

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 Committee on Rules

BILL: CS/SB 1042

INTRODUCER: Governmental Oversight and Accountability Committee and Senators Brandes and Passidomo

SUBJECT: Notaries Public

DATE: February 28, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Tulloch</u>	<u>Cibula</u>	<u>JU</u>	<u>Favorable</u>
2.	<u>Peacock</u>	<u>Caldwell</u>	<u>GO</u>	<u>Fav/CS</u>
3.	<u>Tulloch</u>	<u>Phelps</u>	<u>RC</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1042 permits a notary public to register to provide online notarizations to people both in and out-of-state using audio/video technology. A notary public seeking to provide online notarizations must still qualify, be appointed and commissioned by the Governor, and be governed by the traditional provisions set forth in chapter 117, F.S. However, the bill divides chapter 117, F.S., into two parts and creates Part II, which sets forth the requirements for those notaries who also want to register with the Governor to provide online notarizations.

The bill requires that any notary public registered for and offering online notarizations carry a one million dollar insurance policy to protect against errors and omissions and a \$25,000 bond. The bill also gives rule-making authority to the Department of State, in collaboration with the Agency for State Technology, to refine the types of “identity proofing” technology notaries public are required to use to verify a person’s identity remotely. Additionally, notaries offering online services must take the upmost care in maintaining online security, particularly over their electronic journal, electronic signature, and electronic seal.

The bill takes effect on January 1, 2019.

II. Present Situation:

Notary Publics in Florida

A notary public is a public officer under the Florida Constitution,¹ and “and an impartial agent of the State.”² “[I]n the performance of his or her duties, [a notary public] exercises a delegation of the State’s sovereign power as in attesting the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained and in administering oaths and attesting to the authenticity of signatures.”³

As a public officer, notaries public are constitutionally required to give a bond (as required by law) and swear or affirm to uphold the Constitutions of the United States and Florida.⁴ Notaries public are appointed and commissioned by the Governor to four-year terms,⁵ and are authorized under Florida law to perform six basic duties:⁶

- Administer oaths or affirmations;⁷
- Take acknowledgments;⁸
- Solemnize marriages;⁹
- Attest to photocopies;¹⁰
- Verify vehicle identification numbers (VINs);¹¹ and
- Certify the contents of a safe-deposit box.¹²

Importantly, a notary public may only exercise the foregoing duties within the physical boundaries of the State of Florida.¹³ Generally, a notary public may not charge more than \$10 per notarial act and may not charge a fee for notarizing a vote-by-mail ballot.¹⁴

¹ FLA. CONST., Art. II, s. 5(c).

² 58 AM. JUR. 2D Notaries Public § 1.

³ *Id.* (footnotes omitted). See also BLACK’S LAW DICTIONARY (10th ed. 2014) (“The notary public, or notary, is an official known in nearly all civilized countries. The office is of ancient origin. In Rome, during the republic, it existed, the title being *tabelliones forenses*, or *personae publicae*; and there are records of the appointment of notaries by the Frankish kings and the Popes as early as the ninth century. They were chiefly employed in drawing up legal documents; as scribes or scriveners they took minutes and made short drafts of writings, either of a public or a private nature. In modern times their more characteristic duty is to attest the genuineness of any deeds or writings, in order to render the same available as evidence of the facts therein contained.”) (quoting Benjamin F. Rex, *The Notaries’ Manual* § 1, at 1–2 (J.H. McMillan ed., 6th ed. 1913)).

⁴ See *supra* note 1, *supra*. See s. 117.01(3) & (7), F.S. ((3) requiring that, as part of oath, the applicant must swear he or she has read ch. 117, and knows the duties, responsibilities, limitations, and powers of a notary; (7) requiring that notary give a bond in the amount of \$7,500 in the event the notary breaches duties, both a physical and electronic copy of which is to be kept on file with the Department of State). Section 117.01(1), F.S., requires a notary to be able to read, write, and understand the English language.

⁵ Section 117.01(1), F.S.

⁶ Executive Office of the Governor, State of Florida, *Governor’s Reference Manual for Notaries Public*, p. 13 (Dec. 13, 2016).

⁷ Section 117.03, F.S.

⁸ Section 117.04, F.S.

⁹ Section 117.045, F.S.

¹⁰ Section 117.05(12)(a), F.S.

¹¹ Section 319.23(3)(a)2., F.S.

¹² Section 655.94(1), F.S.

¹³ See *supra* note 5.

¹⁴ Section 117.05(2), F.S.

A notary public may provide an electronic signature that is unique, verifiable, under the notary public's sole control, and attached to a document in a way revealing any subsequent alteration.¹⁵ When an electronic signature must be accompanied by a notary public seal, the requirement is met when the notary public includes his or her full name as provided in the notary public's application for commission, the words "Notary Public State of Florida," the expiration date of the notary public's commission, and the notary public's commission number.¹⁶ The seal must also be applied to all notarized paper documents using a rubber stamp containing the foregoing information.¹⁷ The rubber stamp seal must be affixed to the notarized paper document in photographically reproducible black ink. Every notary public must print, type, or stamp below his or her signature on a paper document his or her name exactly as commissioned.

Additionally, as a public officer, a notary public is held to high standards and is subject to discipline, including suspension by the Governor and removal by the Senate, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony.¹⁸ A notary public is also subject to criminal penalties for certain unlawful uses of the notary public commission (such as notarizing his or her own signature),¹⁹ and liable to pay fees for certain civil infractions (such as notarizing a document when the signor is not in the notary public's presence).²⁰

Becoming a Notary Public in Florida

In order to be eligible to become a notary public in Florida, a person must:

- Be at least 18 years of age;
- Be a Florida resident or permanent resident alien with a recorded declaration of domicile;
- Maintain Florida residence throughout the appointment; and
- Be able to read, write, and understand the English language.²¹

To apply to be a notary public in Florida, the application form provided by the Department of State must be completed, signed, sworn, and filed along with the appropriate applications fees.²² Because the bond must be attached, the bonding agency usually submits the application in both a paper and electronic format.²³ The oath of office and notary public bond must accompany the notary public's application when filed with the Department of State.²⁴ Applicants must also provide the following as part of the application:

- Personal identification information;

¹⁵ Section 117.021(2), F.S.

¹⁶ Section 117.021(3), F.S.

¹⁷ Section 117.05(3), F.S.

¹⁸ FLA. CONST., Art. IV, s. 7.

¹⁹ Section 117.05(1), F.S. (providing violation is a third degree felony). *See also* s. 117.05(3)(d), (7), and (8), F.S.; s. 117.105, F.S.; s. 117.107(9), F.S.

²⁰ Section 117.107(9), F.S. (providing violation is a civil infraction punishable by a fine of up to \$5,000).

²¹ *See supra* note 5.

²² Section 117.01(2), F.S. (requiring \$25 application fee, \$10 commission fee, and \$4 educational surcharge, except that the commission fee is waived for veterans with a 50 percent disability).

²³ *See supra* note 6 at p. 7.

²⁴ Section 117.01(2), F.S.

- Affidavit of good character from a reference who has known the applicant for at least one year and is not a relative;
- Ten-year history of any licenses and discipline;
- Statement regarding whether the applicant has ever been convicted of a felony or had his or her civil rights restored; and
- Any other information requested by the Governor’s office to confirm eligibility.²⁵

Notary’s Duty to Confirm Identity and Physical Presence for Signing

One of the notary public’s primary duties is to verify the identity of the person who is signing a document. If the person is personally known to the notary public or provides “satisfactory evidence” by producing valid identification or witnesses or both verifying that the person is who he or she claims to be, the notary public may notarize the document.²⁶

Additionally, generally the person signing the document, as well as any witness, must be in the notary public’s physical presence at the time of presenting identification and signing.²⁷ It is the physical presence requirement that the proposed bill seeks to redefine.

Online Notarization

Because of new audio/video technologies, such as FaceTime and Skype, two or more people may be able to both see and hear one another in real time using a computer or mobile device, even though they are in different states. This means a notary public can view a person’s face, using audio/video technology, while simultaneously reviewing the person’s identification and other credentials.

One article explains how online notarization works:

The process is pretty straightforward: You upload a document to an app or website and get connected with a notary by video, on a split screen; you verify your identity by showing a government-issued photo ID, and the notary witnesses you signing your name on screen using your finger or mouse. Then, the notary adds their electronic signature and a digital version of a stamp or seal. The whole transaction is recorded and secured on the cloud in compliance with retention rules; both the signer and the notary can get copies.

Right now, even though notarization apps and sites are accessible by everyone, the participating notaries themselves are certified and based only in Virginia and Texas. Nevada will also join those states; it enacted a remote notarization law on June 9.²⁸

²⁵ *Id.*

²⁶ Section 117.05(5), F.S.

²⁷ Section 117.05(4), F.S. *See also* Effect of the Bill, Part I, *infra*, amending multiple provisions in chapter 117, F.S., to clarify that “physical presence” can include an appearance by audio/video technology.

²⁸ Lauren Silverman, *Notaries are Starting to Put Down The Stamp and Pick Up a Webcam*, National Public Radio, All Tech Considered (June 12, 2017), available at <https://www.npr.org/sections/alltechconsidered/2017/06/12/532586426/notaries-are-starting-to-put-down-the-stamp-and-pick-up-a-webcam> (last visited Jan. 29, 2018).

Virginia was the first to pass a remote notarization law in 2012.²⁹

Commissioner of Deeds

Chapter 721, F.S., governs vacation and timeshare plans. Section 721.96, F.S., provides, in part, that the purpose of part IV, ch. 721, F.S., is to provide for the appointment of commissioners of deeds.

Section 721.97(1), F.S., provides that the Governor may appoint commissioners of deeds to take acknowledgments, proofs of execution, or oaths in any foreign country, in international waters, or in any possession, territory, or commonwealth of the United States outside the 50 states. The term of office is 4 years. Commissioners of deeds have authority to take acknowledgments, proofs of execution, and oaths in connection with the execution of any deed, mortgage, deed of trust, contract, power of attorney, or any other writing to be used or recorded in connection with a timeshare estate, personal property timeshare interest, timeshare license, any property subject to a timeshare plan, or the operation of a timeshare plan located within this state; provided such instrument or writing is executed outside the United States. Such acknowledgments, proofs of execution, and oaths must be taken or made in the manner directed by the laws of this state, including but not limited to s. 117.05(4), (5)(a), and (6), F.S., and certified by a commissioner of deeds. The certification must be endorsed on or annexed to the instrument or writing aforesaid and has the same effect as if made or taken by a notary public licensed in this state.

A person seeking to be appointed as a commissioner of deeds must take an oath before a notary public in Florida or any other state, or a person authorized to take oaths in another country, to well and faithfully execute and perform the duties of a commissioner of deeds.³⁰ The oath must be filed with the Department of State prior to the person being commissioned.³¹

Uniform Electronic Transaction Act

Section 668.50, F.S., is known as the Uniform Electronic Transaction Act (act). The act applies to electronic records and signatures relating to a transaction.³² The act does not apply to transactions to the extent they are governed by:³³

- A provision of law governing the creation and execution of wills, codicils, or testamentary trusts;

²⁹ *Id.* See Office of the Secretary of the Commonwealth of Virginia, Notary Commissions, *A Handbook For Virginia Notaries Publics*, available at <https://commonwealth.virginia.gov/media/9760/2017-december-15-revised-handbook.pdf> (last visited Feb. 5, 2018). See also <https://notarize.com/>, a Virginia-based online platform offering online notary services. The video on the homepage also explains how the process works. *Id.* (last visited January 29, 2018).

³⁰ Section 721.97(2), F.S. Also see International Society of Florida Commissioners of Deeds, *Reference Manual for Commissioners of Deeds For the State of Florida* (Aug. 2009), available at http://pawnotary.com/download/Manuals_and_Handbooks/Florida%20commissioner%20of%20deeds.pdf (last visited on Feb. 14, 2018).

³¹ *Id.*

³² Section 668.50(3)(a), F.S.

³³ Section 668.50(3)(b), F.S.

- The Uniform Commercial Code (UCC);³⁴ or
- The Uniform Computer Information Transaction Act.

III. Effect of Proposed Changes:

Section 1 divides ch. 117, F.S. into two parts: Part I entitled “General Provisions,” and Part II entitled “Online Notarizations.”

With the exception of the effective date,³⁵ the remaining sections of the bill can be grouped as follows: Sections 2 through 5; Sections 6 through 19; and Sections 18 through 27.

Sections 2 through 5 amend current provisions of ch. 117, F.S., which will now be Part I that contains the general provisions governing how to become a notary public and the duties and responsibilities of a notary public. The bill adds language to three of the existing provisions in Part I in order to set out some of the additional requirements a notary public must follow in order to register to do online notarizations.

The bill also provides that an online notary public must use a password or code protected electronic signature, and, presumably for security reasons, the online notary public cannot be required to use technology the online notary public has not selected (s. 117.021, F.S.). The bill requires the Department of State, in collaboration with the Agency for State Technology, to adopt rules establishing standards for tamper-evident technologies that will indicate any alteration or change to an electronic record after completion of an electronic notarial act and must publish a list of technologies that satisfy those standards and are approved for use in electronic notarizations, effective January 1, 2019. All electronic notarizations performed on or after January 1, 2019, must comply with the adopted standards and use an approved technology (s. 117.021, F.S.).

The bill provides that the notary public may supervise the making of a copy of a tangible or an electronic records or a printout of an electronic record, and attest to the trueness of the copy or of the printout, provided the document is neither a vital record in this state, another state, a territory of the U.S., or another country, nor a public record, if a copy can be made by the custodian of the public record.

The bill also sets out the criteria for a form certificate a notary public must use when notarizing a copy of a tangible or an electronic record or a printout of an electronic record (s. 117.05, F.S.), and provides that the prohibitions in s. 117.107, F.S., do not apply to electronic signatures and seals necessary to perform online notarizations.

Other changes to Part I primarily clarify that a signer of document may “personally appear” before a notary public either in person or by “audio-video communication technology,” and that an online notary public must comply with Part II, *infra* (s. 117.05, F.S.). The bill also amends the various notarial form certificates in s. 117.05, F.S., to add an option for the notary public to

³⁴ Other than s. 671.107, F.S., and chapters 672 and 680, F.S. The UCC consists of chapters 670 - 680, F.S.

³⁵ See Section 26, *infra*.

select: “The foregoing instrument was acknowledged before me by means of [] physical presence or [] online notarization[.]”

Sections 6 through 19 create Part II of ch. 117, F.S., specifically governing online notary services.

The bill provides definitions of the following terms (s. 117.201, F.S.):

- “Appear before,” “before,” “appear personally before,” or “in the presence of” mean:
 - In the same physical location as another person and close enough to see, hear, communicate with, and exchange credentials with that person; or
 - In a different physical location from another person, but able to see, hear, and communicate with the person by means of audio-video communication technology;
- “Audio-video communication technology” means technology meeting the requirements of this part and of any of the rules adopted hereunder which enables real-time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another;
- “Credential analysis” means a process or service meeting the requirements of this part and any rules adopted hereunder through which a third party confirms the validity of a government-issued identity credential or data thereon through review of public and proprietary data sources;
- “Error and omissions insurance” means a type of insurance that provides coverage for potential errors or omissions in or relating to the notarial act;
- “Government-issued identity credential” means any approved credential for verifying identity set forth in s. 117.05(5)(b)2, F.S.;
- “Identity proofing” means a process or service meeting the requirements of this part and of any rules adopted hereunder through which a third party confirms the identity of an individual through use of public or proprietary data sources, which may include by means of knowledge-based authentication or biometric verification;
- “Knowledge-based authentication” means a form of identity proofing based on a set of questions formulated from public and proprietary data sources for which the principal has not provided a previous answer;
- “Online notarization” means the performance of an electronic notarization by means of audio-video communication technology and which meets standards provided in this chapter and of any rules adopted hereunder;
- “Online notary public” means a notary public who has registered with the Governor’s office to perform online notarizations under this part, a civil-law notary appointed under chapter 118, F.S., or a commissioner of deeds appointed under part IV of ch. 721, F.S.;
- “Principal” means an individual whose electronic signature is acknowledged, witnessed, or attested to in an online notarization or who takes an oath or affirmation from the online notary public; and
- “Remote presentation” means transmission of an image of a government-issued identity credential that is of sufficient quality to enable the online notary public to identify the individual seeking the notary’s services and to perform credential analysis through audio-video communication technology.

Except where the context requires otherwise, any term defined in the Uniform Electronic Transaction Act³⁶ has the same meaning when used in this part of the bill (s. 117.201, F.S.).

The bill clarifies in ss. 117.209, 117.225, 117.235, and 117.265, F.S., that an online notary public: must satisfy all the traditional notary public requirements of Part I; is still subject to Part I; and may perform any of the notarial acts listed in Part I *except* online marriage rites. An online notary public may also charge a fee not to exceed \$25 *in addition to* the fees authorized by Part I (s. 117.275, F.S.). The online notary public must be physically located in Florida while performing the online notarization (s. 117.209, F.S.).

Additionally, s. 117.225, F.S., sets out the registration requirements for online notaries public. Online notaries public must:

- Satisfy qualification requirements of Part I or the qualifications for appointment as a commissioner of deeds under part IV of ch. 721, F.S.;
- Complete a live or online course covering the duties, obligations, and technology requirements for serving as an online notary public;
- Pay the online notarization application fee of \$25;
- Provide proof of bond payable to any individual harmed as a result of a breach of duty by the online notary public acting in his or her official capacity in the minimum amount of \$25,000 as specified by Department of State rule. Such bond must be approved and filed with the Department of State and executed by a surety company authorized to transact business in Florida. Compliance with this requirement satisfies the requirement of obtaining a bond under s. 117.01(7), F.S.;
- Provide proof of errors and omissions insurance policy from an insurer authorized to do business in Florida in the minimum amount of \$1 million on such terms as specified by Department of State rule as reasonably necessary to protect the public;
- Submit a signed and sworn registration to the Governor's office; and
- Identify the audio/video communication technology and identity proofing methods to be used online, which must:
 - Comply with the standards promulgated by the Department of State and the Agency for State Technology; or
 - Be consistent with the requirements of s. 117.295(2), F.S., if the Department of State and the Agency for State Technology have not yet established standards.

Section 117.215, F.S., provides that if a provision of law requires a notary public or other authorized official of this state to notarize a signature or a statement, to take an acknowledgment of an instrument, or to administer an oath or affirmation so that a document may be sworn, made under oath, or subject to penalty or perjury, an online notarization performed in accordance with the provisions of this part and any rules adopted hereunder satisfies such requirement. If a provision of law requires a signature or an act to be witnessed, compliance with the online electronic witnessing standards prescribed in s. 117.285, F.S., and any rules adopted thereunder satisfies that requirement.

The bill requires an online notary public to keep extensive records of each online notarization in a secure electronic journal, which must include all of the following (s. 117.245, F.S.):

³⁶ Section 668.50, F.S.

- The date and time of the notarization;
- The type of notarial act;
- The type, the title, or a description of the electronic record or proceeding;
- The printed name and address of each principal involved in the transaction or proceeding;
- Evidence of identity of each principal involved in the transaction or proceeding in the form of:
 - A statement that the person is personally known to the online notary public;
 - A notation of the type of identification document provided to the online notary public;
 - A copy of the government-issued identity credential provided; and
 - A copy of any other identity credential or information provided;
- An indication that the principal satisfactorily passed the identity proofing;
- An indication that the government-issued identity credential satisfied the credential analysis; and
- A recording of the audio-video communication that includes:
 - The principal and any witnesses who appeared before the notary public.
 - Confirmation of the identity of each.
 - Electronic records signed by the principal and any witnesses.
 - The notarial act was performed.
- The fee, if any, charged for the notarization.

The online notary public must take reasonable steps to (s. 117.245, F.S.):

- Ensure the integrity, security, and authenticity of online notarizations;
- Maintain a backup record of the electronic journal; and
- Protect the electronic journal, the backup record, and any other records received by the online notary public from unauthorized access or use.

The electronic journal must be maintained by the online notary public or a custodian acting on his or her behalf, for at least 10 years after the date of the notarial act. (s. 117.245, F.S.). An omitted or incomplete entry in the electronic journal does not impair the validity of the notarial act or of the electronic record notarized, but may be introduced as evidence to establish violations of this chapter; as an indication of possible fraud, forgery, or impersonation; or for other evidentiary purposes.

For use of electronic journal, signature, and seal, the bill requires an online notary public to (s. 117.255, F.S.):

- Take reasonable steps to ensure that any registered device used to create an electronic signature is current and has not been revoked or terminated by the device's issuing or registering authority.
- Keep his or her electronic journal, electronic signature, and electronic seal secure and under his or her sole control, which includes control in the form of access protection using passwords or codes under control of the online notary public. The online notary public may not allow another person to use or access his or her electronic journal, electronic signature, or electronic seal.
- Use his or her electronic signature only for performing online notarization.
- Attach or logically associate the online notary public's electronic signature and seal to the electronic notarial certificate of an electronic record in a manner that is capable of

independent verification using tamper-evident technology that renders any subsequent change or modification to the electronic record evident.

- Immediately notify an appropriate law enforcement agency and the Governor's office of theft or vandalism of his or her electronic journal, electronic signature, or electronic seal. An online notary public shall immediately notify the Governor's office of the loss or use by another person of the online notary public's electronic journal, electronic signature, or electronic seal.
- Make electronic copies, upon request, of the pertinent entries in the electronic journal and provide access to the related audio-video communication recordings to the parties to the electronic records notarized, the title agent, settlement agent, or title insurer who engaged the online notary public with regard to a real estate transaction. The online notary public may charge a reasonable fee for making and delivering electronic copies of a given series of related electronic records. The online notary public shall disclose the amount of such fee to the requester before making the electronic copies.

Procedurally, the bill provides that an online notary public may notarize documents online for people in Florida and in other states so long as the online notary public confirms the identities of the principle signer and witnesses at the time of signing by using audio-video communication technology and processes that meet the requirements of this part and any of the rules adopted thereunder and records the entire two-way audio-video conference session; and, if out-of-state, confirms that the principle signer consents to a Florida-based notary public and consents to be governed by applicable Florida law (s. 117.265, F.S.). A principal may not act in the capacity of a witness for his or her own signature in an online notarization. An online notary public may verify identification of a principle signer or a witness as follows (s. 117.265, F.S.):

- The online notary public's personal knowledge of the person;
- The remote presentation of a government-issued identity credential by each individual;
- Credential analysis of each government-issued identity credential; and
- "Identity proofing" of each individual which meets the requirements of this part and of any rules adopted hereunder.

If the online notary public is not satisfied that a person's identity has been verified or if the databases consulted for identity proofing do not contain sufficient information to permit authentication, the online notary public is not authorized to perform the online notarization (s. 117.265, F.S.).

The online notary public must take reasonable steps to ensure the audio-video communication technology used in the online notarization is secure from unauthorized interception (s. 117.265, F.S.).

The electronic notarial certificate must include a notation that the notarization is an online notarization. Any failure to comply with procedures set forth in s. 117.265, F.S., does not impair the validity of the notarial act or the electronic record that was notarized, but may be introduced as evidence to establish violations of ch. 117, F.S.; as an indication of possible fraud, forgery, or impersonation; or for other evidentiary purposes (s. 117.265, F.S.). This subsection may not be construed to alter the duty of an online notary public to comply with ch. 117, F.S., and any rules adopted hereunder.

The bill allows for the witnessing of an online notarization (s. 117.285, F.S.). An online notary public may supervise the witnessing of electronic records by the same audio-video communication technology used for online notarization, as follows:

- The identity of each witness must be verified in the same manner as the identity of the principal;
- A witness may physically be present with the principal or remote from the principal provided the witness and principal are using audio-video communication technology; and
- The witness is present in either physical proximity to the principal or through audio-video communication technology at the time the principal affixes the electronic signature and hears the principal make a statement to the effect that the principal has signed the electronic record.

Additionally, the bill provides that the Department of State, in collaboration with the Agency for State Technology may adopt rules and standards necessary to implement the requirements of ch. 117, F.S., and such other rules and standards as may be required to facilitate the integrity, security, and reliability of online notarization, including the minimum amounts of and required terms of bonds and errors and omissions insurance to be held by an online notary public; education requirements for online notaries public; standards regarding identity proofing, credential analysis, unauthorized interception, remote presentation, tamper-evident technology, and audio-video communication technology, and may publish lists of technologies that satisfy the standards and are approved for use in online notarizations (s. 117.295, F.S.).

Until the Department of State adopts applicable rules, identity proofing, credential analysis, unauthorized interception, remote presentation, tamper-evident technology, and audio-video communication technology are governed by the following minimum standards (s. 117.295, F.S.):

- Identity proofing by means of knowledge-based authentication is required to have, at a minimum, the following security characteristics:
 - The principal must be presented with five or more questions with a minimum of five possible answer choices per question.
 - Each question must be drawn from a third-party provider of public and proprietary data sources and be identifiable to the principal's social security number or other identification information, or the principal's identity and historical events records.
 - Responses to all questions must be made within a 2-minute time constraint.
 - The principal must answer a minimum of 80 percent of the questions correctly.
 - The principal may be offered one additional attempt in the event of a failed attempt.
 - During the second attempt, the principal may not be presented with questions from the prior attempt.
- Credential analysis must confirm that the credential is valid and matches the signer's claimed identity using one or more automated processes which scan the credential, including its format features, data, barcodes, or other security features.
- Tamper-evident technology requirements are deemed satisfied by use of technology that renders any subsequent change or modification to the electronic record evident
- Audio-video communication technology used in completing online notarizations must meet the following requirements:
 - The signal transmission must be secure from interception, access, or viewing by anyone other than the participants communicating.

- The technology must provide sufficient audio clarity and video resolution to enable the notary public to communicate with the principal and to confirm the identity of the principal using identification methods described in s. 117.265, F.S.

The bill provides that an online notary public is not responsible for the security of the systems used by the principal or others to access the online notarization session.

Section 117.305, F.S., provides that Part II supersedes 15 U.S.C. s. 7002, the federal Electronic Signatures in Global and National Commerce Act. This is expressly permitted by 15 U.S.C. s. 7002 when a state has adopted the Uniform Electronic Transactions Act,³⁷ which Florida did in 2000.³⁸ Section 117.305, F.S., also provides that the requirements in 15 U.S.C. s. 7001(c) concerning consumer disclosures, and the requirement of 15 U.S.C. s. 7003(b) concerning the delivery of certain legal documents are not superseded or limited.

Sections 18 through 27 make conforming or necessary collateral changes to several provisions outside of chapter 117, F.S.

Section 18 amends s. 28.222, F.S., requiring that a clerk of a circuit court to record copies of any instrument originally created and executed using an electronic signature and is certified as a true and correct paper printout by a notary public in accordance with ch. 117, F.S., if the county is not prepared to accept electronic documents for recording electronically.

Section 19 amends s. 95.231, F.S., concerning acknowledgment relating to limitations for deed or will on record for conveyance of real property.

Section 20 amends s. 689.01, F.S., related to how real estate is conveyed. The bill provides that any requirement that an instrument be signed in the presence of two subscribing witnesses is satisfied by witnesses being present and electronically signing by means of audio-video communication technology and under standards applicable to online notarization pursuant to ch. 117, F.S., and any rules adopted thereunder.

The bill provides that the act of witnessing an electronic signature is satisfied if a witness is present either in physical proximity to the principal or by audio-video communication technology at the time the principal affixes the electronic signature and hears the principal make a statement acknowledging that the principal has signed the electronic record. All witnesses made or taken pursuant to this subsection are validated and, upon recording, may not be denied to have provided constructive notice based on any alleged failure to have strictly complied with these requirements, as currently or previously in effect, or the laws governing notarization of instruments, including online notarization, in this state.

³⁷ See Uniform Law Commission, Acts, *Why States Should Adopt UETA*, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UETA> (last visited Jan. 29, 2018) (“The **Uniform Electronic Transactions Act (UETA)** allows the use of electronic records and electronic signatures in any transaction, except transactions subject to the Uniform Commercial Code. The fundamental purpose of this act is to remove perceived barriers to electronic commerce. The UETA is a procedural statute. It does not mandate either electronic signatures or records, but provides a means to effectuate transactions when they are used. The primary objective is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures.”).

³⁸ Section 668.50, F.S.

Section 21 amends s. 694.08, F.S., to add failure of, or absence of the acknowledgment or the certificate of acknowledgment language relating to certain instruments validated, notwithstanding lack of seals or witnesses, or defect in acknowledgment, etc.

Section 22 amends s. 695.03, F.S., relating to acknowledgements and proof, validation of certain acknowledgments, and legalization of authentication before foreign officials in the recording of real estate conveyances. For acknowledgment or a proof of a person within the state, the bill provides that the affixing of the official seal, or the electronic equivalent authorized under s. 117.021, F.S., or any other state law, conclusively establishes that the acknowledgement was made in compliance with the laws of Florida .

Section 23 amends s. 695.04, F.S., relating to a certificate legalizing or authenticating the signature of a person executing an instrument concerning real property to allow acknowledgment via means of audio-video communication technology as set forth in s. 117.05, F.S.

Section 24 amends s. 695.05, F.S., relating to certain defects cured as to acknowledgments and witnesses in real estate conveyances. The bill makes conforming change concerning acknowledgment.

Section 25 amends s. 695.28, F.S., relating to validity of recorded electronic documents. Under s. 695.28, F.S., a document that is submitted to the clerk of court or county recorder is deemed validly recorded and acts as notice to persons for certain purposes. The bill provides that submission to the clerk of court or county recorder provides notice to all persons that the document was signed, witnessed, or notarized electronically or that witnessing or notarization may have been done outside the physical presence of the notary public or principal. Alternatively, it acts as notice that the document recorded was a certified printout of a document which one or more electronic signatures have been affixed.

The bill states that s. 695.28, F.S., does not preclude a challenge to the validity or enforceability of an instrument or electronic record based upon fraud, forgery, impersonation, duress, undue influence, minority, illegality, unconscionability, or any other basis.

Section 26: The bill has an effective date of January 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

Notaries who wish to provide online services must pay an additional \$25 registration fee.

B. Private Sector Impact:

The availability of online notarial services may be more convenient for those who need the services. Fees for notary services are capped by the statute.

C. Government Sector Impact:

The bill will likely add to the regulatory and record-keeping responsibilities of the Department of State and the Office of the Governor.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 9 of the bill provides an additional satisfying qualifications requirement for online notaries public to include the qualifications for appointment as a commissioner of deeds under part IV of ch. 721, F.S. Section 721.97, F.S., regarding timeshare commissioner of deeds, does not, however, provide any qualifications for this appointment by the Governor, other than taking an oath to faithfully execute and perform the duties of commissioner of deeds.

Also, some of the definitions (“audio-video communication technology,” “credential analysis,” “identity proofing,” and “online notarization”) contained in section 6 of the bill reference rules to be adopted regarding these specified definitions; this may lead to a lack of clarity and create uncertainty.

VIII. Statutes Affected:

This bill substantially amends sections 117.01, 117.021, 117.05, 117.107, 28.222, 95.231, 689.01, 694.08, 695.03, 695.04, 695.05, and 695.28 of the Florida Statutes.

This bill creates sections 117.201, 117.209, 117.215, 117.225, 117.235, 117.245, 117.255, 117.265, 117.275, 117.285, 117.295, and 117.305 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on February 13, 2018:

The Committee substitute:

- Requires the Department of State, instead of the Governor’s Office, to collaborate with the Agency for State Technology:
 - To adopt rules establishing standards for tamper-evident technologies that will indicate any alteration to an electronic record after completion of an electronic notarization; and
 - To publish a list of technologies that satisfy those standards and are approved for use in electronic notarizations, effective January 1, 2019. All electronic notarizations performed on or after January 1, 2019, must comply with the adopted standards and use an approved technology.
- Deletes the requirement that a person applying for a notary public commission must submit a proof of identity to the Governor’s office rather than the Secretary of State’s office;
- Authorizes a notary public to supervise the making of a copy of a tangible or an electronic records or a printout of an electronic record, and attest to the trueness of the copy or of the printout, with certain exceptions;
- Makes changes to the certificate a notary public must use in notarizing a copy of a tangible or an electronic record or a printout of an electronic record;
- Revises various definitions contained in s. 117.201, F.S.;
- Creates definitions of the terms “errors and omissions insurance” and “online notary public” in s. 117.201, F.S.;
- Adds an additional satisfying qualifications requirement for online notaries public to include the qualifications for appointment as a commissioner of deeds under part IV of ch. 721, F.S.;
- Adds a registration requirement for online notaries public to complete a live or online course covering the duties, obligations, and technology requirements for serving as an online notary public;
- Requires online notaries public to obtain bond in the minimum amount of \$25,000;
- Revises insurance requirements for online notaries public to carry error and omissions policy, instead of liability insurance, in the minimum amount of \$1 million;
- Requires the audio-video communication recording contained in the electronic journal of online notarizations to include electronic records signed by the principal and any witnesses;
- Requires the online notary public to protect the electronic journal and any other records received by the online notary public from unauthorized access or use;
- Requires electronic journal to be maintained for 10 years by either the online notary public or a custodian acting on behalf of the notary public;
- Requires an online notary public to make electronic copies, upon request, of entries in electronic journal and provide access to audio-video communication technology recordings to specified persons, including the parties to the electronic records notarized;

- Provides that a principal may not act in the capacity of a witness for his or her own signature in an online notarization;
- Requires identity proofing of each individual by the online notary public to meet the requirements of online notarization and of any rules adopted thereunder;
- Adds a provision that online notarization procedures contained in s. 117.265, F.S., may not be construed to alter the duty of an online notary public to comply with ch. 117, F.S., and any rules adopted thereunder;
- Deletes provision in s. 117.285, F.S., allowing an official of another state authorized under the laws of that state to perform online notarization of documents to supervise the witnessing of electronic records;
- Provides that the Department of State, in collaboration with the Agency for State Technology, may adopt rules on additional topics, including the minimum amounts of and required terms of bonds and errors and omissions insurance to be held by an online notary public and education requirements for online notaries public;
- Provides that until the Department of State adopts applicable rules, specified minimum standards govern identity proofing, credential analysis, unauthorized interception, remote presentation, tamper-evident technology, and audio-video communication technology;
- Revises the minimum standards requirements for credential analysis;
- Deletes certification by title agency, authorized intermediary, or other approved party in proposed revision to s. 28.222, F.S.;
- Deletes proposed revisions to s. 92.50, F.S., relating to oaths, affidavits, and acknowledgments;
- Deletes provisions in the proposed revision to s. 669.01, F.S., relating to conformance/compliance with laws of other states that authorize online notarization of instruments;
- Deletes provisions in proposed revisions to s. 695.03, F.S., regarding:
 - The definition of the term “before”; and
 - Compliance with other state laws that govern the notarization of instruments;
- Amends s. 695.03, F.S., to provide criteria for acknowledgement of a person within the state;
- Deletes proposed revisions to s. 695.28, F.S., regarding online notarization or witnessing of notarization in accordance with the laws of another state;
- Deletes proposed revisions to s. 695.09, F.S., relating to the identity of a grantor in real estate conveyances;
- Makes numerous technical changes; and
- Changes the effective date of the bill from July 1, 2018, to January 1, 2019.

B. Amendments:

None.