**Canadian Association of Private Lenders**

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Financial Services Regulatory Authority of Ontario

25 Sheppard Avenue West, Suite 100
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Submitted electronically via feedback form

Re: Feedback on Proposed Guidance No. MB0044INT – Mortgage Fraud

We write on behalf of the newly formed Canadian Association of Private Lenders, which represents the interests of private mortgage lenders, investors and administrators across Canada. One of the rationales for establishing this association is to focus private lending dialogue on regulatory reform.

More specifically, we are writing to provide comments on the Financial Services Regulatory Authority of Ontario’s (FSRA’s) proposed guidance in MB0044INT, which sets out its interpretation of the “Mortgage Brokerages, Lenders and Administrators Act, 2006 (MBLAA) and its regulations as they apply to mortgage fraud.” MB0044INT explains the nature of mortgage fraud and its many forms which occur in the context of mortgage lending. In particular the document explains that it can result in “borrowers paying higher fees or inflated interest rates, or obtaining a mortgage they cannot afford”.

The proposed document also provides a “Checklist for Detecting and Preventing Mortgage Fraud”, and licensees are advised that they can use the checklist to limit mortgage fraud in the mortgage brokering and lending sector. The guidance further explains the relevance of the checklist by advising that “In its supervisory reviews, FSRA will highlight non-compliance with all aspects of the Checklist and may enforce against those that align with requirements in the MBLAA.”  The checklist contains a specific section on private lending, which directs mortgage brokers and agents to review with lenders or investors “**Documentary evidence of the borrower’s ability to meet the mortgage payments**.” It is this aspect of the guidance and accompanying checklist which we wish to address.

We are concerned that guidance on the interpretation of the MBLAA, which requires licensees who provide private mortgages to obtain and review with investors documentary evidence of the borrower’s ability to repay the mortgage will impede potentially all private mortgage lending. This is due to the nature of private lending, which is solution oriented and is underwritten using different analyses than conventional mortgage financing. While conventional financing is dependent on an analyses of specific income information, debt to income ratios and loan to value ratios, private lending focusses mostly on the property, ensuring that there is a healthy loan to value ratio. Prospective borrowers generally turn to private mortgage solutions when they do not have the required income to qualify for a conventional mortgage – for this reason, private mortgage underwriting generally assesses whether the private mortgage borrower has the capacity to make mortgage payments or a viable exit strategy for the mortgage. For instance, private mortgage borrowers who may not qualify for a conventional mortgage could include:

* separated spouses waiting for a divorce settlement but in the interim need to refinance their home or purchase a new home;
* homeowners who are unable to qualify for a conventional mortgage due to being in-between jobs;
* borrowers who need a mortgage whilst they have damaged credit, and are embarking on a plan to repair their credit in order to qualify at a later date for a conventional mortgage;
* homeowners who need a mortgage while waiting for a payout from the sale of investments, an inheritance or another source of funds;
* homeowners who are unable to renew a mortgage due to default and have the property on the market or pending sale; or
* property developers requiring construction funds to subdivide land or build condos, who will repay the mortgage upon the sale of the subdivided units.

If private lenders were required to ensure that borrowers could afford the mortgage payments, many borrowers would simply not qualify for the mortgage. This would put them in a predicament where they would not be able to find a viable mortgage solution to their financing challenges. A borrower in default for instance, may not be able to stave off a power of sale or foreclosure proceeding by obtaining alternative mortgage funds to tide them over pending the implementation of their own solution. The default action is likely to cost them much more than the private mortgage financing, in terms of both dollars and credit standing.

We note that many private mortgages include fully prepaid loans so that no payments are due during the term of the mortgage or an amount is included for the borrower to keep in order to make payments during the term. While this helps to ensure that the private mortgage is kept current, it likely would not satisfy a regulatory requirement to provide the investor with “documentation of the borrower’s ability to pay the mortgage”.

Deterring mortgage fraud and predatory lending activity is essential to a healthy and thriving private mortgage industry. Predatory lending activity which includes “mortgage churning” and “equity grinding” through successive short terms and charging excessive fees, costs and interest, is clearly a problematic and should be a focus of consumer protection rules. This predatory lending activity should however be distinguished from responsible private mortgage lending which frequently relies on borrower exit strategies to approve mortgages. Accordingly, in order to ensure that the majority of compliant private lenders can continue to lend, we recommend that you consider amending the language in the guidance and checklist so that documentary evidence is provided to the lender or investor of the borrower’s:

* Ability to meet the mortgage payments; ***or***
* ***Viable plan to repay the mortgage using an exit strategy.***

In addition, you may wish to consider limiting the scope of the guidance to consumer mortgage loans which are not for commercial or investment purposes, as commercial mortgage borrowers and investors are more sophisticated and generally do not require the same consumer protection measures.

We appreciate FSRA’s focus on preventing mortgage fraud, and in particular, the goals and measures set out in MB0044INT. Thank you for the opportunity to provide comments on this important document. Please know that we are available to discuss these issues more fully if you wish.

Yours truly,

Samantha Gale

should not apply to commercial/non-consumer loans