



Eric Milstead
Director

Legislative Services Office

Idaho State Legislature

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MEMORANDUM

TO: Senators LODGE, Harris, Stennett and,
Representatives HARRIS, Armstrong, Smith

FROM: Kristin Ford - Division Manager

DATE: January 08, 2020

SUBJECT: Temporary Rule

IDAPA 34.07.01 - Rules Governing Notarial Acts Performed for Remotely Located Individuals (New Chapter) - Adoption of Temporary Rule - Docket No. 34-0701-2001

We are forwarding this temporary rule to you for your information only. No analysis was done by LSO. This rule is posted on our web site. If you have any questions, please call Kristin Ford at the Legislative Services Office at (208) 334-4845. Thank you.

Attachment: Temporary Rule

Kristin Ford, Manager
Research & Legislation

Paul Headlee, Manager
Budget & Policy Analysis

April Renfro, Manager
Legislative Audits

Glenn Harris, Manager
Information Technology

Statehouse, P.O. Box 83720
Boise, Idaho 83720-0054

Tel: 208-334-2475
www.legislature.idaho.gov

IDAPA 34 – SECRETARY OF STATE
34.07.01 – RULES GOVERNING NOTARIAL ACTS PERFORMED FOR
REMOTELY LOCATED INDIVIDUALS
DOCKET NO. 34-0701-2001 (NEW CHAPTER)
NOTICE OF RULEMAKING – ADOPTION OF TEMPORARY RULE

EFFECTIVE DATE: The effective date of the temporary rule is January 2, 2020.

AUTHORITY: In compliance with Sections 67-5226, Idaho Code, notice is hereby given this agency has adopted a temporary rule. The action is authorized pursuant to Sections 51-127 and 51-114A, Idaho Code.

DESCRIPTIVE SUMMARY: The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule:

This temporary rulemaking will govern the performance of notarial acts for remotely located individuals by use of communication technology and describe specifications for the use of tamper-evident technologies that are required for notarial acts performed with respect to electronic records.

TEMPORARY RULE JUSTIFICATION: Pursuant to Section 67-5226(1)(c), Idaho Code, the Governor has found that temporary adoption of the rule is appropriate for the following reasons:

This temporary rule is necessary to provide the guidance needed for the implementation of changes made during the 2019 legislative session that take effect as of January 1, 2019 with regards to notarizations performed for a remotely located individual through the means of communication technology, as per Idaho Code Title 51, Chapter 1.

FEE SUMMARY: No fee associated with this temporary rule.

ASSISTANCE ON TECHNICAL QUESTIONS: For assistance on technical questions concerning the temporary rule, contact Chief Deputy Chad Houck at (208) 332-2862.

Dated this 25th day of November, 2019.

Chad Houck
Chief Deputy
Secretary of State, Administrative Office
700 W. Jefferson, Room E205
P.O. Box 83720
Boise, ID 83720-0080
Phone: (208) 332-2862
Fax: (208) 334-2282

THE FOLLOWING IS THE TEXT OF THE TEMPORARY RULE FOR DOCKET NO. 58-0102-1401
(Only Those Sections With Amendments Are Shown.)

34.07.01 – RULES GOVERNING NOTARIAL ACTS PERFORMED
FOR REMOTELY LOCATED INDIVIDUALS

000. LEGAL AUTHORITY.

In accordance with Sections 51-127 and 51-114A, Idaho Code, the Secretary of State has authority to promulgate administrative rules in order for notaries public to perform notarial acts for remotely located individuals by use of communication technology not inconsistent with the Revised Uniform Law on Notarial Acts (2018) enacted as Title 51, Chapter 1, Idaho Code. (1-2-20)T

001. TITLE AND SCOPE.

01. Title. These rules are titled IDAPA 34.07.01, “Rules Governing Notarial Acts Performed for Remotely Located Individuals.” (1-2-20)T

02. Scope. These rules will govern the performance of notarial acts for remotely located individuals by use of communication technology under Title 51, Chapter 1, Idaho Code. Only notaries public who have been authorized to perform notarial acts with respect to electronic records and by the Secretary of State under this chapter for remotely located individuals are governed by this chapter. Additional specifications for the use of tamper-evident technologies are required for notarial acts performed with respect to electronic records as described in Title 51, Chapter 1, Idaho Code. (1-2-20)T

002. -- 009. (RESERVED)

010. DEFINITIONS.

For all terms used here but not otherwise defined, the meaning will be the same as in Sections 51-102 and 51-114A, Idaho Code.

01. Knowledge-Based Authentication. An identity assessment used by a notary public to identify an individual that is based on a set of questions formulated from public or private data sources that does not contain a question for which the individual provided a prior answer to the person doing the assessment. (1-2-20)T

011. REQUIRED NOTIFICATION TO SECRETARY OF STATE.

01. Qualification Requirements. An individual qualifies to perform notarial acts for remotely located individuals by: (1-2-20)T

a. Being duly commissioned as a notary public under Section 51-121, Idaho Code; (1-2-20)T

b. Being authorized by the Secretary of State to perform electronic notarizations; and (1-2-20)T

c. Providing notice by application to the Secretary of State that the notary public will be performing notarial acts facilitated by communication technology that meets the requirements of this chapter. (1-2-20)T

02. Notification Form. The notification required under this section must be on a form as prescribed by the Secretary of State. (1-2-20)T

03. Submission of Notification. The notification must be submitted to the Secretary of State in writing or as otherwise provided by information posted on the Secretary of State’s website. (1-2-20)T

04. Renewal of Commission. The renewal of the commission of a notary public who has previously qualified to perform notarial acts for remotely located individuals under this section constitutes renewal of the notary public's qualification without the necessity of submission of another notification under this section. (1-2-20)T

05. Updated Technology. This section does not prohibit a notary public from receiving, installing, or using a hardware or software update to the technologies that the notary public identified under Subsection 011.02 of this chapter if the hardware or software update does not result in technologies that are materially different from the technologies that the notary public identified. (1-2-20)T

012. USE OF ELECTRONIC RECORDS.

01. Tamper-Evident Technology Required. A notary shall 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 use a technology that the notary public has not selected. (1-2-20)T

02. Digital Certificate. Tamper-evident technology shall consist of a digital certificate complying with the X.509 standard adopted by the International Telecommunication Union or a similar industry-standard technology. A notary public shall attach or logically associate the notary public's electronic signature and official stamp to an electronic record that is the subject of a notarial act by use of a digital certificate. A notary public may not perform a notarial act with respect to an electronic record if the digital certificate: (1-2-20)T

- a. Has expired; (1-2-20)T
- b. Has been revoked or terminated by the issuing or registering authority; (1-2-20)T
- c. Is invalid; or (1-2-20)T
- d. Is incapable of authentication. (1-2-20)T

013. IDENTITY PROOFING.

If a notary public does not have satisfactory evidence of the identity of a remotely located individual under Section 014 of this chapter, the notary public must reasonably verify the individual's identity through two (2) different types of identity proofing consisting of a multi-factor authentication procedure as provided in this section. The procedure shall analyze the individual's identity credential against trusted third-person data sources, bind the individual's identity to the individual following successful knowledge-based authentication, and permit the notary public visually to compare the identity credential and the individual. The analysis of the identity credential and the knowledge-based authentication shall conform to the following requirements: (1-2-20)T

01. Credential Analysis. The analysis of an identity credential must use public or private data sources to confirm the validity of the identity credential presented by a remotely located individual and, at a minimum: (1-2-20)T

- a. Use automated software processes to aid the notary public in verifying the identity of each remotely located individual; (1-2-20)T
- b. Require that the identity credential passes an authenticity test, consistent with sound commercial practices that use appropriate technologies to confirm the integrity of visual, physical, or cryptographic security features and to confirm that the identity credential is not fraudulent or inappropriately modified; (1-2-20)T
- c. Use information held or published by the issuing source or an authoritative source, as available and consistent with sound commercial practices, to confirm the validity of personal details and identity credential details; and (1-2-20)T
- d. Enable the notary public visually to compare for consistency the information and photograph on the identity credential and the remotely located individual as viewed by the notary public in real time through communication technology. (1-2-20)T

02. Knowledge-Based Authentication. A knowledge-based authentication is successful if it meets the following requirements: (1-2-20)T

a. The remotely located individual must answer a quiz consisting of a minimum of five questions related to the individual's personal history or identity formulated from public or private data sources; (1-2-20)T

b. Each question must have a minimum of five (5) possible answer choices; (1-2-20)T

c. At least eighty percent (80%) of the questions must be answered correctly; (1-2-20)T

d. All questions must be answered within two (2) minutes; (1-2-20)T

e. If the remotely located individual fails the first attempt, the individual may retake the quiz one (1) time within twenty-four (24) hours; (1-2-20)T

f. During a retake of the quiz, a minimum of forty percent (40%) of the prior questions must be replaced; (1-2-20)T

g. If the remotely located individual fails the second attempt, the individual is not allowed to retry with the same notary public within twenty-four (24) hours of the second failed attempt; and (1-2-20)T

h. The notary public must not be able to see or record the questions or answers. (1-2-20)T

014. OTHER METHODS OF IDENTITY PROOFING.

A notary public has satisfactory evidence of the identity of a remotely located individual if the notary public has personal knowledge of the identity of the individual or if the notary public has satisfactory evidence of the identity of the individual by oath or affirmation of a credible witness appearing before the notary as provided in Section 51-107, Idaho Code. A credible witness may be a remotely located individual if the notary public, credible witness, and individual whose statement or signature is the subject of the notarial act can communicate by using communication technology. A remotely located credible witness must meet the same requirements for identity proofing found in Section 013 of this chapter, or the notary public must have personal knowledge of the identity of the remotely located credible witness. (1-2-20)T

015. COMMUNICATION TECHNOLOGY.

01. Audio-Video Feeds. Communication technology shall: (1-2-20)T

a. Provide for synchronous audio-video feeds of sufficient video resolution and audio clarity to enable the notary public and remotely located individual to see and speak with each other; and (1-20-20)T

b. Provide a means for the notary public 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 remotely located individual executed a signature. (1-2-20)T

02. Security Measures. Communication technology shall provide reasonable security measures to prevent unauthorized access to the live transmission of the audio-visual feeds, the methods used to perform the identity proofing process under Sections 013 or 014 of this chapter, and the electronic record that is the subject of the notarial act. (1-2-20)T

03. Workflow. If a remotely located individual must exit the workflow, the remotely located individual must restart the identity proofing process under Sections 013 or 014 of this chapter from the beginning. (1-2-20)T

016. RECORD RETENTION AND REPOSITORIES.

01. Optional Journal. A notary public may maintain one or more journals in which the notary public chronicles all notarial acts that the notary public performs with respect to remotely located individuals. A journal may be created on a tangible medium or in an electronic format using an industry-standard data file format. If the journal

is maintained on a tangible medium, it must be a permanent, bound register with numbered pages. An entry in a journal must be made contemporaneously with the performance of the notarial act. (1-2-20)T

02. Retention Requirements. A notary public shall retain an audio-visual recording required under Section 51-114A, Idaho Code, in a computer or other electronic storage device that protects the audio-visual recording against unauthorized access by password or cryptographic process. The recording must be created in an industry-standard audio-visual file format and not include images of any record in which a remotely located individual made a statement or on which the remotely located individual executed a signature. The recording must be retained for at least ten (10) years after the recording is made. On the death or adjudication of incompetency of a current or former notary public, the notary public's personal representative or guardian or any other person knowingly in possession of a recording shall: (1-2-20)T

- a. Comply with the retention requirements of this subsection; (1-2-20)T
- b. Transmit the recording to one or more repositories under Subsection 016.03 of this chapter; or (1-2-20)T
- c. Transmit the recording in an industry-standard readable data storage device to the Secretary of State. (1-2-20)T

03. Repositories. A notary public, a guardian, conservator, or agent of a notary public, or a personal representative of a deceased notary public may, by written contract, engage a third person to act as a repository to provide the storage required by Subsection 016.02 of this chapter. A third person under contract under this Subsection shall be deemed a repository under Section 51-114A, Idaho Code. The contract shall: (1-2-20)T

- a. Enable the notary public, the guardian, conservator, or agent of the notary public, or the personal representative of the deceased notary public to comply with the retention requirements of Subsection 016.02 of this chapter even if the contract is terminated; or (1-2-20)T
- b. Provide that the information will be transferred to the notary public, the guardian, conservator, or agent of the notary public, or the personal representative of the deceased notary public if the contract is terminated. (1-2-20)T

017. FEES AND EXPENSES.

Third-Person Expenses: Section 51-133, Idaho Code, shall not be construed to prevent a third person who provides technologies or storage capabilities to aid the notary public in the performance of a notarial act or in the fulfillment of duties under this chapter from separately charging and collecting any additional fee for the services provided. (1-2-20)T

018. CERTIFICATE OF NOTARIAL ACT.

Additional Language for Use of Communication Technology: As per Section 51-114A, Idaho Code, a certificate for a notarial act for a remotely located individual, whether in standard or short form, will include additional language to indicate that the notarial act was performed using communication technology and will be sufficient if it is substantially as follows: "This notarial act involved the use of communication technology." (1-2-20)T

019. -- 999. (RESERVED)