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May 16, 2025

Edward M. Augustus Jr., Secretary
Executive Office of Housing and Livable Communities
100 Cambridge Street, Suite 300
Boston, MA 02114

Re: 760 CMR 74.00: Residential Home Inspection

Dear Secretary Augustus:

We are writing on behalf of the Real Estate Bar Association for Massachusetts (REBA), an organization representing over 2,000 lawyers practicing in all areas of real estate law. Our members represent both buyers and sellers of homes as well as clients transferring real estate as part of their estate and generational planning.

We respectfully submit this letter to express our comments to the above-referenced Regulations and to propose revisions. We are deeply concerned that the proposed Regulations are overly broad, conflict with well-established case law, and risk destabilizing an already fragile real estate market, thereby causing significant financial harm to consumers. Our specific objections and recommended solutions are outlined below for your consideration.

1. Inspection Timeline: The proposed regulations impose a mandatory ten (10) day period from the date of the home inspection, or "such other reasonable period as agreed to by the Seller and the Prospective Purchaser" during which a buyer may effectively terminate the transaction. This creates an open-ended contingency that extends well beyond the customary inspection period, potentially up to and even beyond the closing date. Such a framework introduces unnecessary uncertainty into residential real estate transactions and disrupts long-standing practices that protect both buyers and sellers.

Traditionally, home inspections are conducted between the acceptance of an offer to purchase and the execution of either a Contract to Purchase (CTP) or a Purchase and Sale Agreement (P&S). It is critical to recognize that the offer comes from buyer to seller. The seller, by listing their property for sale, is merely soliciting for bids. At the both the CTP stage and /or the P&S stage, buyers confirm their acceptance of the property's condition and commit to proceed with the purchase. A contract is formed. The P&S milestone is also when a more substantial deposit is made, signaling a serious and binding commitment to the transaction. The current practice provides critical certainty to sellers, who rely on this commitment when taking their property off the market and making financial decisions, such as purchasing a new home.

Under the proposed regulations, however, sellers would face a prolonged period of vulnerability. They would be forced to either (1) delay signing a P&S Agreement until after the ten (10) day inspection window has expired, or (2) sign the P&S and accept a significant deposit while knowing the buyer retains an outsized ability to terminate without consequence. Both outcomes represent a radical departure from established norms and would inevitably lead to transaction delays, increased risk, and broader market instability.

It is essential that any regulatory framework maintains the delicate balance between consumer protection and market certainty. To that end, we respectfully suggest a more practical approach: **require that the necessary disclosures be provided at or before the seller's acceptance of the Offer to Purchase, with a clearly defined period (e.g., ten (10) days from the date of the accepted Offer to Purchase and receipt of the disclosure) for the buyer to conduct inspections and make informed decisions.** Once the P&S Agreement is executed, however, all inspection-related contingencies should be considered satisfied, waived, or resolved.

Additionally, the **regulations should explicitly allow buyers to waive the home inspection period after an offer is accepted and required disclosures have been provided.** This flexibility enables buyers who either do not intend to inspect or can do so promptly, to proceed without unnecessary delay, streamlining transactions while respecting buyer autonomy. A similar model exists under Massachusetts and federal lead paint laws, which require sellers and agents to provide the "Property Transfer Lead Paint Notification" at or before the offer. Buyers then acknowledge receipt, are granted a 10-day inspection period, and retain the option to waive that right after disclosure. This well-established process—addressing child safety—demonstrates a balanced approach to informed decision-making. We recommend the inspection regulations adopt a comparable framework, including standardized forms and timelines.

This approach preserves the buyer's right to a thorough inspection and informed consent, while ensuring that sellers have the certainty they need to proceed with confidence. It aligns with established real estate practices, supports transaction efficiency, and avoids the unintended consequence of destabilizing an already fragile market.

2. Nullification of Contracts, Use of Aggregates & Pre-Offer Inspections. A fundamental flaw in the proposed regulations is that they would render Offers to Purchase—and any contracts signed before the inspection period expires—effectively meaningless. Real estate contracts are built on mutual obligations: buyers agree to purchase under specified terms, sellers commit to those terms, and buyers provide a deposit as a sign of good faith, subject to forfeiture if they default. This framework ensures fairness and contract enforceability for both parties.

The proposed regulations undermine this balance by giving buyers an unrestricted right to terminate contracts under the broad pretext of an "unsatisfactory" inspection. Since every inspection, even of new homes, reveals minor defects, this provision creates a de facto right of termination for any reason, however trivial. This is not consumer protection—it's an unfair burden on sellers, who are often consumers themselves. Sellers rely on these contracts to plan their own moves, purchase new homes, and make financial commitments, all while their property is off the market. There is no de minimis or reasonable standard imposed on a buyer.

In practice, Massachusetts real estate transactions already address inspection concerns through the use of an "aggregate" threshold. An aggregate sets a reasonable dollar limit for repair costs (commonly a few thousand dollars) that must be exceeded before a buyer can terminate or renegotiate. This approach ensures that only material defects justify termination, discourages bad-faith terminations over minor issues, and promotes fair negotiations. It reflects long-standing industry practice, balancing buyer protections with transaction stability.

In short, aggregates protect buyers from unforeseen, costly repairs while giving sellers the certainty that a transaction won't be undone by inconsequential matters. Without an aggregate threshold, a buyer could theoretically walk away from a purchase over very minor issues, such as a dripping faucet or a cracked outlet cover.

It is also common practice for Buyers to conduct "pre-offer" inspections, in which they conduct an inspection prior to submitting an offer to purchase. This allows buyers to make informed decisions upfront and reduces the likelihood of terminating the contract due to inspection results. When such inspections occur prior to receipt of the disclosure form, there should be no liability for either party in waiving further inspection rights. The intent of the law is to protect the buyer's right to inspect, not to restrict reasonable practices that fulfill that intent. Allowing pre-offer inspections with seller consent aligns with both the spirit and purpose of the law.

We strongly urge that the **use of aggregates in Offers to Purchase or Pre-offer Inspections not be deemed a restriction or limitation on buyers' inspection rights** under Sections 74.03(1,2) of the proposed regulations.

3. Exemption for New Construction & Renovated Properties: Newly constructed ("new construction") and renovated properties that require the issuance of a Certificate of Occupancy ("renovated properties") should be exempt from these regulations for several compelling reasons. First, new construction and renovated properties are already subject to rigorous oversight. Before occupancy, the seller must obtain a certificate of occupancy from the local municipality, certifying that the home has been built and inspected in compliance with current building codes and safety standards. This process ensures that the property meets all applicable regulations, providing buyers with an official assurance of quality and habitability.

Second, new construction and renovated property sellers typically offer limited warranties that address post-closing repair and condition issues, alongside existing legal obligations under implied warranties of habitability (see Supreme Judicial Court case reaffirming the implied warranty of habitability in new construction: *Albrecht v. Clifford*, 436 Mass. 706 (2002)). These protections ensure buyers have meaningful recourse for legitimate construction defects without destabilizing the transaction itself.

Third, the sales process for new construction differs significantly from typical resale transactions. In many mid- to large-sized developments, developers use "reservations"—agreements to hold a property for a buyer—months or even years before the home is completed. These reservations often precede any formal purchase contract. If buyers are granted an unrestricted right to cancel based on an inspection after construction is complete, developers and their lenders would face serious challenges. Lenders rely on these reservations and purchase commitments to assess financing compliance and to support ongoing construction loans. Introducing broad cancellation rights would undermine the financial stability of these projects and disrupt the housing supply pipeline.

Given the existing safeguards, distinct sales process, and broader economic impact, we strongly urge that **newly constructed residential and mixed-use buildings—as well as renovated residential and mixed-use properties that have received a Certificate of Occupancy—be exempt from these regulations.** Applying rules intended for resale homes to new or renovated properties is unnecessary and could have unintended, harmful consequences for developers, lenders, and the broader real estate market.

4. Imposition of Liability. A very serious concern relates to the broad liability imposed by the proposed regulations—not only on consumers selling real estate, but also on the professionals who assist them. Specifically, Section 74.05(1) extends consumer protection liability to any “Person acting in a business context” without limitation. This vague and expansive language could be interpreted to include attorneys, real estate professionals, and others who provide ancillary services, far beyond the intended scope of real estate brokers and salespersons.

This presents an immediate risk to attorneys involved in real estate transactions. The obligations imposed by these regulations often arise before an attorney is even engaged, meaning attorneys could face liability for compliance failures over which they had no involvement or control. We are deeply concerned about the exposure this creates for our members, who will now bear legal risk simply by virtue of their professional role. **We urge that Attorneys representing buyers and sellers in their legal role should be exempt from the definition of “Agent.”**

Moreover, the regulations impose a significant and unprecedented extension of liability on home sellers themselves. Under existing Massachusetts law, once a sale is completed, the buyer accepts the property “as is,” except in cases of affirmative misrepresentation or fraud. The proposed regulations would upend this settled principle, creating ongoing seller liability for up to one-year post-closing for noncompliance—regardless of intent or actual knowledge of any defect.

This shift not only contradicts longstanding case law but also places an unfair burden on sellers, many of whom are ordinary consumers, not sophisticated commercial entities. Sellers would face potential legal exposure for issues that arise after closing, even if they were unaware of any defect or had acted in good faith. While compliance with the regulations may reduce risk, the mere creation of this liability invites after-the-fact disputes and litigation, undermining the finality of real estate transactions.

In sum, the overbroad imposition of liability on both professionals and consumers is deeply problematic. We urge that the regulations be revised to preserve the longstanding legal principle that, absent fraud, buyers accept the condition of the property upon closing.

5. Exemption for Inter-Family Transfers, gifting and Transfer for Estate Planning Purposes. We strongly urge that the exemptions under 74.04(1) and 74.04(2) be significantly broadened to reflect real-world family, gifting and estate planning needs.

Currently, the inter-family exemption under 74.04(1) is too narrow, excluding common familial relationships for example aunts and uncles. These individuals often need to transfer property among extended family members—such as shares of a family home—and should be able to do so without triggering unnecessary liability. We recommend expanding the definition to include all familial relationships to ensure simplicity and fairness in family property transfers.

Similarly, the exemption for estate planning transfers under 74.04(2) should be revised. First, it should incorporate the same expanded family definition noted above. Second, the exemption should apply broadly to all estate planning tools, including limited liability companies and other entities commonly used to hold real estate. In these cases, ownership remains within the family, and the transfers are made for legitimate estate planning—not commercial—purposes. Without these changes, families may face regulatory burdens and liability when transferring properties that they have long known and occupied. Moreover, restricting the use of estate planning structures could hinder effective tax and generational planning. These revisions would not undermine the law’s intent but would provide essential flexibility for families and consumers across the Commonwealth.

We also urge the regulations to explicitly exempt gifts of real estate from their scope. Not all gifts occur between family members—consumers frequently transfer property to significant others, close friends, or other important individuals outside traditional family definitions. Whether for personal reasons or as part of an estate plan, such transfers are not arms-length transactions and should not trigger the obligations or potential liabilities outlined in these regulations. Subjecting gifts to the same standards as standard market sales would create unnecessary legal exposure and undermine the intent behind many personal and estate-related transfers.

6. Exemption for Commercial or Investment Purchases: The primary intent of the law is to protect consumers purchasing property for personal residential use. However, many transactions involve buyers acquiring properties for commercial or investment purposes—such as redevelopment, resale, or other business activities. These buyers are not acting as residential consumers but rather as investors or commercial entities engaged in the business of real estate. Accordingly, when a buyer affirms in writing that the purchase is for commercial or investment purposes, they should have the option to waive the inspection requirement. This exemption recognizes the sophistication of such buyers and aligns the regulation with the law’s intended consumer protection focus.

7. Implementation Date: The proposed July 15, 2025 implementation date will cause significant disruption to the real estate industry. This regulation marks a major shift in how real estate transactions are conducted and will require months of education and training for practitioners and consumers to comply without risking liability. A more reasonable implementation date is **December 15, 2025**.

REBA along with other trade associations, must revise and distribute standardized forms—including purchase and sale agreements—to reflect the new law. However, this process cannot begin until the regulations are finalized. Once issued, REBA will need time to update forms, distribute them to transaction platforms, and educate our members.

In addition, the state must ensure an adequate supply of licensed home inspectors to meet anticipated demand.

For all these reasons, we urge a delay in implementation until **December 15, 2025**.

8. Clarifications & Additions: Further, we request that the following clarifications and additions are made in the regulations:

- i. Inclusion of Disclosure in Offers and Purchase and Sales Agreements: Does including the required disclosure under 74.03(3) in a contract to purchase satisfy the regulation? The regulations should affirm that embedding the disclosure in standard offers and purchase contracts meets the requirement. Buyers and sellers have the opportunity to review the contract before signing, making this the most efficient and practical method of compliance.
- ii. Waiver of Home Inspection by Buyer: What happens when a seller accepts an offer that includes a home inspection waiver? The regulations should clarify that while the waiver clause is void, the rest of the contract remains enforceable, and the buyer is still entitled to the full ten-day inspection period.

- iii. Return of Deposit After Home Inspection: Does the regulation entitle a buyer to a refund of their deposit if they withdraw from the sale following a home inspection? The language in 74.03 suggests the inspection serves as a contingency. The regulations should explicitly state whether this includes the return of any deposit, to avoid confusion and potential legal disputes. If a buyer utilizes an aggregate in their offer, then that should be the controlling factor as to whether a deposit is returned.
- iv. Definitions:
 - a. The regulations define “Purchase and Sale Agreement”, but do not define an “Offer to Purchase” despite referring to offers throughout. We suggest that the definition of Purchase and Sale agreement substitute the word “agreement” for “contract” and also include the following for the definition of “offer”:
 - i. “Offer to Purchase” a written proposal in which a prospective purchaser proposes purchasing Residential Property under stated terms and conditions, specifying the price, contingencies, and a proposed closing date, and is typically followed by a Purchase and Sale Agreement. The offer, once signed becomes the agreement between the parties.”
 - b. The definition for “Residential Building” and “Residential Dwelling Unit” should mirror each other to a certain extent. Currently, Residential Dwelling Unit is defined as, “A unit within a building or structure, *occupied or intended for occupancy as a residence*”. The italicized portion should be carried through to the definition of Residential Building such that it should state, “A building or structure consisting of one to four Residential Dwelling Units *occupied or intended for occupancy as a residence*; provided, that all such dwelling units shall comprise a single property, to be sold to and owned by a single Person. A Residential Building shall include all the common areas inside and outside such building or structure.”

Due to the above significant considerations and concerns, REBA is opposed to 760 CMR 74.00: Residential Home Inspection Waivers without significant revisions.

Thank you for your consideration of our views.

If you or your staff require further information, please contact us.

Sincerely,



Peter Wittenborg
Executive Director

Cc: REBA Board of Directors