

BILL ANALYSIS

C.S.H.B. 5004
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

During the COVID-19 pandemic, Governor Abbott provided a temporary accommodation in the form of a proclamation allowing for remote ink notarization in real property transactions if certain conditions were met. This accommodation allowed individuals to close real estate transactions without risking exposure to the COVID-19 virus. A straightforward means of providing for remote ink notarization transactions from now on is to amend the existing remote online notarization statute to allow remote ink notarization while keeping the security framework for electronic notarizations in place. In 2019, the 85th Texas Legislature enacted legislation to allow for remote online notarization with several safeguards in place including identity proofing and credential analysis. Remote online notarization allows individuals to have their documents remotely notarized avoiding many inconveniences and potential difficulties formerly caused by the requirement that acknowledgments be witnessed by the notary and the signer within each other's physical presence. Transactions utilizing remote online notarization have proven popular and a great benefit to consumers. The current remote online notarization statute does not accommodate the use of a remote ink notarization, which allows a person to use a "wet ink" signature rather than an electronic signature. C.S.H.B. 5004 sets out provisions and revises current law to provide for the online notarization by an online notary public of tangible instruments or electronic documents that are notarized by the online notary public with a tangible symbol and not an electronic signature.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 5004 amends the Government Code to set out provisions and to revise current law to provide for the online notarization by an online notary public of tangible instruments or electronic documents that are notarized by the online notary public with a tangible symbol and not an electronic signature, defined by reference as an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. Accordingly, the bill sets out new definitions for purposes of current law and the bill's revisions to specify the following:

- "sign" means, with the present intent to authenticate or adopt a record, to execute or adopt a tangible symbol or execute an electronic signature; and
- "signature" means a tangible symbol or electronic signature that evidences the signing of a record executed or adopted by a person with the intent to sign the document.

C.S.H.B. 5004 clarifies that the secure electronic record of electronic documents notarized by the online notary public that the notary must keep containing, among other information, the date and time of a notarization is instead applicable to the date and time of an online notarization. The bill requires an online notary public to keep a record of documents that are tangible instruments notarized by the online notary public with a tangible symbol and requires the record for each online notarization with a tangible symbol to contain the same elements as those for the records kept by the online notary public for electronic documents notarized by the online notary public.

C.S.H.B. 5004 requires an online notary public to authenticate all online notarizations with the online notary public's electronic seal if the online notarization was performed with respect to an electronic document or with the online notary public's seal of office if the online notarization was performed with respect to a tangible document.

C.S.H.B. 5004, with respect to the requirement for an online notary public to verify the identity of a person creating an electronic signature at the time that the signature is taken by using two-way video and audio conference technology, revises that provision, as follows, by:

- replacing the authorization for the identity to be so verified by certain methods with a requirement for the identity to be so verified by those methods; and
- updating the language in current law describing those methods to reflect the bill's revisions and added definitions.

The bill requires the notarial certificate for an online notarization to indicate if the applicable signature was a tangible symbol or an electronic signature.

C.S.H.B. 5004 requires an online notary public, in performing an online notarization in which the principal signs a tangible document with a tangible symbol and not an electronic signature, to reasonably confirm that a document before the online notary public is the same document in which the principal made a statement or on which the principal executed a signature.

C.S.H.B. 5004 establishes that an online notary public satisfies such requirement to take an acknowledgment of a signature on a tangible document if the following conditions are met:

- during a recording of any video and audio conference that is the basis for satisfactory evidence of identity, the acknowledgment is displayed to and identified by the principal and the principal signs the document and a declaration, as specified by the bill, that is a part of or securely attached to the document;
- the principal sends the document and declaration to the online notary public not later than the third day after the date the online notarization was performed; and
- the online notary public in the video and audio recording records the principal signing the document and declaration, receives the document and declaration sent by the principal not later than the 10th day after the date of the online notarization, and, after receipt of the document and declaration from the principal, executes a notarial certificate that includes a statement, as specified by the bill, stating the online notary public witnessed the signing of the applicable document by means of the video and audio conference technology.

The bill establishes that an online notarization performed in compliance with these requirements complies with any requirement regarding the execution of a notarial certificate and is effective on the date the principal signed the declaration. A notarial certificate executed following a signing witnessed by video and audio conference technology may be relied on as conclusive evidence of compliance with the conditions for the timely delivery and receipt of the applicable document and declaration. These provisions expressly do not preclude use of another procedure to satisfy the bill's requirement for applicable confirmation for an online notarization performed with respect to a tangible document.

C.S.H.B. 5004 authorizes an online notary public to administer an oath or affirmation to a principal as an online notarization if, except as otherwise provided by other state law, the online notary public does the following:

- identifies the principal by verifying the identity of a person signing a document at the time of the online notarization by using the applicable two-way video and audio conference technology;
- creates or causes the creation of a video and audio recording of the principal taking the oath or affirmation; and
- retains or causes the retention of such a recording under the bill's provisions revising current law regarding the electronic record that must be kept of online notarizations.

EFFECTIVE DATE

January 1, 2024.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 5004 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute includes a provision absent from the introduced establishing that a notarial certificate executed following a signing witnessed by video and audio conference technology may be relied on as conclusive evidence of compliance with the conditions for the timely delivery and receipt of the applicable document and declaration.

Both the introduced and the substitute require an online notary public to keep a record of the documents notarized by the online notary public with a tangible symbol. However, the substitute specifies that an online notary public is only required to keep such record of documents that are tangible instruments.

Both the introduced and substitute define "sign" as executing or adopting a tangible symbol with the present intent to authenticate or adopt a record. However, whereas the introduced also defined that term as, with the same intent, attaching to or logically associating with the record an electronic symbol, sound, or process, the substitute instead defines the term as executing an electronic signature with that same intent.

The substitute changes the bill's effective date from September 1, 2023, as in the introduced, to on January 1, 2024.