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*Department of the Secretary of State*

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**AGENCY:** N.C. Department of the Secretary of State, Notary Enforcement Division.

**ACTION:** Advance Notice of Proposed Rulemaking (ANPR) and Request for Public Comments

**DEADLINE FOR SUBMITTING COMMENTS:** 11:59 p.m. on November 30, 2022

**ADVANCE NOTICE OF PROPOSED RULEMAKING AND DEPARTMENT OF SECRETARY OF STATE (AGENCY) REQUEST FOR PUBLIC COMMENTS**

The Department of the Secretary of State (Agency) is issuing this advance notice of proposed rulemaking (ANPR) to request public comment on significant questions related to the implementation of the Remote Electronic Notarization Act (RENA). This law became effective July 8, 2022. [N.C. Session Law 2022-54](#). RENA primarily amends Article 2 of Chapter 10B, Notary Public Act, in the North Carolina General Statutes, and those changes have been codified at G.S. 10B-134 *et seq.* Adoption of RENA was a direct outcome of the global pandemic, which increased economic activity being conducted remotely, and established the necessity to conduct crucial business, legal, health-care, and other transactions safely and securely and efficiently in the rapidly changing remote environment.

There is widespread interest in the implementation of RENA. The Agency is publishing this ANPR in order to provide stakeholders with an early opportunity to provide input into the rules the Agency must draft in order to implement RENA. The Agency is using its best efforts to circulate this ANPR widely to persons likely to have an interest in rules implementing RENA. The Agency was unsuccessful in having this ANPR published in the official North Carolina Register, and consequently requests the public's help in broadly circulating notice of this ANPR.

RENA obligates the Agency to adopt permanent rules on a large number of topics. The Agency's goal is to establish a system that will continue to promote public confidence in the reliability of signatures and the identification of remotely located principals to ensure that transactions are not repudiated as a result of:

1. Mental incapacity of the principal;
2. Coercion or duress; or
3. Fraud.

In this ANPR the Agency seeks public input on the role of the remote electronic notary public (RENP) and the general procedures and standards needed to implement RENA so as to ensure the effectiveness, efficiency and integrity of the notarial acts and processes contemplated under RENA. The Agency is not required to request public comment at this stage of the rulemaking process. The Agency nonetheless requests stakeholder input in order to provide for a well-informed, transparent rulemaking process that leads to effective, comprehensive and understandable permanent rules. In a second ANPR the Agency will seek public comment regarding the technical features, specifications, and standards applicable to the communication, credential analysis, and identity proofing technologies contemplated under RENA.

RENA allows qualified Notaries Public and certain principal signers to complete an electronic notarial act even if the notary and the principal are in different physical locations. These parties must use real time online communication technology authorized by the Secretary and the performance of the remote electronic notarial act (REN) may take place only after proper identification of the principal. At the time of the REN, the notary (which in most cases must be an electronic notary) must be physically located in North Carolina, while the principal may be located anywhere inside the United States, or under certain circumstances at US military installations or embassies.

All notaries who perform remote online notarizations must be eNotaries and will have to register as RENPs.<sup>1</sup> When an RENP performs a REN, the remote electronic notarial act will be recorded electronically. The RENP will also have to make note of the REN in an electronic journal. Whether a document must be notarized remains subject to other law, rules, or parties to a transaction.

Robust rulemaking is required to clarify the overall process and protect notaries, principals, and the public against fraud. Additionally, the Agency will be required to license the platforms and approve the credential analysis and identity proofing technologies that the RENP uses in connection with a REN. The RENP and the technology vendors will have to preserve the confidentiality and security of the REN. The Agency must also adopt technical rules establishing standards for the licensure and approval of competent vendors capable of meeting the specifications outlined in RENA and the corresponding rules.

**ABOUT THE RULEMAKING PROCESS:** The Agency is not required to request public comment at this stage of the rulemaking process. The formal rulemaking process begins when the Agency publishes proposed rules in the North Carolina Register.<sup>2</sup> The public will have the opportunity to comment upon the proposed rules once published. North Carolina law requires that the public have at least 60 days to comment upon proposed rules. During the

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<sup>1</sup> There is an exception by which eNotaries and traditional notaries may administer oaths and affirmations in judicial actions or proceedings. G.S. 10B-134.9(d).

<sup>2</sup> North Carolina law generally defines a rule as any “agency regulation, standard, or statement of general applicability that implements or interprets [a North Carolina law] or that describes the procedure or practice requirements of an agency.” G.S. 150B-2(8a). The formal process is set out in Article 2A of the N.C. Administrative Procedures Act (APA), G.S. 150B.

public comment period, the Agency anticipates it will also hold at least one public hearing to receive comments. After the public comment period closes, the Agency will review the comments received and as a result may make changes to the rules. The Agency then formally adopts the rules, which subsequently must be submitted to the Rules Review Commission (RRC). RRC is a legislatively appointed commission, and may request changes to the language of the rules. RRC may also object to any of the rules on the grounds that they are: ambiguous, outside statutory authority, not reasonably necessary, or that proper procedures were not followed. Depending on the comments or objections from RRC, the Agency may make changes to the rules and re-submit them to RRC. There are other steps in the rulemaking process not described here.

If you are interested in receiving notices related to the RENA rulemaking process please subscribe to the Agency rulemaking interested persons list. Instructions for subscribing may be found at [https://sosnc.gov/divisions/general\\_counsel/rulemaking\\_interested\\_person\\_mailing\\_list](https://sosnc.gov/divisions/general_counsel/rulemaking_interested_person_mailing_list) or by following the link at [www.sosnc.gov/rulemaking](http://www.sosnc.gov/rulemaking).

**HOW TO SUBMIT COMMENTS:** In order to submit comments, you must:

1. Put ‘RENA ANPR #1’ in the subject line of any submittal cover page,
2. Include your name and contact information,
3. If you are commenting on behalf of a business or organization, please indicate which one, and
4. Include the question number to which your comments respond.

**ADDRESS COMMENTS TO:** Ann. B. Wall, General Counsel and Rulemaking Coordinator, N.C. Department of the Secretary of State. *Note that all comments are subject to the public records provisions of G.S. 132-1, et. seq.*

**SUBMIT COMMENTS BY:**

1. Emailing comments to [ANPR@sosnc.gov](mailto:ANPR@sosnc.gov),
2. USPS to: P.O. Box 29622, Raleigh, NC 27626-0622, or
3. Courier service (ex. UPS, Fed Ex) to: 2 South Salisbury Street, Raleigh, NC 27601.

**FOR FURTHER INFORMATION:** Email the Agency at [ANPR@sosnc.gov](mailto:ANPR@sosnc.gov) or visit [www.sosnc.gov/rulemaking](http://www.sosnc.gov/rulemaking).

**TOPICS ON WHICH THE AGENCY SEEKS COMMENT:**

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<b>GLOSSARY</b>	
<b>Glossary Term</b>	<b>Definition</b>
Agency	The North Carolina Department of the Secretary of State
ANPR	The Advance Notice of Proposed Rulemaking
CT Recording	The communication technology recording defined in RENA as “the simultaneous, synchronous audio and visual recording of the notarial act” <sup>3</sup>
eNotary	An electronic Notary Public registered with the Agency in conformance with Article 2 of Chapter 10B of the N.C. General Statutes, and who is capable of performing electronic notarial acts
IT	Information Technology
RENPS	The Remote Electronic Notary Public, defined in RENA <sup>4</sup>
REN	Remote Electronic Notarization, defined in RENA <sup>5</sup>
Secretary	The North Carolina Secretary of State
RENA	The <a href="#">Remote Electronic Notarization Act</a> , House Bill 776, Session Law 2022-54

#### **A. ESTABLISHING THE RELATIONSHIP BETWEEN REMOTE ELECTRONIC NOTARIES PUBLIC (RENPS) AND eNOTARIES**

The Remote Electronic Notarization Act (RENA) states “a remote electronic notary may perform any of the notarial acts” that only an eNotary can perform “by means of communication technology.”<sup>6</sup> The statute elsewhere establishes the types of electronic notarial acts only an eNotary may perform.<sup>7</sup> Harmonizing these two provisions,

<sup>3</sup> G.S. 10B-134.1(1).

<sup>4</sup> G.S. 10B-134.1(9).

<sup>5</sup> G.S. 10B-134.1(8).

<sup>6</sup> G.S. 10B-134.3(a).

<sup>7</sup> G.S. 10B-115.

and the fact that RENA was placed in the Electronic Notary Act,<sup>8</sup> leads to the conclusion that the General Assembly intended for all RENPs to be eNotaries.

RENA is less clear, however, whether all eNotaries must receive training and become registered RENPs. The definition of eNotary<sup>9</sup> is independent of, and different from, that of the RENC.<sup>10</sup> Whether all eNotaries must receive training and become registered RENPs is subject to two possible approaches. Either:

1. There will be two types of commissioned North Carolina Notaries:
  - (a) traditional Notaries Public, and
  - (b) eNotaries, all of whom are trained and commissioned as RENPs; or
  
2. There will be three types of commissioned North Carolina Notaries:
  - (a) Notaries Public,
  - (b) eNotaries, and
  - (c) RENPs who are eNotaries and who have chosen to become RENPs by receiving additional training.

**Question A.1:** The Agency invites stakeholders to comment on the relative merits of these approaches, and whether other interpretations of the interplay between RENC and eNotary commissioning are appropriate under G.S. 10B.

#### **B. CONDUCTING RENC FOR PRINCIPALS LOCATED IN U.S. TERRITORIES**

RENA allows a North Carolina RENC to perform a RENC for an individual “who is located at the time of the remote electronic notarial act . . . [i]nside the United States.”<sup>11</sup> The RENC may also perform a RENC in specified circumstances for a limited set of individuals on US military bases, embassies, and similar locations.<sup>12</sup> RENA does not include a definition of “United States”.

A strict interpretation of RENA means that an RENC could not perform a RENC for an individual located in one of the sixteen U.S. territories (assuming the individual does not otherwise qualify for the military or diplomatic exception). Five of the U.S. territories have permanent residents who are U.S. citizens: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

**Question B.1:** Is there any legal basis to conclude that U.S. territories are “inside the United States”? Is there any other legal basis under which an RENC could perform a RENC for a principal located in a U.S. territory? If yes to either of these questions, please explain and provide the legal basis for that conclusion.

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<sup>8</sup> The Electronic Notary Act is Part 2 of G.S. 10B, Notaries, G.S. 10B-100, *et seq.*

<sup>9</sup> G.S. 10B-101(4).

<sup>10</sup> G.S. 10B-134.1(9).

<sup>11</sup> G.S. 10B-134.1(10)(a).

<sup>12</sup> G.S. 10B-134.1(10)(b), (c).

### C. USE OF CREDIBLE WITNESS TO ESTABLISH IDENTITY OF REMOTELY LOCATED PRINCIPALS

RENA does not specifically describe the use of a “credible witness” as a permissible means of verifying the identity of the remotely located principal in a REN transaction.<sup>13</sup> RENA states that RENPs shall comply with Article 1 of the Notary Public Act, Chapter 10B of the N.C. General Statutes<sup>14</sup> unless there is a direct conflict with RENA.<sup>15</sup>

Notaries Public and electronic notaries may use a “credible witness” as satisfactory evidence of the principal’s identity when in the physical presence of a principal.<sup>16</sup> Therefore, there is no direct prohibition against such use in RENA, but there is no specific authorization for such use, either. Therefore, it is unclear whether the use by an RENP of a credible witness to verify the principal’s identity is a permissible means to identify the remotely located principal.

**Question C.1:** Does RENA permit the use of a credible witness in connection with a REN?

**Question C.2:** How important has the use of a credible witness been to establishing the identity of a principal when in the physical presence of notaries?

**Question C.3:** What are the policy reasons in support or against the use of credible witnesses to establish the identity of a remotely located principal?

### D. MAINTAINING CONTROL WHEN EMPLOYED BY OTHERS — PLATFORM, ELECTRONIC JOURNAL AND CT RECORDING

The Agency anticipates there will be times when one or more RENPs work for an employer that has its own IT systems, security procedures, and procurement approaches. It is possible that conflicts may arise between the employer’s expectations and statutory obligations of the RENP, outlined below.

With one narrow exception,<sup>17</sup> RENA establishes that:

1. The RENPs must select the communication technology used to perform the REN;<sup>18</sup>
2. No one may select the communication technology for the RENP;<sup>19</sup>
3. The RENP has the duty to take reasonable steps to assure that the communication technology is secure from unauthorized interception;<sup>20</sup> and

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<sup>13</sup> G.S. 10B-134.11(a).

<sup>14</sup> G.S. 10B-102. Scope of this Article. “(a) Article 1 of this Chapter applies to all acts authorized under this Article unless the provisions of Article 1 directly conflict with the provisions of this Article, in which case provisions of Article 2 shall control.”

<sup>15</sup> G.S. 10B-102(a).

<sup>16</sup> G.S. 10B-3(5), 10B-20(c)(2a). Both provisions are in Article 1 of Chapter 10B of the General Statutes.

<sup>17</sup> In judicial actions or proceedings, any notary may administer an oath or affirmation to a witness that does not require remote electronic notarization of a record. In such cases, the notary shall not be required to select the medium of communication technology or to retain a CT Recording of the performance of such remote oral oath or affirmation. G.S. § 10B-134-9(d). See discussion at Section K, *infra*.

<sup>18</sup> G.S. 10B-134.5(b).

<sup>19</sup> G.S. 10B-134.5(c).

<sup>20</sup> G.S. 10B-134.5(b).

4. The RENP may use only communication technology associated with a platform licensed by the Secretary.<sup>21</sup>

As is true for Notaries and eNotaries and their seals, the electronic notary seal is the property of the RENP.<sup>22</sup>

The RENP's duties under RENA include:

1. Complying with security requirements relating to the storage of CT Recordings,<sup>23</sup>
2. Assuring the secure transmission of CT Recordings,<sup>24</sup> and
3. Implementing data protection safeguards.<sup>25</sup>

The RENP has the obligation to notify both the Secretary and appropriate Register of Deeds within ten (10) days of discovering:

1. Any permanent loss of data,
2. Unauthorized use,
3. Loss of use, or
4. Compromise of the security of the electronic journal or the CT Recordings.<sup>26</sup>

In addition, the RENP has the obligation to notify law enforcement, the Secretary, and the appropriate Register of Deeds within ten (10) days of discovering:

1. Theft,
2. Tampering, or
3. Vandalism of the electronic journal or CT Recordings.<sup>27</sup>

The RENP is required to enter certain information into an electronic journal and retain the journal for ten years after the last REN entered.<sup>28</sup> The electronic journal shall be "the exclusive property" of the RENP.<sup>29</sup> The failure of an RENP to provide timely records required by rule shall result in the suspension of the RENP's powers to act as a notary.<sup>30</sup>

The Agency anticipates there will be a contract creating a relationship with the vendor(s) of the platform and that the contract will license:

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<sup>21</sup> G.S. 10B-134.3(a), 10B-134.19.

<sup>22</sup> G.S. 10B-36.

<sup>23</sup> G.S. 10B-134.5(b), 10B-134.9(b)(2), 10B-134.13.

<sup>24</sup> G.S. 10B-134.17(a)(2).

<sup>25</sup> G.S. 10B-134.17(a)(2).

<sup>26</sup> G.S. 10B-134.17(b).

<sup>27</sup> G.S. 10B-134.17(b).

<sup>28</sup> G.S. 10B-134.15(a).

<sup>29</sup> G.S. 10B-134.15(a).

<sup>30</sup> G.S. 10B-134.17(c).

1. The use of the communication technology,
2. The CT Recordings,
3. Credential analysis,
4. Identity proofing,
5. Electronic journal system, and
6. Related security.

Currently, vendors providing eNotary solutions must contract directly with eNotaries commissioned by the Secretary. The Agency suspects employers that are not the RENP may wish for business reasons to license a platform directly with vendors. If the license is directly between the vendor and the employer who is not the commissioned RENP, issues may arise that prevent the RENP from meeting their statutory obligations. The employer is very likely to wish to make decisions regarding vendor selection and security, for example. The vendor is most likely to communicate directly with the employer licensee paying for the platform rather than the RENP.

Such arrangements have the potential to leave the RENP uninformed about significant changes to the platform integrity. For example, the vendor will typically contact the employer licensee directly, not the RENP user, when:

1. The vendor will no longer provide technical support or updates to the platform,
2. There are data breaches and similar issues, or
3. If the vendor will no longer provide the platform.

If the vendor does not directly communicate with the RENP, faithful discharge of the RENP's statutory duties may become compromised. For example, the RENP may not be able to:

1. Select the platform,<sup>31</sup>
2. Maintain exclusive control of the electronic journal,<sup>32</sup> or
3. Report security breaches in a timely fashion.<sup>33</sup>

The Secretary must ensure that there is direct communication between the platform vendor and the RENP, even if the RENP is not the platform licensee. The RENP will need direct access to the platform vendor because the RENP will quickly need to know directly from the vendor if:

1. There is unauthorized interception of a REN;<sup>34</sup>
2. There is theft, tampering, vandalism, or compromise of the security of the electronic journal and CT Recording;<sup>35</sup>

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<sup>31</sup> G.S. 10B-134.5(b), (c).

<sup>32</sup> G.S. 10B-134.15(a).

<sup>33</sup> G.S. 10B-134.17(b).

<sup>34</sup> G.S. 10B-134.23(c)(1).

<sup>35</sup> G.S. 10B-134.17(b).



3. The RENP needs to obtain proof from a vendor that an issue was on the vendor's side of the technology, not that of the RENP;<sup>36</sup> and
4. The RENP needs technical support when issues arise during a REN transaction.

Specific provisions in the vendor-employer contract or in rules adopted by the Secretary might help the RENP comply with the law.

Moreover, an RENP who terminates employment is required to retain the electronic journal and CT Recording.<sup>37</sup> The RENP may not surrender or destroy either except as directed by a court order or a rule adopted by the Secretary.<sup>38</sup> If the RENP is the licensee of the platform, then the RENP will have access to both the electronic journal and CT Recording after leaving the employer. But if the RENP is not the platform licensee, it is unlikely that the RENP will have continuing access to the electronic journal and CT Recording. Specific provisions in the vendor-employer contract or rules adopted by the Secretary might help the RENP perform those obligations arising under RENA.

The employer does not have the authority to require the RENP to provide the original electronic journal to the employer when the RENP leaves that employment. The RENP may nonetheless choose to allow the employer to have the original electronic journal upon termination of employment. In that case, the RENP must maintain backup copies. Whether the RENP may also allow the employer to have access to the CT Recording is unclear from the statute.<sup>39</sup>

In addition to the employment separation described above, RENA allows the RENP to surrender or destroy the electronic journal or CT Recording upon receipt of a court order, or in accordance with rules adopted by the Secretary.<sup>40</sup> RENA provides no guidance into additional circumstances under which rules might permit surrender or destruction, or additional persons to whom rules might permit surrender of the electronic journal or CT Recordings.

In light of the discussion above, the Agency requests comment on the following topics:

**Question D.1:** Should the Agency provide that platform vendors must contract exclusively with RENPs commissioned by the Secretary? *See, e.g.*, 18 NCAC 07C .0502(5).

**Question D.2:** If the rules were to permit a platform vendor to contract with parties other than RENPs commissioned by the Secretary, how should the rules ensure that the vendor communicates appropriately with the RENP?

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<sup>36</sup> G.S. 10B-134.23(c)(1).

<sup>37</sup> G.S. 10B-134.15(c).

<sup>38</sup> G.S. 10B-134.15(d).

<sup>39</sup> G.S. 10B-134.15(c).

<sup>40</sup> G.S. 10B-134.15(d).

**Question D.3:** Specifically, how should the rules ensure that:

**Question D.3.a:** The RENP receives immediate notice directly from the vendor of an unauthorized interception of a REN transaction?

**Question D.3.b:** The RENP can directly contact the vendor if technical support is needed during a REN transaction?

**Question D.3.c:** The RENP receives notice directly from the vendor of data breaches, etc., so that the RENP can make required 10 calendar-day notices of theft, permanent loss of data, etc.?

**Question D.3.d:** The RENP knows that an issue was on the vendor's side of the technology so that the RENP can request proof directly from the vendor?

**Question D.3.e:** The RENP is empowered to ensure that confidentiality of the electronic journal and CT Recording is maintained?

With regard to the RENP's choice to provide the original electronic journal to the employer on termination, while retaining backup copies:

**Question D.4:** Should the rules provide guidance to the RENP about how to exercise discretion and decide whether to provide the electronic journal to the employer upon termination? For example, should the rules:

**Question D.4.a:** Include a list of factors that the RENP may consider in exercising such discretion?

**Question D.4.b:** Include any other requirements related to the RENP and the backup copy that the RENP is required to maintain if the RENP provides the original to the employer?

**Question D.4.c:** If there should be rules related to the backup copy, what should they include, and why?

With regard to the RENP's termination of employment and the CT Recording:

**Question D.5:** Does the RENP have the authority under RENA to provide the CT Recording to an employer upon termination?

**Question D.6:** Does the Secretary have the authority under RENA to authorize the RENP to provide the CT Recording to an employer upon termination?

**Question D.7:** If the answer to either question D.5 or D.6 is "yes," under what circumstances should the RENP have the authority to do so? Please explain and include statutory references.

With regard to other circumstances and the RENP turning over the electronic journal and CT Recording:

**Question D.8:** Are there any other circumstances (other than order of a court of competent jurisdiction) in which an employer or a third party can require the RENP to turn over the original electronic journal or CT Recording upon termination of employment? If yes, please explain and include statutory references.

The Agency invites comment on the questions below regarding additional rules that might permit surrender or destruction of the electronic journal or CT Recording.<sup>41</sup>

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<sup>41</sup> G.S. 10B-134.15(d).

**Question D.9:** Under what circumstances should the rules permit the RENP to surrender or destroy the electronic journal or CT Recording, other than in response to a court order?

**Question D.10:** To whom should the rules permit the RENP to surrender or destroy the electronic journal or CT Recording? For example, possibilities include surrender:

**Question D.10.a:** In response to a subpoena;

**Question D.10.b:** For a quality assurance review by an employer or interested third parties such as a mortgage lender; or

**Question D.10.c:** For an employer's review of the RENP's performance as an employee.

**Question D.11:** Should the rules allow such a surrender to be permanent or should the rules require that surrender be time limited?

**Question D.12:** Should the rules include the controls that should be in place to assure the security and proper use of such materials?

**Question D.13:** How should the rules address these circumstances so that the RENP and the remotely located principal are clear on when the RENP can and cannot provide access to the electronic journals and CT Recording? Please include supporting statutory references.

With regard to the RENA requirement that the RENP maintain the confidentiality of the REN transaction:

**Question D.14:** Should the rules address with specificity the requirement of maintaining the confidentiality of the REN transaction?

**Question D.15:** Should rules address with specificity the risks to confidentiality posed by an RENP using a shared computer, either at home, at the workplace, or in a public space?

**Question D.16:** Should the rules address confidentiality if the RENP conducts the REN in either a public space or in a space susceptible to observation by parties that are neither the RENP nor a remotely located principal?

**Question D.16.a:** Should the rules require headphones and screen-blocking technology in such instances?

**Question D.17:** Are there any other issues related to confidentiality, security or the legal obligations of the RENP that the Agency should address where the RENP is employed by a third party? If yes, what are they and how should the Agency address them?

**Question D.18:** Is there anything else the rules need to address with regard to the duties of an RENP who performs REN for the RENP's employer? If yes, what else should the rules address? Please be specific.

## **E. ASSURING THE SECURITY AND CONFIDENTIALITY OF THE REN ACT**

RENA includes a number of requirements related to the duty of the RENP to maintain the confidentiality of the REN. These include any facts or information that the RENP learns about the remotely located principal or transaction.<sup>42</sup> In addition, RENA includes requirements about:

1. Security of the information technology,

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<sup>42</sup> G.S. 10B-134.9(f).

2. Access to the technology, and
3. Use of the technology.

The Agency will request comments related to security and technology standards in a separate ANPR.

This ANPR requests comment about certain confidentiality and security matters in the immediate control of the RENP. RENA imposes security and confidentiality duties on the RENP that include ensuring that (a) there is no unauthorized interception of the REN transaction and (b) the communication technology is secure during the REN transaction.<sup>43</sup>

Security today is often ensured by a multi-layered set of protections. For example, before the RENP ever gets to the point of logging on to the communication platform, there is typically a password to access the device the RENP will be using. The RENP may be required to change the device password periodically. The RENP may have to enter a different password to sign on to the internet. Both passwords may have to meet requirements such as a minimum number of characters, and inclusion of a number, symbol, and alphabetical character. Each of these steps is a layer in security protections before those that will be incorporated in the communication platform.

It is possible that an RENP may have reason to be in a public space (such as a public library or coffee shop) when performing a REN transaction. Many public spaces offer access to the Internet through “Wi-Fi”. Some provide, and require, use of a password that they provide in order to access the Wi-Fi. This may be a single password for all users of their public Wi-Fi. Others may simply allow access to their Wi-Fi without a password. Use of public Wi-Fi poses security risks. Sometimes people will try to reduce those risks by using a “Virtual Private Network” or “VPN” to access the public space’s Wi-Fi.

If an RENP is conducting a REN transaction in public spaces, or spaces not controlled by the RENP, the transaction is subject to physical compromise. For example, people not involved in the transaction may be able to view the REN and participants. They may even be able to hear what those involved are saying. If the RENP is in a public space and is engaged in establishing the identity of the remotely located principal, this poses particular risks to sensitive personal identifying information.

**Question E.1:** What should the rules require with regard to security up to the point when the RENP signs on to the selected approved or licensed technology? Please be specific.

**Question E.2:** What security and confidentiality provisions should be included in the rules for a situation in which the RENP’s computer is shared with others?

**Question E.3:** Are there specific security measures that the rules should require? If yes, please be specific.

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<sup>43</sup> G.S. 10B-134.5(b).

**Question E.3.a:** Are there user-based industry standards in this area that the Agency should evaluate in adopting in any such rules? Should the rules require:

**Question E.3.b:** That the RENP use only passwords deemed to have higher security, *e.g.*, combinations of at least 12 characters, numbers and symbols?

**Question E.3.c:** That the RENP is allowed to use password managers or must use random password generators?

**Question E.3.d:** That the RENP may not share or record passwords?

**Question E.3.e:** That security must include multi-factor authentication, security questions or biometric measures such as facial or fingerprint recognition?

**Question E.3.f:** That the RENP regularly change the password to access the computer?

**Question E.4:** Should the rules address the confidentiality and security of the RENP's connection to the Internet?

**Question E.5:** Should the rules limit or even prohibit the administration by an RENP of REN acts in spaces other than those over which the RENP has exclusive control in order to ensure the RENA requirements for confidentiality and security are met? Examples of spaces over which the RENP does not have exclusive control might be a coffee shop, an airport lounge, or even an employer's open space where other employees are also working.

**Question E.6:** If the rules allow the RENP to administer REN acts in public spaces or spaces other than those under the exclusive control of the RENP, how should the rules ensure both confidentiality and security?

**Question E.6.a:** Should the rules say that an RENP cannot perform a REN over public networks?

**Question E.6.b:** If the rules allow REN over public networks, must the network be password protected? If yes, using what protocols?

**Question E.6.c:** If the rules allow REN over public networks, should the rules require use of a VPN or other security protections? If yes, what are those other security protections? Be specific.

**Question E.7:** Are there any other issues that the rules should address to ensure confidentiality and security of the RENP's access to the Internet?

**Question E.7.a:** If yes, what are the issues and how should the rules address them? Please be specific.

**Question E.7.b:** Are there any industry standards in this regard that the Agency should consider including in the rules? If yes, what are they?

RENA requires the RENP to ensure that there is no "unauthorized interception" of REN as the act is being performed.<sup>44</sup> For example, hacking would be "unauthorized interception".

**Question E.8:** Should the rules define "unauthorized interception"? If so, how?

**Question E.8.a:** Is there an industry standard definition or other definition of "unauthorized interception" the Agency should consider adopting?

**Question E.8.b:** Is someone looking over the shoulder of the RNP during the RON transaction "unauthorized interception"?

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<sup>44</sup> G.S. 10B-134.5(b).

**Question E.8.c:** What else should be included in “unauthorized interception”?

**Question E.8.d:** Should the rules apply this requirement to the RENP and the platforms and, if so, how?

RENA requires secure storage of the electronic journal and CT Records, and prompt reporting upon discovering permanent data loss, unauthorized use, loss of use or security compromise. RENA is silent with regard to an RENP’s obligation to confirm the continuing accessibility of the electronic journal and CT Recordings.<sup>45</sup> Without rules requiring periodic confirmation of the integrity of the electronic journal and CT Records, an RENP could conclude that no periodic review is the best risk mitigation strategy for the RENP.

The Secretary has authority to adopt rules related to: security standards, measures and other matters related to communication technology, the security of the electronic journal, and the requirements of secure storage of CT Recordings and the electronic journal.<sup>46</sup> In connection with that authority, the Secretary requests comment in response to the following questions:

**Question E.9:** Should the rules require the RENP to periodically confirm that the electronic journal and CT Recordings are fully accessible and properly secure?

**Question E.9.a:** If yes, what is an appropriate periodicity of review?

**Question E.9.b:** How many entries and recordings would the RENP need to check to constitute confirmation?

**Question E.9.c:** How would the RENP confirm the continued security of the electronic journal and CT Recordings?

**Question E.10:** If there should not be an affirmative obligation on the RENP to periodically confirm the full accessibility and continued security of the electronic journal and CT Recording, why not?

**Question E.11:** Would there ever be any specific times when the RENP should be required to confirm the full accessibility and continued security of the electronic journal and CT Recording? If yes, what, specifically should they be?

With regard to rules about inaccessible electronic journals or CT Recordings:

**Question E.12:** What should the rules require the RENP to do upon finding that an electronic journal or CT Recording is missing or no longer fully accessible? For example:

**Question E.12.a:** Should the RENP be required to immediately verify that the backup electronic journal and CT Recording are fully accessible and properly secure?

**Question E.12.b:** Should the RENP be required to immediately contact the vendor to attempt to restore the damaged files?

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<sup>45</sup> G.S. 10B-134.17.

<sup>46</sup> G.S. 10B-134.21(a).

**Question E.12.c:** If the original electronic journal entry or CT Recording cannot be restored, should the RENP be required to ask the vendor to copy the missing or damaged item into the electronic journal or CT Recording?

**Question E.12.d:** If yes, how should the RENP and/or vendor be required to note what happened in the electronic journal?

**Question E.13:** Is there anything else that the rules should address with regard to inaccessible electronic journals and CT Recordings? If yes, what? Please be specific.

**Question E.14:** Are there generally accepted standards for users in this regard? If yes, what are they? Please be specific.

RENA requires the RENP to maintain the confidentiality of the transaction and information gained from a remotely located principal in the course of performing a REN.<sup>47</sup> RENA does not address instances where the remotely located principal might wish the RENP to share certain information, and whether the remotely located principal may waive the confidentiality RENA otherwise requires of the RENP. The Agency therefore requests comment on the following topics related to waiver of confidentiality:

**Question E.15:** Are there circumstances in which the remotely located principal may waive the RENP's statutory duty of ensuring the confidentiality of the REN? If yes, what is the legal basis for allowing such a waiver?

**Question E.15.a:** Can other parties to the transaction ever waive confidentiality?

**Question E.15.b:** May the RENP refuse the waiver of confidentiality?

**Question E.15.c:** Must all parties to the transaction agree to any waiver, even if the waiver is to information personal to the party seeking to make the waiver?

**Question E.15.d:** If waiver is possible, how should the rules define who can waive confidentiality and how, so that the RENP will know that the person has the appropriate authority and is knowingly doing so?

**Question E.15.e:** To what, exactly, should such a waiver apply or not apply?

**Question E.15.f:** How should the rules address how a waiver would be granted and how the RENP should enter it into the electronic journal?

**Question E.16:** If confidentiality cannot be waived, what is the basis in the law for your answer?

## F. ACTS SUBJECT TO CT RECORDING

Under RENA, an RENP who is physically present in North Carolina will be able to perform REN for a remotely located principal in the United States or, in limited circumstances, another country.<sup>48</sup> RENA requires CT Recordings be made of "the remote electronic notarization."<sup>49</sup> The communication technology used must be capable of "securely creating and storing" the CT Recordings.<sup>50</sup> The communication technology must also keep confidential: (1) the questions asked as part of any identity proofing; and, (2) the means and methods used to

<sup>47</sup> G.S. 10B-134.10(g).

<sup>48</sup> G.S. 10B-134.1(10), 10B-134.5(a)(7), 10B-134.9(a)(6).

<sup>49</sup> G.S. 10B-134.9(a)(1), 10B-134.13.

<sup>50</sup> G.S. 10B-134.19(e)(2).

generate the credential analysis.<sup>51</sup> RENA does not directly indicate when a “remote electronic notarization” begins or ends.

RENA states the following steps must occur *prior to the performance of a remote notarial act*:

1. The RENP and remotely located principal must be online using the same communications technology so they can see and hear each other clearly.
2. The RENP must inform the remotely located principal that the notarial act will be recorded.
3. The RENP must ask the remotely located principal if the presence of an attorney is desired.
4. The RENP must require the remotely located principal to confirm that the principal is not being coerced or under duress.
5. The remotely located principal must describe the document(s) to be notarized or the general nature of the transaction.
6. The RENP must confirm that, if documents are to be notarized, none of them are on the list of those that cannot be remotely notarized.<sup>52</sup>
7. The RENP must verify, through the communication technology, the geolocation of the remotely located principal.<sup>53</sup>
8. The RENP must verify the identity of the remotely located principal.<sup>54</sup>

Once steps (1) – (8) are completed to the satisfaction of the RENP, the RENP may administer the REN. The REN, subject to limited exceptions, may consist of the following: the notarial act; completing the notarial certification or jurat; and then recording information as required in the RENP’s electronic journal.

RENA defines the REN as “a notarial act performed by means of communication technology.”<sup>55</sup> RENA also contains the steps mentioned above that have to occur “prior to the performance of a remote notarial act.”<sup>56</sup> In

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<sup>51</sup> G.S. 10B-134.19(e)(2), (4).

<sup>52</sup> An RENP shall not perform a REN on the following documents: 1) a self-proved will executed pursuant to Article 4A of Chapter 31 of the General Statutes; 2) a revocable or irrevocable trust or any other document amending the same, except for certification of trust or similar document; 3) a death beneficiary form that requires an acknowledgment; 4) a codicil to a will; 5) any document related to the relinquishment of parental rights under Article 3 of Chapter 48 of the General Statutes; or 6) mail-in absentee ballot issued under Article 20 of Chapter 163 of the General Statutes. G.S. 10B-134.3(c). The prohibitions described above do not apply when, at the time the REN is performed, the remotely located principal is outside the United States and physically on the military installation or vessel named in the military orders assigning the member to active duty for more than 120 days, provided the remotely located principal is a member, spouse of a member, or dependent of the member of the Armed Forces of the United States. G.S. 10B-134.1(10)b.

<sup>53</sup> G.S. 10B-134.9(a).

<sup>54</sup> G.S. 10B-134.11(a). RENA states the identity of the remotely located principal shall be verified through (a) personal knowledge; or (b) a combination of (i) credential analysis, (ii) identity proofing, and (iii) comparing the physical appearance of the remotely located principal to acceptable documentary descriptions of the person. G.S. 10B-134.11(a). As described in Section C above, it is possible that a credible witness may also be a permissible means of verifying the identity of a remotely located principal.

<sup>55</sup> G.S. 10B-134.1(8)

<sup>56</sup> G.S. 10B-134.9(a)



contrast, the traditional notarial act includes all of the following: positively identifying the principal, administering the oath or affirmation, taking the acknowledgment, and collecting any fee due to the Notary Public.

It appears, therefore, that RENA does not consider identification of the principal or any of the other steps making up the traditional notarial act to be part of the REN. This difference from a traditional notarial act may lead to confusion. The Secretary has the authority to adopt rules that would include some or all of those eight steps in the REN,<sup>57</sup> and there may be good reason to do so.

RENA provides the Secretary with the authority to require CT Recordings of interactions other than just the REN.<sup>58</sup> There may be compelling reasons to require CT Recordings of other interactions between the RENP and remotely located principal.

**Question F.1:** The Agency invites comment on whether the CT Recording of the remote electronic notarial act should include any or all of the following:

**F.1.a:** The RENP and remotely located principal are first introduced and the RENP is assessing whether the principal is under duress or being coerced?

**F.1.b:** The RENP verifies the identity of the remotely located principal?

**F.1.c:** The remotely located principal executes any document, swears an oath, or makes an affirmation?

**F.1.d:** Any other interaction between the RENP and the remotely located principal?

**Question F.2:** The Agency invites comment on whether and how the results of Steps (1) – (8) above should be memorialized:

**F.2.a:** Should the results be specifically entered in the electronic journal?

**F.2.b:** Should the results be documented in some other fashion?

**F.2.c:** Should the RENP's affixing the seal or performing the REN be assumed to indicate that Steps (1) – (8) have been completed to the satisfaction of the RENP?

The answer to those questions will affect rules including security and confidentiality and what is entered into the required electronic journal.

**Question F.3:** In addition, the Agency requests comment on whether there is any reason why the REN does not end when the notarial certificate or jurat is completed by the RENP.

**F.3.a:** For example, is there a reason the REN should end after the RENP completes the entry into the electronic journal?

**F.3.b:** Is there some other point in the process when the REN should be deemed to have started and ended?

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<sup>57</sup> G.S. 10B-134.15(b), 10B-134.13

<sup>58</sup> G.S. 10B-134.13.

## G. CONTENTS OF THE CT RECORDING

RENA requires making CT Recordings of all REN, with the exception of oral oaths or affirmations administered to witnesses in judicial actions or proceedings described below in Section K.<sup>59</sup> In all other circumstances the RENP must notify the remotely located principal that the REN will be recorded. RENA allows “a party involved in a transaction” to require the RENP to include additional information in the electronic journal.<sup>60</sup> RENA does not mention whether parties may require additions to the CT Recording.

RENA requires the Secretary to adopt rules regarding the required elements of the CT Recording.<sup>61</sup> It does not appear to grant any other party the authority to require additional elements in the CT Recording.

**Question G.1:** Please state whether you agree or disagree with the interpretation that only the Secretary has the authority to establish the contents of the CT Recording. Provide the legal basis for your position if you disagree with that interpretation.

**Question G.2:** Is there any reason that the rules should allow parties to require additions to the CT Recording? If yes, please explain the basis in the law for your response.

**Question G.2.a:** If someone other than the Secretary may establish the contents of the CT Recording, is that authority limited to the RENP?

**Question G.2.b:** Or, may other parties to the REN transaction dictate additional contents of the CT Recording?

**Question G.2.c:** If yes, who might such parties be?

**Question G.2.d:** Are there risks to allowing the RENP to require additional elements in the CT Recording and, if so, are such risks unacceptable? Again, please provide legal support where possible.

**Question G.3:** Should the rules require specific content be included in the CT Recording?

**Question G.3.a:** If yes, other than the actual REN, what should that content include?

**Question G.4:** Is there any content that should be specifically excluded from the CT Recording? Please explain your response.

## H. CONTENTS OF THE ELECTRONIC JOURNAL

RENA requires the Secretary to adopt rules regarding the content of the electronic journal.<sup>62</sup> The electronic journal will be a record of the REN performed by the RENP. The electronic journal helps protect the public from fraud by ensuring that there is a record of the circumstances surrounding the REN. The RENP may also be protected by the entries in the electronic journal.

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<sup>59</sup> G.S. 10B-134.13.

<sup>60</sup> G.S. 10B-134.15(b)(3).

<sup>61</sup> G.S. 10B-134.13.

<sup>62</sup> G.S. 10B-134.15(b).

The electronic journal always includes elements of the REN act such as date, time, and name of the remotely located principal. It is possible that the platform technology may automatically enter these elements. The rules must also allow “a party involved in a transaction that utilizes” REN to require additional information to be included in the electronic journal.<sup>63</sup>

**Question H.1:** Should the rules define “a party involved in a transaction that utilizes” REN?

**Question H.1.a:** If not, how will the RENP be able to discern such parties?

**Question H.1.b:** If so, how should the phrase be defined?

**Question H.2:** Should the rules put limits on the type of information such a party may require to be included in the electronic journal?

**Question H.3:** Should the rules provide for circumstances in which the RENP may reject a request that more information be included in the electronic journal?

**Question H.3.a:** If yes, what are they? Please explain and provide legal support for your responses.

**Question H.4:** Should the rules require an entry into the electronic journal regarding who requested that additional information and, if so, what should such an entry include?

## **I. SURRENDER OF ELECTRONIC JOURNAL AND CT RECORDING**

RENA acknowledges that there may be times when the RENP will not or cannot be the custodian of the electronic journal. The statute lists “resignation, revocation, or expiration of a notary commission or death or adjudication of incompetency” as events when such surrender of the electronic journal may be required.<sup>64</sup> There is no similar list of events applicable to surrender of the CT Recording. RENA does not specify any time frame within which the surrender must occur, nor the recipient of the surrender.<sup>65</sup> RENA states further that the Secretary may adopt rules regarding the surrender of both the electronic journal and the CT Recording.<sup>66</sup> Elsewhere, RENA permits an RENP to store the electronic journal and CT Recordings with a “duly appointed” steward that is a third-party vendor approved by the Secretary.<sup>67</sup>

**Question I.1:** Is there any reason why the Secretary should adopt rules regarding the surrender of the CT Recording that differ substantively from those regarding the electronic journal? Please explain and state the legal basis.

**Question I.2:** Other than by court order (as provided by RENA), under what additional circumstances would it be appropriate for rules to permit such surrender or destruction?

**Question I.3:** Should the mandatory surrender rules apply if the RENP resigns only the registration as an RENP or eNotary, or should mandatory surrender occur only if the RENP resigns the core commission as a Notary Public?

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<sup>63</sup> G.S. 10B-134.15(b)(3).

<sup>64</sup> G.S. 10B-134.15.

<sup>65</sup> G.S. 10B-134.15(b)(5).

<sup>66</sup> Compare G.S. 10B-134.15(b)(5) and (d).

<sup>67</sup> G.S. 10B-134.17(a)(1).

**Question I.4:** How much time should the rules allow for the RENP to surrender the electronic journal and CT Recording?

Agency “revocation” of a commission similarly triggers a requirement that the RENP surrender the electronic journal and CT Recording.<sup>68</sup>

**Question I.5:** Should surrender occur whenever the Secretary revokes the specialized registration to act as an eNotary or as an RENP, or only if the Secretary revokes the core commission to act as a traditional Notary Public?

**Question I.6:** Should the rules clarify this requirement in any other regard? If yes, explain.

A traditional Notary Public whose commission expires does not have to deliver the Notary’s notarial records to the Agency if: (a) the Notary applies and is recommissioned within three (3) months of the expiration date, and (b) the Notary’s commission was not revoked or denied by the Secretary.<sup>69</sup> No similar “grace period” appears in RENA.

**Question I.7:** Should the rules include a similar grace period for RENPs whose commissions expire?

**Question I.7.a:** Does the Secretary have the authority to establish such a grace period? Please explain your answer.

**Question I.7.b:** If the Secretary has authority to establish a grace period, should it be for the same amount of time as for a traditional Notary Public? If not, what should the grace period be?

**Question I.8:** What does “adjudication of incompetency” mean?

**Question I.8.a:** Does this require a judicial determination, or does the determination by a qualified medical professional or a licensing board meet the standard set out in RENA?

**Question I.8.b:** Are there different types of incompetency?

**Question I.8.c:** If yes, should the rules apply to all of the types or only certain ones? Please explain.

Incompetency may be transitory. RENA does not expressly provide for an RENP who has been adjudicated incompetent to be later determined to be competent.

**Question I.9:** For how long must an RENP be incompetent before surrender becomes mandatory?

**Question I.9.a:** If an RENP is adjudicated incompetent, how should any subsequent return to competency be established for purposes of RENA?

**Question I.9.b:** Should the rules permit the now-competent RENP to regain custody of the electronic journal and CT Recordings?

**Question I.9.c:** If yes, what criteria and forms of proof should the rules require?

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<sup>68</sup> G.S. 10B-134.15(b)(5).

<sup>69</sup> G.S. 10B-55(b).

**Question I.10:** Is there anything else the rules should cover with regard to adjudications of incompetency? Please explain.

**Question I.11:** Are there any other circumstances for which the rules should require surrender of the electronic journal and CT Recording?

RENA requires the Secretary to establish to whom the RENP must surrender the electronic journal and CT Recording upon one of the triggering events.<sup>70</sup> Elsewhere, RENA requires electronic journals and CT Recordings to be securely stored in a repository under the control of the RENP or with a third-party vendor steward approved by the Secretary and duly appointed under RENA.<sup>71</sup>

**Question I.12:** Where there has been a triggering event that requires surrender and the RENP has already stored the electronic journal and CT Recording with a duly appointed steward, should surrender be deemed to have occurred?

**Question I.13:** How should that transition from “storage” to “surrender” be documented?

**Question I.13.a:** How should the duly appointed steward be documented so that others with appropriate rights may locate the electronic journal and CT Recording at a later date in the event the RENP cannot provide the necessary information?

**Question I.14:** If a steward has not been appointed before an event requiring surrender, to whom should the electronic journal and CT Recordings be surrendered?

**Question I.14.a:** Who shall decide the recipient of the electronic journal and CT Recording where surrender must occur?

**Question I.14.b:** How should surrender be documented so that the electronic journal and CT Recording may be located if needed at a later date?

RENA provides that all stewards must be a third-party vendor approved by the Secretary.<sup>72</sup>

**Question I.15:** Is there any circumstance under RENA in which the Secretary may act as a steward of an electronic journal and CT Recording? If yes, please provide the legal basis for your response.

**Question I.16:** What should be included in the rules about the RENP’s duly appointed steward?

**Question I.16.a:** What should be the criteria the Secretary should establish in order to approve a third-party vendor as a steward of electronic journals or CT Recordings?

**Question I.17:** What should the rules require with regard to an RENP changing the designation of the steward?

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<sup>70</sup> G.S. 10B-134.15(b)(5), (d).

<sup>71</sup> G.S. 10B-134.17(a)(1).

<sup>72</sup> G.S. 10B-134.7(a)(1).

**Question I.18:** Should the rules include any limits on the RENP’s designation of the steward? If yes, what would the limits be? For example:

**Question I.18.a:** Should the rules require the steward to be a third party vendor different from the third party vendor providing the communication technology platform to the RENP? Please be specific and explain.

## **J. REPORTING TO THE AGENCY**

Documentation of the communication, credential analysis, and identity platforms selected and used by each RENP will be essential. For example, the Agency may need to communicate with RENPs affected by a material change in status or performance by a particular third party vendor. The Agency believes similar documentation is necessary for notifying the RENPs’ duly appointed stewards.

**Question J.1:** The Agency invites comment regarding the reporting expectations described above.

**Question J.2:** Should such reporting be the obligation of the RENP, third party vendors, or both?

**Question J.3:** What types of information should be collected? Be specific.

**Question J.3.a:** How will each type of information benefit the RENPs, the vendors, the public, and the Agency?

**Question J.3.b:** For each type of information that should be collected, how often should the rules require its collection?

**Question J.3.c:** Is there information that the rules should require be reported only at longer intervals? For example, in an annual report or annual approval/license renewal?

## **K. OATHS AND AFFIRMATIONS IN JUDICIAL ACTIONS AND PROCEEDINGS**

RENA allows any notary (not solely RENPs) to remotely administer oaths and affirmations to “witnesses” in “judicial actions or proceedings” if:

1. There will not be a remote document notarization,
2. If neither a notarial certificate nor seal is required, and
3. All requirements of RENA relating to the identity proofing of the witness are satisfied.<sup>73</sup>

The notary is not required to select the communication technology used for the remote oath or affirmation exception. No CT Recording is required. Journaling is not mentioned.<sup>74</sup> Notaries will need to be able to quickly determine whether the action or proceeding is one for which they can administer a virtual oath or affirmation. Vendors will need to know the definition in order to develop the software.

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<sup>73</sup> G.S. 10B-134.9(d).

<sup>74</sup> G.S. 10B-134.9(d).

There is no definition in RENA of either “judicial actions” or “proceedings”. There is not a comma after “judicial actions”. Consequently, it appears that the General Assembly may have intended the exception to apply to “judicial proceedings,” though other interpretations are possible.

**Question K.1:** If you disagree with the interpretation that the word “judicial” modifies both “actions” and “proceedings”, please explain and include the basis in law for your explanation.

**Question K.2:** How should “judicial actions” be interpreted? For example:

**Question K.2.a:** Is a “judicial action” limited to actions filed in State, federal, or tribal courts?

**Question K.2.b:** Does it include foreign (non-US) judicial actions?

**Question K.2.c:** Do proceedings before executive branch administrative bodies (such as the North Carolina Industrial Commission) qualify as a “judicial action”?

**Question K.2.d:** Does it include judicial actions filed in the United States Armed Forces courts?

**Question K.2.e:** Are there existing North Carolina statutory provisions that may help with understanding the scope of acceptable “judicial actions”? If yes, please be specific.

**Question K.2.f:** How should the rules define “judicial actions” in order to provide adequate guidance to notaries and all parties?

**Question K.3:** How should “proceedings” be interpreted? For example:

**Question K.3.a:** Is there a statutory definition of “judicial proceedings” or “proceedings” to which the Agency may refer for guidance? If yes, what is it? Please be specific.

**Question K.3.b:** Does a proceeding include a deposition taken in connection with an action filed before a State, federal, or tribal court?

**Question K.3.c:** Does a proceeding include a deposition taken in anticipation of litigation but before there is a filing in court?

**Question K.3.d:** Does a proceeding include hearings before a State, federal, or tribal executive branch hearing officer or agency such as the Industrial Commission or Licensing Board for General Contractors?

**Question K.3.e:** Does it include proceedings in the United States Armed Forces courts?

**Question K.3.f:** How should the rules define proceedings in order to provide adequate guidance to notaries and all parties?

RENA provides limited guidance regarding the technology to be used for the virtual oaths or affirmations performed by a notary. RENA states only that the notary must satisfy all the identity proofing requirements set out in RENA.<sup>75</sup> Since the notary is not required to select the technology, it is unclear how a notary will know if the technology complies with RENA requirements including those for “identity proofing”.

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<sup>75</sup> G.S. 10B-134.9.(d)(3).

**Question K.4:** Is there any reason why the identity proofing used for remote oaths or affirmations taken remotely in “judicial actions or proceedings” may be any technology other than that which is licensed or approved by the Secretary?

**Question K.4.a:** If the identity proofing technology need not be technology approved by the Secretary under RENA, why not? Please explain and provide the statutory basis for your explanation.

**Question K.4.b:** Is there any a reason why the communication technology selected by someone other than the notary and used for remote oaths or affirmations in “judicial actions or proceedings” may be technology other than that approved or licensed<sup>76</sup> by the Secretary?

**Question K.5:** Should the rules provide any requirements for the technology for the REN oaths and affirmations exception other than for the “identity proofing” element? For example, should the rules require that:

**Question K.5.a:** The notary and remotely located principal be able to simultaneously see and hear each other?

**Question K.5b:** The notary - as with any other notarial act - personally review the witness’ satisfactory evidence of identity, after the technological identity proofing has occurred?

**Question K.5.c:** The notary be the one to determine if there has been enough time to review the witness’ satisfactory evidence of identity?

**Question K.5.d:** Is there anything else that the rules should include with regard to oaths or affirmations made remotely in judicial actions or proceedings?

RENA does not require any journal record – whether electronic or traditional paper entry -- for oaths or affirmations performed under this section.

**Question K.6:** Should the rules require such an entry? Why or why not?

**Question K.7:** Are there any other issues that the rules should address with regard to the remote oath or affirmation exception to RENA? If yes, what are they and how should the rules address them?

## **L. DOCUMENTS PROHIBITED FROM BEING NOTARIZED REMOTELY**

RENA establishes certain documents that an RENP may not notarize remotely.<sup>77</sup> An RENP shall not perform a REN on the following documents:

1. A self-proved will executed pursuant to Article 4A of Chapter 31 of the General Statutes;
2. A revocable or irrevocable trust or any other document amending the same, except for certification of trust or similar document;
3. A death beneficiary form that requires an acknowledgment;
4. A codicil to a will;

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<sup>76</sup> G.S. 10B-134.19.

<sup>77</sup> G.S. 10B-134.3(c), (e).



5. Any document related to the relinquishment of parental rights under Article 3 of Chapter 48 of the General Statutes; or
6. A mail-in absentee ballot issued under Article 20 of Chapter 163 of the General statutes.<sup>78</sup>

The prohibitions described above do not apply when, at the time the REN is performed, the remotely located principal is outside the United States and physically on the military installation or vessel named in the military orders assigning the member to active duty for more than 120 days, provided the remotely located principal is a member, spouse of a member, or dependent of the member of the Armed Forces of the United States.<sup>79</sup>

**Question L.1:** Should the rules provide for an RENP who is not a lawyer to determine whether a prohibited document has been presented for remote notarization?

**Question L.1.a:** If yes, how can the rules accomplish this so that the non-lawyer RENP is not practicing law without a license?

**Question L.2:** How should the Agency enforce this prohibition where the RENP is not a lawyer and presumably is not qualified to determine whether a document is in the category of prohibited documents?

**Question L.3:** Should the Agency by rule declare the effect of a putative REN on a prohibited document? For example, is the REN in such circumstances *void ab initio* (from the beginning)? Please be specific.

**Question L.4:** Should the rules address the need for the RENP and vendors to know if documents are prohibited? If yes, how? Be specific.

## **M. REASONABLE ACCOMMODATION**

RENA requires that the communication technology make reasonable accommodation for remotely located principals with vision, hearing, or speech impairments.<sup>80</sup> “Reasonable accommodation” is a term of art defined in North Carolina law and addressed in federal law.<sup>81</sup> The Agency is unaware of any federal rules clarifying the reasonable accommodation standards with regard to software and technology.

**Question M.1:** What requirements for reasonable accommodation should the rules require to be incorporated into the platforms licensed by the Secretary?<sup>82</sup>

**Question M.2:** Are there generally accepted industry standards or federal rules to which the Secretary may refer?

**Question M.3:** Should the rules require the RENP to make any reasonable accommodations in addition to those incorporated by the third party vendors?

**Question M.3.a:** If yes, what additional reasonable accommodations should the rules require the RENP to make?

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<sup>78</sup> G.S. 10B-134.3(c).

<sup>79</sup> G.S. 10B-134-3(d), *incorporating* G.S. 10B-134.1(10)b.

<sup>80</sup> G.S. 10B-134.1(1).

<sup>81</sup> G.S. 168A-3(10), 29 U.S.C. 794, 42 U.S.C. 12101.

<sup>82</sup> G.S. 134.19.

**Question M.4:** Should the rules require the RENP to ask the remotely located principal about the need for reasonable accommodation?

**Question M.4.a:** If yes, should the RENP document the question and remotely located principal's response? How and where?

RENA prohibits inclusion of pre-recorded audio and video in the communications technology.<sup>83</sup>

**Question M.5:** Does this prohibition on pre-recorded audio and video pose any issues that need to be addressed in the rules with regard to making reasonable accommodations for those with visual, hearing, or speech impediments?

**Question M.5.a:** If so, what are the issues? Please be specific.

**Question M.5.b:** How should the rules address such issues? Please be specific.

**Question M.6:** Are there other issues the Agency should consider in order to ensure that the rules support reasonable accommodation and provide clear direction to all parties to the REN?

## **N. APPLICABILITY OF OTHER LAWS**

RENA is one law within a larger network of laws designed to: (1) protect the public against fraud; (2) promote economic transactions; (3) increase public trust through accountability; (4) facilitate transparency in governmental activities; and (5) support the rule of law. Such other laws relating to confidentiality, privacy and the security of personal information include, but are not limited to those listed below.

**Question N.1:** Please identify any other statutes (federal or state) that the Agency should consider while preparing rules to implement RENA.

**Question N.2:** If you believe the Agency does not need to consider the effect of these or any other law while preparing implementing rules, please explain. Provide the legal basis for your conclusion.

**Question N.3:** If you believe the Agency should consider the effect of these or other laws while preparing implementing rules, please provide your analysis with regard to the specific considerations the Agency must make. Please link your analysis to the specific laws you believe the Agency should take into consideration.

### **North Carolina Laws**

Electronic Commerce in Government, G.S. Chapter 66, Article 11A

Financial Privacy Act, G.S. Chapter 53B

Public Records Act, G.S. Chapter 132

Revised Uniform Fiduciary Access to Digital Assets Act, G.S. Chapter 36F

Trade Secrets Protection Act, G.S. Chapter 66, Article 24

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<sup>83</sup> G.S. 10B-134.5(a)(5).

**United States Laws**

Children’s Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. 6501–6505

Drivers Privacy Protection Act (DPPA), 18 U.S.C. 2721, *et seq.*

Electronic Communications Privacy Act (ECPA), 18 U.S.C. 2510-2523

Fair and Accurate Credit Transactions Act (FACTA), 5 U.S.C. 1681-1681x

Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681

Family Education Rights and Privacy Act (FERPA), 20 U.S.C. 1232g

Federal Trade Commission Act (FTCA), 15 U.S.C. 41-58

Gramm-Leach Bliley Act (GLBA), 15 U.S.C. 6801-6809, 6821-6827

Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 201

Privacy Act, 5 U.S.C. 552a

Stored Communications Act (SCA) Stored Wire and Electronic Communications and Transactional Records Access Act (Stored Communications Act or SCA), 18 U.S.C. Chapter 121

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001(Patriot Act), Pub. L. 107-56, Oct. 26, 2001, 115 Stat. 272

Any other federal laws?

**Other States’ Laws**

California Consumer Privacy Act of 2018 (CCPA), California Civil Code Section 1798.100, California Privacy Rights Act (CPRA), California Civil Code Section 1798.121

Colorado Privacy Act

Virginia Consumer Data Protection Act (CDPA), Va. Code Ann. 59.1-575 (2021)

Biometric Information Privacy Act, 740 ILCS 14, *et seq.*

Any other states’ laws?