

Checklist for Conforming Laws Related to Remote Online Notarization (“RON”)

PURPOSE

The purpose of this checklist is to assist state land title associations, state mortgage bankers' associations, and other interested organizations and persons in reviewing any proposed legislation for remote online notarization. Although RON legislation can take many forms, there are certain essential concepts and features that should be present in order to be consistent with the MBA-ALTA Model Legislation for Remote Online Notarization. The provisions of the Model Legislation should be referred to when you use this checklist in reviewing any proposed legislation. To assist in your review and comparison, the specific sections of the Model Legislation that correspond to this checklist are shown **in bold** where applicable below.

THREE PRIMARY QUESTIONS

Although the Model Legislation carefully covers many important concepts in its interlocking provisions, the following three considerations are of primary importance. Unless the proposed law under review answers “yes” to all three questions, it is not consistent with the MBA-ALTA Model Legislation.

1. *Mandatory Disclosure*: Does the proposed legislation require disclosure of the fact of remote online notarization in the notarial certificate? **Sec. 8(4)**.
2. *Multifactor Authentication*: Does the proposed legislation require identity to be verified through the following processes using public and private/proprietary data sources? **Sec. 8(2)(b)**.
 1. Remote presentation of a government-issued credential
 2. Credential analysis
 3. Identity proofing
3. *Audio-Video Recording*: Does the proposed legislation require the creation and retention of an audio-video recording of the notarial act? **Sec. 6(2) through (4)**.

DETAILED CHECKLIST AND ADDITIONAL INFORMATION

Key definitions. Look for the following definitions in the proposed legislation.

- “Communication technology” or “Audio-video communications”. **Sec. 1(2).**
- “Credential analysis”. **Sec. 1(3).**
- “Electronic document” or “Electronic record”. **Sec. 1(5).**
- “Electronic seal”. **Sec. 1(6).**
- “Electronic signature”. **Sec. 1(7).**
- “Identity proofing”. **Sec. 1(8).**
- “Remote online notarial certificate” or “Electronic notarial certificate”. **Sec. 1(12).**
- “Remote presentation”. **Sec. 1(15).**

Personal appearance and physical location.

- The law needs to be clear that, for notarial acts performed under the state’s authorizing RON statute, personal appearance includes both physical appearance and remote online appearance. **Sec. 1(1) and Sec. 8(5).**
 - *Example:* “As defined in this (Chapter), ‘appear before,’ ‘personally appear’ or ‘in the presence of’ means either being in the notarial officer’s physical presence or interacting with the notarial officer by means of audio-video communication technology.”
 - *Example:* “A remote online notarial act meeting the requirements of this (Chapter) and any rules adopted hereunder satisfies the requirement of any law of this state requiring an individual to appear before or in the presence of a notarial officer during the performance of a notarial act.”
- The law must require the notary to be physically located within the state while performing RON. **Sec. 1(2) and Sec. 5.**
 - *Example:* The definition of “communication technology” applies to “a notary public physically located in this state.”
 - *Example:* “A remote online notary may perform an online notarization if the notary is physically located in this state at the time of the notarial act.”
- The law should allow the principal whose signature is being notarized to be located outside the state at the time of the RON. Special considerations may apply if the principal is physically outside the United States because the act may be forbidden under the laws of the foreign state where the principal is located. **Sec. 5(2) and (3) and Sec. 8(1).**
 - *Example:* “A remote online notary public may perform a remote online notarization that meets the requirements of this (Chapter) and rules promulgated under this (Chapter) regardless of whether the principal is physically located in this state at the time of the remote online notarization.”

- *Example:* “A remote online notary public may perform a remote online notarial act using communication technology for a remotely located individual who is physically located:
 - a. in this State;
 - b. outside this State but within the United States;
 - c. outside the United States if:
 - (i) the record is to be filed with or relates to a matter before a court, governmental entity, public official, or other entity under the jurisdiction of the United States, or involves property located in the territorial jurisdiction of the United States, or a transaction substantially connected to the United States; and
 - (ii) the act of making the statement or signing the record is not prohibited by the foreign state in which the remotely located individual is located.”

Tamper-evident technology.

- The law should require use of tamper-evident technology to assure the integrity of an electronic document notarized remotely online. **Sec. 7(2).**
 - *Example:* “A remote online notary public shall attach an electronic signature and seal to the electronic notarial certificate in a manner that renders any subsequent change or modification to the electronic document to be evident.”
 - *Example:* “A notary must select one or more tamper-evident technologies to perform notarial acts with respect to electronic records.”
 - See the National Association of Secretaries of State (NASS) requirements for reliability of the remote notary public's electronic signature and electronic seal as a guide.

Adequate safeguards to protect the public and the parties relying on notarization from identity theft, forgery, undue influence, and fraud.

- Multifactor authentication should identify the signer through at least two of the following three forms of authentication: (1) what the signer possesses (credentials, e.g., driver's license, passport, military ID card, etc.); (2) what the signer knows (knowledge-based authentication, e.g., questions based on the signer's personal knowledge); and (3) who the signer is (recognition of behavioral and biological characteristics, e.g., facial or fingerprint recognition, retinal scan).
 - *Recommended Authentication Process:* The MBA-ALTA Model Legislation requires three steps: **Sec. 8(2)**
 - Remote presentation of a government-issued identity credential (something the signer possesses)
 - Credential analysis of that credential
 - Identity proofing by means of knowledge based authentication (something the signer knows) or biometric factors (something the signer is)
 - *Note on Biometric Factors:* Biometric comparison as a future option in statute is not objectionable.

- *Caution: Legislation without clear multifactor authentication:* Several versions of the Revised Uniform Law on Notarial Acts (RULONA) and other draft legislation in circulation do not expressly require the use of two or more identity verification methods or delegate the number and types of verification to a regulator without clear statutory guidance. The ALTA Taskforce for RON therefore strongly recommends the three-step process of the MBA-ALTA Model Legislation described above.
- *Caution: Examples of “identity proofing”:* The following may be acceptable examples of “identity proofing” but are NOT appropriate as stand-alone substitutes for the multifactor authentication process described above:
 - Dynamic knowledge-based authentication (KBA)
 - Use of public key infrastructure (PKI) technology
 - Analysis of biometric data
- Remote presentation and credential analysis should require acceptable government-issued identification containing a photograph and signature of the individual, to have its layout, format and security features compared against those expected for a credential of that type.
- The law should NOT allow authentication solely by means of the notary examining an identification credential over the internet through audio-video communication technology or without use of third party credential analysis.
- Each RON transaction must be recorded (audio and video). The Model Legislation only requires a recording of the “notarial act” but does not prohibit other portions of the notarial process from being recorded. Rules and regulations may require additional parts of the process to be recorded, such as the signer’s consent to RON and use of electronic signatures, and the credential analysis of the signer’s government-issued identification. While not a complete protection against fraud, recording the RON transaction serves as evidence of attribution (e.g. as a “security procedure” under § 9 of UETA) and as a deterrence of those who may see RON as an opportunity for criminal activity.
- The audio-video recording and electronic journal must be retained defined period. The Model Legislation recommends a 10-year retention requirement. **Sec. 6(4)**. Some states have adopted shorter timeframes (e.g. 5 years in Texas and Virginia; 7 years in Nevada).

Mandatory disclosure in notarial certificate.

- The certificate of acknowledgment must indicate that the document was notarized remotely online and/or through the use of audio-video communication technology. **Sec. 8(4)**. The Secretary of State (or commissioning official) may be given rulemaking authority to provide for modified forms of notarial certificates.
 - *Example:* “The acknowledgment form provided by this chapter must include a space for a remote online notarization as defined by Section __, to indicate by which method described by Subsection __ the acknowledging person appeared before the officer.”

- *Example:* “The certificate of notarial act for a record executed by a remotely located individual must indicate that the individual was remotely located. A form is sufficient if it is in the form provided by Section ___ and substantially states: ‘This notarial act involved a statement made in or a signature executed on a record by a remotely located individual using communication technology’.”
- *Example:* “The [Secretary of State] may promulgate regulations to . . . provide acceptable forms of notarial certificates for any notarial act that is a remote online notarization.”

Recordability of electronically notarized documents.

- The law should provide confidence that an electronic document notarized using RON is recordable in the official land records and that, once recorded, the document will serve as effective constructive notice upon which the public can rely; this includes the ability to record an electronically notarized (including RON) document in the official land records regardless of the capability to receive electronic recordings. **See provisions from URPERA and regarding Recordation of Electronic Records in Tangible Form, referenced on pp. 17 and 18-21 of the Model Legislation.**
- It is desirable to include a “papering-out” provision that allows an electronically notarized document to be recordable if printed-out and certified by a notary to be a true and complete copy of an electronic original. Such a provision would allow recordation of electronic documents in jurisdictions that do not currently accept electronic recordings. **See provisions for Recordation of Electronic Records in Tangible Form on pp. 18–21 of the Model Legislation.**
- Conclusive evidence and constructive notice when “papering-out”. The law should include provisions that any document which conveys or encumbers an interest in real property will impart constructive notice to third parties and be effective upon recording even if the acknowledgment or notarial act is defective, and that a completed notarial certificate is conclusive evidence that the required procedures were followed. **See subsections (g) and (h) on p. 20 of the Model Legislation.**
 - *Example:* “If a [notarial] certificate is completed with the information required by subsection ___ and is attached to or made a part of a paper document, the certificate shall be conclusive evidence that the requirements of subsection ___ have been satisfied with respect to the document.”
 - *Example:* “A document purporting to convey or encumber real property or any interest therein that has, by inadvertence or excusable neglect, been recorded by a [recorder] for the jurisdiction in which the real property is located, although the document may not have been certified in accordance with the provisions of this section, shall impart the same notice to third persons and be effective, from the time of recording, as if the document had been certified in accordance with the provisions of this section.”

Rulemaking and Standards for RON.

- The law should provide rulemaking authority for the appropriate commissioning official to implement RON. Some states will require a detailed and express delegation of authority listing each area of rulemaking authority; other states may prefer broader grants of authority to the implementing official. **Sec. 2**

- *Example:* “The Secretary of State (or commissioning official) shall [may] adopt rules necessary to implement this subchapter, including rules to facilitate online notarizations.”
- The law should also allow the appropriate commissioning official to adopt and maintain technical standards for RON. **Sec. 3(1)**
 - *Example:* “The Secretary of State (or commissioning official) by rule shall develop and maintain standards for online notarization in accordance with this subchapter, including standards for credential analysis and identity proofing.”
- The law may allow the commissioning official to confer with other state agencies and appropriate outside bodies in developing and promulgating rules and standards. **Sec. 3(2).**
 - *Example:* “In developing standards, the Secretary of State (or commissioning official) shall review and consider standards established by the National Association Secretaries of State (NASS), standards established by national standard-setting bodies such as the Mortgage Industry Standards and Maintenance Organization (MISMO), the standards and practices of other jurisdictions, and the views of other governmental officials and entities and other interested persons.”
- *Optional:* The law may confer various specific areas of rulemaking authority on the commissioning official. Such rules may address:
 - Application, qualifications and authority of remote online notaries.
 - Electronic journal. This requirement protects against fraud and other legal challenges; the law should require the notary to use only electronic records (instead of a traditional paper journal) for RON.
 - Any required notice regarding performance of notarial act.
 - Standards for the performance of the notarial act by means of audio-visual communication technology.
 - Approval of audio-visual communication technology, credential analysis technology, and third-person identity proofing technology.
 - Procedures for RON including remote presentation, credential analysis, third-person identity verification and identity proofing.
 - Requirements or procedures to approve providers of communication technology, credential analysis technology, or third-person identity proofing technology.
 - Fees for the remote online notary public application; permissible fees to be charged by the notary for RON.
 - Acceptable forms of notarial certificates for any notarial act that is a RON.
 - Procedures and requirements for the termination of remote online notary commission.
 - Record retention procedures and requirements.
 - Standards for the third-party repositories for the retention of the audio-video recording of the notarial act.

Other considerations.

- Witnesses required under state law? If witnesses are required for the validity of certain instruments, the law should provide clarity and consistency with any statutes that require the use of both notaries and witnesses.
 - It should give guidance as to whether the witness must be in physical proximity to the signer or whether the witness may be remote.
 - If remote witnessing is permitted, it may set standards for the identification of those witnesses similar to those required of the signer.
 - If remote witnessing is permitted, it should define what it means to witness an electronic signature. As there is not a physical act (like moving a pen) that will be visible across an audio-video connection focused on the signer's face, consider defining the act of remotely witnessing as hearing the signer make a statement to the effect that the signer has signed the electronic record.
- Unauthorized access. Access to electronic notarial records, electronic signatures and seal should be kept secure from unauthorized access or use. **Sec. 6(3), Sec. 7(1) and (3).** Notaries public and RON technology vendors should be required to take reasonable precautions in the preparation and transmission of electronic records. **Sec. 8(3).** The law may consider granting access to the records to a title agent, settlement agent, or title insurer that has engaged the notary for purposes of a real estate transaction.
- Repository and custodian provisions. Notaries should be allowed to designate a third-party repository or custodian to hold the recording and electronic journal on their behalf. **Sec. 6(4)(a).**
 - *Example:* "The remote online notary public may designate as a custodian of the recording and electronic journal (i) the employer of the remote online notary public if evidenced by a record signed by the remote online notary public and the employer, or (ii) a repository meeting the standards established by the Secretary of State (or commissioning official)."
 - *Example:* "The remote online notary public, a guardian of an incapacitated remote online notary public, or the personal representative of a deceased remote online notary public, may, by contract with a secure repository in accordance with rules established under this Chapter, delegate to the repository the remote online notary public's duty to retain the required recordings of audio-video communications."