



State of California
Office of the Attorney General

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July 26, 2022

The Honorable Frank Pallone
Chairman
United States House of Representatives
Energy and Commerce Committee
Washington, DC 20515

The Honorable Cathy McMorris Rodgers
Ranking Member
United States House of Representatives
Energy and Commerce Committee
Washington, DC 20515

RE: Concerns with the SECURE Act (H.R. 3962) related to remote online notarization, fraud, and preemption

Dear Chairman Pallone and Ranking Member Rodgers:

I write to express concerns regarding the SECURE Act (H.R. 3962, The Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2021, “the Bill”), which would preempt state laws regarding notarization. As the chief law officer of a state concerned about the potential for technology-aided fraud and abuse related to notarial acts, particularly towards the elderly, I encourage Congress to pursue legislation that sets a federal floor, not a ceiling, for consumer protections related to remote online notarization. Any federal legal framework should allow the flexibility for states to monitor developments related to technology and fraud with respect to remote online notarization, which is best achieved through federal legislation that embraces, rather than preempts, more robust and protective state laws that may be in place currently or in the future.

Laws governing notaries and notarial acts have long been the province of state regulation. Notarial acts – in California and in sister states – are a matter of traditional state concern, relating to individuals’ important life transactions and involving sensitive private information. These transactions often have long-lasting consequences for individuals and their families. Consequently, the primary goal of notarization is not efficiency, but rather to ensure the proper identity of those whose signatures are used to document life-changing transactions – for example, the creation of advance health care directives, the granting of powers of attorney, or real estate sales and purchases. The events that require notarization are rare occurrences in most people’s lives, and the consequences of a related fraud can be profound. Lawsuits regarding the legality of such transactions often are dependent on evidence that a signature was, or was not, validly notarized. Accordingly, California, like many sister states, has an extensive body of state law governing notaries and notarial acts. These laws govern everything from the registration,

eligibility, duties, and bonding requirements of a notary, to the identity-authentication process, to the preservation of private information related to the notarial act. (Cal. Gov. Code, §§ 8200-8230). And over time, California has seen fit to adjust requirements, such as the addition of fingerprint requirements for certain real-property documents in response to a wave of falsified loan documents in the 1990s. While each state's notary laws may differ, one thing they share is that changes to notary laws have significant implications for the states' civil justice systems. Any changes to these systems, including with respect to remote online notarization, must be undertaken with care.

The SECURE Act, in contrast, is a blunt object that broadly preempts state notarization law in the emerging area of remote online notarization. By the express terms of its Section 9, the Bill prohibits states from modifying its operative provisions, except in the narrowest of circumstances. Substituted for the judgment of the states are new federal standards regarding several facets of notary law, including the identity-authentication process. In California, for example, where "personal knowledge" of an individual by law is not satisfactory evidence for a notarial acknowledgment or jurat, its current identity-authentication standard would be expressly preempted by a federal standard that – in the judgment of California's Legislature, based on a history of fraud in the state related to loan documents – provides less protection to consumers. Similarly, any states that have enacted laws for remote online notarization with provisions that accord greater legal effect to the implementation or application of a particular technical specification or technology would be preempted by the SECURE Act. As a result, the Bill's preemption language operates as a ceiling for protections for the states' residents, not the floor that it should be.


Equally as troubling as the express preemption provisions is the race to the bottom that will inevitably result from the SECURE Act's forced reciprocity. While certain provisions of the Bill give the illusion that states have the ability to set their own standards above the floor provided (e.g., Section 10), the reality of remote online notarization is that there is little a state can do if an online notary company were to set up shop in a low-cost, lightly regulated jurisdiction that did not meet the state's notary standards. Because the SECURE Act requires each state to recognize remote online notarized documents from another jurisdiction as long as the laws of the state met the minimum federal requirements, the floor provided in the Bill will quickly become the ceiling. States will lose confidence in their notarial transactions, and lose jobs to other jurisdictions, including the jobs of those who have a long track record of effectively performing these duties within the state. Further, states will be in a difficult enforcement position in which notarizations are primarily performed by out-of-state notaries not operating according to that state's laws and not commissioned or regulated by that state. Under current California law, for example, notaries may be sued for neglect or official misconduct, have their commissions suspended or revoked, and be subject to civil penalties or criminal sanctions. (Cal. Gov. Code, §§ 8201.2, 8207.4, 8209, 8214, 8214.1, 8214.2, 8214.8, 8214.15, 8214.21, 8214.23, 8221, 8225, 8227.1, 8227.3, 8228.1.) In contrast, out-of-state notaries pose difficult enforcement problems for the states and would greatly increase the time and expense of litigation for aggrieved litigants forced to conduct discovery related to out-of-state entities.

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The exportation of notary jobs to less-regulated jurisdictions is particularly problematic in light of the lack of minimum standards in the SECURE Act regarding the retention of electronic recordings. The Bill has bare requirements, stating only that the notary must comply with the laws of the notary's state, which is likely to be the lowest common denominator. Prior to remote online notarization, the privacy concerns related to a notarial act may have been fairly minimal, as notary journal entries typically were limited to identifying a date and document and possibly including a passport or driver's license number. And for in-person notarizations, notaries do not keep copies of the documents notarized, such as a will. In contrast, in a typical remote online notarization transaction, a notary receives a substantial amount of sensitive information, which may include preserving electronic copies of an individual's financial, familial, and medical affairs. This Bill fails to adequately address important issues of user privacy, evidentiary accessibility, data privacy, and liability related to the electronic storage of this extraordinarily sensitive information. While a lost notary journal may only put at risk the information of a few hundred transactions, a single data breach could imperil information regarding hundreds of thousands if not millions of transactions. Careful consideration should be given as to how best to protect this information, including how to prevent online notarization platforms from using this data for commercial purposes such as data-mining or sale. But the SECURE Act ignores this issue entirely, effectively farming out this concern to the low-cost state that is least likely to care about providing protections to consumers.

California – no doubt similar to some of its sister states – has been diligent in its approach to remote online notarization and consideration of its long-term effects, particularly with respect to fraud and privacy issues. The California Legislature has three times rejected bills that did not include adequate consumer-protection safeguards. The California Legislature continues to consider proposals that embrace technological advancement while protecting against fraud and abuse, particularly towards elders. Its judgment regarding the need for such safeguards should not be overruled by interests not accountable to California voters. Any federal standard should embrace, not preempt, robust consumer-protection laws of the states regarding remote online notarization.

Notarial acts are a matter of traditional state concern. This Bill would thwart the states' long-standing ability to enact and enforce their own laws regarding the authenticity of critical documents. Any federal legal framework for remote online notarization should allow flexibility for states to monitor developments related to technology and fraud and leave the door open for more rigorous and protective state laws.

Sincerely,

ROB BONTA
California Attorney General

cc: Energy and Commerce Committee members