

MORTGAGE BROKERAGE – AGENT FOR BORROWER

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

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

Mortgage brokerages may choose a business model in which they represent borrowers. This service relationship must be in writing.

A mortgage brokerage and its industry professionals must disclose, in writing, to borrowers:

- the service relationship
- the nature of the relationship with the lender
- the range of lenders the brokerage uses
- how the brokerage will receive compensation for the transaction
- the nature of any additional monies or benefits the brokerage will receive from the lender
- any factors that influence payment of any additional monies or benefits
- any additional fees payable by the borrower

Written service agreements are a best practice for making these disclosures.

When a borrower is the brokerage's client, the brokerage has an obligation to represent the borrower's best interests at all times. If that's the case, and all parties agree, they will treat lenders as customers. The brokerage will still have other responsibilities to potential lenders and/or customers.

A customer is a person who has contacted, but not engaged or employed, an industry member to provide services. When representing the borrower, the brokerage will:

- treat the lender honestly
- exercise reasonable care and skill in dealing with the lender

Representing borrowers

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).

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 representing the borrower, the brokerage will represent the borrower's best interests and:

- be honest
- gather the borrower's intended property and financial information to determine the lending options available to the borrower
- disclose, explain and recommend appropriate options for the borrower's consideration
- complete and submit documentation to the lender
- advocate on the borrower's behalf
- provide confidential advice
- inform the borrower of the progress of the application

Fiduciary obligations

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

- **Undivided loyalty:** the brokerage must act in the borrower's best interests, and put them above their own and those of others. The brokerage must avoid conflicts of interest and must protect the borrower'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 borrower, in writing, about their services. They must also tell the borrower everything they know that might affect the relationship or influence the borrower'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 borrower's lawful and reasonable instructions. If the borrower 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 borrower's behalf

The borrower relies on their mortgage brokerage's expertise in conducting due diligence on mortgage options that suits their needs. When a borrower is considering mortgage options, they will often act on their brokerage's recommendation.

An agent cannot be loyal to two parties in the same transaction. Mortgage brokers can't represent the lender and the borrower in the same transaction because they wouldn't be able to fulfil their fiduciary obligations to both parties. The requirement to disclose relevant information and keep a principal's information confidential is a conflict. Typically, an agent assumes the role of an advocate on behalf of their principal. If an agent attempts to represent two parties in the same transaction, it is a conflict of interest.

Regulatory obligations

Additional regulatory obligations include:

- not making false or misleading representations
- providing mortgage broker relationship and compensation disclosure forms
- providing written service agreements
- verifying information disclosure
- delivering documents

Compensation disclosure

Mortgage brokerages must disclose to borrowers how the brokerage will receive compensation for the transaction or any other monies or benefits it may receive and any factors that may influence payment of those monies or benefits.

The disclosure requirements for compensation are:

- the lender pays a fee
- the lender pays a salary
- the lender pays a renewal fee if the borrower renews the mortgage
- the length of the term or the amount of the mortgage affects the compensation
- charge the borrower a fee

The brokerage or its representatives may also receive money or non-monetary benefits from the lender that include:

- the greater volume of business with the lender will increase the commission
- the greater the efficiency with the lender will increase the commission
- increase in commission because the borrower is paying a higher rate than otherwise is available if the benefit was applied to the borrower's mortgage
- travel/gifts
- attendance at seminars or conferences
- equity shares with the lender

RECA has developed a written service agreement – *Service Agreement – Acting for a Borrower* to assist brokerages in meeting all of their requirements when acting for a borrower.

When a mortgage broker completes this document and uses it with their borrower client, it will provide all of the necessary disclosures and consents, including:

- disclosure of compensation
- credit bureau consent
- relationship disclosure
- protection of personal information

Related information

Legislation

- *Real Estate Act* Rules – section 41, s.43, s.44, s.65(c), s.71, s.74

Information Bulletins

- Conflict of Interest
- Disclose – Conflicts of Interest
- Disclose – Cost of Services
- Mortgage Brokerage Relationship Options
- Prohibitions – Mortgage Brokers and Associates
- Responsibilities – Mortgage Broker

Tools

- Representing the Borrower Service Agreement (explanation sheet and service agreement)