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Registers of Deeds, Land Records, and Notaries

The laws governing the institutions involved in real estate transactions underwent substantial change in 2005. The reforms can be classified into three general categories. The most fundamental reforms changed the procedures for recording real estate instruments, conforming the process more closely to that of other states, by narrowing registers' review responsibilities and simplifying methods for recording satisfactions of security instruments. The second category of reforms is a comprehensive rewrite of the notary laws, including rules about notary qualification and discipline and the performance of notarial acts. The third category consists of new statutes intended to facilitate the electronic recording of real estate instruments, the standards for which are to be developed by the Secretary of State in consultation with a newly formed Electronic Recording Council. The 2005 legislation represents substantial progress in positioning North Carolina's fundamental real estate transaction institutions to handle modern transactions.

Mortgage Satisfactions and Registers' Review

S.L. 2005-123 (S 734) resulted from the combined efforts of groups involved in real estate transactions, including registers of deeds, attorneys, title insurance companies, lenders, and the Secretary of State's office. The final act is the fusion of two individual legislative endeavors. The first of these is embodied in the Uniform Residential Mortgage Satisfaction Act, a product of the National Conference of Commissioners on Uniform State Laws. This act is intended to simplify some of the complexities in real estate transactions resulting from idiosyncratic rules for recording mortgage satisfactions and to provide a mechanism for dealing with obtaining satisfactions from uncooperative secured creditors. The second influence in the framing of S.L. 2005-123 was an effort by entities involved in real estate transactions to clarify and narrow the instrument review responsibilities historically assigned to registers, which were perceived as causing unnecessary complexities and delays and presenting an obstacle to the implementation of electronic recording.

S.L. 2005-123 makes some of the most fundamental revisions in decades to North Carolina law governing registers' duties. North Carolina registers have long been more involved in the real estate instrument recording process than is common in other states. They have been obliged to certify the

acknowledgment or proof appearing on instruments by determining whether it is in “due form” and “duly proved or acknowledged.” Registers also have played an unusually active role in handling real estate financial documents, examining security instrument satisfaction records for completeness, accuracy, and form compliance, and making entries on the record. This process consumed registers’ and lenders’ resources and resulted in delays that impaired the mortgage lending process. S.L. 2005-123 greatly narrows the registers’ role in reviewing and preparing records of mortgage satisfactions. These changes took effect October 1, 2005. Instruments not yet recorded as of that date will be governed by the revised law regardless of when they were executed or acknowledged.

Registers’ Review

S.L. 2005-123 has eliminated the requirement that registers certify that execution by one or more signers has been “duly proved or acknowledged” and that the proof or acknowledgment is “in due form.” The revised statute limits the register’s review to determining if the instrument has a proof or acknowledgment if one is required and then only verifying that the proof or acknowledgment “by one or more signers appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgments, and the said proof or acknowledgment includes the officer’s signature, commission expiration date, and official seal, if required.” G.S. 47-14(a). The statute clarifies that the register is not required to verify “(i) the legal sufficiency of any proof or acknowledgment, (ii) the authority of any officer who took a proof or acknowledgment, or (iii) the legal sufficiency of any document presented for registration.” G.S. 47-14(a). An additional clarification of the register’s review responsibilities included in the amended notary laws provides that registers must accept notarial certificates that are in the statutory form and need not review signatures for statements about representative capacity or authority to sign. S. L. 2005-391 (S 671), Section 9; G.S. 47-37.1.

S.L. 2005-123 also provides: “Any document previously recorded or any certified copy of any document previously recorded may be rerecorded, regardless of whether it is being rerecorded pursuant to G.S. 47-36.1 [pertaining to correction of minor errors by explanation].” G.S. 47-14(a). This language indicates that a document need not be reviewed for compliance with recording requirements if it is the same document previously recorded or a certified copy of the document. A technical correction was proposed in Section 40(c) of House Bill 327, the 2005 Technical Corrections Act, to clarify that registers had no obligation to review documents presented for rerecording for alterations, but House Bill 327 was not passed before the General Assembly adjourned.

Simplified Satisfaction Process

S.L. 2005-123 provides new forms of satisfaction documents to be prepared and recorded by secured creditors or trustees. New provisions define the term *security instrument* as any document creating an interest in real property to secure an obligation, including deeds of trust and mortgages, and the term *secured creditor* as the holder of the interest, which does not include a trustee. G.S. 45-36.4(16), (18). A “satisfaction of security instrument” is to be provided by a secured creditor of a security instrument including a mortgage or deed of trust or a “trustee’s satisfaction of a deed of trust” by the trustee or substitute trustee of a deed of trust. Either satisfaction document must identify the type of security instrument, the parties to the original instrument, the original instrument’s recording data, and the office in which it was recorded. The satisfaction document also must indicate that the person signing is the secured creditor, or the trustee for a trustee’s satisfaction, and it must contain language terminating the effectiveness of the security instrument. It must be signed by the secured creditor in the case of a satisfaction of security instrument or the trustee in the case of a trustee’s satisfaction, and be acknowledged. G.S. 45-36.10, 45-36.11, 45-36.20, 45-36.21. The revised law says that “[n]o particular phrasing is required for a satisfaction of a security instrument” or a trustee’s satisfaction of a deed of trust, but it provides forms including the minimum information. G.S. 45-36.11, G.S. 45-36.21.

The revised law provides that there are only two reasons for a register to refuse to record a satisfaction of security instrument or trustee’s satisfaction of a deed of trust: It “is submitted by a

method or in a medium not authorized for registration by the register of deeds under applicable law,” or it is not signed by the required party and acknowledged as required for a real estate conveyance. G.S. 45-36.10(b), G.S. 45-36.20(e). The statutes clarify that a register is not “required to verify or make inquiry concerning . . . the truth of the matters stated” in any satisfaction document or to verify “the authority of the person executing” the document. G.S. 45-36.10(b)(2), G.S. 45-36.20(e)(2). The revised law has also deleted a provision directing registers to reject instruments that did not meet a requirement that names be printed, stamped, or typed beneath signatures on satisfactions prepared under G.S. 45-37, although the requirement itself remains. G.S. 45-37(f). No fee is to be charged for recording satisfactions. G.S. 45-37.2(a).

Obsolete Satisfaction Methods

S.L. 2005-123 deletes from the statute the provision requiring the register to cancel a security instrument upon receipt of a “notice of satisfaction” by a trustee or mortgagee, which effectively has been replaced by the satisfaction of security instrument and trustee’s satisfaction of a deed of trust. G.S. 45-37(a)(5). The satisfaction of security instrument document similarly effectively replaces the register’s cancellation of a security instrument upon exhibition of a certificate of satisfaction by the note owner, which was required by the previous statute. G.S. 45-37(a)(6). The revisions also eliminate the provision for acknowledgment of satisfaction before the register by the trustee, mortgagee, or trustee’s or mortgagee’s legal representative, agent, or attorney. G.S. 45-37(a)(1). A notice of satisfaction or a certificate of satisfaction in the old forms will be accepted and recorded as a proper satisfaction instrument. G.S. 47-46.1, G.S. 47-46.2.

Satisfaction Rescission

The revised law authorizes anyone who erroneously records a satisfaction instrument to record a document of rescission that identifies the erroneous satisfaction or affidavit and states that the error has been made, that the secured obligation remains unsatisfied, and that the security instrument remains in force. Lenders sought this change as some relief from the revised law’s shorter period for lenders to provide satisfaction records—thirty days—fearing the shorter period would increase the likelihood of erroneous recordings. The statute does not expressly require the document of rescission to be acknowledged, which likely will be addressed in corrective legislation. The document of rescission does not affect the rights of those who acquire a real estate interest between the time the satisfaction or affidavit and the document of rescission were recorded, and the law subjects anyone who erroneously or wrongfully records such an instrument to liability for actual losses, attorneys’ fees, and costs. G.S. 45-36.6.

Self-Help Satisfactions

S.L. 2005-123 requires secured creditors to submit for recording a satisfaction document, or to arrange for a recorded satisfaction by other authorized means, within thirty days after full payment or performance of the secured obligation. The law subjects the creditors to liability for actual damages for missing the deadline and, if the failure continues for another thirty days after notice from the landowner, for an additional \$1,000 and attorneys’ fees and court costs. G.S. 45-36.9. The time limit for recording or providing satisfactions for mortgages or deeds of trust satisfied before October 1, 2005, was sixty days. G.S. 45-36.3.

S.L. 2005-123 also creates a mechanism for a borrower to make a record of satisfaction when the lender fails to do so. If the secured creditor fails to provide a satisfaction as required, an attorney licensed to practice law in North Carolina, acting as “satisfaction agent,” may give notice to the secured creditor of intent to record an “affidavit of satisfaction.” This notice must contain prescribed information and give the secured creditor thirty days to provide the satisfaction instrument or to give notice of nonpayment, assignment, or accomplishment of a recorded satisfaction by other permitted methods. G.S. 45-36.14. In the absence of an appropriate response, the satisfaction agent may record an affidavit of satisfaction containing prescribed information. G.S. 45-36.16. The statute says that

“[n]o particular phrasing of an affidavit of satisfaction is required,” but provides a form that will be sufficient. G.S. 45-36.17.

The statute provides that a register must accept an affidavit of satisfaction unless it “is submitted by a method or in a medium not authorized for registration by the register of deeds under applicable law” or it is not signed by the satisfaction agent and acknowledged as required by law for a real estate conveyance. G.S. 45-36.18(c). The statute expressly states that a register is not “required to verify or make inquiry concerning” “the truth of the matters stated” in the affidavit or “the authority of the person executing” it. G.S. 45-36.18(c)(2).

Subsequent Instruments, Indexing, and Good Faith

Subsequent instruments, which are instruments that purport to modify, amend, supplement, assign, satisfy, terminate, revoke, or cancel a previously recorded instrument—such as satisfactions, affidavits of satisfaction, assignments, and designations of substitute trustees—are recorded separately. They are to be indexed in the names of the parties to the subsequent instrument and any original parties as they are named in it, and there must be a reference to the recording data of the original instrument in the index if it is stated in the subsequent instrument. The register may rely solely on the information contained in the first two pages of the subsequent instrument, including the names and recording data provided therein. G.S. 161-14.1.

S.L. 2005-123 specifies that deeds of trust may be indexed in the names of the grantor and the beneficiary only. Prior law permitted the register to index deeds of trust in the names of the grantor and trustee only. G.S. 161-22(d). The revised law has eliminated authority for making marginal notes about foreclosure on recorded deeds of trust or mortgages. The notice of foreclosure is simply recorded and indexed as a subsequent instrument. G.S. 45-38.

Finally, S.L. 2005-123 affirms the guiding principle that registers must perform their duties regarding satisfactions “in good faith.” G.S. 45-36.2. *Good faith* is defined as “[h]onesty in fact and the observance of reasonable commercial standards of fair dealing.” G.S. 45-36.4(6).

Registers’ Duties under the Identity Theft Protection Act

The Identity Theft Protection Act, S.L. 2005-414 (S 1048), which contains a number of protections for personal identifying information, gives individuals the right to require registers of deeds to redact identification numbers from official records on a publicly available Internet Web site maintained by the register or a court. G.S. 132-1.8(f). The protected information includes a person’s Social Security, driver’s license, state identification, passport, checking account, savings account, credit card, or debit card number, as well as personal identification (PIN) codes and passwords. The most likely instance in which such information will appear on a register’s Web site is in loan documents.

A person wishing personal identifying information to be redacted must submit a signed request in writing by mail, facsimile, electronic transmission, or hand delivery, which must specify the information to be redacted and the document in which it appears. No fee may be charged for the redaction. Anyone who submits such a request without proper authority is guilty of an infraction and is subject to a \$500 fine. Registers must post notices about the right of redaction, and the process for doing so, conspicuously in the register’s office and on the Web site containing the records to which redaction applies. G.S. 132-1.8(g).

Electronic Recording

North Carolina has been among the first states to enact legislation to validate the use of electronic records in commerce and in filings with the government. In 2000, the state adopted the Uniform Electronic Transactions Act (UETA), which declared that any record or signature required by law may

be satisfied with an electronic record or electronic signature that complies with the act. G.S. 66-311 to G.S. 66-330. UETA uses broad definitions, providing that an electronic record could be any of a variety of common events such as a facsimile or an e-mail transmission. UETA did not resolve a basic question about the extent to which registers of deeds could accept and maintain official land records electronically, due to the interpretation that North Carolina law requires an “original signature” on real estate instruments submitted for recording unless a statute specifically authorizes a copy to be recorded.

The concern over authority for electronic land records was addressed in the Uniform Real Property Electronic Recording Act (URPERA) [Section 1 of S.L. 2005-391 (S 671)]. The act was drafted by the National Conference on Uniform State Laws to respond to what it described as “uncertainty and confusion” about whether electronic documents may be recorded in land records offices. Uniform Real Property Electronic Recording Act, Prefatory Note (revised 2005).

URPERA overcomes the requirement that a document be a paper “original” by defining a *document* to include “information that is . . . [i]nscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form” and providing that registers may accept electronic documents, broadly defined, if the records comply with standards to be established by the North Carolina Secretary of State. G.S. 47-16.2(1). Registers also are authorized to convert paper documents for recording into electronic form. G.S. 47-16.4(b)(5). They must continue to accept paper documents for recording. G.S. 47-16.4(b)(4). The statute specifically provides that “[a] physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature” as long as the necessary information “is attached to or associated with the document or signature.” G.S. 47-16.3(c).

URPERA defines *electronic signature* broadly to include “an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.” G.S. 47-16.2(4). The law defers the question of standards for electronic records and signatures to a state advisory body. It requires the Secretary of State to develop “standards for recording electronic documents and implementing the other functions” of electronic recording and creates an Electronic Recording Council to advise the Secretary. A majority of the council members will be registers of deeds, but the council will also include representatives from the Bar Association, Society of Land Surveyors, Bankers Association, Land Title Association, Association of Assessing Officers, and the office of the Secretary of Cultural Resources. G.S. 47-16.5. This council and the Secretary of State must also set standards for electronic notarization, not only in response to legislation allowing electronic recording, but also as part of the Secretary’s overall governance of notaries and the need to address their role in the new dimension of electronic recording.

The Electronic Recording Council will be supported by the Secretary of State’s professional and clerical staff and is directed to consult with the North Carolina Local Government Information Systems Association. G.S. 47-16.5(f). URPERA expressly states the intent that North Carolina strive to develop electronic recording standards and procedures that will be consistent with those in other states, as well as considering differences in county size, population, and resources and the need to maintain “adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.” G.S. 47-16.5(g).

The work of the Electronic Recording Council and Secretary of State’s office in developing the standards for electronic recordings and notarial acts will be difficult and critically important to the viability of electronic recording in North Carolina. The two organizations must address complex technological questions, such as what type of technology offers sufficient authenticity and security protections, at the same time they consider how counties with very limited resources will be able to install and maintain the facilities necessary for electronic recording in an increasingly interstate and international transactional environment.

Recording Priority

S.L. 2005-212 (H 764) clarifies G.S. 47-18 and G.S. 47-20(a), which govern priority of recorded instruments in general and deeds of trust and mortgages in particular, by replacing the word “recorded” with “registered” to make the terminology of these statutes consistent with that used elsewhere to refer to the act of proper filing with the register of deeds. The law also clarifies a rebuttable presumption that the order of priority is determined by the time of registration and, if the time is identical for competing documents, the priority is by document number. If there is no document number, priority is by the book and page at which the instrument is registered.

Subordination Agreements

S.L. 2005-212 provides that to be valid a subordination agreement need not state financial terms, including interest rate or principal amount. This rule applies retroactively except to litigation pending on July 20, 2005, with respect to agreements filed or recorded before October 1, 2003. G.S. 39-6.6.

Registers’ Notary Commission Records

Registers of deeds maintain records of notary commissions within their counties. The Secretary of State maintains these records for various purposes, including determining acknowledgment validity. Section 11 of S.L. 2005-391 requires registers to make their records available to the Secretary of State for duplication, the cost of which will be borne by the Secretary of State. Consistent with other legislative changes facilitating use of electronic records, Section 1 authorizes registers to keep commission records in electronic format if the records can be viewed and printed. G.S. 10B-9(c).

Notary Act Overhaul

S.L. 2005-391 repeals G.S. Chapter 10A, the Notary Public Act, and replaces it with new G.S. Chapter 10B, which contains a new Notary Public Act and the Electronic Notary Act. S.L. 2005-391 facilitates electronic recording by authorizing notaries to acknowledge instruments electronically. It also refines the laws governing notaries, including those regulating qualification and discipline. The new notary law was effective December 1, 2005.

Refinements in Notary Procedure

S.L. 2005-391 makes many sound notarial practices into explicit requirements while also introducing new requirements and restrictions. The revised Notary Public Act addresses the four basic types of acts that notaries may perform: acknowledgments, oaths or affirmations, jurats, and verifications or proofs.

An acknowledgment, the most common notary act, is a notary’s attestation that someone known to the notary, or whose identity is proved through satisfactory evidence, has voluntarily signed a record in the notary’s presence. G.S. 10B-3(1). A verification or proof occurs when a person whose identity is known or proved to a notary certifies under oath or affirmation to having already executed a record. G.S. 10B-3(28). The Notary Public Act now defines a *jurat* as a certification added to an affidavit or deposition in which the person giving testimony subscribes and swears to the content of the affidavit or deposition. G.S. 10B-3(8). For each of these acts, the revised Notary Public Act clarifies, in several instances, that the person must be in the notary’s presence when the act occurs, which has always been a requirement. The clarity with which this requirement is now expressed is reflected in the new definition of *personal appearance*, which occurs only when “an individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and

exchange records back and forth during the notarization process.” G.S. 10B-3(16). The statute also clarifies that although the principal or subscribing witness must be in the notary’s presence when the notarial act is performed, the notary can later complete the certificate. G.S. 10B-20(c)(1). The revised law expressly prohibits notaries from using false certificates or certificates not written in English; from notarizing a signature on a record without indicating what type of notarial act is being performed; from certifying, notarizing, or authenticating a photograph; or from using the notary title or seal in connection with endorsements of products, candidates, or other offerings. G.S. 10B-22, 10B-23, 10B-24.

The evidence on which a notary may rely to determine a signer’s identity now includes documents issued by a “federal or state-recognized tribal government agency”; the statute also allows use of photograph identification having either a physical description or signature. G.S. 10B-3(22). The revised law clarifies that a witness who is verifying or proving a signature must sign the document along with the principal, be known to the notary or prove identity with satisfactory evidence as defined by the statute, and take an oath or affirmation to having witnessed the signature. G.S. 10B-3(26). For identification of someone not personally known to a notary, the notary may rely only on a *credible witness*, defined as “an honest, reliable, and impartial person who is personally known to the notary and takes an oath or affirmation from the notary to confirm a signer’s identity.” G.S. 10B-3(5).

The revised law also describes additional express limitations on the acceptable demeanor of the person whose acknowledgment is being taken. A notary is prohibited from performing a notarial act if “[t]he principal or subscribing witness shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act,” or “[t]he principal or subscribing witness, in the notary’s judgment, is not acting of the principal’s or the subscribing witness’s own free will.” G.S. 10B-20(c)(3)–(4).

S.L. 2005-391 revises the language governing the nature of an oath or affirmation. Prior law distinguished between an oath or affirmation based on whether the act occurred with “reference made to a Supreme Being” or with “no reference made to a Supreme Being.” The revised law further defines an *oath* as “a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word ‘swear,’” and an *affirmation* as a vow “based on personal honor and without invoking a deity or using any form of the word ‘swear.”” G.S. 10B-3(2), (14).

The Notary Public Act now provides forms for certificates for acknowledgments, verifications or proofs, and oaths or affirmations. It also describes information that satisfies an acknowledgment given by someone in a representative capacity. G.S. 10B-40 through G.S. 10B-43. The authorized forms supplement forms set forth in other statutes for particular types of notarial acts.

The notary’s name must now be legibly typed or printed near the notary’s signature. G.S. 10B-20(b)(2). Previous law allowed use of the name in the seal. A notary’s seal must now include the word “County” or Co.” with the name of the county in which the register is commissioned, and it must be of a prescribed size and shape. G.S. 10B-37(b)(3), G.S. 10B-37(c). The notary must place the image or impression on the same page as the signature. G.S. 10B-36(b).

The statutory definition of an official signature consists of misplaced language, specifically a repeat of the definition of an official seal, which should be corrected in the next legislative session. G.S. 10B-35. The definition as was envisioned is a restatement of the requirement that a notary sign a paper record in ink using “exactly and only the name indicated on the notary’s commission” at the time the notary act is performed, and not by using a stamp or other printing method.

The Notary Public Act now spells out the process for notarization of a signature made by mark or through other persons. The notary must be present when the mark is made and write the following below it: “Mark affixed by (name of signer by mark) in presence of undersigned notary.” A principal unable to make a mark may designate a disinterested party to do it, if the principal directs the signature in the presence of the notary and two witnesses unaffected by the record, the witnesses sign near the principal’s signature, and the notary writes the following below the principal’s signature: “Signature affixed by designee in the presence of (names and addresses of principal and witnesses).” G.S. 10B-20(d), (e).

The revised law requires a notary to cross out all blank spaces in a certificate, except for lines for unknown recording information to be shown in powers of attorney. G.S. 10B-20(o). Failure to do so,

however, does not invalidate the acknowledgment or record and is not a ground for a register to refuse to record the instrument. G.S. 10B-20(o)(2), (3).

In a number of instances, the revised law stresses protection of notary seals from unauthorized access. It requires notaries to keep “the seal in a secure location that is accessible only to the notary” and directs notaries not to allow others to use the seal and not to surrender it to an employer upon termination of employment. G.S. 10B-36(a). A notary must report theft of a seal to law enforcement and the appropriate register of deeds within ten days. G.S. 10B-36(c). Seals must be delivered to the Secretary of State upon termination of a notary’s authority. G.S. 10B-36(d).

Effective December 1, 2005, the revised law increases the fee a notary may charge to \$5 for each signature and for each oath or affirmation without a signature. G.S. 10B-31. [The fee had been increased from \$3 to \$4 by S.L. 2005-328 (H 1217), effective August 26, 2005.] Notaries who charge must display a conspicuous schedule of their fees. G.S. 10B-32.

The Secretary of State provides certificates of authentication of a notary’s or other official’s act for use in other jurisdictions. S.L. 2005-391 deleted the option of certifications for acknowledgments prepared in another language and translated into English—the acknowledgment must be in English. G.S. 66-273(3).

Interstate Recognition

Another express goal of the Notary Public Act revisions is “[t]o enhance interstate recognition of notarial acts.” G.S. 10B-2(5). The revised law provides: “Any notarial certificate made in another jurisdiction shall be sufficient in this State if it is made in accordance with federal law or the laws of the jurisdiction where the notarial certificate is made.” G.S. 10B-40(e). The revised law also provides that a notarial act performed in another jurisdiction is valid under North Carolina law if the notary or other official was authorized by, and complied with, the laws of that jurisdiction, North Carolina law, or federal law. G.S. 10B-20(f). Similarly, the law defers to federal law or regulation for a determination about a military officer’s authority to perform a notarial act for military personnel or their spouses or dependents. G.S. 10B-20(g). These revisions will clarify the validity of notarial acts across jurisdictions, although other statutes, such as those governing the registration of instruments with registers of deeds, may have additional requirements.

Notary Qualification and Discipline

The North Carolina Secretary of State handles thousands of complaints about notary misconduct annually. Many of the complaints are addressed with simple cautionary letters but some result in disciplinary action or even criminal investigations. The revised law includes provisions sought by the Secretary of State to discourage misconduct and clarify and solidify enforcement mechanisms. The revised law states an express purpose “[t]o foster ethical conduct among notaries.” G.S. 10B-2(4).

S.L. 2005-391 adds three specifically prohibited actions that constitute Class 1 misdemeanors:

1. Performing a notarial act if the person’s commission has expired or been suspended
2. Performing a notarial act before the person has taken the oath of office
3. Taking an acknowledgment or performing an oath, affirmation, or jurat without the principal personally appearing before the notary

G.S. 10B-60(b)(2), (b)(3), (c)(1). Four additional actions are now among those for which a person can be convicted of a Class I felony:

1. Taking an acknowledgment or jurat without the principal appearing before the notary if done with the intent to commit fraud
2. Taking a verification or proof without the subscribing witness appearing before the notary if done with the intent to commit fraud
3. Performing a notarial act in this state knowing he or she is not commissioned
4. Obtaining, using, concealing, defacing, or destroying notarial seals or records without the proper authority

G.S. 10B-60(d)(2)(3), (e), (f), (g). The statutes now expressly provide that investigations into misconduct need not terminate upon a notary’s resignation. G.S. 10B-60(h). Any person who

knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct is subject to the same punishment as a notary, for aiding and abetting. G.S. 10B-60(j). The revised law also expressly reserves application of other laws and remedies, including for forgery and aiding and abetting. G.S. 10B-60(k).

The circumstances under which notaries must resign now also include becoming “permanently unable to perform their notarial duties.” G.S. 10B-54(b). A notary has forty-five days to surrender the seal upon resignation or revocation of authority, but those whose commissions have expired (without being revoked or denied) have three months to apply for recommissioning before having to surrender the seal. G.S. 10B-55(a), (b). A deceased notary’s estate must notify the Secretary of State of the death and deliver the seal as soon as reasonably practicable but no later than the closing of the estate. G.S. 10B-55(c).

The prohibition against the practice of law by nonattorneys expressly forbids assisting someone “in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.” G.S. 10B-20(k). Notaries also are prohibited from determining “the type of notarial act or certificate to be used” if “certificate wording is not provided or indicated for a record,” although a notary may provide a selection of authorized or recognized forms. G.S. 10B-20(m). A notary is also expressly prohibited from claiming “to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.” G.S. 10B-20(n).

Persons seeking to be commissioned as notaries must meet additional qualifications under the revised law. Applicants must reside legally in the United States; be able to speak, read, and write English; and possess a high school diploma or equivalent. G.S. 10B-5(b). The requirement that notaries receive the recommendation of a publicly elected official has been eliminated in counties where there are more than 15,000 active notaries, a condition currently applicable only to Wake County. S.L. 2005-75 (S 763); G.S. 10B-5(b)(8). The law clarifies that a notary must be commissioned in his or her county of residence, or, if not a state resident, in the county of employment. G.S. 10B-5(c).

The revised Notary Public Act describes in general terms the contents of an application for commission, which must include disclosure of the information necessary for establishing the statutory qualifications, and specifies an oath or affirmation that must be made on the application. G.S. 10B-6, 10B-7, 10B-12. The revised law specifically identifies more grounds for denying a commission or recommission application, which are as follows:

1. “Submission of an incomplete application or an application containing material misstatement or omission of fact”
2. Having pleaded “*nolo contendere* to a felony or any crime involving dishonesty or moral turpitude” (previously only conviction was disqualifying)
3. Having been released from prison, probation, or parole within the last ten years
4. “A finding or admission of liability against the applicant in a civil lawsuit based on the applicant’s deceit”

G.S. 10B-5(d)(1)–(3). The statute defines *moral turpitude* as “conduct contrary to expected standards of honesty, morality, or integrity.” G.S. 10B-3(9). The law also now provides that at least five years must have lapsed after compliance with conditions of any disciplinary order in connection with notary or professional licensure before an applicant may be approved for commissioning. G.S. 10B-5(d)(4).

The revised Notary Public Act has increased from three to six hours the minimum length of the course required for an initial commission for a nonattorney notary. The course must be taken within three months preceding application, and a nonattorney applicant for an initial commission or for recommissioning must pass an examination approved by the Secretary of State by answering at least 80 percent of the questions correctly. G.S. 10B-8, G.S. 10B-11(b)(3). The examination for recommissioning will be available on the Secretary of State’s Web site. Commission applicants who are former registers of deeds and clerks of court who have been notary instructors are exempt from the education requirement. G.S. 10B-14(d). The revised law clarifies that notary commissions are not effective until the notary takes the oath of office. G.S. 10B-9.

Heightened standards for notary conduct are also reflected in the revised requirements for notary instructor certification, which now specify that the qualifying course be at least six hours and that the instructor have at least one year of experience as a notary. G.S. 10B-14(a), (b). Assistant and deputy registers of deeds must have had a regular notary commission before being qualified as an instructor.

G.S. 10B-14(e). The Secretary of State has express authority to suspend or revoke a notary instructor's teaching certification for violation of the law or applicable rules. G.S. 10B-14(f).

The revised law allows forty-five days, rather than thirty, for a notary to give the Secretary of State notice of a change in name, phone number, or address, which notice can be given by fax, e-mail, or certified mail. G.S. 10B-50, G.S. 10B-51. A notary with a name change may continue to use the former name until receiving a new seal and confirmation of the new name from the Secretary and taking a new oath with the register of deeds, which must occur within forty-five days after the change's effective date. G.S. 10B-51. A notary who changes county of residence need not change the seal or take a new oath until recommissioning. G.S. 10B-52. Notaries may not apply for recommissioning earlier than ten weeks before the expiration date of the prior commission. G.S. 10B-11(a). Notaries also may apply for recommissioning within one year after expiration of the prior commission but must retake the course of study unless this requirement is waived by the Secretary of State. G.S. 10B-11(c).

Electronic Notarization

Some of the revisions to the Notary Public Act were intended "[t]o integrate procedures for traditional paper and electronic notarial acts." G.S. 10B-2(6). S.L. 2005-391 also adds a new Article 2 to G.S. Chapter 10B, called the Electronic Notary Act. G.S. 10B-100 to G.S. 10B-118. The act validates electronic notarial acts in connection with electronic records. The precise methods of performing these acts will be governed by standards to be adopted by the Secretary of State with input from the same Electronic Recording Council that will be involved in developing standards for electronic recording with registers of deeds.

A notary must register the capability to notarize electronically with the Secretary of State upon commissioning and recommissioning and pay a \$50 fee. G.S. 10B-105; G.S. 10B-106(a)-(c); G.S. 10B-108. The registration is electronic and includes a description of the technology that will be used as well as information about any issuing or registration authority for that technology. G.S. 10B-106(d). Any issuing registration must be kept current and any changes reported to the Secretary of State. G.S. 10B-127. The registration also must include "any decrypting instructions, codes, keys, or software that allow the registration to be read." G.S. 10B-106(e). The electronic signature and seal must comply with rules to be adopted by the Secretary of State. G.S. 10B-125.

All of the types of notary acts may be performed electronically. G.S. 10B-115. The law allows an electronic notary to charge up to \$10 per signature. G.S. 10B-118. Although proposals have been made to allow electronic notary acts to be conducted by issuance of keys that would not require a notary to be present when the document is signed electronically, the law as enacted in North Carolina requires the signer to be in the notary's presence at the time of notarization. G.S. 10B-116. Thus the notary's physical observation of the act of signing is considered to be essential corroboration.

The electronic notarial act requires that all of the notary information, including the notary's electronic signature, "be attached to, or logically associated with, the electronic document" in an "immediately perceptible and reproducible" form. G.S. 10B-117. An electronic notary act must indicate that the official is an "Electronic Notary Public." G.S. 10B-117(2).

Notaries must safeguard their electronic signatures, seals, and records and may not surrender or destroy them without a court order or unless allowed by rules to be adopted by the Secretary of State. G.S. 10B-126(a). Electronic notaries must keep the signature, seal, and records under their exclusive control, G.S. 10B-126(b), which will require special attention when a notary is employed in an organization where access to electronic files is shared among employees.

Electronic notaries must complete an additional three hours of instruction and pass an examination administered by the Secretary of State. G.S. 10B-107. Electronic notaries will be governed by rules to be adopted by the Secretary of State, which may include rules requiring them to maintain an electronic journal. The statute provides that rules regarding electronic journals will become effective no earlier than eighteen months after the statute's effective date. G.S. 10B-126(e). This delay was a compromise between proponents of the view that journals of notarial acts are an important safeguard against fraud, and those opposing the introduction of such a requirement in general and with respect to electronic

notaries in particular. Notaries must report within ten days to law enforcement and the Secretary of State that an electronic seal or signature has been stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image. G.S. 10B-126(c). Any records that will be required of an electronic notary must be surrendered to the Secretary of State upon termination of the notary's authority. G.S. 10B-126(g). Electronic signature programs or devices must be destroyed unless recommissioning occurs within three months. G.S. 10B-128. Wrongful manufacture, distribution, or possession of electronic notary software or hardware will be a felony. G.S. 10B-146.

The new law also provides a form for an electronic certificate or authority to be issued by the Secretary of State, which can be used to establish the notary's authority in other jurisdictions. G.S. 10B-137.

S.L. 2005-391 appropriates \$100,000 for each year of the 2005-07 fiscal biennium to the Secretary of State for administration of the Electronic Notary Act. In addition, the act authorizes the Department of the Secretary of State to use its information technology staff and to spend up to \$200,000 in 2005-06 from the department's E-Commerce Transaction Fund to implement the act. S.L. 2005-391, Section 10(a), 10(b).

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