

**ANPR@sosnc.gov ANPR@sosnc.gov - [Caution: External Mail] RENA ANPR #2**

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**From:** Jim Thompson <jim@esignrecords.org>  
**To:** "ANPR@sosnc.gov" <ANPR@sosnc.gov>  
**Date:** 5/15/2023 9:31 AM  
**Subject:** [Caution: External Mail] RENA ANPR #2  
**Cc:** "Pratt, Nancy G" <Nancy.G.Pratt@bkfs.com>, "dale.hardy@notarize.com" <da...>  
**Attachments:** ESRA NC Comment Letter\_5.12.23.docx

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Good morning,

On behalf of the Electronic Signature & Records Association, I'd like to submit the attached comment letter and would like to thank the State of North Carolina for its work in advancing remote online notarization (RON), and for the opportunity to submit comments on this advanced notice of proposed rulemaking (ANPR).

Sincerely,

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May 12, 2023

### Introduction:

The Electronic Signature & Records Association (ESRA) would like to thank the State of North Carolina for its work in advancing remote online notarization (RON), and for the opportunity to submit comments on this advanced notice of proposed rulemaking (ANPR).

### About ESRA:

ESRA is the premier association representing organizations that adopt or provide electronic signature and document technology. Founded in 2006, ESRA's mission is to further public policy and educate its members and the public on legal, regulatory, and operational issues regarding the use of electronic signatures and records.

In 2021, ESRA established the RON Vendor Caucus Group to address the policy and industry issues impacting RON Technology Vendors nationwide. The RON Vendor Caucus Group is made up of over 20 of the largest RON technology vendors across the country, with representatives comprising the leading experts on RON today. Many of those experts have been instrumental in not only advancing RON in the over 40 states who have authorized it to date, but in formulating the existence of RON and the very legal frameworks for electronic signatures and records in the United States. In supporting the development of RON, a guiding principle for ESRA has always been and continues to be ensuring that RON is implemented in a manner that maintains the integrity of the notarial act while allowing businesses and notaries to serve consumers through technology.

### General Comments:

ESRA would like to thank Secretary of State Marshall and her office for the diligence and effort that is clearly going into researching the rules necessary to implement the Remote Electronic Notary Act (RENA). The questions cover a very wide range of issues in the RON world, and can only be described as comprehensive in many respects. However, while this ANPR appears to be a fact-finding exercise and some requirements the future rules will implement are contained in statute, ESRA would like to take this opportunity to encourage caution on behalf of the Secretary's office regarding scope and specificity when drafting the proposed rules. The vendors represented by ESRA have a vested interest in protecting the integrity of RON. Issues regarding fraud and reliability that may reflect poorly on the industry as a whole would have serious ramifications for each individual vendor were RON to no longer be viewed as a secure process. That said, over-regulation and unnecessarily specific procedures will dissuade many vendors in the space from ever offering services to the notaries of North Carolina. That outcome does not benefit anyone, and so we kindly ask that only vitally necessary processes and procedures be implemented.

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Again, ESRA thanks the Secretary and her office for the comprehensive approach to gathering information for this rulemaking. ESRA will not be responding to each question or sub-question in the ANPR. Instead, these comments will focus on a few of the issues that are directly related to all vendors represented by our organization.

## Responses to Specific Questions

**Question A.1** Third-party vendors have their own set of criteria in order to do business with a platform and they certainly could choose not to work with certain platforms or provide their services in certain states depending on the requirements they would have to meet. Both third-party vendors and platforms do their own due diligence before entering into a partnership.

**Question A.1.a** § 10B-134.19(a) of RENA requires an electronic notary to utilize a licensed platform for all notarial acts. There is a small exception for oaths or affirmations occurring in judicial proceedings under §10B-134.9(c) & (d). However, even though identity proofing the witness is still required in the context of judicial proceedings, any notary public in North Carolina may perform an oath or affirmation in this context regardless of their status as an electronic notary. As such, it would seem most logical for the Secretary to issue standards that identity proofing methods must meet, but leave it to the notary to select the method. As the notary does not have to register or meet any additional qualifications before performing remote electronic notarizations (RENs) in this situation, it follows that the identity proofing method would be viewed similarly. Since the vast majority of RENs are statutorily required to be performed through a licensed platform, electronic notaries will be utilizing approved identity proofing methods and providers as a matter of course.

**Question A.1.b** Yes, § 10B-134.21(a)(3) appears to give the Secretary wide latitude on adopting rules relating to, "...The security standards, features, qualifications, measures, storage, and any other matter related to communication technology, credential analysis, and identity proofing." However, our position is that there is not a need for the SOS to license or establish additional oversight as the third-party vendors have a due diligence process already in place for the products they offer to a platform. The standard items they currently require in order to do business with a platform as a reseller/end-user of their data assets are as follows:

Attach a completed third-party audit report, or SSAE 16 (formerly SAS 70), Webtrust, Systrust, PCI, or ISO 27001 audit report that addresses areas (a) through (b) below, OR a description of your comprehensive information security program which includes:

- a. Proof of technical controls including the use of anti-virus software and perimeter-based firewalls, and account/password management processes.
- b. A description of your end user monitoring process, including what technology is used, the processes for escalation of alerts, and the investigative process. If seeking to become a reseller, please also address the following:
- c. Attach a copy of your current end user application and agreement.

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- d. Documentation of your credentialing practices redacted if necessary to preserve confidentiality. If you currently conduct business as a reseller for a non-LN company, supply a complete credentialing file for a sample customer, showing completion of each of the credentialing steps.
- e. Documentation of your audit process redacted if necessary to preserve confidentiality. If you currently conduct business as a reseller for a non-LN company, supply a complete audit file for a sample customer, showing completion of each of the audit steps.

**Question A.2** Yes, it is important that North Carolina establish rules around custodial services and inform the RENPs as to expectations around custody of the journal and to what extent an RENP may utilize a custodian.

**Question A.4.b** This is a novel requirement in the world of RON, and as such, we are unaware of any industry standard definition for the terms listed in A.4.a as they relate to RON.

**Question A.4.c** No, the requirements cited in A.4 should not be extended to third-party vendors. Platforms will have done their own due diligence on the third-party vendor prior to contracting with them. So, the platform will have already determined the existing risk related to each third-party vendor with which the platform engages. The notary's point of contact for notarization services will be with the platform. Any engagement with the third-party vendor on the part of the notary will be minimal at best.

**Question A.5.** Similar to question A.4, A.5 asks questions that are new to the RON industry. There are no industry specific definitions for these terms.

**Question B.1.** Past performance is no guarantee for future solvency or ability to achieve compliance. Instead of a forensic examination of the financial health of each individual vendor, we would instead suggest a forward-looking approach, requiring an attestation regarding compliance in the event of a cessation of operations and consequences for the failure to follow through.

**Question B.5.d** A platform should have the responsibility to inform the Secretary if a change occurs that could impact viability or functionality of a platform that was approved.

**Question B.5.d.1** If the change of circumstances is substantial enough, then it could require a review

**C. Audio- Video Communication** For the question in this section, we would recommend that the Secretary consult with existing standards, such as those set by the National Association of Secretaries of State (NASS) and the Mortgage Industry Standards Maintenance Organization (MISMO). These are organizations that have been providing guidance on the regulation of RON for years, and as such, referring to them would promote consistency in the industry. They contain definitions of common terms and standards on a variety of subjects, including identity proofing, technological aspects of RON, and deference to state law where applicable.

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**Question D.1** The identity proofing method offered by the third-party vendor that a platform selects allows the platform's experts to determine a risk value they are comfortable with based upon a multi-layered, risk-based defense strategy. This is set at the company level in cooperation with their third-party providers. We would respectfully submit that this is not an area the SOS should be mandating. Identity proofing is never guaranteed to identify an individual, the same as the presentation of an identification credential to a notary in person is not guaranteed to equip a notary to properly identify the individual. The notary continues to play a critical role in the transaction when using RON. Each tool, identity proofing and credential analysis, are intended to assist and enhance the notary's ability to identify someone. They are not intended to replace a notary's function. We would suggest the Secretary consult with the NASS and MISMO standards, and potentially other standards set by organizations such as the National Institute of Standards and Technology (NIST).

**F. Geolocation** The technology to capture an IP address is readily available, but unfortunately it is not foolproof. In addition to capturing this information, it may be prudent to require an attestation by the principal to the notary regarding the principal's location. It should be incumbent on the person for whom the notarization is being performed to comply with the law. Any consequences for noncompliance should be rendered against a fraudulent principal.

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## Comments on the Collection of Information Regarding Platform Employees

There have been many questions that, if implemented in the final rules, would require the disclosure of an immense amount of information, both potentially proprietary and extremely personal. There is a strong feeling among many of our members that the presence of some of these questions would be enough to prevent participation in North Carolina. Some of these questions include the financial history of employees and officers of the company, the employment or educational history of employees, and depending on the breadth of the final definitions, even the list of employees who fall in the category of having substantial influence or control over the platform. We would again ask that the Secretary adopt only those rules absolutely necessary to implement RENA and provide for a successful RON program. Although not all of the statutory requirements match what is to be required in North Carolina, many states have already done this to great success.

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## Conclusion:

It is in our members' best interest that RON be reputable, reliable, and readily available. To that end, we welcome the sensible regulation of our industry in order for those who would circumvent requirements and undermine the safety and security of RON be barred from participating. However, there is a point for every industry where regulation becomes so burdensome or unwieldy that participation is no longer viable for most, if not all, companies. If that point is reached in North Carolina, the ones who will be most hurt are North Carolina's notaries and their businesses. RON will still be available to the vast majority of other states, and North Carolina's citizens can access the services of notaries from those states.

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As such, we humbly ask the Secretary to take our input into consideration and draft the rules in a manner that strikes the appropriate balance between safety and operation.

ESRA thanks the Secretary of State's office for the time and effort put into gathering information through these ANPRs. Our desire is to see RON implemented in North Carolina in a way that maintains the integrity of the notarial act while still allowing businesses and notaries to serve consumers utilizing technology. We believe that the opportunity to achieve this still exists, and hope this opportunity will be taken to work together towards confronting the issues presented.

More information on ESRA's policies and outreach efforts is available at [www.esignrecords.org](http://www.esignrecords.org).

Sincerely,

The Electronic Signature & Records Association

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