

Clearinghouse Rule 22-009

PROPOSED ORDER OF THE DEPARTMENT OF FINANCIAL INSTITUTIONS, DIVISION OF CORPORATE AND CONSUMER SERVICES CREATING RULES

The Wisconsin Department of Financial Institutions – Division of Corporate and Consumer Services proposes an order to create DFI- CCS 25 of the Wisconsin Administrative Code, relating to notaries public and notarial acts.

The scope statement for this rule was approved by the Governor on June 11, 2020 and published in *Administrative Register* No. 774A3 on June 15, 2020.

ANALYSIS

1. Statutes interpreted:

Chapter 140 of the Wisconsin Statutes.

2. Statutory authority:

Sections 140.27 and 140.145(8) of the Wisconsin Statutes.

3. Explanation of agency authority:

The Department of Financial Institutions commissions and regulates notaries public of this state under Chapter 140 of the Wisconsin Statutes. Section 140.27 of the Wisconsin Statutes authorizes the Department to promulgate administrative rules to implement Chapter 140, including rules ensuring the integrity of notarial acts for remotely located individuals, preventing fraud or mistake, and prescribing the process for granting and restricting notary commissions. Section 140.145(8) further authorizes the Department to promulgate administrative rules relating to the performance of notarial acts for remotely located individuals.

4. Related statutes or rules:

Notaries public and notarial acts in this state are governed by Chapter 140 of the Wisconsin Statutes.

5. Plain language analysis:

These administrative rules help the state to implement 2019 Wisconsin Act 125, which revised state law governing notaries and notarial acts and authorized notaries public to perform notarial acts for remotely located individuals using approved technologies. They are intended to provide additional clarity to notaries public regarding remote online notarization, while ensuring the integrity of the notarial process and flexibility to adjust to technological developments. They also take advantage of the expertise of the state Remote Notary Council, a new body created by Act 125, to evaluate remote online notarization platforms and providers and to help ensure that Wisconsin notaries are using providers that implement proper safeguards to minimize the risk of fraud or mistake.

The rules do the following:

(1) Codify the Remote Notary's Council's role in reviewing and approving technology providers. By statute, Wisconsin notaries may only perform remote online notarial acts using technologies that have been approved by the Department. Since Act 125 became effective, the Department has developed applications by which providers of technology used for remote online notarial acts can seek state approval, and it has worked with the Remote Notary Council to review application materials, meet with providers, establish conditions, and ultimately approve 19 providers (and counting) that seek to offer their technologies to notaries in this state.

The proposed rules would codify the procedures jointly developed and implemented to date by the Department and the Council. Under both current practice and the proposed rules, remote online notarization technology providers seeking to make their technologies available for use by Wisconsin notaries would apply for approval with the Department. The application requires the provider to explain how it will help ensure compliance with the law and safeguard the integrity of the notarial process. The application is then reviewed at a meeting of the Remote Notary Council, where a representative of the applicant must appear and answer questions from the Council. The Council may deny an application or approve it, subject to such conditions as may be appropriate to protect the public and Wisconsin notaries public, and may rescind an approval for violating those conditions, violating Wisconsin law, or taking other specified actions described in the proposed rules.

(2) Codify certain processes relating to notary commissions. The proposed rules authorize the department to use email as the primary means of providing notices to notaries and notary applicants. They also codify the grounds for restricting or revoking a notary commission.

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

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.

Iowa's remote online notarization statute (SF 475) took effect on July 1, 2020, and the state has promulgated administrative rules which also took effect on that date.⁵ The statute contains substantially similar requirements for notarial acts as 2019 Wisconsin Act 125.

Illinois last year enacted a remote online notarization statute that took effect on January 1, 2022.⁶ It has not yet developed administrative rules relating to remote online notarization under the new law. Prior to the passage of that legislation, the state permitted remote online notarization through adopted emergency guidelines⁷ that did not require identity-proofing or credential verification—safeguards that are required by both Wisconsin Act 125 and the new legislation in Illinois.

8. Summary of factual data and analytical methodologies:

The proposed rules are based on: (1) the Department's experience in commissioning and regulating notaries public in this state; (2) a review of 2019 Wisconsin Act 125 and substantially similar statutes and administrative rules governing remote online notarization in other states, as well as the statement of support by the National Association of Secretaries of State for 2018 revised national electronic notarizations standards developed by the National E-Notarization Commission, which mirror those contained in Act 125; and (3) the experience of the Department and the Remote Notary Council in administering Act 125 in this state since spring 2020.

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 Iowa Code 9B and IAC 721-43, both accessible from the Secretary of State's website: <https://sos.iowa.gov/covid19/remotenotarization/form.aspx> or from here:

<https://www.legis.iowa.gov/docs/ico/chapter/9B.pdf>

<https://www.legis.iowa.gov/docs/aco/arc/5041C.pdf>

⁶ Ill. Pub. Act 102-160/Senate Bill 2665.

⁷ See <https://www.cyberdriveillinois.com/departments/index/notary/electronicnotary0320.pdf>.

The Department conferred with Remote Notary Council members regarding the proposed rules at public meetings of the Council on November 5, 2021, and January 18, 2022. At the conclusion of January 18 meeting, the Council members expressed their support for these proposed rules by unanimous vote.

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

Small businesses are not financially 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.

11. Effect on small business:

These rules do not financially impact small businesses, though as a general matter the efficiencies and flexibility of remote online notarization are beneficial for all companies that utilize notarized documents.

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: DFIComments@dfi.wisconsin.gov

Via the department's website: <http://www.wdfi.org/statutes/ProposedRules.htm>

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

Chapter DFI-CCS 25

NOTARIES PUBLIC AND NOTARIAL ACTS

DFI-CCS 25.01. Definitions. In this chapter, unless otherwise indicated, words and phrases shall have the meanings specified in ss. 140.01, 140.145, and 990.01, Stats.

DFI-CCS 25.02. Notices from the department; notary contact information. (1)

Notices and other communications from the department may be provided to a notary public by email or other electronic means.

(2) A notary public shall provide the department with written notice, in a form and manner acceptable to the department, of any change of name, seal or stamp, and address, including primary email address, within 10 days of the change.

DFI-CCS 25.03. Notarial acts for remotely located individuals. A notary public of this state may perform a notarial act for a remotely located individual if all the following apply:

(1) The notary public performs the notarial act by utilizing a communication technology provider that has authorized the notary public to utilize its technology and has been approved pursuant to s. DFI-CCS 25.04, or by utilizing an alternative process that has been approved pursuant to s. DFI-CCS 25.05.

(2) The notary public has reviewed and understands s. 140.145, Stats., and all guidance published on the department's website regarding the performance of notarial acts for remotely located individuals.

(3) The notary public is competent with the technologies and processes to be utilized in performing notarial acts for remotely located individuals.

DFI-CCS 25.04. Providers of communication technology used to perform notarial acts for remotely located individuals. (1) APPROVAL REQUIRED. A provider of communication technology used to perform notarial acts for remotely located individuals shall obtain approval as provided in this section before allowing its platform to be used by a notary public of this state to perform a notarial act for a remotely located individual.

(2) CONTENTS OF REQUESTS FOR APPROVAL. A provider of communication technology may request approval of the remote notary council by submitting documentation or other evidence to the department, in a form and manner acceptable to the department, that explains all the following:

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

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

(c) The proposed method by which a provider's identity proofing will operate to ensure compliance with s. 140.07, Stats.

(d) Whether the provider's technology and identity proofing processes meet the most current standards of the Mortgage Industry Standards Maintenance Organization.

(e) The means used to ensure that notarial acts for a remotely located individual are accurate, authentic, resistant to tampering, and tamper-evident.

(f) 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.

(g) The means used to ensure that the communication technology is secure from hacking or interception.

(h) The means used to ensure that a notarial act for a remotely located individual is recorded and adequately preserved for a period of at least seven years after the recording is made.

(i) The means used to ensure that a notary public is properly instructed and competent to perform a notarial act for a remotely located individual using the provider's communication technology.

(j) All jurisdictions in which a provider's communication technology has been approved or disapproved for the performance of a notarial act for a remotely located individual.

(k) A provider's experience utilizing the means, processes, and procedures described in this subsection.

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

(m) Any pending or adjudicated lawsuits against a 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 information that the department or remote notary council requests and believes is necessary or helpful in evaluating a provider's request for approval.

(3) PROCEDURE FOR REQUESTS FOR APPROVAL. (a) Once the department is satisfied that a provider's application includes the information required in sub. (2), the department shall schedule the application for consideration at a forthcoming meeting of the remote notary council.

(b) A representative of the applicant with knowledge of its processes and authority to make binding representations on its behalf shall 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.

(c) 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.

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

(4) PROVIDER STATEMENTS BINDING; DUTIES TO SUPPLEMENT AND TO NOTIFY. (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 a provider approved under this section is no longer accurate or complete, the provider shall 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) A provider approved under this section shall promptly inform the department, in a form and manner acceptable to the department, regarding notaries public of this state who have become newly authorized to use the provider's communication technology to perform notarial acts for remotely located individuals.

(5) TERMINATION OR LIMITATION OF APPROVAL. (a) 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 any of the following apply:

1. The provider has violated ch. 140, Stats., this chapter, or any other relevant state or federal statute or administrative rule.
2. The provider has violated any condition of any approval granted under this section.
3. The provider has made a false or misleading statement or omission of material fact to the department or the remote notary council.
4. The provider has been subject to administrative discipline or legal action in another jurisdiction.
5. 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.
6. Any other fact or condition exists that undermines the department's or the remote notary council's confidence in the ability of the provider to meet its duties and ensure compliance with ch. 140, Stats.

(b) When restricting, limiting, suspending, or terminating any approval granted to a provider under this section, the department or the remote notary council may take, or require the provider to take, any further action it deems necessary and appropriate to mitigate risks of harm to notaries public or others.

DFI-CCS 25.05. Alternative processes used to perform notarial acts for remotely located individuals. In addition to the method of utilizing a communication technology provider that is approved under s. DFI-CCS 25.04, the department may establish alternative processes or methods of performing notarial acts for remotely located individuals, provided such processes or methods meet the requirements of ch. 140, Stats.

DFI-CCS 25.06. Investigations; suspensions and revocations of notary public commissions. (1) The department may investigate whether a person has violated, is violating, or is about to violate any provision of ch. 140, Stats., or 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.

(2) The department may deny, refuse to renew, revoke, suspend, or impose a condition on the commission of 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 any of the following:

- (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 required of a notary public.
- (c) Being convicted in any jurisdiction of committing any felony, any misdemeanor involving fraud, forgery, or similar violations of the public trust, or the unauthorized practice of law.

(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 knowingly omitting a material fact, in any application or filing required by ch. 140, Stats.

(f) Failing to promptly and fully comply with any investigation or request for information by the department.

SECTION 2. EFFECTIVE DATE. This rule shall take effect on the first day of the first month commencing after the date of publication in the Wisconsin *Administrative Register* as provided in s. 227.22 (2) (intro.), Stats.

Department of Financial Institutions

Date: January 21, 2022

By: /s/ Matthew Lynch

Matthew Lynch
Chief Legal Counsel