

Legislative Hearing to Protect Consumers and Strengthen the Economy

House Committee on Energy & Commerce

Subcommittee on Consumer Protection and Commerce

Thursday, May 26, 2022

12:00 p.m.

Written Testimony Submitted By Michael O'Neal

AMERICAN
LAND TITLE
ASSOCIATION



www.alta.org

Chairwoman Schakowsky, Ranking Member Bilirakis and members of the subcommittee, my name is Michael O’Neal. I am a Vice President of Corporate Underwriting with First American Title Insurance Company. In that role, I work on notarial law and practice around the country. Over the past five years, I have assisted dozens of states in updating their notary laws to allow for the use of electronic signatures and to leverage the notarization tools available in the 21st century. Thank you for the opportunity to speak to you today on the SECURE Notarization Act and the importance of remote online notarization.

I am here today speaking on behalf of the American Land Title Association (“ALTA”). ALTA is the national trade association representing the almost 20,000 title insurance and real estate settlement service companies that employ over 145,000 professionals across the country. ALTA members serve homebuyers, sellers, and lenders in every county in the United States to safely facilitate real estate transactions, which are often the largest transaction a consumer will ever make and the greatest source of wealth for many Americans. In 2021, real estate accounted for \$3.8 trillion in U.S. economic activity.

Notarial law is critically important to the real estate and title industry. The most common time Americans use notarial services is when they buy or refinance property. Notaries improve the safety and security of life’s most critical transactions. They do this by authenticating a signer’s identity and serving as an impartial witness to the execution of legal documents. Beyond real estate, notaries are commonly used for transactions involving wills, trusts, health care proxies, life insurance, automobile ownership, powers of attorney, and in many other contexts.

Even before the COVID-19 pandemic, the title and lending industries began undergoing a digital transformation to provide consumers with convenient options when buying a home. One of these new tools is remote online notarization, or “RON” for short. The Securing and Enabling Commerce Using Remote and Electronic Notarization Act (“SECURE Notarization Act”)¹ is a bipartisan bill that increases access to RON for consumers. Just like it sounds, remote online notarization takes the traditional notarial process and moves it online—allowing a signer to get a document securely notarized over a webcam or smart phone. Americans sign documents and engage in countless e-commerce transactions every day using electronic signatures thanks to Congress’s adoption of E-SIGN in 2000.² Now is the time to do the same for notarizations.

¹ Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2021, S. 1625, 117th Cong. (2021); H.R. 3962, 117th Cong. (2021) (hereinafter, “SECURE Notarization Act”).

² Electronic Signatures in Global and National Commerce Act, § 101, 15 U.S.C. § 7001.

The SECURE Notarization Act is Critical to Support Digital Closings

RON benefits and protects consumers by offering them safe and convenient options for executing legal documents online. When title companies and other financial service providers offer customers a digital closing option using RON, it puts the consumer in the driver's seat, allowing them flexibility to execute documents based on their schedules without the need to take time off work or find a babysitter.

As of May 2022, 40 states have enacted permanent statutes that approve the use of RON under state law. However, the lack of national authority makes it harder to provide this valuable flexibility to those that need it the most, like servicemembers, overseas Americans, and underserved communities. Furthermore, the legal landscape would benefit from additional certainty around the use and interstate recognition of RON, and Congress is best positioned to provide this certainty just as it did with electronic signatures.

The SECURE Notarization Act does three things. First, it permits all consumers to have access to remote notary services. In the context of real estate, it gives consumers the option of closing from the comfort and convenience of their homes.

Second, the bill creates national minimum consumer protections for use of the technology supporting RON. These minimum protections include the use of multifactor authentication for determining a signer's identity, tamper-evident technology to identify changes to a document after it has been executed, and an audio-visual recording of the notarization to deter fraud and provide strong evidence in court if there is a dispute.

Finally, by providing certainty around interstate recognition of remotely notarized documents, the SECURE Notarization Act ensures a document is enforceable and valid everywhere, no matter where it was signed.

Equally important to what the SECURE Notarization Act does, is what it doesn't do. The Act allows states (the traditional source of notary law) to continue to commission and regulate notaries. It allows states to add standards and requirements for RON. Additionally, the SECURE Notarization Act works in tandem with a state's existing data privacy requirements to protect consumer data. Lastly, the Act does not favor or restrict the use of specific technologies.

Today, the country stands at an inflection point with RON. Just as Congress acted decisively to facilitate the adoption of electronic signature technology by enacting E-SIGN, the SECURE Notarization Act will provide a uniform rule supporting RON nationwide and will encourage states to enact the

Uniform Law Commission’s Revised Uniform Law on Notarial Acts (“RULONA”)³ or a consistent equivalent. It addresses the current patchwork of state laws by promoting national standards that are necessary for today’s financial services market. Absent congressional action, American consumers and businesses will continue to have to navigate the thicket of inconsistent state laws. They could also face potentially catastrophic consequences if courts hold to be invalid or ineffective the tens of thousands of estate planning, health care planning, and real property conveyancing documents executed by using RON since the beginning of the COVID-19 pandemic.

How the SECURE Notarization Act Works

As stated above, the first component of the SECURE Notarization Act is to permit any state notary to perform remote notarizations.⁴ This provision expands access to local notary services for consumers. With 40 states having passed RON legislation, this component remains important because it clarifies the ability to use RON in states that don’t specifically authorize it, provides a federal-law backstop to authority challenges to a notary’s power to perform RON, and levels the playing field for local notaries.

While this provision would authorize notaries to conduct RON in the 10 states that have not passed a law, it is important to note that it does not alter the states’ ability to set special qualifications or authorizations as a condition to performing a RON or any of the duties of care a notary must abide under its commission.⁵ States remain the primary regulator for their commissioned notaries. The Act provides an incentive for the remaining states to pass their own authorizing laws with whatever additional conditions or requirements they desire, such as compliance with educational or training mandates.

The second policy objective of the SECURE Notarization Act is to create national minimum consumer protections for performing remote notarizations. These standards effectively mirror those in the Uniform Law Commission’s RULONA⁶ and can be broken down into three fundamental requirements:

1. Remote notarizations would require the use of tamper-evident technology, so that third parties can examine electronically signed and notarized documents to determine if they have been

³ REVISED UNIF. L. ON NOTARIAL ACTS (UNIF. L. COMM’N 2018/2021) (hereinafter, “RULONA” with all references to the 2021 version of the uniform law).

⁴ SECURE Notarization Act § 4(a) (granting state-commissioned notaries authority to perform RON “[u]nless prohibited under section 10”, on which see *infra* note 5).

⁵ *Id.* § 10(b)(1) (requiring notaries to receive any special commissions or authorizations required under state law).

⁶ See RULONA § 14A for requirements applicable to remote online notarizations.

modified since the time of the notarization.⁷

2. The remotely located individual must be identified by the notary through personal knowledge, use of a credible witness, or multifactor authentication.⁸

3. The notary must create and retain an audio-video recording for 10 years unless another time frame (not falling below five years) is stipulated under state law.⁹

These minimum standards make RON safer than traditional paper notarizations and endow them with superior evidentiary value. The requirement for multifactor authentication provides additional identity verification beyond what an in-person notary can obtain by visually reviewing a signer's driver's license or passport. Additionally, the retention of the audio-visual recording ensures that a notary can produce additional evidence when the validity of a document is challenged in court. Besides deterring would-be fraudsters, the video can also show evidence of the signer's mental state in cases of potential elder abuse. By contrast, only a minority of states require any sort of notarial recordkeeping for paper notarizations,¹⁰ and a notary's journal entry cannot reveal what actually happened during a notarization or visually capture the identity of fraudsters.

The third policy goal is to conclusively address interstate recognition of remotely notarized documents. Although many states have enacted RULONA or another form of RON law consistent with it, this has not been the case universally. Many existing interstate recognition statutes were drafted in the era of the horse and buggy and even before the invention of the telephone, much less the Internet and webcam. The SECURE Notarization Act plugs this gap by requiring every state to "recognize" notarizations performed under another state's laws regardless of whether the notarization was performed electronically or remotely. It requires similar recognition be provided by federal courts regardless of whether the rule of decision is supplied by state or federal law. Furthermore, Sections 5 and 6 of the Act follow the three-part test for proving the authority of a notarial officer as contained in RULONA and prior iterations of the uniform notarial laws.¹¹ Taken together, these provisions provide legal certainty for consumers and businesses alike that a document that is validly notarized in any state will be treated as valid in every other state.

⁷ SECURE Notarization Act § 3(b)(2). *Cf.* RULONA § 20(a) on use of tamper-evident technology for all electronic notarizations, whether performed in-person or remotely.

⁸ *Id.* § 4(b)(2)(A). *Cf.* RULONA § 14A(c)(1).

⁹ *Id.* § 4(b)(2)(B). *Cf.* RULONA §§ 14A(c)(3), 14A(k) (recommended 10-year retention requirement).

¹⁰ An up-to-date list of state requirements for notarial journals is maintained by the American Society of Notaries at <https://www.asnnotary.org/?form=rbkrequirements>.

¹¹ *See* RULONA § 11 cmt. (three steps are: (1) proof that the signature in the notarial certificate is that of the identified individual, (2) proof the named individual holds the designated notarial office, and (3) proof the individual holding the designated notarial office may perform the notarial act).

Importantly, Section 9 of the SECURE Notarization Act contains a rule of non-preemption modeled on the earlier E-SIGN Act.¹² The imitation is intentional because it deals broadly with the same problem. In E-SIGN, Congress enacted the broad rule of legal equivalence envisioned by the Uniform Electronic Transactions Act (“UETA”) to the full extent of Congress’s Commerce Clause power.¹³ In doing so, it expressly preempted contrary state laws. However, Congress also provided a mechanism that ensured a state’s laws would *not* be preempted to the extent that it enacts either a “clean” version of UETA as originally approved by the Uniform Law Commission or another state law “consistent” with E-SIGN.¹⁴

The SECURE Notarization Act follows a nearly identical approach. It would not preempt any state law that is either an enactment of RULONA or that provides “additional or alternative” protections that are “consistent” with the national minimum standards, including the minimum five-year retention requirement for the audio-visual recording.¹⁵

The Act further follows E-SIGN by incorporating a principle of technology neutrality. A state law can “modify, limit, or supersede” the national authorization or minimum standards only if it does “not accord greater legal effect to the implementation or application of a specific technology or technical specification for performing those notarizations.”¹⁶ At its most basic level, the technology-neutrality principle says that all technologies result in equally valid notarizations with the same legal effects. Like in E-SIGN, the technology neutrality principle in the SECURE Notarization Act is limited and does not preclude a state from mandating notaries to use specific technologies, but it does prevent states from invalidating a notarization because the notary failed to use a specifically mandated technology.¹⁷

Notaries Provide a Critical Anti-Fraud Service

Equally important, the SECURE Notarization Act modernizes notarial law for the 21st century to ensure that notaries will continue to play their crucial anti-fraud role for future generations. The office of notary public is the oldest civil-law institution in America. Notaries can be continually traced back to

¹² SECURE Notarization Act § 9(a); *cf.* 15 U.S.C. § 7002(a).

¹³ 15 U.S.C. § 7001(a) (applicable to “any transaction in or affecting interstate or foreign commerce”).

¹⁴ 15 U.S.C. § 7002(a). *See also* 1 RAYMOND T. NIMMER & HOLLY K. TOWLE, THE LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS § 4.09[3] (LexisNexis A.S. Pratt) (discussing the so-called “back-in rule”).

¹⁵ SECURE Notarization Act § 9(a).

¹⁶ *Id.* § 9(a)(B)(ii); *cf.* 15 U.S.C. § 7002(a)(2)(A)(ii).

¹⁷ *Cf.* NIMMER & TOWLE, *supra* note 12, § 4.09[3][b][i]. E-SIGN’s technology neutrality principle is also incorporated into RULONA § 27. *See id.* cmt. (noting that “[t]his is the same requirement provided in ESign”).

ancient Rome.¹⁸ They made their way from Italy to England in medieval times and were one of the earliest legal transplants to the New World.¹⁹ For centuries, the American colonies²⁰ and later states have required real estate documents to be “acknowledged” before a notarial officer to reduce fraud and prove their authenticity.²¹ In nearly every state today, a conveyance or mortgage of real property continues to require a notarization to be valid or fully effective.²² The same rule often applies to powers of attorney.²³ Generations of lawmakers have thus continually reaffirmed the importance of notaries and the crucial societal benefits they provide.

A “notary public” is a public officer who attests to the genuineness of writings to render them available as evidence of the facts they contain. A notary public is also authorized to administer oaths and to take affidavits or sworn statements. While not an elected position, notaries are usually considered public officials whose acts are performed under the color of state authority.²⁴

In general, notaries public are appointed by the state governor, secretary of state, or judicial bar. The powers of a notary are defined by both statute and the common law. State laws vary on their requirements for appointment, but they commonly include: 1) a written examination; 2) a sworn oath; 3) obtaining appropriate insurance or surety bond; 4) use of a special stamp or seal; and 5) maintenance of a journal. Notaries public are usually appointed for a limited period of time (commonly for four years) subject to periodic renewal. The duties and liability of notaries are likewise products of both statutory and common law. Primary regulatory authority over notaries typically rests with the state official who appoints them. A notary who breaches a duty or engages in official misconduct may face private civil

¹⁸ Michael L. Closen & G. Grant Dixon III, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873 (1992); C.H. Zyl, *Notaries: Their Origin and Office*, 26 S. AFRICAN L.J. 34 (1909); HAN C. TEITLER, *NOTARII AND EXCEPTORES* (1985).

¹⁹ C.R. CHENEY, *NOTARIES PUBLIC IN ENGLAND IN THE THIRTEENTH AND FOURTEENTH CENTURIES* 23–25 (1972); DONNA MERWICK, *DEATH OF A NOTARY: CONQUEST & CHANGE IN COLONIAL NEW YORK* (1999); John E. Seth, *Notaries in the American Colonies*, 32 J. MARSHALL L. REV. 863 (1999).

²⁰ Joseph H. Beale, Jr., *The Origin of the System of Recording Deeds in America*, 19 THE GREEN BAG 335 (1907); George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U.L. REV. 281 (1941).

²¹ Under the Federal Rules of Evidence and many state evidence rules, a document is self-authenticating (meaning no extrinsic evidence of its authenticity is needed) if it is acknowledged by a notary. FED. R. EVID. 902(8).

²² See 1 AM. JUR. 2D *Acknowledgments* §§ 3–4 (2022); 23 AM. JUR. 2D *Deeds* § 88 (2022); 1A C.J.S. *Acknowledgment* §§ 5–6 (2022); 2 JOYCE PALOMAR, *PATTON & PALOMAR ON LAND TITLES* § 356 (3d ed.), Westlaw (database updated Dec. 2021); 14 MICHAEL ALLAN WOLF, *POWELL ON REAL PROPERTY* § 81A.04[1][g] (LexisNexis Matthew Bender).

²³ See, e.g., N.Y. GEN. OBLIG. LAW § 5-1501B (McKinney 2021) (“To be valid . . . [a power of attorney] must . . . [b]e signed . . . with the signature of the person signing duly acknowledged in the manner prescribed for the acknowledge of a conveyance of real property . . .”); CAL. PROB. CODE § 4121(c) (West 2021) (acknowledgment before notary or signature of at least two witnesses “legally sufficient”); FLA. STAT. § 709.2105(2) (2021) (two subscribing witnesses *and* acknowledgment before a notary public required).

²⁴ Michael L. Closen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651 (1998).

liability (damages),²⁵ official sanctions (including monetary fines), or suspension or removal from office.

Although there are many federal notarial officers, the vast majority of the nation's more than 4.3 million notaries are appointed by the states. Nonetheless, Congress has continually played a vital role in defining the authority and legality of notarial acts performed by state-appointed notaries throughout American history.

In the 19th century, Congress granted state-appointed notaries federal-law notarial powers on numerous occasions.²⁶ These statutes played an important role in our country's legal integration and development, especially in the then sparsely populated western territories. At the dawn of the 21st century, Congress stepped in to ensure the nationwide validity of electronic notarizations by passing the E-SIGN Act, one of the most important and successful e-commerce statutes of the Internet era.²⁷ Today, various federal statutes authorize persons to act as notaries public including consular officers, military officers, and legal personnel in the Department of Justice.

Notarization is a bedrock of our legal system, and has been for nearly all of American history. The SECURE Notarization Act will help to ensure that this continues to be the case in the 21st century.

The Advent of Remote Online Notarization

For centuries, the notarial process has also been wedded to the traditional requirements of pens, paper, and physical presence. Although webcam technology has been available since the 1990s, it took a couple of decades of technological and legal development to safely bring this technology to the notarial process.

In 2011, the first RON law was passed in Virginia, followed by Montana in 2015.²⁸ Fast-forward to today and as of May 2022, 40 states have enacted permanent statutes that approve the use of RON under state law.²⁹ The earliest RON laws paved the way, but they also exposed some gaps in security and consumer safeguards. As more states began passing similar laws, the need for uniformity and consistency became apparent to avoid conflicts.

²⁵ Closen & Dixon, *supra* note 18, at 888–93; Nancy Perkins Spyke, *Taking Note of Notary Employees: Employer Liability for Notary Employee Misconduct*, 50 ME. L. REV. 23, 28–29 (1998).

²⁶ Act of Aug. 23, 1843, ch. 188, 5 Stat. 516, 517 (1842) (the power to take acknowledgments of bail); Act of Sept. 16, 1850, ch. 52, 9 Stat. 458 (1850) (power to take oaths, affirmations, and acknowledgments under federal law to the same extent as state-appointed justices of the peace); Act of Aug. 15, 1876, ch. 304, 19 Stat. 206 (1876) (powers to take acknowledgments and affidavits as federal district court commissioners); Act of June 22, 1874, § 20, 18 Stat. 178, 186 (1874) (amending the Bankruptcy Act of 1867, 14 Stat. 517 (1867)) (bankruptcy proceedings). *See also* United States v. Curtis, 107 U.S. 671, 675 (1883) (under the 1876 Act notaries had the same powers as district court commissioners).

²⁷ Electronic Signatures in Global and National Commerce Act, § 101(g), 15 U.S.C. § 7001(g).

²⁸ Virginia Electronic Notaries Act of 2011, 2011 Va. Acts, ch. 731; 2015 Mont. Laws, ch. 391.

²⁹ <https://www.alta.org/advocacy/online-notarization.cfm>.

Getting from two states to 40 was a herculean effort that involved input from a broad coalition of stakeholders, including state officials, notary associations, consumer protection groups, the title and mortgage industries, and technology providers. In 2017, the Mortgage Bankers Association (“MBA”) and ALTA adopted model legislation that addressed many of the shortcomings identified in the earliest RON laws.³⁰ Most importantly, in 2018 the Uniform Law Commission formally adopted RULONA with the guidance of the nation’s leading notarial law experts and input from a broad cross-section of stakeholders. RULONA was a breakthrough model act and is largely consistent with the MBA-ALTA model.

The Benefits of Remote Online Notarization for American Consumers

When appropriately implemented, RON provides consumers with additional flexibility for signing documents related to real estate and other financial transactions. It is strictly optional and is simply an alternative for those Americans who wish to use it. As noted by the Consumer Financial Protection Bureau in a 2015 report, electronic loan closings can benefit consumers significantly by making the process more efficient, less complex, and more understandable.³¹

RON promotes ease of access to notary services. Americans can get documents notarized anywhere, anytime. RON is especially useful to disadvantaged or immobilized Americans who need to notarize official documents. Expanding access to broadband will only improve access to RON for more Americans, especially those in rural and underserved communities.

RON saves Americans lost wages, time and travel costs. RON eliminates the need to make appointments, take leave from work, find a babysitter, or drive for miles to find a notary to conduct a real estate closing. This flexibility helps improve the closing experience for homebuyers.

RON benefits members of the military who are deployed overseas. RON permits servicemembers to finalize important financial documents directly instead of having to rely on finding a military notary or executing a power of attorney before deployment. This lets their families more easily take advantage of favorable refinance or other transactions while deployed.

The biggest driver of RON adoption in the past two years was COVID-19. A survey conducted by the ALTA of major vendors working in the RON space found that the use of RON increased 547% during 2020 when compared to 2019. According to another ALTA survey, in 2020, more than 5% of transactions were closed with some variation of RON, and 35% of title and settlement companies offered RON to

³⁰ MODEL LEGIS. FOR REMOTE ONLINE NOTARIZATION (MORTG. BANKERS ASS’N & AM. LAND TITLE ASS’N 2017).

³¹ CFPB, LEVERAGING TECHNOLOGY TO EMPOWER MORTGAGE CONSUMERS AT CLOSING: LEARNINGS FROM THE eCLOSING PILOT (August 2015), at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-electronic-mortgage-closings-can-benefit-consumers/>.

close deals.

The pandemic made Americans rethink the meaning and importance of home. It also sped up a shift to digital, with the increased need for remote options. Current requirements for a signer to be physically in the presence of a notary are often impractical and sometimes impossible due to health concerns, social distancing, or just life. Digital transactions have been critical to helping the title insurance industry serve Americans during an unprecedented and uncertain housing market.

As a survey by ALTA member company Champion Title in Virginia showed, consumers appreciate the convenience and choice provided by RON.³² In that survey of 350 customers, 95% said they would recommend the RON process to others. Additionally, 97% of consumers who closed on transactions in Virginia using RON said the process was safe and secure. Here is what some of the consumers said about their use of RON:

- “I am stationed overseas in South Korea. My closing happened nearly 7,000 air miles away and 13 time zones different. Closing on the house would have been impossible without this option. Our dream house would have slipped away from us had we not been able to execute the buy remotely.”
- “It allows for people with disabilities, autoimmune disorders, and those without access to transportation to easily close. It’s a more inclusive and accessible option.”
- “For a family with three children, the remote process made it so much easier for us. We didn’t have to arrange for a sitter, get all the kids ready, take them to a sitter, etc. If the kids were in school, it wouldn’t be a problem but with being in a time of virtual learning, the remote process took a lot of stress off our shoulders.”
- “We had already moved across country. Remote closing saved us from flying back for one hour of signing papers. It was also much more convenient than manually signing all the papers in a real estate transaction.”
- “It allowed me to physically remain at work but take a break to take care of my closing. Minimal disruption of my workday, no dealing with commuter traffic, no finding/paying for parking in an unfamiliar location, and then having to go back to work.”

Furthermore, in a 2,000-person nationally representative Harris Poll survey³³ conducted last year on behalf of one RON provider, the majority of respondents agreed (68%) that they wish there was an easier, faster way to get a document notarized. A full 59% believe the traditional way of getting a

³² <https://blog.alta.org/2021/08/consumers-call-remote-online-notarization-process-safe-secure.html>.

³³ <https://www.businesswire.com/news/home/20210804005307/en/Notarize-Survey-Reveals-That-The-Majority-of-Americans-Feel-Secure-Making-Transactions-Online-Though-Generational-Differences-Exist>.

document notarized is outdated and hasn't kept up with the times.

Conclusion

RON benefits and protects consumers by offering them safe and convenient options for executing legal documents online. We believe now is the perfect time for Congress to expand this option for consumers and bring additional certainty to the law of RON. Consumer demand for safe and secure digital financial transactions is only growing. We have the chance to give consumers greater freedom and choice in how to close on their next home sale or purchase, or when they refinance their home mortgage, while enshrining common sense safety and soundness into the closing process.

Thank you for inviting me to testify today. ALTA is eager to serve as a resource to this Subcommittee. I am happy to answer any questions.

