services Rules. These records include:

- Written disclosures;
- Written service agreements and any other record that establishes the scope of authority of the brokerage respecting the provision of trading services to a client;
- Financial reports;
- Notices related to assignment of contracts;
- Contracts for acquisition or disposition of real estate; and
- Trade record sheets if your brokerage holds or receives money in relation to a trade including:
    - The nature of the trade;
    - A description sufficient to identify the real estate involved
    - The deal number for the purposes of identifying the trade;
    - The sale price or other consideration;
    - The name and address of every party to the trade;
    - The amount of money received that is required by *RESA* to be paid into the brokerage trust account and disbursement details; and
    - The amount of remuneration paid or payable to any licensee or other person, the name of the party paying the remuneration and the name of the party who has received it or is to receive it.

While none of *RESA*, the Real Estate Services Rules, or Regulation outline any obligation for an individual licensee to retain copies of documents that they submit under the Real Estate Services Rules to the brokerage, there is external legislation that may require you and your brokerage to either keep specific forms or written records. A prudent licensee will retain documentation in case it is needed to support their position where there is a complaint or civil litigation.

Canada Revenue Agency, and other government agencies may need to review documents for tax purposes and therefore require that you be able to supply evidence of income. Speak to an accountant to ensure that you are retaining all the information you need.

RESA requires that all brokerage records must be kept in the province of British Columbia. Per the Real Estate Services Rules, these include proper books, accounts, and other records. Like paper records, if your brokerage chooses to retain documents in an electronic format, the servers which store the information must be in the province of BC.

B) Documents related to referrals fees paid or received

The Real Estate Services Rules require that when your brokerage receives a referral fee, and the only trading service provided by the brokerage is the referral, the brokerage must, on a form approved by BCFSA, prepare, and maintain the following information:

- The amount of the referral fee;
- The date the brokerage received the referral fee;
- A description sufficient to identify the activity of the brokerage or related licensee for which the referral was received;
- The name of the person who paid the referral; and
- The name of every person to whom any amount of the referral is paid, and date they were paid.

Your brokerage may require you to provide this information so that they may satisfy their obligations under the Real Estate Services Rules.

Module Five:
Anti-Money Laundering

Module Five: Anti-Money Laundering

ONE: OVERVIEW

This module is divided into eleven focus areas to make it easier for you to understand how money laundering impacts the real estate industry, and your obligations for collecting consumer information and reporting to the Financial Transactions and Reports Analysis Center of Canada ("FINTRAC").

By the end of this module you will be able to:

- Identify the warning signs for money laundering in real estate;
- Know your FINTRAC reporting requirements;
- Understand beneficial ownership and ongoing business relationship monitoring; requirements;
- Understand the tools available to assist in complying with Proceeds of Crime (Money Laundering) and Terrorist Financing Act ("*PCMLTFA*"); and
- Understand your professional and ethical obligations.

A) Resources

In this module, you will use the following resources:

- Federally, the *PCMLTFA* Knowledge Base
- FINTRAC website: https://www.fintrac-canafe.gc.ca/guidance-directives/1-eng

TWO: INTRODUCTION TO ANTI-MONEY LAUNDERING

As a licensee, you play a key role limiting criminal money laundering activities in the province of BC. Money laundering is a significant concern in Canada. Criminals may use real estate to hide or "clean" ill-gotten funds.

There are two pieces of anti-money laundering legislation that BC licensees should be aware of. You must ensure that you are familiar with the federal and provincial legislation, their purpose and their applications.

Federally, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("*PCMLTFA*") imposes requirements on financial institutions and other businesses to assist in the fight against money laundering. Canada's financial intelligence unit, FINTRAC is responsible for the detection, prevention and deterrence of money laundering and the financing of terrorist activities.

In BC, the *Land Owner Transparency Act* ("*LOTA*") received royal ascent in May 2019 and was brought into force in November 2020. *LOTA* requires disclosure of indirect interest holders in a property in a property. Find further information on *LOTA* obligations and guidelines.

PCMLTFA applies to both real estate brokerages and licensees. It requires the development of a brokerage compliance program and creates obligations for all licensees that they must adhere to.

A) FINTRAC

FINTRAC's role:

- Facilitates the detection and prevention of money laundering and financing of terrorist activities;
- Ensures compliance of reporting entities with *PCMLTFA;*
- Outlines who is considered a reporting entity under *PCMLTFA* (of which licensees are one), and the guidelines around who and what information must be reported; and
- More information can be found under FINTRAC's Guidance Directives.

PCMLTFA's reporting obligations is what affects your business most significantly as it is comprised of obligations that licensees are bound by. Understanding how reporting obligations apply to both you and your brokerage are key components to your ability to comply.

FINTRAC identifies that real estate brokers, sales representatives and real estate developers must comply. It does not apply to property management. Licensees providing only rental and strata management are therefore not obligated under *PCMLTFA*.

While most reporting obligations are ascribed to the managing broker, the reporting of suspicious transactions and terrorist property applies to both sales representatives and brokers.

B) *LOTA*

LOTA was introduced in BC to address part of government's concern with money laundering in the province. The legislation is intended to enhance visibility of the ownership of land in BC and to:

- Address "hidden ownership";
- Crack down on tax fraud;
- Close loopholes; and
- Combat money laundering.

LOTA requires individuals and entities who are "reporting bodies" to disclose information about themselves and about "interest holders" who indirectly hold an "interest" in land.

LOTA records are completely separate from Land Title Office ("LTO") records and are handled by the administrator of *LOTA* and stored in a searchable registry (the Land Owner Transparency Registry or LOTR) developed by the Land Title and Survey Authority of British Columbia.

LOTA itself does not refer to a "registry" ("LOTR") but for ease of reference the information about "interest holders" is referred to as being in the LOTR. However, unlike the Land Title registry, LOTR does not confirm the title or ownership of estates and interests. It is merely a repository of records.

Some of the information required by *LOTA* is made available through a public search, while some of the information is available only to certain authorities and officials. The information contained in LOTR is not vetted by anyone other than the transferee of the interest in land, to the best of the transferee's knowledge. If it is later determined that the information contained in LOTR is incorrect or misleading, the individual responsible may be subject to penalties, fines and possible offence provisions.

THREE: IDENTIFY WARNING SIGNS FOR MONEY LAUNDERING IN REAL ESTATE

Money laundering in real estate can take a variety of forms. It does not necessarily involve buying a property with cash. Even if your brokerage does not accept cash deposits or a property is not paid for in cash, there can still be a risk of money laundering. Licensees are in a unique position to identify suspicious transactions because of their close relationship with clients in real estate transactions.

A) General warning signs

- Use of corporations, other legal entities, nominees;
- Ownership by foreign persons;
    - — Example: Transactions in which the parties are foreign or non-resident for tax purposes and their only purpose is a capital investment (that is, they do not show any interest in living at the property they are buying)
- Purchase without a mortgage; and
- Use of unregulated lenders.

B) Client behaviour warning signs

- Client over-justifies or over-explains the purchase;
- Client expresses unusual concerns about government reporting requirements and the real estate brokerage anti-money laundering or counter-terrorist financing policies;
- Client shows a lack of concern about risks, commissions, or other transaction costs;
- Client is known to have paid large remodeling or home improvement invoices with cash; and
- Client arrives at a real-estate closing with a significant amount of cash.

C) Unusual transaction warning signs

- Client sells or buys property significantly below or above market value;
- Client buys property without inspecting it;
- Frequent change of ownership of same property, particularly between related or acquainted parties;
- If a property is re-sold shortly after purchase at a significantly different purchase price, without corresponding changes in market values in the same area;
- Client buys back a property that they recently sold;
- Client negotiates a purchase for the market value or above the asked price, but

requests that a lower value be recorded on documents, paying the difference "under the table";

- Client purchases multiple properties in a short time, and seems to have few concerns about the location, condition, and anticipated repair costs, etc. of each property;
- Client wants to build a luxury house in non-prime locations;
- Transactions in which payment is made in cash, bank notes, bearer cheques or other anonymous instruments; and
- Transactions in which the parties show a strong interest in completing the transaction quickly, without there being good cause.

D) Person/entity financial profile warning signs

- Client persists in representing their financial situation in a way that is unrealistic or that could not be supported by documents; and
- Transactions carried out on behalf of minors, incapacitated persons or other persons who appear to lack the economic capacity to make such purchases.

E) Use of other parties warning signs

- Client does not want to put their name on any document that would connect them with the property or uses different names on Offers to Purchase, closing documents and deposit receipts;
- Client inadequately explains the last-minute substitution of the purchasing party's name;
- Client purchases property in someone else's name such as an associate or a relative (other than a spouse);
- Client pays initial deposit with a cheque from a third party, other than a spouse or a parent;
- Client pays substantial down payment in cash and balance is financed by an unusual source (for example a third party or private lender) or offshore bank;
- A transaction involving legal entities, when there does not seem to be any relationship between the transaction and the activity carried out by the buying company, or when the company has no business activity; and
- Transaction is completely anonymous—transaction conducted by lawyer—all deposit cheques drawn on lawyer's trust account.

If you identify a warning sign for money laundering, you have obligations under *PCMLTFA* to report it. These obligations are discussed further in the AML guidelines.

More information can be found under FINTRAC's guidelines.

4. KNOW YOUR CLIENT

PCMLTFA requires licensees to verify their clients' identity for certain activities and transactions. It is important to always know who your client is and to gather the information required under *PCMLTFA*. Clients can include individuals, or entities such as corporations, trusts, partnerships, funds and unincorporated associations or organizations.

You must take reasonable steps to identify your client or an unrepresented party and confirm the existence of an entity. These steps to know your client should be undertaken at the following points:

- Receipt of funds at the time the transaction takes place;
- Collection of client information records at the time the transaction takes place;
- Submission of large cash transactions at the time the transaction takes place; and
- Identification of suspicious transactions involving an unrepresented party before submitting a suspicious transaction report.

You must attempt to identify every individual involved in each of the steps discussed above and must ensure that you keep your client information up to date for reporting purposes.

More information can be found under FINTRAC's "know your client" requirements.

FIVE: POLITICALLY EXPOSED PERSONS AND HEADS OF INTERNATIONAL ORGANIZATIONS

As a reporting entity under the *PCMLTFA*, licensees are required to take reasonable measures to determine whether their client is a politically exposed person ("PEP"), a head of an international organization ("HIO"), or a person related or closely associated with a PEP or HIO, in the following scenarios:

- When entering into a business relationship (more information on this later in the module);
- When conducting periodic monitoring of your business relationships; and
- When a fact is detected about an existing business relationship that indicates a PEP or HIO connection.

Licensees must also take reasonable measures to make PEP, HIO, family member or close associate determinations for specific large cash or Virtual Currency transactions (typically the receipt of an amount of $100,000 or more in cash or VC equivalent). More information can be found under FINTRAC's guidance and consult with your managing broker for further information.

If a licensee determines that their client is a PEP, HIO, family member or close associate of a PEP or HIO, they must take reasonable measures to establish their client's source of wealth, and undertake enhanced measures as part of their risk assessment for this high risk client. Brokerages should have compliance program policies and procedures in place, which can assist in taking the

appropriate enhanced measures when this type of high-risk client is identified. In this scenario, licensees must also keep PEP and HIO business relationship records. More information can be found under FINTRAC's guidance.

SIX: FINTRAC'S REPORTING REQUIREMENTS

It is crucial to understand what needs to be reported, when and to whom. Below is a list of situations where licensees and brokerages must report to FINTRAC. Please check with FINTRAC often as the information is subject to change.

A. Suspicious Transactions

When you or your brokerage have reasonable grounds to suspect attempted money laundering or terrorist financing in a real estate transaction, a Suspicious Transactions Report ("STR") must be submitted as soon as practicable. More information can be found under FINTRAC's What Is a Suspicious Transaction Report.

B. Terrorist Property

If you are aware that a property you are listing or have listed in the past is owned or controlled by a terrorist or terrorist organization, you must immediately cease working with the client and submit a report to FINTRAC.

You must also submit a report to the Royal Canadian Mounted Police ("RCMP") and the Canadian Security Intelligence Service ("CSIS").

More information can be found under FINTRAC's submitting terrorist property reports.

C. Large Cash Transactions

Large cash transactions include a transfer of funds over $10,000 CAD. During a real estate transaction, this is most often seen with purchase deposits. Large cash transactions can include a single transfer of $10,000 CAD or more, or multiple small transactions and transfers within a 24-hour period that add up to $10,000 CAD or more.

You must submit a Large Cash Transaction Report to FINTRAC within 15 calendar days after the transaction(s). It is important to note that cryptocurrencies are considered cash. For more information on cryptocurrencies review FINTRAC's guidelines.

Large cash transaction reports must be submitted to FINTRAC electronically.

If the circumstances warrant the filing of a suspicious transaction report to FINTRAC, the disclosure of information about your client in that report would not be a breach of your duty of confidentiality to that client, because the disclosure is required under federal law ("*PCMLTFA*").

Your brokerage will provide you with a form you can use to collect the required client information. It will look like the one below:

Individual Identification Information Record

NOTE: An Individual Identification Information Record is required by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. This Record must be completed by the REALTOR® member whenever they act in respect to the purchase or sale of real estate.
It is recommended that the Individual Identification Information Record be completed:

(i) for a buyer when the offer is submitted and/or a deposit made, and
(ii) for a seller when the seller accepts the offer.

Transaction Property Address: . . . . . .

Sales Representative/Broker Name: . . . . . .
Date Information Verified/Credit File Consulted: . . . . . .

A. Verification of Individual

NOTE: One of Section A.1, A.2. or A.3 must be completed for your individual clients or unrepresented individuals that are not clients, but are parties to the transaction (e.g. unrepresented buyer or seller) . Where you are unable to identify an unrepresented individual, complete section A.4 and consider sending a Suspicious Transaction Report to FINTRAC if there are reasonable grounds to suspect that the transaction involves the proceeds of crime or terrorist activity. Where you are using an agent or mandatary to verify the identity of an individual, see procedure described in CREA's materials on REALTOR Link®.

1. Full legal name of individual: . . . . . .
2. Address: . . . . . .
. . . . . .
3. Date of Birth: . . . . . .
4. Nature of Principal Business or Occupation: . . . . . .

A.1 Federal/Provincial/Territorial Government-Issued Photo ID

Ascertain the individual's identity by comparing the individual to their photo ID. The individual must be physically present unless using technology capable of assessing a government-issued photo identification document's authenticity.

1. Type of Identification Document*: . . . . . .
(must view the original and have a photo, see CREA's FINTRAC materials on REALTOR Link® for examples)
2. Document Identifier Number: . . . . . .
3. Issuing Jurisdiction: . . . . . **Country:** . . . . . .
(insert applicable Province, Territory, Foreign Jurisdiction or "Canada")
4. Document Expiry Date: . . . . . .
(must be valid and not expired)

A.2 Credit File Method

Ascertain the individual's identity by comparing the individual's name, date of birth and address information above to information in a Canadian credit file that has been in existence for at least three years and is derived from more than one source. If any of the information does not match, you will need to use another method to ascertain client identity. Consult the credit file at the time you ascertain the individual's identity. The individual does not need to be physically present.

1. Name of Canadian Credit Bureau Holding the Credit File: . . . . . .
. . . . . .
2. Reference Number of Credit File: . . . . . .

A.3 Dual ID Process Method

1. Complete two of the following three checkboxes by ascertaining the individual's identity by referring to information in **two** independent, reliable, sources. Each source must be well known and reputable (e.g., federal, provincial, territorial and municipal levels of government, crown corporations, financial entities or utility providers). The individual does not need to be physically present.

☐ Confirm the individual's name and date of birth by referring to a document or source containing the individual's name and date of birth*
- ○ **Name of Source:** . . . . . .
- ○ **Account Number**:** . . . . . .
(must be valid and not expired; must be recent if no expiry date)

☐ Confirm the individual's name and address by referring to a document or source containing the individual's name and address*
- ○ **Name of Source:** . . . . . .
- ○ **Account Number**:** . . . . . .
(must be valid and not expired; must be recent if no expiry date)

☐ Confirm the individuals' name and confirm a financial account*
- ○ **Name of Source:** . . . . . .
- ○ **Financial Account Type:** . . . . . .
- ○ **Account Number**:** . . . . . .

*See CREA's FINTRAC materials on REALTOR Link® for examples. ** Or reference number if there is no account number.

Individual Identification Information Record

A.4 Unrepresented Individual Reasonable Measures Record *(if applicable)*

Only complete this section when you are unable to ascertain the identity of an unrepresented individual.

1. Measures taken to Ascertain Identity *(check one):*

☐ Asked unrepresented individual for information to ascertain their identity
☐ Other, explain: . . . . . .

Date on which above measures taken: . . . . . .

2. Reasons why measures were unsuccesful *(check one):*

☐ Unrepresented individual did not provide information
☐ Other, explain: . . . . . .

B. Verification of Third Parties

NOTE: *Only complete Section B for your clients.* Take reasonable measures to determine whether your clients are acting on behalf of third parties by completing this section of the form. If you are not able to determine whether your clients are acting on behalf of a third party but there are reasonable grounds to suspect there are, complete Section B.1. If there is a third party, complete Section B.2.

B.1 Third Party Reasonable Measures

Is the transaction being conducted on behalf of a third party according to the client? *(check one):*

☐ Yes
☐ No

Describe why you think your client may be acting on behalf a third party:

. . . . . .

B.2 Third Party Record

Where there is a third party, complete this section.

1. Name of other entity: . . . . . .
2. Address: . . . . . .
3. Telephone number: . . . . . .
4. Date of Birth *(if applicable)*: . . . . . .
5. Nature of Principal Business or Occupation: . . . . . .
. . . . . .
6. Registration or incorporation number, and jurisdiction and country that issued that number *(if applicable)*: . . . . . .
. . . . . .
7. Relationship between third party and client: . . . . . .
. . . . . .

Individual Identification Information Record

NOTE: *Only complete Sections C and D for your clients.*

C. Client Risk *(ask your Compliance Officer if this section is applicable)*

Determine the level of risk of a money laundering or terrorist financing offence for this client by determining the appropriate cluster of client in your policies and procedures manual this client falls into and checking one of the checkboxes below:

Low Risk

- ☐ Canadian Citizen or Resident Physically Present
- ☐ Canadian Citizen or Resident Not Physically Present
- ☐ Canadian Citizen or Resident – High Crime Area – No Other Higher Risk Factors Evident
- ☐ Foreign Citizen or Resident that does not Operate in a High Risk Country (physically present or not)
- ☐ Other, explain:

Medium Risk

- ☐ Explain:

High Risk

- ☐ Foreign Citizen or Resident that operates in a High Risk Country (physically present or not)
- ☐ Other, explain:

If you determined that the client's risk was high, tell your brokerage's Compliance Officer. They will want to consider this when conducting the overall brokerage risk assessment, which occurs every two years. It will also be relevant in completing Section D below. Note that your brokerage may have developed other clusters not listed above. If no cluster is appropriate, the agent will need to provide a risk assessment of the client, and explain their assessment, in the relevant space above.

Individual Identification Information Record

D. Business Relationship

D.1. Purpose and Intended Nature of the Business Relationship

Check the appropriate boxes.

Acting as an agent for the purchase or sale of:

- ☐ Residential property
- ☐ Residential property for income purposes
- ☐ Commercial property
- ☐ Land for Commercial Use
- ☐ Other, please specify: . . . . . .

Optional: describe your business dealings with the client and include information that would help you anticipate the types of transactions and activities that the client may conduct.

. . . . . .
. . . . . .

D.2. Measures Taken to Monitor Business Relationship and Keep Client Information Up-To-Date

D.2.1. Ask the client if their name, address or principal business or occupation has changed and if it has include the updated information on page one.

D.2.2 Keep all relevant correspondence with the client on file in order to maintain a record of the information you have used to monitor the business relationship with the client. Optional - if you have taken measures beyond simply keeping correspondence on file, specify them here:

D.2.3. If the client is high risk you must conduct enhanced measures to monitor the brokerage's business relationship and keep their client information up to date. Optional - consult your Compliance Officer and document what enhanced measures you have applied:

D.3 Suspicious Transactions

Don't forget, if you see something suspicious during the transaction report it to your Compliance Officer. Consult your policies and procedures manual for more information.

E. Terrorist Property Reports

Don't forget to follow your brokerage's procedures with respect to terrorist property reports. Consult your policies and procedures manual for more information.

SEVEN: BENEFICIAL OWNERSHIP AND ONGOING BUSINESS RELATIONSHIPS

A) Beneficial ownership

At times, the names on legal documents in a real estate transaction may contain the name of an entity (which includes a corporation, partnership, or trust). Under the *PCMLTFA*, beneficial owners are the individuals who are trustees, known beneficiaries and settlors of a trust, or who directly or indirectly own or control 25% or more of a corporation or an entity other than a corporation or trust, such as a partnership. In other words, beneficial owners are the actual individuals behind the transaction.

Identifying beneficial owners is an important piece of Canada's anti-money laundering and anti-terrorist financing regime. As a licensee, when you confirm the existence of an entity, you are required to collect and confirm the accuracy of beneficial ownership information under the *PCMLTFA*, including:

- Information that describes the ownership, control and structure of the entity, including corporations and trusts; and
    - If the entity is a corporation, obtaining the names of all the directors, as well as the names and addresses of the beneficial owners;
    - If the entity is a trust, obtaining the names and addresses of all trustees and known beneficiaries and settlors of the trust;
    - If the entity is other than a corporation or trust, obtaining the names and addresses of the beneficial owners;
- Taking reasonable measures to confirm the accuracy of the information obtained, and keeping records of the information obtained and the measures taken to confirm its accuracy.

Your brokerage will provide you with a form you can use to collect the required client information.

It will look like the one attached in Resources titled "Beneficial Ownership Record"

Note: The definition of beneficial owners under *PCMLTFA* is broader that the definition under *LOTA*, so it is unlikely that you will be able to collect all necessary information through a LOTR search.

B) On-going business relationship

Under the *PCMLTFA*, a business relationship is defined as a relationship established between a reporting entity and a client. As a licensee, you are considered a reporting entity under the *PCMLTFA*, and you enter into a business relationship with a client the first time that you are required to verify their identity. Once you have entered into a business relationship with a client you have on-going monitoring obligations based on your risk assessment of the client. As part of its compliance program requirements, brokerages should have written compliance policies and procedures that include enhanced measures to mitigate risk. When conducting a risk assessment of on-going business relationships, licensees should consult their brokerage's compliance program policies to assist with their risk assessment of those relationships.

Ongoing monitoring is a process used to regularly review information collected about clients with whom there is a business relationship, in order to:

- Detect any suspicious transactions that are required to be reported to FINTRAC;
- Keep client identification information, beneficial ownership information, and the purpose and intended nature of the business relationship record up to date; and
- Determine whether transactions or activities are consistent with the client information obtained and the risk assessment of the client.

If, subsequent to completion of a transaction, you become aware of information which causes you to reassess the risk associated with a client, you should review the new information with your managing broker to decide if any action should be taken.

Ongoing monitoring for a client only ends after the business relationship with them ends. A business relationship ends when a period of at least five years has passed since the last transaction when required to verify the identity of the client.

More information can be found on FINTRAC's Ongoing Monitoring Requirements.

EIGHT: UNDERSTAND THE TOOLS AVAILABLE TO ASSIST YOU WITH YOUR *PCMLTFA* OBLIGATIONS

A) *LOTA*

The Land Owner Transparency Registry ("LOTR") provides information about individuals and entities who have a beneficial ownership in property in BC.

Section 35 of *LOTA* provides for searches by members of the public. A licensee falls within this category. A licensee may search publicly accessible information by either:

(a) searching for the name of a person to ascertain the parcel identifier(s) for the parcel(s) of land in relation to which the person is, identified as a reporting body, interest holder or settlor, or

(b) searching for the parcel identifier for a parcel of land to ascertain the person(s) who are, identified as reporting bodies, interest holders or settlors in relation to the parcel of land.

LOTA provides that the administrator must make the following information contained in transparency records available through searches conducted pursuant to section 35:

(a) primary identification information in respect of reporting bodies that are identified as registered owners of *LOTA* interests; and

(b) primary identification information in respect of

(i) individuals who are identified as interest holders in relation to

(A) the reporting bodies referred to in paragraph (a) above, or

(B) the *LOTA* interests in respect of which the reporting bodies referred to in paragraph (a) above are identified as registered owners, and

(ii) in the case of reporting bodies referred to in paragraph (a) above that are trustees of relevant trusts, persons who are identified as settlors of the relevant trusts; and

(b.1) parcel identifiers for parcels of land in relation to which persons are identified as reporting bodies, interest holders or settlors.

More information can be found in BCFSA's *LOTA* regulatory information.

B) Land Title and Survey Authority (LTSA)

The Land Title and Survey Authority of BC ("LTSA") operates the BC land title and survey system focusing primarily on three areas:

- Land Titles;
- Land Surveys; and
- Crown Grants.

In BC, land ownership, transfers and charges are recorded in the Land Title Office ("LTO") register. BC uses a land registration and land transfer system known as a "Torrens System", which serves as conclusive evidence that the person (or other legal entity) recorded on title as being the owner is in fact the owner, subject to certain statutory exceptions, and also serves as a record of all other real property interests recorded on title. This conclusive evidence of ownership (referred to as the principle of "indefeasibility") means that, except for certain statutory exceptions set out in the Land Title Act ("LTA"), the person who is registered on title as the owner of the land has a legal right to the land, and others searching the title can rely on this. The LTO register is operated and administered by the Land Title and Survey Authority of BC ("LTSA"). The LTSA's electronic search service allows registered users (for a fee) to perform title searches and obtain copies of registered documents and plans. Obtaining and reviewing a title search is often the first step in the due diligence process.

The statutory exceptions to the principle of indefeasibility, as set out in the LTA, generally stated, include:

- The subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;
- Federal or provincial taxes;
- Municipal charges;
- Certain leases;
- Highways and other public easements;
- Expropriations or escheats;
- Charges, liens, and interest registered on title or that may be registered on title;
- Incorrect description of boundaries;
- Fraud in which the registered owner has participated; and
- Conditions, rights or obligations imposed by the Forest Act.

C) Corporate Registry

In British Columbia, all registrations for businesses, not for profit societies, and cooperatives are administered through the BC Registries department of the provincial government. All businesses, not for profit societies, and cooperatives must register, file documents and update records which are then stored in a database searchable by the public.

Pertaining to a real estate transaction, a corporate registry search will provide information confirming whether a company exists, the official corporate name as it is registered with the province, and the corporation's directors and officers, but not shareholders. This information is useful for licensees when facilitating a transaction where a buyer or seller of the real property is a company. In some instances, where the individual consumer representing the corporation does not appear in a company search, such as when the individual is not a director, additional information may be needed to confirm signing authority for that individual.

Some of the information that can be accessed on a corporate registry search includes:

- Status – the company is active or not active;
- Recognition/incorporation date – when they were incorporated, registered, amalgamated within BC;
- Last Annual Report – with date filed;
- Previous company name(s);
- Registered office address;
- Records office address; and
- Names of Directors, Officers – often included in annual reports.

NINE: UNDERSTAND THE IMPORTANCE OF HAVING EARLY DISCUSSIONS WITH YOUR CLIENT IN ORDER TO ASSIST WITH YOUR AML OBLIGATIONS UNDER THE *PCMLTFA*

As a licensee, you have an obligation under *PCMLTFA* to know the individual you are working with in a real estate transaction, whether you are in an agency relationship or not. This means that for certain activities and transactions you must:

- Verify the identity of clients (and whether they are a politically exposed person or head of an international organization);
- Confirm the existence of entities (a body corporate, a trust, a partnership, a fund or an unincorporated association or organization) and collect beneficial ownership information;
- Determine third party involvement in a real estate transaction;
- Conduct ongoing monitoring when a business relationship is formed (including a risk-based approach to assessing your business/client relationships); and
- Report suspicious transactions or transactions linked to terrorist-controlled property.

You should consult your brokerage's FINTRAC compliance policies and procedures to ensure you are aware of your specific responsibilities under your brokerage's compliance program.

When working with clients and unrepresented parties you have several tools available to assist you with your obligations. For example, if you are dealing with a seller, you will want to obtain information through the Land Title and Survey Authority ("LTSA"), or if you are dealing with a company you may want to obtain information through the Corporate Registry.

Another tool that can be useful is the Land Owner Transparency Registry ("LOTR"). The LOTR is unique to BC and can assist you in satisfying some of your AML obligations. Some of the guidance below is intended to help you understand when and how to utilize LOTR to assist in fulfilling your AML obligations. The information you obtain from a LOTR search is publicly available information, but you are not expected to share the results with any other party other than your client.

In order for you to comply with your *PCMLTFA* obligations related to beneficial ownership, you must ensure that you collect all the *PCMLTFA* required information and, in some cases, verify the information collected. LOTR may be of assistance in acquiring this information, but in some cases it may not. It is important to note that just because you cannot find certain information using LOTR, it does not mean that you do not still have a duty to collect it, if required under the *PCMLTFA*.

You need to discuss with your client your *PCMLTFA* obligations. It is important that your client understands why you will be undertaking LTSA, Corporate Registry, or LOTR searches regarding their land ownership interests. Your conversation could include the following:

- As a licensee, you have obligations under federal anti-money laundering legislation to know/identify who you are working with, which, in the context of a real estate transaction, would include understanding their current land ownership interests, whether legal or beneficial.
- In BC, we have a Land Owner Transparency Registry which makes some information on beneficial ownership and interests publicly available and requires purchasers to file a transparency declaration any time they make an application to register an "interest" (as defined in *LOTA*) in land.
- The real estate industry is committed to being part of the solution to concerns about potential money laundering in BC.
- The regulator of real estate has issued guidelines setting the expectation that all licensees will undertake available searches with respect to the ownership interests of their clients.
- This is a routine part of a real estate relationship and, in the vast majority of situations, will merely confirm the ownership information already registered at the Land Title Office or provided by the client.

Remember you have an obligation to report any suspicious transactions to FINTRAC. The information you discover when verifying your client's identity, land interests, or beneficial ownership, whether through LOTR or otherwise, may have to be provided to FINTRAC. For example, if you discover information that does not match the information that your client has provided to you, and your client is unable to provide a reasonable explanation for the discrepancy, you may need to report this as a suspicious transaction. More information can be found under BCFSA's AML Information.

TEN: CONSIDERATIONS WHEN WORKING WITH CONSUMERS

A) Seller clients

As a licensee, you are responsible for identifying clients for:

- Receipt of funds;
- Client information records;
- Large cash transactions; and
- Suspicious transactions.

Although there are nuances to each of these client identification requirements (see your brokerage's compliance policies and procedures), in most cases, you will need to identify your client at the time a transaction takes place. However, the timing requirements under the *PCMLTFA* are not always conducive to established real estate practice, and so the guidance below encourages client identification at an earlier stage in the relationship. As part of your client identification requirements, you are also responsible for screening and identifying suspicious transactions, which includes assessing the facts and context surrounding the transaction, identifying red flags, and using a risk-based approach with your client.

If you identify/confirm that your client is an entity (a body corporate, a trust, a partnership, a fund or an unincorporated association or organization), you also need to collect beneficial ownership information that describes the ownership, control and structure of the entity, including corporations and trusts.

To assist with fulfilling these requirements, it is recommended that you perform a title search at the LTO on the property and a LOTR search on both your seller client and their property (using the Parcel Identifier ("PID") number) at the time your brokerage enters into a listing agreement with your client. Prior to performing the search, you should ask your client if they have any unregistered interests in land in BC and advise them that you will be searching LOTR to verify this information as part of your AML obligations under the *PCMLTFA*. If the title search reveals that the property is owned by an entity, you should also perform a corporate registry search on the entity that owns the property.

A LOTR name search will provide you with a list of matching individuals and the city where they primarily reside, as well as the last 3 digits of the PID (i.e., the property) in which they have a *LOTA* interest. If your client's name appears in the initial results, you should initiate a discussion with them if the information you are seeing does not align with the information you were provided by your client. For example, they may have told you that they do not have any *LOTA* interests in BC, but their name shows up in the search connected to two properties.

Please note that the LOTR name search results may not be sufficient to definitively connect the information to your seller client. For example, a name search for "Richard Lee" may show more than one Richard Lee with a principal residence in a particular jurisdiction and being interest holders under *LOTA*. However, where potential matching information is discovered, it is appropriate to have a conversation with your client about whether the interests revealed in the LOTR search may relate to them.

A PID search will provide you with the reporting body and the name of the interest holders or settlors linked to the property, if applicable. If you do see a result from searching with the PID, it would be prudent to purchase a full report to gain insight into the interest holders of the property. If your client is an entity, the information found in the full report may also assist you in collecting some of the required beneficial ownership information that is needed under the *PCMLTFA*. A search of the property may also identify an interest holder that is, or is linked to, a terrorist, a terrorist group, or a listed person. In such a case, you should immediately file a terrorist property report and cease any further action with respect to the transaction. If any of the information found in the full report does not align with the information provided by your client, you should initiate a discussion with them to discuss the discrepancy.

Through the course of performing these searches you may also discover that you are in a potential conflict of interest. If this is the case, you must disclose this conflict of interest to your client and discuss with them how you are to proceed. For example, you may determine through your LOTR search that you are related to one of the interest holders.

If your client is unable to provide you with a reasonable explanation for any discrepancy relating to the information that you find in your LOTR search results, you should discuss the situation with your managing broker and consider whether the client relationship should be terminated, and a suspicious transaction report filed. Consult your brokerage's compliance officer if you need further assistance in making this determination.

If corporations are involved, you should search information in the corporate registry to ensure that the corporation exists, and you have the correct corporate name. If you have concerns about whether the person you are dealing with has the authority to act on behalf of the corporation and sell the property, the corporate search may or may not be of assistance and you may have to make further inquiries.

A LOTR search of the property will disclose certain trusts, which may or may not show in the LTO records. If your LOTR search discloses a trust you should seek guidance from your managing broker and advise your client to seek legal advice.

It is important to note that if you, as the listing agent, are dealing with a buyer who is represented by another licensee in a transaction, you do not need to perform a LOTR search on the buyer. Any

LOTR search would be conducted by the licensee who is representing the buyer, as part of their AML obligations. However, if your seller client instructs you to perform a LOTR search on the buyer, you should act in accordance with their instruction.

It is important to note that ownership structures can be complex, but it is not expected that you will become an expert in understanding them. LOTR results will only display the ultimate interest holder(s) and will not display an organization's complete ownership structure. You are, however, expected to identify disconnects between ownership information provided by a client and information revealed in a LOTR, LTSA, or Corporate Registry search or any other public search. When these disconnects arise, you need to discuss any unclear information with your managing broker who can provide guidance to you on how to proceed.

B) Buyer clients

As a licensee, you are responsible for identifying clients for:

- Receipt of funds;
- Client information records;
- Large cash transactions; and
- Suspicious transactions.

Although there are nuances to each of these client identification requirements (see your brokerage's compliance policies and procedures), in most cases, you will need to identify your client at the time a transaction takes place. However, the timing requirements under the *PCMLTFA* are not always conducive to established real estate practice, and so the guidance below encourages client identification at an earlier stage in the relationship. As part of your client identification requirements, you are also responsible for screening and identifying suspicious transactions, which includes assessing the facts and context surrounding the transaction, identifying red flags, and using a risk-based approach with your client.

Furthermore, if you identify/confirm that your client is an entity (a body corporate, a trust, a partnership, a fund, or an unincorporated association or organization), you also need to collect beneficial ownership information (as part of your *PCMLTFA* duties) that describes the ownership, control and structure of the entity, including corporations and trusts.

To assist with fulfilling these requirements, it is recommended that you perform a LOTR search on your buyer client when you enter into a buyer's agency agreement or, if no agreement is entered into, before writing an offer. Prior to performing the search, you should ask your client if they have any *LOTA* interests in land in BC and advise them that you will be searching LOTR to verify this information as part of your AML obligations under the *PCMLTFA*. If your buyer client is an entity you should perform a corporate registry search on the entity.

A LOTR name search will provide you with a list of matching individuals and the city where they primarily reside, as well as the last 3 digits of the PID (i.e., the property) in which they have a *LOTA* interest. If your client's name appears in the initial results, you should initiate a discussion with them if the information you are seeing does not align with the information you were provided by your client. For example, they told you that they do not have any interests in land in BC, but their name shows up in the search connected to two properties.

Please note that the LOTR name search results may not be sufficient to definitively connect the information to your buyer client. For example, a name search for "Richard Lee" may show more than one Richard Lee with a principal residence in a particular jurisdiction and being interest holders under *LOTA*. However, where potential matching information is discovered, it is appropriate to have a conversation with your client about whether the interests revealed in the LOTR search may relate to them.

If the search reveals ownership information inconsistent with the background information your client has provided you, and cannot be reasonably explained through a conversation with them, you should discuss the situation with your managing broker and consider whether the client relationship should be terminated, and a suspicious transaction report filed. Consult your brokerage's compliance officer if you need further assistance in making this determination.

If the seller of the selected property is represented in the transaction, there is no need to perform a LOTR search of the seller or their property unless your client instructs you to do so, as the licensee representing the seller is responsible for knowing their client as part of their AML obligations. In this circumstance, however, you should obtain and review a copy of the title with your client.

It is important to note that ownership structures can be complex, but it is not expected that you will become an expert in understanding them, as LOTR results will only display the ultimate interest holder(s) and will not display an organization's complete ownership structure. You are however expected to identify disconnects between ownership information provided by a client and information revealed in a LOTR, LTSA, or Corporate Registry search or any other public search. When these disconnects arise you need to discuss any unclear information with your managing broker who can provide guidance to you on how to proceed.

Having discussions with your buyer client(s) regarding your AML obligations is important. The following video will help you understand how you may want to address these obligations with your client.

C) Unrepresented parties

If you are representing a seller client, you should perform a LOTR search of the unrepresented buyer prior to your client entering into a purchase agreement with them. You have the same client identification obligations under the *PCMLTFA*, with respect to the unrepresented buyer, as you would if they were your client. You must take reasonable steps to identify the individual and confirm the existence of an entity (if applicable), as defined in the *PCMLTFA* Regulation, and screen and identify whether the transaction is suspicious. You are also required to collect beneficial ownership information if the unrepresented party is an entity. Utilizing LOTR in this instance, may assist you in fulfilling these requirements. If the buyer is a corporation, you should also perform a corporate registry search on that entity.

If you are representing a buyer in the purchase of a property where the seller is unrepresented, you should first perform a title search on the property, and then a LOTR search on both the property and the individual seller prior to writing an offer. In this situation, your *PCMLTFA* obligations with respect to the unrepresented seller are the same as if the seller were your client. A search of the property may identify an interest holder that is, or is linked to, a terrorist, a terrorist group, or a listed person. In such a case, you should immediately file a terrorist property report and cease any further action with respect to the transaction. A search of the seller may assist you in fulfilling your beneficial ownership information collection obligations under the *PCMLTFA* and may also help you identify money laundering red flags that may aid in your determination as to whether a suspicious transaction report needs to be filed. If the unrepresented seller is a corporation you should also perform a corporate registry search on that entity.

ELEVEN: UNDERSTAND YOUR PROFESSIONAL AND ETHICAL OBLIGATIONS

As a licensee, you need to identify the areas of your business that are vulnerable to being used by criminals for conducting money laundering or terrorist financing activities. It is important that you take a risk-based approach ("RBA") when assessing the risks associated with all the real estate services you provide, and develop a risk assessment process specific to your situation. More information can be found in FINTRAC's RBA guidelines. Please note that while some of the RBA

guidance is brokerage specific, you still have a duty, as a reporting entity under the *PCMLTFA* who enters into business relationships, to develop and undertake an RBA. An RBA is intended to help you assess elements of your client/business relationships in order to identify possible money laundering or terrorist financing risks, and what measures you should apply to help mitigate any of these risks. Consult your brokerage's FINTRAC compliance policies and procedures for more information on your specific requirements.

If you become concerned about the possibilities of money laundering in a real estate transaction, you should analyze the situation by asking yourself questions such as:

- Have I seen any warning signs/indicators?
- What do I know about my client or the unrepresented party?
- Have I fully discussed the situation with my managing broker?
- Should I or my brokerage file a suspicious transaction report?
- What is the threshold for reporting?
- If I go ahead with the transaction and it emerges that money laundering was involved, what will the impact be on my professional career?
- What will be the impact of money laundering on the reputation of the real estate industry?

Ultimately, if you have any concerns or suspicions that money laundering or terrorist financing is taking place or took place at an earlier time, you should discuss the matter with your managing broker.

BCFSA BC Financial Services Authority

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