

REMOTE PERFORMANCE OF NOTARIAL ACTS

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5811 (reported from committee as substitute H-1)

Sponsor: Rep. Diana Farrington

Committee: Financial Services

Complete to 5-11-18

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY:

House Bill 5811 would amend the Michigan Notary Public Act to require the Secretary of State and the Department of Technology, Management, and Budget to review, and allow them to approve, remote electronic notarization platforms for the performance of notarial acts in this state. The bill would specify guidelines and establish procedures for notarial acts performed using such a platform. The bill would take effect 90 days after it is enacted.

FISCAL IMPACT:

The bill would have an indeterminate, but likely marginal, impact on the Department of State (DOS) and the Department of Technology, Management, and Budget (DTMB). Costs related to acquiring the license or software for a remote notarization platform are not yet determined but would likely be supported through existing appropriations to DOS. There would also be minimal costs associated with the evaluation and procurement process conducted jointly between DOS and DTMB.

DETAILED SUMMARY:

Remote Electronic Notarization Platforms

Under House Bill 5811, beginning January 1, 2019, the Secretary of State (SOS) and the Department of Technology, Management, and Budget (DTMB) would be required to review, and would be allowed to approve, remote electronic notarization platforms for the performance of notarial acts in Michigan.

Remote electronic notarization platform would mean any combination of technology that enables a notary to perform a notarial act remotely; that allows the notary public to communicate by sight and sound with the individual for whom he or she is performing the notarial act, and witnesses, if applicable, by means of audio and visual communication; and that includes features to conduct *credential analysis* and *identity proofing*.

Identity proofing would mean a process or service by which a third party provides a notary public with a reasonable means to verify the identity of an individual through a review of personal information from public or proprietary data sources conducted remotely.

Credential analysis would mean a process or service by which a third party affirms, through a review of public and proprietary data sources conducted remotely, the validity of a government-issued identity document that contains an individual's photograph and signature.

In developing criteria for the approval of any remote electronic notarization platform for use in this state, the SOS and DTMB would have to consider at least all of the following:

- The need to ensure that any change to or tampering with an electronic record containing the information required under the act is evident.
- The need to ensure integrity in the creation, transmittal, storage, or authentication of remote electronic notarizations, records, or signatures.
- The need to prevent fraud or mistake in the performance of remote electronic notarizations.
- The ability to adequately investigate and authenticate a notarial act performed remotely with the remote electronic notarization platform.
- The most recent standards regarding remote electronic notarization promulgated by national bodies, including at least the National Association of Secretaries of State.
- The standards, practices, and customs of other jurisdictions that allow remote electronic notarial acts.

If a remote electronic notarization platform is approved or certified by a government-sponsored enterprise as defined in 2 USC 622(8),¹ and verifiable proof of that approval or certification is provided to the SOS and DTMB, the SOS and DTMB would be required to approve the platform for use in this state unless the SOS affirmatively disallows use of the platform.

At least every four years, the SOS and the DTMB would have to review their standards for approving remote electronic notarization platforms for use in this state and whether the number of approved remote notarization platforms is sufficient.

Remote Notarial Acts

A notary public could perform a notarial act using a remote electronic notarization platform if either of the following is met:

- He or she makes all applicable determinations according to personal knowledge or satisfactory evidence, performance of the notarial act complies with Section 27 of the Act (regarding his or her signing), and he or she does not violate Section 31 (prohibited conduct for a notary public) in the performance of the act.
- Through use of the platform, personal knowledge, or satisfactory evidence, the notary public is able to identify the record before him or her as the same record presented by the individual for notarization.

¹ The Federal National Mortgage Association (FNMA, commonly known as Fannie Mae) and the Federal Home Loan Mortgage Corporation (FHLMC, commonly known as Freddie Mac) are examples of ***government-sponsored enterprises*** as defined in 2 USC 622(8).

A notary public could not use a remote electronic notarization platform that was not approved under the bill. A notarial act performed using a remote electronic notarization platform that otherwise satisfied the requirements of the Act would be presumed to satisfy any requirement that a notarial act be performed in the presence of a notary public. Identification of an individual through an identity proofing process and the presentation of an identity document that is verified through credential analysis would be considered satisfactory evidence that an individual is the individual whose signature is on a record. The notary public would have to note on the record being notarized whether the notarial act was performed electronically or using a remote electronic notarization platform.

Audio or Visual Recording

The notary public could not record by audio or visual means a notarial act performed using a remote electronic notarization platform unless he or she discloses that such a recording is being made, and how the recording will be preserved, to the person requesting the notarial act and the person consents to the recording. A notary public may refuse to conduct a notarial act using a remote electronic notarization platform if the person requesting the notarial act objects to the audio or visual recording of it. A notary public would have to retain an audio or visual recording of a notarial act for at least ten years after the performance of the notarial act.

Journal

A notary public who performs notarial acts using a remote electronic notarization platform would have to maintain a journal that records each of those notarial acts. A notary public could keep only one journal for recording notarial acts and would have to keep the journal either as a tangible, permanent bound register or in a tamper-evident, permanent electronic format.

A notary public would be required to make an entry in the journal contemporaneously with performance of the notarial act, and the entry would have to include, at a minimum, all of the following:

- The date, time, and nature of the notarial act.
- A description of the record, if any.
- The full name and address of each individual for whom the notarial act is performed.
- If the identity of the individual is based on personal knowledge, a statement to that effect. If the identity of the individual is based on satisfactory evidence, a brief description of the method of identification and the identification credential presented, if any, including the date of issuance and expiration of the credential.
- The fee charged, if any, by the notary public.

An entry made in a journal maintained by a notary public would have to also reference (but could not itself contain) any audio or visual recording of a notarial act performed using a remote electronic notarization platform.

The journal would have to be retained for at least ten years after the performance of the last notarial act recorded in it. If a notary public is not reappointed or his or her commission is

revoked, the former notary public would have to inform the SOS where the journal is kept or, if directed by the SOS, forward the journal to the SOS or a repository designated by the SOS.

A notary public could designate a custodian to maintain the journal, or retain an audio or visual recording of a notarial act, on his or her behalf. If an audio or visual recording is transferred to a custodian to hold, the journal entry must identify the custodian with sufficient contact and location information.

Criminal Background Check for Applicants

Current law allows the SOS to use the Law Enforcement Information Network, as provided in the C.J.I.S. Policy Council Act, to check the criminal background of an applicant for appointment as a notary public. The bill would also allow the SOS to check the Internet Criminal History Access Tool (ICHAT) maintained by the Department of State Police for those purposes.

Michigan Notary Public Act Modification Declaration

Finally, the bill would add a section to the Michigan Notary Public Act to declare that the Act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 USC 7001 to 7031, but does not modify, limit, or supersede section 101(c) of that act or authorize electronic delivery of any of the notices described in section 103(b) of that act.

MCL 55.275 et al.

POSITIONS:

The following entities indicated support for the bill:

- Amrock (5-2-18)
- Fidelity National Title Group (5-2-18)
- Community Bankers (5-2-18)
- Michigan Association of Realtors (4-25-18)
- Michigan Chamber (4-25-18)
- Michigan Credit Union League (4-25-18)
- Michigan Creditors Bar Association (5-2-18)

The following entities indicated a neutral position regarding the bill:

- Department of State (4-25-18)
- Michigan Association of Register of Deeds (4-25-18)

Legislative Analyst: E. Best
Fiscal Analyst: Michael Clossen

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.