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Quick Summary:

- We agree that notarization by audio-video communication is a more accessible, secure and verifiable form of notarization, and that states across the country should empower their own notaries to use it.
- The identity validation, document security and "curative provision" recommendations in the Draft Principles are reasonable and should be supported.
- The proposals to reverse interstate recognition of notarial acts and to introduce "territorial limits" and "category restrictions" on notarial powers, however, would change extremely long-standing practice and undermine the crucial role and protections of the notarial act.
- The existing statutory system of interstate acceptance of notarial acts is already in place and already provides uniformity of acceptance. The Principles would replace the existing system, which is working, with a fragmented system rife with legal uncertainty, consumer confusion, constant lawsuits and interstate disputes.
- There is no legal precedent for the "concern" underlying the Principles: That one state will invalidate another state's duly-performed notarizations because of differences in the "means or manner" of performing it.
- No modern notarial statute has ever limited a notary's authority to certain "categories" of transactions (e.g. by excluding land title documents); doing so would create confusion and burden for consumers and practitioners.
- Remote notarization is just one option; paper-based notarization remains an option too. The benefits of remote notarization for society at large can and should be preserved. Any concerned title company can use simple technical tools to identify and choose which forms of notarial act they wish to use and to accept in any given transaction.

Discussion:

1. The Draft Principles Confirm the Value of Remote Notarization and Its Improvements Over Paper-Based Notarization.

The Draft Principles implicitly confirm that notarization by audio-video communication represents an enormous step forward – when compared to paper notarization -- in verifying a signer's identity, generating a clear and permanent journal, creating a video record of the signer's knowledge and intent, and deterring fraud.

The Draft Principles suggest basic legislative approaches to ensure the safety and validity of remote notarizations: (a) use of technology-based tools to heighten the level of assurance in identity validation; and (b) use of "tamper-evident" electronic technologies to enhance security of the electronically signed and notarized document. The Principles also suggest that states adopt "curative" provisions in their real-property statutes to preserve "constructive notice" and resulting lienholder protections even if a notarial act is defectively performed. We think these recommendations are reasonable and discuss them further below.

But beyond these supportive mechanisms for ensuring the safety of the notarial act and the resulting real property records, the Draft Principles implicitly suggest that remote notarization should be halted until states: (a) enact 50 new sets of laws to authorize this new technology for performing the notarial act, (b) impose new rules limiting the territory and categories of notarial acts, and (c) establish a new set of state-by-state conditions upon the notarial acts they will (and will not) recognize and accept from other states.

For the reasons set forth below, these proposed legislative limitations on remote notarization are counter-productive and would replace the existing and long-standing benefits and protections of the notarial act with uncertainty, disputes and litigation.

2. Further Clarity Would Be Helpful About The Concern Underlying The Draft Principles:

The Principles set out "Guiding Assumptions" about notarization by means of audio-video communication, some "Questions" states should consider when legislating with respect to it, and some "Must Haves" and "Recommendations" which should apply as each state considers such legislation.

Not included in the Draft document, however, is any discussion of "Why" these Draft Principles are being put forward.

We believe that the concern behind the Draft Principles is as follows: That a remote notarization conducted by a notary in Virginia (or another state which authorizes remote notarization) for a signer in another state might one day be held to be invalid by a court in the signer's state. In that event, the argument goes, any mortgage so notarized could be deemed to be "defectively acknowledged" and thus not validly recorded in the public record. As a result, the mortgage document might not be deemed to provide constructive notice to a bona fide purchaser for value (including a Bankruptcy Trustee), thus essentially voiding the lender's lien — who would then look to the title company for coverage of the ensuing loss.

So far as we know, this "risk" is entirely hypothetical, as no case of which we're aware has ever rejected a duly-performed notarization from one state because the means for performing it were different than those in the receiving state.

In any event, we understand that those who've expressed this concern have proposed that no remotely notarized documents should be permitted where the signer is in another state, or where the document is intended for use in another state – even though land title documents are currently notarized in one state for use in other states all the time. Those who've drafted these Principles suggest that it will promote certainty if each state (a) passes new laws expressly validating use of this new technology, and (b) adopts its own rules and conditions regarding acceptance of other states' notarial acts.

However, we respectfully suggest that the "remedy" embodied in the Draft Principles is unnecessary and would not create certainty. Instead, it would do great harm to a longstanding system which already works.

At the same time, there are simple and easy-to-implement technology tools which can manage any perceived risk. These tools can allow any concerned title company to easily identity and set contractual policies for which kinds of notarial acts they wish to accept. Such a private-sector approach would fully and easily address any of the concerns underlying the Draft Principles without limiting the benefits of remote notarization and without undermining the entire interstate recognition statutory scheme already in place across the country.

3. What We Believe to Be the Fundamental Issue With the Draft Principles, Including "Guiding Assumption D," "Question A" And "Must Have Principle C:"

In at least three places, the Principles suggest that states have the authority to decide whether to accept notarial acts from other states, and if so, to impose conditions upon such acceptance. They also suggest that states should consider limiting notaries' authority (such as, for example, by excluding the authority to notarize documents affecting land in other states. See "Should Have Principle A").

While it may (or may not) be true that states can condition or limit the duly-performed and valid notarial acts they will accept from other states, were they to start to do so, it would represent a very dramatic departure from longstanding law and the existing "recognition and acceptance" statutory framework across the U.S.

In this respect, the Draft Principles imply that "new laws across all 50 states" are required because remote notarization utilizes new technological means for having a signer personally appear before the notary. Because this technology for personal appearance is new, the argument goes, 50 new sets of state laws are required.

Not only is there simply no authority whatsoever for this idea, it would send us collectively down a path which would lead exactly in the opposite direction away from the uniformity and clarity of recognition and acceptance which we already currently have (and which the Principles claim to want to have as well).

With respect to notarial law, there has always been a well-established balance between what is unique in each state -- and what is uniform across states:

a) The "means and manner" by which notarizations are performed differ widely (and have always differed widely) between the states, and have changed dramatically over time: Some states allow notarization with electronic signatures and seals, some do not; years ago, some required "photo" ID's once they became available, others did not; some states required raised seals, others did not; some now require thumbprints to confirm identity, some do not; some require notaries to receive education and training and to maintain written or electronic journals, some do not, etc.

b) Notarization involves three simple acts: A signer appears before a notary, his or her identity is confirmed, and the notary witnesses the notarial act and places his or her signature and seal. From a "technology change" perspective, states have repeatedly changed their internal rules for how identity is validated, how a notary signs a document, what the notary's seal must be like, etc. None of these changes (which are completely non-uniform across states, and which have occurred on totally disparate timelines across the states) have necessitated any changes in the interstate recognition statutes nationwide. Changing the technology used for personal appearance requires no change in these statutes, either.

c) At the same time, for well over a century (and actually much longer than that) each state has had statutes and court decisions "recognizing and accepting" the duly performed notarial acts of other states' notaries, so long as those acts are performed in accordance with the notary's own state's laws. California's notarial recognition statue (Cal. Civ. Code 1189) is one typical example: "Any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the laws of the place where the acknowledgment is made." Arizona's

recognition statute (AZ Rev Stat § 33-501) uses the typical Model law formulation: "Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws of this state: 1. A notary public authorized to perform notarial acts in the place in which the act is performed. . ."

d) This concept of "interstate recognition," without regard to the "means or manner" (including the technology) by which another state's notarial acts are performed, is fundamental and very, very long-standing. (In addition to the interstate recognition statutes referenced above, a number of authorities have also expressed the view that the federal Constitution's Full Faith and Credit Clause requires such interstate recognition of notarial acts.) In any event, even when the policy of one state is so fundamental that it is enshrined in that state's constitution, it has been held that a notarization duly performed in another state must be recognized even if it would violate the receiving state's fundamental policies. This arose early in the 20th century relating to women as notaries. See *Terry v. Klein*, 133 Ark. 366, 201 S.W. 801 (1918), and *Nicholson v. Eureka Lumber Co*, 75 S.E. 730, 160 N.C. 33 (N.C., 1912).

We have heard it argued that even if interstate recognition statutes are "means and manner neutral" and "technology neutral" on their face, and do not prescribe any specific means for appearing "before" the notary, that nonetheless they do not permit appearance by technology-based means. The reason, it is argued, is that the interstate recognition statutory regime was enacted before audio-video communication existed, so it cannot have contemplated acceptance of an out-of-state notarization based upon "personal appearance" through use of such technology.

The difficulty with this argument, we believe, is that the earliest Uniform Recognition of Acknowledgment Act was first promulgated in 1894 – before photo ID's, rubber stamps, fingerprint analysis, and on and on. It and its successors have stood the test of time and numerous technology changes. *Perhaps for that reason, no case of which we're aware has ever held that the interstate recognition statutes, which are "means and manner neutral" on their*

face, are implicitly limited to appearance by physical presence or to technologies which existed when they were enacted.

Many stakeholders with whom we've spoken believe the principle of interstate recognition is so long-standing and so fundamental that the sector's focus should be on confirming and reinforcing uniform recognition of notarial acts, rather than on encouraging states to develop new and inconsistent "conditions" under which they will accept other states' notarial acts.

Taking such an approach (as proposed by the Draft Principles) would put in place newly disparate, inconsistent and fragmented recognition standards which would undermine the whole point of having notarization in the first place. If notarized documents will no longer be recognized uniformly between states (as they now are), commerce – and land title transactions in particular – will be the worse off for it.

4. The Fundamental – And Existing – Principle That Notarial Acts Are Uniformly Accepted "Anywhere, Any Time" Would Not Survive the Draft Principles, And That Would Be A Problem.

Currently, validly performed notarizations are essentially accepted "anywhere" (i.e across state lines) and "any time" (i.e the notarization is valid today and remains valid in future years). This is so basic and fundamental a feature of notarization that it is often overlooked – but it would be undermined were the Draft Principles put into effect.

It is self-evident that if a notarial act performed in State A is not accepted by State B, then enormous inconvenience and difficulty applies to the notarial process: Suddenly consumers would be required to review, understand and apply differing notarial laws in different states, and to decide which state's laws govern before having a document notarized. None of that occurs today.

Today, literally thousands of times each year, residents of one state have documents notarized in another state which they then use in a different state. (This can occur where one spouse is on deployment, where an elderly family member is conveying property to another family member, where a business

traveler has to arrange a power of attorney for a commercial transaction in another state, etc.)

All of these notarial transactions could be conveniently and securely performed by an audio-video connection with the notary; under the Draft Principles, all of them would become legally uncertain and potentially invalid depending upon where they would be used.

This fundamental problem with the Draft Principles is not just one of "geography," it is also an issue of validity over time: If notarial acts are not valid across state lines, then a notarial act validly performed in State A today (such as a notarization of a signature on a Will or a Power of Attorney) could in theory "become" invalid years from now if the person moves and seeks to use the document in another state.

5. The Draft Principles Ignore The Benefits Of Remote Notarization – Many of Which Directly Benefit The Land Title Industry In Its Ongoing Battle Against Fraud.

As discussed above, technology improves, and new technologies have again and again been adopted to make the notarial act safer, better and more reliable.

Technology changes have not in the past been met – and shouldn't now be met – with legislative efforts to "wall off" each state from other states' lawful and valid notarizations. Clearly, personal appearance by means of audio-video communication offers a host of benefits for the notarial act. A big part of the value proposition of remote notarization (in addition to its enhanced security, robust transaction record and fraud prevention features) is having a signer able to sign regardless of their location, and no matter where their document will be used (as with all notarizations today).

This move to "appearance by video" is by no means unique to remote notarization – and in fact it didn't start there. In telemedicine, in business transactions, in investigations, and across the country in state and federal court proceedings, appearance by real-time audio video connection is becoming a standard means of communication and "evaluation" of demeanor – in circumstances where the "stakes" are just as high as in performing the notarial

act. (See, for example, materials collected in the Comments to Sec. 2-1 of the Model Electronic Notary Act of 2017, https://www.nationalnotary.org/file%20library/nna/reference-library/model-enotarization-act.pdf.)

The proposed limitations in the Draft Principles would preclude the remote notarization process from being available as an option to residents on business or family trips, to military service members on deployment in another state or overseas, or to a husband and wife — one of whom is out of town — who wish to complete their home refinance, etc.

Instead of leveraging technology to provide a better, more accessible and secure form of notarization, these limitations would make remote notarization a second-class form of notarization which can only be used for extremely limited purposes. There is no precedent for this kind of "limited notarization."

This is why Virginia's law doesn't have these limitations; nor does the ULC Amendment to RULONA passed by the ULC this past summer. (Note: Some of these territorial limitations are in the current version of remote notarization enacted in Montana. However, they have substantially limited the utility and uptake of the process, and we understand they are looking to expand the process by removing certain of these limitations.)

6. The Basic Concern of the Draft Principles -- That A Court Might Invalidate a Duly-Performed Virginia Notarial Act – Ignores Existing Law and the Parties' Agreements.

As usually explained, the concern about "court invalidation" of a duly-performed notarial act performed using audio-video communication, is expressed as follows: A court might conclude (a) that the law of the signer's state applies, not Virginia's law, (b) that the signer's state's "policy" is to require personal appearance by means of physical presence only, and (c) that the signer's state's statute recognizing and accepting out-of-state notarial acts is implicitly conditioned upon personal appearance by means of physical presence before the notary.

a) There are many reasons why we believe this theory, and the choice-of-law analysis on which it relies, is erroneous. First and foremost, the most prominent legal authorities in this area point out that notaries are public officials whose acts are performed based upon authority granted by their commissioning State. Notaries don't "reach out" to perform notarial acts; signers come to the notaries, and in so doing invoke the notary's state-granted authority. [Closen, The Public Official Role of the Notary, 31 J. Marshall. Law Rev. 651 (1998); Closen, Notaries Public — Lost in Cyberspace or Key Business Professionals of the Future?, 15 John Marshall Journal of Infor. Tech. & Privacy Law 703 (1997).]

b) For the above reason, and in addition because a notary can only be expected to know the laws of her own commissioning jurisdiction, it has long been held that the validity of the notarial act is determined by the law of the notary's jurisdiction. See, for example, *Era v. Morton Cmty. Bank* (D.R.I. 2014), 8 F.Supp.3d 66, 71; *State v. Davis* (N.C. App., 2010), 700 S.E.2d 85, 89; *Otani v. District Court in and for Twenty-First Judicial Dist.* (Colo. 1983), 662 P.2d 1088, 1090. See also *Pierce v. Indseth, (1882), 106 U.S. 546,* 550.

c) Additionally, signers are made aware of the fact that they're connecting to a notary in Virginia and agree that Virginia has jurisdiction over the notarial act and that Virginia law applies. No one is forced to appear before a notary by means of audio-video communication. It's an option, and they can always go to a traditional notary. Accordingly, given that it is voluntary, entirely consensual, and initiated by the signer, there is no precedent for a court to overrule the parties' agreement about choice of law.

7. Brief Comments on Other Draft Principles:

a) *Authorization of Remote Notarization In Additional States*: We certainly are not against any state authorizing its own notaries to perform notarial acts by audio-video communication. To the contrary, we think it's positive and we encourage it, just as we encourage each state to adopt modern electronic record-keeping, journal and education requirements as well. But as set forth above, there should be no confusion between whether or not a state authorizes its own notaries to permit remote notarization, and

whether it recognizes and accepts duly and validly-performed remote notarizations done in another state which already authorizes its notaries to do so.

b) *Changes to the notarial certificate*: We do not understand why now, after a century of disparate notarial laws across all 50 states, we should for the first time adopt the practice of listing the "means and manner" by which a notarial act is performed in each state. That is not currently part of notarial certificates. Its only purpose can be to undermine the interstate acceptance currently in place between states.

To be clear, any stakeholder (such as a title company or correspondent lender) who wishes to recognize when a note or deed was originated as part of a remote closing by audio-video communication, they can easily do so through simple software tools and specifications. The MISMO data specifications allow for customizable and "machine-readable" fields which can explicitly indicate that a note or mortgage or other closing document was conducted as part of a remote closing. This would allow companies to set and enforce whatever contractual policies they choose to put in place regarding the means and manner of notarial acts. (We believe they will choose to have their key transactions closed using audio-video communication, for all the reasons set forth above; but it will be their choice to make.)

c) *Technology neutrality*. We wholeheartedly agree that statutes should be technology neutral so far as possible, and should allow for technology changes over time.

d) *Higher (and more secure) level of ID validation and storage of video record*: We support these key benefits of notarization by means of audio video communication. A higher standard of identity validation, and more robust record-keeping, make notarization by audio-video communication more reliable and secure, avoids needless battles over specious "repudiation" of signatures, and aids in law enforcement and fraud prevention.

e) *Tamper seal:* Documents signed with a digital certificate (which all modern vendors require) are "tamper evident," not "tamper sealed." That simply means that subsequent changes are evident. We of course support

this. However, limiting the use of remotely notarized documents to those jurisdictions which currently record fully electronic documents is simply infeasible: The vast majority of jurisdictions currently use early state recording methods and systems.

f) *Curative Provisions:* To address title concerns and the issue of "constructive notice," a number of states include various forms of "curative provisions" in their recording statutes. We support the use of curative provisions to make sure that duly-recorded land title documents are deemed to provide constructive notice regardless of claimed technical issues with the notarization.