

State Licensing Flexibility

Existing temporary regulatory flexibility allowing state licensed mortgage company staff to work from other than a licensed location should be uncoupled from dates in state emergency declarations, extended through 2021 and include 120-day transition periods. Additionally, industry and policy makers should collaborate to update licensing laws and rules to permit these flexibilities and others on a permanent basis.

OVERVIEW

Summary: During 2020, independent mortgage bankers (IMBs) received permission from regulators for their state licensed staff to work from other than a licensed location temporarily in states that have such requirements. These guidance documents and “no action” letters allowed the real estate finance industry, an essential engine for the American economy, to continue to function and serve consumers during the pandemic. In states where this regulatory flexibility was provided, MBA believes it should be uncoupled from any time frames in state or national shelter-in-place declarations or emergency executive orders and it should be extended without sunset dates, but at least through 2021. Additionally, state policy makers should allow a 120-day transition period to provide the industry adequate time to return to licensed locations. Such action will allow for the development, testing and wide distribution of a reliable vaccine(s). Lastly, industry and policy makers should work together to change state licensing laws to apply the lessons of the pandemic and make these and other flexibilities permanent.

Background: To help curb the global coronavirus pandemic, public officials in states and large municipalities began issuing mandatory shelter-in-place requirements in early 2020, which required all Americans, except those deemed “essential,” to work from home. In the case of the real estate finance industry, however, these orders by state and local officials conflicted with many states’ statutory and/or regulatory requirements for licensed staff to work from a licensed location, such as a branch office. Depending on the state, these employees of MBA member companies include mortgage loan originators (MLOs), servicing staff and others involved in assisting consumers with urgent pandemic-related forbearance needs. To eliminate this legal uncertainty and allow a key element of the economy to continue to function, state mortgage banking regulators quickly began issuing either conditional permission to allow licensed staff to work from other than a licensed location, or “no action” letters, which effectively achieved the same necessary result.

Conditions in many of these official state policies included, for example, the following requirements.

- Licensable activity must be conducted from the home location of an individual working on behalf of a state-licensed company.
- Working from home must be due to a reason relating to the COVID-19 outbreak.

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- Licensed staff must maintain all necessary licenses under state law to conduct licensable activity.
- None of the licensable activities may be conducted in person with members of the public from the home location.
- The company/employer must exercise reasonable supervision of the licensable activity being performed at the remote office and ensure that appropriate safeguards and controls are established concerning consumer information and data security.
- Licensed staff and their employer must meet specific data and information security provisions:
 - They must be able to access the company's secure origination system (including a cloud-based system) directly from any out-of-office device the licensed staff member uses (e.g., laptop, phone, desktop computer, tablet, etc.) using a virtual private network (VPN) or similar system that requires passwords or other forms of authentication to access;
 - All security updates, patches, or other alterations to device security must be maintained; and
 - Licensed staff must not keep any physical business records at any location other than the licensed main office.

Mortgage lenders and servicers successfully implemented these provisions during 2020 while simultaneously meeting unprecedented consumer need and addressing their own significant operational challenges. However, given how little was known in early 2020 about the long-term impact of the virus, many of these regulator actions were short-term and continue to require extensions. IMBs need this flexibility beyond existing and modified shelter-in-place order timelines to operate and serve consumers. Moreover, given the many lessons of the pandemic, it is important for industry and policy makers to work together to change laws to make these flexibilities permanent. Such action would importantly also prepare the industry for future national emergencies or natural disasters.

IMPACT

The re-opening of the economy is happening unevenly across states and sometimes among counties/regions within a state. These asynchronous public policy decisions are creating regulatory risk for lenders and servicers licensed in multiple states as they must balance health concerns of their teams and customers with each state's requirements, which is further complicated when staff are licensed by a state in which they do not reside. Moreover, the appearance of COVID-19 variants and a slow initial rollout of the COVID vaccine have made it difficult to ascertain a timeframe of when normal business operations may commence.

State licensed companies must address space issues such as modifying workstations or collaborating with commercial landlords who are making changes to common spaces in office buildings. Ultimately, these spaces may not accommodate a full staff simultaneously working in proximity and will require staggered in-office workdays into the future. Additionally, for any phased re-opening, an employer needs to develop and implement new policies and procedures regarding transmission risk and contact tracing. Of course, steps will also need to be taken should a member of staff contract the virus or if someone in the same building occupied by a state licensed company tests positive. Sudden office closures and deep cleaning will be necessary along with two-week isolation of any member of a team that encountered the infected person. Moreover, personal health or any number of family reasons could require a licensed team member to continue to adhere to basic quarantine procedures.

Addressing these issues requires more time. Employers need to review all requirements and develop/implement new procedures necessary to protect their employees and their customers. They also need to navigate the increased potential for employee-related litigation and claims. As

companies develop policies and procedures to open their offices, they will need to test and implement strategies for basic hygiene, social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training. Until they can confidently complete all these tasks, the Occupational Safety and Health Administration (OSHA) suggests they should “consider extending special accommodations to workers with household members at higher risk of severe illness.”¹

Additionally, the application of these workplace changes has offered lessons and new insight to the industry and regulators alike. Given that the overall licensing framework was passed by Congress in 2008, and subsequently by the states in the following years, it is appropriate to review them and consider rationale changes to thus structure. The supervisors and the supervised in the real estate finance industry should collaborate to reshape these laws and rules in manner that offers greater flexibility for both while assuring robust consumer protections are maintained.

MBA’S POSITION / NEXT STEPS

MBA believes that until a safe and highly effective vaccine is developed and widely administered in the general population, existing work from home guidance or no action letters should be maintained without sunset dates, or at least through 2021. If regulators are unable to comply and remove any connection in their guidance to a date in a state or national executive order, they must offer at a minimum a 120-day transition period to IMBs. This will allow companies to make necessary changes to their facilities as well as to develop and implement new human resource policies and procedures. There should also be a means by which those staff members who are deemed at a high risk or live with or are the primary care giver to a family member who is high risk or who have another reasonable compelling need, to obtain additional work from home permission. MBA will work with its members and state and local partner organizations to advocate for these priorities.

MBA has released model state legislative and regulatory language to help make permanent changes to state licensing requirements to help apply lessons of the pandemic to the current regulatory paradigm. These tools are available to state policy makers, MBA’s state and local association partners and other stakeholders to revisit and update branch licensing and other requirements. All materials are available at www.mba.org/LicensingFlexibility.

¹ <https://www.osha.gov/Publications/OSHA4045.pdf>

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