

Mortgage Brokers Act
Review
Public Consultation Paper



Ministry of
Finance

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MORTGAGE BROKERS ACT REVIEW

PUBLIC CONSULTATION PAPER

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INTRODUCTION

The *Mortgage Brokers Act* (MBA) was originally enacted in 1972 as consumer protection legislation in response to an increased number of mortgage brokers and complaints of gross and unconscionable interest rates and fees. At the time, mortgage brokers were considered the lenders of last resort; however, over the years the industry has changed and has become part of the mainstream financial market.

Although it has been amended several times since its enactment, the MBA has not kept pace with evolving national and international standards in consumer protection, changes in the financial services market and emerging issues such as money laundering in the real estate market.

The 2018 Expert Panel on Money Laundering in BC Real Estate described the MBA as antiquated and recommended replacing the MBA with a modern statute to regulate all those in the business of mortgage lending, with few exceptions.

Purpose of MBA Consultation Paper

The purpose of this consultation is to elicit discussion and feedback from stakeholders on the Expert Panel on Money Laundering in Real Estate's recommendation¹ to replace the MBA with modern legislation that would:

- establish business authorization requirements for all mortgage lenders, with the possible exception of individuals lending to a small number of friends and family;
- make a distinction between regulation of the intermediary function and the lending function, with appropriate provisions for both aspects of the industry;
- establish a governance structure with designated management responsible for compliance within mortgage intermediaries and mortgage lenders, as well as compliance requirements placed on employees within the organization; and
- include modern regulatory powers and requirements.

After the consultation period, Ministry staff will analyze feedback and prepare policy proposals for the consideration of government. Ultimately, the replacement of the MBA is subject to consideration and approval by the Minister of Finance and Cabinet, and approval of the Legislature of British Columbia.

How to Provide Input

Submissions and comments must be received by March 13, 2020 and may be transmitted electronically to mbareview@gov.bc.ca.

¹ See Appendix A

Submissions and comments may also be mailed to:

Attn: Policy & Legislation Division
MBA Review
Ministry of Finance
PO Box 9418 Stn Prov Govt
Victoria BC V8W 9V1

Public Nature of Consultation Process

Please note that this is a public consultation process and, unless confidentiality is specifically requested, comments and submissions may be disclosed to other interested parties or made publicly available.

If certain comments should not be shared publicly with other parties, please clearly indicate that in the submission or covering letter. However, please note that all submissions received are subject to the *Freedom of Information and Protection of Privacy Act* and, even where confidentiality is requested, this legislation may require the Ministry to make information available to those requesting such access.

BACKGROUND AND CONTEXT

Legislative and Regulatory Framework – The *Mortgage Brokers Act* (MBA)

The MBA provides a framework for the regulation of mortgage brokers in BC and creates a Registrar of Mortgage Brokers (the Registrar). The Registrar was a part of the Financial Institutions Commission and has now become a part of the BC Financial Services Authority (see below). The MBA provides the Registrar with the power to investigate complaints and to suspend and cancel registrations.

Although the MBA has been amended several times, most notably in 1998 to protect investors following discovery of the Eron Mortgage fraud, the financial services market has changed profoundly. Examples of the degree of change include the type of mortgage products available, securitization of mortgage pools (i.e. asset-backed commercial paper), reverse mortgages, syndicated mortgage investments, the emergence of non-traditional mortgage lenders and the increased role of mortgage brokers as intermediaries in arranging mainstream residential mortgages.

Many provinces that first enacted mortgage broker legislation in the 1970s have since modernized their legislation. Manitoba rewrote their MBA in 1987, Ontario in 2006, Saskatchewan in 2007 and New Brunswick in 2016.

The results of a recent review of Ontario’s legislation, published in September 2019 focussed on streamlining processes and reducing regulatory costs. Specific recommendations from the review

would raise the sector’s professional and education standards, boost protections for homebuyers and assist in the fight against money laundering.

Adopting best practices and promoting legislative consistency across provinces where feasible ensures consumer protection and promotes a fair and stable market across jurisdictions, helping to create certainty in the market place.

The BC Financial Services Authority (BCFSA)

The *Financial Services Authority Act*, which received Royal Assent May 16, 2019, established the BC Financial Services Authority (BCFSA) as a new Crown entity that replaces the Financial Institutions Commission (FICOM). On November 1, 2019, FICOM was dissolved and the Authority took on all of FICOM’s regulatory responsibilities, including the regulation of mortgage brokers.

The establishment of the BCFSA reflects government’s commitment to building a modern, efficient, and effective regulatory framework to respond to a rapidly changing financial services industry and new risks to consumers.

The Ministry is targeting fall 2020 to bring forward new legislation to include real estate in BCFSA’s mandate by spring 2021. The BCFSA will fully leverage expertise and best practices across regulated industries, including mortgage brokers, real estate, insurance, trusts, credit unions, and pensions.

Objectives of the MBA Review

Financial sector stability and consumer protection remain core priorities for government. These priorities are balanced with the need to ensure that the industry is not unduly burdened and that regulations do not stifle innovation or create barriers to new entrants.

The ultimate goal is a regulatory framework that helps to ensure that British Columbians continue to benefit from a financial services sector that is strong, stable, and inspires public confidence and trust.

The following objectives provide a framework to guide the analysis of issues during the review to:

- Reflect recognized national and international standards, while respecting the context of the BC marketplace including the size, scope and diversity of the industry.
- Enable early detection, timely intervention and resolution of issues.
- Promote clear, consistent and harmonized regulation.

- Foster an environment that promotes industry growth, innovation, and responsible business conduct.

Broadly speaking, the Ministry is proposing to meet these objectives by developing legislation that clearly sets out current best practices by:

- Requiring licensing of all mortgage brokering with limited exemptions.
- Providing for minimum standards of conduct and a duty of care to consumers.
- Requiring transparency and disclosure in mortgage transactions.
- Providing enhanced disclosure and reporting requirements for more complex products.
- Reducing regulatory gaps, leveraging work done in other provinces and respecting existing inter-jurisdictional agreements.

DISCUSSION OF KEY ISSUES AND AREAS FOR PUBLIC INPUT

Overview

The remainder of this paper sets out in summary form what replacing the current MBA with more modern provincial legislation could look like. For each issue, a description of the current approach and possible changes are discussed. Please note that the issues have been numbered for ease of reading and discussion and do not reflect any sort of ranking.

In addition to the issues listed below, the government is also seeking feedback on any other reforms that could be considered or aspects of the MBA that are working well and that should be retained.

MORTGAGE BROKER REGISTRATION OR LICENCING REQUIREMENTS

Building on national and international best practices, a modern MBA would establish business authorization requirements for all mortgage brokers and lenders except in circumstances of low consumer risk, such as individuals lending to a small number of friends and family. The authorization requirements would be supplemented by targeted consumer protection measures relevant to the borrower, lender or investor.

Ideally, the governance structure would impose clear accountability, requiring a brokerage to designate an individual responsible for managing the conduct of the business and supervision of employees and place compliance requirements on both the brokerage and the employees.

Issue 1: Scope of the MBA

As noted in the 2012 consultation paper, the original goal of the MBA was to protect consumers from harsh and unconscionable mortgage transactions. At the time, less reputable brokers were tacking on fees to the face rate of a mortgage without disclosing the impact of the fees on the true cost of borrowing. To address this, the MBA required persons carrying on activities captured by the definition of “mortgage broker” to register their business address and provide borrowers with true cost of borrowing disclosure if the mortgage broker charged a finder’s fee or other charge.

Under the current MBA, a mortgage broker is a person who engages in any of the following activities:

- (a) carries on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker's own or that of another person;
- (b) holds himself or herself out as, or by an advertisement, notice or sign indicates that he or she is, a mortgage broker;
- (c) carries on a business of buying and selling mortgages or agreements for sale;
- (d) in any one year, receives an amount of \$1,000 or more in fees or other consideration, excluding legal fees for arranging mortgages for other persons;
- (e) during any one year, lends money on the security of 10 or more mortgages;
- (f) carries on a business of collecting money secured by mortgages.

Mortgage broker legislation differs from province to province but, broadly speaking, most mortgage broker legislation fulfills a consumer protection mandate by regulating all business activity carried on within the province in respect of:

- lending money secured by a mortgage,
- soliciting a mortgage loan or investment,
- negotiating and arranging a mortgage loan or an investment,
- administering mortgage loans and investments and
- holding one’s self out to be a mortgage broker.

While the existing definitions of a mortgage, mortgage broker, and submortgage broker in the MBA captures much of the spirit of the above, there are gaps in the existing legislation.

The key differences between the current MBA and modern mortgage broker legislation are:

- The current definition of “mortgage” is limited to mortgages on real property located in BC and is only expanded to include all mortgages in limited circumstances, such as the disclosures required to be made to lenders. If the intent of the MBA is to ensure all mortgage brokering transactions that include a BC person, or that are carried on in BC, are

regulated² the current legislation is not clear. This creates potential gaps in the regulatory framework.

- “Carrying on business” is not defined separately from, but is integral to, the definition of a “mortgage broker.” Modern legislation more clearly provides that persons are within the scope of the legislation and are regulated if they meet a two-part test: 1) the person must be “carrying on business;” and, 2) the business activities must be “mortgage brokering activities” or “mortgage administration activities.” Such a test would provide more clarity than the current MBA, which sets thresholds of either \$1,000 or more in fees or lending money on the security of 10 or more mortgages above either of which a person is considered a “mortgage broker.”
- The MBA does not allow definitions to be expanded to include new business activities as the industry changes without changing the Act. Modern legislation provides the ability to expand the scope of the legislation by regulation. Providing the ability to bring new business activities or ways of doing business by regulation allows the legislative framework to meet the changing needs of consumers and the marketplace in a more timely fashion.

With the current definitions private mortgage lenders may not be regulated unless they meet the existing thresholds. This is the case even if the lender is otherwise lending money secured by mortgages in BC. An estimated 5% of mortgages are originated by unregulated mortgage lenders, or private lenders. This activity can expose consumers to risks that should be mitigated by the MBA.

Questions:

- 1) Are there any unintended consequences or concerns with amending the scope of the MBA legislation to align with other modern provincial MBA legislation?
- 2) To what extent should private lending be regulated?
- 3) Are there any other mortgage broker or lending activities that should be subject to regulatory oversight?

Issue 2: Types of Licences and Related Obligations

Currently, the MBA requires persons to register as either mortgage brokers or submortgage brokers. A submortgage broker is an employee of a particular mortgage broker and may carry on the same activities as a mortgage broker.

The MBA places most statutory duties and obligations on the business entity registered as a mortgage broker, while imposing fewer duties on the individuals employed as submortgage brokers.

² Other than federally regulated transactions.

To more clearly define the responsibility of mortgage brokers and their relationship with employees, the Registrar requires each mortgage broker, as a condition of registration, to have a submortgage broker act as a designated individual, who is responsible for the conduct of the business entity and all of its submortgage brokers.

Today, mortgage brokers carry out a number of different mortgage related activities, each with different associated risks to the consumer and public. The different risks are not always addressed with the current broad categories of registration. Modern mortgage legislation addresses this issue, at least in part, by distinguishing between persons carrying out different mortgage brokering activities and imposing duties and obligations specific to those activities. Licences are grouped as follows:

- “mortgage brokerage” – a business entity that is a corporation, partnership or sole proprietorship that brokers mortgages,
- “mortgage administrator” – a corporation that provides administrative services in respect of mortgages, including receiving mortgage payments from borrowers for the benefit of lenders or investors,
- “mortgage associate” – an individual who brokers mortgages on behalf of a mortgage brokerage, and
- “managing mortgage broker” – an individual who brokers mortgages on behalf of a mortgage brokerage and meets criteria to supervise mortgage associates,

While statutory obligations and responsibilities could vary by license type, all licensees should be required to apply for a licence, pay an annual fee, and comply with the terms of their license and the legislation.

Another possible change from the current application of the MBA in BC is licenses could be continuous. This would eliminate licence renewals, though licences could still be suspended or cancelled.

Under modern mortgage legislation in other jurisdictions, mortgage administrators and brokerages are required to establish policy and procedures to ensure compliance with the legislation. They also have a duty to appoint a managing mortgage broker as a representative in all dealings under the legislation.

Questions:

- 1) What are the challenges associated with moving to a more modern licencing regime described above?
- 2) Are there disadvantages to continuous licensing the government should consider?

Issue 3: Exemptions from Registration or Licencing

Currently, the MBA provides exemptions from registration to persons who are otherwise subject to equivalent regulation under another Act, including the following persons:

- insurance companies,
- savings institutions (banks, credit unions, extraprovincial trust corporations and subsidiaries of banks that are loan companies),
- a member of the Law Society of British Columbia,
- an employee, or director, of an insurance company or savings institution,
- persons registered under the *Securities Act*, other than exempt dealers, that offer for sale securities of syndicated mortgages and
- a person licensed under the *Real Estate Services Act*, in respect of vendor take-back mortgages.

Additional exemptions are available for:

- persons acting for the government or for an agency of the government,
- a liquidator, receiver, trustee in bankruptcy or a person acting under the authority of any court or an executor or trustee acting under the terms of a will or marriage settlement.
- a person lending money, directly or indirectly, on the security of land to provide housing for the person's employees,
- any other person or class of persons exempted by the Registrar from registration.

Modern mortgage legislation tends to provide similar exemptions from licensing. However, additional exemptions are also provided, including exemptions for:

- persons acting on behalf of a Crown corporation or agency of any Canadian jurisdiction,
- persons registered under the *Securities Act* of any Canadian jurisdiction,
- persons that provide simple referrals, and
- mortgage lenders who only lend through a licensed brokerage or an otherwise exempt broker.

Questions:

- 1) In your view, what are the costs or benefits of matching the MBA registration exemptions to parallel modern mortgage legislation?
- 2) Is the exemption from registration for persons lending money on the security of land to provide housing for the person's employees still relevant?
- 3) Are there any other persons currently exempted from registration either under the MBA or modern legislation that should not be exempted?
- 4) Are there any other persons that should be exempted from registration under the MBA?

DUTIES OF ALL REGISTERED OR LICENCED PERSONS

The MBA requires mortgage brokers and submortgage brokers to register by filing an application to the Registrar. The required form, any additional requirements, and the fee are set out in the regulation and in guidelines. Applicants are subject to a suitability review.

Modern mortgage legislation, sets out directly in the legislation, duties and obligations that apply to all licensed persons, including the following:

- a duty to act fairly, honestly and in good faith in carrying out licensed activities,
- comply with errors and omission insurance requirements,
- record keeping and retention requirements,
- restrictions on tied selling and
- working capital requirements for persons who handle trust funds.

The legislation is supplemented by regulations or rules that set out how the legislated duties and obligations are to be achieved.

Issue 1: Duty to Act Fairly, Honestly and in Good Faith

The MBA does not legislate a duty to act fairly, honestly and in good faith.

Generally, financial services providers in the areas of securities, insurance, and real estate should have as an objective, to work fairly and honestly and to exercise good faith in their dealings. This duty already cuts across sectors in BC. BC requires a positive obligation or duty to act honestly in rules created under the *Real Estate Services Act* and the Insurance Council of BC requires good faith as a fundamental aspect of conduct.

Modern mortgage legislation tends to contain such a duty that is consistent with the duties imposed across the financial sector. In addition, to further promote responsible business conduct, the MBA could place a positive obligation or duty for licencees to report industry member misconduct to the regulator.

Questions:

- 1) Do you have any concerns with matching modern mortgage legislation to include a duty to act fairly, honestly and in good faith?
- 2) Should a positive obligation to require reporting misconduct be legislated?

Issue 2: Insurance

Errors and omissions (E&O) insurance is not currently required in BC under the MBA. This is inconsistent with modern mortgage legislation as well as the requirements placed on other regulated persons (e.g., insurance agents, real estate brokers). E&O insurance is a significant tool in

consumer protection regimes to ensure funds are available to pay for consumer losses caused by an agent's negligence.

The Mortgage Brokers Regulator's Council of Canada³ (MBRCC) is currently developing national standards for E&O insurance for mortgage brokering activities.⁴ As the national standards are developed, a new MBA would require insurance with a goal to harmonize with other jurisdictions and adopt the national standards for E&O insurance developed by the MBRCC for the protection of consumers.

Questions:

- 1) If you are a mortgage broker, do you currently have E&O insurance?
- 2) If you are a mortgage broker, what are your reasons for having or not having E&O insurance?
- 3) Is there any reason why E&O insurance should not be required?

DUTY TO BORROWERS

In addition to the general duty to act fairly, honestly and in good faith in carrying out licensed activities, licencees under some modern mortgage legislation have a specific duty to act in the best interest of a borrower.

Acting in the best interest of a borrower means a broker must:

- verify the identity of the borrower, lender or private investor and determine the suitability of mortgage products available to the borrower by taking into account specified factors, including the interest rate, term, amortization period and any other distinguishing features of the mortgage,
- provide information about the brokerage business that a borrower may want to consider in their dealings with the brokerage, including ownership by a mortgage lender or private lender, the name and number of lenders they work with, the fees and remuneration or penalties payable by the borrower,
- disclose all direct or indirect compensation receivable by the brokerage from others, or payable by the brokerage if the borrower enters into the specific mortgage.

The brokerage must keep a record that the above steps took place and obtain acknowledgement, in writing, from the borrower that the steps took place.

³ The MBRCC is comprised of the provincial regulators that are responsible for administering mortgage broker legislation and regulating the industry across Canada. The MBRCC aims to balance consumer protection with an open and fair marketplace and works cooperatively to improve information sharing, promote harmonized regulatory practices and to develop a unified approach to engaging stakeholders on common issues.

⁴ In support of this initiative, the MBRCC E&O Committee consulted with mortgage brokering stakeholders across Canada. The consultation period closed April 1, 2019.

Further, the above measures are typically supplemented by additional requirements to disclose the cost of credit and prohibitions against deceptive or unconscionable acts or practices.

Issue 1: Duty to Act in Borrowers' Best Interest and Mortgage Suitability

The current MBA does not place a duty on a broker to act in the best interest of the borrower nor does it place a duty on a broker to determine if a mortgage product is suitable for the borrower.

The duty to act in the best interest of the borrower is common in modern mortgage legislation and is not unique to Canada. The European Union mortgage credit directive (MCD) sets out a duty to act honestly, fairly, transparently and professionally, considering the rights and interest of the consumer. The United Kingdom, in adopting the MCD, further specifies actions that will tend to show a contravention of the customer's best interest.

The current MBA is out of step with international standards and may create a gap in consumer protection by not requiring a broker to act in the borrower's best interest. Unethical actors may continue to work as brokers and remediation must be sought through other, often more costly channels.

Questions:

- 1) What do you consider to be acting in the best interest of the borrower? What parts of that should be required by legislation?
- 2) If a duty is placed on a broker to determine suitability of a mortgage product for a borrower, what factors should a broker consider when determining suitability?
- 3) Are there borrowers who do not require the protection offered by a duty to determine mortgage suitability?

Issue 2: Disclosure of Brokerage Information

The current MBA does not require brokerages to provide basic brokerage business information beyond requiring disclosure of potential conflicts of interest (discussed below in Issue 3).

Most modern legislation recognizes that information about the brokerage and the type of services offered, in addition to disclosing potential conflicts of interest, is required to ensure transparency and enable the borrower to make an informed decision. Basic brokerage information that must be provided to a borrower and maintained on record would include the following:

- if the brokerage is owned by a mortgage lender or private investor, the name of that mortgage lender or private investor;
- the name and number of lenders or private investors,
- the steps that the brokerage took to confirm the identity of the lender and private investor,

- the fees, remuneration or penalties payable by the borrower in connection with the services offered by the mortgage brokerage, and
- potential conflicts of interest, (i.e., where the brokerage or a related person has an interest in the mortgage).

Question:

- 1) Is there information that should or should not be included in disclosures to borrowers?

Issue 3: Disclosure of Compensation Receivable or Payable

Under the MBA, mortgage brokers are required to disclose interests in transactions. The disclosure must be made to the borrower and lender on a prescribed form (Form 10).⁵

The MBA does not prescribe the detailed information required to be disclosed to borrowers. As a result, the Registrar has published the Mortgage Broker Conflict of Interest Disclosure Guidelines and Frequently Asked Questions, which provides that brokers must disclose in dollar terms the commission and volume bonuses, plus other rewards, that a broker may receive.

Modernizing the legislation would include providing the Registrar with the ability to determine the form and manner of all filings including any required information to be disclosed to consumers. The legislation would allow the Registrar to be more responsive to changes in the industry and adjust the required forms as needed.

Question:

- 1) Are there any specific concerns with providing the Registrar with the flexibility to strengthen the MBA disclosure requirements as needed?

Issue 4: Disclosure of Cost of Credit for Home Equity Loans

The *Business Practices and Consumer Protection Act* (BPCPA) amalgamated a number of consumer protection statutes and the *Cost of Consumer Credit Disclosure Act*. The consumer credit disclosure requirements were developed as a federal-provincial-territorial initiative to harmonize laws concerning the cost of consumer credit disclosure. The BPCPA requires mortgage brokers and lenders to provide disclosure to individuals who borrow primarily for personal, family or household purposes, regardless of whether the broker or lender is charging additional fees or expenses.⁶

⁵ The form is not required if the borrower received the required information as part of an offering memorandum or prospectus.

⁶ By referencing the BPCPA, the MBA adopts the provisions that deal with the disclosure of the cost of borrowing and broker conduct rules.

While the MBA does not require that the cost of borrowing disclosure be provided to individuals who use their home equity to secure a business loan, this gap may create unnecessary risk to the residential housing market.

Question:

- 1) Is there a reason why disclosure of the cost of borrowing should not be required in every instance where an individual takes out a mortgage secured against residential property?

Issue 5: Reverse Mortgages

While the MBA applies to reverse mortgages, it does not require any enhanced disclosure, which may be needed to protect the vulnerable populations most likely to access these products. In 2006, the British Columbia Law Institute and the Canadian Centre for Elder Law published a report on reverse mortgages. The report recommended that legislation should specifically address reverse mortgages, with a focus on enhanced disclosure requirements, an extended cooling-off period and independent counselling.

In surveying best practices across Canada, New Brunswick, Ontario and Saskatchewan currently require independent legal advice before a borrower can take out a reverse mortgage. The *Mortgage Act* of Manitoba sets rules for reverse mortgages to limit fees, provides for an extended cooling-off period and requires disclosure that highlights the effect of an interest rate change on the mortgage balance.

Questions:

- 1) What are the benefits and costs of requiring independent legal advice before taking out a reverse mortgage?
- 2) What is an appropriate extended cooling off period for reverse mortgages?
- 3) Should disclosure of the effects of an interest rate change on the mortgage balance be required for reverse mortgages?
- 4) Are there other disclosures or requirements that could better protect consumers not contemplated here?

DUTY TO LENDERS AND INVESTORS

The current MBA does not place a duty to act in the best interest of a lender or private investor on mortgage brokers. The MBA also does not place a duty to determine if the mortgage is a suitable investment for an investor.

Under modern mortgage legislation, in addition to the general duty to act fairly, honestly and in good faith in carrying out licensed activities, licencees that solicit, negotiate, arrange or provide advice to private investors in respect of an investment in a mortgage have a duty to act in the best interest of the private investor.

As an example, a private investor in New Brunswick, meaning everyone other than a corporation with \$5M or more in net realizable assets, a trustee of a registered pension plan, another mortgage broker or a government entity must act in a private lender's best interests.

A broker required to act in the best interest of a private investor must take reasonable steps to verify the identity of the investor, ensure the mortgage investment is suitable and provide the investor with:

- disclosure in respect of mortgage investment information,
- disclosure of material risks, and
- disclosure of potential conflicts of interest.

Issue 1: Suitability of Investment

The MBA requires disclosure of mortgage investment information (via Form 9) to all lenders and private investors, except if:

- the borrower or the investor is a sophisticated person⁷,
- an offering memorandum or a prospectus has been provided in accordance with the *Securities Act*, or
- in the case of a mortgage that is part of a pool of mortgages, an interest in the pool is being offered as a security, as defined in the *Securities Act*, and the mortgage is fully guaranteed by the government of Canada or a province.

In contrast, under modern mortgage legislation, the suitability of the investment and related disclosure requirements are intended to apply only in respect of private investors. The disclosure requirements are focused on protecting persons who are the most likely to benefit from standard disclosure in respect of the mortgage investment.

Questions:

- 1) Should the duty to disclose mortgage information be amended and limited to private investors?
- 2) Should the mortgage broker duty to a private investor include determining mortgage investment suitability?

⁷A sophisticated person is defined and includes government bodies, banks, credit unions, insurance companies, trusts companies, mortgage brokers, registered investment dealers, portfolio managers and certain transactions with persons registered under the *Securities Act*.

Issue 2: Best Interest of Private Investor

The current MBA does not include a duty to act in the best interest of an investor or lender nor does it limit a brokerage from simultaneously acting for both the borrower and the investor.

Modern mortgage legislation would set out that mortgage brokerages that solicit, negotiate, arrange or provide advice to private investors in respect of an investment in a mortgage have a duty to act in the best interest of the private investor, if the private investor is not represented by another brokerage. Additionally, some jurisdictions require that if a mortgage brokerage has a duty to act in the best interest of a private investor, the brokerage must ensure that the borrower is represented by another brokerage.

Questions:

- 1) Are there potential conflicts between the duties to a borrower as outlined above and acting in the best interest of a private investor?
- 2) What would be the effect, if any, on your mortgage brokerage business if you are prohibited from acting for both the borrower and the private investor in a mortgage transaction?

Issue 3: *The Securities Act*

Since the late 1980's, the mortgage investment market has become increasingly complex, attracting both sophisticated and unsophisticated investors. Because mortgages sold as investments are generally securities within the meaning of the *Securities Act*, both the MBA and the *Securities Act* can apply to a person registered as a mortgage broker in BC.

The intent underlying the *Securities Act* is to protect investors and support fair capital markets by regulating companies, firms or individuals that issue, trade or provide advice on securities. To assist investors, companies offering securities for sale must generally file a prospectus and meet extensive continuous disclosure requirements, unless an exemption exists. In addition, firms and individuals trading or advising on securities must be registered under the *Securities Act*, unless an exemption exists.

Beginning January 1, 2019, mortgage investment entities (MIE)⁸ are now subject to the dealer registration regime, including 'know your client' and suitability requirements relating to:

- the general investment needs and objectives of their client and any other factors necessary for them to be able to determine whether a proposed purchase or sale is suitable ('know your client' or KYC); and
- the attributes and associated risks of the products they are recommending to clients (commonly referred to as know your product or KYP).

⁸ Mortgage investment entities include both mortgage investment corporations and mortgage syndications.

Although a MIE must be registered under the MBA when lending, the Registrar has limited authority to regulate the capital raising activities of the MIE as that falls under the BC Securities Commission (investors buy shares in the MIE and not mortgages).

Question:

- 1) Does the current division of regulatory oversight between the *Securities Act* and the MBA create gaps or unnecessary duplication in regulation or oversight?

Issue 4: Disclosure of Compensation Receivable or Payable

As discussed above, under the MBA, mortgage brokers are required to disclose interests in transactions to all borrowers and lenders. (via Form 10).

In contrast, modern mortgage broker legislation requires brokers to disclose actual or potential conflicts of interest only to private investors, so that the private investor may make an informed decision.

Question:

- 1) Should the disclosure to lenders of potential conflict of interests be limited and only required if the lender is a private investor?

MODERN REGULATORY REQUIREMENTS AND POWERS

As noted above, the new Financial Services Authority has taken on all regulatory responsibilities relating to the credit union, insurance, trust, mortgage broker and pension sectors. Additionally, the Authority will become the sole regulator for real estate services by spring 2021.

Ensuring the Authority's regulatory powers are harmonized across the sectors (where appropriate) would increase efficiency and transparency across the broader financial services sector.

Issue 1: Regulations and Rule Making Powers

The current MBA provides broad regulation making powers to the Lieutenant Governor in Council and more limited powers to the registrar.

Modern mortgage legislation provides rule making power to the regulator, for example in New Brunswick the Financial and Consumer Services Commission is given broad rule making power. Similarly, formal rule making power is provided to the Superintendent under the *Real Estate Services Act*, respecting licensing and regulating the provisions of real estate services and it

is expected the Authority will take on this power once it becomes the sole regulator for real estate services in BC.

Before making or amending specific rules, the Minister's consent would be required.

Question:

- 1) Please, provide your views on the Authority being provided with the power to make rules under the MBA?

Issue 2: Annual Information Returns

Currently, annual filing requirements under the MBA are limited. A mortgage broker is required to file either a declaration that they do not handle trust funds, or to file a report on the trust funds, including an accountant's report.

Modern mortgage legislation requires mortgage brokerages and administrators to file annual information returns, which are then used by regulators to identify, assess and monitor risk. The filings are completed by the managing broker and typically include the following information:

- Contact information including all locations and an address for service,
- Types of licensed activities carried on during the year,
- Number of brokers and broker associates,
- Number and dollar amount of mortgages placed, by type of mortgage and by type of lender,
- Errors and omission insurance coverage, claims and payouts, and
- A description of any complaints made to the brokerage regarding the brokerage or any of its associated brokers.

If the brokerage does not handle trust funds, a declaration to that effect would be filed. If the brokerage handles trust funds, audited financial statements would be filed.

The annual information filings would support the continuous licensing system and provide the regulator with up to date information on the industry.

The audited financial statements would support the prudential supervision of those mortgage brokerages and administrators that handle trust funds. For example, licencees in New Brunswick that hold trust funds must maintain at least \$25,000 in working capital.

Questions:

- 1) What concerns, if any, would you have with requiring an annual information return from all brokerages and administrators?

- 2) What are the expected impacts to your business in requiring audited financial statements in place of an accountant’s report on trust funds.

Issue 3: Enforcement and the BPCPA

The MBA not only adopts by reference provisions of the BPCPA that deal with the disclosure of the cost of borrowing and broker conduct rules, it also adopts the related BPCPA enforcement provisions. The Registrar may exercise the BPCPA enforcement provisions in respect of inspections, undertakings, freeze orders, administrative penalties and court proceedings. Navigating the requirements under the MBA is made more complex where the same or similar enforcement powers are dealt with in both the MBA and the BPCPA.

Modern mortgage legislation would provide for enforcement provisions based on their specific jurisdiction. In Ontario, for example, the regulatory framework provides for all enforcement powers within the mortgage legislation. In contrast, New Brunswick mortgage transactions may be subject to both the mortgage legislation and the *Cost of Credit Disclosure and Payday Loans Act*.

Questions:

- 1) Would the administrative and enforcement provisions be clearer if they were all embedded directly in the MBA, and not split between the MBA and the BPCPA?
- 2) If enforcement provisions continue to be split, are there clarifications that could be made in the MBA to reduce complexity and uncertainty?

Issue 4: Enforcement

The MBA provides the Registrar with enforcement powers to take effective action against non-compliant mortgage brokers. Specifically, the Registrar may investigate, summon witnesses, and inspect the affairs and records of a person and may:

- suspend or cancel a registration;
- issue orders requiring a person to take specified actions;
- levy administrative penalties of up to \$50,000;
- issue cease and desist orders and
- enforce orders by filing them with the courts.

Mortgage brokers and submortgage brokers are generally entitled to a hearing before these powers are enforced. A person affected by a direction, decision or order of the Registrar is entitled to be heard and can make an appeal to the Financial Services Tribunal. The Tribunal’s decisions are final, but subject to judicial review.

The maximum dollar amount of administrative penalties imposed to deter non-compliance in other consumer protection statutes have been substantially increased. For example, the *Real Estate*

Services Act maximum administrative penalty was increased from \$20,000 to \$500,000 for brokerages and from \$10,000 to \$250,000 in any other case.

Questions:

- 1) Do you have any suggestions on ways to further improve enforcement powers and remedies?
- 2) Given the significant monetary value of mortgages and the significant increase to penalties provided in other legislation that regulates real estate services is the current \$50,000 limit on the administrative penalties still appropriate?

CONCLUDING REMARKS

Thank you for taking the time to read through this paper and engage with the ideas and issues it addresses. Your input will help inform government's decision on replacing the MBA with modern legislation.

Please send your comments to MBAReview@gov.bc.ca or:

Attn: Policy and Legislation Division
MBA Review
Ministry of Finance
PO BOX 9418 Stn Prov Govt
Victoria, BC
V8W 9W1

The consultation period is open until March 13, 2019.

Public Nature of Consultation Process

The Ministry of Finance will share comments it receives with other branches of government, specifically the BC Financial Services Authority, who is responsible for the administration of the MBA.

Freedom of information legislation may require that responses be made available to members of the public who request access.

GLOSSARY

“**BCFSA**” is the BC Financial Services Authority established under the *Financial Services Authority Act* a new Crown entity that replaces FICOM.

“**BPCPA**” is the *Business Practices and Consumer Protection Act*, a consumer protection statute.

“**Expert Panel**” is the Expert Panel on Money Laundering in BC Real Estate appointed by the Minister of Finance in September 2018 to review money laundering in the real estate sector after two independent reports revealed that B.C.'s real estate market is vulnerable to criminal activity and market manipulation.

“**FICOM**” refers to the Financial Institutions Commission appointed by the Lieutenant Governor in Council which had statutory authority for the regulation of financial institutions in BC.

“**FINTRAC**” Financial Transaction Reporting and Analysis Centre: federal financial intelligence unit

“**modern mortgage legislation**” include the New Brunswick, Ontario and Saskatchewan mortgage legislation that provides the regulatory framework for mortgage brokers.

“**MBA**” is the *Mortgage Brokers Act*, the BC legislation that provides the regulatory framework for mortgage brokers.

“**MCD**” is the European Commission Mortgage Credit - Directive 2014/17

“**PCMLTFA**” – *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*: federal anti-money laundering legislation

APPENDIX A – EXPERT PANEL AND RECOMMENDATIONS

The *Mortgage Broker Act* (MBA) is not a modern statute and does not provide a solid basis for the regulation of the industry, especially mortgage lenders that are not financial institutions. Currently it is unclear exactly which lenders are subject to the Act, and many that should be regulated are not registered. The Act should be replaced.

New legislation would:

- establish business authorization requirements for all mortgage lenders except individuals lending to a small number of friends and family;
- include modern regulatory powers and requirements;
- establish a governance structure with designated management responsible for compliance within mortgage intermediaries and mortgage lenders, as well as compliance requirements placed on employees within the organization; and
- make a distinction between regulation of the intermediary function and the lending function, with appropriate provisions for both aspects of the industry.

Those using mortgages as a money laundering tool either directly or through currently unregulated lenders should be subject to regulatory action under the new act, which would also enhance the market conduct public protection that the MBA was originally intended to provide.

A modern MBA would require additional regulatory resources to be effective, and this should be funded on a user-pay basis by regulated entities. The Panel recognizes that FICOM is currently undergoing considerable change. Implementing a new MBA would place additional change-management responsibilities on the organization. A new MBA would also place additional compliance costs on those currently registered under the MBA and those who would be regulated for the first time.

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

Recommendation 19: The BC government should require BC regulators of reporting entities to enforce compliance with PCMLTFA requirements and provide training and education to assist them in doing so, in cooperation with FINTRAC.

Recommendation 25: The BC government should ensure that all those in the mortgage lending business should be required under provincial legislation to conduct and maintain know-your-customer records and records of the source of mortgage payment funds from borrowers, until such requirements are placed on mortgage lending businesses by the federal government

APPENDIX B – REFERENCES

British Columbia - BCFSA - Mortgage Brokers

(https://www.bcfsa.ca/index.aspx?p=mortgage_brokers/industry)

Combatting Money Laundering Report

(https://news.gov.bc.ca/files/Combatting_Money_Laundering_Report.pdf)

G20 High-level Principles on Financial Consumer Protection

(<https://www.oecd.org/daf/fin/financial-markets/48892010.pdf>)

Manitoba - Securities Commission - Mortgage Brokers

(http://www.mbrealestate.ca/home_buyers/index.html)

Mortgage credit - Directive 2014/17/EU | European Commission

(https://ec.europa.eu/info/law/mortgage-credit-directive-2014-17-eu_en)

New Brunswick - Financial and Consumer Services Commission - Mortgage Brokers

(<http://www.fcnb.ca/industry-mortgage-brokers.html>)

Ontario - Financial Services Commission of Ontario - Mortgage Brokering

(<https://www.fSCO.gov.on.ca/en/mortgage/Pages/industry.aspx>)

Saskatchewan - Financial and Consumer Affairs Authority - Mortgage-Brokerages

(<https://fcaa.gov.sk.ca/regulated-businesses-persons/businesses/mortgage-brokerages>)