

February 11, 2019

The Advisory Committee to the Open Banking Review  
Financial Institutions Division  
The Financial Sector Policy Branch  
Department of Finance Canada  
90 Elgin Street  
Ottawa, ON K1A 0G5

**Re: Finance Canada's Consultation and Review into the Merits of Open Banking**

**Dear Sirs/Mesdames;**

The Canadian Mortgage Brokers Association (CMBA) wishes to make comments concerning your consultation and review into the merits of open banking. We agree that it is inevitable that open banking concepts are likely to take root in Canada within the foreseeable future. Open banking represents a global, unstoppable movement which promises to dramatically change how consumers make financial decisions, borrow and plan for their financial futures.

We wish to raise a number of issues for your consideration, which are:

- Privacy issues and data ownership;
- Regulatory blurring between regulated parties and third-party service providers;
- Pre-existing regulatory blurring between federal and provincial financial service providers, which may be compounded by open banking; and
- The role of provincial mortgage brokers in open banking.

***Privacy Issues and Ownership of Data***

A discussion on open banking fosters many questions about who controls and owns the financial data of consumers collected by a bank. Is it the individual consumer or the bank? A very important question concerns whether banking data can be commoditized and sold by banks to third parties. The issues around Facebook's sale of data from 50 million users to Cambridge Analytica are still probably fresh in everyone's minds as we contemplate the merits of open banking. A concentration of data in the hands of a few, well-resourced players would undoubtedly result in oligopolies or even monopolies controlling business and possessing the dangerous potential to manipulate consumers.

If Finance Canada was to proceed with open banking, we believe it needs to review the law around data ownership with a view to resolving its legal ambiguity, and more importantly ensure that consumers have the power to share data with servicer providers. Canadian laws need to be amended so that it is clear that consumers, and not financial institutions, control and own their personal financial data. The consumer should be in control of what data is collected about them, when and how it is

shared/disclosed, for what purpose the data is used, and for how long the data can be retained by the entity holding it.

We recommend that the entities which hold the data should have to meet security standards for data retention and be held accountable for breaches of such standards.

### ***Regulatory Blurring with Regulated and Un-regulated Service Providers***

Opening up the financial services ecosystem to a myriad of FinTech service providers will blur the lines between regulated financial services and completely unregulated peripheral, analytical or informational support services. When regulated entities parse out bits and pieces of their financial services to third party contractors, how will we determine whether those new financial service providers are engaging in “regulated activity” and require regulation? Will third party FinTech providers undertaking critical, outsourced functions from a regulated entity also require regulation? Compounding this problem is that services providers may operate outside of Canada’s borders, making policing near impossible.

We need to start our dialogue on open banking and the provision of financial services with an understanding of federal and provincial jurisdictions governing financial services, and the consumer protection rationale behind that regulation.

### ***Regulatory Blurring over Federal and Provincial Jurisdictions - the Mortgage Broker Context***

Even before we discuss specific policies applicable to open banking, it is important to address the already confusing regulatory landscape in Canada within the financial services sector. Banking under the constitutional federal commerce and trade power is regulated by OSFI and the Financial Consumer Agency of Canada, while the provinces under the constitutional property and civil rights power, regulate the industries and professionals engaged in finance and real estate activity, usually under provincial licensing legislation and land titles requirements. Other provincial powers such as over matters of a merely local or private nature (such as BC lands being mortgaged by a BC borrower to a BC lender) may come into play as well.

The Supreme Court of Canada in a trilogy of cases (referred to as Marcotte) have determined that banks, while regulated federally, must also comply with provincial consumer protection legislation in certain circumstances. The Supreme Court concluded that “banks cannot avoid the application of all provincial statutes that in any way touch on their operations, including lending and currency conversion.” Despite the Marcotte case, some banks have authorized their employees to act as financial intermediaries, such as mortgage brokers who place borrowers with third party lenders, without obtaining any provincial licensing.

Most bank customers looking for a traditional bank mortgage do not expect to encounter bank employees who will place them with third party lenders not connected to the bank; yet such a placement is exactly what often occurs when the bank employee is unable to qualify the client for a bank mortgage. This is often done to the financial benefit of the bank and/or bank employee without the client having consented (or even been made aware of) to the relationship between the third party and the bank, and the additional expense. While duly licensed mortgage brokers act for borrowers to find them the best mortgage options, bank employees do not. They may superficially resemble mortgage brokers but they work for the bank and do not act in the borrower’s best interests. As you

likely know, certain sales tactics utilized by bank employees have recently come under review by the Financial Consumer Agency of Canada.

This disconnect between one set of federal regulations for oversight of mortgage transactions originated within the walls of traditional banks and a different set of regulations for those facilitated by an independent mortgage broker is already very confusing for consumers and comes as direct result of federal banking policies not taking provincial jurisdictional concerns into account. A fragmented financial services ecosystem populated by open banking service providers will inevitably lead to even greater overlap and confusion between federally and provincially regulated services providers.

Some leaders, such as Christine Lagarde, the Managing Director of the International Monetary Fund, have commented that: “Traditionally, regulators have focused on overseeing well-defined entities. But as new service providers come on stream in new shapes and forms, fitting these into buckets may not be so easy. Think of a social media company that is offering payments services without managing an active balance sheet. What label should we stick on that?”

Regulation for regulation’s sake is never desirable. However, policy makers have already determined that there is a need to ensure a certain level of consumer protection through authorizations and licensing regimes. A fragmented financial services ecosystem will lead to regulatory gaps and inconsistencies, and perhaps create an even greater need for the public to rely on licensed financial intermediaries.

We therefore urge the Advisory Panel to ensure that its recommendations are guided by an understanding of the regulatory scope of the federal and provincial governments, and in particular the role of provincially licensed financial intermediaries such as mortgage brokers.

### ***Open Banking begins with independent intermediaries in the 1970’s.***

We note that the Consultation Document on Open Banking does not discuss the role of financial intermediaries. However, in some sense, financial intermediaries, such as mortgage brokers, who emerged in the 1970’s as regulated professionals under provincial licensing legislation, represent the inception of open banking.

As banks began to delve into the mortgage lending business, with the development of amortized terms and rapidly rising interest rates in the late 1960’s, mortgage brokers found a niche role in steering borrowers to various mortgage options available from an array of different financial institutions. They were able to assist borrowers in mortgage shopping; enabling borrowers to move from bank to bank to obtain the best mortgage at competitive terms. Mortgage brokers have clearly played a discernible role in making financial products cheaper and more accessible to consumers.

In the mortgage origination context, the open banking rationale of sharing borrower information to enhance financial decision making has always existed. Mortgage brokers provide mortgage lenders with a seemingly endless trail of information and documentation to facilitate the approval process and ensure underwriting rigour. Borrowers used to hand deliver or fax to their broker wads of paper including bank statements, tax documents, contracts and the like. Now of course, these documents are digitized and sent electronically by email or a third-party electronic conduit. On the flip side, mortgage brokers are then able to utilize customer related information to assist borrowers in making important financial decisions.

Given the services already provided by brokers, open banking may not radically change the current mortgage borrower's consumer experience. There is already a trend in the mortgage brokering industry towards the adoption of FinTech, and the proliferation of FinTech tools will surely make the process more efficient and accessible. FinTech is clearly a catalyst for evolution and not revolution in banking.

### ***Summary of Recommendations***

Thank you for the opportunity to provide comments on your consultation and review into open banking. We can summarize our recommendations as follows:

- review the law around data ownership with a view to resolving its legal ambiguity, and more importantly ensure that consumers have the power to share data with servicer providers
- third party entities which hold financial data should have to meet security standards for data retention and be held accountable for breaches of such standards
- ensure that there is a consumer protection frame work in place which is guided by an understanding of federal and provincial jurisdictions governing financial services, and the consumer protection rationale behind that regulation.
- ensure that there is a consumer protection frame work in place to determine how unregulated third party service providers will be accountable when regulated financial service providers parse out bits and pieces of their services to them.

Please know that we are available for further engagement in your consultation process at any later stages, if desired.

Yours truly,

Samantha Gale, CEO  
CMBA - British Columbia



CMBA-Atlantic



CMBA-Ontario



CMBA-Quebec

