

## Frequently Asked Questions - Compliance with the MBMA

On October 1, 2010, *The Mortgage Brokerages and Mortgage Administrators Act* (the “MBMA”), came into force. Since then, the Superintendent of Financial Institutions (the “Superintendent”) office has spoken with industry members regarding the MBMA’s requirements.

A number of the questions and comments that came forward are applicable to all brokerages and/or their brokers and associates. In order to ensure a consistent understanding of requirements, the following sets out the Superintendent’s position on each item:

### 1. Initial Disclosure Form and Mortgage Disclosure Form

The MBMA requires information be provided to a borrower prior to the borrower committing to enter into the mortgage or committing to make any payment in connection with the mortgage (the “unconditional commitment”). As described below under the Mortgage Disclosure heading, the date the borrower signs the commitment letter will not necessarily be the date of the unconditional commitment.

The Superintendent has developed two forms to assist brokerages in meeting these information requirements:

- (a) the Initial Disclosure, which must be provided at the earliest opportunity, and in any event, at least two business days in advance of the unconditional commitment; and
- (b) the Mortgage Disclosure, which must be provided at the earliest opportunity, and in any event, at least one business day in advance of the unconditional commitment.

Both forms must be signed by the borrower, acknowledging that they received a copy. These forms are available on the [www.sfsc.gov.sk.ca](http://www.sfsc.gov.sk.ca) website.

The following guidance will assist in complying with these requirements:

#### Initial Disclosure

There are two requirements for the initial disclosure form: providing the form to the consumer, and obtaining the consumer’s signed acknowledgement.

The form must be provided to the consumer at the earliest opportunity. This means:

- If the first contact with the consumer is in-person, the form must be provided to the consumer during this initial in-person meeting.
- If the first contact with the consumer is by electronic communication (e.g. phone call, text, fax, email, etc.), the form must either be sent to the consumer promptly after the

communication or, if the brokerage has the form on its website, the consumer may be directed to view the form on the website. If the brokerage chooses to send the form to the consumer promptly after the communication, the brokerage may send it by electronic delivery, such as fax or email.

- If the brokerage takes applications from consumers through its website, the form must be included on the brokerage's website as a "click through" (i.e. a consumer needs to check a box stating they have seen the form) prior to completing an on-line application.

The requirement to obtain a signed acknowledgement of the initial disclosure by the consumer must be met for all mortgages that fund. It must also be obtained in all cases where there is an in-person meeting with the borrower or any exchange of documents, whether or not the mortgage funds. If a brokerage's first contact with a consumer is by electronic means (including a phone call) and the consumer does not retain the brokerage's services after the first contact, the Superintendent does not expect brokerages to pursue the consumer to obtain the signed acknowledgement.

The initial disclosure form has been revised to clarify that the date the borrower receives the form may be different than the date the borrower acknowledges its receipt.

Mortgage brokerages should be aware that the Superintendent's examinations will focus on whether:

- A borrower-signed initial disclosure form is included in every file for all funded mortgages;
- The initial disclosure document is readily accessible from the brokerage's website (not applicable where the brokerage does not have a website); and
- The initial disclosure document "pops up" prior to a borrower completing an on-line application form from the brokerage's website (not applicable if the brokerage does not accept electronic applications).

### Mortgage Disclosure Form

To determine when the mortgage disclosure form must be provided, the mortgage broker needs to determine the borrower's unconditional commitment date. This is the date on which:

- the borrower has given a commitment to enter into the mortgage or to make a payment in connection with the mortgage; and
- the borrower can no longer avoid entering into the mortgage or making the payment in connection with the mortgage without incurring some form of penalty.

The date the borrower signs the commitment letter may or may not be the date of the unconditional commitment, depending on the wording of the commitment letter. The Superintendent will apply the requirement as follows:

1. the date the borrower signs the commitment letter is the date of unconditional commitment where:
  - the commitment letter states that the borrower is liable to pay a fee, penalty or other charge for withdrawing or not proceeding with the transaction; or
  - the commitment letter states that the borrower is liable to pay a fee or other charge on the signing of the commitment letter, e.g. an application fee, costs already incurred by the lender, etc.;
2. the date the borrower signs the commitment letter is not the date of unconditional commitment where:
  - the commitment letter does not mention any fees, penalties or charges to be paid by the borrower; or
  - the commitment letter states that the borrower will have to pay costs or fees that may potentially be incurred after the signing of the commitment letter, e.g. appraisal, survey or legal costs.

In the scenarios under #1 above, because the date the borrower signs the commitment letter is the date of unconditional commitment, the mortgage disclosure form must be provided to the borrower at least one business day prior to the borrower signing the commitment letter. In the scenarios under #2 above, because the date the borrower signs the commitment letter is not the date of unconditional commitment, the mortgage disclosure form must, at the latest, be provided to the borrower at the time the borrower signs the commitment letter.

Each brokerage needs to ensure all brokers and associates know which lenders unconditionally commit borrowers in the lender's commitment letter or other documentation to enter into the mortgage or to make a payment, as this impacts the timing for delivery of the mortgage disclosure form. The wording of the commitment letter or other document is key; whether or not the lender in question typically pursues withdrawing borrowers for payment of the fees is irrelevant.

## **2. Can the role of the brokerage be clarified in the Mortgage Disclosure document?**

The Superintendent has revised the Mortgage Disclosure document to address concerns that its wording was misleading as it did not reflect the role mortgage brokerages play in the transaction. The previous wording of the form was (emphasis added):

The primary reasons this mortgage was **selected** for you [provide description, which needs to refer to at least one of the following considerations: whether the mortgage is

conventional or high ratio, the interest rate, whether the interest rate is fixed or variable, whether the interest rate may change during the term of the mortgage, the term of the mortgage, whether the mortgage is closed, partially open or fully open, the amortization period]:

The Mortgage Disclosure document has been revised to state (emphasis added):

The primary reasons this mortgage was **determined to be the most suitable for you** [provide description, which needs to refer to **one or more of the following aspects which the borrower identified as a key consideration in selecting the mortgage:** whether the mortgage is conventional or high ratio, the interest rate, whether the interest rate is fixed or variable, whether the interest rate may change during the term of the mortgage, the term of the mortgage, whether the mortgage is closed, partially open or fully open, the amortization period, **any other considerations that the borrower identified**]

This revised wording recognizes the concerns brought forward by licensees, while maintaining compliance with the MBMA's requirements that a mortgage brokerage must act in the best interests of the borrower, determine the mortgage loan that is most suitable for the borrower, and provide the borrower with a written assessment of the determination of suitability considering the borrower's needs.

Ultimately, it is the borrower who decides which available mortgage loan is most suitable, but this should occur only after the brokerage has advised the borrower about the different options available through the brokerage and how those options might affect the borrower in light of his or her circumstances. The role of the brokerage is to review the borrower's needs as described by the borrower, and guide the borrower to the most suitable mortgage loan available through the brokerage.

The Mortgage Disclosure document is not a prescribed form, and a mortgage brokerage can provide additional information concerning its role in the transaction. This could be provided in a number of forms, such as a written agreement setting out the brokerage's services. Brokerages are cautioned that any changes to the disclosure documents or additional information provided must be consistent with the MBMA.

### **3. What are the requirements for brokering outside of Saskatchewan?**

Everyone brokering mortgages in another jurisdiction must comply with their rules, and must contact that jurisdiction to determine the licensing requirements.

Operating in violation of the requirements of another jurisdiction may be considered by the Superintendent in determining whether a licensee remains suitable to be licensed pursuant to the MBMA.

#### **4. When does the MBMA apply to a mortgage brokerage transaction?**

The Superintendent has received a number of inquiries as to when the MBMA applies to various Saskatchewan “connections”, such as where the borrower is in Saskatchewan, the property is in Saskatchewan, the lender, or a combination of these items.

As a starting point, the MBMA establishes that anyone carrying on the business of brokering mortgages in Saskatchewan must be licensed pursuant to the Act. The MBMA provides some elaboration in subsection 2(3) of what is meant by “carrying on business”, but the phrase is not conclusively defined. For this reason, the unique facts of each case must be considered in determining if activities amount to “carrying on business” in Saskatchewan. However, we can provide some general guidelines.

Generally speaking, the MBMA will always apply when the borrower or private investor (where applicable) is in Saskatchewan. When a transaction involves property not located in Saskatchewan, the key factor remains whether a Saskatchewan borrower or Saskatchewan private investor is involved; the location of the property to be mortgaged is less relevant. If a Saskatchewan borrower or Saskatchewan private investor are involved, then the MBMA will apply to the transaction. Where the only connection to Saskatchewan is the location of the property, then the MBMA will not generally apply.

If you have a concern that someone is carrying on unlicensed mortgage brokering activity in Saskatchewan, please contact our office.

#### **5. Can the Superintendent use email to send information and notices?**

Yes. The Superintendent can now send emails to all licensees by licence type (i.e. brokerage, broker, associate, administrator). Licensees are reminded that the MBMA requires them to maintain an accurate email address with the Superintendent, any changes to their email must be immediately reported to the Superintendent’s office. Information is also posted on the SFSC’s website at [www.sfsc.gov.sk.ca](http://www.sfsc.gov.sk.ca)

#### **6. Can common wording for disclosing compensation / fees be developed?**

The MBMA requires disclosure of the fees received by the brokerage to the borrower. In particular, section 17(3) of the Regulations states that if a brokerage or other related person is receiving remuneration if the mortgage transaction proceeds, the disclosure statement must include:

- (a) the identity of the person providing the remuneration;
- (b) if the remuneration is in the form of money, the basis for calculating the remuneration; and
- (c) if the remuneration is in a form other than money, the nature of the remuneration.

These disclosures are built into the Mortgage Disclosure form.

There are a number of different ways in which the brokerage may be remunerated. The precise basis for calculating the remuneration is determined by the specific language of the brokerage's agreement with the payer. For this reason, mortgage brokerages are in the best position to describe the remuneration they receive and need to provide an accurate description of all aspects of remuneration associated with that mortgage transaction to the borrower.

## **7. What information is required on a business card?**

The MBMA sets out disclosure requirements for advertising and for correspondence. Communications that are correspondence are those directed to a specific recipient, and must contain some additional information not required of advertising.

The Superintendent views business cards to be a form of correspondence and as such requires that the cards include the licence number and the type of licence held of both the brokerage and the broker or associate named on the card. Below is an example of the minimum basic information that is required to appear on the business card:



## **8. What information is required on office signage?**

The brokerage's office sign is not viewed as advertising by the Superintendent. To qualify as an office sign, the sign must be affixed to the brokerage's business premises or adjacent to the brokerage's business premises. Office signs do not include signs such as sandwich boards, billboards or other types of portable signage that may be located near the office location or that may be easily moved away from the office location. Also, signs that provide information about specific products or services supplied by the brokerage are not considered office signs by the Superintendent and as such must adhere to advertising and correspondence requirements, as the case may be.

**9. Can my advertising indicate that I am part of a team within a licensed brokerage?**

No. The Act requires advertising to be in the name of the licensed brokerage. Advertising using a team name conveys that a borrower may be dealing with a person different than the licensed brokerage. In order to advertise under a team name, that team would need to be licensed as a brokerage and comply with all brokerage requirements (E&O insurance, privacy policy, disclosure forms etc).

**10. When do advertising and communications need to comply with the MBMA?**

The MBMA is currently in effect, and licensees need to comply with all of its requirements. However, the Superintendent recognizes that the transition to the new advertising and correspondence requirements may take some time to implement, and as such acknowledges that brokerages may require a short grace period to make the necessary changes.

Brokerages must be taking actions to move to compliance with the advertising and correspondence requirements of the MBMA, and full compliance is expected in the near future. Brokerages that anticipate that full compliance will not be obtained as of October 1, 2011 (i.e. one year after the legislation was implemented) should contact the office of the Superintendent with a proposal setting out their expected timeframe. Proposals involving more expensive changes (e.g. billboard advertising) requesting a compliance date no later than December 31, 2011 will generally be accepted. Items such as business cards and letterhead must be revised in a much shorter time period.

Advertising and correspondence must never contravene the MBMA in some other manner, such as by containing false, misleading or deceptive information.