

## 2009 DRAFTING REQUEST

### Bill

Received: **07/23/2009**

Received By: **agary**

Wanted: **As time permits**

Identical to LRB:

For: **Leon Young (608) 266-3786**

By/Representing: **Rachel Rodriguez**

This file may be shown to any legislator: **NO**

Drafter: **agary**

May Contact:

Addl. Drafters:

Subject: **Fin. Inst. - banking inst.**

Extra Copies: **MDK**

Submit via email: **YES**

Requester's email: **Rep.Youngl@legis.wisconsin.gov**

Carbon copy (CC:) to: **aaron.gary@legis.wisconsin.gov**

---

### Pre Topic:

No specific pre topic given

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### Topic:

Imposing duty of good faith on mortgage brokers

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### Instructions:

See attached

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?				_____			State
/P1	agary 07/30/2009	bkraft 08/14/2009	jfrantze 08/17/2009	_____	sbasford 08/17/2009		State
/P2	agary 09/10/2009	bkraft 09/10/2009	mduchek 09/11/2009	_____	cduerst 09/11/2009		State
/P3	agary 09/24/2009	bkraft 09/25/2009	rschluet 09/28/2009	_____	lparisi 09/28/2009		State

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	agary 09/29/2009	jdye 09/29/2009	phenry 09/29/2009	_____	mbarman 09/29/2009	cdurst 09/30/2009	

FE Sent For: "/1" @ intro. 10/5/09

<END>

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FE Sent For:

1 P3 bjk 9/25

*[Handwritten signatures and initials]*  
MDK  
PH 9/28

<END>



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FE Sent For: / P2 bjk 9/10

MD  
9/11

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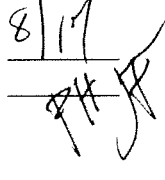
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/?	agary	1/Pl bjk 8/14		8/17 			State

FE Sent For:

<END>

## Gary, Aaron

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**From:** Kunkel, Mark  
**Sent:** Wednesday, July 22, 2009 2:23 PM  
**To:** Gary, Aaron  
**Subject:** Mortgage broker fiduciary duty

Rachel in Rep. Young's office wants a bill that imposes on mortgage brokers the same fiduciary duty that a financial institution owes a client. According to her, mortgage brokers do not currently owe their clients some sort of fiduciary duty that banks owe their clients.

Does this make sense? Do you want to do this one, or do you want me to handle it?

-- Mark



in

7/30

Cljk

A Note

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

SA  
X-ref

1 AN ACT <sup>gen.</sup> ...; relating to: imposing a duty of good faith on mortgage brokers.

***Analysis by the Legislative Reference Bureau***

Under current law, a person may not act as a mortgage broker unless the person is registered with the Division of Banking in the Department of Financial Institutions (division). In 2009 Wisconsin Act 2 (Act 2), provisions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 were adopted into state law, including provisions relating to mortgage bankers, mortgage loan originators, and mortgage brokers. These provisions become effective on January 1, 2010, and this discussion of current law includes changes made in Act 2.

Under current law, a mortgage broker is, with certain exceptions, a person who, on behalf of a loan applicant or an investor and for commission or other compensation, finds a loan or negotiates a loan or loan commitment. However, state and federally chartered financial institutions are not mortgage brokers. A contract for mortgage brokerage services between a mortgage broker and an individual must be in writing and contain all information required by division rules. Before entering into a contract with an individual to provide mortgage brokerage services, a mortgage broker must give the individual a copy of a disclosure statement in a form and content specified by the division and explain the content of the statement. The disclosure statement must contain a brief explanation of the relationship between the individual and the mortgage broker under the proposed contract, a brief explanation of the manner in which the mortgage broker may be compensated under the proposed contract, and any additional information required by division rules.

Current law imposes various requirements on, and specifies numerous acts and practices prohibited by, mortgage brokers and their principals and agents. For

example, no mortgage broker or principal or agent of a mortgage broker may do any of the following: 1) make materially false or deceptive statements or representations, including engaging in bait and switch advertising or falsely representing residential mortgage loan rates, points, or other financing terms or conditions; 2) make false, deceptive, or misleading promises relating to the services being offered or that influence, persuade, or induce a client to act to his or her detriment; 3) act for more than one party in a transaction without the knowledge and consent of all parties on whose behalf the mortgage broker is acting; 4) demonstrate a lack of competency to act as a mortgage broker in a way that safeguards the interests of the public; 5) fail to account for or remit any moneys coming into the mortgage broker's possession that belong to another person; 6) engage in conduct that violates a standard of professional behavior that has become established for mortgage brokers; 7) engage in conduct that constitutes improper, fraudulent, or dishonest dealing; 8) solicit or enter into a contract with a borrower that provides in substance that the mortgage broker may earn a fee or commission through "best efforts" to obtain a residential mortgage loan even though no residential mortgage loan is actually obtained for the borrower; or 9) solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting. Also, a mortgage broker must deposit in a trust account all funds it receives other than nonrefundable fees, pending proper disbursement of the funds. A person who violates the laws regulating mortgage brokers may be fined not more than \$25,000 or imprisoned for not more than nine months or both, may be subject to an administrative forfeiture of not more than \$25,000, may be subject to license revocation or suspension by the division, and may also be subject to civil liability in a private action.

This bill provides that a mortgage broker has a duty of good faith toward any individual who receives, or contracts to receive, mortgage brokerage services from the mortgage broker in connection with a residential mortgage loan. This duty includes all of the following: 1) acting with honesty and fairness in providing mortgage brokerage services to the individual and in the conduct of any transaction, including refraining from placing the interest of any other person above that of the individual; 2) using reasonable care, skill, and diligence in performing the duties of a mortgage broker; 3) making reasonable good faith efforts to secure a residential mortgage loan that is in the reasonable interests of the individual considering all the circumstances reasonably available to the mortgage broker, including the rates, points, fees, and other financing terms or conditions; and 4) making reasonable good faith efforts to ensure that the cost of credit is reasonably appropriate considering the individual's income, financial resources, level of creditworthiness, and other bona fide underwriting factors. The bill requires a mortgage broker, in each brokerage services contract with an individual and in each disclosure statement provided to an individual, to identify the mortgage broker's duty of good faith.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

---

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 224.79 (title) of the statutes is amended to read:

2           **224.79 (title) Mortgage brokerage agreements and disclosures and**  
3           **mortgage broker duty.**

4           History: 2003 a. 260; 2009 a. 2.

4           **SECTION 2.** 224.79 (3) of the statutes is created to read:

5           **224.79 (3) MORTGAGE BROKER DUTY OF GOOD FAITH.** (a) A mortgage broker has  
6           a duty of good faith toward any individual who receives, or contracts to receive,  
7           mortgage brokerage services from the mortgage broker in connection with a  
8           residential mortgage loan.

9           (b) The duty of good faith under par. (a) includes all of the following:

10           1. Acting with honesty and fairness in providing mortgage brokerage services  
11           to the individual and in the conduct of any transaction, including refraining from  
12           placing the interest of any other person above that of the individual.

13           2. Using reasonable care, skill, and diligence in performing the duties of a  
14           mortgage broker.

15           3. Making reasonable good faith efforts to secure a residential mortgage loan  
16           that is in the reasonable interests of the individual considering all the circumstances  
17           reasonably available to the mortgage broker, including the rates, points, fees, and  
18           other financing terms or conditions.

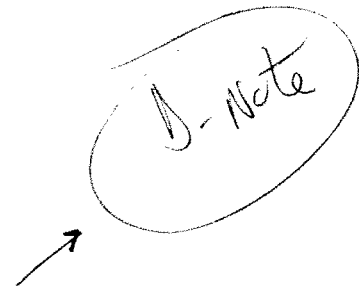
19           4. Making reasonable good faith efforts to ensure that the cost of credit is  
20           reasonably appropriate considering the individual's income, financial resources,  
21           level of creditworthiness, and other bona fide underwriting factors.

1 (c) Every contract under sub. (1), and every disclosure statement under sub. (2),  
2 shall identify the mortgage broker's duty of good faith under par. (a).

3 **SECTION 3. Effective date.**

4 (1) This act takes effect on January 1, 2010, or on the first day of the 3rd month  
5 beginning after publication, whichever is later.

6 (END)



A handwritten note consisting of the text "D-Note" written in cursive, enclosed within a hand-drawn oval. An arrow points from the bottom-left towards the oval.

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3180/P1dn

ARG:.....

Lbjk

Date

ATTN: Rachel Rodriguez

Please review the attached draft carefully to ensure that it is consistent with your intent.

My understanding of the drafting request is that you want to impose a fiduciary duty on mortgage brokers similar to that which financial institutions owe their clients. The statutes contain no explicit fiduciary duty by banks toward clients. I have not used the term "fiduciary duty" in this draft because the meaning of the term is unclear. Nowhere in the statutes is the term defined. I also consulted Black's Law Dictionary, which offers no clear definition of the term. In the attached draft, I have required of mortgage brokers a duty of good faith and provided a few clear examples of what this duty entails. Please advise if this is not consistent with your intent.

(I)

Please let me know if you would like any changes made to the attached draft or if you have any questions. If the attached draft meets with your approval, let me know and I will convert it to an introducible "/1" draft.

Aaron R. Gary  
Legislative Attorney  
Phone: (608) 261-6926  
E-mail: aaron.gary@legis.wisconsin.gov



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3180/P1dn  
ARG:bjk:jf

August 17, 2009

ATTN: Rachel Rodriguez

Please review the attached draft carefully to ensure that it is consistent with your intent.

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Aaron R. Gary  
Legislative Attorney  
Phone: (608) 261-6926  
E-mail: [aaron.gary@legis.wisconsin.gov](mailto:aaron.gary@legis.wisconsin.gov)

file w/ Rachel - Rep. Yang 9/9  
- 3180 6-3786

• duty of real estate broker

452.13 - wants to mirror this

- placing the client's interests ahead of the broker's interests
- broker has a duty to provide written materials w/in the scope of the transaction
- duty to negotiate on behalf of the client
- look it over - try to figure out what is relevant



COON

LRB-3180 PZ

ARG:bjk:jf

in 9/10

stays

KMR

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

SA

Inserts

J. Note

Certain duties

regen.

1

**AN ACT to amend 224.79 (title); and to create 224.79 (3) of the statutes; relating**

2

**to: imposing a duty of good faith on mortgage brokers.**

***Analysis by the Legislative Reference Bureau***

Under current law, a person may not act as a mortgage broker unless the person is registered with the Division of Banking in the Department of Financial Institutions (division). In 2009 Wisconsin Act 2 (Act 2), provisions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 were adopted into state law, including provisions relating to mortgage bankers, mortgage loan originators, and mortgage brokers. These provisions become effective on January 1, 2010, and this discussion of current law includes changes made in Act 2.

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Current law imposes various requirements on, and specifies numerous acts and practices prohibited by, mortgage brokers and their principals and agents. For example, no mortgage broker or principal or agent of a mortgage broker may do any of the following: 1) make materially false or deceptive statements or representations, including engaging in bait and switch advertising or falsely representing residential mortgage loan rates, points, or other financing terms or conditions; 2) make false, deceptive, or misleading promises relating to the services being offered or that influence, persuade, or induce a client to act to his or her detriment; 3) act for more than one party in a transaction without the knowledge and consent of all parties on whose behalf the mortgage broker is acting; 4) demonstrate a lack of competency to act as a mortgage broker in a way that safeguards the interests of the public; 5) fail to account for or remit any moneys coming into the mortgage broker's possession that belong to another person; 6) engage in conduct that violates a standard of professional behavior that has become established for mortgage brokers; 7) engage in conduct that constitutes improper, fraudulent, or dishonest dealing; 8) solicit or enter into a contract with a borrower that provides in substance that the mortgage broker may earn a fee or commission through "best efforts" to obtain a residential mortgage loan even though no residential mortgage loan is actually obtained for the borrower; or 9) solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting. Also, a mortgage broker must deposit in a trust account all funds it receives other than nonrefundable fees, pending proper disbursement of the funds. A person who violates the laws regulating mortgage brokers may be fined not more than \$25,000 or imprisoned for not more than nine months or both, may be subject to an administrative forfeiture of not more than \$25,000, may be subject to license revocation or suspension by the division, and may also be subject to civil liability in a private action.

~~This bill provides that a mortgage broker has a duty of good faith toward any individual who receives, or contracts to receive, mortgage brokerage services from the mortgage broker in connection with a residential mortgage loan. This duty includes all of the following: 1) acting with honesty and fairness in providing mortgage brokerage services to the individual and in the conduct of any transaction, including refraining from placing the interest of any other person above that of the individual; 2) using reasonable care, skill, and diligence in performing the duties of a mortgage broker; 3) making reasonable good faith efforts to secure a residential mortgage loan that is in the reasonable interests of the individual considering all the circumstances reasonably available to the mortgage broker, including the rates, points, fees, and other financing terms or conditions; and 4) making reasonable good faith efforts to ensure that the cost of credit is reasonably appropriate considering the individual's income, financial resources, level of creditworthiness, and other bona fide underwriting factors. The bill requires a mortgage broker, in each brokerage services contract with an individual and in each disclosure statement provided to an individual, to identify the mortgage broker's duty of good faith.~~

insert  
ANAL

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

SECTION 1. 224.79 (title) of the statutes is amended to read:

224.79 (title) **Mortgage brokerage agreements and disclosures and mortgage broker duties** <sup>ies B</sup>

SECTION 2. 224.79 (3) of the statutes is created to read:

224.79 (3) MORTGAGE BROKER DUTY OF GOOD FAITH (a) A mortgage broker has a duty of good faith toward any individual who provides or contracts to provide mortgage brokerage services from the mortgage broker in connection with a residential mortgage loan.

(b) The duty of good faith under par. (a) includes all of the following:

1. Acting with honesty and fairness in providing mortgage brokerage services to the individual and in the conduct of any transaction, including refraining from placing the interest of any other person above that of the individual.
2. Using reasonable care, skill, and diligence in performing the duties of a mortgage broker.
3. Making reasonable good faith efforts to secure a residential mortgage loan that is in the reasonable interests of the individual considering all the circumstances reasonably available to the mortgage broker, including the rates, points, fees, and other financing terms or conditions.
4. Making reasonable good faith efforts to ensure that the cost of credit is reasonably appropriate considering the individual's income, financial resources, level of creditworthiness, and other bona fide underwriting factors.

insert 3-8

1 (c) Every contract under sub. (1), and every disclosure statement under sub. (2),  
2 shall identify the mortgage broker's <sup>duties</sup> ~~duty of good faith~~ under par. (a).

3 **SECTION 3. Effective date.**

4 (1) This act takes effect on January 1, 2010, or on the first day of the 3rd month  
5 beginning after publication, whichever is later.

6 (END)

*J. Note*

1           **INSERT ANAL:**

Under this bill, a mortgage broker who provides, or contracts to provide, mortgage brokerage services to an individual in connection with a residential mortgage loan owes all of the following duties to the individual:

1. The duty to provide mortgage brokerage services honestly and fairly.
2. The duty to provide mortgage brokerage services with reasonable skill and care.
3. The duty to place the individual's interests ahead of the mortgage broker's interests and the interests of third parties.
4. The duty to present loan options in an objective and unbiased manner and to disclose the advantages and disadvantages of each loan option.
5. The duty to disclose, upon request, material information relating to the loan transaction and accurate and timely market information.
6. The duty to fulfill obligations under the mortgage brokerage agreement and instructions within the scope of the mortgage brokerage agreement.
7. If the mortgage broker may receive compensation for referring the individual to a third party, the duty to disclose this fact to the individual before making the referral.
8. The duty to keep the individual's information confidential.

These duties may not be waived. The bill requires a mortgage broker, in each brokerage services contract with an individual and in each disclosure statement provided to an individual, to identify the mortgage broker's duties.

2

3           **INSERT 3-8:**

4           (110 P) owes all of the following duties to the individual:

- 5           1. The duty to provide mortgage brokerage services honestly and fairly.
- 6           2. The duty to provide mortgage brokerage services with reasonable skill and
- 7           care.
- 8           3. The duty to place the individual's interests ahead of the mortgage broker's
- 9           interests and the interests of 3rd parties.
- 10          4. The duty to present loan options in an objective and unbiased manner and
- 11          to disclose the advantages and disadvantages of each loan option.

1           5. The duty to disclose to the individual, upon request, all information known  
2 by the mortgage broker, and not known by the individual, that is material to the loan  
3 transaction, except for confidential information and other information the disclosure  
4 of which is prohibited by law.

5           6. The duty to provide to the individual, upon request, accurate and timely  
6 information about market conditions that affect the loan transaction.

7           7. The duty to fulfill any obligation required by the mortgage brokerage  
8 agreement, and any instruction or order of the individual that is within the scope of  
9 the mortgage brokerage agreement, that is not inconsistent with another duty that  
10 the mortgage broker has under this chapter or any other law.

11           8. If the mortgage broker will or may receive compensation for referring or  
12 recommending the individual to a 3rd party, including as a result of the mortgage  
13 broker's direct or indirect interest in the 3rd party, the duty to disclose this fact to  
14 the individual before making the referral or recommendation.

15           9. The duty to keep confidential any information given to the mortgage broker  
16 in confidence, or any information obtained by the mortgage broker that he or she  
17 knows a reasonable person would want to be kept confidential, unless the  
18 information must be disclosed by law or the individual whose interests may be  
19 adversely affected by the disclosure specifically authorizes the disclosure of  
20 particular information. A mortgage broker shall continue to keep the information  
21 confidential after the loan transaction is consummated and after the mortgage  
22 broker is no longer providing mortgage brokerage services to the individual.

23           (b) The duties imposed under par. (a) may not be waived.



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**  
Date

LRB-3180/P2dn

ARG:.....

Lbjk

ATTN: Rachel Rodriguez

Please review the attached draft carefully to ensure that it is consistent with your intent. As discussed, the draft imposes duties on mortgage brokers that are patterned after duties imposed on real estate brokers under s. 452.133, but tailored and screened for relevance to mortgage brokers.

Please let me know if you would like any changes made to the attached draft or if you have any questions. If the attached draft meets with your approval, let me know and I will convert it to an introducible "/1" draft.

Aaron R. Gary  
Legislative Attorney  
Phone: (608) 261-6926  
E-mail: [aaron.gary@legis.wisconsin.gov](mailto:aaron.gary@legis.wisconsin.gov)

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3180/P2dn  
ARG:bjk:md

September 11, 2009

ATTN: Rachel Rodriguez

Please review the attached draft carefully to ensure that it is consistent with your intent. As discussed, the draft imposes duties on mortgage brokers that are patterned after duties imposed on real estate brokers under s. 452.133, but tailored and screened for relevance to mortgage brokers.

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Aaron R. Gary  
Legislative Attorney  
Phone: (608) 261-6926  
E-mail: [aaron.gary@legis.wisconsin.gov](mailto:aaron.gary@legis.wisconsin.gov)

## Gary, Aaron

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**From:** Rodriguez, Rachel  
**Sent:** Wednesday, September 23, 2009 4:02 PM  
**To:** Gary, Aaron  
**Subject:** Minnesota Mortgage Broker Language

**Attachments:** mn mortgage broker language.pdf

Aaron,

Attached is the language from Minnesota we discussed. It is especially important to us that the two provisions in the scope of the language be included in our draft. Please contact me with any questions.

Thanks,

Rachel Rodriguez  
Office of Rep. Leon Young  
*Chair - Committee on Housing*  
608.266.3786 (Office)  
888.534.0016 (Toll Free)  
608.282.3616 (Fax)



mn mortgage  
roker language.pdf..

From Rachel

**Sec. 6. [58.161] MORTGAGE BROKER 7.1 DUTIES OF AGENCY.**

**Subdivision 1. Generally.** A mortgage broker shall be considered to have created an agency relationship with the borrower in all cases and shall comply with the following duties:

(1) mortgage brokers shall act in the borrower's best interest and in the utmost good faith toward borrowers, and shall not compromise a borrower's right or interest in favor of another's right or interest, including a right or interest of the mortgage broker. A mortgage broker shall not accept, give, or charge any undisclosed compensation or realize any undisclosed remuneration, either through direct or indirect means, that inures to the benefit of the mortgage broker on an expenditure made for the borrower;

(2) mortgage brokers will carry out all lawful instructions given by borrowers;

(3) mortgage brokers will disclose to borrowers all material facts of which the mortgage broker has knowledge which might reasonably affect the borrower's rights, interests, and/or ability to receive the borrower's intended benefit from the residential mortgage loan, but not facts which are reasonably susceptible to the knowledge of the borrower;

(4) mortgage brokers will use reasonable care in performing duties; and

(5) mortgage brokers will account to a borrower for all the borrower's money and property received as agent.

**Subd. 2. Scope.** (a) The duty of agency between mortgage broker and borrower applies when the mortgage broker is acting in the capacity of mortgage broker as described in section 58.02, subdivision 14 or 23.

(b) Nothing in this section prohibits a mortgage broker from contracting for or collecting a fee for services rendered and which had been disclosed to the borrower in advance of the provision of such services.

(c) Nothing in this section requires a mortgage broker to obtain a loan containing terms or conditions not available to the mortgage broker in the mortgage broker's usual course of business, or to obtain a loan for the borrower from a mortgage lender with whom the mortgage broker does not have a business relationship.

*Pulled from internet*

## **2009 Minnesota Statutes**

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### **58.02 DEFINITIONS.**

Subdivision 1. **Scope.** For purposes of this chapter, the terms defined in this section have the meanings given to them.

Subd. 2. **Act.** "Act" means the Minnesota Residential Mortgage Originator and Servicer Licensing Act.

Subd. 3. **Advance fee.** "Advance fee" means a commission, fee, charge, or compensation of any kind paid to a residential mortgage originator before the closing of a loan, that is intended in whole or in part as payment for the originator's services in finding or attempting to find a loan for a borrower. Advance fee does not include pass-through fees or commitment or extended lock fees or other fees as determined by the commissioner.

Subd. 3a. **Advertisement.** "Advertisement" includes, but is not limited to, any illustration, circular, or statement that presents information to the public in either a paper, electronic, or other medium that is intended to attract clients, generate interest, or otherwise make known the existence of the licensee and which addresses services, fees, or products provided by or available through the licensee, including, but not limited to, interest rates, loan origination fees, types of available loans, discount points, closing costs, or sample mortgage terms.

Subd. 4. **Borrower.** "Borrower" means a person or persons applying for a residential mortgage loan, a mortgagor, or the person or persons on whose behalf the activities in subdivisions 12, 14, 22, and 23 are conducted.

Subd. 5. **Closing.** "Closing" means either or both of the following: (1) the process whereby the real estate contract between a buyer and a seller is consummated; or (2) the process whereby the documents creating a security interest in real property become effective between the borrower and the lender.

Subd. 6. **Commissioner.** "Commissioner" means the commissioner of commerce.

Subd. 7. **Employee.** "Employee" means an individual who is treated as an employee by the residential mortgage originator or servicer for purposes of compliance with federal income tax laws.

Subd. 8. **Escrow account.** "Escrow account" means a trust account that is established and maintained to hold funds received from a borrower, such as real estate taxes and insurance premiums, incurred in connection with the servicing of the mortgage.

Subd. 9. **Exempt person.** "Exempt person" means a person exempt from residential mortgage originator licensing requirements, and a person exempt from residential mortgage service licensing requirements.

Subd. 10. **Financial institution.** "Financial institution" means a bank, bank and trust, trust company with banking powers, savings bank, savings association, or credit union, organized under the laws of this state, any other state, or the United States; an industrial loan and thrift under chapter 53; or a regulated lender under chapter 56. The

term "financial institution" also includes a subsidiary or operating subsidiary of a financial institution or of a bank holding company as defined in the federal Bank Holding Company Act, United States Code, title 12, section 1841 et seq., if the subsidiary or operating subsidiary can demonstrate to the satisfaction of the commissioner that it is regulated and subject to active and ongoing oversight and supervision by a federal banking agency, as defined in the Federal Deposit Insurance Act, United States Code, title 12, section 1811 et seq., or the commissioner.

Subd. 11. **Lender.** "Lender" means a person who makes residential mortgage loans including a person who provides table funding.

Subd. 12. **Making a residential mortgage loan.** "Making a residential mortgage loan" means for compensation or gain, or the expectation of compensation or gain, to advance funds or make a commitment to advance funds in connection with a residential mortgage.

Subd. 13. **Mortgage broker; broker.** "Mortgage broker" or "broker" means a person who performs the activities described in subdivisions 14 and 23.

→ Subd. 14. **Mortgage brokering; brokering.** "Mortgage brokering" or "brokering" means helping to obtain from another person, for a borrower, a residential mortgage loan or assisting a borrower in obtaining a residential mortgage loan in return for consideration to be paid by the borrower or lender or both. Mortgage brokering or brokering includes, but is not limited to, soliciting, placing, or negotiating a residential mortgage loan.

Subd. 15. [Repealed, 2000 c 427 s 21]

Subd. 16. **Person.** "Person" means a natural person, firm, partnership, limited liability partnership, corporation, association, limited liability company, or other form of business organization and the officers, directors, employees, or agents of that person.

Subd. 17. **Person in control.** "Person in control" means any member of senior management, including owners or officers, and other persons who possess, directly or indirectly, the power to direct or cause the direction of the management policies of an applicant or licensee under this chapter, regardless of whether the person has any ownership interest in the applicant or licensee. Control is presumed to exist if a person, directly or indirectly, owns, controls, or holds with power to vote ten percent or more of the voting stock of an applicant or licensee or of a person who owns, controls, or holds with power to vote ten percent or more of the voting stock of an applicant or licensee.

Subd. 18. **Residential mortgage loan.** "Residential mortgage loan" means a loan secured primarily by either: (1) a mortgage on residential real property; or (2) certificates of stock or other evidence of ownership interest in and proprietary lease from corporations, partnerships, or other forms of business organizations formed for the purpose of cooperative ownership of residential real property.


Subd. 19. **Residential mortgage originator.** "Residential mortgage originator" means a person who, directly or indirectly, for compensation or gain or in expectation of compensation or gain, solicits or offers to solicit, or accepts or offers to accept an application for a residential mortgage loan through any medium or mode of

communication from a borrower, or makes a residential mortgage loan. "Residential mortgage originator" includes a lender as defined in subdivision 11 and a broker as defined in subdivision 13.

Subd. 20. **Residential mortgage servicer; servicer.** "Residential mortgage servicer" or "servicer" means a person who engages in the activity of servicing a residential mortgage as defined in subdivision 22.

Subd. 21. **Residential real property; residential real estate.** "Residential real property" or "residential real estate" means real property improved or intended to be improved by a structure designed principally for the occupancy of from one to four families, whether or not the owner occupies the real property.

Subd. 22. **Servicing; servicing a residential mortgage loan.** "Servicing" or "servicing a residential mortgage loan" means through any medium or mode of communication the collection or remittance of, or the right or obligation to collect or remit for a lender, mortgagee, note owner, noteholder, or for a person's own account, payments, interest, principal, and escrow items such as insurance and taxes for property subject to a residential mortgage loan.

 Subd. 23. **Soliciting, placing, or negotiating a residential mortgage loan.** "Soliciting, placing, or negotiating a residential mortgage loan" means for compensation or gain or expectation of compensation or gain, whether directly or indirectly, accepting or offering to accept an application for a residential mortgage loan, assisting, or offering to assist a borrower in applying for a residential mortgage loan, or negotiating or offering to negotiate the terms or conditions of a residential mortgage loan with a lender on behalf of a borrower.

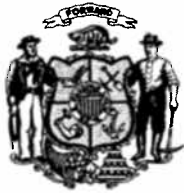
Subd. 24. [Repealed, 2004 c 203 art 1 s 11]

Subd. 25. **Trust account.** "Trust account" means a negotiable order of withdrawal account, demand deposit, or checking account maintained for the purpose of segregating trust funds from other funds. A "trust account" must not allow the financial institution a right of set-off against the money owed it by the account holder.

Subd. 26. **Trust funds.** "Trust funds" means funds received by a residential mortgage originator or servicer in a fiduciary capacity for later distribution, such as appraisal or credit report fees, taxes, or insurance premiums. Trust funds includes commitment, lock, extended lock, and advance fees.

Subd. 27. **Subprime loan.** "Subprime loan" means, in the case of an adjustable rate loan secured by a first lien on a dwelling that can increase in interest rate but not decrease in interest rate below the fully indexed rate at the time of origination, a loan for which the annual percentage rate (APR) is greater than two percentage points above the yield on United States Treasury securities having comparable periods of maturity, as of the 15th day of the preceding month if the rate is set between the first and the 14th day of the month and as of the 15th day of the current month if the rate is set on or after the 15th day.

For all other loans secured by a first lien on a dwelling, the term means a loan for which the APR is greater than three percentage points above the yield on United States



State of Wisconsin  
2009 - 2010 LEGISLATURE

soon

LRB-3180/2  
ARG:bjk:md

P3

in 9/24

stays

PMR

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

SA

Inserts

1

*regen.*  
AN ACT *to amend* 224.79 (title); and *to create* 224.79 (3) of the statutes; relating

2

to: ~~imposing certain~~ duties on mortgage brokers

and agency relationships

**Analysis by the Legislative Reference Bureau**

Under current law, a person may not act as a mortgage broker unless the person is registered with the Division of Banking in the Department of Financial Institutions (division). In 2009 Wisconsin Act 2 (Act 2), provisions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 were adopted into state law, including provisions relating to mortgage bankers, mortgage loan originators, and mortgage brokers. These provisions become effective on January 1, 2010, and this discussion of current law includes changes made in Act 2.

(loan)

Under current law, a mortgage broker is, with certain exceptions, a person who, on behalf of a loan applicant or an investor and for commission or other compensation, finds a loan or negotiates a loan or loan commitment. However, state and federally chartered financial institutions are not mortgage brokers. A contract for mortgage brokerage services between a mortgage broker and an individual must be in writing and contain all information required by division rules. Before entering into a contract with an individual to provide mortgage brokerage services, a mortgage broker must give the individual a copy of a disclosure statement in a form and content specified by the division and explain the content of the statement. The disclosure statement must contain a brief explanation of the relationship between the individual and the mortgage broker under the proposed contract, a brief explanation of the manner in which the mortgage broker may be compensated under the proposed contract, and any additional information required by division rules.

residential mortgage



Current law imposes various requirements on, and specifies numerous acts and practices prohibited by, mortgage brokers and their principals and agents. For example, no mortgage broker or principal or agent of a mortgage broker may do any of the following: 1) make materially false or deceptive statements or representations, including engaging in bait and switch advertising or falsely representing ~~residential mortgage~~ loan rates, points, or other financing terms or conditions; 2) make false, deceptive, or misleading promises relating to the services being offered or that influence, persuade, or induce a client to act to his or her detriment; 3) act for more than one party in a transaction without the knowledge and consent of all parties on whose behalf the mortgage broker is acting; 4) demonstrate a lack of competency to act as a mortgage broker in a way that safeguards the interests of the public; 5) fail to account for or remit any moneys coming into the mortgage broker's possession that belong to another person; 6) engage in conduct that violates a standard of professional behavior that has become established for mortgage brokers; 7) engage in conduct that constitutes improper, fraudulent, or dishonest dealing; 8) solicit or enter into a contract with a borrower that provides in substance that the mortgage broker may earn a fee or commission through "best efforts" to obtain a ~~residential mortgage~~ loan even though no ~~residential mortgage~~ loan is actually obtained for the borrower; or 9) solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting. Also, a mortgage broker must deposit in a trust account all funds it receives other than nonrefundable fees, pending proper disbursement of the funds. A person who violates the laws regulating mortgage brokers may be fined not more than \$25,000 or imprisoned for not more than nine months or both, may be subject to an administrative forfeiture of not more than \$25,000, may be subject to license revocation or suspension by the division, and may also be subject to civil liability in a private action.

Under this bill, a mortgage broker who provides, or contracts to provide, mortgage brokerage services to an individual in connection with a residential mortgage loan owes all of the following duties to the individual:

1. The duty to provide mortgage brokerage services honestly and fairly.
2. The duty to provide mortgage brokerage services with reasonable skill and care.
3. The duty to place the individual's interests ahead of the mortgage broker's interests and the interests of third parties.
4. The duty to present loan options in an objective and unbiased manner and to disclose the advantages and disadvantages of each loan option.
5. The duty to disclose, upon request, material information relating to the loan transaction and accurate and timely market information.
6. The duty to fulfill obligations under the mortgage brokerage agreement and instructions within the scope of the mortgage brokerage agreement.
7. If the mortgage broker may receive compensation for referring the individual to a third party, the duty to disclose this fact to the individual before making the referral.
8. The duty to keep the individual's information confidential.

insert  
ANAL

e

~~These duties may not be waived. The bill requires a mortgage broker, in each brokerage services contract with an individual and in each disclosure statement provided to an individual, to identify the mortgage broker's duties.~~

stays → For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1 SECTION 1. 224.79 (title) of the statutes is amended to read:

2 224.79 (title) **Mortgage brokerage agreements and disclosures** and  
 3 **mortgage broker duties.** *agency relationship and*

insert  
3-4 →

4 SECTION 2. 224.79 (3) of the statutes is created to read:

5 224.79 (3) MORTGAGE BROKER DUTIES. (a) A mortgage broker who provides, or  
 6 contracts to provide, mortgage brokerage services to any individual in connection  
 7 with a residential mortgage loan owes all of the following duties to the individual:

- 8 1. The duty to provide mortgage brokerage services honestly and fairly.
- 9 2. The duty to provide mortgage brokerage services with reasonable skill and  
 10 care.
- 11 3. The duty to place the individual's interests ahead of the mortgage broker's  
 12 interests and the interests of 3rd parties.
- 13 4. The duty to present loan options in an objective and unbiased manner and  
 14 to disclose the advantages and disadvantages of each loan option.
- 15 5. The duty to disclose to the individual, upon request, all information known  
 16 by the mortgage broker, and not known by the individual, that is material to the loan  
 17 transaction, except for confidential information and other information the disclosure  
 18 of which is prohibited by law.

1           6. The duty to provide to the individual, upon request, accurate and timely  
2 information about market conditions that affect the loan transaction.

3           7. The duty to fulfill any obligation required by the mortgage brokerage  
4 agreement, and any instruction or order of the individual that is within the scope of  
5 the mortgage brokerage agreement, that is not inconsistent with another duty that  
6 the mortgage broker has under this chapter or any other law.

7           8. If the mortgage broker will or may receive compensation for referring or  
8 recommending the individual to a 3rd party, including as a result of the mortgage  
9 broker's direct or indirect interest in the 3rd party, the duty to disclose this fact to  
10 the individual before making the referral or recommendation.

11           9. The duty to keep confidential any information given to the mortgage broker  
12 in confidence, or any information obtained by the mortgage broker that he or she  
13 knows a reasonable person would want to be kept confidential, unless the  
14 information must be disclosed by law or the individual whose interests may be  
15 adversely affected by the disclosure specifically authorizes the disclosure of  
16 particular information. A mortgage broker shall continue to keep the information  
17 confidential after the loan transaction is consummated and after the mortgage  
18 broker is no longer providing mortgage brokerage services to the individual.

19           (b) The duties imposed under par. (a) may not be waived.

20           (c) Every contract under sub. (1), and every disclosure statement under sub. (2),  
21 shall identify the mortgage broker's duties under par. (a).

22           **SECTION 3. Effective date.**

23           (1) This act takes effect on January 1, 2010, or on the first day of the 3rd month  
24 beginning after publication, whichever is later.

25           (END)

1           **INSERT ANAL:**

This bill specifies that a mortgage broker has an agency relationship with the residential mortgage loan applicant or investor on whose behalf the mortgage broker provides, or contracts to provide, mortgage brokerage services (borrower). The mortgage broker owes all of the following duties to the borrower:

1. The mortgage broker must act in the borrower's best interest and in the utmost good faith. The mortgage broker may not compromise the borrower's rights or interests in favor of the mortgage broker's or any other person's.

2. The mortgage broker may not accept, give, or charge any undisclosed compensation or realize any undisclosed remuneration that inures to the benefit of the mortgage broker on an expenditure made for the borrower.

3. The mortgage broker must carry out all lawful instructions given by the borrower.

4. The mortgage broker must disclose to the borrower all material facts of which the mortgage broker has knowledge that might reasonably affect the borrower's rights or interests or ability to receive the borrower's intended benefit from the residential mortgage loan. This does not include facts that are reasonably susceptible to the knowledge of the borrower.

5. The mortgage broker must use reasonable care in performing the mortgage broker's duties.


6. The mortgage broker must account to the borrower for all money and property received by the mortgage broker as the borrower's agent.

The bill does not prohibit a mortgage broker from contracting or collecting a fee for services provided, if the services were disclosed to the borrower before they were provided. The bill also does not require a mortgage broker to obtain a loan containing terms or conditions not available to the mortgage broker or to obtain a loan for the borrower from a mortgage lender with whom the mortgage broker does not have a business relationship.

These duties may not be waived. The bill requires a mortgage broker, in each brokerage services contract and related disclosure statement, to identify the parties' agency relationship and the mortgage broker's duties.

2           **INSERT 3-4:**

3           **SECTION 1.** 224.79 (3) of the statutes is created to read:

4           224.79 (3) MORTGAGE BROKER AGENCY RELATIONSHIP AND DUTIES. (a) In this  
5 subsection, "borrower" means the residential mortgage loan applicant or investor on  
6 whose behalf a mortgage broker provides, or contracts to provide, mortgage  
7 brokerage services. 

1 (b) A mortgage broker, at all times when acting in the capacity of a mortgage  
2 broker, has an agency relationship with the borrower.

3 (c) A mortgage broker owes all of the following duties to the borrower:

4 1. The mortgage broker shall act in the borrower's best interest and in the  
5 utmost good faith toward the borrower, and may not compromise the borrower's  
6 rights or interests in favor of another's rights or interests, including those of the  
7 mortgage broker.

8 2. The mortgage broker may not accept, give, or charge any undisclosed  
9 compensation or realize any undisclosed remuneration, through direct or indirect  
10 means, that inures to the benefit of the mortgage broker on an expenditure made for  
11 the borrower.

12 3. The mortgage broker shall carry out all lawful instructions given by the  
13 borrower.

14 4. The mortgage broker shall disclose to the borrower all material facts of which  
15 the mortgage broker has knowledge that might reasonably affect the borrower's  
16 rights or interests or ability to receive the borrower's intended benefit from the  
17 residential mortgage loan, but not facts that are reasonably susceptible to the  
18 knowledge of the borrower.

19 5. The mortgage broker shall use reasonable care in performing the mortgage  
20 broker's duties.

21 6. The mortgage broker shall account to the borrower for all money and  
22 property received by the mortgage broker as the borrower's agent.

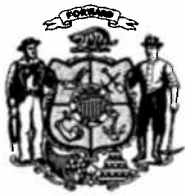
23 (d) Nothing in this subsection prohibits a mortgage broker from contracting or  
24 collecting a fee for services provided, if the services were disclosed to the borrower  
25 before they were provided.

1           (e) Nothing in this subsection requires a mortgage broker to obtain a  
2 residential mortgage loan containing terms or conditions not available to the  
3 mortgage broker in the mortgage broker's usual course of business or to obtain a  
4 residential mortgage loan for the borrower from a mortgage lender with whom the  
5 mortgage broker does not have a business relationship.

6           (f) The duties imposed under par. (c) may not be waived.

7           (g) Every contract under sub. (1), and every disclosure statement under sub.  
8 (2), shall identify the agency relationship described in par. (b) and the mortgage  
9 broker's duties imposed under par. (c).

10  
11



Wanted  
by 9/30  
in 9/29

RMR

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

9/29 - Per Rachel - wants 1 - no changes

No changes

4  
Regen

1 AN ACT to amend 224.79 (title); and to create 224.79 (3) of the statutes; relating  
2 to: mortgage broker duties and agency relationships.

**Analysis by the Legislative Reference Bureau**

Under current law, a person may not act as a mortgage broker unless the person is registered with the Division of Banking in the Department of Financial Institutions (division). In 2009 Wisconsin Act 2 (Act 2), provisions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 were adopted into state law, including provisions relating to mortgage bankers, mortgage loan originators, and mortgage brokers. These provisions become effective on January 1, 2010, and this discussion of current law includes changes made in Act 2.

Under current law, a mortgage broker is, with certain exceptions, a person who, on behalf of a residential mortgage loan (loan) applicant or an investor and for commission or other compensation, finds a loan or negotiates a loan or loan commitment. However, state and federally chartered financial institutions are not mortgage brokers. A contract for mortgage brokerage services between a mortgage broker and an individual must be in writing and contain all information required by division rules. Before entering into a contract with an individual to provide mortgage brokerage services, a mortgage broker must give the individual a copy of a disclosure statement in a form and content specified by the division and explain the content of the statement. The disclosure statement must contain a brief explanation of the relationship between the individual and the mortgage broker under the proposed contract, a brief explanation of the manner in which the mortgage broker may be compensated under the proposed contract, and any additional information required by division rules.

Current law imposes various requirements on, and specifies numerous acts and practices prohibited by, mortgage brokers and their principals and agents. For example, no mortgage broker or principal or agent of a mortgage broker may do any of the following: 1) make materially false or deceptive statements or representations, including engaging in bait and switch advertising or falsely representing loan rates, points, or other financing terms or conditions; 2) make false, deceptive, or misleading promises relating to the services being offered or that influence, persuade, or induce a client to act to his or her detriment; 3) act for more than one party in a transaction without the knowledge and consent of all parties on whose behalf the mortgage broker is acting; 4) demonstrate a lack of competency to act as a mortgage broker in a way that safeguards the interests of the public; 5) fail to account for or remit any moneys coming into the mortgage broker's possession that belong to another person; 6) engage in conduct that violates a standard of professional behavior that has become established for mortgage brokers; 7) engage in conduct that constitutes improper, fraudulent, or dishonest dealing; 8) solicit or enter into a contract with a borrower that provides in substance that the mortgage broker may earn a fee or commission through "best efforts" to obtain a loan even though no loan is actually obtained for the borrower; or 9) solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting. Also, a mortgage broker must deposit in a trust account all funds it receives other than nonrefundable fees, pending proper disbursement of the funds. A person who violates the laws regulating mortgage brokers may be fined not more than \$25,000 or imprisoned for not more than nine months or both, may be subject to an administrative forfeiture of not more than \$25,000, may be subject to license revocation or suspension by the division, and may also be subject to civil liability in a private action.

This bill specifies that a mortgage broker has an agency relationship with the residential mortgage loan applicant or investor on whose behalf the mortgage broker provides, or contracts to provide, mortgage brokerage services (borrower). The mortgage broker owes all of the following duties to the borrower:

1. The mortgage broker must act in the borrower's best interest and in the utmost good faith. The mortgage broker may not compromise the borrower's rights or interests in favor of the mortgage broker's or any other person's.

2. The mortgage broker may not accept, give, or charge any undisclosed compensation or realize any undisclosed remuneration that inures to the benefit of the mortgage broker on an expenditure made for the borrower.

3. The mortgage broker must carry out all lawful instructions given by the borrower.

4. The mortgage broker must disclose to the borrower all material facts of which the mortgage broker has knowledge that might reasonably affect the borrower's rights or interests or ability to receive the borrower's intended benefit from the residential mortgage loan. This does not include facts that are reasonably susceptible to the knowledge of the borrower.

5. The mortgage broker must use reasonable care in performing the mortgage broker's duties.



6. The mortgage broker must account to the borrower for all money and property received by the mortgage broker as the borrower's agent.

The bill does not prohibit a mortgage broker from contracting or collecting a fee for services provided, if the services were disclosed to the borrower before they were provided. The bill also does not require a mortgage broker to obtain a loan containing terms or conditions not available to the mortgage broker or to obtain a loan for the borrower from a mortgage lender with whom the mortgage broker does not have a business relationship.

These duties may not be waived. The bill requires a mortgage broker, in each brokerage services contract and related disclosure statement, to identify the parties' agency relationship and the mortgage broker's duties.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

---

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           SECTION 1. 224.79 (title) of the statutes is amended to read:

2           **224.79 (title) Mortgage brokerage agreements and disclosures;**  
3           **mortgage broker agency relationship and duties.**

4           SECTION 2. 224.79 (3) of the statutes is created to read:

5           224.79 (3) MORTGAGE BROKER AGENCY RELATIONSHIP AND DUTIES. (a) In this  
6 subsection, "borrower" means the residential mortgage loan applicant or investor on  
7 whose behalf a mortgage broker provides, or contracts to provide, mortgage  
8 brokerage services.

9           (b) A mortgage broker, at all times when acting in the capacity of a mortgage  
10 broker, has an agency relationship with the borrower.

11           (c) A mortgage broker owes all of the following duties to the borrower:

12           1. The mortgage broker shall act in the borrower's best interest and in the  
13 utmost good faith toward the borrower, and may not compromise the borrower's  
14 rights or interests in favor of another's rights or interests, including those of the  
15 mortgage broker.

1           2. The mortgage broker may not accept, give, or charge any undisclosed  
2 compensation or realize any undisclosed remuneration, through direct or indirect  
3 means, that inures to the benefit of the mortgage broker on an expenditure made for  
4 the borrower.

5           3. The mortgage broker shall carry out all lawful instructions given by the  
6 borrower.

7           4. The mortgage broker shall disclose to the borrower all material facts of which  
8 the mortgage broker has knowledge that might reasonably affect the borrower's  
9 rights or interests or ability to receive the borrower's intended benefit from the  
10 residential mortgage loan, but not facts that are reasonably susceptible to the  
11 knowledge of the borrower.

12           5. The mortgage broker shall use reasonable care in performing the mortgage  
13 broker's duties.

14           6. The mortgage broker shall account to the borrower for all money and  
15 property received by the mortgage broker as the borrower's agent.

16           (d) Nothing in this subsection prohibits a mortgage broker from contracting or  
17 collecting a fee for services provided, if the services were disclosed to the borrower  
18 before they were provided.

19           (e) Nothing in this subsection requires a mortgage broker to obtain a  
20 residential mortgage loan containing terms or conditions not available to the  
21 mortgage broker in the mortgage broker's usual course of business or to obtain a  
22 residential mortgage loan for the borrower from a mortgage lender with whom the  
23 mortgage broker does not have a business relationship.

24           (f) The duties imposed under par. (c) may not be waived.



**Duerst, Christina**

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**From:** Rodriguez, Rachel  
**Sent:** Wednesday, September 30, 2009 2:03 PM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB 09-3180/1 Topic: Imposing duty of good faith on mortgage brokers

Please Jacket LRB 09-3180/1 for the ASSEMBLY.