

NASS Summary: SECURE Act ([S 1265/HR 3962](#))

May 2021

Definitions:

- Defines “communication technology” as an electronic device or process that allows the notary performing the notarization to communicate simultaneously by sight and sound with a remotely located individual.
- Defines “notarial officer” as a notary public, or other individual authorized to perform a notarization under state law without a notary commission or appointment.
- Defines “notarization” as any act a notarial officer performs under federal law or the law of the notary’s state, including any act under the bill with respect to a tangible or electronic record for an individual in the physical presence of the notary or located remotely.
- Defines “notary public” as an individual commissioned or appointed as a notary public to perform notarization under state law.
- Defines “personal knowledge” as knowledge of the identity of an individual through dealings sufficient to provide reasonable certainty of the individual’s claimed identity.
- Defines “remotely located individual” as an individual not in the physical presence of the notary performing the notarization.
- Defines “signature” as an electronic signature, or a tangible symbol executed or adopted by a person and evidencing the present intent to authenticate or adopt a record.
- Defines “simultaneously” as communicating substantially simultaneously without unreasonable interruption or disconnection and includes any reasonably short delay inherent in or common to the method of communication.

Authorization and Standards for Notarization of an Electronic Record

- Authorizes a notary (unless prohibited under the Act) to notarize an electronic record that impacts interstate commerce.
- Establishes the following requirements for notarization of an electronic record impacting interstate commerce:
 1. the notary’s electronic signature and any other required information must be attached to or logically associated with the electronic record; and
 2. the electronic signature, or other information must be bound to the record in a manner that renders any subsequent change or modification to the electronic record evident.
- Establishes the following requirements for a notarization for a remotely located individual that impacts interstate commerce:
 1. the remotely located individual must appear personally before the notary by using communication technology
 2. the notary public must:

- A. reasonably identify the remotely located individual through:
 - personal knowledge of the individual; or
 - by obtaining satisfactory evidence of the identity of the remotely located individual by:
 - at least 2 processes or services through which a 3rd party provides a means of identity verification using public or private data sources; or
 - oath or affirmation of a credible witness who:
 - is in the physical presence of the notary or the remotely located individual, or appears personally before the notary and the individual using communication technology; and
 - has personal knowledge of the identity of the remotely located individual; and
 - has been identified by the notary through personal knowledge, or at least two 3rd party verification methods
- B. The notary public, either directly or through an agent:
 - creates an audio and visual recording of the performance of the notarization, and
 - notwithstanding any resignation from, or revocation, suspension, or termination of the notary's commission or appointment, retains the recording:
 - for a period of no less than:
 - if an applicable law of the notary's state specifies a retention period, the greater of:
 - the specified period; or
 - 5 years after the recording is created; or
 - if no applicable state law specifies a retention period, 10 years after the date the recording is created, in accordance with those laws
 - if any applicable law of the notary's state governs the content, manner, or place of retention, security, use, effect, or disclosure of the recording or any information in the recording, in accordance with those laws
- C. If the notarization is performed with respect to a tangible or electronic record, the notary must take reasonable steps to confirm that the record is the same

record in which the remotely located individual made a statement or on which the individual executed a signature

3. If a guardian, conservator, executor, personal representative, administrator, or similar fiduciary or successor is appointed for or on behalf of a notary public or a deceased notary public under applicable law, that person must retain the recording unless:
 - A. another person is obligated to retain the recording under applicable state law; or
 - B. under applicable state law, that person may transmit the recording to an office, archive, or repository approved or designated by the State, and that person transmits the recording in accordance with state law
4. If the remotely located individual is physically located outside the geographic boundaries of a state, or is otherwise physically located in a location that is not subject to the jurisdiction of the US, at the time of the notarization:
 - A. the record must be intended for filing with or relate to a matter before a court, public official, or other entity subject to U.S. jurisdiction, or involve property located in the U.S. or a transaction substantially connected to the U.S; and
 - B. the act of making the statement or signing the record is not prohibited by the laws of the jurisdiction in which the individual is physically located

Personal Appearance Satisfied

- If a state or federal law requires personal or physical presence at the time of notarization, that requirement must be considered to be satisfied if:
 1. the individual is remotely located; and
 2. appears personally before the notary at the time of notarization using communication technology; and
 3. the notarization was performed under or relates to a public act, record, or judicial proceeding of the notary's state, or the notarization impact interstate commerce.

Recognition of Notarizations in Federal Court

- Requires federal courts to recognize a notarization performed by a notary of any state as valid if the notarization is valid under the laws of the notarial officer's state.
- The notarization must have the same legal effect under the state or federal law applicable in the judicial proceeding as if it was validly performed by a notary of that state, or under the SECURE Act or other federal law, regardless of whether it was performed with respect to a tangible or electronic record, or for an individual in the physical presence of the notary or an individual remotely located.
- In determining the validity of a notarization recognized by a federal court, the signature and title of an individual performing the notarization must be prima facie evidence in any U.S. court that the signature is genuine and the individual holds that title. The signature and title of the following

notarial officers of a state conclusively establish the authority of the officer to perform the notarization:

- a notary public of that state; or
- a judge, clerk, or deputy clerk of a court of that state.

Interstate Recognition of Notarizations

- Requires each state to recognize a notarization performed by a notary of any other state as valid if:
 - the notarization is valid under the laws of the notarial officer's state; and
 - the notarization is performed under or relates to a public act, record, or judicial proceeding of the notarial officer's state, or impacts interstate commerce.
- The notarization must have the same legal effect under the laws of the recognizing state as if it was validly performed by a notary of that state, regardless of whether it was performed with respect to a tangible or electronic record, or for an individual in the physical presence of the notary or an individual remotely located.
- In determining the validity of a notarization recognized by another state, the signature and title of an individual performing a notarization are prima facie evidence in any state court that the signature is genuine and the individual holds that title. The signature and title of the following notarial officers of a state conclusively establish the authority of the officer to perform the notarization:
 - a notary public of that state; or
 - a judge, clerk, or deputy clerk of a court of that state.

Electronic and Remote Notarization Not Required

- The Act does not require a notary to notarize an electronic record, perform a notarization for a remotely located individual, or perform a notarization using a technology the notary has not selected

Validity Not Affected; Rights of Aggrieved Person

- The failure of a notary to meet a requirement of the Act in performing a notarization, or the failure of a notarization to conform to a requirement of the Act, does not invalidate or impair the recognition of the notarization.
- The validity and recognition of a notarization under the Act does not prevent a person from seeking to invalidate a record or transaction, or from seeking other remedies under state or federal law for any reason not addressed in the Act, including on the basis:
 - that the person did not intend to authenticate or adopt a record or execute a signature on the record;
 - that the individual was incompetent, lacked authority or capacity to authenticate or adopt a record, or did not knowingly and voluntarily authenticate or adopt a record; or

- of fraud, forgery, mistake, misrepresentation, impersonation, duress, undue influence, or other invalidating cause
- Nothing in the Act affects a state law governing, authorizing, or prohibiting the practice of law

Exception to Preemption

- A state law may modify, limit, or supersede the provisions of the Act with respect to state law only if that state law:
 - Either:
 - constitutes an enactment of the Revised Uniform Law on Notarial Acts (RULONA), except that any modification to RULONA in state law is preempted to the extent that the modification inconsistent with the Act or would not be permitted under the Act; or
 - specifies additional or alternative procedures or requirements for notarizations with respect to electronic records or for remotely located individuals, if the additional or alternative procedures or requirements are consistent with the Act, and do not accord greater legal effect to the implementation or application of a specific technology or technical specification for performing the notarizations
 - Requires the retention of an audio and visual recording of the performance of a notarization for a remotely located individual for a period of not less than 5 years after the recording is created.

Rule of Construction

- Nothing in the sections on recognition of notarizations in federal court or recognition by other states may be construed to preclude the recognition of a notarization under applicable state law, regardless of whether the state law is consistent with those sections.

State Standards of Care; Authority of State Regulatory Officials

- The Act does not prevent a state or a notarial regulatory official of a state from:
 - adopting a requirement in the Act as a duty or standard of care under the laws of the state or sanctioning a notary for breach of the duty or standard;
 - establishing requirements and qualifications for, or denying, refusing to renew, revoking, suspending, or imposing a condition on a commission or appointment as a notary;
 - creating or designating a class or type of commission or appointment, or requiring an endorsement or other authorization to be received by a notary, as a condition on the authority to perform notarizations with respect to electronic records or for remotely located individuals;
 - prohibiting a notary from performing a notarization under the act as a sanction for a breach of duty or standard of care or for official misconduct.

Special Commissions or Authorizations; Sanctions

- A notary may not perform an electronic or remote notarization under the authorization of the Act if:
 - the notary's state has enacted a law that creates or designates a class or type of commission or appointment, or requires an endorsement or other authorization to be received by a notary public, as a condition on the authority to perform notarizations with respect to electronic records or for remotely located individuals, and the notary's commission or appointment is not of the class or type or the notary public has not received the endorsement or other authorization; or
 - the notarial regulatory official of the notary's state has prohibited the notary from performing the notarization as a sanction for a breach of duty or standard of care or for official misconduct.

Severability

- If any provision of the Act or the application of the provision to any person or circumstance is held to be invalid or unconstitutional, the remainder of the Act and the application of the provisions to other persons or circumstances must not be affected.