



## MORTGAGE BROKERAGE – BORROWER RELATIONSHIPS

**Summary: A mortgage brokerage and its representatives have an obligation to disclose to the borrower the brokerage’s relationship with the borrower, the lender, the range of products offered, how the brokerage will be compensated and any additional compensation. Mortgage brokerages may choose, as their business model, to represent borrowers and, if all parties agree, will treat lenders as customers. In this service relationship, since the borrower is the brokerage’s client, the brokerage has an obligation to represent the borrower’s best interests at all times, but still has a number of responsibilities to any potential lenders and/or customers. [See: *Real Estate Act* Rules s.41(e); s.65(c)(i)(ii)(iii)(iv)(v); Mortgage Broker Relationship Disclosure Document and Mortgage Broker Compensation Disclosure Document]**

The *Real Estate Act* Rules require that all mortgage brokers disclose to borrowers, in writing, the nature of their relationship with the borrower and the nature of their relationship with the lender. [*Real Estate Act* Rules, s.65(c)(i)(ii)]. Additionally, there is a responsibility to ensure their role is clearly understood by their clients and third parties [*Real Estate Act* Rules, s.41(e)], whether the client is the lender or the borrower.

The disclosure responsibility is two-fold: mortgage brokers must not only disclose their relationships with lenders and borrowers, they must also ensure that relationship (role) is understood by all parties.

The mortgage brokerage and its representative’s role and obligations to the borrower and the lender will vary depending on the nature of the service relationship between the mortgage brokerage and the lender or borrower. This information bulletin attempts to address a number of issues that a brokerage may consider in determining if its business model is to represent borrowers. It is the broker that determines the brokerage’s relationship between the brokerage, lenders and borrowers.

### What is Agency?

Agency describes a consensual relationship created by contract or by law where one party, the principal, grants authority for another party, the agent, to act on behalf of and under the control of the principal to deal with a third party and where the agent accepts responsibility for representing the principal. An agency relationship is fiduciary in nature and the actions and words of an agent exchanged with a third party bind the principal. Agency law sets out rules and principles for these consensual relationships.

The brokerage is the agent, with others employed or appointed to act on behalf of the brokerage being identified as brokers and associates. The *Real Estate Act* Rules state “agent” means an industry member who is expressly or implicitly authorized to act for or represent another person. An industry member includes the brokerage, broker and associate.

## Creating the Relationship

An agency relationship is usually created in the mortgage brokerage business through express agreement or ratification. In express agreement, this may be achieved either in writing or verbally. In ratification, an agent's authority can be granted retroactively. Ratification applies if the agent has acted either without authority or in excess of granted authority. In that instance, the principal subsequently agrees to be bound by such unauthorized acts.

Although an agency relationship may be created by express agreement in writing or verbally, in a situation where the mortgage brokerage is representing a lender in an agency relationship, the relationship should always be by written agreement.

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

## Fiduciary Obligations

In an agency relationship, the agent owes fiduciary obligations to the principal. At its heart, fiduciary relationships entail that agents owe their principal a duty of utmost loyalty, to avoid and disclose all conflicts of interest, and to act only in their clients' interests. In particular, this expands to mean that an agent must:

- disclose any relevant information to the principal known by the agent;
- not misuse confidential information about the principal; and,
- refrain from making any secret profits (including, directly or indirectly, disclosing any interest that the agent has in a mortgage transaction) at the expense of his or her principal.

If a mortgage broker industry member were to attempt to represent, in an agency relationship, both the lender and the borrower in the same transaction, it is impossible for that industry member to fulfill his or her fiduciary obligations to both parties. An agent cannot be loyal to two parties in the same transaction nor can an agent act only in the best interests of one party when the interests of the other party are different. 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 is attempting to represent two parties in the same transaction, it is a conflict of interest.

## General Obligations

There are eight general obligations that apply to mortgage brokerages (and those authorized to act on behalf of those brokerages), when performing agency duties for a principal. These obligations are to:

- be honest;
- exercise reasonable care and skill;
- act in person;
- perform the mandate;
- maintain confidentiality;
- obey lawful instructions;
- negotiate favourable terms; and,

- disclose relevant information known to industry member.

## Regulatory Obligations

The third set of obligations that a mortgage broker has to a client are regulatory in nature. There are a number of regulatory requirements that have already been addressed in previous obligations in this bulletin. The regulatory obligations are to:

- not make false or misleading representations;
- provide mortgage broker relationship and compensation disclosure forms;
- provide written service agreements;
- verify information disclosure; and,
- delivery of documents.

## Representing the Borrower

A mortgage brokerage may only represent either the lender OR the borrower but not both, when the lender is a “private” lender. Lenders that are not considered “private” include banks, treasury branches, credit unions, loan corporations, trust corporations, insurance companies, any persons engaged in the business of making loans secured with mortgages or any persons that manage registered pension plans. In these situations, the mortgage brokerage cannot represent both parties. The inherent conflicts identified previously in this information bulletin in acting as an agent for two parties to the same transaction requires that the brokerage only act on behalf of the borrower or the lender.

A mortgage brokerage that chooses to represent the borrower may treat the lender as a customer of the brokerage. The *Real Estate Act* Rules define customer as meaning a person who has contacted, but not engaged or employed, an industry member to provide services. When representing the borrower, the brokerage has an obligation to represent the borrower’s best interests. With respect to the lender (customer), the brokerage will:

- treat the lender honestly; and,
- exercise reasonable care and skill.

In representing the borrower, the brokerage will represent the borrower’s best interest and:

- be honest;
- exercise reasonable care and skill;
- 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; and,
- keep the borrower informed of the progress of the application.

Mortgage brokerages are cautioned that their industry members must only undertake activities that match the type of relationship the brokerage has chosen to have with lenders and/or borrowers.

## Compensation Disclosure

Mortgage brokerages must also disclose to borrowers how the brokerage will be compensated 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 fairly straightforward with the brokerage indicating it will be paid by way of:

- Commission/income or fee paid by the lender;
- Salary paid by the lender
- A renewal commission from the lender if the borrower keeps the mortgage loan in force; and/or,
- Commission/income depending on the length of the term or the amount of the mortgage.

Or by:

- charging the borrower a fee.

The second part of the compensation is where the monies or benefits are not readily seen by the borrower but may have an effect on the borrower's mortgage or their decision to apply for a mortgage from a particular lender. The brokerage or its representatives may also receive monies or non-monetary benefits from the lender that include:

- Additional commission/income based on the volume of business with the lender;
- Additional commission/income based on the efficiency with the lender;
- Additional commission/income 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; and/or,
- Equity shares with the lender.

RECA has developed a Mortgage Borrower Relationship Disclosure Document and a Mortgage Broker Compensation Disclosure Document to assist brokerages in making the relationship and compensation disclosures to borrowers. These forms will also assist borrowers in understanding their relationship with mortgage brokerages and the mortgage broker's relationship with lenders, and how the brokerage will be compensated. When a mortgage broker correctly uses the RECA-developed forms, it meets the disclosure requirements of section 65(c) of the *Real Estate Act Rules*. The forms should be presented in their entirety to provide appropriate disclosure to the borrower. The forms are available through the RECA website at [www.reca.ca](http://www.reca.ca).

When a brokerage is facilitating a deal in mortgages and has not entered into an agency relationship with the borrower or lender they may act as an intermediary. Please see RECA Information Bulletin: *Mortgage Brokerage – Acting as an Intermediary*.