

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL: SB 2104

INTRODUCER: Commerce and Tourism Committee

SUBJECT: Notaries Public

DATE: February 15, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	Favorable
2.			BC	
3.				
4.				
5.				
6.				

I. Summary:

SB 2104 transfers the current notary administration responsibilities of the Executive Office of the Governor (EOG) that relate to the education and investigation of notaries public to the Department of State (DOS) under a type two transfer, as defined in s. 20.06(2), F.S. To fund these transferred responsibilities, the bill allocates \$2.35 from the \$4 notary public application surcharge to be deposited in DOS's Operating Trust Fund.

In addition, the bill:

- Transfers the notary education requirement from s. 668.50, F.S., to s. 117.01, F.S., and amends the education requirement to eliminate the 3-hour provision.
- Revises notary application requirements.
- Reiterates current law under s. 817.155, F.S., which provides that an applicant who submits an application that he or she knows to contain any false, fictitious, or fraudulent statement commits a felony of the third degree.
- Requires DOS to provide conspicuous notice to applicants on the notary public application form that, if an applicant misrepresents information on the application, he or she commits a felony of the third degree pursuant to s. 817.155, F.S.
- Requires any entity issuing bonds for notaries public to submit an annual report to DOS as to whether any claims were paid and the circumstances under which those claims were paid.
- Requires DOS to inform the EOG of its findings related to any investigation of complaints made against notary publics.
- Makes stylistic changes and deletes two obsolete provisions concerning an increase in the required bond amount on January 1, 1999, and the required use of rubber stamps after January 1, 1992.

This bill substantially amends the following sections of the Florida Statutes: 117.01, 117.021, 117.05, 117.103, 117.107, and 668.50.

II. Present Situation:

Notary Public Administration¹

Notaries public are referenced in the State Constitution as public officers, which are to be commissioned by the Governor.²

A notary public has been defined as a public officer whose function it is to attest and certify, by his or her hand and official seal, certain classes of documents in order to give them credit and authenticity in foreign jurisdictions, to take acknowledgements of and certify deeds and other conveyances, and to perform certain official acts, chiefly in commercial matters.³

Simply stated, a notary public verifies the identities of individuals involved in legal transactions and is the gatekeeper for preventing fraudulent transactions. In Florida, there are two types of notaries: notaries public and civil-law notaries. Chapter 117, F.S., provides for the appointment and commissioning of notaries public and ch. 118, F.S., provides for the appointment of civil-law notaries.⁴ The main distinctions between notaries public and civil-law notaries are that civil-law notaries must be attorneys and may issue “authentic acts,” which are more likely to be legally recognized by a foreign country than notarizations by notaries public.

While different divisions with DOS have administered the notary section, currently notaries are administered by both the Division of Corporations (division) within DOS and the Executive Office of the Governor (EOG).

The EOG’s notary section is responsible for appointing, investigating, and educating notary public applicants. The EOG also has the discretion to suspend notary public commissions. The division is responsible for processing notary public applications, approving and recording a required \$7,500 bond, issuing notary public commissions and certificates of notarial authority, and recording the results of actions taken by the EOG against a notary public. The division notes

¹ Adapted from Senate Bill Analysis and Fiscal Impact Statement for CS/CS/CS/SB 2330 (April 14, 2010).

² See Fla. Const. art. II, s. 5, and art. IV, s. 1. Note: Notaries public differ from other types of public officers (e.g. legislators, law enforcement, clerks of court). For example, notaries are not eligible for the same types of benefits and protections provided for public officers under chs. 111 and 112, F.S.

³ 66 C.J.S. Notaries s. 1 (2011); see also Commercial Union Ins. Co. of New York v. Burt Thomas-Aitken Const. Co., 230 A.2d 498, 499 (N.J. 1967). The dictionary defines a notary public as a “person authorized by a state to administer oaths, certify documents, attest to the authenticity of signatures, and perform official acts in commercial matters, such as protesting negotiable instruments.” Black’s Law Dictionary (8th ed. 2004).

⁴ Section 118.10(3), F.S., authorizes a civil-law notary to “authenticate or certify any document, transaction, event, condition, or occurrence” and s. 118.10(7), F.S., specifies that civil-law notaries have “all the powers of a notary public under any law of this state.”

that “[c]oordination between the [d]ivision and the Governor’s Office is essential in carrying out the duties and responsibilities of the notary public program.”⁵

The division reported that in FY 2010-11 there were 102,517 notary public commissions (including renewals). The division has also reported that as of January 2011, there are 397,129 notary public commissions and 108 civil-law notary appointments active in Florida.⁶

Legal Qualifications for Florida Notaries Public

Section 117.01, F.S., requires notary public applicants to meet certain legal qualifications prior to being commissioned by the Governor. These legal qualifications require an applicant to:

- Be at least 18 years of age;
- Be a legal resident of the state and maintain such residency throughout his or her 4-year term of appointment;
- Be able to read, write, and understand the English language;
- Complete an application form prescribed by DOS;⁷
- Submit to DOS an affidavit of good character from someone unrelated to the applicant and who has known the applicant for 1 year or more;
- Submit to DOS a list of all professional licenses and commissions issued by the state during the previous 10 years and a statement as to whether or not the applicant has had any such license or commission revoked or suspended;
- Submit to DOS a statement as to whether or not the applicant has been convicted of a felony, and if so, the nature of the felony and whether or not the applicant’s civil rights have been restored;
- Take an oath that the application for a commission is true and correct, that he or she has read ch. 117, F.S., that he or she knows the duties, responsibilities, limitations, and powers of a notary public, and that he or she will honestly, diligently, and faithfully discharge the duties of the notary public;⁸
- Obtain a bond for \$7,500, payable to any individual harmed as a result of a breach of duty by the notary public acting in his or her official capacity; and
- Provide any other information the Governor deems necessary for determining whether the applicant is eligible to be commissioned.

In addition, s. 668.50(11)(b), F.S., requires first-time notary public applicants to submit proof that the applicant has, within 1 year prior to the application, completed at least 3 hours of interactive or classroom instruction, which covers electronic notarization and the duties of the notary public.

Civil-law notaries are appointed by the Secretary of State. Pursuant to s. 118.10(1)(b), F.S., applicants must be a Florida Bar member in good standing who has practiced law for at least 5

⁵ Department of State Sunset Review Agency Report to the Legislature, July 2008. Page IV-68.

⁶ Information received from the Department of State on January 26, 2012, on file with the Budget Subcommittee on Transportation, Tourism and Economic Development.

⁷ A person must complete a new application when applying for a new commission, renewal of a commission, or subsequent commission.

⁸ A person taking the oath is subject to the penalty of perjury under s. 837.012, F.S., which is a misdemeanor of the 1st degree.

years.⁹ Additionally, under DOS administrative rule, 1N-6.001, F.A.C., civil-law notary applicants must complete an application form as prescribed by DOS and must successfully complete a civil-law notary examination with a score of 70 percent or higher on the exam. The Secretary of State may adopt rules prescribing procedures for the disciplining of civil-law notaries, including the suspension and revocation of appointments.¹⁰ However, the Secretary of State is prohibited from regulating and disciplining “any civil-law notary for, or with regard to, any action or conduct that would constitute the practice of law in this state, except by agreement with The Florida Bar.”¹¹

Application Fees

Section 117.01(2), F.S., requires notary public applicants, including renewals, to pay a \$25 application fee and a \$10 commission fee.¹² In addition, applicants must pay a \$4 fee, which is appropriated to the EOG to be used to educate and assist notaries.¹³

Civil-law notary applicants, pursuant to 1N-6.001(1)(b)2., F.A.C., must pay a \$50 application processing fee.¹⁴ In addition, applicants may pay up to \$200 to take the civil-law notary examination.¹⁵

Notary Section of the Executive Office of the Governor

Section 117.01, F.S., vests the Governor with the authority to appoint and commission as many notaries public as he deems necessary. The Governor is also responsible for disciplining and providing educational assistance to notaries public.¹⁶

The notary section of the Executive Office of the Governor (EOG) states that it carries out its function by:

publishing and distributing educational materials, particularly the notary laws and the Governor’s Reference Manual for Notaries; by answering telephone inquiries from Notaries; by conducting notary seminars; and maintaining the on-line Notary Education Course. . . . The Notary Section also assists the Governor by reviewing “special review” applications

⁹ Chapter 1N-6.001(1)(b)1., F.A.C., requires civil-law notary applicants to submit a certificate of good standing from the Supreme Court of Florida to DOS within 90 days of the date of application.

¹⁰ Section 118.10(5)(e), F.S. See also, ch. 1N-6.001, F.A.C.

¹¹ Section 118.10(6), F.S.

¹² Because there are approximately 100,000 applications a year, the division collects an estimated \$3.5 million annually, which is deposited into General Revenue. Statistics provided by the Division of Corporations, December, 2012, on file with the Budget Subcommittee on Transportation, Tourism and Economic Development.

¹³ Because there are approximately 100,000 applications a year, the EOG collects an estimated \$400,000 annually, which is deposited in the Grants & Donations Trust Fund. Statistics provided by the notary section of the EOG and by the Division of Corporations, December, 2012, on file with the Budget Subcommittee on Transportation, Tourism and Economic Development.

¹⁴ Civil-law notaries also pay \$50 a year when submitting annual reports. Because the current 95 civil-law notaries retain their appointment as long as they file an annual report, DOS collects approximately \$4,750 annually, which is deposited into General Revenue. Statistics provided by the Division of Corporations, December, 2012, on file with the Budget Subcommittee on Transportation, Tourism and Economic Development.

¹⁵ See ch. 1N-6.001(2)(c), F.A.C.

¹⁶ See s. 117.01, F.S.

related to the applicants' eligibility for appointment and by reviewing complaints against Notaries and recommending disciplinary action when appropriate.¹⁷

The notary section, by and large, fulfills its educational assistance requirement by approving notary education curricula for certain vendors. Applicants can only take the required 3-hour class from a notary education vendor that has a core curriculum approved by the EOG. In Florida there are 17 vendors that provide notary public applicants with the required 3-hour notary public education course.¹⁸ Many of these vendors also offer "one-stop" type services for notary applicants by providing them with the surety bond (directly or in coordination with an underwriter), educational course, application forms, and notary equipment required by statute.

Another important function of the notary section is the investigation of notaries or notary public applicants. Investigations are conducted on applicants under "special review," when their applications have been flagged by a vendor or the division. Under s. 117.01(2), F.S., an applicant is required to self-disclose if he or she has ever been convicted of a felony, which may trigger an investigation. In addition, the notary section may receive complaints by phone or mail, which may lead to the investigation of a commissioned notary public or an applicant. Section 117.01(8), F.S., requires a surety company to notify the Governor when a claim for a bond has been paid and the circumstances under which the claim was paid, which could lead to an investigation of a commissioned notary.

Usually during an investigation a criminal background check is performed, which is not statutorily required for notary public applicants under ch. 117, F.S. The notary section reports that it coordinates investigations with law enforcement and the Florida Bar if the notary is also an attorney.

The notary section of the EOG has no role in the administration, investigation, or appointment of civil-law notaries.

Notary Section of the Division of Corporations

The division serves solely in a ministerial capacity when processing notary public applications, issuing certificates of notarial authority, and recording bonds. The division does not verify application information or investigate notary public applicants or commissioned notaries. If a concern with the application is identified during processing, it is referred to the EOG for review and investigation.

The division reports that it receives all of its notary public applications from vendors that provide a "one-stop" type service for those seeking to become a notary public. These companies provide surety services (directly or through its affiliates) to meet the \$7,500 statutory bond requirement for notaries public, ensure that the educational courses satisfy the 3-hour notary public educational course required by statute, ensure that the application forms meet with the department's approval, and may provide notary equipment, such as stamps and embossers, to

¹⁷ See notary section website, available at http://www.flgov.com/notary_intro (last visited 2/14/2012).

¹⁸ A list of vendors with approved curricula is available at http://www.flgov.com/notary_education (last visited 2/14/2012).

notaries once they have been commissioned. These companies submit their customers' applications, along with proof of attendance of the educational course and the required bond, to DOS. DOS receives the applications and reviews them for completeness to ensure they meet the statutory requirements under ch. 117, F.S., before processing the application and printing a commissioning certificate.

The division reports that complaints concerning notaries public are referred to the notary section of the EOG.

Although the division reports that it operates solely in a ministerial capacity when processing notary public applications, it has a different role with civil-law notaries. Statutorily, the Secretary of State has the authority to develop application processes, prescribe educational requirements, investigate applications, appoint civil-law notaries, and suspend or revoke the appointments of civil-law notaries under ch. 118, F.S.¹⁹ These functions are carried out by the division. However, to date, the division has not deemed it necessary to investigate civil-law notaries or suspend or revoke a civil-law notary's appointment.²⁰

Notary Misconduct

It is reported that notary public misconduct has been a problem in the United States ever since the first notary public was appointed in the American colonies in 1639.²¹ Examples of notary public misconduct include the forgery of signatures, the notarization of signatures of persons not present before the notary, and the notarization of blank documents that are later drafted with fraudulent terms.²² The National Notary Association (NNA) reports that, in Florida, notary public misconduct is especially prevalent in fraudulent real estate transactions where the elderly and those who speak English poorly are targeted.²³ Notary misconduct is punishable as a felony of the third degree or misdemeanor of the second degree.²⁴

¹⁹ See s. 118.10(2), (5)(a)-(g), F.S. See also, ch. 1N-6.001, F.A.C.

²⁰ *Supra* fn. 30.

²¹ Anderson, John C., and Closten, Michael L; A Proposed Code of Ethics for Employers and Customers of Notaries: A Companion to the Notary Public Code of Professional Responsibility; 32 J. Marshall L. Rev. 887 (Summer 1999).

²² See Lilly, Joanna, The Unlawful Notary, which gives an account of various cases of notary fraud, available at <http://www.lastwordedits.com/unlawfulnotary.pdf> (last visited 2/14/2012). Note: This is not an exhaustive list of the types of notary misconduct.

²³ National Notary Association, The Growing Real Estate Problem in Florida: How Requiring a Thumbprint in a Notary Recordbook Can Significantly Diminish Real Property Scams in the State, March 2003, pg. 4, available at <http://www.nationalnotary.org/userimages/reFraudfla.pdf> (last visited 2/14/2012).

²⁴ Section 117.105, F.S., provides that "a notary public who falsely or fraudulently takes an acknowledgment of an instrument as a notary public or who falsely or fraudulently makes a certificate as a notary public or who falsely takes or receives an acknowledgment of the signature on a written instrument is guilty of a felony of the third degree." Pursuant to s. 117.05(1), F.S., a notary public is guilty of a felony of the third degree if the notary uses a commission in other than the notary's real name and if the notary notarizes his or her own signature. In addition, it is unlawful to possess a notary public official seal or any papers or copies relating to notarial acts, impersonate a notary public, or to knowingly act as a notary public after a commission has expired; all are a misdemeanor of the second degree. See s. 117.05, F.S.

Agency Sunset Review of the Department of State

Sections 11.901 – 11.920, F.S., were known as the Florida Government Accountability Act (act).²⁵ Under this act, most state agencies and their respective advisory committees were subject to a “sunset” review process to determine whether the agency should be retained, modified, or abolished. The review process for DOS began in July of 2008.

The Senate Commerce Committee recommended consolidation of responsibilities related to administration of the notary public commissioning process either within the division or within EOG.²⁶

III. Effect of Proposed Changes:

Section 1 amends s. 117.01, F.S., to transfer the current notary administration responsibilities of EOG that relate to the education and investigation of notaries public to DOS. To enable DOS to carry out these responsibilities, this section of the bill allocates \$2.35 from the \$4 notary public application surcharge to be deposited in the department’s Operating Trust Fund. DOS is to use the \$2.35 surcharge to educate and assist notaries public, and to receive and investigate complaints against notaries public. The other \$1.65 from the surcharge is to be deposited into the EOG’s Grants and Donations Trust Fund to continue commissioning and disciplining responsibilities.

The notary education requirement for first-time applicants is transferred from s. 668.50, F.S., to s. 117.01(4), F.S., and education requirement is amended to eliminate the 3-hour provision. DOS is required to approve entities or individuals who offer training courses.

This section of the bill also revises the notary application requirements to:

- Require an applicant to provide his or her “legal” name.
- Require the applicant to provide his or her citizenship status.
- Delete the requirement for applicants to provide an affidavit of good character from an unrelated person who has known the applicant for 1 year or more.
- Require the applicant to state whether he or she has previously been commissioned as a notary public in Florida.
- Require the applicant to state whether he or she has been convicted “or found guilty” of a felony.

This section is amended to reiterate current law under s. 817.155, F.S., by providing that an applicant who submits an application that he or she knows to contain any false, fictitious, or fraudulent statement commits a felony of the third degree. Additionally, DOS is required to provide conspicuous notice to applicants on the notary public application form that, if an

²⁵ Repealed by ch. 2011-34, L.O.F.

²⁶ See Senate Commerce Committee, Issue Brief 2009-308: Agency Sunset Review of the Division of Corporations of the Department of State (October 2008), available at http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-308cm.pdf (last visited 2/14/2012); and Interim Report 2010-212: Agency Sunset Review of the Division of Corporations of the Department of State (December 2009), available at http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-212cm.pdf (last visited 2/14/2012).

applicant misrepresents information on the application, he or she commits a felony of the third degree pursuant to s. 817.155, F.S.

Any person is permitted to file a complaint with DOS alleging a violation of ch. 117, F.S., and requires that DOS conduct a preliminary investigation of the complaint and submit a summary of its investigation to EOG.

Any entity issuing bonds for notaries public to submit an annual report to DOS to report whether any claims were paid and the circumstances under which those claims were paid. To ensure compliance with this provision, DOS may not accept bonding certificates from an entity that has failed to submit the required report until the required report is submitted.

This section of the bill also makes stylistic changes and deletes an outdated provision concerning an increase, on January 1, 1999, of the required bond amount for notaries public.

Section 2 amends s. 117.021, F.S., changing a reference to the Executive Office of the Governor to the Governor.

Section 3 amends s. 117.105, F.S., deleting an obsolete provision concerning rubber stamp type notary seals on documents and making stylistic changes.

Section 4 amends s. 117.103, F.S., making stylistic changes.

Section 5 amends s. 117.107, F.S., adding that notaries who violate this section with the intent to defraud are subject to suspension pursuant to s. 117.01, F.S., and making stylistic changes.

Section 6 amends s. 668.50, F.S., removing the notary education provision and making stylistic changes (this provision is transferred to s. 117.01, F.S.).

Section 7 provides for the type two transfer of powers and responsibilities, from the Executive Office of Governor to the Department of State.

Section 8 provides for a nonrecurring transfer of \$1.35 million from EOG to DOS to fund the processing of notary applications, education and assistance for notaries, and the investigation of complaints against notaries. The funds are transferred from the trust fund in EOG that the \$4 notary public application surcharges are deposited.

Section 9 provides for an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

DOS would incur costs associated with assuming the investigatory and education responsibilities from the EOG. However, these costs will be offset by the \$2.35 per notary application surcharge allocated to DOS. There would likewise be a reduction of revenues received and costs incurred in EOG.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.