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# Wisconsin Legislative Council

## RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 22-009

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]**

#### 1. Statutory Authority

a. The plain language analysis explains that the department intends to promulgate the proposed rule, in part, to relieve an apparent discrepancy between the requirements contained in ss. 140.02 (3) (a) and 140.17 (1), Stats., related to the required content of a notary public’s official stamp. The department should explain its statutory authority to relieve a statutory discrepancy by administrative rule rather than efforts to resolve the statutory discrepancy through the legislative process.

b. Following extensive details on provider approval in s. DFI-CCS 25.05, s. DFI-CCS 25.06 states that the remote notary council may approve alternative processes or methods of performing notarial acts for remotely located individuals. It is unclear what the statutory authority is for this approval, as it appears to create an approval process administered outside of the administrative code. The department should explain its statutory authority to delegate this authority to the remote notary council without providing such details by rule.

#### 2. Form, Style and Placement in Administrative Code

a. Section DFI-CCS 25.02 (1) provides that the department may provide a notary public notices and communications by email or other electronic means. Subsection (2) requires a notary public to provide changes to certain information within 10 days but does not explain the process for doing so. The department should explain how a notary public may provide these changes. The department should also consider whether to include the address (e.g., mailing address, email address, website, etc.) in a note at the end of sub. (2). This comment also applies to the submission requirement referenced in s. DFI-CCS 25.05 (2). [s. 1.12 (1) (a), Manual.]

b. Section DFI-CCS 25.03 appears to relate to the department’s determination of arrests and convictions that are substantially related to regulated activity as a notary public, pursuant to s. 111.335, Stats. However, as drafted, the proposed rule does not clearly specify the relationship between the provision and the treatment of an arrest or conviction under the state’s Equal Employment Law, ss. 111.321, 111.322, and 111.335, Stats. The department should review the

intent of this provision and revise accordingly, in a manner consistent with the Equal Employment Law. In particular, s. 111.335, Stats., contemplates agency discretion to determine whether an arrest or conviction is substantially related to a regulated activity. Is it the department's intent to deem all arrests, and all convictions for misdemeanors and other non-felony offenses to be unrelated to activity as a notary public? That appears to be the current meaning of sub. (1). Similarly, is it the department's intent to deem any expunged or pardoned felony conviction to be unrelated to activity as a notary public? That appears to be the current meaning of sub. (2). The content of subs. (1) and (2) should also be reviewed for consistency with sub. (3). For example, if misdemeanors, non-felony offenses, and expunged and pardoned felonies are deemed unrelated to activity as a notary public, would they need to be disclosed under sub. (3)?

c. Section DFI-CCS 25.04 (2) requires a notary public to review and understand s. 140.145, Stats., and all guidance published on the department's website regarding remote online notarization in this state. Under state law, "guidance" is a term of art referring to material that is published by an agency but that does not have the force of law. If the department wishes to assign a force of law, such as the consequences in s. DFI-CCS 25.08, to such material, it should promulgate specific material directly in the administrative code. [s. 1.12 (1) (a) and (4), Manual.]

d. Various titles are lengthy and confusing. Three examples of lengthy titles are s. DFI-CCS 25.05 (title), (2) (title), and (3) (title). A title should fairly reflect and encompass all of the content of the text that follows, but be as concise as possible. [s. 1.10 (2) (a) 3., Manual.] The department should review titles throughout the entire rule and consider rewriting them to be as concise as possible.

e. In s. DFI-CCS 25.05:

- (1) Various terms are used when referring to a "provider of communication technology used to perform notarial acts for remotely located individuals", including "provider of communication technology", "provider", and "applicant". The department should consider creating a definition and use it consistently throughout the rule. [s. 1.07 (1), Manual.]
- (2) In subs. (1), (2) (intro.), (3), and (5) (a), it is unclear whether the department or the remote notary council approves a provider of communication technology before it may be used in the state to perform notarial acts for remotely located individuals. It is also unclear where the application form may be obtained and submitted. Is the application submitted to the department? If the application form is available or submitted on the department's website, a note specifying the location may be helpful. [s. 1.12 (1) (a), Manual.] The department should review the intent of these provisions and revise accordingly.
- (3) It appears that the purpose of subs. (2) (a) to (o) is two-fold. One is to create requirements to approve providers of communication technology and the process of identity proofing. Another appears to be the establishment of requirements for communication technology more generally, pursuant to s. 140.145 (8) (b) and (c), Stats. If the intent is to also establish the requirements that a provider of communication technology must satisfy in order to be approved in Wisconsin, then the department should create another provision that clearly does so.

- (4) In sub. (2) (d), the incorporation by reference of standards of the Mortgage Industry Standards Maintenance Organization should be reviewed for compliance with s. 1.14 of the Manual. In particular, the provision should be reviewed to avoid prospective incorporation by reference of future materials.
- (5) Subsection (4) organizes various subject material related to providers. The department should consider separating the renewal requirements into a different subsection. [s. 1.09 (2) (b), Manual.]
- (6) Subsection (5) (a) 5. should be rewritten in the present tense. [s. 1.05 (1) (b), Manual.]

f. The formatting of references to state statutes should be reviewed throughout the rule and revised to conform with the format specified in s. 1.15 (2) (b) 1., Manual.

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

a. Sections 140.145 (9) and 140.27 (1) (c), Stats., require the department to consider recommendations from the National Association of Secretaries of State, or any successor organization, when the department is promulgating its rules related to notarial acts of a remotely located individual. The department should explain whether it has considered the recommendations from this association.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. In s. DFI-CCS 25.03 (3), the various words that are plural should be written in the singular form. [s. 1.05 (1) (c), Manual.]

b. In s. DFI-CCS 25.04 (2), it is unclear what the phrase, “all guidance published on the department’s website regarding remote online notarization in this state” means. For example, does the online notarization need to occur in this state? What does the undefined phrase, “remote online notarization” mean? It is not defined by statute or rule, or used anywhere else in the rule. The department should review its intent for this subsection and revise accordingly.

c. In s. DFI-CCF 25.04 (3), it is unclear who determines whether the notary public is “comfortable and competent” with the technologies and processes to be utilized in performing the notarial act. Does the department make this determination? Does the notary public make this determination, and if so, how does the notary public inform the department of this self-determination? Does the individual submit sign a sworn statement to this effect? Also, the title of this section refers to notarial acts for remotely located individuals, but sub. (3) refers to notarial acts generally. The department should review the intent of this subsection and revise accordingly.

d. In s. DFI-CCF 25.05:

- (1) It is unclear in sub. (2) (k) what “experience and track record in other jurisdictions” means how a provider may demonstrate its experience and track record. The department should review its intent of this provision and revise accordingly.
- (2) It is unclear in sub. (2) (m) what constitutes a “threatened” lawsuit. This term is vague and should be defined.
- (3) Subsection (4) (c) does not specify whether any provider or only approved providers of a communication technology must promptly inform the department

of notaries who are authorized to use the provider's technology. The department should review the intent of this section and revise accordingly. The department should also consider creating a note that specifies where the provider may inform the department of these notaries public. [s. 1.12 (1) (a), Manual.]

- (4) It is unclear in sub. (4) (d) when the department may require a provider to re-apply for approval. The department should specify in the rule what "time" the department "deems reasonable and appropriate". At present, the provision appears unnecessary in relation to the details on termination provided in sub. (5).
- (5) It is unclear in sub. (5) (a) 1. what qualifies as "any other relevant state or federal statute or administrative rule". It is also unclear what provisions in ch. 140, Stats., a provider may violate as this chapter appears to delegate authority for the department to specify the requirements placed upon a provider. The department should review the intent of this provision and revise accordingly, while also ensuring that it is consistent with current law.
- (6) Subsection (5) (a) 6. appears to be vague and overly broad. It also appears to misconstrue ch. 140, Stats., as setting forth requirements that a provider of communication technology may violate. Section 140.145 (8) (b) and (c), Stats., requires the department to establish these requirements by rule. The department should review the intent of this provision and revise accordingly with more specificity.

e. In s. DFI-CCS 25.07, it is unclear whether the phrase "The department will" means may or shall. The word "will" could either be permissive or mandatory. The department should review its intent and replace "will" with the word "may" or "shall". [s. 1.08 (1) (b), Manual.]

f. In s. DFI-CCS 25.08:

- (1) It appears that in sub. (1), the department is investigating complaints that a person "violated, is violating, or is about to violate" ch. 140, Stats., or ch. DFI-CCS 25. The department should consider replacing this phrase with the word "complaint" and explaining how a complaint may be filed with the department.
- (2) In sub. (2) (c), the phrase "any felony" could be under state law, another state's law, or federal law. The department should review the intent of this term and revise accordingly.
- (3) In sub. (2) (e), in the phrase, "untrue or misleading statement or omission", it is unclear whether the phrase "untrue or misleading" modifies both the word "statement" and the word "omission", or just the word "statement". The department should review its intent with this statement and revise accordingly.
- (4) The department's investigation process is mentioned, but not fully articulated or described. For example, under sub. (2) (f), the department may deny or refuse to renew, revoke, suspend, or impose a condition on a notary public's commission for failing to promptly comply with the department's investigation. What does the department consider to be prompt compliance? The department should consider reviewing its intended process for conducting investigations, and revise accordingly.