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## BILL ANALYSIS



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House Bill 5811 (Substitute H-1 as passed by the House)  
Sponsor: Representative Diana Farrington  
House Committee: Financial Services  
Senate Committee: Banking and Financial Institutions

Date Completed: 6-4-18

**CONTENT**

**The bill would amend the Michigan Notary Public Act to do the following:**

- **Require the Secretary of State (SOS) and the Department of Technology, Management, and Budget (DTMB) to review, and permit the SOS and the DTMB to approve, remote electronic notarization platforms for the performance of electronic notarizations in the State.**
- **Require the SOS and the DTMB to review the standards for approving remote electronic notarization platforms, and whether currently approved platforms remained sufficient for the electronic performance of notarial acts, at least every four years.**
- **Allow a notary public to perform notarial acts using a remote electronic notarization platform if certain conditions were met.**
- **Prohibit a notary public from recording by audio or visual means a notarial act performed using a remote electronic notarization platform, unless certain conditions were met.**
- **Require a notary public to maintain a journal of notarial acts he or she performed using a remote electronic notarization platform, and require him or her to record the notarial acts contemporaneously.**
- **Permit a notary public to designate a custodian to maintain a journal and/or retain an audio or visual recording of a notarial act on the notary public's behalf.**
- **Require a person applying to be a notary public to include on his or her application, the person's e-mail address and any other information required by the SOS.**
- **Permit a notary public to consult the Internet Criminal History Access Tool when determining whether an individual met the qualifications to be appointed as a notary public.**

The bill would take effect 90 days after its enactment.

**Remote Electronic Notarization Platform**

Beginning January 1, 2019, the bill would require the Secretary of State and the Department of Technology, Management, and Budget to review, and permit the DTMB to approve, remote electronic notarization platforms for the performance of electronic notarizations in the State. A notary public could not use a platform that was not approved.

In developing criteria for the approval of a remote electronic notarization platform for use in the State, the SOS and the DTMB would have to consider, at minimum, all of the following:

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

If an remote electronic notarization platform for the performance of remote electronic notarizations were approved or certified by a government-sponsored enterprise, as that term is defined in 2 USC 622(8), the SOS and the DTMB would have to approve the platform for use in the State if verifiable proof of that approve or certification were provided to the SOS and the DTMB, unless the SOS affirmatively disallowed the use of the remote electronic notarization system.

At least every four years, the SOS and the DTMB would have to review the standards for approving remote electronic notarization platforms, and whether currently approved platforms were sufficient.

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

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

"Credential analysis" would mean a process or service by which a third party affirms the validity of an identity document through a review of public and proprietary data sources conducted remotely.

"Government-sponsored enterprise", as defined in 2 USC 622(8), means a corporate entity created by a law of the U.S. that has a Federal charter authorized by law; is privately owned; is under the direction of a board of directors; is a financial institution with the power to make loans or loan guarantees, and raise money by borrowing; does not exercise powers that are reserved to the government as a sovereign; does not have the power to limit the government financially; and has employees whose salaries are paid by the enterprise and are not Federal employees.

#### Use of Remote Electronic Notarization Platform

The bill would permit a notary public to perform a notarial act using a remote electronic notarization platform if either of the following were met:

- The notary public made all applicable determinations according to personal knowledge or satisfactory evidence, performance of the notarial act complied with Section 27 of the Act, and the notary public did not violate Section 31 in the performance of the notarial act.
- The notary public, through use of the platform, personal knowledge, or satisfactory evidence, was able to identify the record before him or her as the same record presented by the individual for notarization.

(Section 27 prescribes certain requirements pertaining to a notary public's signature on each record upon which he or she performs a notarial act. Section 31 specifies certain prohibited conduct.)

A notarial act performed using a remote electronic platform that otherwise satisfied the requirements of the Act would be presumed to satisfy any requirement under the Act that a notarial act be performed in the presence of a notary public.

A notary public would have satisfactory evidence that an individual was an individual whose signature was on a record if the individual were identified and verified through an identity proofing process or service that was part of a remote electronic notarization platform, and the person presented an identity document (a current license, ID card, or record issued by a Federal or state government that contains the individual's photograph and signature) that was verified through a credential analysis process or service that was part of a remote electronic notarization platform.

#### Audio or Visual Recording

Under the bill, a notary public could not record by audio or visual means a notarial act performed using a remote electronic notarization platform, unless the or she disclosed to the person that requested the notarial act that an audio or visual recording was being made and how the recording would be preserved, and the person consented or had previously consented to the recording. A notary public could refuse to conduct a notarial act using a remote electronic notarization platform if the person that requested the notarial act objected to an audio or visual recording of the act.

#### Journal

The bill would require a notary public, if he or she performed notarial acts using a remote electronic notarization platform, to maintain a journal that recorded, at minimum, each of those notarial acts. A notary public be required to maintain only one journal for the recording of a notarial act and would have to keep the journal either as a tangible, permanent bound register or in a tamper-evident, permanent electronic format. A notary public would have to retain the journal for at least 10 years after the performance of the last notarial act recorded in it. If a notary public were not reappointed, or his or her commission were revoked, the former notary public would have to inform the SOS where the journal was kept or, if the SOS directed, would have to forward the journal to the SOS or a repository designated by the SOS.

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

- The date, time, and nature of the notarial act.
- A description of the record, if any.
- The full name and address of each individual for whom the notarial act was performed.
- The fee charged, if any, by the notary public.

- If the identity of the individual for whom the notarial act was performed were based on personal knowledge, a statement to that effect.

If the identity of the individual for whom the notarial act was performed were based on satisfactory evidence, an entry in a journal would have to include a brief description of the method of identification and the identification credential presented, if any, including the date of issuance and expiration for the credential.

An entry made in a journal maintained by a notary public would have to refer to, but could not itself contain, any audio or visual recording of a notarial act performed using a remote electronic notarization platform. Subject to exceptions described above, a notary public would have to retain an audio or visual recording of a notarial act for at least 10 years after the notarial act was performed.

#### Designation of a Custodian

The bill would permit a notary public to designate a custodian to do either of the following on his or her behalf:

- Maintain a journal.
- Retain an audio or visual recording of a notarial act.

If an audio or visual recording of a notarial act were transferred to a custodian to hold on behalf of the notary public, the journal entry would have to identify the custodian with sufficient information to locate and contact the custodian.

#### Notary Signature

The Act requires a notary public to place his or her signature on every record upon which he or she performs a notarial act. On each record that the notary public performs a notarial act and immediately near his or her signature, he or she must convey in a specified form certain information, including the name of the notary public and the date the notarial act was performed.

Under the bill, the notary public also would have to convey, if applicable, that the notarial act was performed using a remote electronic notarization platform.

#### Notary Public Application

The Act requires a person to apply to the Secretary of State for appointment as a notary public. An application for appointment must contain certain information, including the applicant's name, residence address, date of birth, and telephone number. The bill also would require a person to include on the application his or her electronic mail address, as well as any other information required by the SOS.

#### Criminal Background Check

Under the Act, after the Secretary of State receives an application for appointment as a notary public, the SOS must determine whether the applicant meets the qualifications for appointment as a notary public. To assist in deciding whether the applicant is qualified, the SOS may use the Law Enforcement Information Network as provided in the CJIS Policy Council Act to check the criminal background of the applicant. The bill would allow the SOS also to use the Internet Criminal History Access Tool maintained by the Michigan State Police.

### Superseding Authority

The bill specifies that the Act would modify, limit, and supersede the Electronic Signatures in Global and National Commerce Act, but would not modify, limit, or supersede Section 101(c) of that Act, or authorize electronic delivery of any of the notices described in Section 103(b) of that Act.

(Section 101 of the Electronic Signatures in Global and National Commerce Act generally provides that a signature, contract, or other record relating to any transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form, and specifies certain requirements for the preservation of rights and obligations, consumer disclosures, and the retention of contracts and records.

Under Section 101(c), the use of an electronic record to provide or make available information relating to a transaction or transactions in or affecting interstate or foreign commerce must meet certain consumer disclosure and consent requirements if a statute, regulation, or other rule of law requires that information to be made available to a consumer in writing.

Section 103(b) specifies that the provisions of Section 101 do not apply to certain court orders or notices, other official court documents, certain other notices, and documents required to accompany the transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.)

MCL 55.275 et al.

Legislative Analyst: Stephen Jackson

### **FISCAL IMPACT**

The bill would create marginal but indeterminate costs for both the Department of State and the Department of Technology, Management, and Budget. The Department of State likely would incur minimal costs to acquire licenses and software for a remote notarization platform; however, those costs are yet to be determined. Additionally, both the Department of State and the DTMB would incur some costs related to the evaluation and procurement process as prescribed in the bill. Although the costs are indeterminate and would depend on the costs of licenses, software, etc., they should be minimal and each Department's annual appropriations should be able to absorb the costs.

Fiscal Analyst: Joe Carrasco

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.