

CAAMP

Ontario Standards of Practice Guidelines

For Mortgage Brokerages,
Administrators, Brokers and Agents

A Guide to Complying with the Ontario
Mortgage Brokerages, Lenders and
Administrators Act, 2006

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PREFACE

The Financial Services Commission of Ontario (FSCO), an arm's-length agency of the Ministry of Finance, regulates the mortgage brokerage industry under the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (MBLAA, MBLA Act or the Act) and its Regulations. This new MBLAA replaces the *Mortgage Brokers Act, 1990* previously governing the industry. The new rules are quite comprehensive, both outlining new and expanding on previous business and technical requirements that must be met by industry participants. New rules came into effect on July 1, 2008, while others will go into effect on January 1, 2009. The Act is subject to review every five years.

The Standards of Practice Guidelines consist of seven sections. Each section covers a major topic under the Act and begins with a set of Learning Objectives and concludes with a Section Review. Throughout this Guidelines document, practical examples are provided to demonstrate the application of the rules. References to the related sections of the Act and its Regulations are also provided.

Disclaimer

In order to help CAAMP members to transition smoothly to the new regulatory regime, CAAMP has prepared this Ontario Standards of Practice Guidelines document (Guide) to assist its members in complying with the new MBLAA. However, the content of this Guide is merely a general guideline. It is not intended to be an authoritative reference document concerning the Act or its Regulations and may not necessarily be up to date as of the time of reading. The Act, its Regulations and the FSCO, as the regulator, are the final authority in relation to the rules and interpretation of the rules governing mortgage brokerage, broker, agent and administrator businesses that the reader is required to comply with. In this regard, it is the sole responsibility of the reader to ensure compliance with the Act and its Regulations, and to retain competent legal or other professional counsel as may be required from time to time to obtain professional advice. CAAMP does not accept and specifically disclaims any responsibility of liability whatsoever arising from the use or reliance by the reader upon any portion of the contents of this Guide, or for any consequential losses, damages, penalties or fines that might result.

TERMS USED IN THESE GUIDELINES

Throughout these Guidelines, a number of terms are used often. Their specific meanings within this document are outlined below:

| Term | Meaning |
|--|---|
| Act | Mortgage Brokerages, Lenders and Administrators Act, 2006 also referred to as the MBLAA or MBLA Act |
| agent | Mortgage agent |
| authorizing brokerage | The brokerage under which a broker or agent is authorized to deal or trade in mortgages, also referred to as the home brokerage |
| authorized name | The name in which a brokerage, broker, agent or administrator is licensed |
| broker | Mortgage broker |
| brokerage | Mortgage brokerage |
| business day | A day that is not a Saturday or holiday within the meaning of section 87 of the <i>Legislation Act, 2006</i> (as per MBLAA Regulation 188/08 Definitions) |
| CPIC | Canadian Police Information Centre Criminal Record Synopsis |
| home brokerage | The brokerage under which a broker or agent is authorized to deal or trade in mortgages, also referred to as the authorizing brokerage |
| licencee | any person or entity licensed under the Act (brokerage, administrator, broker, agent) |
| MBLAA | The Mortgage Brokerages, Lenders and Administrators Act, 2006 also referred to as the MBLA Act or the Act |
| mortgage recommendation or recommendation for a mortgage | A mortgage or investment in a mortgage that a brokerage, broker or agent presents for consideration to a borrower, lender or investor, as the case may be |

| | |
|-------------------|--|
| outside brokerage | A mortgage brokerage under which a broker or agent is not authorized to deal or trade in mortgages. |
| Principal Broker | Designated Chief Compliance Officer for the brokerage |
| Regulations | The Regulations associated with the MBLAA |
| regulator | The Financial Services Commission of Ontario or its representative |
| Tribunal | Financial Services Tribunal, an independent, decision-making body that hears appeals from decisions and reviews proposed decisions of the Superintendent of the Financial Services Commission of Ontario |

PRINCIPLES-BASED REGULATION

Overview

In order to better understand and apply the standards of practice outlined in this document, it is helpful to begin by discussing the approach to regulation that is used in the MBLAA.

The regulatory approach used in the Act is called Principles-Based Regulation (PBR). PBR focuses on conveying major underlying principles (e.g., consumer protection) that should drive specific outcomes (e.g., suitable mortgage recommendations for borrowers).

The Act and its Regulations provide more general guidelines about how brokerages, brokers, agents and administrators should conduct themselves and are less reliant on outlining long lists of prescriptive rules to direct the behaviour of the industry. The focus is on the desired outcomes the regulator wants to achieve, leaving industry members wide discretion on how to achieve those desired outcomes.

For some, this approach may be frustrating. There may be uncertainty about how to comply with the Act and increased detailed direction may be requested. Of course, the new MBLAA and its Regulations do provide some prescriptive rules to ensure consumer protection, but rules are not the primary method of regulation.

The regulator monitors activity in the industry and takes action, as required, if it believes that participants are not complying with the rules and the spirit of the rules and there is, or may be, a concern about the public interest.

Benefits of Principles-Based Regulation

There are several benefits to PBR. For example:

- PBR is more efficient and effective. It allows firms greater flexibility to devise their own business processes and controls to align themselves with the regulatory goals. This promotes more innovation and competitive marketplaces.
- PBR is a better approach to regulation in changing markets. The mortgage market and its products are constantly changing, adapting to consumer needs and financial conditions. A rules-based approach to regulation may be sluggish to respond to changing conditions, as prescriptive rules would have to be constantly changing. In contrast, PBR's emphasis on outcomes means that the principles, which are stable, can continue to be applied as conditions change.
- A rules-based approach can result in hundreds or even thousands of rules. The sheer number of rules can make it very difficult, particularly for smaller firms, to stay on top of the requirements. In contrast, the more general guidelines in PBR are fewer and easy to understand.
- A rule-based approach can lead to adhering to the 'letter of the law' instead of adhering to both the 'letter' and the 'spirit' of the law.

CAAMP's Ontario Standards of Practice Guidelines

This Guidelines document is designed to provide additional direction on how the industry can comply with the principles of regulation promoted by the MBLAA. This should help alleviate some of the frustration or confusion that some people may experience when trying to comply with the new Act.

SECTION 1: LICENSING REQUIREMENTS

The regulation of the mortgage brokerage industry relies primarily on the requirement for individuals and organizations to be licensed in order to conduct mortgage business. This licensing requirement is an important vehicle through which the regulator enforces compliance with the MBLAA and the Regulations for operating in the mortgage industry.

Under the Act, the regulator has the power to refuse an application for a licence as a mortgage brokerage, broker, agent or administrator. It may also impose conditions on an applicant, amend a licence at any time, investigate potential non-compliance with the Act, and suspend or cancel a licence in order to protect the public interest.

The licensing process is largely electronic. With the exception of the initial applications for brokerage and administrator licences, all applications and issues regarding broker and agent licenses will be processed through FSCO's new online tool called *Licensing Link*. This tool is available 24 hours a day, seven days a week (24/7). Brokerages will be able to track the status of their applications and provide FSCO with notifications of any changes, all online.

LEARNING OBJECTIVES

After reading this section you should:

- Understand the importance of the licensing requirements
- Be familiar with the licensing requirements for each category of licensing: brokerage, administrator, broker, agent
- Know the duties and responsibilities of each type of licensee
- Discuss the various types of exemptions from the licensing requirement

CATEGORIES OF MORTGAGE BUSINESS

[2006, c. 29, s. 2 – 5), Reg. 406/07, s.1]

The mortgage industry is characterized by four categories of business activity:

- Dealing in mortgages
- Trading in mortgages
- Mortgage lending, and
- Administering mortgages

Both persons and legal entities may be involved in any of the four categories of business. They are considered to be engaged in the activity whether they are actually carrying out the service or merely representing or holding themselves out to be providers of the business activity.

A person or entity is defined as *dealing* in mortgages when he, she or it is engaged in, or holds out as engaging in:

- Soliciting another person or entity to borrow or lend money on the security of real property
- Providing information about a prospective borrower to a prospective mortgage lender
- Assessing a prospective borrower on behalf of a prospective lender
- Negotiating or arranging a mortgage on behalf of another person or entity, or attempting to do so

Trading in mortgages is defined as:

- Soliciting another person or entity to buy, sell, or exchange mortgages
- Buying, selling or exchanging mortgages on behalf of another person or entity
- Buying, selling or exchanging mortgages on the person or entity's own behalf

Mortgage *lending* is defined as lending money on the security of real property.

Administering a mortgage involves:

- Receiving payments from a borrower under a mortgage on behalf of another person or entity and remitting the payments to or on behalf of that person or entity
- Taking steps, on behalf of another person or entity, to enforce payment by a borrower under a mortgage

Individuals and entities engaged in any of these four categories of mortgage business must be appropriately licensed with FSCO, unless an exemption applies. The various exemptions from the licensing requirement are discussed later on in this section.

CATEGORIES OF LICENSING

[2006, c. 29, s. 7 – 10, Reg. 406/07, s.1]

Under the Act, there are four types of licences:

- Mortgage Brokerage
- Mortgage Broker
- Mortgage Agent
- Mortgage Administrator

MORTGAGE BROKERAGE LICENCE

A corporation, partnership or sole proprietorship may apply for a licence as a **mortgage brokerage** (i.e., both legal entities and individuals may be mortgage brokerages). The mortgage brokerage licence allows the licensee to deal and trade in mortgages and to lend money for mortgages. It does not, however, allow the licensee to administer mortgages. This requires a separate licence as a mortgage administrator. Not all mortgage brokerages want both a brokerage and an administrator licence and, a mortgage brokerage licence is not required to apply for a mortgage administrator licence.

Once approved as a mortgage brokerage, with a designated Principal Broker, the brokerage may authorize individuals to deal or trade in mortgages on its behalf. These authorized representatives must also be appropriately licensed as either mortgage brokers or mortgage agents.

Mortgage Brokerage Application Form

The mortgage brokerage application form may be downloaded from the FSCO website and a copy is attached in *Appendix 1*. This application must be completed and submitted to FSCO in hard copy. It cannot be provided via the Internet or by fax as original signatures are required for the Consent and Notification/Attestation section of the form. FSCO will, however, acknowledge receipt of the application via e-mail to the applicant.

Requirements for Licensing as a Mortgage Brokerage

[Reg. 408/07]

Applicants for a mortgage brokerage licence must meet both general and suitability requirements.

The following general criteria must be satisfied when applying for a mortgage brokerage licence:

- Corporations and partnerships must be incorporated or formed under any jurisdiction in Canada; sole proprietors must be residents of Canada. A foreign-owned business can receive a brokerage licence if it is incorporated or formed in Canada or is a resident of Canada
- The brokerage must have a mailing address in Ontario, that is not a post office box, where registered mail may be received
- The brokerage must have Errors and Omissions (E&O) insurance that includes coverage for fraudulent acts up to a minimum of \$500,000 for any one occurrence and up to \$1 million for all occurrences during a 365-day period. CAAMP has affiliated with the firm Rocca Dickson Andreis which offers E&O insurance for the mortgage industry:

Rocca Dickson Andreis: Tel: 905-652-8680, Fax: 905-652-8688
Toll Free: 1-800-479-6450
E-mail: caamp@rdainsurance.com
Website: rdainsurance.com

A complete list of approved E&O providers is available on the FSCO website at: www.fSCO.gov.on.ca/English/licensing/MB_EOinsurance.asp.

- For corporations and partnerships, the name and e-mail address of the proposed Principal Broker must be included in the application. The role of the Principal Broker is discussed a little later in this section.
- Applicants and their senior representatives (i.e., sole proprietors, partners or officers and directors of corporations) must meet a set of suitability requirements

The regulator will consider the following when determining whether an applicant is suitable for licensing as a mortgage brokerage:

- Whether the applicant's financial situation can be reasonably expected to support its business
- Whether the past conduct of any director or officer of the corporation, any partner of the partnership or the sole proprietor leads the regulator to suspect that the applicant may not carry out its mortgage brokerage business with integrity and honesty and in accordance with the law
- Whether the corporation, partnership or sole proprietor is carrying on activities that contravene or will contravene the Act or the Regulations
- Whether a director or officer of the corporation, partner or proprietor has made a false statement or provided false information to the regulator with respect to the application for a licence

In addition to the above, a variety of other checks will be conducted to ensure the appropriateness of the application, including police background checks (CPIC) and reviews of professional and educational background.

Once the regulator is reasonably satisfied with its initial review of the application file, it will instruct the brokerage (via e-mail through *Licensing Link*) to submit the application for its Principal Broker and the declarations for Directors and Officers. It is very important to note that the application for the Principal Broker, his/her Declaration of Compliance and the declarations for all

Directors and Officers must be submitted before the mortgage brokerage application can be finalized. Both the Principal Broker Declaration of Compliance and the declarations for Directors and Officers may be submitted online through *Licensing Link*.

On approval of the application, FSCO will send the Principal Broker the new licence number for the brokerage via e-mail. **No paper licence will be issued.** The mortgage brokerage will also be granted full access to *Licensing Link*, so that it may initiate and submit applications for its mortgage brokers and agents. In contrast to the brokerage's application, these subsequent applications for brokers and agents must be completed entirely online via *Licensing Link*.

Trade Names

A brokerage licence may be issued in either: (1) the legal name of the corporation, partnership or sole proprietorship or (2) the legal name and one other name that is registered to the applicant under the *Business Names Act*.

The regulator will not issue a brokerage licence in a name that: (1) is similar to the name of another licensee in order to avoid confusing or misleading the public or (2) may be objectionable on any public grounds.

Brokerage Licence Fee

The fee for a new licence as a brokerage is payable when the application for the Principal Broker is submitted. There is no additional fee for the Principal Broker, but there are licensing fees payable for each broker and agent authorized by the brokerage.

The brokerage licence is a 'continuous licence,' meaning a re-signing and re-submitting of the attestation form is not required. Nonetheless, a brokerage licence fee is due every two years, on April 1. The fee is \$550 for a full two-year licensing cycle. The first full two-year cycle begins April 1, 2010. For licensing periods that are less than two years (e.g., all mortgage brokerage licences approved on or after July 1, 2008 but before March 31, 2010), the fees are pro-rated as shown in Table 1 (\$23 x number of whole or partial months to the end of the licensing cycle).

Table 1 - Calculating Licence Fees

The fee is the same for all licence categories. It is \$550 for every full two-year cycle. For licensing periods that are less than two years, the fees must be pro-rated up to the end of the cycle as described below. The fees are due and payable at the beginning of each licensing cycle (April 1 for current licenses) or at the time of application (for new licences).

| Licence Category | Fee | 1 st Cycle Due Date | Subsequent Cycles Dues Dates |
|---|--|---|--|
| Brokerage Administrator Broker Agent | \$23 x the number of whole or partial months to end of term/due date | March 31, 2010 (\$23 x number of months to March 31, 2010) | March 31, 2012, 2014, 2016, etc. (\$23 x number of months to March 31, 2012, and so on) |

E.g., if a brokerage becomes licensed on November 21, 2008, the fee payable must include the remainder of the month of November through to March 31, 2010. Therefore, \$391 (\$23 x 17 months) is due on November 21, 2008 and \$550 would be payable on April 1, 2010 (for the period April 1, 2010 through March 31, 2012).

Surrendering a Mortgage Brokerage Licence

[c. 29, s. 20]

A brokerage must apply to the regulator for approval to cease operations. Before allowing a brokerage to surrender its licence, the regulator will assess whether or not it is in the public interest to allow the licensee to end its mortgage brokerage business. In making this determination, it will consider whether:

- the licensee has any funds remaining in a mortgage brokerage trust account
- any funds in the brokerage trust account have not been accounted for
- the applicant has failed to make reasonable arrangements for the retention of the required records or has failed to inform the regulator about where the records will be kept
- any documents have not been returned to the borrower, lender or investor (i.e., original client documents in files which have not been completed; original documents in completed transactions should have been returned to the borrower; these documents may include original copies of job letters confirming employment, original income tax assessments confirming income, etc.)
- the applicant had any outstanding fees, charges or penalties payable under the Act

Designating a Principal Broker

The Principal Broker plays the ultimate supervisory role at a brokerage. Under the MBLAA, a brokerage may not operate without a designated Principal Broker. The Act requires each brokerage to: (1) designate a Principal Broker, (2) have a Principal Broker at all times and, (3) have only one Principal Broker at a time. A brokerage’s licence is automatically suspended if it ceases to have a designated Principal Broker and is reactivated when a new Principal Broker is authorized. Any

changes relating to the Principal Broker (e.g., transfer to another brokerage, new e-mail address, etc.) must be communicated to FSCO within five days.

Principal Broker Eligibility Criteria

[Reg. 410/07]

In order to be eligible as a designated Principal Broker, the individual must:

- be a licensed mortgage broker, authorized by the mortgage brokerage
- be a senior representative of the brokerage:
 - if the brokerage is a corporation, the Principal Broker must be a director or officer the corporation
 - if the brokerage is a partnership, the Principal Broker must be a partner
 - if the brokerage is a limited partnership, the Principal Broker must be a general partner or a director or officer of a corporation that is a general partner
 - if the brokerage is a sole proprietorship, the Principal Broker must be the owner/sole proprietor

The Act defines the primary role of the Principal Broker as that of Chief Compliance Officer. This is an important responsibility. As Chief Compliance Officer, the Principal Broker must:

- ensure that the brokerage, and each of its authorized brokers and agents meet all the requirements of the Act and its Regulations
- ensure that the brokerage takes reasonable steps to deal with any breaches of the Act
- review and recommend changes to the brokerage's policies and procedures
- ensure brokers and agents are adequately supervised
- sign and approve any trust account reconciliation statements prepared by the brokerage to confirm their accuracy

The Principal Broker must sign a Declaration of Compliance, demonstrating commitment to his/her supervisory role, on behalf of the brokerage. A copy of this declaration is provided as *Appendix 2*.

In addition, the Principal Broker is FSCO's primary contact regarding licensing applications/issues for the brokerage. The Principal Broker is responsible for:

- the initial screening of applicants for mortgage brokers and agents
- initiating applications for broker and agent licences
- review of broker and agent applications for completeness, background suitability, education and equivalency requirements
- final approval of broker and agent applications for submission to FSCO

In a small firm the Principal Broker may personally undertake the above responsibilities. In a larger firm, the Principal Broker may create and manage a compliance system in which other staff complete the day to day activities needed to ensure compliance.

There are explicit requirements under the MBLAA regarding the delegation of responsibility to submit broker and agent licensing applications to FSCO. One person must be designated the 'primary user' and this person will be responsible for exercising security precautions to control access to *Licensing Link*. The primary user will be able to provide access to other users, called

‘administrative users’ to submit applications to FSCO. FSCO must be advised of the name of the primary user. The primary and administrative users do not have to be licensed individuals.

Brokerage Duty re Authorization of Brokers and Agents

[Reg. 188/08, s.43]

A brokerage must take reasonable steps to ensure that it authorizes only individuals that are suitable for licensing as brokers and agents to conduct business on its behalf. This entails a substantive review of an individual’s education, experience and general reputation (e.g., conducting credit, reference and possibly police checks; note, as the regulator conducts police background checks (CPIC) on new applicants for licensing, firms may not wish to do police checks on new licencees). See Table 2 - Screening Candidates for Employment as Brokers and Agents.

A brokerage must notify FSCO immediately if it believes that a broker or agent is not suitable for licensing under the Act. This determination of suitability may not be as difficult a task as it sounds given that the standard for suitability for licensing under the MBLAA is much more objective than the standard for suitability for employment. This is because regulatory suitability is limited to the requirements under the MBLAA. In contrast, a brokerage will look to a broader array of factors to assess suitability for employment. For example, a brokerage may decide that a candidate or employee who has a history of being late or failing to show at meetings is unsuitable for employment with the firm, but this fact would not have to be reported to FSCO. However, evidence that an employee engaged in fraudulent mortgage transactions or provided false information on a license application should be reported to FSCO.

The duty to report is much more obvious when an individual who is employed with a brokerage contravenes the law. It is more difficult to navigate around issues of suitability for licensing when an individual is not yet employed by the brokerage.

Under the Act, brokers and agents are allowed to work for only one brokerage. Therefore, a brokerage must ensure it does not authorize individuals to act on its behalf if it knows, or reasonably should know, that the individual is a broker or agent authorized by another brokerage.

When a brokerage hires/authorizes a broker and agent, the brokerage is responsible for ensuring that these representatives comply with the requirements of the Act.

Table 2 - Screening Candidates for Employment as Brokers and Agents
Sample Factors to Consider

(Note: This is not an exhaustive list)

- Employment history
- Education
- Business and/or Personal References
- Licensing status with FSCO
- Business reputation
- Credit bureau reports
- CPIC report
- Disclosed criminal charges and convictions
- Undisclosed criminal charges and convictions (failure to make a disclosure should be considered a significant red flag)
- Disclosed/undisclosed civil judgments and/or pending litigation
- Disciplinary history with a regulatory body

Once the brokerage/Principal Broker has made an assessment of the candidate based on objective, third party data, it is valuable to consult his/her 'gut instinct' about the candidate's suitability for the position prior to making a final decision. *Appendix 3* is a guideline used by CAAMP to assess whether an applicant for CAAMP membership is of 'good character'. This guideline may assist a Principal Broker in determining whether an applicant with a problematic past history would be considered to be of good character.

It is important to note that under the MBLAA, the regulator has the power to take action against the brokerage if it believes the brokerage did not exercise due diligence in assessing its applicants for suitability for licensing as brokers and agents. The brokerage should also consider the damage/potential damage to its reputation and that of the industry, if it consistently makes poor hiring decisions.

MORTGAGE BROKER AND AGENT LICENSING

[Reg. 409/07]

Once the licensing process for the mortgage brokerage is complete, the Principal Broker may initiate applications for brokers and agents via *Licensing Link*.

In preparation for the licensing process, the Principal Broker should:

- be familiar with/understand FSCO's Suitability Review Guidelines and the Principal Broker Guideline
- collect past employment information about the applicant
- confirm that the applicant has the required education and experience for obtaining a broker or agent licence
- meet with the potential mortgage broker/agent to discuss the questions on the licensing application

After the Principal Broker has reviewed a broker/agent's application and decides to employ/authorize the applicant, the Principal Broker, or designate(s), must initiate the application in *Licensing Link*. The subsequent steps in the licensing process are outlined below.

Table 3 - Steps in the Licensing Process

1. The brokerage begins the application process for brokers and agents by entering an applicant's basic contact information, including an e-mail address, on *Licensing Link*.
2. FSCO e-mails the applicant the *link* for the electronic application.
3. The applicant completes the application verifying the contact information, confirming completion of the education requirements/exemptions, answering past conduct questions and declaring the information provided is correct.
4. The applicant submits the application electronically. It will automatically be sent through *Licensing Link* to the sponsoring brokerage for review and approval and submission to FSCO, again via *Licensing Link*.
5. FSCO reviews/approves the broker and agent licensing application. Throughout the application process, the sponsoring brokerage is able to monitor the status of the application through the company section on *Licensing Link*.
6. Approved applicants receive a licence number. FSCO informs the brokers and agents of their new licence numbers by e-mail. **No hard copy licenses are issued.**
7. The names and business information of approved brokers and agents are automatically included in the public register on the FSCO website.
8. Application fees may be paid by credit card. Refunds for unsuccessful applicants are not provided.

Mortgage Broker Licence

A mortgage broker is a person who deals or trades in mortgages on behalf of a mortgage brokerage. Mortgage brokers may be responsible for supervising the activities of one or more mortgage agents. Consequently, the education and experience requirements for licensing as a broker exceed those for licensing as an agent. In selecting brokers for supervisory positions, brokerages should consider the individual's ability to perform supervisory tasks such as implementing policies and procedures to ensure agents are complying with the provisions of the new Act.

Under the MBLAA, a mortgage broker can work for only one mortgage brokerage at a time.

Applicants as mortgage brokers must:

- Be 18 years of age or older
- Be a resident of Canada
- Have a mailing address in Ontario that can receive registered mail
- Have a valid e-mail address
- Be authorized by a mortgage brokerage to deal or trade in mortgages on its behalf
- Have been licensed as a mortgage agent for at least 24 months during the 36-month period preceding the application as a mortgage broker
- Have successfully completed an approved educational course and exam for mortgage brokers (within the three years before applying for a mortgage broker licence). See Summary of Education Requirements in Table 4.
- Meet the suitability requirements outlined in the Regulations (discussed below)

An individual is exempted from the above education and experience requirements for a broker's licence if the individual was licensed as a mortgage broker in Ontario at any time during the 24 months before applying for the licence. In any case, an individual may apply to the regulator for an exemption from the education and experience requirements if he or she believes they have a combination of education and experience that is equivalent to the stated standard.

Once an applicant is approved as a broker, he/she must comply with the requirements of the MBLAA and its Regulations.

Mortgage Agent Licence

A mortgage agent is a person who deals or trades in mortgages for a mortgage brokerage under the supervision of a licensed mortgage broker. As new entrants into the industry, working under the guidance of a more experienced professional, the education requirement for licensing as an agent focuses on the technical skills required to perform duties such as completing a mortgage application form and assessing a borrower's creditworthiness, etc.

Similar to brokers, mortgage agents can work for only one mortgage brokerage at a time.

Applicants for mortgage agents must:

- Be 18 years of age or older
- Be a resident of Canada
- Have a mailing address in Ontario that can receive registered mail
- Have a valid e-mail address
- Be authorized by a mortgage brokerage to deal or trade in mortgages on its behalf
- Have completed an approved education program for mortgage agents (within two years before applying for the agent licence)
- Meet the suitability requirements outlined in the Regulations (discussed below)

An individual may be exempted from the prescribed education and experience requirements for the agent's licence if the individual was licensed as a mortgage agent in Ontario at any time during the 24 months before applying for the licence. In any case, an individual may apply for an exemption from the education requirement if he or she believes they have an equivalent to the stated standard.

Once an applicant is approved as an agent, he/she must comply with the requirements of the MBLAA and its Regulations.

Broker and Agent Suitability Requirements

In granting approval for broker and agent licensing, the regulator will consider:

- Whether the individual's past conduct leads the regulator to believe that he or she will not deal or trade in mortgages with integrity and honesty and in accordance with the law
- Whether the individual is carrying on activities that contravene or will contravene the Act or the Regulations
- Whether the individual has made a false statement or has provided false information to the regulator with respect to the application for a licence

Table 4 - Summary of Education Requirements

| | Broker | Agent | Real Estate Brokers |
|--------------|--|---|--|
| General | <p>Successfully complete the new Mortgage Broker Education Program approved by FSCO AND Apply for the mortgage broker licence within three years of successfully completing the approved new Mortgage Broker Education program. This program will be available from Seneca College in December 2008. For more information see: www.seneca.on.ca/parttime/programs/mortgage_brokers_program.html.</p> | <p>Successfully complete one of the approved mortgage agent education programs offered by CAAMP, IMBA or an OntarioLearn Community College AND Apply for a mortgage agent licence within two years of successfully completing one of the approved mortgage agent education programs</p> | <p>Starting July 1, 2008, real estate brokers will need to be licensed under the new Act if they wish to deal in mortgages. See requirements to the left. See below for the transitional requirements.</p> |
| Transitional | <p>If you were <u>enrolled</u> on July 1, 2008 in Seneca's FSU Program you are not required to successfully complete the new Mortgage Broker Education Program.</p> <p>You may rely on the FSU program to meet the education requirement if: (1) you successfully complete the FSU program and (2) you apply for the mortgage broker licence within one year. Please note, you must <u>do both of these things before July 1, 2011</u></p> | <p>If you have successfully <u>completed</u> one of the following before July 1, 2008 and apply for a mortgage agent licence within two years of completing the course you will meet the education requirement:</p> <ul style="list-style-type: none"> •CAAMP's Canadian Mortgage Industry Course •IMBA's 10 Steps to Becoming a Successful Mortgage Agent •Seneca's FSU 101 Introduction to the Canadian Mortgage Industry or FSU 111 Introduction to Mortgage Brokering •OREA's mortgage agent educational program (consisting of Phase 1, Phase 2, Phase 3 Residential, Phase 3 Commercial, Real Property Law, and Principles of Mortgage Financing) | <p>You are not required to complete the new Mortgage Broker Program if you were a registered Real Estate Broker on July 1, 2008 and you apply for a mortgage broker licence before July 1, 2009.</p> |

Restrictions on Applications as Brokers and Agents

If an individual has had his or her broker or agent licence revoked, or has been refused renewal of such a licence, then he or she must:

- Wait 12 months before re-applying for the broker or agent licence
- AND
- Satisfy the regulator that material circumstances have changed

Broker and Agent Licence Suspensions

[2006, c. 29,]

A broker or agent's licence is automatically suspended when the broker or agent ceases to be authorized by the mortgage brokerage specified in his or her licence. This suspension ends when the broker or agent becomes authorized by another brokerage and his or her licence is amended accordingly.

A broker or agent's license is also automatically suspended if the licence of their home brokerage is suspended and is reactivated when their home brokerage's licence is reactivated.

Broker and Agent Licence Renewals

[2006, c. 29, s.16]

Broker and agent licences are granted for a period of two years. All licences have a common renewal date of April 1 and must be renewed prior to this renewal date. The first full two-year licensing cycle begins April 1, 2010 and ends on March 31, 2012, with consecutive two-year periods following. If a mortgage broker or agent licence takes effect on or after July 1, 2008 but before April 1, 2010, the licence will expire on March 31, 2010.

In order to qualify for licence renewal, brokers or agents must meet the following requirements:

- Be a resident of Canada
- Be an authorized representative of a brokerage
- Have completed an approved continuing education requirement, if any. The requirements for mandatory continuing education have yet to be determined.

An online renewal application must be submitted to FSCO through *Licensing Link*. Brokerages will then approve the application and pay the appropriate fees. Electronic notifications from FSCO will be sent to both the brokerage and the broker or agent 60 days prior to the expiry of the licence.

Licensing Fees for Brokers and Agents

The brokerage is responsible for submitting all licensing fees on behalf of its authorized brokers and agents to FSCO. It is up to each brokerage firm to determine how it may be reimbursed for these fees from their brokers and agents.

Broker and Agent Duty to Authorizing Brokerage

Mortgage brokers and agents must take care to not do or omit to do anything that might reasonably be expected to result in their home brokerage failing to comply with the requirements of Act.

Broker and Agent Transfers between Brokerages

Brokers and agents do not need regulatory approval to leave a mortgage brokerage and transfer to another. However, they do need to update their employment information online. Licences must

notify FSCO of this change within five days. Failure to do so can result in a \$250 penalty for the broker/agent.

Broker and Agent Remuneration (Dollar Fees and Incentives other than Money)

[Reg. 187/08, s. 4-5]

All dollar fees paid to a broker or agent must be paid through his or her authorizing brokerage. This remuneration may be direct (i.e. from the home brokerage) or indirect (i.e. a fee that is paid from money received by the home brokerage from another person or entity for services provided by the broker and agent).

Brokers and agents may receive incentives other than money (e.g., points, travel vouchers) from their home brokerage or an outside brokerage or financial institution. These types of incentives may be paid to the brokers and agents through their home brokerage **or** directly from the outside brokerage or financial institution. The regulations state that incentives may be paid directly by outside organizations only **if all** of the following conditions are met:

- The broker/agent receiving the incentive has written consent from his/her home brokerage
- There is a written agreement between the home brokerage and outside brokerage or financial institution governing the provision of the incentives to the broker/agent
- The broker/agent has a written agreement with the outside brokerage or financial institution governing the provision of the incentive to him/her
- Both of the above two agreements require that the outside brokerage or financial institution periodically, and upon request, provides the home brokerage with details about the incentives being given (including any options exercised) during the applicable period

[Reg. 188/08, s.45 (1)]

ADMINISTRATOR LICENCE

[Reg. 411/07]

A mortgage administrator receives payments from borrowers and forwards them to lenders or investors. It may also take steps on behalf of lenders and investors to enforce payments under mortgage contracts. An administrator is not required to appoint a Principal Broker and its employees do not have to be licensed as mortgage brokers or agents.

The majority of requirements for a mortgage administrator licence are similar to those for a brokerage licence. The additional requirements for mortgage administrators are underlined in the lists below.

A mortgage administrator licence may be granted to a corporation, partnership or sole proprietorship. The applicant must:

- Be incorporated or formed under any jurisdiction in Canada if the applicant is a corporation or partnership; must be resident of Canada if the applicant is a sole proprietor
- Have a mailing address in Ontario that is not a post office box where it can receive registered mail
- Have E&O insurance including coverage of fraudulent acts up to a minimum of \$500,000 for any one occurrence and \$1 million for all occurrences during a 365-day period. If a mortgage administrator is also licensed as a brokerage, this insurance is in addition to the E&O insurance required for the brokerage.

- Have a financial guarantee for \$25,000 (unimpaired working capital or some other financial guarantee in a form approved by the regulator)
- Meet the suitability requirements listed in the Regulations

The suitability requirements for an administrator are similar to the suitability requirements for brokerages and are repeated here for your convenience.

The regulator will consider the following when determining whether an applicant is suitable for licensing as a mortgage administrator:

- Whether the applicant's financial situation can be reasonably expected to support its business
- Whether the past conduct of any director or officer of the corporation, any partner of the partnership, or the sole proprietor leads the regulator to suspect that the applicant may not carry out its mortgage brokerage business with integrity and honesty and in accordance with the law
- Whether the corporation, partnership or sole proprietor is carrying on activities that contravene or will contravene the Act or the Regulations
- Whether a director or officer of the corporation, partner or proprietor has made a false statement or provided false information to the regulator with respect to the application for a licence

The mortgage administrator application form may be downloaded from the FSCO website and is attached as *Appendix 4*. The application must be completed and submitted to FSCO in hardcopy.

JOINT AND SEVERAL LIABILITY – BROKERAGES AND ADMINISTRATORS

Whether individuals are affiliated with a brokerage or an administrator, the members of the directing body are jointly and severally liable to comply with the requirements of the Act. For example, if a licence was issued to a partnership, each partner, as well as the partnership itself, is responsible for compliance with the Act. In the case of a corporation, each member of the governing body of the corporation (e.g., board of directors, senior officers) is responsible for adherence to industry rules.

USE OF BROKERAGE, ADMINISTRATOR, BROKER AND AGENT TITLES

[2006, c. 29, s. 11, s. 12]

A person must be appropriately licensed under the MBLAA before they can use any of the following approved titles or an equivalent of these titles in another language:

- mortgage brokerage or maison de courtage d' hypothèques
- mortgage broker or courtier en hypothèques
- mortgage agent or agent en hypothèques
- mortgage administrator or administrateur d' hypothèques

In addition, a person or entity must not use a description that might reasonably lead someone to believe that they are a mortgage brokerage, broker, agent or mortgage administrator if they are not properly licensed as such.

A person or entity may not file a claim for remuneration for dealing, trading or administering mortgages if at the time they were transacting in mortgages they were not licensed to do so, did not qualify for an exemption from the licensing requirement or were not required to be licensed.

EXEMPTIONS FROM LICENSING

[2006, c. 29, s. 6, Reg. 186/08, Reg. 407/07]

Certain entities and persons are exempt from the requirement to be licensed as a brokerage, administrator, broker or agent. These exemptions are based on the nature and intent of the operations of the entities and/or persons (e.g., transacting in mortgages is not the primary focus of operations, the role in the mortgage transaction is limited, etc.)

Table 5 - Parties Exempt from Licensing Requirement under MBLAA - Highlights

- Financial Institutions (e.g., banks, credit unions, insurance companies, trust companies)
- Other entities/persons (e.g., lawyers, a person or entity who is acting as a trustee in bankruptcy, certain statutory corporations such as the Ontario Development Corporation, consumer reporting agencies, registered dealers under the Securities Act, certain motor vehicle dealers, etc.)
- Persons/entities who provide a simple referral

FINANCIAL INSTITUTIONS

Financial institutions are exempt from the requirement to be licensed as a brokerage or administrator. Financial institution means:

- domestic and foreign banks authorized under the Bank Act
- credit unions and caisse populaires under the Credit Unions and Caisses Populaires Act, 1994
- insurers licensed under the Insurance Act/Insurance Companies Act
- corporations registered under the Loan and Trust Corporations Act
- retail associations as defined under the Cooperative Credit Associations Act

Directors, officers or employees of financial institutions are also exempt from the licensing requirement when, in the ordinary course of their duties, they deal or trade in mortgages on behalf of the financial institution.

LAWYERS

A lawyer is exempted from the licensing requirement when, acting in his or her professional capacity as a lawyer on behalf of a client, he or she is involved in transacting mortgage business **and** he or she does not hold themselves out as transacting in the mortgage business.

OTHER EXEMPTIONS

The following are exempted from the requirement to have a brokerage or mortgage administrator's licence (certain conditions apply):

- a person or entity who is acting as a trustee in bankruptcy
- a person or entity who is acting under an order of the Superior Court of Justice

- certain statutory corporations (Eastern Ontario Development Corporation, Northern Ontario Development Corporation, Ontario Development Corporation, Ontario Infrastructure Projects Corporation, Ontario Mortgage and Housing Corporation, Ontario Realty Corporation)
- the personal corporation of a broker, agent
- motor vehicle dealers registered under the Motor Vehicle Dealers Act, 2002
- Consumer reporting agencies registered under the Consumer Reporting Act
- Registered dealers under the Securities Act
- A person or entity carrying on the business of trading in mortgages in connection with mortgage securitization.
- A person or entity buying, selling or exchanging mortgages on its own behalf through a mortgage brokerage
- A person or entity carrying on business as a mortgage lender solely through a mortgage brokerage
- A person or entity carrying on the business of administering mortgages on behalf of the Crown in right of Ontario, Canada or another province or territory of Canada
- A person or entity carrying on the business of administering mortgages on behalf of a financial institution or finance company
- Collection agencies registered under the Collection Agencies Act
- In connection with mortgage-backed securities, the person or entity carrying on the business of administering only those mortgages that constitute the assets backing the mortgage-backed securities.
- Registered real estate brokerages, brokers or salespersons only when arranging vendor take-back mortgages

The following are exempted from the requirement to have a mortgage broker or agent licence:

- Directors and employees of Crown agencies and directors, partners or members of the governing body of a Crown agency, if they deal or trade in mortgages solely on behalf of the Crown agency in the ordinary course of their duties
- Officers and employees of exempted persons or entities and directors, partners or members of the governing body of exempted persons or entities, if they deal or trade in mortgages solely on behalf of the exempted persons or entities in the ordinary course of their duties

PERSONS/ENTITIES WHO PROVIDE A SIMPLE REFERRAL

A person or entity that makes a *simple referral* is also exempt from the requirement to be licensed as a mortgage brokerage, broker or agent.

A referral is a simple referral when only basic information about the potential borrower and lender is provided. Therefore, the person making a simple referral may provide the prospective:

- borrower with only basic information about the prospective lender, broker or agent, the name, address, telephone number, fax number, e-mail address or website address of the prospective lender, broker or agent, or of an individual who acts on behalf of the prospective lender, broker or agent,
- lender, broker or agent, with only basic information about the prospective borrower: the name, address, telephone number, fax number, e-mail address or website address of the prospective borrower or of an individual who acts on behalf of the prospective borrower.

In addition, the person or entity making the referral must, before or at the time of making the referral, provide the prospective borrower with written disclosure about:

- any fee or other remuneration payable, directly or indirectly, to them for the referral
- the nature of the relationship between the person or entity making the referral and the prospective lender

When making a simple referral, persons or entities must be careful to not engage in activities that are part of the mortgage dealing and arranging process and would require licensing as a broker/agent. The Financial Institutions Commission of British Columbia (FICOM), which is the regulator in BC, provided some guidance concerning activities that would be outside the bounds of a simple referral. This guidance is applicable for Ontario licencees and is listed below.

The following tasks would be considered outside the parameters of simple referral:

- taking mortgage applications
- explaining mortgage terms and options
- reviewing mortgage documentation
- obtaining credit checks
- providing mortgage advice, including advice on how to deal with mortgage proceeds or mortgage payments

(Source: *FICOM Bulletin MB 08-001*)

Table 6 - Referral Scenarios

A financial planner completes a mortgage application on behalf of a new client and forwards it to a lender. He charges the client a modest \$50 fee for completing the application. Since the financial planner has provided more than the basic information about a borrower to a lender, this is not a simple referral and the financial planner should be licensed to deal in mortgages.

A referral company collects name and telephone information from various real estate related sources and forwards it on to mortgage brokerage companies for a fee. The referral company has not provided more than basic contact information about potential borrowers and therefore does not have to be licensed to deal in mortgages.

Real estate brokers making only simple referrals (receiving a fee for referring a prospective borrower to a prospective mortgage lender, broker or agent,) do not have to be licensed as mortgage brokers or agents, provided they comply with the rules governing simple referrals.

SECTION REVIEW

1. Describe the four categories of mortgage business.
2. Describe the four categories of licensing.
3. List the general requirements for licensing as a mortgage brokerage.
4. List the general requirements for licensing as a mortgage broker.
5. List the general requirements for licensing as a mortgage agent.
6. List the general requirements for licensing as a mortgage administrator.
7. Discuss the suitability requirements for licensing.
8. Describe the role of the Principal Broker.
9. Explain the difference between the duties and responsibilities of a mortgage broker and those of a mortgage agent.
10. Explain the rationale underlying the exemptions from licensing.
11. List five types of exemptions from licensing.
12. Describe a 'simple referral'.
13. Describe the *Licensing Link* application process.
14. Can brokers and agents initiate their application process directly with the regulator?
15. What is the expiry date/licensing cycle for mortgage brokers and agents?
16. What duty does a mortgage broker or agent owe his or her home brokerage?
17. If a licensee has had his or her licence revoked or renewal refused, what is required before resubmitting an application for licensing?
18. Can brokers and agents be paid directly by an outside brokerage or financial institution? Explain.
19. Are there any restrictions on the use of the titles mortgage brokerage, broker, agent or administrator? Explain.

SECTION 2: ADVERTISING / PUBLIC RELATIONS

Public relations materials play an important role in defining and branding the overall image of the mortgage industry. By providing information about mortgage services and products, advertising helps create a general understanding of the mortgage market among consumers. Consequently, the information presented must be informative, accurate and not misleading. The MBLAA outlines rules intended to guide ‘what’ and ‘how’ information may be published for distribution to the public. Licencees should ensure that both the literal meaning and the general impressions created by their ads meet the technical requirements and the spirit of the Act and its Regulations.

The MBLAA rules with respect to public relations apply to the wide variety of essential tools used daily in mortgage business operations (e.g., business cards, letterhead stationary, websites, flyers, radio ads, etc.) Brokers and agents should familiarize themselves with the MBLAA rules and any additional requirements imposed on their advertising materials by their home brokerages.

Brokerages should implement a system for review of the public relations materials used by their brokers and agents and, brokers and agents should be sure to have their brokerages sign off on their promotional materials. Such steps will help ensure all promotional initiatives meet the industry standards of practice.

LEARNING OBJECTIVES

After completing this section, you should:

- Understand what constitutes public relations materials
- Know the proper way to use titles in advertising materials
- Be aware of what constitutes false or misleading advertising
- List the additional requirements when a brokerage is acting as a lender

PUBLIC RELATIONS MATERIALS DEFINED

[Reg. 187/08, s. 1]

The Act defines public relations materials as:

- i) ‘any advertisement by the broker or agent in connection with his or her status as a licencee or his or her dealing or trading in mortgages that is published, circulated or broadcast by any means

OR

- ii) any material that a broker or agent makes available to the public in connection with his or her status as a licencee or his or her dealing or trading in mortgages’

These definitions are quite broad, encompassing a wide variety of materials that are essential tools in conducting daily mortgage business activities (e.g., business cards, letterhead stationary, websites, flyers, radio ads, etc.) Brokers and agents should ensure that all their public relations materials meet the requirements outlined below and have been reviewed and approved by their brokerage.

Whether ‘customer-facing forms and disclosure documents,’ such as the Cost of Borrowing Disclosure Form, are considered public relations materials may be open to debate. However, when

in doubt, it is best to err on the side of caution and ensure these types of forms are also compliant with the MBLAA rules regarding public relations materials (i.e., the forms should state the name and licence number of the brokerage).

USE OF AUTHORIZED NAMES, TRADE NAMES, TRADEMARKS AND FRANCHISEE NAMES

[Reg. 188/08, s.5 – 6]

Brokerages, brokers, agents and administrators may operate only under the names in which they are licensed. These are the authorized names. These are the names shown in the public registry of licencees on the FSCO website at: <http://www2.fSCO.gov.on.ca/mbslist/Agents.mbl>.

For brokerages and administrators, both the authorized name and the licence number must be prominently disclosed in all of their public relations materials.

As noted in Section 1, a brokerage may obtain a license in its legal name and one other name that is registered to it. This alternate name is often referred to as a ‘trade name’. Trade names and trademarks are often used to differentiate one company from another to convey a certain brand or image. A trademark may be a symbol, a single word, a slogan, a combination of these, etc. Brokerages may use trade names and their registered trademarks in conjunction with their registered legal name.

Brokerages must answer their telephones using either their legal name or trade name.

If the authorized name of a brokerage or an administrator is, or includes, a franchise name that the brokerage is permitted to use under a franchise agreement, the public relations materials must clearly indicate that the brokerage is independently owned and operated. Brokerages cannot answer their telephones using only the name of the franchise.

IDENTIFYING BROKERS AND AGENTS IN ADVERTISING MATERIALS

[Reg. 187/08, s. 7-8]

The names of any individual brokers and agents used in public relations materials must be the names in which the brokers or agents are licensed (i.e., the authorized name). These names can be confirmed on the FSCO public registry noted above.

FSCO allows brokers and agents to be licensed in their legal name and a ‘nick name’ as provided (in brackets) on the application for licensing. For example, an agent can submit his name in the following format: Wai Ho (Mark) Chan. The full name, in this format, including the brackets can be used in public relations material. The bracketed name cannot be used if it is not part of the name provided in the licence application and part of the public registry on the FSCO website. The use of only the bracketed name is also technically non-compliant with the rules. Whether the use of only the bracketed name in conjunction with the broker/agent licence number will be acceptable is uncertain.

If a broker or agent wishes to change the name in which they are licensed (e.g. to add a bracketed name, to change to a married name, etc.) a written request, with supporting documentation if required, must be submitted to the FSCO licensing department to have the change approved.

If public relations materials include the name of a broker and/or agent, the materials must identify the broker and/or agent by an approved title at least once in the materials. The approved titles are:

- For brokers: ‘mortgage broker’, ‘broker’, ‘courtier en hypothèques’, ‘courtier’ or an abbreviation of any of those titles.
- For agents: ‘mortgage agent’, ‘agent’, ‘agent en hypothèques’ or an abbreviation of any of those titles.

Brokers or agents may not identify themselves using titles such as mortgage specialist, mortgage consultant, consultant, etc. in place of the above approved titles. However, they may use these terms as additional descriptors so long as they have first used the approved title. For example, the following are acceptable:

*Jack Brown, Mortgage Agent,
Specialist in Retail and Commercial Mortgages*

*Bob Dackson, Broker
A highly trained mortgage specialist*

Mortgage brokers and agents must disclose their licensee name and the authorized name and licence number of their home brokerage in all of their public relations materials. It is not a requirement under the MBLAA that brokers and agents provide their licence numbers as well on the public relations materials, but it is permitted.

Table 7 - Use of Names- Examples
(Modified FICOM example)

The company RD Mortgage Inc., likes to use the trade name Value Mortgage *VM. It applied for its mortgage brokerage licence under both names. Therefore, RD Mortgage Inc.'s public relations materials may contain either or both the legal name of the brokerage and the trade name.

Brokerage legal and trade names on business card – MBLAA compliant

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| <p>Value Mortgage *VM Don Game, AMP Mortgage Broker</p> <p>RD Mortgage Inc., Lic.# 1098 1440 Sheffield Avenue Toronto, Ontario M2M 3X3 (416) 123-4567</p> |
|--|

Brokerage trade name only on business card – MBLAA compliant


| | |
|---|-------------------|
| <p>Value Mortgage *VM 1440 Sheffield Avenue Toronto, Ontario M2M 3X3 (416) 123-4567</p> <p>Don Game, AMP Mortgage Broker</p> | <p>Lic.# 1098</p> |
|---|-------------------|

Value Mortgage also owns a trademark logo: *VM. However, it cannot identify itself by its trademark only.

Brokerage trademark/logo only on business card – Not MBLAA compliant

| | |
|--|-------------------|
| <p>*VM 1440 Sheffield Avenue Toronto, Ontario M2M 3X3 (416) 123-4567</p> <p>Don Game, AMP Mortgage Broker</p> | <p>Lic. #1098</p> |
|--|-------------------|

Brokerage legal and franchise name – MBLAA compliant.

| | |
|---|--|
| <p>Sudbury Mortgage Brokers Inc. Independently owned & Operated Lic. # 577145</p> <p>Robert Julian, AMP Mortgage Agent 1900 Orchard Lane Sudbury, ON A3C 2B5 (123) 456-7890 General Line (123) 987-654 Direct Line rjulian@internet.ca</p> |  |
|---|--|

Sudbury Mortgage Brokers Inc. may not answer the telephone as LIONS LENDING but must identify itself by its authorized name, Sudbury Mortgage Brokers Inc.

FALSE, MISLEADING OR DECEPTIVE INFORMATION

The public relations materials of brokerages, brokers, agents and administrators must not contain false, misleading or deceptive information. Statements that do not balance the benefits and risks of a transaction may be considered misleading. Advertisements that make material unsubstantiated claims may also be considered misleading.

Determining whether public relations materials contain information that is false or inaccurate should be an objective exercise (i.e., the information is correct or incorrect, true or false). However, making a distinction between creative wordsmithing and misleading advertisement can be difficult. An advertisement may be considered misleading even if it did not actually result in a consumer being misled. It would be enough to show that the advertisement was capable of misleading a reasonable consumer. FICOM provides some examples of misleading advertising which are relevant for Ontario as well.

Table 8 - Examples of Misleading Advertisements

(Source: FICOM Bulletin MB 06-002)

The following are some examples of false or misleading advertisements:

- providing sample monthly repayment for mortgage loans requiring no repayment of principal without identifying that the payments represent only the interest
- advertising payment amounts for mortgage loans with unusually long amortization periods that do not specify the amortization period
- advertisements which contain repayment figures but do not contain an indication of the amortization period used to determine the repayment figure
- advertisements for interest only mortgages that do not specify that the repayments do not include any principal amounts

While in some instances the term '*for illustration purposes*' may be included with advertisements such as the above, it may or may not be sufficient to ensure that the ad is not misleading. Determining when the inclusion of a disclaimer is sufficient to clarify an advertisement is discussed below.

CAUSES OF MISLEADING REPRESENTATIONS

(Modification of the RECA Regulator January 2008 publication)

The regulator in Alberta, the Real Estate Council of Alberta (RECA), recently addressed the issue of misleading representation. The following review of the position taken in Alberta covered in this section 'Causes of Misleading Representations,' may be useful for assessing whether a communication is misleading.

Misleading representations may be the result of a variety of factors:

- Negligence
- Incompetence
- Intentional misrepresentation
- Improper use of disclaimers

- Improper reliance on industry terms
- Incomplete comparative ads
- Implied endorsements
- Improper use of teasers
- Use of unsubstantiated exaggeration
- Lack of timely reviews of advertisement

Negligence

If a licensee provides incorrect information by mistake (for example, punches the wrong number into the calculator when determining APR), the licensee has made a negligent misrepresentation to the consumer.

Incompetence

Consider a licensee who very carefully reviews a client's application, but still misses a red flag in the documents for income verification (e.g., a list of short-term employment contracts). If there is a pattern of such material errors, it may demonstrate incompetence.

While the issues of negligence and incompetence are not specifically addressed by the MBLAA, they may impact on the determination of the suitability of a mortgage for a consumer. They may also be grounds for consumers to seek recovery of damages through the civil courts.

Intentional Misrepresentation

Intentional misrepresentation is an intentional untrue statement deliberately made to entice a party to act (e.g., a licensee attempts to justify a commission rate by stating that a government body fixes commissions).

Improper Use of Disclaimers

Industry members should use disclaimers such as 'Terms and Conditions Apply' only if space and time limitations are legitimate. Sometimes, a simple disclaimer such as the above eliminates the need for a long description in a short ad and increases the appeal of the advertisement.

How does one know when the details of a disclaimer should be spelled out in an advertisement? A rule to follow is that conditions (or terms or restrictions) do not need to be described if:

- it is disclosed that there are conditions; and
- the conditions are reasonable and likely to be anticipated by the consumer; and
- the conditions do not substantially alter the offer or program being advertised

Examples of 'reasonable' conditions that would likely be anticipated by the consumer are '*Rates are subject to approved credit*'. If terms, conditions or restrictions substantially alter the advertisement, they must be disclosed in a clear and conspicuous manner. Consider the following example:

'Our brokerage promises to pay your appraisal fee if we don't get you a mortgage commitment within 30 days. Terms and Conditions apply.'

The impression created by this statement is that the consumer will receive the amount of the appraisal fee if there is no mortgage commitment within 30 days. However, the ‘terms and conditions’ are that the payment of the appraisal fee is conditional on the broker successfully getting a commitment after the 30 days and the mortgage is eventually funded. The actual offer was substantially different from what appeared to be offered. This misleading ad should be clarified to reflect the true nature of the program. For example:

‘Our brokerage promises to pay your appraisal fee if we don’t get you a mortgage commitment within 30 days. Terms and Conditions: Broker must arrange eventual funding.’

In cases where space limitations are not legitimate and the details of the ‘terms and conditions’ are not provided and, the ad is determined to be misleading, the failure to clarify the terms and conditions may be considered an aggravating factor by a regulator.

Improper Reliance on Industry Terms used in Advertising

What is clear to industry members may be confusing to the general public. When industry-specific terms (e.g., APR, COB) are used in advertising, the information must be presented in such a way that the general public will have a clear understanding of what the advertisement means.

Incomplete Comparative Ads

Comparative advertisements can be very beneficial to the marketplace. Ads that compare facts and figures in a straightforward way make it easier for consumers to decide whom they want to deal with.

Consider the ad: *‘We work with many different lenders to find the right mortgage for you’*

Without additional information, this ad is meaningless and may be a misleading comparison, whether or not it is an accurate statement. It leaves consumers with the impression that a wide range of lenders can fund their mortgage. This advertisement can be made more useful and truthful by a simple clarification, for example: *‘We can access mortgage products from more than 40 lenders to find the right product for you’*

Consider the ad: *‘Our brokerage is the most popular one in the area.’*

Again, this is a meaningless comparison because it does not specify where or in what market the brokerage arranges more mortgages. It may also be misleading. Consumers would reasonably assume that the information applies locally. If this claim is based on statistics for Hamilton, but the advertisement is circulated in Barrie, the Barrie consumers are likely to be misled. A simple change would correct this problem: *‘Our brokerage was awarded the People’s Choice award in 2008 as the best mortgage brokerage in Hamilton.’*

To avoid an unprofessional industry image, ads that make a comparison to a competitor should be clear, truthful and in good taste. The Canadian Code of Advertising Standards (see *Appendix 5*) states that advertisements must not unfairly discredit other products, services, advertisements or companies or exaggerate the nature or importance of competitive differences.

Implied Endorsements

An ‘implied endorsement’ is the use of information that implies - without actually stating - that a certain individual or organization endorses the industry member. Licencees should take care to avoid giving the impression of an endorsement unless they have written confirmation that a person or company has provided the endorsement.

For example, attaching a logo from one or a few suppliers in an advertisement (e.g., a bank), without the consent of the supplier(s), is a classic example of an implied endorsement. It is also illegal to use a copyrighted logo, without permission.

Improper use of Teasers

Teasers are advertisements that are deliberately devoid of information to encourage direct contact by the consumer. The following is an example of a teaser:

‘I offer a mortgage broker service performance guarantee. Call me for details at 1-800-123-4567.’

Teasers are generally not considered misleading because they don’t provide sufficient information to create an impression. They are designed to create curiosity. If the regulator, however, investigates such an ad and discovers that the person or entity offering to transact in mortgages is not appropriately licensed, the person or entity is subject to sanctions.

The name and licence number of a brokerage is not provided in this example. This is in contravention of the rules. Further, the ad provides a type of ‘guarantee’. Licencees are not permitted to make guarantees with respect to a mortgage under the MBLAA. While this particular statement is making a guarantee about the service performance and not the actual mortgage, it may be pushing the limits. When in doubt, err on the side of caution. Do not make guarantees with respect to any aspect of arranging/negotiating a mortgage.

Use of the term ‘Specialist’

Industry members may like to advertise that they have special qualifications or expertise in a specific industry sector or geographical area (e.g., commercial mortgage specialist, condominium specialist or neighbourhood specialist). As consumers can rely very heavily on such ads, it is important that the industry member have and can demonstrate the qualification advertised (e.g., based on education, experience, a combination of both, a certification or designation).

Use of Unsubstantiated Exaggeration

A claim of being ‘the friendliest broker in town!’ is not misleading in a material respect even if the agent is usually grumpy. This is considered ‘puffery’ – a claim that is entirely subjective and can neither be proven nor disproved. The public generally understands that such statements are exaggerations or simply matters of opinion.

‘We find a mortgage for 99% of our customers!’ is a material representation. Its truthfulness is not affected by opinion, and it is a statement that could have a direct impact on the purchaser’s choice of mortgage brokerage/broker/agent. Claims of this nature must be able to be proven with accurate documentation.

Lack of Timely Reviews of Advertisement

Advertisements that will be in circulation for a long period of time (e.g., ads on large billboards or in the Yellow pages) present a challenge for industry members because the information contained in these ads may change while the advertisement is still available to the public (e.g., it takes time for an ad in the Yellow Pages to be updated to reflect new information). Therefore, it is important that industry members review and update such ads on a regular basis (e.g., to ensure that brokers and agents that are no longer authorized by a brokerage firm are not advertising under the brokerage name).

For further information on advertising see the Advertising Standards Canada website: (www.adstandards.com) and the Competition Bureau of Industry Canada website: (www.competitionbureau.gc.ca)

ADVERTISING FOR PARTICULAR MORTGAGES

[Reg. 191/08, s. 18, 19, 20]

There are specific advertising requirements for several types of mortgages:

Mortgages for Fixed Amounts

Advertisements for a mortgage for a fixed amount that state the interest rate or the amount of any payment or of any charge other than interest, must also include the Annual Percentage Rate (APR) and the term of the mortgage and the APR must be displayed in a manner consistent with the remainder of the ad.

If the APR or the terms of the mortgage are not the same for all mortgages to which the advertisement relates, the disclosure must be based on an example of a mortgage that fairly depicts all those mortgages and is identified as a representative sample of them.

Mortgages Securing Lines of Credit

Advertisements for mortgages that secure lines of credit that state the annual interest rate or the amount of any payment or of any charge other than interest must also include the annual rate of interest on the date of the advertisement. They must also include any initial or periodic charges other than interest and this information must be displayed as prominently as the other information in the ad.

Interest-free periods

If an advertisement states or implies that a period of the mortgage is free of any interest charges, the ad must indicate whether interest accrues during the period and is payable after the period. If interest does not accrue during a period, the ad must clearly state:

- that there is an interest-free period or grace period
- the conditions that apply to qualify for the interest free period
- the APR or the annual interest rate if the conditions are not met

REPRESENTATIONS RE: PAYMENTS

A licensee must not, directly or indirectly, convey that a government authority approves any fees payable to the brokerage related to the carrying on of its business. The only exceptions are the disbursements required under the Land Titles Act or the Registry Act.

REGULATOR REMEDIES FOR NON-COMPLIANT PUBLIC RELATIONS MATERIALS

The regulator has a variety of options available to enforce compliance. These remedies range from: a letter of warning to cease use of non-compliant advertising, an order to retract or publish corrections of public relations materials which were determined to be false advertising, a requirement for pre-approval of a licensee's advertising materials by the regulator, etc.

The regulator's remedies will be based on:

- The degree to which the contravention was intentional, reckless or negligent
- The extent of the harm or potential harm to others resulting from the infraction
- The extent to which the person or entity tried to mitigate any loss or to take other remedial action
- The extent to which the person or entity derived or may have expected to derive any economic benefit from the contravention.
- Any other contraventions to comply with the Act or with any other financial services legislation (of Ontario or any other jurisdiction) during the preceding five years

ADVERTISING CHECKLIST

The following checklist* provides licensees with guidance on: (1) complying with the MBLAA requirements governing public relations materials and, (2) general good business practices.

This mortgage industry advertising checklist applies to business cards, letterhead, websites and all major advertisements. Recommendations regarding smaller promotional items, such as pens, calculators, etc. are addressed separately below.

Advertising Checklist for Mortgage Industry

RE: Brokerage

- Is the name and license number of the brokerage prominently displayed?
- Does the name of the brokerage appear as it is registered with FSCO?
- Is the name and license number of the brokerage prominently displayed on the website? At the very least, the name and brokerage license number should be on the home page and the 'contact us' section. It must be clear to the reader who the brokerage is.
- In the case of a franchise, does the phrase 'Independently owned and operated' clearly appear with the brokerage name?
- Is a method to contact the brokerage included in all advertising? This can be a telephone number, mailing or e-mail address
- Is the brokerage contact information provided the same as that listed with FSCO?

**This checklist is a modification of the Real Estate Council of Ontario (RECO) advertising checklist.*

- Is the contact information being provided consistent? For example, a personal telephone number should not appear with a mailing address for the brokerage.
- Are any additional (non-brokerage) telephone numbers in the public relations materials appropriately identified as being direct, cellular or home telephone numbers? Additional (non-brokerage) e-mail addresses listed on a brokerage's website should be appropriately identified as being direct.

RE: Broker / Agent

- Does the broker or agent's name appear as it is registered with FSCO?
- Do one of the approved titles mortgage broker, broker, mortgage agent or agent, clearly appear with the broker or agent's name?
- Is the name and license number of the brokerage included in the advertisement?
- Is the contact information provided in the broker or agent's public relations materials the same brokerage contact information listed with FSCO?

RE: Teams

- It must be clear that the team is not the licensed brokerage. Does the ad clearly state the name and licence number of the brokerage?
- Are the team members identified with the appropriate titles?

RE: Multiple Service Providers

- The advertisements must be clear about which services are being provided by which entities. It may be helpful if the ad had an obvious 'structure' to it. For example, if a firm operates both a real estate business and a mortgage business, there should be no confusion about what services are offered by each (e.g., with respect to a business card, one side of the card may be for the real estate broker services, the other side for the mortgage broker services).

RE: Awards and Claims

- When advertising an award, the following information should be included in the advertisement: (1) provider of the award (e.g., the mortgage brokerage franchise, CAAMP); (2) the basis of the award (e.g., sales, volume, commission earned); (3) the date or period of time to which the award applies. These disclosures should be made in every advertisement in which the award appears.
- Awards that have been purchased cannot be advertised.
- Are there any claims made in the public relations materials that cannot be verified? If you make a claim such as #1 Mortgage Broker in Anytown or the largest Brokerage in Anytown, you should substantiate these claims by indicating: (1) the source or provider of the statistics/information (e.g., CAAMP); (2) the basis for the claim (e.g., sales volume, number of representatives); (3) the date or period of time to which the claims apply. These disclosures should be made within the advertisement.

RE: Promises and Offers

- Have you included appropriate disclosures with respect to the terms applicable to any promises or offers that are being made in public relations materials? Are these disclosures presented within the same advertisement?

- Are the terms of your offer(s) available in writing to any individual inquiring about the offers(s) without an obligation on that individual to provide confidential or personal information or commit to a transaction?
- If the offer in an advertisement is not an offer by the brokerage, have you reviewed the terms of the offer to ensure that the wording does not inadvertently oblige the entire brokerage to honour the offer? Do you have written authority, as necessary, to make the offer?

RE: Other Promotional Materials

- Technically, promotional items such as pens, calculators, T- shirts/jackets, holiday cards, classified ads and Yellow Pages ads must comply with the Act and should include the required information (legal name and licence number of brokerage, broker and/or agent title, if broker/agent is listed). CAAMP expects that regulator will use a common sense approach with respect to these items and will recognize that it may not be feasible to provide all the information required on a pen, etc. CAAMP expects that the regulator will not focus on minor technical violations but will be driven by consumer complaints about ads that may put the public interest at risk. The obligation is on the advertiser to ensure that their promotional materials do not mislead the public.

RE: Disclaimers/Qualifiers

- Are disclaimers/qualifiers clearly shown in the advertisement? Can they be read easily?
- Are the disclaimers/qualifiers clearly connected to the content in the body of the advertisement to which they apply (i.e., by a unique symbol such as an asterisk)?
- Further, the Canadian Code of Advertising Standards requires that disclaimers or footnoted information must not contradict the more prominent aspects of the advertisement message.

RE: Private Information

- If private information is collected (e.g., via a mortgage application on a website) is there a Privacy Policy?

SECTION REVIEW

1. Define public relations materials.
2. Explain the rules with respect to identifying brokerages, brokers and agents in advertisements?
3. Name the approved titles for brokers and agents.
4. Describe the use of trade names and when they can be used in advertisements.
5. Can advertisements include franchisee names?
6. Give five examples of misleading advertisements.
7. Describe five causes of misleading advertising.

SECTION 3: DEALING WITH CUSTOMERS

The nature of the service relationship with a customer is the key determinant of how to proceed with a mortgage transaction. Consequently, the role of the brokerage and its authorized representatives must be clarified at the very beginning of the process of arranging for a mortgage.

Relationships with customers must be conducted in a professional manner, based on clear and open disclosures, consents and acknowledgements. Recommendations must be based on analysis of a client's unique financial and personal situation and the product offerings available under the chosen service arrangement and market conditions. Taking the time to educate a client about the various products and other factors that may impact their decisions about a mortgage will help make the client a partner in the determination of the most suitable mortgage option for him/her. This vested interest in the decision process can help avoid problems down the road, should the borrower run into difficulties (e.g., falling in arrears). Timely communication with the borrower throughout the loan process is also helpful in building customer satisfaction.

LEARNING OBJECTIVES

After completing this section, you should:

- Understand the role of proper disclosure
- Understand the importance of knowing your client
- Be familiar with the process required for verification of information
- List and describe the various types of disclosure documents

IDENTIFYING LICENSED PARTIES

[Reg. 187/08, s.10]

Brokers and agents must provide the name(s) in which they are licensed and their licence numbers if requested to do so by a client, lender, investor, regulator, etc. They must also comply with a request to provide the name and licence number of their brokerage.

A brokerage must provide the name and licence number of any of its authorized agents and brokers upon request. It does not, however, have to provide the names and licence numbers of all or substantially all of its brokers and agents.

VERIFYING PARTIES TO A TRANSACTION

[Reg. 188/08, s 10–11]

It is simply good business sense to know the parties you are dealing with when conducting a business transaction. In line with this practice, the MBLAA requires that licencees take **reasonable** steps to verify each of the parties to a transaction.

A brokerage must attempt to confirm the identity of each borrower, lender and investor with whom it wishes to transact business. There are two exceptions to this requirement: (1) if the brokerage is dealing with a 'traditional' lender that is required by law to verify the borrower's identity, the onus of verifying a borrower's identity rests with this lender and, (2) in situations where another brokerage is acting as the representative for an investor in a trade, the responsibility of verifying that investor's identity rests with the other brokerage.

In cases, where a brokerage is dealing with a ‘non-traditional’ lender that provides funding for mortgages (e.g. a private lender), the brokerage presenting the mortgage for consideration will be held accountable for taking reasonable steps to verify a borrower’s identity because this lender is not required by law to verify identity.

In cases where the brokerage is unable to verify the identity of another party to the transaction, the brokerage must advise the borrower, lender or investor of this situation before:

- the borrower enters into a mortgage agreement or signs a mortgage instrument or mortgage renewal agreement with the lender
- submitting the borrower's mortgage application to the lender or arranging for a mortgage renewal agreement with the lender; or
- the trade completion date for the investment in a mortgage

It is also recommended that the inability to confirm the identity be documented in the client file.

Even when dealing with a traditional lender, it is recommended that brokerages exercise due diligence in confirming a borrower’s identity as failure to do so can result in:

- lenders and/or investors making funding and investment decisions based on misleading or false information
- inaccurate assessments of creditworthiness
- poor assessment of mortgage suitability for the client
- problems for agents and brokers who may find themselves inadvertently associated with fraudulent activity

While the review and sign-off by the lawyer in a mortgage transaction is usually the final verification of party identities, documentation of all the steps taken by a brokerage to confirm party identities is crucial, especially if a problem does arise down the road.

A mortgage administrator must also take care to verify the identity of each lender or investor under a mortgage before entering into an agreement with the lender or investor to administer the mortgage. This verification by the administrator is not necessary if a brokerage was required to verify the lender or investor’s identity.

Table 9 - Recommended Steps for Verifying Identification

(Note: Not an exhaustive list)

Additional information re: verifying identification is available in CAAMP's Origination Standards for Fraud Avoidance available on the CAAMP website at:

http://www.caamp.org/download_docs/Origination_Standards_ENG.pdf.

Collect Personal Information

- **Client Name:** It is important to use the correct legal name of the client and not an abbreviation. A full and correct legal name provides a check against possible deception, forged documents, etc.
- **Home & Business Addresses:** Both a residence address and a business address should be obtained.
- **Contact Information:** Home and business numbers should be obtained and verified. It may also be helpful to collect as much other contact information as possible (e.g., cell phone, fax, pager, and cottage telephone numbers.)
- **Date of Birth:**
- **Marital Status:** Marital status has both financial and legal implications and therefore impacts the creditworthiness of the client.
- **Dependents:** Whether or not the client has any dependents also has financial implications.

Collect Financial Information

Financial information underpins the lending decision. Collect the following information:

- Employer, Position, Length of Service
- Income
- Total Net Worth
- Banking Info
- Credit Check
- Lawyer Info

Other Information

- **Co-Signatures/Guarantors:** A diligent effort must be made to confirm the identity of the guarantor and ensure that the guarantor understands the obligation/liability being assumed.
- **Source of Client:** Verifying the identity of walk-ins/phone-ins may require additional due diligence than is required for referrals from known contacts.
- **Driver's licence**

Red Flags

Some client behaviours may be indications for increased due diligence. Be cautious if client:

- is reluctant to provide adequate information
- provides vague information or false information
- provides documentation that appears altered/counterfeit
- cannot be reached at telephone number(s) provided
- is overly interested in compliance and/or money laundering rules

DUTY RE: SUITABILITY OF MORTGAGE FOR CONSUMER

[Reg. 188/08, s.24]

Brokerages, brokers and agents must take **reasonable** steps to ensure that their mortgage recommendations are suitable for the client.

Every client has a unique profile. This profile is determined by financial and personal factors such as annual income, debt obligations, risk tolerance, investment horizon, marital status, stage in the life cycle, etc. Brokerages collect the majority of this information about their clients in the normal course of completing an application for a mortgage.

The requirement for suitability, however, extends beyond the mere gathering of information. What is required is an analysis of: (1) the information about the client and, (2) the array of mortgage products available to meet the client's needs given the existing market environment. Therefore, brokers and agents must conduct a 'matching' exercise based on a careful and knowledgeable assessment of many factors in order to ensure the suitability of his/her recommendation.

Training, supervision and experience all play a role in developing a broker or agent's skill and ability to make appropriate mortgage recommendations based on a consumer's profile and preferences and product options available. In some cases, providing a client with an unsuitable mortgage may lead to a mortgage default, but defaults can occur for other reasons. Life events such as loss of employment, medical crises or family problems can often lead to bankruptcy and/or defaults and foreclosures. It is nearly impossible to predict such events. Licencees are not expected to have crystal balls when assessing suitability, but they are expected to consider reasonably foreseeable events when making recommendations.

A good test of whether or not a brokerage, broker or agent feels that he or she has made a suitable recommendation for their client is whether or not they feel they can comfortably defend their recommendation to other competent mortgage professionals. The broker/agent should ask themselves, 'would my colleagues have arrived at the same recommendation, based on the information available'?

The duty to ensure the suitability of a mortgage does not apply if the borrower, lender or investor is another brokerage or financial institution. In this case, these parties are viewed as sophisticated and able to make their own determinations. *[Reg. 188/08, s. 24 (1), (2)]*

SUITABILITY – FACTORS TO CONSIDER

In order to determine whether a mortgage is suitable for a client, many different factors must be assessed. It is impossible to provide an exhaustive list of such factors. Table 10 offers some guidance on what types of things should be considered in assessing the suitability of a mortgage for the consumer.

Table 10 - Determining Suitability of Mortgage for a Borrower
Examples of Factors to Consider

(Note: This is not an exhaustive list.)

Client considerations:

- annual income – amount, source and stability
- net worth, TDS, GDS
- credit score
- amount of down payment
- term, interest rate and amortization sought by client
- preference for variable vs. fixed rate
- age
- gifts (size and giftors)
- risk tolerance
- urgency in requiring a mortgage
- motivation for the mortgage (renewal, renovation)
- preferences re: prepayment options
- willingness to pay any penalties for paying out the mortgage prior to the end of the term of the loan
- ability or willingness to pay fees
- family/household obligations (e.g., impending divorce and alimony and/or child support payments)

Property Considerations

- market value
- property registration (e.g., common versus joint survivorship)
- existing mortgages on property
- residential vs. commercial
- primary residence vs. cottage/second home
- property location (e.g., outside Ontario)

Market Considerations

- consensus view on possible mortgage interest rate movements
- general willingness of lenders to make mortgage loans (market liquidity)
- expectations re trends in property values

Mortgage Lender, Insurer and Product Considerations

- loan amount
- lender requirements and guidelines
- availability to broker/agent of a wide range of mortgage products and mortgage insurance

Table 11 - Determining Suitability – Examples

Bob, a new inexperienced agent has just spoken to his clients, the Carltons. The Carltons currently live in the city, but wish to retire to the country within the year and have put their home up for sale. The For Sale sign is on the lawn. Nonetheless, they must refinance their mortgage until they sell their home. Bob recommends that they take a five-year closed mortgage.

This type of mortgage is inappropriate for the Carltons at this time. What Bob should have recommended is a six-month open mortgage, even if it is at a higher rate, given that the Carlton's home would likely sell within six months. The prepayment fees on the five-year mortgage could be substantial.

Jennifer is a borrower wishing to renew her mortgage. She is 55 years old and has a sales job in which her compensation is heavily weighted toward an annual bonus. She is concerned that if she has a 'lean year' she will not be able to make her mortgage payments. The agent arranges a mortgage with a long amortization and generous prepayment options.

This mortgage is suitable as the client is protected in lean years by having a lower monthly mortgage payment, but in more affluent times she has the freedom to make large lump sum payments that will decrease the amortization of the loan.

Consider a client that may wish to reduce cash outflow to invest in securities or pay down a second mortgage or simply reduce monthly payments to avoid default. In this case an interest-only loan may be most suitable.

The issues of suitability of a mortgage for the borrower, knowing your client and disclosure (e.g., of material risks, conflicts of interest) are intricately connected. Consumer complaints may initially surface as related to issues of suitability. On further inspection, it may become apparent that an unsuitable recommendation was provided as a result of an undisclosed conflict of interest (e.g., greater fee or incentive for an agent to recommend one product versus another). Ensuring suitability will help reduce consumer complaints (and likely defaults).

DOCUMENTING THE ANALYSIS FOR SUITABILITY

As discussed above, brokers and agents collect the vast majority of data required to assess suitability of a mortgage for a client in the normal course of the application process. What is new for the industry is that licencees are now being held explicitly responsible/accountable for making a suitable recommendation under the MBLAA.

How can an analysis for suitability be proved? While the MBLAA does not explicitly require it, documentation of the steps in the process of arriving at a recommendation is good practice. This documentation is important should the borrower, brokerage or regulator question the recommendation. The documentation should outline the conditions at the time of the mortgage application and the reasons for the recommendation. The test for suitability will be based on:

- Evidence that the proper information was considered (Table 10 above) and that a checklist was used (Table 12)

- The reasonableness of the analysis of the factors and the resulting conclusion/recommendation
- The extent of the risk to the borrower and/or lender as a result of the recommendation
- Any steps taken by the licensee to remedy the situation, once he/she became aware of any problems

Table 12 - Determining Suitability – Checklist

(Note: This is not an exhaustive list.)

Ask yourself the following questions:

- Have I considered the client’s financial situation (i.e., debt service ratio, stability of income stream)?
- Have I considered the client’s life stage - goals and objectives (e.g., retiring soon, upcoming concerns re: funding university education)?
- Have I considered the client’s overall household situation (e.g., has client indicated they are in divorce proceedings and may be subject to making alimony or child support payments)?
- Have I made the proper disclosures with respect to my interests in the transaction (e.g., may receive incentive from lender, the lender is your sister’s husband)?
- Have I considered the appropriateness of the products available to me for the client (e.g., are you fully aware of, and understand, all the products available to you from all your potential lenders)?
- Have I considered what risks the borrower could face as a result of my recommendation? Have I also considered the risks to the lender(s) and my brokerage as a result of my recommendation?
- Have I taken the time to ensure my client fully understands any reasonably foreseeable risks of this transaction?
- Have I documented my assessment of the factors impacting my decision at the time (e.g., all of the factors above, including economic conditions)?
- Could I defend this recommendation to my colleagues, to a regulator (i.e., would another mortgage professional reasonably make the same conclusions and recommendation given the circumstances)?

Ultimately, if the brokerage, broker and/or agent feel strongly that they cannot serve the best interests of the borrower under the circumstances, they should choose not to proceed with the transaction.

SUITABILITY IN PRIVATE TRANSACTIONS

A private transaction relates to arranging funding for a mortgage through private lenders (i.e., one or a group of individuals or companies with funds to invest; not a traditional financial institution). However, having sizable net worth or investable assets does not necessarily make an investor sophisticated and highly knowledgeable about financial investments. Brokerages may wish to impose a stricter oversight of private transactions.

DUTY TO RETURN CERTAIN DOCUMENTS

[Reg. 188/08, S. 17]

A brokerage/administrator should not unreasonably withhold any deed, instruments or other documents from their owner. As a general practice, original documents should be returned to their owners promptly, without charge. In any case, such documents must be returned to their owners, without charge, upon receipt of a written request to do so from the regulator, the owner of the documents or the owner's agent. A brokerage may consider questioning why a broker/agent would want to retain the original documents. For what purpose?

CONSENT AND CONFIDENTIALITY

Brokerages should ensure that they have obtained all the required consents from their clients in order to proceed with the mortgage transaction. These consents include: agreement for credit bureau checks, consent to provide personal information as required with the necessary third parties to obtain the mortgage, etc.

The consent forms should clearly state the:

1. Purpose for providing the consent : e.g., to assess and respond to borrower need for loan/mortgage/renewal and maintain a client relationship with the brokerage and
2. The types of consents being provided. For example, consent to allow:
 - the brokerage to obtain personal information about the borrower(s) from consumer reporting agencies, credit bureaus, and real estate appraisers
 - the brokerage to provide personal information to third parties, such as lenders, insurers and technology support companies, in order to arrange the mortgage
 - each lender considering the application to obtain personal information about the borrower(s) from consumer reporting agencies, credit bureaus, and real estate appraisers
 - the brokerage and/or each lender to ensure the accuracy of the borrower(s) personal information by contacting third parties (e.g., references)

In addition, it would be beneficial to the borrower if the consent form made it clear that:

- the personal information may be retained by the brokerage (for six or more years). See Record-keeping in Section 6 for additional information on document retention.
- the borrower's file is kept by the broker/agent until a loan/mortgage is funded, after which it is sent to the brokerage's head office for review and physical and/or electronic storage
- if the borrower would like information related to the mortgage transaction provided to another party, such as a parent, the borrower must provide express written consent
- the borrower has the right to review and correct personal information
- the borrower may obtain the brokerage's privacy policy

Brokerages should ensure all client personal and financial information is kept confidential:

- Discuss client information/transaction details only with those involved in the transaction
- File documents properly/safely, to avoid snooping, loss, alterations

Clients should sign consent forms even if they provided oral consent over the phone. Copies of the consents provided via the Internet should be kept in the client file.

LEGAL AUTHORITY AND SUSPICIOUS ACTIVITY

If for any reason, a brokerage, broker or agent doubts that a client has legal authority to mortgage a property, or doubts the accuracy of the borrower's application and/or supporting documentation, they should not be dealing with this potential client and must inform the lender of their concerns as soon as possible.

Brokerages, brokers or agents should not act for a borrower/lender/investor if they believe a mortgage is unlawful.

DISCLOSURE

Open, honest and full disclosure with all parties involved in a transaction underpins a strong professional relationship. It increases understanding of the particulars of the transaction being considered, helping to ensure informed decisions. It also establishes clear expectations for all parties and reduces misunderstandings, protecting both industry participants (brokerages, administrators, lenders, brokers and agents) and the public (consumers). It helps build trustworthiness and confidence in the brokerage, broker/agent and industry in general. Given the importance of the disclosures required, the topic is discussed in more detail in the next section of these Guidelines.

CLIENT RIGHTS

Your clients have a right to ask for additional information. You should indicate to clients that if they require additional information about your qualifications or the nature of your business or business relationships, you would be happy to provide this to them.

Table 13 - Checklist for Dealing with Clients

Ask yourself the following questions. Have I:

- properly identified my brokerage and myself?
- properly identified my role and that of my brokerage in the transaction?
- provided the proper disclosures with respect to fees and compensation?
- taken reasonable steps to verify the identities of the parties to the transaction, as required?
- any concerns with respect to the legal authority of the borrower?
- collected, analyzed and documented all the necessary information to make a suitable recommendation for the borrower?
- provided the borrower with the proper disclosures with respect the technical/financial aspects of the mortgage loan (e.g., cost of borrowing, material risks)?
- provided the borrower with proper disclosures with respect other issues (e.g., conflicts of interests)?
- inadvertently made a guarantee about the mortgage?
- returned all original documents to the borrower?
- ensured proper handling the borrower's application to ensure confidentiality of the file?

Note: Disclosure documentation is discussed in the next Section.

MORTGAGE ADMINISTRATION

ADMINISTRATION AGREEMENT

A mortgage administrator cannot administer a mortgage without a written agreement between the administrator and each lender or investor. This agreement, which governs how the mortgage will be administered, must include the following:

- The name in which the mortgage is or will be registered under the Land Titles Act or the Registry Act
- If the mortgage is held in trust, the details of the trust
- A description of when and how a lender or investor may dispose of all or part of their interest in the mortgage
- How the payments made by the borrower under the mortgage will be disposed
- The rights and duties of each lender or investor under the agreement if the borrower defaults and the costs for which each lender or investor will be responsible
- Protocol in the event of a foreclosure or power of sale, including the rights and duties of each lender or investor
- The administration fees payable by each lender or investor, including how the fees are calculated and the method of payment

A mortgage administrator must promptly notify each lender or investor if it becomes aware of a significant change in circumstances that affect the mortgage (e.g., borrower default, subsequent encumbrance on the mortgage). This duty should be clearly stated in the administration agreement. If it is not, it is nonetheless deemed to be included in the document.

PAYMENTS

An administrator may use only the funds paid under a mortgage by the borrower to make payments to a lender or investor in connection with administering the mortgage. Further, if a borrower does not use a certified cheque to make a payment, the administrator must wait until the cheque clears and the administrator receives the funds before it can disburse any payments to the lender or investor.

If an administrator received proceeds from the redemption or partial redemption of a mortgage, the administrator must promptly pay the full amount owing to the lender or investor.

SECTION REVIEW

1. What information must you provide when asked to identify yourself?
2. Why is it important to verify the parties to a transaction?
3. Under what circumstances is a brokerage exempt from the requirement to identify the parties to a transaction?
4. What must a brokerage do if it is unable to verify the parties to a transaction? When should this information be conveyed?
5. List ten types of information that should be collected to help verify the identity of the client.
6. Discuss five factors that should be considered when making a recommendation for a suitable mortgage for a borrower.

7. What is a good test for gauging whether you have made a suitable recommendation for your client?
8. What types of original documents should be returned to the client?
9. List five items that should be contained in a mortgage administration agreement.
10. Describe the importance of disclosure.

SECTION 4: DISCLOSURE DOCUMENTATION

There are numerous items, such as the cost of borrowing, conflicts of interest and remuneration fees that must be disclosed to the various parties in a mortgage transaction. These disclosures must be made in writing, using language that is clear and concise and should be presented in a logical manner so as to draw the attention of the borrower, lender or investor to the pertinent information being provided.

The licensee(s) making the disclosures must always obtain from the client written acknowledgement that he/she has received the required disclosures. Each disclosure may be made in a separate form or be provided as part of a larger disclosure document that addresses a number of other items.

Providing clear, open and honest disclosures is not only a requirement under the Act but it also helps promote a reputation for professionalism and trustworthiness with your clients.

Some disclosures are not required if the lender or investor in the mortgage transaction is a member of a Designated Class of lenders and investors. Members of the Designated Class (e.g., a financial institution, brokerage acting on its own behalf, persons with net assets of at least \$5 million) are either required to provide certain disclosures under their own governing acts or are viewed as 'sophisticated' persons/entities capable of assessing the benefits and risks of a mortgage transaction without having to rely on this disclosure requirement. The types of persons and entities included in this class are listed in Table 22 at the end of this section.

LEARNING OBJECTIVES:

After reading this section you should:

- Understand the primary role of disclosure
- Be familiar with the list of required disclosures
- Know when and how to make the required disclosures
- Discuss how to manage conflicts of interest

BROKERAGE DISCLOSURES TO BORROWERS

[Reg. 188/08, s. 35]

Every required disclosure to a borrower should be made at the earliest opportunity and in any case no later than two business days before the borrower enters into a mortgage agreement or signs a mortgage instrument, whichever is first. If the borrower consents in writing to receiving the disclosure after this deadline, the disclosure may be made at any time before the borrower signs a mortgage instrument.

For every required disclosure to a borrower, the brokerage must obtain written acknowledgement from the borrower that the disclosure has been made.

NATURE OF BROKERAGE SERVICE RELATIONSHIP WITH BORROWER AND/OR LENDER

[Reg. 188/08, s. 18]

The nature of a service relationship determines the obligations of a brokerage and its authorized representative to the borrower and/or the lender. Clarifying the role of the brokerage, broker or agent also helps identify whether any conflicts/perceived conflicts of interest exist and must be disclosed. Consequently, the nature of the service arrangement should be discussed and decided with the borrower at the very beginning of the relationship.

There are three types of service contracts possible under the MBLAA. In a mortgage transaction, the brokerage may act for:

1. the lender (but not the borrower)
2. the borrower (but not the lender), or
3. both the borrower and the lender, but not give preference to the interests of either

Licencees should discuss with the client each type of service agreement available and the mortgage products that the brokerage can provide under each type of arrangement. This discussion will allow the borrower to make a more informed decision about which service contract would best suit their needs.

Once a decision has been made on the nature of the brokerage service relationship, it must be documented in the client file, including the client's acknowledgement of the service arrangement.

In 'acting for' the borrower, lender or both, the licensee exerts some discretion on behalf of the borrower and/or lender and, therefore, owes the affected parties a duty of care. This duty of care requires that the licensee act in the client's best interest, with competence, loyalty and full disclosure.

RECA notes there are four basic rules to follow. These are the 'Four Ds':

1. Disclose options for potential relationships
2. Decide on the relationship
3. Document that disclosure, and
4. Do what you decided (i.e., act according to the chosen service role)

Table 14 - Sample Wording for Disclosure of Nature of Brokerage Relationship

Broker/agent must check one box:

- I will act as an agent for the borrower. In this service relationship, I have an obligation to represent the best interests of the borrower at all times
- I will act as an agent for the lender. In this service relationship, I have an obligation to represent the best interests of the lender at all times
- I will act as an agent for both the borrower and the lender. In this service relationship, I have an obligation to represent the best interests of both the borrower and the lender at all times

BROKERAGE RELATIONSHIP WITH LENDERS

[Reg. 188/08, s. 19 (1) – (3)]

A brokerage must disclose to a borrower: (1) the nature of the relationship between the brokerage and each lender under a mortgage (2) the number of lenders it acted for during the previous fiscal year and, (3) whether the brokerage itself was a lender during that period.

If requested by the borrower, the brokerage must also disclose:

- whether the brokerage was the lender for more than 50% of the total number of mortgages and mortgage renewals it completed during the previous fiscal year
- the name of the lender, if more than 50% of the brokerage's total number of mortgages and mortgage renewals completed during the previous fiscal year were arranged through one lender.

Table 15 - Sample Wording for Disclosure of Brokerage Relationship with Lender

Within the past 12 months ending January 31, 2007 (fiscal year), ABC Brokerage has acted as a lender in more than 50% of the total number of mortgages and mortgage renewals it completed during this period.

Within the past 12 months ending January 31, 2007 (fiscal year), XYZ Lender has funded more than 50% of ABC Brokerage's total number of mortgages and renewals it completed during this period.

MONETARY FEES AND NON-MONETARY INCENTIVES RECEIVABLE/PAYABLE BY BROKERAGES

[Reg. 188/08, s. 21-22]

Brokerages, brokers and agents may be entitled to receive monetary and non-monetary remuneration for arranging mortgages or mortgage renewals from a party that is not the borrower. A brokerage must disclose if the brokerage or its authorized representatives:

- are entitled to a fee or incentive, directly or indirectly, from another person or entity for arranging the mortgage or renewal
- if a fee or incentive is payable, the identity of the person or entity making the payment, the basis for calculating the amount of the fee or other remuneration, and the nature of the benefit must be disclosed

The reverse situation may also occur. A brokerage may pay a person or entity (not one of its authorized brokers or agents) in connection with negotiating a mortgage or renewal that it presents for the borrower's consideration. In this case, the brokerage must disclose to the borrower:

- That the brokerage may or will pay a fee or other remuneration, directly or indirectly, to another person or entity for arranging the mortgage or renewal
- If such a fee is payable, the identity of the other person or entity, the basis for calculating the amount of the fee or other remuneration, and the nature of the benefit must be disclosed

Table 16 - Sample Wording for Disclosure of Fees and Incentives

ABC Brokerage and its authorized representatives (i.e., brokers and agents) may receive fees from each lender, and may receive a program fee from the lender which varies with the mortgage interest rate and terms negotiated and accepted by the borrower. Fees and program fees may be money, or goods and services having value to the recipient. Different lenders may provide ABC Brokerage and its authorized representatives with different fees and incentives for similar products. A lender’s fees and incentives may be dependent on amounts and types of business originated by ABC Brokerage and its authorized representatives.

Borrower Confirms Fee Disclosure through Signature:

Borrower Signature: _____ Date: _____

REFERRAL FEES

A brokerage may be entitled to a fee or other remuneration for referring a borrower, lender or investor to another person or entity for the purpose of negotiating a mortgage. This remuneration arrangement and the nature of the relationship between the brokerage and the other person or entity must be disclosed by the brokerage to the borrower, lender or investor in writing. It is not necessary to disclose the amount of the payment for the referral.

MATERIAL RISKS

A brokerage must disclose to a borrower the material risks of each mortgage that the brokerage presents for the consideration of the borrower. Examples of material risk include: rising interest rates if have a variable rate mortgage, falling in arrears, negative amortization (payment stays the same, but the rates increase), prepayment penalties, foreclosure, etc. It is difficult to provide a client with an exhaustive list of material risks associated with a mortgage. However, the brokerage should review with the client both the general risks associated with a mortgage and any specific risks associated with their particular mortgage.

This disclosure does not apply if the lender or investor is a member of a Designated Class of lenders and investors. [Reg. 188/08, s. 25 (2)]

Table 17 - Sample Wording for Disclosure of Material Risks

The brokerage has reviewed with the borrower the general risks associated with a mortgage commitment. These risks include: risk of falling in arrears, default and foreclosure, prepayment penalties, etc. In addition, the following specific risks associated with this particular mortgage transaction have been discussed:

Signature: _____ Date: _____
(Borrower)

DEFAULT CHARGES

Default charges must be clearly disclosed to the borrower. If a borrower fails to make a payment when it becomes due or fails to comply with an obligation under the mortgage, in addition to interest, the brokerage may impose charges for the recovery of costs such as:

- legal services required to collect or attempt to collect the payment
- expenses incurred to realize or protect a security interest taken under the mortgage
- costs incurred to process the borrower's cheque or other payment instrument that was dishonoured

ESTIMATES OF UNKNOWN INFORMATION

In some cases, disclosures have to be made based on estimated values. Disclosures based on estimated values are acceptable in cases where the brokerage cannot reasonably know the actual information to be disclosed and if the estimate or assumption is reasonable. Nonetheless, the brokerage must inform the borrower that an estimate is being provided.

SAMPLE MORTGAGE BORROWER DISCLOSURE DOCUMENT

A sample form outlining a number of required disclosures to a borrower is provided in Table 18.

Online disclosure forms are currently under development. Industry members have been working with the regulator and technology service providers, Filogix and Marlborough Stirling, to create online forms for the cost of borrowing and other enhanced disclosure. The latest drafts of these documents from Filogix and Marlborough Stirling are included as *Appendix 6* and *Appendix 7*.

Table 18 - Sample Mortgage Borrower Disclosure Document

(Adaptation of the CAAMP and AMBA Disclosure form used in Alberta)

This is a sample format only. Brokerages may tailor their own disclosure forms.

The obligations of a mortgage brokerage and that of their authorized representatives, mortgage brokers/agents to the borrower and lender will vary depending on the nature of the service and relationship between the mortgage brokerage and the lender or borrower.

The borrower is encouraged to discuss the following items with his/her mortgage broker/agent in order to better understand the duties owed to him/her by the mortgage brokerage and its representatives prior to signing the document.

A mortgage brokerage cannot guarantee that funding will occur. A mortgage brokerage cannot always provide the lowest rate or best terms in the marketplace.

Nature of the Service Relationship(s):

(There are three options; broker/agent must check one box.)

- I will act as an agent for the borrower. In this service relationship, I have an obligation to represent the best interests of the borrower at all times
- I will act as an agent for the lender. In this service relationship, I have an obligation to represent the best interests of the lender at all times
- I will act as an agent for both the borrower and the lender. In this service relationship, I have an obligation to represent the best interests of both the borrower and the lender at all times

Product Offerings:

- I offer mortgages from a single lender
- I offer mortgages from multiple lenders

Brokerage/Lender Relationship:

The brokerage has acted for _____(number) of lenders during the previous fiscal year.

- The brokerage has acted as a lender in the previous fiscal year
- The brokerage has not acted as a lender in the previous fiscal year

Nature of Relationship with Lender:

- I am employed by a lender or a lender's subsidiary
- I am not employed by a lender
- One of my lenders expects the right of first refusal
- Other: _____

Compensation:

I may (will) be compensated for this mortgage transaction in the following ways:

- By way of commission/income/fee paid by the lender depending on the length of time or the amount of the mortgage
- By way of salary paid by the lender
- By charging you a fee
- By way of a renewal commission from the lender if you keep the mortgage loan in force
- Other: _____

I may (will) also receive monies or non-monetary benefits from the lender that may include:

- Additional commission/income based on my volume of business with the lender
- Additional commission/income based on my efficiency with the lender
- Additional commission/income because you are paying a higher rate than otherwise is available with this particular lender
- Travel/gifts
- Attendance at seminars or conferences
- Equity shares with the lender
- Other: _____.

Other Fees and/or Refund:

If I charge you a fee to arrange your mortgage and I am not successful in getting your mortgage approved by a lender, you will receive:

- A full refund of the fees you paid
- No refund
- A refund of \$ _____
- Not Applicable (if mortgage is for less than \$300,000)
- Other: _____

What additional fees will you have to pay?

- None
- An application/placement fee
- Property appraisal
- Default mortgage insurance
- Title insurance
- Legal/disbursement fees
- Inspection fees
- Other: _____

As a mortgage broker/agent, I may (will) be paying others part of my compensation for this mortgage referral:

- Yes Payable to: _____
- No
- Not Applicable
- Other: _____

Names:

Signatures:

Mortgage Brokerage
Mortgage Broker/Agent
Borrower

Date: _____

COST OF BORROWING DISCLOSURE TO BORROWERS

A mortgage brokerage must disclose to each borrower the cost of borrowing (COB). The cost of borrowing is simply the total amount of interest paid over the term of the mortgage plus additional fees or charges payable by the borrower that are associated with the mortgage.

The COB includes the following charges:

- Charges for the services, or disbursements, of a lawyer or notary hired by the lender and payable by the borrower
- Brokerage charges paid by the lender to another brokerage in connection with the mortgage, if the borrower is required to reimburse the lender for the charges
- Charges for appraisal, inspection or surveying services provided directly to the borrower in relation to the property being mortgaged, if those services are required by the lender
- Insurance charges other than those excluded below (e.g., default insurance on Low Ratio Mortgages)
- Administrative charges

Expenses excluded from the COB calculation include:

- Charges for insurance on the mortgage if (1) the insurance is optional (e.g., life or disability insurance), (2) the borrower is its beneficiary and the amount of the insured reflects the value the property being mortgaged

- Charges for insurance against defects in title to real property if: (1) the borrower selects the insurer; (2) the insurance is paid for directly by the borrower and (3) the borrower is the beneficiary of the insurance.
- Charges for insurance against default on a high-ratio mortgage (e.g., as provided by Canada Mortgage and Housing Corporation (CMHC) and Genworth Financial)
- Charges for an overdraft
- Charges paid to register documents or obtain information from a public registry about security interests in the property being mortgaged
- Penalty charges for the prepayment of the mortgage
- Charges for the services, or disbursements, of a lawyer or notary, other than those mentioned above
- Charges for appraisal, inspection or surveying services provided directly to the borrower in relation to the property being mortgaged if the borrower receives a report from the person providing the service and is entitled to give the report to third parties
- Charges to maintain a tax account that are required for a high-ratio mortgage or that are optional
- Any expenses to discharge a security interest
- Default charges

The COB shall be calculated based on the following formula:

$$APR = \frac{C}{T \times P} \times 100$$

- APR means the cost of borrowing expressed as an annual rate on the principal
- C is all the costs of borrowing under the mortgage (including the eligible charges described above) over the term of the mortgage
- P is the average of the principal of the mortgage outstanding at the end of each period for the calculation of interest under the mortgage, before subtracting any payment that is due at that time
- T is the term of the mortgage in years, expressed to at least two decimal points

In calculating the APR:

- The APR may be rounded off to the nearest one-eighth of one per cent
- Each instalment payment made on the mortgage must be applied first to the accumulated cost of borrowing and then to the outstanding principal
- A period of one month is 1/12 of a year; one week is 1/52 of a year; and one day is 1/365 of a year
- If the annual interest rate underlying the calculation is variable over the period of the mortgage, it must be set as the annual interest rate that applies on the day that the calculation is made
- If there are no instalment payments under the mortgage, then the APR must be calculated on the basis that the outstanding principal is to be repaid in one lump sum at the end of the term of the mortgage

- A mortgage for an amount that comprises, in whole or in part, an outstanding balance from a prior mortgage is a new mortgage for the purpose of the calculation.
- The APR is the annual interest rate if there are no expenses related to arranging the mortgage other than interest
- If an interest rate is disclosed in accordance with Section 6 of the Interest Act (Canada), the APR must be calculated in a manner that is consistent with that section.

The initial disclosure must be made to the borrower at least two business days before the earliest of:

- The day on which the borrower makes any payment, other than a disbursement charge
- The day on which the borrower enters into the mortgage agreement
- The day on which the borrower incurs any obligation in relation to the mortgage

If the borrower consents in writing **before** the earliest of these dates above, the COB disclosure may be provided at any time before the borrower signs a mortgage instrument. [Reg. 191/08, s. 7 (2)].

Also, if the borrower consents in writing, the COB disclosure may be provided by electronic means in an electronic form that the borrower can retrieve and retain [Reg. 191/08, s. 6 (5)].

As noted earlier, new electronic forms for the cost of borrowing and other disclosures are currently under development. See Appendix 6 and Appendix 7.

Please refer to Regulation 191/08, s. (8) – (12) for additional information on cost of borrowing disclosure requirements with respect to: fixed interest rate mortgages for a fixed amounts, variable interest mortgages for fixed amounts, mortgages securing lines of credit, issuing credit cards secured by a mortgage and arranging mortgages secured by credit cards.

The COB disclosure requirement does not apply: (1) if the lender in the transaction is a financial institution or another brokerage as described in Column 1 below **and** (2) there is no mortgage brokerage fee payable by the borrower. If the brokerage requires a borrower to pay for any of its services/activities in relation to the mortgage, the brokerage must provide the required disclosures whether or not the lender is a financial institution or another brokerage.

| Table 19 - Financial Institutions and their Governing Acts | |
|--|---|
| Column 1 | Column 2 |
| A bank | Bank Act (Canada) |
| A retail association as defined under the Cooperative Credit Associations Act (Canada) | Cooperative Credit Associations Act (Canada) |
| A credit union | Credit Unions and Caisses Populaires Act (Canada) |
| An insurance company | Insurance Act |
| An insurance company | Insurance Companies Act (Canada) |

| | |
|----------------------------|---|
| A trust corporation | Trust and Loan Companies Act (Canada) |
| A loan corporation | Trust and Loan Companies Act (Canada) |
| Another mortgage brokerage | Mortgage Brokerages, Lenders and Administrators Act, 2006 |

The COB disclosure form must be signed by a broker or agent and the form must provide the following information:

- principal amount of the mortgage
- annual percentage rate of borrowing (APR), or in the case of a variable rate interest rate mortgage, the method of determining the APR
- applicable instalment period and the amount of each instalment payment
- amortization period for the mortgage and particulars of any compounding of interest
- particulars of the fees and costs that are payable by the borrower, indicating any amounts that are to be deducted from the principal amount of the mortgage
- net amount to be advanced under the mortgage
- term of the mortgage and the amount that the borrower will owe when the term expires
- particulars of any rights, obligations, charges and penalties and other terms and conditions under the mortgage

OTHER DISCLOSURES TO BORROWERS

Reverse Mortgages

[Reg. 188/08, s. 29]

In order to arrange or enter into a reverse mortgage with a borrower, a brokerage must obtain from the borrower a signed statement stating that a lawyer has provided independent legal advice to the borrower.

A mortgage is defined as a reverse mortgage if both of the following conditions are met:

- (1) the money advanced under the mortgage does not have to be repaid until one or more of the following occurs:
 - the death of the borrower, or if there is more than one borrower, the death of the last surviving borrower
 - the borrower, or the last surviving borrower, acquires another dwelling to use as his or her principal residence
 - the mortgaged property is sold
 - the borrower, or last surviving borrower, vacates the mortgaged property to live elsewhere with no reasonable prospect of returning
 - there is a default under the conditions of the mortgage
- (2) while the borrower or last surviving borrower continues to occupy the mortgaged property as his/her principal residence and otherwise complies with the terms of the mortgage, repayment of the entire principal is not due or capable of becoming due (although, interest payments and repayment of part of the principal may become due)

Term Mortgages

If a mortgage is required to be repaid on a fixed future date or by instalments, the brokerage must disclose to the borrower the following:

- whether the borrower has the right to repay the amount borrowed before the maturity of the mortgage
- any terms or conditions relating to repayment of the mortgage before maturity
- whether any portion of the cost of borrowing for the mortgage is to be rebated to the borrower or any charge or penalty is to be imposed on the borrower, if the borrower exercises a right to repay before maturity
- the manner in which any rebate, charge or penalty referred to above is to be calculated
- particulars of any charges or penalties to be imposed on the borrower if the borrower fails to repay the amount of the mortgage at maturity or fails to pay an instalment on the day the instalment is due
- if the mortgage brokerage is the lender, particulars of any prescribed change relating to the mortgage agreement or the cost of borrowing for the mortgage
- particulars of any rights or obligations of the borrower

Loan Secured by a Mortgage

A brokerage must disclose the following to a borrower if there is an arrangement to enter into a loan secured by a mortgage, including arrangements for a line of credit:

- particulars of any changes or penalties to be imposed on the borrower if he or she fails to pay an amount in accordance with the arrangement
- particulars of any charges for which the borrower becomes responsible by entering into the arrangement
- if the mortgage brokerage is the lender, particulars of any prescribed change relating to the arrangement or the cost of borrowing under the arrangement
- particulars of any rights or obligations of the borrower

BROKERAGE DISCLOSURES TO INVESTORS AND LENDERS

[Reg. 188/08, s. 36]

Every required disclosure by a brokerage to a lender or investor should be made at the earliest opportunity and in any case no later than two business days before the earliest of the following:

- brokerage receives money from the lender or investor
- brokerage enters into an agreement to receive money from the lender or investor
- lender enters into an agreement to fund a mortgage or the investor enters into an agreement to purchase, exchange or sell a mortgage
- money is advanced to the borrower under a mortgage
- trade completion date

If the lender or investor consents in writing to receiving the disclosure after the deadline described above, the disclosure may be made no later than one business day before the earliest of the events listed above.

For every required disclosure to a lender/investor, the brokerage must obtain written acknowledgement from the lender/investor that the disclosure has been made.

INVESTORS AND LENDERS DISCLOSURE FORM

[Reg. 188/08, s. 31]

The brokerage must give each lender and/or investor in a mortgage/investment in a mortgage that is not a member of the Designated Class of lenders and investors (e.g., a financial institution or a brokerage acting on its own behalf) a completed Investors and Lenders Disclosure Form.

Mortgage transactions with investors and/or lenders that are not part of the Designated Class are referred to as 'private transactions'.

For investors/lenders that are not part of this Designated Class, disclosure with respect to the following must be provided:

- Role of brokerage
- Material risks of the mortgage/mortgage investment
- Referral fees
- Estimates of Unknown Information
- Mortgage Default
- Conflict of Interest

The Investors and Lenders Disclosure Form must be signed by a broker (not an agent).

A new form is currently under development. The principles guiding the content of the new form and the existing Investor/Lender disclosure form are attached as *Appendix 8*.

In addition to the Investors and Lenders Disclosure Form, the brokerage must give each lender/investor the following:

- A copy of the mortgage instrument, in the case of an investment in an existing mortgage
- Documentary evidence of the value of the property: (1) A copy of an appraisal of the property, completed within the preceding 12 months, or (2) other documentary evidence of the value of the property, other than an agreement of purchase and sale.
- If available, a copy of any agreement of purchase and sale entered into in the preceding 12 months
- Evidence of the borrower's ability to meet the mortgage payments
- A copy of the application for the mortgage and any supporting documents
- For a new mortgage, evidence of any down payment
- A copy of any agreement that the lender or investor may be asked to enter into with the brokerage
- Any other information, in writing, that would be reasonably considered material to a lender or investor's decision about the mortgage or mortgage investment

This disclosure and documentation described directly above does not apply if the lender or investor is a member of a Designated Class of lenders and investors. *[Reg. 188, s. 31 (1) - (2)]*

MORTGAGE PREVIOUSLY IN DEFAULT

If a mortgage has been in default during the past 12 months, the brokerage must disclose to the investor the amount and duration of the default. The brokerage must get written acknowledgement

that the investor has received this information. This disclosure and acknowledgement is currently addressed in the Investors and Lender Disclosure Form. *[Reg. 188/08, s.28]*

LENDER RENEWAL FORM

[Reg. 188/08, s. 32]

In cases of mortgage renewals, a brokerage must provide each lender that is not a member of the Designated Class with a completed Renewal Form. This form must be signed by a broker and addresses the same types of disclosures covered in the Investor and Lender Disclosure Form.

In addition, the brokerage must provide the lender with the following:

- If an appraisal was completed over the preceding 12 months, a copy of the appraisal
- If an agreement of purchase and sale was entered into in the preceding 12 months, a copy of the agreement
- Any other information, in writing, that would be reasonably considered material to a lender's decision about the mortgage renewal

This disclosure and documentation described directly above does not apply if the lender or investor is a member of a Designated Class of lenders and investors. *[Reg. 188, s. 31 (2)]*

ADMINISTRATOR DISCLOSURES TO INVESTORS AND LENDERS

Mortgage administrators must disclose, in writing, to each investor/lender in a mortgage the following:

- the nature of administrator relationship with each borrower under the mortgage
- whether it will receive or pay fees or other remuneration, directly or indirectly, in connection with the administration of a mortgage. If fees or other remuneration are receivable/payable, the identity of the person or entity paying/receiving the benefit, the basis for calculating the amount of the benefit and the nature of the benefit must be disclosed.
- conflicts of interest

Every required disclosure to a lender or investor by an administrator should be made at the earliest opportunity and in any case no later than two business days before the administrator and the lender or investor enter into a mortgage administration agreement.

If the lender or investor consents in writing to receiving the disclosure after the prescribed deadline, the disclosure may be made no later than one business day before the mortgage administrator and the lender or investor enter into a mortgage administration agreement.

For every required disclosure to a lender/investor, the administrator must obtain written acknowledgement from the lender/investor that the disclosure has been made.

The disclosure requirement does not apply if the lender/investor is a brokerage, a financial institution or another administrator.

DISCLOSURE OF CONFLICTS OF INTEREST TO BORROWERS, LENDERS AND INVESTORS

[Reg. 188/08, s. 27]

Conflicts of interest cannot always be avoided, but they should be managed with comprehensive disclosure to the affected parties. Conflicts of interest may arise, for example, in situations where a brokerage, broker or agent has a personal or business interest in a mortgage transaction. These situations do not suggest wrongdoing, but the licensee's interests must be disclosed to the clients (borrower, lender or investor) as they may impact the licensee's ability to put the client's interest first.

Disclosable conflicts of interest may exist in situations where a mortgage broker/agent:

- is acting in multiple roles for the borrower, such as mortgage broker, realtor, insurance agent, appraiser, or notary in the same transaction
- arranges a mortgage for a borrower in which the broker/agent is also the lender or has an interest in the transaction as a shareholder or director of a corporate lender or as the spouse of a lender
- arranges a mortgage for a borrower where the lender is related, either directly or indirectly to the mortgage broker/agent
- arranges a mortgage for a borrower where the lender provides any kind of compensation, including volume bonuses, points and other rewards to the broker

(Source of Examples: FICOM)

A brokerage must disclose in writing to a borrower, lender or investor any conflict of interest that the brokerage or any of its authorized brokers or agents may have in connection with a mortgage or a trade in a mortgage that it presents for the consideration of the borrower, lender or investor. The brokerage must obtain written acknowledgement from the each borrower, lender or investor, as the case may be, that such disclosure has been made. This disclosure does not apply if the lender is another brokerage or if the investor is another brokerage or a financial institution. *[Reg. 188/08, s. 27 (1) – (4)]*.

Similarly, an administrator must disclose in writing to each lender or investor in a mortgage any conflict of interest that the administrator or an employee engaged in administering the mortgage may have in connection with the mortgage. The administrator must obtain written acknowledgement from the each lender or investor, as the case may be, that such disclosure has been made. This disclosure does not apply if the lender or investor is a brokerage, financial institution or another administrator. *[Reg. 189/08, s. 19 (1) - (3)]*

When determining whether or not a disclosable conflict/perceived conflict of interest exists, a licensee could ask themselves, would it appear to a reasonably informed person that I, the broker or agent, had an incentive to not act in the best interest of the client? If the answer is yes, then there is a disclosable interest. In any case, when there is doubt about whether something should be disclosed or not, it is prudent to err on the side of caution and disclose the situation.

Table 20 - Conflicts of Interest Disclosure

(Modified for the mortgage industry – Source: Canadian Life and Health Insurance Association Inc., Reference Document: Advisor Disclosure, March 2005)

When assessing whether a disclosable conflict or perceived conflict might exist, the brokerage, broker and/or agent should consider:

- Would the recommendation/product being offered have been different if the situation, or incentive, giving rise to the potential conflict of interest did not exist?
- Would it appear to a reasonable, informed third party looking at all the facts that we/I acted in the best interests of the client?

Potential sources of conflict include: company relationships (e.g., ownership interest, the very fact of compensation, and other situational circumstances (e.g. power of attorney, loans to and from clients, executor of client’s will, etc.)

Sample Wording for Disclosure of Conflict(s) of Interest

The following situation may be perceived to be a potential conflict of interest with respect to my recommendations to you. However, I confirm that my overall recommendation takes into consideration and is based on my analysis and assessment of your financial and security needs.

I, <client name>, have been informed of, and understand the implications of the conflict of interest associated with my <name of brokerage, broker/agent> in relation to the transaction recommended. I agree to continue with my dealings with <name of brokerage, broker/agent>.

Client Signature: _____ Date: _____

Table 21 - Disclosure Checklist

Have the disclosures regarding the following been provided:

| |
|---|
| <input type="checkbox"/> Role of brokerage |
| <input type="checkbox"/> Brokerage relationship with lender |
| <input type="checkbox"/> Monetary and non-monetary incentives |
| <input type="checkbox"/> Referral fees |
| <input type="checkbox"/> Material risks <i>Disclosure requirement does not apply if lender or investor is a member of a designated class of lenders and investors [Reg. 188/08, s. 25 (2)]</i> |
| <input type="checkbox"/> Estimates |
| <input type="checkbox"/> Default charges |
| <input type="checkbox"/> Cost of borrowing <i>Disclosure requirement does not apply if the lender or investor is a member of a designated class of lenders and investors. [Reg. 191/08, s.7 (2)]</i> |
| <input type="checkbox"/> Disclosures re: reverse and term mortgages, loan secured by a mortgage |
| <input type="checkbox"/> Conflicts of interest <i>Disclosure requirement by brokerage does not apply if lender is another brokerage or if the investor is another brokerage or a financial institution . [Reg. 188/08, s. 27, (3), (4)].</i> <i>Disclosure requirement by administrator does not apply if the lender or investor is a brokerage, financial institution or another administrator. [Reg. 189/08, s. 19 (1) - (3)]</i> |
| <input type="checkbox"/> Investors and Lenders Disclosure Form <i>Disclosure requirement does not apply if the lender or investor is a member of a designated class of lenders and investors. [Reg. 188/08, s. 31 (2)]</i> |
| <input type="checkbox"/> Renewal Form <i>Disclosure requirement does not apply if the lender or investor is a member of a designated class of lenders and investors. [Reg. 188/08, s. 32 (2)]</i> |

DISCLOSURES IF BROKERAGE IS ACTING AS A LENDER

In transactions where a brokerage is acting as a lender, additional disclosures are required with respect to:

- amendment to a mortgage
- renewal of a mortgage
- offer to waive payment
- cancellation of optional services

The requirements for these disclosures are discussed in Reg. 191/08, s. 13-16.

Table 22 - Designated Class of lenders and Investors

Regulation 188/08 s. 2 defines the following persons or entities as members of a designated class:

1. The Crown in right of Ontario, Canada or any province or territory of Canada.
2. A brokerage acting on its own behalf.
3. A financial institution.
4. A corporation that is a subsidiary of a person or entity described in 1, 2 or 3.
5. A corporation that is an approved lender under the *National Housing Act* (Canada).
6. An administrator or trustee of a registered pension plan within the meaning of subsection 248 (1) of the *Income Tax Act* (Canada).
7. A person or entity who is registered as an adviser or dealer under the *Securities Act* when the person or entity is acting as a principal or as an agent or trustee for accounts that are fully managed by the person or entity.
8. A person or entity who is registered under securities legislation in another province or territory of Canada with a status comparable to that described in paragraph 7 when the person or entity is acting as a principal or as an agent or trustee for accounts that are fully managed by the person or entity.
9. A person or entity, other than an individual, who has net assets of at least \$5 million as reflected in its most recently prepared financial statements and who provides written confirmation of this to the brokerage.
10. An individual who, alone or together with his or her spouse, has net assets of at least \$5 million and who provides written confirmation of this to the brokerage.
11. An individual who, alone or together with his or her spouse, beneficially owns financial assets (being cash, securities within the meaning of the *Securities Act*, the cash surrender value of a life insurance contract, a deposit or evidence of a deposit) that have an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$1 million and who provides written confirmation of this to the brokerage.
12. An individual whose net income before taxes in each of the two most recent years exceeded \$200,000 or whose net income before taxes in each of those years combined with that of his or her spouse in each of those years exceeded \$300,000, who has a reasonable expectation of exceeding the same net income or combined net income, as the case may be, in the current year and who provides written confirmation of this to the brokerage.
13. A person or entity in respect of which all of the owners of interests, other than the owners of voting securities required by law to be owned by directors, are persons or entities described in paragraphs 1 to 12.

'spouse' means spouse as defined in section 29 of the *Family Law Act*.

SECTION REVIEW

1. If asked to identify themselves, what information must agents provide?
2. List ten items of information that should be collected to help verify the identification of a party to a transaction.
3. Why is it important to attempt to verify the identities of parties to a transaction?
4. List ten items of information that must be considered when assessing the suitability of a mortgage recommendation for a borrower.
5. Why should brokerages return client documents?
6. Explain the importance of disclosure and proper documentation for such disclosure.
7. Describe the various types of service agreements that a brokerage may define with a client and contrast how the obligations to the client differ under each arrangement.
8. List ten types of disclosures that a brokerage must make to the client.
9. Describe two situations where conflicts of interest between a broker/agent and the client may exist.
10. What are some additional disclosures that must be made in situations where the brokerage is acting as a lender under the mortgage?

SECTION 5: PROHIBITED ACTIVITIES

There are specific activities that are prohibited by the Act. These activities are described in this section.

LEARNING OBJECTIVES

After completing this section, you should:

- Know what business activities are prohibited under the Act
- Understand why these activities are prohibited

OPERATING WITHOUT A LICENCE

All mortgage brokerages, administrators, brokers and agents must be licensed with FSCO in order to carry on mortgage brokerage activities in Ontario, unless an exemption applies. The exemptions from licensing were discussed earlier in Section 1 of this Guide.

OPERATE UNDER AN UNAUTHORIZED NAME

All mortgage brokerages, administrators, brokers and agents must use only the name in which they are licensed when transacting in mortgages.

TIED SELLING

Tied selling involves making the provision of one service contingent on the sale/purchase of another service. A brokerage or administrator must not coerce a borrower, lender or investor to obtain a product or service from the brokerage or particular person or entity, as a condition for obtaining another service from the brokerage. However, the brokerage or administrator may offer a borrower, lender or investor more favourable terms on a transaction on the condition that they obtain another product or service from the brokerage or administrator, a particular person or entity. Reg. 188/08, S. 15 (1), (2)

PROVIDING GUARANTEES

A brokerage or administrator must not, directly or indirectly, make any guarantees to a lender or investor with respect to a mortgage or investment in a mortgage. For example, a brokerage may not guarantee that the mortgage is of a certain quality. Reg. 188/08, S. 16

CLAIMING THAT FEES ARE GOVERNMENT APPROVED

A brokerage, administrator, broker or agent may not claim that a government authority approves any fees related to the mortgage brokerage activity. The only exceptions are the disbursements required under the Land Titles Act or the Registry Act. [Reg. 188/08, s. 20]

COLLECTING ADVANCE FEES FOR MORTGAGES

A brokerage may not request or accept a deposit or advance payment of any fees (for service or expenses to be incurred) when the principal amount of the mortgage is less than \$300,000. If the mortgage principal is greater than \$300,000 a fee or a deposit may be provided when the borrower signs the mortgage agreement (for new mortgages) or enters into a new mortgage renewal agreement (for mortgage renewals). [Reg. 188/08, s. 37]

RECEIVING FUNDS FROM INVESTORS/LENDERS IN ADVANCE

A brokerage cannot receive funds from an investor unless an existing mortgage is available, or from a lender unless a mortgage application has been made on a specific property. That is, a brokerage cannot receive funds from investors or lenders unless the funds are related to specific contractual mortgage obligations.

PROCEEDING WITH SUSPICIOUS MORTGAGES

Brokerages, administrators, brokers and agents must not act for a borrower/lender/investor if they believe a mortgage is unlawful.

A brokerage must advise each prospective lender as soon as possible if the brokerage has any reason to doubt: (1) a borrower's legal authority to mortgage a property, and (2) the accuracy of information contained in a borrower's mortgage application or in a document submitted in support of an application.

Reg. 188/08 S. 12, 13, 14

SECTION REVIEW

1. List and describe five prohibited activities.

SECTION 6: MANAGING THE BUSINESS

Brokerages and administrators must take steps to ensure that their operations are compliant with the requirements of the MBLAA. This applies whether the brokerage/administrator is a one-person outfit or has 100 employees distributed across many branch offices. Key to ensuring compliance with the Act is the development, distribution and implementation of a set of policies and procedures that outline how the daily activities of the business should be handled in keeping with the MBLAA and its Regulations.

These policies and procedures must be kept up to date and promoted throughout the brokerage/administrator. Training sessions can be an effective option for advising employees of the rules, with follow-up assessments (e.g., file audits, performance reviews, general de-briefs) re-enforcing the policies and procedures. A focus on promoting a 'culture' of compliance may also contribute to increased customer service and satisfaction.

LEARNING OBJECTIVES

After reading this section you should:

- Understand the role and importance of policies and procedures
- Know the areas that those policies and procedures must address
- Describe the role and importance of the Principal Broker
- Understand the importance of the duty of supervision
- Discuss how to deal with customer complaints

POLICIES AND PROCEDURES - BROKERAGE

[Reg. 188/08, s. 40]

The role of policies and procedures is to help guide business conduct. A mortgage brokerage must establish and implement policies and procedures that are reasonably designed to ensure that the brokerage and its brokers and agents comply with the requirements of the Act. These policies and procedures should provide descriptions of the processes and forms necessary for carrying out the various tasks/goals of the mortgage brokerage operation and are often set out in a manual (hard copy or electronic). Brokerages should ensure that all their brokers and agents, as well as their non-licensed employees, are familiar with these policies.

The policies and procedures must address three broad areas:

- (1) the provision of advice (i.e., providing recommendations to clients)
- (2) supervision
- (3) compliance (e.g., taking steps to ensure the requirements of the Act and its Regulations are met)

Each of these major topics, however, has many sub-topics. Brokerages/administrators should refer to the Act and the Regulations to ensure that all sub-topics are dealt with in their manuals.

The following are examples of issues that should be addressed in the manual:

- When and how to provide disclosure of the nature of the service relationship with a client (i.e., the role of the brokerage, broker and agent)

- Steps for verification of borrower, lender and investor identities
- Steps for determination of the suitability of a mortgage or investment in a mortgage for a borrower, lender or investor
- When and how to discuss the material risks associated with a mortgage/investment in a mortgage
- Steps for identifying and reporting conflicts/potential conflicts of interest to clients
- When and how to disclose fees and other incentives payable/receivable

The matters listed above were covered in previous sections of this Guidelines document.

Additional items that should be addressed in a policies and procedures manual are discussed below and include:

- Provision of brokerage/administrator contact information to FSCO
- Brokerage/administrator reporting requirements (e.g., change of address, designated Principal Broker, etc.)
- Steps for supervision of brokers and agents
- Prohibited activities
- Maintenance of E&O insurance
- Filing of Annual Information Return (AIR)
- Record-keeping requirements
- How to manage concurrent businesses
- Requirements for trust accounts
- How to manage complaints
- How to deal with the regulator

POLICIES AND PROCEDURES - ADMINISTRATOR

Similar to a brokerage, an administrator must also establish and implement policies and procedures designed to ensure the administrator and its representatives comply with the requirements of the Act. In particular, the administrator's policies must provide guidance for ensuring:

- adequate supervision of an administrator's representatives
- verification of identity of lenders and investors
- identification and disclosure of potential conflicts of interest

IDENTIFYING/LISTING BRANCH OFFICES

Mortgage brokerages may operate more than one location. If a brokerage carries on business in multiple locations, one location should be designated as the 'principal place of business' or head office and all other locations should be listed as 'branch offices'. A branch office is a location, other than the head office, which is 'open to the public' for conducting the brokerage's mortgage business. It typically has a telephone line that is answered in the name of the brokerage.

As the Act does not explicitly comment on 'home offices,' members will have to rely on their judgment to determine whether a home office should be listed with FSCO as a branch office. If a broker/agent regularly meets with clients at his/her home during regular business hours, then it would seem reasonable that this home office should be listed as a branch office of the brokerage, whether or not the licensee has a sign outside his/her house advertising the mortgage brokerage services. If meetings with clients occur at a broker/agent's home very infrequently, a reasonable

observer may not consider the home office as ‘open to the public’ or a branch office of the brokerage.

Branch offices must be listed with FSCO although they do not require a separate licence number from that of the brokerage (head office). Therefore, there are no separate fees for branch offices. It is an offence under the MBLAA for a brokerage to carry on business at an address that is not listed with FSCO.

It is not necessary for each branch office to include a unique identifier in its dealings with the public. If a branch office includes a unique identifier in its legal name, then it will not be a branch office, but a separate legal entity from the brokerage or a franchise operation. In the example below, the two brokerages appear to have different legal names and would therefore require separate brokerage licences or they may be ABC Brokerage franchise operations.

ABC Brokerage (North York) Incorporated and ABC Brokerage (Hamilton) Incorporated.

SUPERVISING BRANCH OFFICES

The Principal Broker is responsible for the brokerage’s entire operation, including the activities of all the branch offices. Depending on the size of the brokerage, this can be a formidable task.

Responsibility for a branch office entails: (1) an adequate level of supervision of the brokers and agents working from the location; (2) taking reasonable steps to deal with any failures to comply with the MBLAA by a broker, agent or other person employed in the branch office; and (3) managing the records pertaining to the branch office.

Recommendations to assist in supervising a branch office include:

- A brokerage may wish to consider requiring that each branch be staffed by at least one agent with a minimum number of years of experience (brokerage to determine an appropriate minimum level of experience)
- The brokerage may require a senior broker to conduct monthly face-to-face meetings and weekly telephone updates with assigned agents at branches to review transactions. The senior broker could also conduct a daily review of active lender/borrower issues with follow-up as required.
- The brokerage may wish to limit the maximum number of client files that one broker or agent is allowed to manage

PLACE OF BUSINESS AND CONTACT INFORMATION

A brokerage must have an address in Ontario where it will carry out its mortgage brokerage activities and maintain its records. This is the brokerage’s principal place of business.

A brokerage must also have a mailing address in Ontario. It may or may not be different from the brokerage’s principal place of business address. In any case, the mailing address cannot be a post office box number and must be suitable to permit service by registered mail.

Brokerages must also have an operating telephone number and e-mail address.

Brokerages must notify FSCO within 5 days of any of the following:

- Change in principal place of business address or change of address for any office of the brokerage that is open to the public
- Change in mailing address, e-mail address, telephone or fax number
- Change in a director, officer, partner or Principal Broker
- Change in authorized representatives

CHANGE IN AUTHORIZED REPRESENTATIVES

When a broker or agent resigns from a brokerage (e.g., Brokerage A) and does not wish to transfer to another brokerage (e.g., Brokerage B), then Brokerage A is responsible for notifying FSCO. If the broker/agent makes a direct transfer from Brokerage A to Brokerage B, then Brokerage B is required to notify FSCO (via *Licensing Link*). The broker/agent also has a responsibility to notify FSCO of any changes in his/her authorization to act on behalf of a brokerage. FSCO must be notified of any such changes within five days.

ERRORS AND OMISSIONS (E&O) INSURANCE AND FINANCIAL GUARANTEE

[Reg. 188, s. 42]

Every mortgage brokerage must have E&O insurance that includes coverage for fraudulent acts up to a minimum of \$500,000 for any one occurrence and \$1 million for all occurrences during a 365-day period.

Every mortgage administrator must also have a similar E&O insurance in relation to its administrator's licence. Therefore, if a person or entity holds both a brokerage and administrator licence, there must be two E&O insurance policies in place to cover each licence. In addition to E&O insurance, a mortgage administrator must have a financial guarantee of \$25,000 of unimpaired working capital.

A brokerage/administrator must notify FSCO **immediately** if the E&O insurance or other assurance maintained by a brokerage or administrator is cancelled or not renewed. Failure to comply with this requirement may result in a \$1,000 penalty.

REPORTING REQUIREMENTS

Licencees are required to report any changes with respect to the list of items below to the regulator on a timely basis. Late notifications are subject to penalties as outlined in Table 23.

| Table 23 - Summary Reporting Requirements [Reg. 193/08, Reg. 412/07] | | | |
|---|--|--|-----------------------------|
| Reporting/Filing Requirement | Deadline for Reporting/Filing | Penalties for Late Notification | |
| | | Brokerages & Administrators | Brokers & Agents |
| Annual Information Form | On or before March 31 of every year | \$1,000 | N/A |
| Financial Statements (Mortgage Administrator only) | Within 90 days after the end of every fiscal year | \$1,000 | N/A |
| Establishment of trust account (by brokerage or administrator) | No later than 5 days following the requirement to establish an account | \$1,000 | N/A |
| Location of Records | | \$500 | N/A |
| Change of address for service | No later than 5 days after the change | \$500 | \$250 |
| Change of other contact information (e.g., e-mail address, phone or fax number) | No later than 5 days after the change | \$500 | \$250 |
| Change of principal place of business | No later than 5 days after the change | \$500 | N/A |
| Change of offices to the public | No later than 5 days after the change | \$500 | N/A |
| Change of director, officer, partner | No later than 5 days after the change | \$500 | N/A |
| Change of Principal Broker | No later than 5 days after the change | \$500 | N/A |
| Change of authority to act on behalf of brokerage | No later than 5 days after the change | \$500 | \$250 |
| Change re insurance coverage | Immediately | \$1,000 | N/A |
| Change re financial guarantee, mortgage administrator only | Immediately | \$500 | N/A |
| Shortfalls in trust accounts | Immediately | | |

ANNUAL INFORMATION RETURN

Every brokerage and administrator must file an Annual Information Return (AIR) on or before March 31 on FSCO's *Licensing Link*. The AIR relates to information for the previous calendar year (January 1 – December 31) and must be in a form approved by the regulator. Late filings may be subject to a \$1,000 penalty.

The development of a new AIR is in progress. The latest draft is attached as *Appendix 9*.

FINANCIAL STATEMENTS (FOR MORTGAGE ADMINISTRATORS ONLY)

In addition to the AIR, a mortgage administrator must provide the regulator with the following information, within 90 days of its fiscal year end:

- audited financial statements for the year (prepared according to Generally Accepted Accounting Principles)
- auditor's report about the books, records and accounts of the administrator
- auditor's report about the administrator's trust account and the assets and liabilities under administration for the year

The audited financial statements and the auditor's report on the books and accounts of the administrator must be prepared by the same person.

SUPERVISION

One of the intended outcomes of the new Act is increased responsibility by brokerages for the conduct of their authorized brokers and agents. Consequently, a brokerage's processes for supervision are key to ensuring adequate screening and monitoring of brokers and agents and enforcement action, if required, to ensure a brokerage's compliance with the Act.

Table 24 - Supervising Brokers and Agents

Suggestions for monitoring of broker and agent conduct include:

- regular performance reviews (e.g., formal annual reviews)
- timely update meetings (e.g., monthly, weekly, as appropriate)
- random audits of mortgage files
- strict follow-up on change of contact information, lender issues on files, customer complaints and E&O claims
- reconciling requests for credit checks against completed deals
- requiring and monitoring completion of firm training sessions (in addition to education requirements for licensing purposes)

A brokerage is responsible for notifying FSCO if a broker/agent is not suitable for licensing.

COMPLAINTS PROCESS

[Reg. 188, s. 41]

Brokerages must establish a process for managing complaints from the public about its mortgage business activities and/or any of its brokers and agents. Specifically, the brokerage must designate one or more individuals to receive, and attempt to resolve, complaints from the public. Each designated individual must be an employee of the brokerage or someone who is otherwise authorized to act on its behalf.

Brokerages must respond to complaints in writing, outlining how the brokerage plans to resolve this complaint. It must also advise the person making the complaint that if he/she is not satisfied with the proposed resolution and believes the complaint relates to a contravention of the Act or its Regulations, the complainant may refer the issue to the regulator. FSCO's Mortgage Business Activities Complaint Form may be downloaded from the FSCO website at: <http://www.fSCO.ca/english/regulate/mortgagebrokers/resolvecomplaint-mortgagebroker.asp>.

The brokerage must keep a record of all written complaints received from the public and its written responses to those complaints.

Brokerages should consider analyzing customer complaints data to determine whether any patterns exist and whether it may be possible to prevent similar occurrences in the future by making changes to its policies and procedures or providing staff with more training in certain areas. Managing customer complaints can be a timely and costly process and, therefore, anything that can be done to reduce the potential for customer complaints would contribute to overall business productivity and customer satisfaction.

Mortgage administrators must also respond to customer complaints in writing, setting out a proposed resolution of the complaint and the customer's right to refer the complaint to the regulator if the customer is not satisfied with the proposed solution.

PROHIBITION OF RETRIBUTIVE EMPLOYMENT ACTION

Brokerages and administrators should promote an atmosphere of trust and safety. Employees that report suspected infractions of the MBLAA must not be subject to retributive employment action (e.g., suffer loss of employment or demotions, etc.)

REMUNERATION

Reg. 188/08 S.44 (1), (2); S. 45 (1), (2), (3)

All fees payable to brokers and agents must be paid to the broker or agent's home brokerage (e.g., co-brokering/referral fees). A brokerage may not directly pay money fees to brokers and agents that are authorized to transact mortgage business on behalf of another brokerage (whether the brokerage is fully aware or reasonably ought to have known that the brokers or agents were authorized by another broker).

A brokerage may, however, provide non-monetary incentives to an outside broker or agent if the proper documentation is in place:

- The broker/agent has written consent from his/her home brokerage
- There is a written agreement between the home brokerage and outside brokerage or financial institution governing the provision of the incentives to the broker/agent
- The broker/agent has a written agreement with the outside brokerage or financial institution governing the provision of the incentive to him/her
- The last two agreements require the outside brokerage or financial institutions to periodically, and upon request, provide the home brokerage with details about the incentives provided (including any options exercised) during the applicable period.

CONCURRENT BUSINESSES

[Reg. 188, s. 56]

Brokerages and administrators may operate other businesses while operating a mortgage business. They must not, however, allow the other business to jeopardize the integrity, independence or competence of its mortgage business activities.

Brokers and agents should disclose to their brokerages all other businesses they are involved in and the brokerage should assess whether these other ventures may result in conflicts of interest with their clients. This disclosure also relates to any other licenses that brokers or agents may possess (e.g., insurance, real estate or other licence).

The MBLAA does not prohibit a mortgage broker or agent from holding other licenses (e.g., as a real estate agent, insurance agent, investment funds salesperson, etc.) However, mortgage brokers and agents should confirm with the relevant licensing body (i.e., regulator for the other profession) whether dual/multiple licenses are allowed under their regulations.

RECORD-KEEPING

Brokerages must have procedures in place to ensure the proper retention of records. Accurate and efficient record-keeping: (1) facilitates the day-to-day business activities of the brokerage and (2) is critical evidence in investigations, disciplinary actions, litigation and other business issues.

It is helpful to create and regularly update a list of what records are required to be maintained.

REQUIRED RECORDS

[Reg. 188/08, s. 46]

A brokerage must maintain complete and accurate records of:

- The financial records of its licensed mortgage brokering activities in Ontario; the financial records must distinguish between deemed trust funds and other assets
- Every mortgage application, instrument and renewal agreement that is received or arranged by the brokerage
- Mortgage brokerage agreements on dealing/trading in mortgages and mortgage lending
- All documents and written information that is given to and obtained from clients and prospective clients.

An administrator must maintain complete and accurate records of:

- The financial records of its licensed activities in Ontario; the financial records must distinguish between deemed trust funds held by the administrator, mortgages held in trust for a lender or investor and any other assets pertaining to other activities
- All of the documents or written information given to or obtained from a lender or investor or any other person pursuant to the Act
- Every mortgage administration agreement

SECURITY OF RECORDS

[Reg. 188/08, s. 47]

Brokerages and administrators must take adequate precautions to ensure the security of their records. That is, they must take steps to guard against loss, theft or falsification of records (e.g., require signatures of those filing the records, keep records in limited access locations or locked cabinets and for electronic records, require passwords for different levels of access).

LOCATION OF RECORDS

[Reg. 188/08, s. 48 (4) – (7)]

Records should be stored at the brokerage or administrator's principal/main office. Records originated at another place of business must be forwarded to the principal office. FSCO must be informed if the records are being stored in a location other than the principal office.

Electronic records do not need to be stored at the main office, as long as they can be quickly retrieved (in an understandable electronic and paper form promptly upon request).

RECORDS RETENTION PERIOD

[Reg. 188/08, s. 48 (1)- (3)]

Brokerage and administrator records required under the MBLAA must be kept for at least six years.

For brokerages, records must be kept for at least 6 years after:

- the expiry of the term of mortgage or renewal (for mortgages and mortgage renewals)
- the completion or other expiry of a purchase, sale or trade of a mortgage transaction (for investment in a mortgage)

The MBLAA does not require that brokerages maintain any records related to mortgages that were not funded.

For administrators, all records that relate to an agreement to administer a mortgage must be kept for at least 6 years after the expiry of the agreement.

The brokerage/administrator must also ensure the capacity to retrieve its electronic records throughout the retention period.

OTHER NON-MANDATED RECORDS

There are a number of types of records that are not specifically mandated by regulation, but that may be beneficial for other purposes to the brokerage:

- Records of policy and procedure changes may assist in the resolution of litigation and investigations. It is important to have a record of the policies and procedures in place at the time of any incident.
- Records of supervisory staff changes can be helpful in determining regulatory liability (e.g., who was responsible for oversight at the time of an infraction).
- Statistical records of client complaints and settlements can be useful in analyzing trends in customer complaints and determining whether changes to the brokerage or administrator's policies and procedures may help avoid future issues.

A brokerage may also want to consider record retention policies for less formal forms of records such as day-timers and client books which may be useful in settling any disputes, investigations, etc. In order to show that such records were not made up for the occasion (i.e., an investigation or dispute), it may be necessary to show that the individual who made the record did so as a matter of practice.

MANAGEMENT OF TRUST ACCOUNTS

[Reg. 188/08, s. 49 – 55]

DEFINING DEEMED TRUST FUNDS

Money that is received by a brokerage (directly or indirectly) from a borrower, lender or investor in connection with carrying on the business of dealing or trading in mortgages is 'deemed' to be held in trust by the brokerage. These are not funds that belong to the brokerage, but rather, funds that the brokerage is holding in trust for a lender or investor.

Money that is earned by a brokerage for its services (brokerage fees) or received to reimburse the brokerage for its expenses or payable to the brokerage as a mortgage lender is money that belongs to the brokerage itself and is, therefore, not required to be held in trust.

Money that is received by a mortgage administrator (directly or indirectly) from a borrower, lender or investor under an agreement to administer a mortgage must be held in trust by the mortgage administrator. Money that is earned by an administrator for its services or received to reimburse the administrator for its expenses is not required to be held in trust.

SETTING UP TRUST ACCOUNTS

Trust accounts may be established at a bank, credit union, loan or trust company, or a co-operative. A brokerage or administrator may not have more than one trust account, unless it has received prior written approval of the regulator.

The brokerage must notify FSCO as soon as practicable and in any event no later than 5 days after the brokerage is required to establish the trust account.

FUND TRANSACTION RECORDS

When a brokerage receives money that constitutes ‘deemed trust funds’, the brokerage must provide the person or entity paying the money with a written statement outlining the following:

- The amount of money received
- The date the money was received
- The name of the person/entity that provided the funds and, if the money was received on behalf of another person or entity, the name of that person or entity
- The purpose of the funds
- The terms on which the brokerage holds the money
- The name of the broker or agent who received the funds

Similarly with respect to every disbursement made from the authorized trust account, there must be a written record of:

- The amount of money disbursed
- The date the money was disbursed
- The name of the person/entity to whom the money was disbursed
- The purpose for the disbursement

The information required in the trust account transaction records of an administrator is similar to the above. With respect to every deposit/disbursement made to/from an authorized trust account, the administrator must have a written record containing the following:

- The amount of the deposit/disbursement
- The date of the transaction
- The name of the person or entity from whom the money was received/to whom the payment was made
- The purpose of the deposit/disbursement
- With respect to every payment of interest on money in the trust account, a way of identifying the deposit of deemed trust funds to which the interest relates, the amount of the interest associated with the deposit and, the date on which the interest was paid to the person or entity entitled to it.

ADMINISTRATION OF TRUST ACCOUNT

A brokerage or administrator must:

- deposit deemed trust funds received in its authorized trust account within two business days after receiving the funds
- keep deemed trust funds separate from money that does not constitute deemed trust funds
- pay to the beneficial owner of the deemed trust funds the interest earned on the deemed trust funds unless otherwise agreed to in writing by the beneficial owner
- disburse all funds from the trust account according to terms upon which the funds were received

MONTHLY AND ANNUAL RECONCILIATION STATEMENTS FOR TRUST ACCOUNT

Brokerages and administrators must prepare monthly reconciliation statements for their authorized trust accounts. The statements must be reviewed, dated and signed by the brokerage’s Principal Broker, or in the case of the administrator, an officer of the administrator.

There is a deadline for preparing these statements. If the brokerage/administrator receives a monthly statement from a financial institution where the account is maintained, the reconciliation statement for a month must be prepared and signed within 30 days of receiving the statement from the financial institution. In any other case, the statement must be prepared within 30 days after the end of the month.

The monthly reconciliation statement must: (1) set out any differences between the records of the brokerage/administrator and the records of the applicable financial institution and, (2) show the balance in the account that is owing to each person or entity. If the brokerage/administrator receives a monthly statement from the institution, these amounts (i.e., differences and balances owing) should be as of the date of the financial institution's statement. If the financial institution provides no monthly statement, the amounts should be as of the last day of the month.

If, for any month during its fiscal year, a brokerage is required to prepare a reconciliation statement for a trust account, the brokerage must also prepare an annual reconciliation statement for the account for the fiscal year within 90 days after the end of the year. This annual filing should summarize the contents of the monthly statements.

An administrator must always prepare an annual reconciliation statement. This annual filing should summarize the contents of the monthly statements.

DUTY TO REPORT SHORTFALL IN TRUST ACCOUNT

If a brokerage or administrator determines that there is a shortfall in the authorized trust account, the brokerage/administrator must immediately notify the regulator.

ADMINISTRATOR – MONTHLY RECONCILIATION, CERTAIN FINANCIAL MATTERS

Administrators must prepare, on a monthly basis, a record that reconciles the total of outstanding principal balances due from borrowers on mortgages under administration and the total principal balances held by the mortgage administrator on behalf of lenders and investors under those mortgages. The record must set out the differences, if any, between the balances as of the last day of the month and provide an explanation for the variances.

SECTION REVIEW

1. What is the role of a brokerage's policies and procedures?
2. Discuss some of the areas that must be covered by a brokerage's policies and procedures.
3. List ten items, where if there is a change, the change must be reported to the regulator.
4. What is errors and omissions insurance?
5. Does a mortgage administrator require errors and omissions insurance?
6. Describe the process that brokerages and administrators should follow to handle customer complaints.
7. Can brokers and agents receive fees from any brokerage, as long as the brokers and agents have provided a service? Discuss the rules re: remuneration of brokers and agents.
8. Discuss how the activities of a licensee's concurrent business should be managed.

9. When is it required for a brokerage to establish a trust account?
10. Describe how trust fund transactions must be recorded.
11. What types of records must brokerages and administrators keep?
12. What is the required records retention period?
13. Explain the value of keeping other non-mandated records.

SECTION 7: DEALING WITH THE REGULATOR

Dealing with a regulator may often seem intimidating. What should be remembered is that the regulator's primary concern is consumer protection and that its actions are focused on ensuring compliance with the rules and Regulations designed to protect the public. Mortgage professionals should be aware of the regulator's powers and remedies under the Act and, ensure they provide professional, courteous co-operation in investigatory matters.

LEARNING OBJECTIVES

- Understand the extent of liability associated with leading a brokerage business
- Know how to interact with the regulator
- Be familiar with the regulator's powers of investigation
- Know the penalties for offences under the Act

THE PUBLIC REGISTER

[2006, c. 29, s. 28; Reg. 190/08, s. 1 – 2]

The regulator maintains a public register of licencees which can be accessed from the FSCO website. Information contained in the register includes the names and licence numbers and contact information for licencees. See Table 25 for more details.

CO-OPERATING WITH THE REGULATOR

[2006, c. 29, s.43 – 47]

The regulator or a person designated by the regulator has the authority to make inquiries and conduct examinations of the business and activities of each licencee to ensure that the licencee is complying with the MBLAA.

Individuals and entities must not obstruct investigations or mislead the regulator. They must not conceal, alter or destroy anything relevant to an inquiry or examination. Rather, they should be co-operative, responding to the regulator's questions, requests for documents or other assistance in a timely and professional manner.

Individuals providing the regulator with co-operation and assistance must not be subject to adverse employment action by his/her brokerage nor are they liable in any civil action for having provided the regulator with any requested documents, when acting in good faith.

Table 25 - Information on FSCO Public Register

| –Active Licences – | |
|---|---|
| For Brokerages & Administrators | For Brokers & Agents |
| <ul style="list-style-type: none"> • Each name in which it is licensed and its licence number • The type of licence that it holds and whether the licence is in good standing or is suspended • Any conditions that apply to the licence • For a brokerage, the name of its Principal Brokerage • A mailing address and telephone number | <ul style="list-style-type: none"> • The name in which he/she is licensed and the licence number • The type of licence that he or she holds, its expiry date and whether the licence is in good standing or is suspended • Any conditions that apply to the licence, other than conditions relating to educational requirements • The name of his/her authorizing brokerage |
| –Inactive Licences – | |
| <p>This information will be on the register for two years after the licensee ceases to be licensed:</p> | |
| For Brokerages & Mortgage Administrators | For Brokers & Agents |
| <ul style="list-style-type: none"> • Each name in which it was licensed and the former licence number • The type of licence that it held • The date on which it ceased to be licensed • Whether the license was surrendered or revoked | <ul style="list-style-type: none"> • The name in which he/she is licensed and the former licence number • The type of licence that was held • The date on which he/she ceased to be licensed • Whether the licence expired, renewal of licence was refused, the licence was surrendered or revoked • The name of the brokerage on whose behalf he/she was authorized to deal or trade in mortgages |

POWERS OF THE REGULATOR

[2006, c. 29, s. 30 - 41]

The regulator, or its designate, may in the course of conducting an investigation do any of the following:

- Enter and inspect, at any reasonable time, any premises used in connection with the business or activities of the licensee (person or entity). This excludes the part of the business that is used as a dwelling unless the occupant consents to the entry or the regulator has authority under an order of the court
- Examine all money, valuables, documents and records of the licensee that may be relevant to the examination/inquiry

- Require a person who appears to be working at the premises to answer questions or produce documents and records about anything that may be relevant to the examination/inquiry or produce
- Gather information using any data storage, processing or retrieval device or system used in connection with the business activities of the licensee
- Remove for examination and copying anything that may be relevant to the examination/inquiry. A receipt will be provided for anything that is removed and the regulator will promptly return the thing to the person who produced it

SENIOR STAFF LIABILITY

[2006, c. 29, s. 48 (5) – (6)]

Liability for offences under the Act extends to the senior representatives of a brokerage.

INCORPORATED ENTITIES

For directors and officers of a corporation, every director or officer who directed, authorized, assented to, acquiesced in or participated in the commission of an offence, or who failed to take reasonable care to prevent the corporation from committing the offence, is guilty of an offence, whether or not the corporation/partnership is prosecuted or convicted.

UNINCORPORATED ENTITIES

For every partner of a partnership and every individual who is member of the directing body of an entity, who directed, authorized, assented to, acquiesced in or participated in the commission of an offence by the partnership or entity, which if committed by a person, would be guilty of an offence under the Act, is guilty of an offence.

The Act imposes the ultimate responsibility for compliance with the rules of the Act on the senior leaders of a brokerage/administrator. Its aim is to reduce complacency and promote action against suspected infractions.

DEADLINE FOR REGULATOR ACTION AGAINST INFRACTIONS

The regulator may not proceed with any action (e.g., investigation and/or prosecution) more than two years after the day that it became aware of the facts of a possible offence under the Act.

PENALTIES

[2006, c.29, s. 49, Reg. 192/08, s. 3 - 5]

Individuals convicted of an offence under the Act may be subject to a fine of up to \$100,000 or imprisonment for a term of up to one year or both a fine and imprisonment.

Corporations convicted of an offence under the Act may be subject to a fine of up to \$200,000. In determining the amount of a penalty, the regulator considers the following:

- The degree to which the contravention was intentional, reckless or negligent
- The extent of the harm or potential harm to others resulting from the infraction
- The extent to which the person or entity tried to mitigate any loss or to take other remedial action

- The extent to which the person or entity derived or may have expected to derive any economic benefit from the contravention
- Any other contraventions to comply with the Act or with any other financial services legislation (of Ontario or any other jurisdiction) during the preceding 5 years

Penalties must be paid no later than 30 days after notice or as stated in the specific order. Penalties may be imposed alone or in conjunction with another measure available to the regulator such as the suspension or revocation of a licence. In addition to any penalty imposed by the regulator, the courts can order those convicted of an offence under the MBLAA to pay compensation or make restitution in an amount and manner determined by the court.

APPEALS PROCESS

The regulator will give a person or entity under investigation, a reasonable opportunity to make written submissions to explain/defend their conduct. Notwithstanding such a submission, if the Regulator decides to impose a penalty, the person/entity may make a written request for an appeal hearing with the Financial Services Tribunal (Tribunal). If a request for a hearing is made, it will be granted and the imposition of the penalty is put on hold until the matter is resolved.

The Tribunal is an independent decision-making body that hears appeals from decisions of the Superintendent of FSCO. The Tribunal has the authority to hold hearings under a number of statutes, including the MBLAA. Most cases are heard by a three-person panel, selected from the members of the Tribunal. The party requesting an appeal hearing may represent itself or choose to hire lawyer, at its own expense. There are no fees charged for the hearings. The Tribunal's decision is provided in writing, along with the reasons for the decision. It may be appealed to the Divisional court.

Additional information about the workings of the Tribunal can be found at www.fstontario.ca/english/faq.asp#q1

SECTION REVIEW

1. What information about licencees is posted on FSCO's public register?
2. Explain the liability of senior brokerage representatives with respect to ensuring compliance with the Act.
3. After the regulator becomes aware of a possible infraction of the Act, how long does it have to begin a proceeding?
4. What are the possible penalties for offences under the Act?
5. What factors does the regulator take into consideration when determining a penalty?
6. Describe the powers of the regulator.

APPENDICES

Appendix 1: Mortgage Brokerage Application

Appendix 2: Principal Broker Declaration of Compliance

Appendix 3: Good Character Policy of the CAAMP Board of Directors

Appendix 4: Mortgage Administrator Application

Appendix 5: Canadian Code of Advertising Standards

Appendix 6: Filogix Draft New Disclosure Forms

Appendix 7: Marlborough Stirling Draft New Disclosure Forms

Appendix 8: Draft New Investors and Lenders Disclosure Form

Appendix 9: Draft New Annual Information Return (AIR)

Appendix 10: FSCO Compliance Guidelines