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101 – 1765 West 8th Ave., Vancouver, BC V6J 5C6

October 30, 2015

Carolyn Rogers, Registrar of Mortgage Brokers
2800 - 555 West Hastings Street
Vancouver BC, V6B 4N6

Re: Mortgage Broker Compensation Disclosure

Dear Ms. Rogers,

Further to the submissions made to the Registrar of Mortgage Brokers dated October 9, 2015, the MBABC wishes to make additional submissions regarding the application of section 17.3 of the Mortgage Brokers Act (MBA).

Plain Meaning of section 17.3

As you know section 17.3 of the MBA requires every mortgage broker who acts in a mortgage transaction to provide borrowers with disclosure of their direct or indirect interest in every mortgage transaction. The key word in section 17.3 is "disclose", which according to Black's Law Dictionary means to "make something known". So really the MBA requires brokers to tell or explain "something", but we are now asking what that something is. Is it a simple description or is it a quantitative description?

If you are asked to describe, disclose or make known the items in your garage, what would be an accurate response? It would be correct to say that there are lots of work tools, garden equipment and a car. You would not need to put a value on these items to answer the question about describing or disclosing. In other words, the value of the car, work tools and garden equipment would be additional information. This is why we are of the view that a plain reading of the requirements set out in section 17.3 does not necessitate identifying the quantum of compensation, and the current practice of brokers to explain that they receive compensation from lenders and the kinds of compensation appears to fit within the statutory requirements of the MBA.

Application of section 17.3 to Lenders

Some of our members have asked whether section 17.3 applies to lenders, as they have heard that they may be exempt from its application. Section 1 of the MBA defines lenders to be mortgage brokers. Section 17.3 would therefore apply to all mortgage brokers and lenders who act in a transaction – their obligation being to disclose their interest in the transaction to the borrower. There is no trigger in this section which only

imposes a requirement if there is a conflict of interest, or an exemption if a lender is not representing the borrower. It is simply an obligation on lenders to disclose their interest if they are the lender in the transaction. However, a requirement for mortgage lenders to disclose conflicts to borrowers leads to an absurd and redundant result, but it also appears to be right conclusion based on a plain reading of section 17.3.

Flaws in section 17.3

The flaws in section 17.3 are numerous. The primary challenge is that there is no disclosure trigger based on a registrant having conflicting duties with the borrower, leading to the result that some registrants, such as lenders, must provide disclosure even though they do not represent borrowers. Lenders should also not have to disclose self-evident matters, such as that their relationship contains conflicting interests with borrowers, or their compensation and mortgage interest, which for residential mortgage transactions is already disclosed in minute detail in the cost of credit disclosure forms.

Another equally troubling challenge with section 17.3 is that it does not apply to submortgage brokers, who are the active intermediary between borrowers and lenders and should bear the burden of providing disclosure to borrowers.

While section 17.3 does not necessitate the disclosure of quantum of compensation, we also know that in some circumstances, but not all, a quantitative description may be required. These are instances where a broker has a fiduciary relationship with a client, and the common law of fiduciaries requires the principal to know the compensation details received by the fiduciary. Section 17.3 fails to recognize this obligation in these particular circumstances.

How to fix section 17.3

While regulatory authorities often have rule making power under their enabling statute, we note that the MBA contains no rule making power for the Registrar. The MBA is very clear that the Lieutenant Governor in Council has power to make regulations but not the Registrar. For example, under section 23, only the Lieutenant Governor in Council can make regulations:

(f) defining words or expressions not defined in this Act;

(g) respecting any matter necessary or advisable to carry out the intent and purpose of this Act;

(h) prescribing the form and content of disclosure statements under sections 17.3 and 17.4 and information statements under section 17.1;

As stated in our previous submission, the British Columbia Supreme Court was cognizant of these limitations in *Registrar of Mortgage Brokers v. Financial Services Tribunal and Matick* and ruled that the Registrar cannot fill in any gaps where section 17.3 contains inconsistencies, gaps or incomplete requirements.

We understand that the Ministry of Finance may be in a position to soon commence phase 2 of the legislative review of the MBA. It is our view, that the MBA requires a

complete overhaul on the subject of conflict of interest disclosure, and that a public consultation on the problems and solutions in this area is long overdue.

We share the Registrar's concerns in ensuring that the public is protected in the area of mortgage broker conflicts. However, this concern must be resolved in compliance with the requirements of the MBA.

I trust that you will find the above comments helpful in your review of this matter.

Sincerely,

Samantha Gale
CEO, MBABC