

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

From: Jay Teeter <Jay.Teeter@sas.com>
To: Ann Wall <awall@sosnc.gov>, "anpr@sosnc.gov" <anpr@sosnc.gov>
Date: 5/15/2023 10:09 PM
Subject: [Caution: External Mail] RENA ANPR #2
Cc: "Dwight U. Thompson" <Dwight.Thompson@sas.com>

Many thanks, Ann, to the Secretary, you, and your colleagues for the opportunity to provide these comments.

We appreciate your consideration and look forward to staying in touch.

Best regards,

Jay

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RENA ANPR #2

May 15, 2023

Via Email (anpr@sosnc.gov)

To: Ann B. Wall, Esq.
General Counsel and Rulemaking Coordinator
N.C. Department of the Secretary of State

From: Dwight U. Thompson (dwight.thompson@sas.com)
Donald R. Teeter, Jr. (jay.teeter@sas.com)

Question A.2. – Response: Yes, it will help the RENPs and third-party vendors if the Secretary defines custodial services. We suggest the Secretary consult the third-party vendors to ascertain what is technologically feasible in their platforms so that the vendors can provide cost-effective services to the

RENPs and the general public. The third-party vendors can provide secure storage of the electronic journals.

Question C.1.a. – Response: As early drafters of this proposed legislation, we confirm that the terms “real-time” and “simultaneous” had specific meanings, which may have become conflated during later drafting:

The term “real-time” communication was meant to indicate that both the RENP and the RLP were “live” (i.e., present at the same time) during the entire remote notarization session without notable interruption or disconnection. The term “real-time” was meant to rule out a recorded video session by one party or the other. This term “real-time” also excludes popular chat-like sessions where the parties communicate with transmitted recorded messages. This term is meant to exclude asynchronous or time shifting communications, such as email, chat, voicemail, or stored messages.

Note that there can be delay and latency in the telecommunications, which should not be problematic, as long as the latency is negligible (and which is typically considered an acceptable result of modern telecommunication protocols / standards). See, e.g.:

<https://www.techtarget.com/searchunifiedcommunications/definition/real-time-communications>

The term “real time” is also used as part of the definition of an “Interoperable Video Conference Service”. “The term ‘interoperable video conferencing service’ means a service that provides **real-time** video communications, including audio, to enable users to share information of the user’s choosing.” 47 USC § 153 (27) (emphasis added): <https://www.law.cornell.edu/uscode/text/47/153#27>

By way of example, the Colorado Secretary of State defines “Real Time” in a similar way under that state’s election rules [8 CCR 1505-1]:

15.9.1 (d) *“Real time” or “in real time” means, with respect to an interaction between individuals by means of audio-video communication, that the individuals can see and hear each other substantially simultaneously and without interruption or disconnection. Delays of a few seconds that are inherent in the method of communication do not prevent the interaction from being considered to have occurred in real time.*

https://www.sos.state.co.us/pubs/rule_making/files/2020/ElectionRules8CCR1505120200708.pdf

The term “simultaneous” communication was meant to indicate “bi-directional (two-way) communication” between the RENP and RLP, in particular to exclude less robust audio-video connections in which, for example, (i) the quality is so poor that only one party is able to communicate at a time; (ii) only documents or data can be transmitted; or (iii) the parties cannot be present on video at the same time as the data transmission.

Question C.1.b. – Response: This question of time lag rests upon the subjective judgement of the RENP. In particular, when the time lag is such that (i) the communication is no longer “simultaneous” with “bi-directional (two-way) communication”; (ii) the communication becomes disconnected; or (iii) the communication becomes asynchronous, then the RENP can consider the communication to have an “unacceptable time lag”.

Question C.1.c. – Response: As noted above, a time lag of a few seconds is generally considered acceptable in modern telecommunication standards. We note that specific telecommunication protocols in the

computing industry have their own Quality of Service (QoS) standards (and whose technical details are likely beyond the scope of this question).

Question C.1.d. – Response: Please see the responses above. We note that there are various industry standards for defining and measuring the technical qualities of audiovisual communications. Regardless of what type of device and communication service the RENP and the RLP uses, both parties must use the vendor’s platform to perform the notarization. We suggest reviewing with each vendor its own standards on its own platform, given each vendor’s existing experience with many RENs in several other states.

Question F.1. – Response: Please see this article, which includes a table of various states’ definitions of geolocation under their privacy laws:

<https://www.natlawreview.com/article/understanding-differences-state-privacy-laws-how-geolocation-information-defined>

Question F.2. – Response: One key distinction of our RENA from other states’ is the requirement that the principal be located in the U.S. or in certain approved military or diplomatic locations. We believe the identified location of the geolocation must be kept as broad as permissible under statutory requirements and limited only as required to prevent fraud. Further requirements are likely to be problematic.

For example, geolocation services can reveal the location of US government and military personnel, which can include sensitive foreign sites, military bases, and government vessels. See, e.g.:

<https://www.defense.gov/News/News-Stories/Article/Article/1594486/new-policy-prohibits-gps-tracking-in-deployed-settings/>

<https://www.marines.mil/News/Messages/Messages-Display/Article/2472175/use-of-geo-location-capable-devices-applications-and-services/>

In addition, we note that “[t]he FTC considers precise geolocation data to be sensitive personal information, and failure to reasonably protect this information, or failure to adequately disclose its collection or sharing, would violate Section 5 of the FTC Act for unfair or deceptive trade practices.” *How to Navigate Geolocation and Data Protection Laws*, Focal Point Insights, March 18, 2021:

<https://blog.focal-point.com/how-to-navigate-geolocation-and-data-protection-laws>

Further, many companies require the use of Virtual Private Networks (VPN) for security purposes. VPNs do **not** reveal the actual location of their users, but **only** the location of the VPN server. In practice, these employees could be, and often are, located anywhere in the world. We note that any requirement that an employee disconnect from the company’s secure VPN to perform a REN may compromise the company’s policy, if not the company’s security.

We therefore believe that a geolocation described more generally as any of the following is appropriately precise: (i) within the United States; (ii) within a US military installation (including military vessels); or (iii) within a US embassy, consulate, or diplomatic mission (and this geolocation should not be narrowly, and more problematically, limited to, e.g., a particular state, city, street, or within any radius of the principal).

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