

Approach



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Supervision Approach for Non-Qualified Syndicated Mortgage Investments with Permitted Clients and Legacy Non-Qualified Syndicated Mortgage Investments

Purpose

This Approach Guidance describes the principles, processes and practices of the Financial Services Regulatory Authority of Ontario (“FSRA”) for the supervision of:

- Non-Qualified Syndicated Mortgage Investment (“NQSMI”)¹ transactions with “Permitted Client” investors / lenders effective July 1, 2021
- NQSMI transactions with Permitted and non-Permitted Clients conducted prior to July 1, 2021 (“Legacy NQSMIs”)
- administrators of NQSMIs

¹ NQSMIs are syndicated mortgages that do not meet the definition of “qualified syndicated mortgage” in accordance with subsections 1(2) and 1(3) of O. Reg. 188/08.

“Permitted Client” is defined in section 1 of Ontario Regulation 188/08: Mortgage Brokerages: Standards of Practice (“O. Reg. 188/08”) under the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (“MBLAA”). The definition lists several types of “Permitted Clients”, which are entities and individuals that are presumed to have significant experience and knowledge regarding financial matters, including investments, and robust financial means.²

Scope

This Approach Guidance applies to:

- 1) mortgage brokerages dealing and/or trading in NQSMIs with Permitted Client investors / lenders
- 2) mortgage brokerages, when dealing in NQSMIs, acting on behalf of the borrower in NQSMIs with investors / lenders that are non-Permitted Clients
- 3) mortgage brokerages that dealt and/or traded in Legacy NQSMIs (with Permitted and/or non-Permitted Clients)
- 4) mortgage administrators administering NQSMIs (for Permitted and/or non-Permitted Clients, whether the NQSMIs are Legacy NQSMIs or transacted on or after July 1, 2021).

This Approach Guidance does not apply to the supervision of Qualified Syndicated Mortgages³ (QSMs).

Rationale and context

NQSMI Regulatory Framework

Effective July 1, 2021, responsibility for regulation of NQSMI transactions is split between the Ontario Securities Commission (“OSC”) and FSRA.

² This definition of “Permitted Client” reflects the definition used in Canadian Securities Administrators (CSA) National Instrument 31-103.

³ See footnote 1.

Key for determining the division of oversight over NQSMI transactions are two elements:

- 1) whether the investors / lenders are Permitted or non-Permitted Clients
- 2) whether the borrower is a Permitted or non-Permitted Client

Regulatory oversight of NQSMI transactions is as follows:

- a) Dealing or trading in NQSMIs with Permitted Client investors / lenders can be overseen by FSRA or the OSC.
- b) Dealing or trading in NQSMIs with non-Permitted Client investors / lenders is primarily overseen by the OSC.
- c) Dealing or trading in NQSMIs with both Permitted and non-Permitted Client investors / lenders can be overseen jointly by FSRA and the OSC or by the OSC only, in accordance with their respective regulatory regimes.
- d) When dealing or trading in NQSMIs, a dealer registered with the OSC can deal or trade with all types of investors and borrowers who are Permitted Clients.

The regulatory amendments to implement the new regulatory regime for NQSMIs include:

- Amendment to Part 3 of OSC Rule 45-501: [Ontario Prospectus and Registration Exemptions \(OSC Rule 45-501\)](#) to exempt persons or entities from the requirement to be registered as a dealer with the OSC when transacting in NQSMIs on a property located in Canada with Permitted Clients, if the person or entity is licensed under the MBLAA.
- Introduction of section 14.1 of Ontario Regulation 407/07: Exemptions from the Requirement to be Licensed (O. Reg. 407/07) to exempt persons or entities from the requirement to be licensed under the MBLAA to deal or trade in NQSMIs if the person or entity is registered as a dealer with the OSC for the purposes of dealing or trading in NQSMIs. That is, dealers may deal or trade in NQSMIs with all types of investors. When dealing or trading in NQSMIs with investors, they may also deal with borrowers who are Permitted Clients.

Table 1 – Division of Regulatory Oversight of NQSMIs (as of July 1, 2021)

Borrowers in NQSMIs		
	Permitted Client	Non-Permitted Client
Investors / Lenders in NQSMIs	FSRA Licence OR OSC Registration and FSRA Licence Exemption ⁴	FSRA Licence
	OSC Registration and FSRA Licence Exemption	OSC Registration AND FSRA Licence
	Permitted Client	Non-Permitted Client

MBLAA licensing through FSRA continues to be required for all MBLAA-regulated activities other than dealing or trading in NQSMIs, as described above.

These MBLAA-regulated activities include:

- “dealing” in mortgages, as defined in section 2 of the MBLAA
- “trading” in mortgages, as defined in section 3 of the MBLAA
- “mortgage lending”, as defined in section 4 of the MBLAA
- “administering mortgages”, as defined in section 5 of the MBLAA

Depending on the activities being conducted, a person or entity may require a FSRA licence, even though it may also be regulated by the OSC as a dealer. For example, a dealer registered with the OSC selling securities is not exempt from licensing under the MBLAA if it engages in any MBLAA-regulated activities, such as dealing or trading in non-NQSMI mortgages. It must also be

⁴ See section 14.1 of Ontario Regulation 407/07.

licensed with FSRA as a mortgage brokerage. Similarly, if it wishes to administer a NQSMI or any other type of mortgage, it requires a FSRA mortgage administrator licence.

FSRA Mandate

In supervising and regulating the mortgage brokering sector, FSRA is required to administer and enforce the MBLAA and its regulations in a manner that will achieve FSRA's statutory objects⁵, in particular, to:

- contribute to public confidence in the mortgage brokering sector;
- monitor and evaluate developments and trends in the mortgage brokering sector;
- cooperate and collaborate with other regulators where appropriate;
- promote high standards of business conduct;
- protect the rights and interests of consumers; and,
- foster a strong, sustainable, competitive and innovative mortgage brokering sector.

Principles

This Approach Guidance describes how FSRA aims to achieve its statutory objects using a data-driven, proactive and targeted, risk-based approach to supervision:

Data-driven judgement – FSRA collects data from mortgage brokerages and administrators to appropriately target supervision of higher-risk brokerages and administrators.

Proactive – FSRA creates forward-looking risk assessments of mortgage brokerages and administrators to implement processes to identify issues early and take actions for timely intervention, as required.

Targeted risk-based approach – FSRA targets its supervision resources based on the risk profile of the mortgage brokerage and administrator and the NQSMIs it transacts and administers, respectively. The risk profiles consider various factors including the following in Table 2:

⁵ See *Financial Services Regulatory Authority of Ontario Act, 2016*, s. 3.

Table 2 – Risk Profile Factors

<p>Mortgage Brokerages Risks:</p>	<ul style="list-style-type: none"> • number of brokers, agents, locations • compliance history, including complaints received and supervision review outcomes • NQSMI funds raised and number of real estate projects funded • non-arm's length relationship with borrower in a mortgage (i.e., related to borrower / not independent of borrower)
<p>Mortgage Administrators Risks:</p>	<ul style="list-style-type: none"> • type of mortgages being administered • type of investors / lenders in a mortgage • type of borrower in a mortgage • non-arm's length relationship with borrower in a mortgage (i.e., related to borrower / not independent of borrower)
<p>NQSMI Risks:</p>	<ul style="list-style-type: none"> • total mortgage value (amount) • outstanding balance • intended use of funds • project status • existence of a subordination clause • type of Permitted Client investors / lenders (e.g., entity versus individual) • conflicts of interest between parties • high loan-to-value ratios (e.g. 90% or higher) • location of the subject property

Processes and practices

Supervision Approach for Mortgage Brokerages Dealing and Trading in NQSMIs with Permitted Clients

The objectives of this supervision approach are to:

- Supervise by monitoring and evaluating developments and trends in NQSMIs with Permitted Clients through regular data collection and adjusting FSRA's supervision approach based on analysis of the data.
- Ensure mortgage brokerages dealing and trading in NQSMIs with Permitted Clients comply with the MBLAA, its regulations, and applicable FSRA Guidance⁶ to ensure adherence with FSRA's statutory objects.

NQSMI Data to support FSRA supervision

Subsection 29(2) of the MBLAA gives FSRA broad authority to request information and documents from licensees. Under this authority, FSRA requires mortgage brokerages to provide the data outlined in Table 3 for each NQSMI with Permitted Clients. Effective with the reporting period starting January 1, 2022, FSRA requires annual reporting of the data as part of the brokerage's Annual Information Return (AIR) ^{7,8}. The AIR must be filed by March 31 every year, with data related to the previous calendar year.

⁶ See Appendix 1 for applicable Guidance.

⁷ NQSMI information was previously collected via a separate quarterly NQSMI report. This quarterly report is no longer required. The questions in the quarterly report have been incorporated into the AIR questionnaire.

⁸ The data collected via real-time supervision was more restrictive in terms of timing (filing required within five days) and more content-extensive. FSRA is no longer collecting:

- Source of investment funds
- Name of prior mortgagees, if applicable
- Details of appraisals (e.g., name, title and contact information of appraiser, etc.)
- Information re: borrowers, developers (if different from borrower) and guarantors' names.

⁹ Such as purchase, refinance, construction / development, renewal, renovation, etc.

While FSRA does not require similar data for trades in NQSMIs to non-Permitted Clients, it is made aware of industry conduct issues through various information sharing practices with other regulators. FSRA reviews information from other regulators and takes regulatory action, including enforcement, as may be required.

Examples of compliance or enforcement actions include the imposition of licence conditions, suspension or revocation of licence, and enforcement proceedings seeking administrative monetary penalties.

FSRA also considers this information when determining initial or ongoing suitability for licensing in all sectors regulated by FSRA in general and when supervising MBLAA-regulated activities in particular.

Table 3 – NQSMIs with Permitted Clients – NQSMI Data

Project	Registered/committed mortgage amount, advanced amount to date, initial term and remaining term to anticipated refinancing/payout date, purpose ⁹ , disclosed use of funds ¹⁰ at the time of raise, current stage of the project ¹¹ , loan-to-cost ratio, loan-to-value ratio, ranking of the mortgage, class of investors within the mortgage ¹² , existence of subordination clause ¹³ , cost to complete.
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⁹ Such as purchase, refinance, construction / development, renewal, renovation, etc.

¹⁰ Such as (raw) land acquisition and/or development, equity take-out, soft and/or hard construction costs, zoning/plans/permits approvals, payout tax liens or mortgage arrears.

¹¹ Such as pre-zoning, zoning approved, pre-construction, under construction, etc.

¹² For example, when investors have different priorities within the same tranche/mortgage.

¹³ For example, contractual for the project completion or force majeure due to tax liens, default or distress situations, etc.

<p>Property</p> <p>Transactions / investments</p>	<p>Type of property funded¹⁴, estimated market value¹⁵ of the property, location of the property.</p> <p>Investors: Total number of investors, number of Permitted Clients involved, their names, the amount of their respective investments, supporting documentation confirming the Permitted Client status and specific category of Permitted Client.¹⁶</p> <p>Borrowers: Category of Borrower.¹⁷</p>
<p>Mortgage administrator</p> <p>Fees</p>	<p>Name of mortgage administrator</p> <p>Was there a change in the mortgage administrator? If so, provide explanation.</p> <p>Fees schedule¹⁸ outlining anticipated / actual fees incurred by the investors and borrowers.</p>
<p>Related Parties</p>	<p>Disclose actual and / or potential conflicts of interest within a transaction among the mortgage brokerage, the mortgage administrator, the borrower and developer.</p>

¹⁴ Such as bare, raw, farm, industrial land, existing building, etc.

¹⁵ Also referred to the 'as is' value of the property as per the AIC guidelines.

¹⁶ Brokerages are to confirm the Permitted Client status of the prospective investor / lender.

¹⁷ For example, is the borrower an individual, a corporation, etc.?

¹⁸ For example, fees received by / owed to the brokerage and related parties.

Targeted Compliance Reviews

Using the NQSMI data, other AIR data, and internal supervisory information, FSRA creates a risk profile for each mortgage brokerage. Mortgage brokerages with a high-risk profile are targeted for increased supervisory oversight such as compliance desk reviews, onsite examinations, or referral to enforcement where applicable. Risk profiles are determined according to FSRA's risk framework, in which, individual risk factors are assigned risk values that add up to an overall risk rating.

As part of its compliance reviews, FSRA examines the mortgage brokerage's supervision of its brokers / agents and its policies and procedures, with a focus on the due diligence conducted to ensure investors / lenders for NQSMIs meet the Permitted Client definition.

Mortgage brokerages must take reasonable steps to confirm the Permitted Client status and class of these investors / lenders. These must include:

- documenting the steps taken to confirm investor / lender status
- obtaining signed confirmation of Permitted Client status from the investor / lender

Review findings could result in follow-up compliance or enforcement actions¹⁹, as appropriate.

Supervision Approach for Mortgage Brokerages that Dealt and/or Traded in Legacy NQSMIs

As noted earlier, Legacy NQSMIs are NQSMIs with Permitted and non-Permitted Clients transacted by mortgage brokerages prior to July 1, 2021. The objectives of this supervision approach are to:

- supervise by monitoring and evaluating the status and recoverability of Legacy NQSMIs through at least annual data collection
- ensure mortgage brokerages with Legacy NQSMIs complied with the provisions of the MBLAA and its regulations, and applicable FSRA Guidance²⁰ in place prior to July 1, 2021

¹⁹ Examples of compliance or enforcement actions include, without being limited to, the imposition of licence conditions, suspension, revocation of licence, and enforcement proceedings seeking administrative monetary penalties.

²⁰ See Appendix 1 for applicable Guidance.

- protect the rights and interests of NQSMI investors / lenders and borrowers

Data-driven, Targeted Compliance Reviews

Through periodic surveys²¹, FSRA will collect data, such as that outlined in Table 4, from select mortgage brokerages to monitor and evaluate the residual risk to investors / lenders and borrowers in Legacy NQSMI transactions.

Table 4 – Data Collection for Legacy NQSMIs

Project	Project status, outstanding mortgage amount ²² , loan-to-cost ratio, loan-to-value ratio, cost to complete.
Property	Type of property funded (e.g., residential, commercial, mixed-used, industrial), estimated market value (also referred to as the ‘as is’ value) of the property, location of the property.
Transactions / investments	<p>Investors: Total number of investors, investor type (designated or other), their names, the value of their respective investments, supporting documentation confirming the designated investor status and category of designated investor.</p> <p>Borrowers: Category of borrower (e.g., individual, entity, etc.)</p>
Mortgage	Whether the term was extended past the contractual extension date and how many instances

²¹ Data collection surveys will be completed on at least an annual basis.

²² To include a breakdown of accrued/unpaid interest, late fees, and any other owed amount at the time of reporting.

<p>Mortgage administrator</p>	<p>If the mortgage was paid out, if investors / lenders were paid out in full.</p> <p>Name of mortgage administrator</p> <p>Was there a change in the mortgage administrator? If so, provide explanation.</p>
<p>Fees</p>	<p>Fees schedule (e.g., for fees received by / owed to the brokerage and related parties).</p>
<p>Related Parties</p>	<p>Actual and / or potential conflicts of interest within a transaction among the mortgage brokerage, the mortgage administrator, the borrower and developer.</p>
<p>Disclosures</p>	<p>What disclosures were made²³ and by which party²⁴ at times of renewals or extensions for example.</p>
<p>Exit strategy</p>	<p>Description of repayment plan for investors / lenders will be repaid.</p>

Using the Legacy NQSMIs data collected, AIR and internal supervisory information, FSRA creates a risk profile for each mortgage brokerage.

For Legacy NQSMIs with identified greater risk of investor / lender loss, FSRA will conduct further reviews to understand, at a minimum:

²³ Such as conflict of interest, material risks, etc.

²⁴ Such as mortgage brokerage, mortgage administrator, etc.

- disclosures provided to investor / lender consumers by the mortgage brokerage
- suitability assessments conducted on investor / lender clients throughout the life of the NQSMI where the funding is completed in various raises / tranches

This approach reflects FSRA's existing supervision of mortgage brokerages that dealt and traded in NQSMIs prior to July 1, 2021.

Supervision Approach for Mortgage Administrators Administering NQSMIs

The objectives of this supervision approach are to:

- ensure mortgage administrators administering NQSMIs comply with the MBLAA, its regulations, and applicable FSRA Guidance
- ensure the protection of investor / lender interests, in particular, the interests of non-Permitted Client investors / lenders

Reviews of Mortgage Administrators Administering NQSMIs

FSRA's supervisory approach for mortgage administrators that administer NQSMIs focuses on the administration of NQSMIs with non-Permitted Clients.

Using AIR and internal supervisory information, FSRA creates a risk profile for each mortgage administrator. Mortgage administrators with an identified high-risk profile will be targeted for increased supervisory oversight such as compliance desk reviews, onsite examinations, and referral to enforcement where applicable. Risk profiles are determined according to FSRA's risk framework, individual risk factors are assigned risk values that add up to an overall risk rating.

As part of its compliance reviews, FSRA will examine the mortgage administrator's:

- steps taken to ensure it is aware of subsequent encumbrances and significant changes in circumstances affecting the mortgage (see Guidance No. MB0039INT)²⁵

²⁵ See FSRA's Mortgage Administrators – Responses to Market Disruption Interpretation Guidance No. MB0039INT ([Guidance No. MB0039INT](#)).

- notifications provided to investors / lenders²⁶
- disclosures, and timing of disclosures, made to each investor / lender, in particular:
 - disclosure of the mortgage administrator's relationships with each borrower, as per section 19 of Ontario Regulation 189/08 – Mortgage Administrators: Standards of Practice (O. Reg. 189/08)
 - disclosure of any conflicts of interest that the mortgage administrator or an employee administering the mortgage may have in connection with the mortgage as per section 20 of O. Reg. 189/08
- processes and controls for the exercise of discretion²⁷
- processes and controls to ensure concurrent businesses (if any) do not jeopardize its integrity, independence or competence when carrying on the business of administering mortgages as per section 40 of O. Reg. 189/08

Review findings could result in follow-on compliance or enforcement actions²⁸, as appropriate. General maladministration of NQSMIs or identified improper behaviour towards an investor / lender in a NQSMI, could result also in FSRA bringing sanctions under the MBLAA.

Effective Date and Future Review

This Approach Guidance was effective July 1, 2021 and will be reviewed no later than July 1, 2024. The section regarding NQSMI Data to support FSRA supervision was updated on

²⁶ See footnote 23.

²⁷ See footnote 23.

²⁸ Examples of compliance or enforcement actions include, without being limited to, the imposition of licence conditions, suspension, revocation of licence, and enforcement proceedings seeking administrative monetary penalties.

June 27, 2022 to reflect a change in how the NQSMI data is collected (through the AIR instead of the previously required quarterly report).

About this Guidance

This document is consistent with [FSRA's Guidance Framework](#). As Approach Guidance, it describes FSRA's internal principles, processes and practices for supervisory action and application of Chief Executive Officer discretion. Approach Guidance may refer to compliance obligations, but does not in and of itself create a compliance obligation.

Appendix

This Appendix outlines the applicability of FSRA Guidance to NQSMI transactions.

Applicability of FSRA Guidance and Forms			
Issue Date	Guidance	For NQSMI transactions on or after July 1, 2021 Applies to:	For NQSMI transactions before July 1, 2021 Applied to:
March 10, 2021	Mortgage Brokerage Disclosure and Suitability Assessments for Non-Qualified Syndicated Mortgage Investments (SMIs) – Responses to Market (for Transactions on or after July 1, 2021) MB0043INT	NQSMIs with Permitted Clients	Not applicable
March 10, 2021	Mortgage Brokerage Disclosure and Suitability Assessments for Non-Qualified Syndicated Mortgage Investments (SMIs) – Responses to Market (for Transactions prior to July 1, 2021) MB0040INT	Not applicable	Legacy NQSMIs
May 12, 2020	Mortgage Administrators – Responses to Market Disruptions MB0039INT	All Mortgage Administrators	All Mortgage Administrators

December 5, 2019	<u>Amended disclosure forms 3.0, 3.1 and 3.2 for non-qualified syndicated mortgages</u> (for Transactions prior to July 1, 2021) MB0038INT	Not applicable	Legacy NQSMIs
November 12, 2019	<u>Supervision approach for high-risk syndicated mortgage investments</u> (for Transactions prior to July 1, 2021) MB0037APP	Not applicable	High-Risk Legacy NQSMIs
October 26, 2018	<u>Policies and Procedures - Non-qualified Syndicated Mortgages</u> MB0009ORG	Not applicable	Legacy NQSMIs
Effective July 1, 2018	<u>Checklists for Non-Qualified Syndicated Mortgage Forms effective July 1, 2018</u> MB0024ORG	Not applicable	Legacy NQSMIs
June 28, 2018	<u>Changes to syndicated mortgage rules: New FSCO forms available</u> MB0008ORG	Not applicable	Legacy NQSMIs
June 30, 2015	<u>Requirements for Promoting Syndicated Mortgage Investments</u> MB0006ORG	NQSMIs with Permitted Clients	Legacy NQSMIs

January 21, 2015

[MFDA and FSCO issue
joint communication
concerning the selling of
syndicated mortgage
investments](#)
MB0017ORG

NQSMIs with
Permitted Clients

Legacy NQSMIs