

**TESTIMONY WITH RESPECT TO PA S.B. 595  
BEFORE THE SENATE COMMITTEE ON STATE GOVERNMENT  
OCTOBER 24, 2017**

The Pennsylvania Land Title Association (PLTA) is grateful for the opportunity to discuss S.B. 595 with respect to online notarial acts. We thank Senator Mike Folmer for his sponsorship of this important legislation and his invitation to today's hearing.

In this written testimony, PLTA would like to discuss our interest in S.B. 595, our role amongst industry stakeholders in the notarial process, the benefits and potential pitfalls that accompany online notarization, and the principles that we believe should inform the legislative process to have a safe and effective online notarization system.

**The Challenges of Online Notarization**

Until a few years ago, the concept of notarizing a document when the signatory is in a different physical location than the notary would have seemed to most people to be a contradiction in terms. The very purpose of the notarial process is to determine the identity of the person in front of the notary, to assess the capacity of the signatory, and to certify, in the notary's best professional judgment, that a signatory's execution of a document or attestation of facts was duly, freely, and voluntarily given. These functions all require personal interaction and a high degree of awareness by a notary of the circumstances surrounding a notarial event.

The advent of high-speed internet and increases in the effectiveness and availability of communication technologies (both hardware and software) have spurred a number of states to enable, or to consider enabling, the notarial event to take place over the internet. These "remote" or "online" notarization laws hold out the promise of revolutionizing the notarial process in the same way that new technologies have affected other fundamental aspects of our daily lives. There are, however, unique safety and legal challenges that must be addressed.

We believe that an online notarization law, when done *correctly*, can provide a superior consumer experience, increase efficiencies across many industries, provide greater ease of access, and lower costs to consumers and business. Especially rural or underserved communities, or those without ready access to transportation, will be tremendously helped by technology that allows people to notarize documents from the convenience of their homes or jobs at any time of the day. In other words, online notarization holds out the promise of becoming a major societal good.

However, we should be alert to the fact that an online notarization law, when done *poorly*, could jeopardize consumers' identities, create new avenues for elder abuse, and make it easier for fraudsters and the unscrupulous to steal property rights. In addition, a poorly conceived online notary law could open up to attack in court those notarized documents that are a part of the public records, thereby rendering property rights less secure. Addressing these issues is what we term the *challenges of online notarization*.

## **Notaries and the Land Title Industry**

PLTA and the land title industry as a whole have taken a keen interest in online notarization. Notaries perform a vital function across a wide spectrum of our country's commercial, private, and governmental spheres. While real estate transactions constitute only a fraction of the total number of notarizations that take place today, notaries play an outsized role in the real estate industry, which by some estimates now constitutes the single largest sector of the U.S. economy.

Notaries are the lynchpin of our system of real estate transfer and registration. In order for a document to be recorded or registered with a county recorder, state law nearly universally requires the document to be notarized. Without a proper and valid notarization, a document may not be able to be recorded. What is more, if a document is recorded but contains an improper or invalid notarization, a court may still find that the document was not properly entitled to be recorded and therefore could set aside the recording. Such an outcome can result in serious legal and economic consequences.

The risk of improperly or invalidly notarized documents is thus a core threat that runs through our entire real estate economy.

How do players in the real estate industry manage this risk? The short answer is title insurance. When we issue an owner or a lender one of our standard title insurance policies, in most cases we are assuming their risk that the document by which they acquired title or secured their loan was improperly notarized or recorded. It is therefore safe to say that the title insurance industry as a whole *assumes the vast majority of the financial risk in the U.S. economy of improper or invalid notarizations.*

In addition, as providers of settlement services the title industry is also one of the major consumers and providers of notarial services. Our industry employs thousands of notaries across the U.S. on a daily basis. When appropriate, we want to be able to embrace new technologies that will not only make our jobs easier but also make the settlement process simpler and more convenient to our customers.

Because of this unique position of the title industry, of all the relevant industry players we believe that our interests are most closely and directly aligned with that of consumers. Simply put, we want our customers' identities and property rights to be safe and secure. We also want our customers to be able to benefit from advances in new technology. If we achieve both of these goals, it will be a true "win-win" situation.

### **How Do We Get There?**

Fortunately for us today, we are not starting from scratch without any roadmap or guide. The title industry has been grappling with the problem of online notarization with our peers and partners across a wide spectrum of industries for several years, and these efforts have borne substantial fruit.

Ever since Virginia enacted the first online notary law back in 2012, progress in adoption and refinement of approach has been uneven and halting. However, we believe that 2017 marks a breakthrough year. This past spring, two states—Texas and Nevada—enacted online notary laws that adhere to a set of core principles that we believe should inform any future legislative efforts. In particular, in Texas H.B. 1217 involved a protracted debate that led to broad agreement amongst state officials, notary advocates, the mortgage industry, technology vendors, and the title industry. Below are a set of five principles that we believe can be distilled from these earlier legislative efforts.

**Principle #1: Technology Neutrality & “Plug-In” Approach**

A main objective of legislation in the electronic arena should be that the law must not favor or, even worse, carve into legislative stone any particular type of technology hardware, software, process, or technique. This principle of *technology neutrality* is embodied in the successful electronic signature laws, namely the federal Electronic Signatures in Global and National Commerce (ESIGN) Act, enacted by Congress in 2000, and the Uniform Electronic Transactions Act (UETA), promulgated by the Uniform Law Commission in 1999. This same principle is carried over into the Revised Uniform Law on Notarial Acts (RULONA), which is now part of the fabric of Pennsylvania law.

It is relatively straight-forward to build on Pennsylvania’s enactment of RULONA and to adopt it to online notarization. For example, the provisions of RULONA that apply to a notary’s selection technology (57 Pa.C.S.A. § 320), the approval of technology by state regulators (57 Pa.C.S.A. § 327), and safety requirements such as the use of tamper-evident technology in electronic records (57 Pa.C.S.A. § 320), should all apply with equal force to online notarization. As the drafters’ commentary to RULONA makes clear, such features are now an integral component of Pennsylvania law:

[57 Pa.C.S.A. § 327(a)] is comprehensive authority for the commissioning officer or agency to adopt rules to implement this Act. Any rules adopted with respect to the performance of notarial acts on electronic records must be *technology neutral*; they may not require or favor one technology or technical specification over another. This is the same requirement provided in ESign, 15 U.S.C. Ch. 96, §102(a)(2)(ii) (2010) [emphasis added].

We can apply the principle of technology neutrality to online notarization by embedding the online notarization provision within RULONA as a standalone section (what may be termed a “plug-in”) but which references and builds on RULONA’s existing framework.

Of course, technology neutrality does not mean allowing the use of insecure or compromised practices. We cannot sacrifice security on the altar of neutrality. Therefore, it is especially important not to enshrine into law particular methods or practices, but rather to focus on principles that can be applied as new methods and practices emerge. How this balance works in practice will be further described below under Principle #4 relating to identity verification.

## **Principle #2: Pennsylvania Law Should Govern**

This may seem like an obvious point, but it is worth spelling it out explicitly and in some detail. One of the thorniest aspects of online notarization is that it remains an unsettled and unstandardized area of law. Many policymakers are understandably hesitant or reluctant to embrace a new technology precisely because of the challenges mentioned above.

In many states, we have seen policymakers take an affirmative stance by stating unequivocally that, for purposes of their state's notarial laws, the signatory must be in the *physical presence* or appear *in-person* before the notary. In addition, a state may declare that it will only recognize a notarial act performed in other states if it meets this requirement for personal appearance (e.g., IOWA CODE § 9B.11(4)). This raises difficult questions about the validity of online notarization for documents that cross state lines. While we believe these policy questions will eventually be resolved with the widespread and safe adoption of online notarization, there are certain steps that can be taken by any state wishing to adopt an online notary law to provide clarity today.

First of all, to address these concerns S.B. 595 should state unequivocally that, *in determining the legality of the online notarization, Pennsylvania law should control.*

Secondly, it is also important to require that the online notary be *physically located within Pennsylvania* at the time of the notarial act. This requirement prevents thorny questions of state sovereignty from arising by establishing a direct territorial basis for the assertion of Pennsylvania law over the notarial event. The validity of a notarial act under state law done by an online notary who is (1) commissioned by the state and (2) physically located in the state at the time of the notarization is, we believe, strong.

The mortgage industry at large already insists on these requirements. For example, Fannie Mae's *Selling Guide* spells out specific requirements for online notarization. In order for a loan to be acceptable for delivery and service, not only must the notarization be valid under the laws of the state where the notary is located, but the online notary must also be "licensed and physically located in the state where the notarial act occurred." Fannie Mae, *Selling Guide*, § A2-5.1-03 (pub. May 30, 2017). For the reasons stated above, we believe that this is a prudent requirement for any online notarial act, not simply those related to mortgage documents.

It is important not to confuse this proposal here (online notary licensed by Pennsylvania and physically located in Pennsylvania at time of notarial act means that validity of the online notarial act is governed by Pennsylvania law) with the "deeming" approach used in Virginia. Under VA. CODE § 47.1-13(B), Virginia's online notaries were granted the ability to perform notarial acts while they are *outside* of the border of Virginia; indeed, anywhere in the world. And under VA. CODE § 47.1-13(D), these acts are "deemed to have been performed within the Commonwealth." This "deeming" approach is difficult to square with sister states' legitimate policy interests, and may be subject to attack on multiple grounds. For this reason, the "deeming" approach used in Virginia has been rejected as other states have considered online notary legislation.

### **Principle #3: Mandatory Disclosure in the Notarized Document**

This principle flows directly from the previous one. Because government officials (*e.g.*, county recorders and clerks) and third parties (*e.g.*, lenders and title insurers) must be able to determine the validity and effect of an online notarization in different circumstances, *it is imperative that the document clearly disclose the fact that it was acknowledged or attested through online notarization.*

Without universal, mandatory disclosure there is simply no way for third parties to assess the validity of a notarization in different circumstances. *A lack of disclosure could result in an unintentional and inadvertent assumption of tremendous liability and risk.* For example, in order to accept and service a loan Fannie Mae requires that the state where property is located “expressly accept remote [online] notarizations performed out-of-state in accordance with the laws of the state in which the notarial act is performed.” Fannie Mae, *Selling Guide*, § A2-5.1-03 (pub. May 30, 2017). Absent mandatory disclosure, there is simply no way for an originating lender to know whether or not a particular document was remotely notarized and thus whether or not they are complying with this requirement.

Mandatory disclosure may be easily achieved by simply requiring that any certificate of acknowledgement or notarial jurat disclose that it was the result of an online notarization. Specific forms of notarial certificates should be promulgated by the Department of State to give clear guidance to notaries about how they may appropriately give adequate disclosure.

### **Principle #4: Sufficient Identity Safeguards**

Many observers believe that one of the riskiest elements of online notarization is the ability of a notary to identify a person over a webcam or mobile device. This is certainly a core area of concern for the title insurance industry. Practical experience has shown that it is extremely difficult, if not impossible, for a notary to examine and determine with a high degree of confidence the validity of an ID credential over a webcam. Not only is image quality over the internet often poor, but the traditional ability to examine the physical ID in detail, to hold it in-hand, and to look at various security features becomes completely negated in an online environment. Comparing the photo of the person in the ID to the person on the other end of the webcam is also an extreme challenge.

We must add to this list of concerns the fact that an online notary’s interaction with a signatory can become divorced from context. In the traditional world of in-person notarizations, the notary has the ability to interact with the signatory, observe his or her demeanor, meet any companions who are present, and get an overall sense of the situation through direct human interaction. While an online interaction can approximate an in-person meeting, present technology tends limit our ability to detect subtle clues or have full situational awareness of events on the other end of the webcam.

The solution is to give notaries *technological tools that provide a high degree of confidence* that the person on the other side of the internet connection is who he or she claims to be. We can give an online notary this confidence through a three-part identity verification system described below.

### 1) **Traditional ID Credential**

First, a successful online notary law should continue to require a signatory to have a valid, government-issued ID credential that contains his or her photograph and signature. In the vast majority of cases, this will be a U.S. driver's license, but it could also be a passport or other government ID of sufficient quality.

### 2) **Credential Analysis**

The second element is what is termed "credential analysis." In this step, the online notary applies technology to analyze the validity of the ID presented by the signatory.

The process by which the signatory provides an image of the ID to the notary is defined as "remote presentation." The actual method of remote presentation will evolve with technology, but today the most common means of doing so will likely entail a smart phone, tablet, or other mobile device with a high resolution camera. Given the high-quality images generated by these devices, the notary can select from a wide variety of software service providers to analyze an ID's contents and layout.

Driver's licenses that are compliant with the standards of the federal REAL ID Act contain dozens of security features that are amenable to extremely sophisticated analysis, including barcodes, microdots, microprint, and holographic features that may be decoded or analyzed. Passports contain similar security features. The goal of credential analysis is to provide an online notary a cheap, extremely fast, efficient, and effective means to assess with confidence the validity of the ID being presented.

### 3) **Identity Proofing**

Finally, an additional layer of identity verification should be employed to buttress the above steps. The basic concept is called "identity proofing" and is quite simple: the notary must ask a third-party data provider to provide confidence of the signer's identity through a review of public and private (or "proprietary") data sources.

In the market today, identity proofing is most commonly achieved through so-called "out-of-wallet" questions that ask about personal history that an identity thief could not answer simply by looking through a stolen wallet. (In legal parlance, this is called Dynamic Knowledge-Based Authentication, or "DKBA"). Almost all of us have likely answered "out-of-wallet" questions when pulling a credit report or applying for a loan. The questions are often things like: "What street have you lived on in the past 10 years?" or "Which of the following people are you associated with?"

However, in keeping with the need for *technology-neutral* solutions and to allow the law to adapt to a *rapidly changing identity-theft landscape*, it is important to understand that "identity proofing" must encompass much more than "out-of-wallet" questions. Nearly every day, news reports highlight risks to our identities. In particular, the Equifax hack stands as a stark reminder the information behind "out of wallet" questions can be stolen

and sold to criminals and fraudsters. Clearly, reliance on “out of wallet” questions, without more, is not enough to protect consumers. Thankfully, possible technological solutions are right around the corner. Facial recognition, voiceprint analysis, fingerprint analysis, and numerous other biometric solutions are already in use in mobile banking, and more robust implementations of those solutions are no doubt near at hand. Successful legislation should therefore eschew enshrining a particular form of “identity proofing” in statute—such as DKBA—and instead simply enact the general concept.

The above identity-verification steps are merely enunciations of broad principles. We believe that the legislative text should go no further. Because technology evolves at an increasingly rapid pace, adhering to these general, technology-neutral principles is the best way to have a durable legislative framework. The model for this approach is other successful technology legislation, such as UETA and E-SIGN, which, as noted above, have stood the test of time for nearly two decades.

How these principles are refined and applied in practice should be determined through appropriate Department of State regulations. Again, the goal should be simply to utilize the technology approval process already embedded in RULONA.

It is important for policymakers to be aware that the regulation-writing process will not need to take place in the dark. As stated previously, Texas and Nevada have already adopted online notary laws incorporating the general principles outlined above and will have regulations that can be looked to for guidance. In addition, a number of industry groups such as the National Association of Secretaries of State (NASS) and, most recently, the Mortgage Industry Standards Maintenance Organization (MISMO), have established online notary workgroups to address these functional aspects of online notarization with the goal of issuing broadly acceptable industry standards. RULONA already encourages the Department of State to look to these other industry and governmental bodies for guidance in the regulation-writing process (*see* 57 Pa.C.S.A. § 327(b)).

#### **Principle #5: A Robust Audit Trail**

Finally, online notarizations should be buttressed by an appropriate audit trail which documents and proves the various elements of the notarial act, but without compromising a signatory’s non-public personal information by giving the notary access to it. (Thus, for example, an online notary should not be able to retain the contents of the “identity proofing” event—only its final result.)

The centerpiece of this evidentiary framework is *an audio-video recording of the online notarial event* to be retained by the notary. This is an established tenet of all existing online notary laws, although the timeframe for keeping the recording varies by state. Virginia and Texas, for instance, require a recording to be kept 5 years, while Nevada provides for a 7-year retention and Montana imposes a 10-year record requirement. We believe that a 5-year retention requirement is a prudent standard without imposing an undue burden.

An additional benefit of requiring an audio-video recording is its *fraud-deterrent effect*. When fraudsters know that they will be captured on camera in their criminal act, this could prove to be a powerful deterrent to committing a crime in the first place.

It should also be noted that notaries may already keep an electronic journal under 57 Pa.C.S.A. § 319 documenting various details of the notarial event. Online notarizations should utilize the existing journal requirement with the simple addition that the entry should indicate whether it was an in-person or online notarial act.

Finally, prudence informed by experience may suggest in the future that additional facts of the online notarial event should be documented. For example, a log of keystrokes or an indication of the geolocation of the signatory (detected through online technology) may be extremely useful information to document a party's intent to sign a document. It is simply not possible to speculate today on what nuances and risks the future may bring. Therefore, we believe that the legislation should empower the Department of State to set additional records retention standards as may be deemed appropriate.

### **Conclusion**

PLTA thanks the Committee on State Government for the opportunity to provide this testimony on a topic that is of immense important to our industry. We hope that these comments provide a useful framework for policymakers to think about the many challenges and opportunities associated with online notarization. We look forward to providing any additional insight or assistance that may be requested.