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Comments on the Proposed amendments to O. Regs. 187/08, 188/08, and 189/08 of
the Mortgage Brokerages, Lenders and Administrators Act, 2006

On behalf of the Mortgage Brokers Association of BC (MBABC), I would like to make submissions concerning proposed changes to the regulations under Ontario's *Mortgage Brokerages, Lenders and Administrators Act* which enhance the mortgage brokerage industry's fraud avoidance obligations. Our association reviewed a similar set of proposed rule changes regarding New Brunswick's "Mortgage Broker Licensing and Ongoing Obligations" and would like to share our views with Ontario, in an effort towards interprovincial rule harmonization.

By way of background, the MBABC is a 25 year old professional association which represents mortgage brokers and many private mortgage lenders in British Columbia. Regulatory oversight of mortgage brokers in BC was implemented with the enactment of the BC *Mortgage Brokers Act* in 1972, which was at that time an innovative piece of legislation. The MBABC has therefore accumulated a considerable depth of knowledge of mortgage broker regulation and mortgage broker practice. We can offer the following comments for your consideration concerning Ontario's proposed regulations.

Sections 12 and 13 – Unlawful Transactions and Borrower's Legal Authority and
Accuracy of Mortgage Application- Mortgage Brokerages

Section 12 prohibits a mortgage brokerage from acting for a "borrower, lender or investor in respect of a mortgage if the brokerage has reason to doubt that the mortgage, its renewal or the investment in it is lawful". Section 13 requires a mortgage

brokerage to advise a lender if it possesses a reason to doubt the legal authority of a borrower to mortgage a property.

The purpose of these proposed sections would obviously be to place a burden on mortgage brokers to discontinue acting either in the midst of a transaction or for a borrower if there is the potential for fraud. These sections tackle the problem of wilful blindness, where a mortgage broker might close his or her eyes to a problem and claim that they were unaware of it or its relationship to a fraud. The challenge, however may be to find the right balance between the mortgage broker's obligation to serve a client against their broader duty to the industry to stop and prevent fraud.

These sections also place a very high burden on mortgage brokers and require them to possess legal knowledge in order to assess the lawfulness of a transaction or the legal authority of a borrower, which they are unlikely to possess. Whether a mortgage transaction is lawful or a borrower has the proper legal authority can be a highly technical matter, which is most likely within the expertise of a lawyer. The Ministry may therefore want to consider using other language in these sections, which could encompass misconduct broader in scope than "unlawfulness". For instance, it could borrow language from the BC *Mortgage Brokers Act*, which prohibits mortgage brokers from being "a party to a mortgage transaction that is harsh and unconscionable or otherwise inequitable" or from engaging in any activity "which is prejudicial to the public interest".

In addition, the Ministry may want to consider adopting a higher threshold which triggers the obligation than "possessing a reason to doubt". Mortgage brokers have obligations to clients which are based on contractual obligations, but in some circumstances those client obligations may even rise to the level of a fiduciary or quasi-fiduciary duty. Having a reason to doubt the lawfulness of a transaction could conceivably be as low a threshold of one percent – having one reason to doubt the lawfulness of the transaction but having 99 reasons to believe in the lawfulness of it. Given that mortgage brokers have competing professional obligations to act for their clients and proceed with transactions, the trigger to abandon those obligations should be weighted much higher, such as "on a balance of probabilities" or 51% in favour of the "unlawfulness" or "problematic nature" of the transaction.

Thank you for the opportunity to make comments on your proposed rules. If you wish to discuss any of the comments further, please feel free to contact me.

Yours truly,
THE MORTGAGE BROKERS ASSOC. OF BC



Samantha Gale, CEO