

**Ministry of Finance****BRIEFING DOCUMENT**

**To:** Honourable Selina Robinson  
Minister of Finance

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**TITLE:** *Mortgage Brokers Act Review Consultation – Summary*

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**PURPOSE:**

**(X) FOR INFORMATION**

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**COMMENTS:** A summary of the submissions received in respect of the *Mortgage Brokers Act Review* consultation.

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**DATE PREPARED:** August 18, 2020

**TITLE:** Mortgage Brokers Act Review Consultation – Summary

**ISSUE:** A summary of the submissions received in respect of the *Mortgage Brokers Act* Review consultation.

**BACKGROUND:**

From January 17, 2020 through April 30, 2020, the Ministry of Finance held a public consultation to elicit feedback on modernizing the *Mortgage Brokers Act* (MBA). The consultation was originally scheduled to end on March 27, 2020 but was extended to April 30, 2020 as a result of the COVID-19 pandemic. Submissions received after the closing date continue to be accepted; all submissions received up to July 30, 2020 are included in this summary.

The consultation was in response to a specific recommendation of the Expert Panel on Money Laundering in BC Real Estate:

- Recommendation 9: Replace the MBA with a modern regulatory statute that is effective in regulating all those in the business of mortgage lending, with few exceptions.

The objective of the consultation was to elicit feedback on developing a modern MBA. The public consultation paper focused on national and international standards designed to protect consumers, promote provincial harmonization and facilitate responsible business conduct.

The consultation paper was divided into five major topics that covered:

1. licensing requirements – what activities should be licensed, who should be licensed and who should be exempt;
2. general requirements and duties – the standards expected from all licencees;
3. duties owed to borrowers – the specific measures required to ensure the borrower's interests are protected;
4. duties owed to lenders and investor – measures required to protect lenders and investors; and
5. modern regulatory requirements and powers – the administrative and enforcement measures that ensure licencees comply with the Act.

The paper also welcomed feedback on other measures not included above.

## **DISCUSSION:**

Based on the submissions received there is general support from individuals within the industry, industry associations, and other stakeholders for modernizing the MBA to promote a balance between consumer protection and financial sector stability.

BC received submissions from 33 stakeholders:

- 12 from individuals, including nine BC registered sub mortgage brokers; and
- 21 from entities, including the three major mortgage broker industry associations: Mortgage Professionals Canada and the Canadian Mortgage Brokers Association BC, representing mortgage brokers, and the British Columbia MIC Managers Association, representing mortgage investment corporations.

The Canada Mortgage and Housing Corporation, the Canadian National Association of Real Estate Appraisers, the Mortgage and Title Insurance Association of Canada, the Canadian Life and Health Association, the Law Society, the Office of the Senior's Advocate and the BC Financial Services Authority (BCFSA) are some of the other entities that also provided submissions.

The BC Financial Services Authority submission provided extensive reform proposals that are not discussed in this summary but will be analyzed and presented in a separate note.

Although there is consensus on general reform, there are a number of topics where opinions and comments are split.

### 1. Licensing Requirements:

Currently the MBA has two categories of registration, mortgage broker and sub mortgage broker (for employees of mortgage brokers). These categories cover a wide range of activities including brokering, lending and administering mortgages. A modern statute's licensing requirements should better reflect the range of mortgage broker activities.

The consultation asked respondents:

- a) if they had concerns with amending the scope of the Act to align with modern provincial MBA legislation;

- b) if private lending, or any additional mortgage activities, should be regulated;
- c) the challenges associated with moving to a modern licensing system and related obligations; and
- d) if exemptions should be amended.

### *New Categories of Licensing*

There is general support for modernizing the legislation and establishing a licensing regime that would distinguish between mortgage origination, lending and investing activities.

One commenter raised a concern with a loss of common law precedent that could occur by expanding the scope of the act and regulating in new areas such as private lenders. One industry association stated that the scope of activity captured under the MBA should be clear and without room for subjective interpretation and that a business test would not provide the required distinction.

Commenters expressed a clear preference for aligning changes to match larger Canadian jurisdictions, such as the Ontario regime, to allow for best practice and standardization of mortgage brokering activities across Canada.

The challenges to moving to a modern licensing system are similar to the concerns with respect to amending the scope of the legislation; confusion and disruption to industry that will require mitigation to transition to a new licensing regime.

### *Regulation of Private Lenders*

Commenters discussed different types of private lending in the market place: individual-to-individual; individual lending money through a mortgage broker; individual investing in a mortgage entity. Individual-to-individual, or peer-to-peer, lending was identified as the most susceptible to consumer abuse, fraud and money laundering.

Most commenters believe that all arm's length transactions should be regulated but would accept exemptions for transactions between family and friends. It was also suggested that BC could follow Ontario's lead and gain a better understanding of the market before proceeding to regulate private lending.

### *Exemptions*

Comments were divided on adding additional exemptions. Commenters agreed that BC exemptions should match other provinces, in particular Ontario's, and spoke to the benefit of a single set of rules, standardized across Canada, that would make it easier

for persons who operate in multiple jurisdictions. Some commenters believe the current exemptions do not need amendment; others believe the exemptions are too broad and that reducing the exemptions would make it easier to monitor the market.

Commenters thought existing exemptions should be clarified. For example, bank employees are exempt from registration, but commenters argue the exemption should be limited to mortgage activities undertaken by the employee in their capacity as an employee of the bank. They make a similar argument with respect to lawyers – lawyers should only be exempt if their mortgage activities are incidental to their professional services, but not if those activities represent a separate business.

## 2. General Requirements and Duties of Licensees:

Currently individuals must meet minimum education standards, apply, pay a fee and pass suitability reviews before being registered under the MBA.

The paper asked if the following additional general requirements for all licensees should be included in a modern MBA:

- a) a duty to act fairly, honestly and in good faith;
- b) a positive obligation to report misconduct; and
- c) mandatory errors and omission insurance.

The industry associations believe that legislating a high level of practice standards will enhance the profession. Although none of the commenters were concerned with having and expecting professional standards from brokers, they caution that implementing the standards may be complex and will require clarity of expectations.

Most submissions support legislating a positive obligation to report misconduct; one commenter expressed the view that it would be an effective way of identifying unethical and criminal behavior. A few concerns were raised however, including the effect on employment and supervisory relationships, issues around anonymity, and breadth of the obligation (e.g. should the obligation extend beyond clear, objective, and observed misconduct).

There is general agreement that mortgage brokerages should be required to carry errors and omission insurance or an equivalent. The expectation is that insurance coverage would follow the national standards developed by the Mortgage Broker Regulators' Council of Canada where the employer covers the cost.

### 3. Duty to Borrowers:

The paper asked if modernizing the MBA should include additional consumer protection measures that would:

- a) require brokers to act in the best interest of borrowers, determine mortgage suitability and what these requirements should be;
- b) require disclosure of general brokerage information, not just the current specific conflict of interest disclosure;
- c) extend the *Business Practices and Consumer Protection Act* provisions to require cost of credit disclosure in all instances where an individual grants a mortgage secured by residential property regardless of the purpose of the loan; and
- d) incorporate specific consumer protection measures for reverse mortgages.

There is clear support for a best interest duty in circumstances where a broker acts for a borrower as the middleperson for a mortgage with an established lender such as a bank. However, if the broker represents a private lender, if the borrowing is used to fund a commercial enterprise, or if the borrower is a sophisticated person, commenters thought that the broker owes a more limited duty to the borrower.

Some commenters were of the view that if a broker provides a professional standard of care to all borrowers and presents viable options with full disclosure, they have met their duty of care; especially where the borrower is a knowledgeable person. However, others suggested that current standards did not address broker compensation and incentives that may act to push the borrower into the wrong product.

The comments were evenly split about the benefit of added disclosure of general brokerage information including operations, ownership and fees. Some commenters expressed the view that the current specific conflict of interest disclosure was adequate and nothing more should be required. The industry associations all agreed that current disclosure requirements were sufficient and provided all of the information required for a borrower to be able to make an informed decision. One association suggested that fees should be clearly set out in the client service agreements.

Most commenters support providing cost of credit disclosure in every instance where a mortgage secures residential property. Some submissions go further and believe that all borrowers should be provided with the disclosure so that they are aware of the true cost of the loan. However, a couple of responses suggested that existing forms could be streamlined and made easier to understand.

The Office of the Senior's Advocate provided the most complete response on the need for additional measures to safeguard seniors that enter into reverse mortgages. Although requiring independent legal advice was supported by a number of commenters, the Advocate suggested that alternative persons, such as accountants, could provide that independent advice. Most commenters had limited experience with reverse mortgages but agreed that an extended cooling off period was appropriate given the high dollar value involved, the potential for financial abuse and, unlike with a real estate purchase and sale, time constraints should not be considered a significant factor to finalize and fund the mortgage.

#### 4. Duty to Lenders and Investors:

The paper asked for comments on legislating the broker's duty to lenders and private investors including:

- a) limiting disclosure of mortgage information to private investors;
- b) determining mortgage product suitability;
- c) the extent of conflict of interest where a broker represents both borrower and lender, and the impact of limiting dual agency; and
- d) the division of regulatory oversight with the *Securities Act*.

In respect of limiting the brokers duty to disclose detailed mortgage information to private investors, opinions were split. Some submissions stated that the disclosure should be provided in respect of all transactions, while others would limit the disclosure to only those persons who could be expected to rely on the disclosure.

Responses were also split on legislating a duty to determine mortgage product suitability for all mortgage investors. Some commenters stated that brokers are not educated, and not qualified to act as investment advisors. Other commenters interpreted the issue more narrowly. They focused on the broker as a mortgage expert who can and should be held responsible for determining the suitability of a particular mortgage investment for an individual.

All commenters acknowledged that there is an inherent potential for conflict of interest where a broker acts for both the borrower and the lender. Some felt that barring dual representation outright would delay mortgage applications and result in additional costs for the borrower. Mortgage investment corporations representatives, in particular, were concerned they could be adversely affected as their corporate structure relies on a group of related companies to raise investment funds, lend the funds and service the mortgages.

The Canadian Mortgage Brokers Association BC suggested that BC develop a relationship disclosure model, similar to Alberta's, which is designed to provide the borrower with a clear understanding of the mortgage broker's role in their specific transaction and who they represent: the borrower, the lender or an intermediary.

The interaction and potential overlap between the *Securities Act* and the MBA was not viewed as a major issue by most commenters, as they focus on different aspects of the business: capital raising versus lending. However, because responsibility for syndicated mortgages is split, a review of this area was suggested.

5. Modern regulatory requirement and powers:

The last part of the public consultation paper grouped together questions on the Registrar's powers with the administrative and enforcement provisions including:

- a) Providing rule making power to the Registrar of mortgage brokers;
- b) Requiring all mortgage brokerage, lender and administrator businesses to file annual information returns together with audited financial statements;
- c) Enforcement of mortgage broker requirements under the *Business Practices and Consumer Protection Act*; and
- d) Penalties and other enforcement suggestions.

There is general support, including from the industry associations, for granting the BC Financial Services Authority with rule making power for a modern MBA. However, this support is conditional on the regulator seeking practical knowledge-based input from industry stakeholders before moving forward with any change. Commenters recommend that an advisory board be created. Further, commenters would expect the Minister of Finance to provide final approval of any proposed rule.

There is also support for requiring businesses to file an annual information return that would be similar to the Ontario requirement. The Ontario annual information return goes beyond the current BC requirement that is limited to reporting only on funds held in trust by a business. The information return could be supplemented by audited financial statements to allow the regulator to gather information on the industry and establish risk assessment benchmarks. However, commenters did express concerns that this could impose additional costs and a regulatory burden on businesses, particularly if the information return was not harmonized with the Ontario model. There is also some concern with respect to what information would be collected and how it would be used.

Currently the Registrar of mortgage brokers may enforce the provisions of the *Business Practices and Consumer Protection Act* provisions that apply to financial service



suppliers that are mortgage brokers. Comments on the proposal to include these administrative and enforcement provisions directly in the MBA were split. Although some agreed that including all provisions within one act would provide greater clarity, others did not see a need for change and were concerned as to how this would impact their business practices.

The discussion on increasing the maximum amount of penalties and fines elicited a mixed response with those advocating for increased penalties not representing those who would be responsible for paying those penalties. The industry associations stated that if the current maximum \$50,000 fine did not act as a deterrent, it is unlikely that increasing the amount would increase compliance with the Act. Instead, the industry associations assert that the focus should be to remove serious offenders from the industry.

Suggestions to improve enforcement included holding the managing broker responsible for the acts of persons they supervise. Mainly, suggestions focused on implementing a clear and consistent process for enforcement across the real estate sector and having an adequately resourced regulator that could perform spot checks and act quickly. Also suggested was moving to issuing tickets for minor infractions.

#### 6. Other:

Respondents were encouraged to provide feedback on any other reforms that should be considered or aspects of the current MBA that work well and should be retained. A number of respondents provided additional input on a variety of topics including, the creation of advisory boards, mortgage broker education and qualifications, eliminating the employee requirement thus allowing personal service corporations, and advertising. One significant additional area of discussion was money laundering.

Money laundering, criminal activity and fraud were commented on as a group. There is general support for including anti-money laundering measures directly in the legislation. Entry requirements to, and education of, the profession were identified as the first line of defense to preventing and identifying criminal or fraudulent activity. The individuals would be supported by requiring brokerages to put in place processes and policies that set out know-your-client, record keeping, source of fund documentation, mandatory filing of suspicious transaction reports and an obligation to step away from fraudulent transactions.

Anti-money laundering measures require a coordinated approach between federal and provincial bodies, the sharing of information and the funding and education of law enforcement to promote enforcement and prosecutions.

**SUMMARY:**

Comments support modernizing the MBA and promoting national standards. This would mean a move from the current broker registration scheme to a more sophisticated licensing model that distinguishes between mortgage origination, lending and investing and that would hold licencees to a duty to act fairly, honestly and in good faith in all their dealings.

There is also agreement that consumer protection measures for both borrowers and lenders are required, even if there are differences in what, if any, of the existing requirements need substantive change.

There is also general support for amending the legislation to provide the Registrar with rule making power to adjust to emerging trends (following consultations with industry and with the Minister's approval).

**NEXT STEPS:**

The next steps before implementing changes in response to the *Mortgage Brokers Act* Review Consultation and Recommendation 9 of the Expert Panel on Money Laundering include:

- Preparing decision notes requesting approval in principal to move forward with modernizing the MBA to promote national standards;
- Preparing decision notes requesting approval for framework legislation consistent with providing the Registrar with rule making power to better adjust to emerging trends.
- An analysis of proposals made in a BCFSA submission that was not discussed in this note, is also required. In particular, direction around the BCFSA's proposal to move towards prudential regulation of mortgage investment entities.

A series of decision notes will follow that seek direction on the above issues. Once legislation/regulations are drafted it may also be helpful to seek further stakeholder comments, either through a whitepaper or draft regulations.