COVID-19: PENNSYLVANIA ENACTS LEGISLATION TO FACILITATE THE FUNCTIONING OF BUSINESS AND GOVERNMENT DURING THE COVID-19 EMERGENCY

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As part of Pennsylvania's response to the COVID-19 emergency, Pennsylvania Governor Tom Wolf signed into law a variety of measures to facilitate the functioning of businesses and government activities during the COVID-19 emergency. Act 15 of 2020, which took effect on April 20, 2020:

- grants temporary authorization for remote notarizations;
- allows the certification and recording of tangible copies of electronic records;
- authorizes the use of unsworn declarations in many circumstances in which laws, orders, or regulations require the truth of declarations to be made under oath taken before a notarial officer;
- permits local governments to conduct meetings by means of telecommunications;
- extends deadlines for making Education Improvement Act Tax Credit donations; and
- allows extended property tax discount periods and delays to imposition of penalties for the late payment of property taxes.

REMOTE NOTARIZATION

During the COVID-19 emergency, and for 60 days following the end of the emergency, Act 15 allows a person to appear before a notary public by means of communication technology rather than being physically present before a notary. Legislation to make this authorization permanent is also under active consideration by the General Assembly. Access to notary services by means of audio-visual communication is needed during the emergency because notaries have only been granted limited authority to operate during the emergency other than by providing virtual or telework services.

Prior to the effective date of Act 15, the Pennsylvania Department of State announced that the Governor, using his emergency powers during the COVID-19 emergency, had waived the requirement that a person signing a document or making a statement to be notarized must physically appear before a notary. Instead, the department authorized remote notarization if conducted in a manner consistent with the Revised Uniform Law on Notarial Acts as amended in 2018 by the Uniform Law Commission. The Governor's waiver, however, only applied to certain

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types of notarizations. Act 15 temporarily adopts into law the 2018 amendments to the Uniform Act and applies its provisions to all types of notarial acts.

Currently, 23 states have permanently authorized some type of remote notarization, and 17 states have authorized various types of remote notarization for the duration of the COVID-19 emergency.

The legislation sets forth the following requirements and procedures for notaries to begin providing services for individuals not in their physical presence:

- The notary must notify the Pennsylvania Department of State that it will be conducting remote notarizations and designate the communication and identity-proofing technology that it intends to use. Notice of intent to conduct remote notarization is given to the department in a simple electronic form, available here. No additional fees or mandatory training is required to qualify to perform remote notarizations.
- The notary must use a technology that satisfies the following requirements:
  - The technology must enable a notary public located in Pennsylvania to communicate with a remotely located individual simultaneously by sight and sound and make reasonable accommodations for persons with vision, hearing, or speech impairments.
  - The technology must enable the notary public to determine the identity of the remotely located individual based on (1) his or her personal knowledge, (2) the testimony of a credible witness, or (3) by using at least two identity-proofing technologies or services. Identify-proofing processes or services include having a remote individual answer questions for which there is a high probability that only the true individual would be able to answer correctly or identifying an individual through the use of biometric identification technology or the analysis of identification cards. The identity of a witness must be determined in the same manner as the identity of the remotely located individual.
  - The technology must enable the identification of a record in the presence of the notary as the same record being signed by or containing a statement made by the remotely located individual. This can be accomplished by the use of electronic records or signatures created using tamper-evident technology, the presence of the same tangible record before the notary and the remotely located individual, or by the exchange of tangible records.
  - The technology must create an audio-visual recording of the notarization, including all interactions between the notary public and the remotely located individual that will be retained by the notary public or a person acting on his or her behalf for at least 10 years or for an alternative period of time as designated by the Pennsylvania Department of State.
- After giving notice to the Pennsylvania Department of State, a notary may immediately begin conducting remote notarizations using the technologies of one of the remote notarization solution vendors on a list of approved vendors made available by the Pennsylvania Department of State. The list of approved vendors is available here. A notary can also use any other technology by giving notice to the department 30 days prior to using the technology unless the department determines the technology does not satisfy the requirements of Act 15 or that the use of the technology should be delayed pending further evaluation. To use technologies provided by vendors approved by the department, the notary will also need to make arrangements with the vendor to use their services.

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- The notarial certificate must disclose that the notarization was conducted using communication technology.
- The remotely located individual may be in Pennsylvania, another state or U.S. territory or possession, or in a foreign country. If the individual is not within the United States, the notarial act must relate to a record to be used before a U.S. court or agency or relate to property located in the United States or to a transaction substantially connected with the United States. The signing of the document or making the statement must also not be prohibited by the law of the country in which the individual is located. The failure to satisfy these requirements may provide grounds to challenge the validity of the notarial act, but the law does not impose any obligation on the notary public to ensure that foreign laws are not violated.

How effective this legislation will be in facilitating transactions during the COVID-19 emergency depends on the ability of an adequate number of notaries to be approved to engage in remote notarization in a manner consistent with its requirements. Currently, many suppliers of remote notarization technology are experiencing significant delays in signing up notaries approved by the Pennsylvania Department of State. While these delays could be addressed by the development of new systems, including systems developed by financial institutions to facilitate transactions for their customers, other measures may be needed to make needed notarial services available for the duration of the emergency. One viable alternative may be to rely on the services of notaries employed by businesses designated as “life sustaining” that are permitted to remain in operation during the emergency, such as banks, savings associations, and credit unions. The Governor's Office has clarified that these notaries may continue to conduct in-permit notarizations within the premises of any life-sustaining business.

CERTIFICATION AND RECORDING OF ELECTRONIC RECORDS

Although Pennsylvania law broadly recognizes the validity of electronic records and allows the recording of electronic documents, it is often useful to rely on tangible copies of electronic records.

Act 15 grants temporary express authority for notarial officers to certify tangible copies of electronic records and for the recording of tangible copies of electronic records certified by notarial officers. While such actions may be permitted under current law, the legislation removes any ambiguity about their permissibility.

Notarial officers are notaries or other persons authorized by state law to perform notarial acts, including the certification of records. Persons other than notaries authorized to certify records include judges, members of the minor judiciary, recorders of deeds, clerks of court, prothonotaries, and state and local officials or employees authorized to certify copies of governmental records.

UNSWORN DECLARATIONS

Act 15 expands the scope of Pennsylvania's Unsworn Declarations Act, which currently applies only to declarations made by persons located outside of the United States, to apply to declarations regardless of the location of individuals making declarations.

The legislation provides that if any Pennsylvania statute, order, or rule requires or permits use of a declaration in a signed record to be sworn to before a notary public, the law is satisfied by an unsworn declaration. An unsworn declaration is a statement not made under oath before a notary, which states that it is true and correct subject to

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the penalties for perjury. An unsworn declaration must also be signed, dated, and identify the location of the declarant.

The law provides a widely applicable alternative to the use of notarizations, but it does not apply to depositions, oaths of office, declarations relating to real property required or authorized to be recorded, or oaths or affirmations required for self-proving wills.

LOCAL GOVERNMENT MEETINGS

The Pennsylvania Sunshine Act requires agencies to deliberate and take official action on agency business in an open and public meeting, which means that the public must be able to attend, participate, and comment at such meeting before an agency can take official action. However, the COVID-19 pandemic has made it difficult for public entities to hold meetings in person. Public entities have been using various means of holding meetings remotely (e.g., live teleconference, videoconferences, or posting recordings after the meetings), but it was uncertain whether these means complied with the Sunshine Act.

Act 15 expressly allows Pennsylvania's political subdivisions, i.e., counties, cites, boroughs, townships, school districts, local authorities, and respective agencies, to conduct hearings, meetings, proceedings, or other business by using an “authorized telecommunications device” until the expiration or termination of the COVID-19 disaster emergency. An authorized telecommunications device is defined as any device that, at a minimum, permits audio communication between individuals. To the extent practicable, political subdivisions must allow for public participation in the meeting via an authorized telecommunication device, U.S. mail, or email.

To the extent practicable, governing bodies and agencies of political subdivisions must post advance notice of each meeting on their publicly accessible websites, in local newspapers, or in both unless the meeting is held under “exigent circumstances” to address an issue related to the Governor's COVID-19 disaster emergency declaration. In such a case, the public entity must post the draft minutes within 20 days after the meeting or before the next regularly scheduled meeting, whichever is earlier. However, action may not be taken regarding any application, plat, plan, submission, appeal, or curative amendment unrelated to the governor's declaration of disaster emergency unless notice to the public and interested parties has been provided at least five days prior to the meeting.

Act 15 also tolls (i.e., suspends) statutory review and approval periods for applications covered by the Development Permit Extension Act, including land development, subdivision, and zoning applications. The tolling period begins on March 6, 2020 (the date of the Governor's disaster emergency declaration), or the date of the receipt of the application if it is received during the period in which the disaster emergency declaration is in effect. The tolling period ends on May 20, 2020.

EDUCATION IMPROVEMENT TAX CREDITS

One of Pennsylvania's most popular tax credit programs allocates up to $185 million of tax credits annually to business firms that make commitments to make donations to scholarship organizations that provide private school scholarships, educational improvement organizations that support innovative programs in public schools, or to prekindergarten scholarship organizations.

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Tax credits are equal to 75 percent of contributions, up to a maximum of $750,000 per taxable year, and can be increased to 90 percent if a business agrees to provide the same amount for two consecutive tax years. For contributions to prekindergarten scholarship organizations, a business may receive a tax credit equal to 100 percent of the first $10,000 contributed and up to 90 percent of the remaining amount contributed up to a maximum credit of $200,000 annually.

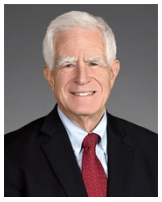
Under current law, if a business is awarded education improvement tax credits, donations must be made no later than 60 days following the approval of an application. During any tax years affected by the COVID-19 emergency, Act 15 extends the deadline for making donations to the end of the tax year in which a business makes approved donations.

COLLECTION OF LOCAL PROPERTY TAXES

Most Pennsylvania counties, cities, boroughs, and townships issue annual real property tax bills at the beginning of March. If taxes are paid within two months, taxpayers are entitled to a discount of at least 2 percent of the amount due (or any higher discount rate established by the local taxing district), and if taxes are not paid within four months, penalties may be assessed not to exceed 10 percent of the amount due.

Act 15 authorizes counties, cities, boroughs, and townships to extend their discount periods until August 31, 2020, and to waive the imposition of penalties for any taxes paid by December 31, 2020. The law does not apply to school district property taxes.

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