

MORTGAGE BROKERAGE – AGENT FOR LENDER

Purpose: To explain the requirements for a mortgage brokerage acting as an agent for a lender.

This bulletin applies to all mortgage brokerages, brokers and associates.

Mortgage brokerages may choose a business model in which they represent lenders. There are two types of lenders.

The first type of lender includes persons that are in the business of making loans secured by a mortgage, such as financial institutions, loan corporations, insurance companies, etc. Mortgage brokerages are not required to enter into a written service agreement with these types of lenders.

The second type includes private lenders, investors in syndicated mortgages and mortgage investment corporations. The level of service to each of the respective types can vary significantly and create different relationships for each type. For the purpose of the Information Bulletin, we use the term private lender to refer to the second type of lender. When the lender is a private lender, the mortgage brokerage may only represent the lender. The brokerage treats the borrower as a customer.

Representing private lenders

Agency describes a consensual relationship that you may create by contract or by law where one party, the principal, grants authority for another party, the agent, to act on their behalf. The agent is under the principal's control to deal with a third party and the agent accepts responsibility for representing the principal.

You may create an agency relationship through express agreement (verbally or in writing) or implied (by actions). When a brokerage is representing a lender, the agreement must be in writing.

An agency relationship is fiduciary in nature, and the actions and words of an agent with a third party bind the principal. Agency law sets out rules and principles for these relationships.

When a brokerage is acting as the agent of a lender (representing the lender) it has a duty to protect that lender client's interests. In this relationship, the mortgage brokerage has the highest level of legal responsibility to the lender. These responsibilities include:

- **Undivided loyalty:** the brokerage must act in the lender's best interests, and put them above their own and those of others. The brokerage must avoid conflicts of interest and must protect the lender's negotiating position at all times
- **Confidentiality:** the brokerage must keep information confidential, even after the relationship ends. Confidential information includes any personal information, information about the property, and information about the transaction (except information the law says must be disclosed or information the borrower agrees to disclose)
- **Full disclosure:** the brokerage must tell the lender, in writing, about their services. They must also tell the lender everything they know that might affect the relationship or influence the lender's decision in a transaction, even if the brokerage doesn't think it is important. This includes avoiding and disclosing any conflicts of interest.
- **Obedience:** the brokerage must obey all of the lender's lawful and reasonable instructions. If the lender insists on something unlawful, the brokerage must refuse, and should consider ending the relationship and the agreement
- **Reasonable care and skill:** the brokerage must exercise reasonable care and skill. It must meet the standard of a reasonable and competent mortgage brokerage professional
- **Full accounting:** the brokerage must account for all money and property they receive while acting on the lender's behalf

Private lenders typically rely more on the mortgage brokerage's expertise to conduct due diligence on the borrower and property. When a lender is considering committing to a loan, they will often rely on the mortgage brokerage's recommendation.

To receive commission or remuneration, the brokerage must prove that a contract exists. The best solution is to execute a written service agreement.

Obligations to a lender client

When representing lenders, the mortgage brokerage must enter into a written service agreement. That agreement must:

- be signed by all relevant parties
- clearly show all terms and conditions, including:
 - the names of the parties to the agreement
 - the responsibilities of each party to the agreement
 - the services of the mortgage brokerage

- the term of the agreement
- the loan terms, property description details and analysis
- provisions to terminate the agreement
- the risk tolerances of the lender, respecting priority on title, ratio of loan to property value, nature and type of the property as security for the loan, costs and outcomes associated with foreclosures, and source of loan capital
- the amount or method of calculating the remuneration the lender will pay
- the process for the collection, use, safekeeping and distribution of confidential and personal information
- the terms of trust (if the brokerage is expected to hold trust funds)
- the method of communicating loan possibilities and property details to the lender and the lender's response to same (if the agreement is of an ongoing basis)
- the method of communicating changes to the lender's risk tolerances (if the agreement is of an ongoing basis)
- the role of the mortgage broker, if any, in the event the borrower defaults on the mortgage deal

Mortgage brokerages that represent private lenders must ensure the lender receives:

- a copy of the registered mortgage
- a copy of the certificate of title for the property affected by the mortgage
- a copy of the solicitor's report, if any, with respect to the registration and the effect of the transaction

Best practices

A mortgage brokerage representing a lender client should:

- provide competent underwriting services
- present suitable mortgage products for lender's risk tolerance
- disclose risks about each mortgage deal
- verify identity of lenders and borrowers
- return original documents to lender
- disclose all legal, appraisal or any other fees
- disclose remuneration from borrower or other parties, if any

Requirements and best practices when you administer a loan

When administering a mortgage for a lender, the mortgage brokerage must:

- enter into written service agreement with the lender client
- prepare and maintain a ledger for each borrower
- prepare periodic statements of receipts and disbursements
- disburse all trust funds in accordance with terms of trust

- provide lender with periodic reports
- advise lender of any missed payments or other defaults
- contain terms of trust to disburse funds

All written mortgage administration agreements should:

- identify property in which mortgage is registered
- identify information to report to the lender
- identify the frequency of the reports
- identify who is responsible for borrower compliance

A mortgage brokerage should not sell interests in mortgages or represent lenders in relation to mortgages where the value of the mortgage exceeds the value of the real estate while acting as a mortgage broker under the *Real Estate Act*.

Related information

Legislation

- *Real Estate Act* Rules – s.72, s.73, s.74, and 106

Information Bulletins

- Mortgage Brokerage Relationship Options

Tools

- Borrower Consent and Disclosure When you Represent the Lender