

Interpretation



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Mortgage Brokerage Disclosure and Suitability Assessments for Non-Qualified Syndicated Mortgage Investments (NQSMIs) – Responses to Market Disruptions (for Transactions on or after July 1, 2021)

Purpose

This Interpretation Guidance¹ provides the Financial Services Regulatory Authority of Ontario’s (“FSRA’s”) interpretation of mortgage brokerages’ obligations under the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (“MBLAA”). It addresses requirements for ensuring the protection of investors / lenders in a mortgage / mortgage investment during a significant market disruption, such as a declared emergency under the *Emergency Management and Civil Protection Act* (“Market Disruption”).

Mortgage brokerages must consider the potential impacts of the Market Disruption in:

- disclosure of material risks to a Permitted Client¹ that is an individual² (Individual Permitted Client) and an investor / lender in a non-qualified syndicated mortgage investment (“NQSMI”);³ and
- suitability assessment for an Individual Permitted Client NQSMI investor / lender.

Scope

This Interpretation Guidance applies to mortgage brokerages that deal and / or trade in NQSMIs with individual Permitted Client investors / lenders effective July 1, 2021.

Rationale and context

Mortgage brokers and agents are subject to Ontario Regulation 187/08, Mortgage Brokers and Agents: Standards of Practice, which, pursuant to section 3, requires a mortgage broker or agent not to do anything, or omit to do anything, that might reasonably be expected to result in the brokerage on whose behalf the mortgage broker or agent is authorized to deal in mortgages to contravene or fail to comply with a requirement established under the MBLAA.

Further, in supervising and regulating the mortgage broker and administrator sector, FSRA is required to administer and enforce the MBLAA and its regulations, including the Standards of Practice, in a manner that will achieve FSRA’s statutory objects⁴, in particular, to:

- contribute to public confidence in the regulated sectors;
- monitor and evaluate developments and trends in the regulated sectors;
- promote transparency and the disclosure of information in the regulated sectors;
- promote high standards of business conduct particularly with respect to financial services sectors; and
- protect the rights and interests of consumers particularly with respect to financial services sectors

Effective July 1, 2021, FSRA is responsible for the regulation of:

- NQSMI transactions with Permitted Client investors / lenders (Permitted Client NQSMIs), unless an exemption applies;
- NQSMI transactions with non-Permitted Client borrowers, and with Permitted Client borrowers, unless an exemption applies for the latter, and;

- NQSMI transactions with Permitted and non-Permitted investors / lenders prior to July 1, 2021 (Legacy NQSMIs).

The Ontario Securities Commission (OSC) is responsible for regulation of NQSMIs with non-Permitted Client investors / lenders.

The government made amendments to Ontario Regulation 188/08: Mortgage Brokerages: Standards of Practice (the “Standards of Practice”) and Ontario Regulation 407/07: Exemptions from the Requirements to be Licensed to facilitate this division of responsibility for oversight of NQSMIs. A number of the amendments reduce burden on NQSMIs with Permitted Client investors / lenders that remain under FSRA oversight.

Legacy NQSMI transactions are subject to the requirements in place before the transfer date. NQSMI transactions with Permitted Clients are subject to the amended requirements effective July 1, 2021.

A Market Disruption, such as the declared emergency due to the COVID-19 pandemic, can have an impact on a mortgage / mortgage investment and the underlying property. In turn, this can result in an obligation to disclose the Market Disruption and its impact to the lender / investor who is relying on the security of the property relating to the NQSMI. Moreover, this can also impact whether and to what extent the NQSMI remains within the risk tolerance of the investor / lender.

This Interpretation Guidance is intended to provide FSRA’s interpretation of mortgage brokers’ and agents’ obligations under the MBLAA, where Market Disruption constitutes a material risk related to the NQSMI.

Interpretation

The MBLAA and its regulations govern mortgage brokering and administration activities in Ontario.

This Interpretation Guidance sets out FSRA’s requirements for how a mortgage brokerage is required to meet certain requirements of the Standards of Practice under the MBLAA during a Market Disruption.

Disclosure of material risks

Subsections 25(1) and 25(2)2 of the Standards of Practice require a mortgage brokerage to disclose in writing to an Individual Permitted Client investor / lender in a NQSMI the material risks of the mortgage / mortgage investment.

A risk is material if it is significant for an investor / lender to make a decision about a mortgage, or if its omission or misstatement would likely influence or change the decision of the investor / lender. Material risks include specific risks related to the NQSMI being considered, as well as general risks related to NQSMIs.

Material risks include the potential risks associated with a Market Disruption on a mortgage / mortgage investment and the underlying property.

A risk is material if it is:

- borrower's failure to make scheduled mortgage payments;
- default;
- amendments to the mortgage (e.g., mortgage maturity is extended);
- availability and cost of financing / refinancing;
- forbearance granted (e.g., payments are allowed to be deferred or capitalized);
- material delay in development of a project being funded by the mortgage;
- substantial reduction in sales / forecasted sales for the project funded by the mortgage;
- other encumbrances being registered on a mortgaged property (e.g., a tax lien);
- change in value of the underlying property and mortgage-based investment, such as a NQSMI (e.g., property values used in offering documents may no longer reflect rapidly changing market conditions);
- loan-to-value ratio (e.g., changing property valuations could result in higher-than-expected loan-to-value ratios); and
- change in the ability of an investor / lender to redeem prior to the maturity date of the mortgage investment.

A mortgage brokerage can use its own forms and documentation to make the required disclosures under the MBLAA.

Disclosures would be considered inappropriate or misleading if assumptions, facts or information presented in the offering materials and other documents were:

- “known by the issuer” not to be true; or
- “unlikely” or “improbable” given material changes in market conditions.

Disclosure of a property’s estimated market value and loan-to-value (LTV) ratio in a market disruption

Other than the borrower’s ability to meet the mortgage payments, the appraised value of the property relating to the NQSMI is also critical to evaluating the risk associated with the NQSMI. As such, an appraisal with an effective date before the Market Disruption may be inaccurate, misleading or out of date, and may obscure the material risks associated with the NQSMI, which a mortgage brokerage is obliged to disclose to each investor / lender pursuant to subsections 25(1) and 25(2)2 of the Standards of Practice. To comply with the obligation to disclose material risks, a mortgage brokerage must:

- consider whether the appraisal being supplied / used for loan-to-value (LTV) calculations properly reflects the market / current value⁵of the property / project; a difference between these two values is material if it is significant for an investor / lender to make a decision about a mortgage, or if its omission or misstatement would likely influence or change the decision of the investor / lender;
- make the investor / lender aware of the risk of relying on an appraisal that was completed / dated prior to the occurrence of the Market Disruption, or that does not consider the potential impact of the Market Disruption on the property valuation; and
- where an appraisal contains limitation statements, bring such statements to the attention of the investor / lender.

Suitability assessment

Mortgage brokerages must conduct a suitability assessment to analyze whether a NQSMI is suitable for an Individual Permitted Client investor / lender that has not waived the suitability assessment as per subsections 24(1) and 24(2) of the Standards of Practice.

A mortgage brokerage is required to assess and consider the terms and risks of the NQSMI, as well as the unique circumstances and needs of the investor / lender — for example, the financial circumstances, investment needs and objectives, and risk tolerance.

When assessing suitability of the NQSMI for an investor / lender, a mortgage brokerage is required to take into account the potential impacts of a Market Disruption on the NQSMI, its probable future performance, and the unique circumstances of the investor / lender.

For example, a mortgage brokerage should consider:

- How has the Market Disruption impacted, and how will it impact, the stated appraised value of the property and the resulting LTV ratio?
- Has the Market Disruption increased the risks related to the NQSMI?
- Has the borrower's ability to repay the loan changed?
- How does the Market Disruption affect the financial circumstances of the investor / lender?
- Is the NQSMI within the risk tolerance of the investor / lender and suitable for them, taking into account the most updated information, such as emerging risks and LTV ratio based on current property value in light of the Market Disruption?

Supervision and enforcement

Mortgage brokerages are required to comply with the MBLAA and its regulations, as interpreted in this Interpretation Guidance.

Failure to comply may result in enforcement or supervisory action including the imposition of licence conditions, suspension, revocation of licence, and enforcement proceedings seeking administrative monetary penalties.

Effective date and future review

This Interpretation Guidance becomes effective July 1, 2021.

The latest possible date for FSRA to initiate a review of this Interpretation Guidance will be July 1, 2024.

About FSRA

FSRA regulates the insurance, credit union, caisse populaire, mortgage brokerage, loan and trust, and pension administration sectors in Ontario in addition to providing deposit insurance for members of provincially-incorporated credit unions and caisses populaires.

FSRA's vision is financial safety, fairness and choice for Ontarians. Our mission is public service through dynamic, principles-based and outcomes-focused regulation.

About this guidance

This document is consistent with [FSRA's Guidance Approach](#). As Interpretation Guidance, it describes FSRA's view of requirements under its legislative mandate (i.e. legislation, regulations and rules) so that non-compliance can lead to enforcement or supervisory action.

Effective Date: July 1, 2021

¹ This definition of "Permitted Client" reflects the definition used in Canadian Securities Administrators (CSA) National Instrument 31-103.

² Individual Permitted Client refers to those in class (o) of the definition: an individual who beneficially owns financial assets, as defined in section 1.1 of National Instrument 45-106 *Prospectus and Registration Exemptions*, having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$5 million.

³ While this Interpretation Guidance specifically clarifies the obligations of a mortgage brokerage to each investor / lender in a SMI during periods of Market Disruption, these obligations also apply to all other non-SMI transactions, as per sections 24, 25 and 31 of Ontario Regulation 188/08.

⁴ See *Financial Services Regulatory Authority of Ontario Act, 2016*, s.3

⁵ The estimated market value of a property is also referred to as the 'as is' value.