

Client Alert: Legislation Would Create National Remote Online Notarization Standards

By RIW on March 24, 2020



In an effort to mitigate the significant harm to commerce caused by COVID-19, several organizations including the American Land Title Association (“ALTA”), the Mortgage Bankers Association (“MBA”), and the National Association of Realtors (“NAR”) are rallying around the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (the “SECURE Notarization Act”) to set minimum national standards for remote online notarization (“RON”), while respecting and integrating with existing state laws permitting RON.

Different from electronic notarization, which occurs when the notarial seal, signature or certificate is created, placed and stored electronically, RON permits an individual and the notary public to be in different locations but in communication via simultaneous audio and visual technology (i.e., a video meeting program or chat application). Under the SECURE Notarization Act, federal courts and states would be required to recognize remote online notarizations performed outside of their respective jurisdictions.

Generally speaking, in order for a notarial act to satisfy the criteria set forth in the SECURE Notarization Act, as proposed by ALTA, MBA, and NAR:

1. The notary public and the individual must be able to communicate simultaneously by sight and sound at the time of notarization. So long as the parties can communicate simultaneously by sight and sound, any personal appearance requirements under state laws would be satisfied.
2. The notary public must identify the individual via (i) personal knowledge; (ii) two different processes or services by which a third party provides verification by way of review of data sources, either public or private; and (iii) oath or affirmation of a credible witness in physical presence of either party OR is communicating with the notary public and the individual via simultaneous audio and video and has been reasonably identified by the notary public by way of (i) or (ii) above.
3. The notary public must create, either itself or through an agent, an audio, and visual recording of the performance of the notarization and must retain such record through the notary public’s tenure as a notary public.
4. In the event the individual is outside the same state as the notary public or outside of the geographic bounds of the United States, the notarized document must relate to a filing within the jurisdiction of the United States or relate to property within the geographic bounds of the United States or the transaction is substantially connected to the United States. The notary public must also have no actual knowledge that the subject document and/or individual’s statement is/are prohibited by the laws having jurisdiction over the individual’s location.

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Although the SECURE Notarization Act would set the minimum national standard for RON, those states that have already adopted the Uniform Law on Notarial Acts likely wouldn't be subject to preemption (unless same was adopted with modifications inconsistent with the SECURE Notarization Act) nor would states with RON laws consistent with the SECURE Notarization Act (unless said state laws granted greater legal effect to specifically required technology or programs). States will still be permitted to set notarial standards of care, as well as minimum qualifications of notary publics. Of particular importance, the industry-sponsored SECURE Notarization Act discussed herein is not intended to impact state law on testamentary wills and trusts.

Notably, the SECURE Notarization Act does not force notaries to engage in RON, nor does it render standard or other electronic notaries invalid. Moreover, the SECURE Notarization Act is not intended to prevent any claims of false execution and specifically permits aggrieved parties to claim forgery, fraud, misrepresentation, incompetency, and lack of execution with present intent.

Although timely, the nascent bill was only recently introduced to Congress and will likely be subject to revision in each house. As with all COVID-19 related legal developments, RIW will continue to provide updates on the status of the SECURE Notarization Act.

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