

HOUSE No. 4716

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, April 21, 2022.

The committee on The Judiciary to whom was referred the petition (accompanied by bill, House, No. 1602) of Carmine Lawrence Gentile relative to regulating notarization to allow for electronic notaries, a petition (accompanied by bill, Senate, No. 1067) of Eric P. Lesser, Brian M. Ashe, Kelly W. Pease and Joanne M. Comerford for legislation to establish a commission on electronic notarization, a petition (accompanied by bill, House, No. 493) of Richard M. Haggerty, Christopher Hendricks and Kate Lipper-Garabedian for legislation to further regulate virtual notarization, and a petition (accompanied by bill, House, No. 1601) of Carmine Lawrence Gentile for legislation to establish a commission (including members of the General Court) on electronic notarization, reports recommending that the accompanying bill (House, No. 4716) ought to pass.

For the committee,

MICHAEL S. DAY.

HOUSE No. 4716

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Second General Court
(2021-2022)

An Act modernizing notary services.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 222 of the General Laws, as appearing in the 2020 Official
2 Edition, is hereby amended by striking out section 1 in its entirety and inserting in place thereof
3 the following section:-

4 Section 1. For the purposes of this chapter, the following words shall have the following
5 meanings, unless the context clearly requires otherwise:

6 "Acknowledgment", a notarial act in which an individual, at a single time appears in
7 person before a notary public, is identified by the notary public through satisfactory evidence of
8 identity and presents a document or electronic record to the notary public and indicates to the
9 notary public that the signature on the document or record before the notary was voluntarily
10 affixed by the individual for the purposes stated within the document or electronic record or that
11 the signature on the document or electronic record was the individual's free act and deed and, if
12 applicable, that the individual was authorized to sign in a particular representative capacity.

"Affirmation", a notarial act, or part thereof, that is legally equivalent to an oath and in which an individual, at a single time appears in person before a notary public, is identified by the notary public through satisfactory evidence of identity and the individual makes a vow of truthfulness or fidelity under the penalties of perjury without invoking a deity.

"Appears in person", "appears personally", or "personally appears", being in the same physical location as another individual and close enough to see, hear, communicate with, and exchange tangible identification credentials with that individual; or interacting with a remotely located individual by means of communication technology in compliance with section 28 of this chapter.

"Communication technology", an electronic device or process that allows a notary public and a remotely located individual to communicate with each other simultaneously by sight and sound, and when necessary and consistent with other applicable law, facilitates communication with a remotely located individual with a vision, hearing, or speech impairment.

"Copy certification", a notarial act in which a notary public is presented with a document that the notary public copies, or supervises the copying thereof, by a photographic or electronic copying process, compares the original document to the copy and determines that the copy is accurate and complete.

"Credential analysis", a process or service that meets guidelines established by the Secretary, through which a third person affirms the validity of a current government-issued identification credential by review of public and proprietary data sources.

"Credible witness", an honest, reliable and impartial person who personally knows an individual appearing before a notary and who takes an oath or affirmation before the notary to vouch for that individual's identity.

"Dynamic knowledge-based authentication", a form of identity proofing based on a set of questions which pertain to an individual and are formulated from public or proprietary data sources.

"Electronic", relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Electronic record", information that is created, generated, sent, communicated, received, or stored by electronic means.

"Electronic signature", an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

"Foreign state", a jurisdiction other than the United States, a state, or a federally recognized Indian tribe.

"Identity proofing", a process or service that meets the guidelines established by the Secretary, by which a third person provides a notary public with a means to verify the identity of a remotely located individual by a review of personal information from public or private data sources, which may include credential analysis, dynamic knowledge-based authentication, analysis of biometric data such as, but not limited to, facial recognition, voiceprint analysis, or fingerprint analysis, or other means permitted by the Secretary.

54 "Journal", a chronological record of notarial acts performed by a notary public.

55 "Jurat", a notarial act in which an individual, at a single time appears in person before a
56 notary public, is identified by the notary public through satisfactory evidence of identity and: (i)
57 presents a document or electronic record; (ii) signs the document or electronic record in the
58 presence of the notary public; and (iii) takes an oath or affirmation before the notary public
59 vouching for the truthfulness or accuracy of the contents of the signed document or electronic
60 record.

61 "Notarial act" or "notarization", an act that a notary public is empowered to perform,
62 including acts performed electronically in accordance with this chapter.

63 "Notarial certificate", the part of or attachment to a notarized document or electronic
64 record for completion by the notary that bears the notary public's signature and seal and states
65 the venue, date and facts that are attested by the notary public in a particular notarial act or
66 notarization.

67 "Notary public" or "notary", a person commissioned to perform official acts pursuant to
68 Article IV of the Amendments of the Constitution.

69 "Notarial seal," a physical image or impression affixed, stamped, or embossed on a
70 tangible record; or an electronic image attached to, or logically associated with, an electronic
71 record.

72 "Oath", a notarial act, or part thereof, that is legally equivalent to an affirmation and in
73 which an individual, at a single time, appears in person before a notary public, is identified by

the notary public through satisfactory evidence of identity and takes a vow of truthfulness or fidelity under the penalties of perjury by invoking a deity.

"Official misconduct", a violation of sections 13 to 24, inclusive, or any other general or special law in connection with a notarial act or a notary public's performance of an official act in a manner found to be grossly negligent or against the public interest.

"United States", a location within the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory, insular possession, or other location subject to the jurisdiction of the United States.

"Personal knowledge of identity", familiarity with an individual resulting from interactions with that individual over a period of time sufficient to ensure beyond doubt that the individual is the person whose identity is claimed.

"Principal", a person whose signature is notarized or a person taking an oath or affirmation before a notary public.

"Record", information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

"Regular place of work or business", a place where an individual spends a substantial portion of their working or business hours.

"Remotely located individual", an individual who is not in the physical presence of the notary public who performs a notarial act pursuant to section 28 of this chapter.

"Satisfactory evidence of identity", identification of an individual based on: (i) at least 1 current document issued by a federal or state government agency bearing the photographic image

of the individual's face and signature; (ii) the oath or affirmation of a credible witness unaffected by the document or transaction who is personally known to the notary public and who personally knows the individual; or (iii) identification of an individual based on the notary public's personal knowledge of the identity of the principal; provided, however, that for a person who is not a United States citizen, "satisfactory evidence of identity" shall mean identification of an individual based on a valid passport or other government-issued document evidencing the individual's nationality or residence and which bears a photographic image of the individual's face and signature. For purposes of a notarial act performed using communication technology for a remotely located individual, "satisfactory evidence of identity" shall be determined pursuant to section 28 of this chapter.

"Secretary," the Secretary of the Commonwealth.

"Signature witnessing", a notarial act in which an individual, at a single time, appears in person before a notary public, is identified by the notary public through satisfactory evidence of identity and presents a document or electronic record and signs the document or electronic record in the presence of the notary public.

"Tamper evident" means the use of a set of applications, programs, hardware, software, or other technologies that will display evidence of any changes to an electronic record.

SECTION 2. Section 1A of chapter 222 of the General Laws, as so appearing, is hereby amended by striking out, in line 6, the number "26" and inserting in place thereof the following number:- "29"

SECTION 3. Section 8 of chapter 222 of the General Laws, as so appearing, is hereby amended by striking out subsection (b) in its entirety and inserting in place thereof the following subsection:-

(b) A notary public shall keep an official notarial seal that shall be the exclusive property of the notary public. A notary public shall not permit another to use such notarial seal. A notary public shall obtain a new seal upon renewal of the commission, upon receipt of a new commission or if the name of the notary public has changed. The notarial seal shall include: (1) the notary public's name exactly as indicated on the commission; (2) the words "notary public" and "Commonwealth of Massachusetts" or "Massachusetts"; (3) the expiration date of the commission in the following words: "My commission expires ____"; and (4) a facsimile of the seal of the commonwealth.

If a notarial seal that requires ink is employed, black ink shall be used. The seal of a notary public may be a digital image that appears in the likeness or representation of a traditional physical notary public seal. Only the notary public whose name and registration number appear on an electronic seal shall affix that seal. If the seal is electronically generated, it shall include the words "Electronically affixed." The requirements of this subsection shall be satisfied by using a seal that, together, include all of the information required by this section. Failure to comply with this section shall not affect the validity of any instrument or the record thereof.

SECTION 4. Section 16 of chapter 222 of the General Laws, as so appearing, is hereby amended by inserting, in line 3, after the word "notarization" the following words:- , except as specifically provided in this chapter.

SECTION 5. Section 16 of chapter 222 of the General Laws, as so appearing, is hereby amended by inserting, in line 27, after the word “services” the following words:- ; further provided, however, that a notary public shall not be precluded from receiving an additional technology services fee that has been clearly disclosed in advance to the person requesting the service so long as the technology services fee reflects the actual reasonable cost to the notary public of utilizing a third-party technology service provider.

SECTION 6. Section 18 of chapter 222 of the General Laws, as so appearing, is hereby amended by inserting after subsection (d) the following subsection:-

(e) Whenever the secretary believes that a notary public registered pursuant to section 28 has engaged in a pattern of conduct, or a standard, practice, or procedure that the secretary determines is contrary to section 46E of chapter 221, he may order the notary public to comply with the law. The attorney general may enforce the order by civil action as provided in said section 46E. The secretary may adopt regulations governing administrative proceedings under this section. The remedy provided by this section shall not in any way limit the availability of judicial remedies to any person or official.

SECTION 7. Section 22 of chapter 222 of the General Laws, as so appearing, is hereby amended by striking out, in lines 4 and 5, the words “The journal shall be a permanently bound book with numbered pages, except as otherwise provided in this section” and inserting in place thereof the following words:- A journal may be created on a tangible medium or in an electronic format. If the journal is maintained on a tangible medium, it must be a permanent, bound register with numbered pages. If the journal is maintained in an electronic format, it must be in a permanent, tamper-evident electronic format complying with the rules of the Secretary.

SECTION 8. Section 22 of chapter 222 of the General Laws, as so appearing, is hereby amended by striking out, in lines 6 and 7, the words “active journal at the same time” and inserting in place thereof the following words:- tangible journal at any time. A notary may keep more than 1 electronic journal provided that each electronic journal conforms to the requirements of subsection (a).

SECTION 9. Section 22 of chapter 222 of the General Laws, as so appearing, is hereby amended by striking out, in lines 33 and 34, the words “(3) the fee, if any, charged for the notarial act; and (4) the address where the notarization was performed” and inserting in place thereof the following words:- (3) a notation indicating whether the notarial act was conducted in person or remotely; (4) the fee, if any, charged for the notarial act; and (5) the address where the notarization was performed.

SECTION 10. Section 22 of chapter 222 of the General Laws, as so appearing, is hereby amended by striking out, in lines 51 and 57, each time they appear, the words “state secretary” and inserting in place thereof the following word:- “Secretary”

SECTION 11. Section 22 of chapter 222 of the General Laws, as so appearing, is hereby amended by striking out subsection (i) in its entirety and inserting in place thereof the following subsection:-

(i) If not in use, a journal shall be kept under the exclusive control of the notary public or a third-party technology service provider designated by the notary public, provided there is a mutual agreement by both the notary public and the third-party service provider, and shall not be used by any other notary public or surrendered to an employer upon termination of employment.

SECTION 12. Chapter 222 of the General Laws is hereby amended by inserting after section 26 the following sections:-

Section 27. Electronic notarization

(a) A notary public may select one or more tamper-evident technologies to perform notarial acts with respect to electronic records. A person may not require a notary public to perform a notarial act with respect to an electronic record with a technology that the notary public has not selected.

(b) The Secretary shall have the authority to establish standards for approval of technologies for use by notaries public commissioned by the Commonwealth of Massachusetts.

(c) A tangible copy of an electronic record shall be accepted as the equivalent of an original document for purposes of recording said copy, provided that: (1) the copy contains a notarial certificate that satisfies all requirements for an original document to be accepted for recording; (2) the copy satisfies all requirements for recording an original document set forth in chapter 183 and chapter 185 of the general laws, as applicable; and (3) the notarial officer executing the notarial certificate certifies that the tangible copy is an accurate copy of the electronic record.

Section 28. Notarial act performed for remotely located signatory.

(a) A notary public physically located in this state may perform a notarial act using communication technology for a remotely located individual who is the principal in a notarial act if:

(1) the notary public: (i) has personal knowledge of the identity of the individual; (ii) has identified the remotely located individual by means of an oath or affirmation of a credible witness unaffected by the document or transaction who is personally known to the notary public and who personally knows the individual; or (iii) reasonably can identify the individual by at least two different types of identity proofing processes or services;

(2) the notary public is able to execute the notarial act in a single, real-time session;

(3) the notary public is able reasonably to confirm that a record before the notary public is the same record in which the remotely located individual made a statement or on which the individual executed a signature; and

(4) the notary public, or a person acting on behalf of the notary public, creates an audio-visual recording of the performance of the notarial act.

(b) A notary public physically located in the commonwealth may perform a notarial act using communication technology for a remotely located individual who is located outside the United States if: (1) the record is to be filed with or relates to a matter before a public official or court, governmental entity, or other entity subject to the jurisdiction of the United States; or involves property located in the territorial jurisdiction of the United States or a transaction substantially connected with the United States; and (2) 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.

(c) A notary public shall not use communication technology to notarize a record related to the electoral process, or a will, codicil, or document purporting to be a will or codicil.

(d) Before a notary public performs the notary public's initial notarization using communication technology, the notary public shall register as a remote notary with the Secretary, inform the Secretary that the notary public will be performing remote notarizations and identify the communication technology that the notary public intends to use. The remote notarization system must conform to the requirements of this chapter and any rules adopted by the Secretary. The notice must be submitted in the form required by the Secretary and must: (1) include an affirmation that the notary public has read and will comply with this section and all rules adopted by the Secretary; (2) be accompanied by proof that the notary public has successfully completed any training and examination required by this section or that may be required by the Secretary; and (3) identify a usual place of business in this state or, if a foreign entity, identify a registered agent, and in either case an address for service of process in connection with a civil action or other proceeding.

(e) If a notarial act is performed under this section, the certificate of notarial act required by section 15 must indicate that the notarial act was performed remotely using communication technology and identify the venue for the notarial act as the county within the commonwealth where the notary public is physically located while performing the notarial act.

(f) A notary public, a guardian, conservator, or agent of a notary public, or a personal representative of a deceased notary public shall retain the audio-visual recording created under subsection (a)(4) or cause the recording to be retained by a repository designated by or on behalf of the person required to retain the recording. The recording must be retained for a period of ten (10) years after the recording is made.

(g) Upon request, the notary public shall make available electronic copies of the pertinent entries in the electronic journal and provide access to any related audio-video communication recording to the following persons: (1) the parties to an electronic record notarized by the notary public; (2) the title insurer reviewing an insured transaction in the context of an audit of its agent, if the agent conducted the electronic notarial act as an element of the insured transaction; and (3) any other persons pursuant to a subpoena, court order, law enforcement investigation, or other lawful inspection demand.

(h) The Secretary shall have the authority to establish standards for the use of communication technology and identity proofing. A notary public who uses communication technology shall conform to those standards.

(i) In addition to the authority set forth in subsection (h), the Secretary may adopt rules under this section regarding performance of the notarial act. The rules may: (1) prescribe the means of performing a notarial act involving a remotely located individual using communication technology; (2) establish requirements or procedures to approve providers of communication technology and the process of identity proofing; and (3) establish standards for the retention of an audio-visual recording created under subsection (a)(4).

(j) By allowing its communication technology or identity proofing to facilitate a notarial act for a remotely located individual or by providing storage of the audio-visual recording created under subsection (a)(4), the provider of the communication technology, identity proofing, or storage appoints the Secretary as the provider's agent for service of process in any civil action in this state related to the notarial act.

(k) Unless the Secretary adopts rules setting standards that are equally or more protective, the following minimum standards shall apply to notarizations utilizing communication technology performed by a notary public in the Commonwealth:

(1) Identity proofing by means of dynamic knowledge-based authentication that must have, at a minimum, the following security characteristics:

(i) the remotely located individual must be presented with five or more questions with a minimum of five possible answer choices per question;

(ii) each question must be drawn from a third-party provider of public and proprietary data sources and be identifiable to the social security number or other identification information of the remotely located individual, or such individual's identity and historical events records;

(iii) responses to all questions must be made within a 2-minute time constraint;

(iv) the remotely located individual must answer a minimum of 80 percent of the questions correctly;

(v) if the remotely located individual fails the first attempt, the individual may be offered one additional attempt within twenty-four hours of the initial failed attempt; and

(vi) during the second attempt, the remotely located individual may not be presented with more than three questions from the prior attempt.

(2) Identity proofing by means of credential analysis using one or more commercially available automated software or hardware processes that, consistent with sound commercial practices, aid the notary public in verifying the authenticity of the credential by analyzing the integrity of visual, physical, or cryptographic security features to indicate that the credential is

not fraudulent or inappropriately modified; and use information held or published by the issuing source or authoritative source to confirm the validity of credential details. The results of the credential analysis process must be provided to the notary public performing the notarial act.

(3) Use of audio-video communication technology in completing notarizations that must meet the following requirements: (i) the signal transmission must be reasonably secure from interception, access, or viewing by anyone other than the participants communicating; and (ii) the technology must provide sufficient audio clarity and video resolution to enable the notary to communicate with the remotely located individual and any witness, and to confirm the identity of the remotely located individual and any witness, as required, using identity proofing.

(4) The communication technology is deemed to have satisfied tamper-evident technology requirements by use of technology that renders any subsequent change or modification to the electronic record evident.

(5) With respect to notarial acts conducted in the course of a closing, as that term is defined in section 46E of chapter 221, the communication technology shall be engaged by the closing attorney with the approval of the lender. Upon successful verification of the identity of the remotely located individual by the notary as required by Section 28(a)(1) of chapter 222, such attorney shall enter and affirm the Massachusetts Board of Bar Overseers assigned number of the attorney prior to the conduct of the first notarial act. The communication technology shall be responsible for recording such information in a manner that is logically associated with the transaction and shall retain such information for the same length of time and in the same manner as it retains all other information regarding the notarial act.

(6) In addition to any coverage it elects to provide for individual notaries public, maintenance of errors and omissions insurance coverage by a communication technology service provider in a total amount of at least \$250,000 in the annual aggregate with respect to potential errors or omissions in or relating to the technology or processes provided by the communication technology service provider. A notary public is not responsible for the security of the systems used by the remotely located individual or others to access the notarization session.

(7) A two-hour in-person or online course addressing the duties, obligations, and technology requirements for conducting remote notarizations offered by the Secretary or a vendor approved by the Secretary shall be completed by a notary public prior to the notary public's initial notarization using communication technology. Each such provider shall make the in-person or online course generally available to all applicants. Regardless of membership in the provider's organization, the provider shall charge each attendee the same cost for the course unless the course is provided in conjunction with a regularly scheduled meeting of the provider's membership.

(l) Notwithstanding any provision of this act to the contrary, with respect to any document executed in the course of a closing, as that term is defined in section 46E of chapter 221, involving a mortgage or other conveyance of title to residential real property, only a notary public appointed pursuant to this chapter who is an attorney licensed to practice law in the commonwealth or a non-attorney, either under the direct supervision of or pursuant to a direct request by such an attorney who is directing or managing the closing, shall perform an acknowledgment, affirmation or other notarial act utilizing communication technology. The notarial certificate affixed to any such document shall recite the Massachusetts Board of Bar Overseers registration number of the Massachusetts attorney notary, or of the supervising

Massachusetts attorney in the event that the document is notarized by a non-attorney. Failure to comply with this section shall not affect the validity of the document or the recording thereof.

Section 29. A notary public shall not use, sell, or offer to sell to another person or transfer to another person for use or sale any personal information obtained under Section 28 that identifies a remotely located individual, a witness to a remote notarization, or a person named in a record presented for remote notarization, except: (a) as necessary to facilitate performance of a notarial act; (b) to effect, administer, enforce, service, or process a record provided by or on behalf of the individual or the transaction of which the record is a part; or (c) in accordance with this section, including the rules adopted pursuant thereto, or other applicable federal or state law, or to comply with a lawful subpoena or court order.

SECTION 12. Chapter 221 of the General Laws is hereby amended by inserting after section 46D the following section:-

Section 46E. Practice of law in real estate closings involving the use of communication technology.

(a) With respect to real estate closings involving the use of communication technology, as that term is defined in chapter 222, the following words, as used in this section, shall have the following meanings, unless the context clearly requires otherwise:

“Closing,” the consummation of a transaction between parties for the purpose of granting a mortgage or otherwise transferring title to real property, including the execution of documents necessary to accomplish the valid and proper transfer of title and the transfer of the consideration for the conveyance, whether done simultaneously with or subsequent to the execution of documents for the transfer of title; excepting herefrom any transaction in which the consideration

for the transfer of title is evidenced solely by a home equity loan or line of credit that is secured by a mortgage lien on a residential dwelling with four or fewer separate households, does not involve the issuance of a lender's or mortgagee's policy of title insurance in connection with such transaction, and is to be retained by the lender and not sold on the secondary mortgage market.

"Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly or in a nominee capacity, a mortgage loan securing real property, including, but not limited to, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; provided, that "creditor" shall also include any servant, employee, representative or agent of a creditor.

(b) Notwithstanding any provision of the general laws, no person shall direct or manage a real property closing unless that person has been admitted as an attorney in the Commonwealth of Massachusetts and has not been disqualified from the practice of law due to resignation, disbarment, suspension or placement on inactive status.

(c) No person shall take the following actions in preparation for, or furtherance of, a closing unless that person has been admitted as an attorney in the Commonwealth of Massachusetts and has not been disqualified from the practice of law due to resignation, disbarment, suspension or placement on inactive status:

(1) giving or furnishing legal advice as to the legal status of title;

(2) ensuring that the seller, or the borrower-mortgagor in a mortgage refinancing transaction, is in a position to convey marketable title to the residential property at issue;

371 (3) issuing a certification of title pursuant to section 70 of chapter 93;

372 (4) drafting a deed to real property on behalf of another;

373 (5) ensuring that the documents necessary for the transfer of title are executed in
374 accordance with the laws of the Commonwealth of Massachusetts;

375 (6) disbursing, or managing the disbursement, of consideration for the conveyance.

376 (d) The attorney general may initiate an action, including a petition for injunctive relief,
377 against any person or creditor whose violation of this section is part of a pattern, or consistent
378 with a practice, of noncompliance. The supreme judicial court and the superior court shall have
379 concurrent jurisdiction in equity. A person having an interest or right that is or may be adversely
380 affected by a violation of this section may initiate an action against the person or creditor for
381 private monetary remedies.