

PERSONAL MORTGAGE DEALS

Summary: Mortgage brokerage industry members have a number of written disclosures that they must provide when they become involved in personal mortgage deals, either directly or indirectly. [See: *Real Estate Act* Rules, s.1(1)(h), s.41(f) and s.75]

Avoiding conflicts of interest – and the appearance of conflicts of interest – is an important part of working as a mortgage brokerage industry member. There is nothing preventing mortgage brokerage industry members from becoming personally involved in mortgage deals, either directly or indirectly, though when doing so, they must ensure they provide the written disclosures required by section 75 of the *Real Estate Act* Rules.

Conflict of interest

The *Real Estate Act* Rules, section 1(1)(h) define a conflict of interest as a real or apparent incompatibility between an industry member's interests and the interests of a client or potential client.

If a mortgage brokerage industry member, either directly or indirectly, deals in mortgages on their own behalf, he or she must make a number of disclosures in writing, either to the borrower, lender, vendor or purchaser of the mortgage, as the case may be. A mortgage industry member dealing in mortgages on his or her own behalf could be considered to be in a conflict of interest. If there is a complaint filed about the mortgage deal or the industry member's actions, how would a RECA hearing panel or a court of law view the conflict where the industry member has stated they are representing the best interests of the client at the same time as the individual industry member is directly or indirectly dealing in mortgages on their own behalf?

Providing the required disclosures is notice to the borrower, lender, vendor or purchaser of the mortgage as the case may be, that the industry member is dealing in mortgages on his or her own behalf and has a vested interest in how the deal proceeds. Please note this includes the brokerage as well as individuals registered with the brokerage. Should the other party to the deal not feel comfortable with the conflict that has arisen, he or she can choose not to proceed with the deal or seek independent advice.

Written disclosures required

Pursuant to section 75 of the *Real Estate Act* Rules, an industry member dealing in mortgages on their own behalf must disclose the interest, either direct or indirect, that they have in the deal, that they are authorized pursuant to the *Real Estate Act* and the brokerage with which they are registered.

They must also disclose the complete details of any negotiations for a further disposition of the mortgage or the industry member's interest in it, and any information they have that could materially affect the acceptance, issuance, sale or purchase of the mortgage.

The above written disclosures must be provided at the earliest practical opportunity and as soon as the potential for conflict of interest arises.

Example

1. A small developer is looking for a source of money for a small development and may have difficulty arranging financing through traditional sources, so the developer approaches a mortgage associate that he has regularly worked with in the past. The associate does not specialize in private lending and syndicated mortgages, however he refers the developer to an associate in another brokerage that specializes in private lending.

The developer needs \$500,000 of additional funding to develop the project and it is anticipated he will only need the money for a maximum of one year. The second mortgage associate contacts his regular investors and has some difficulty arranging the financing so he himself ends up becoming an investor in the syndicated mortgage. He will sell his interest in the mortgage as soon as possible and continues to search for another investor. Four investors participate equally in the mortgage.

The mortgage associate, through his brokerage and with a written service agreement, will administer the mortgage. The developer will pay the second associate's brokerage a \$15,000 fee for arranging the mortgage. The loan is at an annual rate of interest of 14%.

A number of conflicts of interest have arisen as a result of how this mortgage deal is structured. These conflicts include that: the industry member has invested in the mortgage; the mortgage associate's brokerage, through the mortgage associate, is acting on behalf of the investors (not the developer) in the syndicated mortgage; and, that the associate is attempting to dispose of his interest. The disclosures required of the mortgage associate to the borrower include: that the mortgage associate has a direct interest in the mortgage as one of the investors in the mortgage; that the industry member is attempting to dispose of his interest; that the brokerage is representing the investors in the deal and in the ongoing administration of the mortgage; that the developer is a customer of the brokerage; and, the name of the associate's brokerage. The associate needs to disclose to the investors that he is an investor and that he is disposing of his interest in the loan.