

**ORDER OF THE
DEPARTMENT OF FINANCIAL INSTITUTIONS**

The Department of Financial Institutions by this order creates ch. DFI-CCS 25 related to notaries public and notarial acts. This order is issued pursuant to section 80 of 2019 Wisconsin Act 125, which authorizes the Department to promulgate these rules as emergency rules and eliminates several steps from the normal emergency-rule promulgation process under s. 227.24, Stats., as described in paragraph 3 of the analysis below.

ANALYSIS

- 1. Statutes interpreted:** Chapter 140, Stats.
- 2. Statutory authority:** Sections 140.27 and 140.145(8), Stats., and Section 80 (“Non-statutory provisions”) of 2019 Wisconsin Act 125.
- 3. Explanation of agency authority:** The Department of Financial Institutions commissions and regulates notaries public of this state under Chapter 140, Stats. Section 140.27 authorizes the Department to promulgate administrative rules to implement Chapter 140, including rules establishing maximum fees for performing notarial acts for remotely located individuals; ensuring the integrity of notarial acts for remotely located individuals and preventing fraud or mistake; and prescribing the process for granting and restricting commissions. Section 140.145(8) further authorizes the Department to promulgate administrative rules relating to the performance of notarial acts for remotely located individuals.

Section 80 of 2019 Wisconsin Act 125 authorizes the Department to promulgate these rules as emergency rules under s. 227.24, Stats., and further eliminates several steps from the normal emergency-rule promulgation process, as follows:

Notwithstanding s. 227.24 (1) (a), (2) (b), and (3), the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection. Notwithstanding s. 227.24 (1) (e) 1d., the department of financial institutions is not required to prepare a statement of scope of the rules promulgated under this subsection. Notwithstanding s. 227.24 (1) (e) 1g., the department of financial institutions is not required to present the rules promulgated under this subsection to the governor for approval.

- 4. Related statutes or rules:** Notaries public and notarial acts are governed by Chapter 140, Stats.

5. Plain language analysis:

These administrative rules implement 2019 Wisconsin Act 125, which revises state law governing notaries and notarial acts and authorizes notaries public to perform notarial acts for remotely located individuals using approved communication technologies. They are intended to provide clarity to notaries public and enable the flexibility of remote notarization while ensuring the integrity of the notarial process. They also take advantage of the expertise of the newly created remote notary council, a body unique to Wisconsin, to evaluate remote online notarization platforms and providers and ensure that Wisconsin notaries are using providers that implement state-of-the-art safeguards to minimize the risk of fraud or mistake.

The rules do the following:

--Create procedures to ensure that Wisconsin notaries utilize communication technologies that meet national and state standards for remote online notarizations. Under the rules, remote online notarization providers can apply for approval of their systems, processes, training programs, and safeguards. Providers that have been reviewed and approved may be utilized by Wisconsin notaries to perform notarial acts for remotely located individuals.

This is similar to the approach in place in Michigan and the emergency remote notarization procedures implemented in Iowa, as well as other states. Unlike Michigan and Iowa, however, Wisconsin can draw upon the expertise of a remote notary council newly created by 2019 Wisconsin Act 125. The rules call for the remote notary council to review a provider's application for approval and to require the provider to appear for questions and provide any information requested by council members to aid in their evaluations.

--Set a maximum fee of \$25 for performing a notarial act for a remotely located individual, which is the prevailing maximum fee among those states (like Wisconsin) that have enacted statutes distinguishing between the maximum fees for in-person and remote notarizations. Locally, Minnesota and Ohio each impose a \$25 maximum fee.

--Codify certain processes for granting and restricting notary commissions, including the process for making complaints against a notary public, the department's authority to investigate those complaints, and the grounds for restricting or revoking a notary commission. The rules also clarify the types of prior offenses that are disqualifying when applying for a notary commission and authorize the department to use email as the primary means of providing notices to notaries and notary applicants.

6. Summary of, and comparison with, existing or proposed federal regulation:

Not applicable. The commissioning and regulation of notaries public is a matter of state law.

7. Comparison with rules in adjacent states:

Michigan has had a remote online notarization statute in effect since early 2019. Its Secretary of State is required to review whether communication technology providers meet the state's

standards for identity proofing, credential verification, records retention, training for notaries public, and other safeguards that overlap those set forth in 2019 Wisconsin Act 125.¹ State notaries public are permitted to perform remote online notarizations using communication technology providers.²

Michigan has not adopted separate administrative rules for remote online notarization, though its Secretary of State has issued official guidance to notaries.³ It has not set a distinct maximum fee for a remote notarization; all notarizations in that state are subject to a \$10 maximum.

Minnesota also has not adopted separate administrative rules, though its remote online notarization statute⁴ largely mirrors the standards and requirements of 2019 Wisconsin Act 125. Minnesota sets a \$25 maximum fee for a remote notarization.

Iowa's remote online notarization statute (SF 475) has not yet taken effect, and it has not yet promulgated administrative rules. The statute is silent on maximum fees for a remote notarization but contains substantially similar requirements for notarial acts as 2019 Wisconsin Act 125.

Illinois does not yet have a remote online notarization statute, but it has adopted emergency guidelines⁵ that permit remote online notarizations via live audio and video feed without extensive or standardized procedures for identity-proofing and credential verification. Illinois has not set a distinct maximum fee for a remote notarization.

8. Summary of factual data and analytical methodologies:

The proposed changes are based on staff input on practices and procedures in administering the commissioning and regulation of notaries public in this state, as well legal counsel's review of 2019 Wisconsin Act 125 and substantially similar statutes and administrative rules governing remote online notarization in all states that have permitted it.

9. Analysis and supporting documents used to determine effect on small business:

Small businesses are not affected by these rules.

10. Anticipated costs incurred by private sector:

No additional costs are anticipated to be incurred by the private sector as a result of these rules.

¹ Mich. Laws §§ 55.286a, 55.286b.

² Mich. Laws. § 55.286.

³ See https://www.michigan.gov/documents/sos/E-Notary_and_Remote_Notary_Guide_2019_eq051319_655391_7.pdf.

⁴ Minn. Stat. § 358.645.

⁵ See <https://www.cyberdriveillinois.com/departments/index/notary/electronicnotary0320.pdf>.

11. Effect on small business:

Small businesses are not affected by these rules.

12. Agency contact person:

Jennifer Booker
Director, Bureau of Uniform Commercial Code, Notary and Trademarks
Division of Corporate and Consumer Services
Department of Financial Institutions
Jennifer.Booker@dfi.wisconsin.gov

13. Place where comments are to be submitted and deadline for submission:

Comments may be submitted to the contact person shown below no later than the date on which the public hearing on this proposed rule order is conducted. Information as to the place, date and time of the public hearing will be published in the Wisconsin Administrative Register.

By mail: Matthew Lynch, Chief Legal Counsel, Department of Financial Institutions, PO Box 8861, Madison, WI 53708-8861.

By delivery: Matthew Lynch, Chief Legal Counsel, Department of Financial Institutions, 4822 Madison Yards Way, North Tower, Madison, WI 53703.

By e-mail: DFIRulesComments@wisconsin.gov

SECTION 1. Chapter DFI-CCS 25 is created to read:

Chapter DFI-CCS 25

NOTARIES PUBLIC AND NOTARIAL ACTS

DFI-CCS 25.01. Definitions. This chapter adopts and incorporates the defined terms and definitions set forth in ch. 140, Stats.

DFI-CCS 25.02. Notices from the department. (1) Any notices or other communications from the department may be provided to a notary public by email.

(2) A notary public must provide the department with written notice of any change of address (including primary email address) within 10 days of the change.

DFI-CCS 25.03. Arrest and conviction record. (1) For purposes of applying s. 140.02(1)(b), Stats., “an arrest or conviction record” relevant to service as a notary public is a record that includes one or more felonies or other offenses that would be admissible for purposes of impeaching the applicant’s character for truthfulness in a judicial proceeding governed by the rules of evidence of this state or the federal courts.

(2) Offenses that have been expunged or pardoned are not considered to be part of a person’s arrest or conviction record for purposes of applying s. 140.02(1)(b).

(3) A notary public or applicant must comply with any requests of the department to provide official records, reports, or other information regarding any arrests or convictions.

DFI-CCS 25.04. Providers of communication technology. (1) **REMOTE NOTARY COUNCIL APPROVAL REQUIRED.** (a) Except as provided in sub. (1) (b) of this section, a provider of communication technology used to perform notarial acts for remotely located individuals must obtain the approval of the remote notary council before allowing its platform to be used by a notary public of this state to perform a notarial act for a remotely located individual.

(b) A provider that was provisionally approved by the department prior to the effective date of these rules must submit the application materials described in sub. (2) of this section no later than August 1, 2020. Such provider’s approval remains effective until such time as the remote

notary council denies the application under sub. (3) of this section, in whole or in part, or the approval is restricted or terminated under sub. (5) of this section.

(2) REQUESTS FOR APPROVAL; CONTENTS. A provider of communication technology may request approval of the remote notary council by submitting to the department verified documentation or other evidence sufficient to detail:

(a) how the provider will ensure that notarial acts for remotely located individuals performed on the provider's platform by a notary public of this state comply the requirements of ss. 140.145 and 140.20, Stats., and this chapter;

(b) the proposed methods of performing a notarial act involving a remotely located individual using the provider's communication technology;

(c) the process or service used to verify the identity of a remotely located individual by a review of personal information from public or private data sources ("identity proofing");

(d) the means used to ensure that notarial acts for remotely located individuals are accurate, authentic, resistant to tampering, and tamper-evident;

(e) the means used to ensure that all parties using the communication technology are viewing the same record, and that all signatures, changes, and attachments to the record are made in real time;

(f) the means used to ensure that the communication technology is secure from hacking or interception;

(g) the means used to ensure that notarial acts for remotely located individuals are recorded and adequately preserved for a period of at least seven years after the recording is made;

(h) the means used to ensure that notaries public are properly instructed and competent to perform notarial acts for remotely located individuals using the provider's communication technology;

(i) all jurisdictions in which the provider's communication technology has been approved or disapproved for the performance of notarial acts for remotely located individuals;

(j) the provider's experience and track record in utilizing the aforementioned means, processes, and procedures in other jurisdictions;

(k) whether the provider has been approved or disapproved for use by companies that provide insurance for transactions requiring notarized signatures, such as land transactions;

(L) any warning letters or complaints received or disciplinary actions taken against a provider in any other jurisdiction;

(m) any pending, threatened, or adjudicated lawsuits against the provider relating in any way to the performance of notarial acts using the provider's communication technology in any jurisdiction;

(n) whether the provider has and will maintain insurance coverage or other security for potential errors or omissions relating to the communication technology or provider's processes;

(o) any other such information that may be necessary or helpful to evaluate the provider's request for approval; and

(p) any other such information that may be requested by the department or the remote notary council to aid in evaluating the request for approval.

(3) REQUESTS FOR APPROVAL; PROCEDURE. (a) Once the department is satisfied that an application is bona fide and includes the information required in sub. (2), the department will forward the application materials to members of the remote notary council.

(b) The remote notary council will place the application on its agenda for deliberation at one of its next two regularly scheduled meetings or at any interim special meeting it may deem necessary and appropriate. The department will notify the applicant of the time and date of the meeting.

(c) A representative of the applicant with knowledge of its processes and authority to make binding representations on its behalf must be available to participate in the meeting and respond to questions from remote notary council members. Unless otherwise specified by the remote notary council, the representative may participate by phone or other remote means.

(d) Upon consideration of the merits of the applicant and application, the remote notary council may approve the application, impose additional conditions or limitations upon approval, deny the application, table the application for further deliberation at a subsequent meeting, or require the applicant to supplement the application with additional explanations, information or evidence of its ability to ensure compliance with state law.

(e) Upon approval of a provider's application, the department will add the provider to a list of approved providers of communication technology for notarial acts for remotely located individuals.

(4) PROVIDER STATEMENTS BINDING; DUTY TO SUPPLEMENT; RENEWALS. (a) All representations, promises, and assurances of future performance by a provider or its representative to the department or the remote notary council are binding on the provider.

(b) If facts or circumstances change such that any material statement, representation or explanation made by the provider under this section is no longer accurate or complete, then the provider must promptly inform the department of the change, explain the reasons for it, and provide an updated version of any application document affected by the change.

(c) The department or the remote notary council may require a provider to re-apply for approval at such time and with such notice as it deems reasonable and appropriate.

(5) TERMINATION OR LIMITATION OF APPROVAL. The department or the remote notary council may restrict, limit, suspend, or terminate any approval granted to a provider under this section if it concludes that:

(a) the provider has violated ch. 140, this chapter, or any other relevant state or federal statute or administrative rule;

(b) the provider has made a false or misleading statement or omission of material fact to the department or the remote notary council;

(c) the provider has failed to live up to assurances or otherwise perform at the level indicated in its application materials or other representations made to the department or the remote notary council;

(d) the provider has been subject to administrative discipline or legal action in other jurisdictions;

(e) any fact or condition exists that, if the provider were required to re-apply under this section, would warrant the denial or restriction of approval; or

(f) any other fact or condition exists that undermines confidence in the ability of the provider to meet its duties and ensure compliance with ch. 140, Stats.

(6) AVOIDANCE OF CONFLICTS OF INTEREST. The remote notary council member appointed under s. 15.185 (8) (b) 4., Stats., may participate in deliberations but shall not vote on any matters described in this section.

DFI-CCS 25.05. Notarial acts for remotely located individuals. (1) A notary public of this state may not perform notarial acts for remotely located individuals except by utilizing a communication technology provider that has been approved by the remote notary council in the manner set forth in this chapter.

(2) A notary public may not perform notarial acts for remotely located individuals using an approved provider until:

(a) the notary public becomes knowledgeable about the provider's communication technology and processes for performing notarial acts for remotely located individuals, including completion of any training or instruction modules prepared by the provider; and

(b) the notary public is approved by the provider to use its communication technology to perform notarial acts for remotely located individuals.

(c) A provider shall promptly notify the department whenever it approves a notary public to use the provider's communication technology to perform notarial acts for remotely located individuals.

DFI-CCS 25.06. Maximum fee for a notarial act for a remotely located individual. A notary public may charge no more than \$25 to perform a notarial act for a remotely located individual.

DFI-CCS 25.07. Complaints, Suspensions, and Revocations. (1) A person may file a complaint against a notary public in a manner directed by the department. A complaint must include the complainant's contact information and a complete statement of the basis for the complaint, including any relevant records.

(2) The department may, on its own initiative or in response to a complaint, make such investigation as it determines to be reasonable and necessary to determine whether a person has violated, is violating, or is about to violate any provision of ch. 140, Stats., or any administrative rules promulgated thereunder, including this chapter. The department may administer oaths and affirmations, issue subpoenas, take evidence, require the filing of statements (including responses to allegations), require testimony in oral or written form, and require the production of any records that the department considers relevant or material to the investigation.

(3) The department may deny, refuse to renew, revoke, suspend or impose a condition on a commission as a notary public for any act or omission that demonstrates the individual lacks the competence, reliability or integrity to act as a notary public, including:

(a) failing to comply with any provision of ch. 140, Stats., or this chapter;

(b) committing an act of fraud, deceit, or of any other misconduct substantially relating to the character or public trust necessary to be a notary public;

(c) being convicted of any felony or other offense that would be admissible for purposes of impeaching the person's character for truthfulness in a judicial proceeding governed by the federal rules of evidence or the rules of evidence of this state;

(d) using false or misleading advertising or otherwise engaging in any method, act or practice that is unfair or deceptive, including any untrue or misleading statement or omission of a material fact relating to a duty or responsibility of a notary public;

(e) making an untrue or misleading statement or omission of a material fact in any application or filing required by ch. 140, Stats.; or

(f) failing to promptly and fully comply with any information or investigative request by the department.

SECTION 2. EFFECTIVE DATE. This rule shall take effect upon publication in the official state newspaper as provided in s. 227.24 (1) (c), Stats.

Department of Financial Institutions

Date: May 1, 2020

By: /s/ Matthew Lynch_____

Matthew Lynch
Chief Legal Counsel