

DRAFT

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III. Trusted Enrollment Agents™

A. Legal Status and Function

One of the most promising solutions to emerge in the search for a reliable identity proofer is the Trusted Enrollment Agent™ (TEA), introduced by the nonprofit National Notary Association (NNA), whose expertise in notarial best practices, risk management, identification methods and recordkeeping processes spans more than half a century. The TEA meets specifications for identity proofers set by PKI certificate policies¹ and by federal Form I-9 guidelines,² among other such qualifications.

As conceived by the NNA, a Trusted Enrollment Agent™ is a specially trained, certified and background-screened notary public assigned to perform in-person identity proofings of individuals seeking digital identity credentials. The TEA travels to the credential applicant's place of business, residence or other location, and identifies a credential applicant in person following the specific policies of the credential issuer.

The NNA provides Trusted Enrollment Agent™ training and certification, and a national and mobile network of TEAs who perform in-person identity proofing services to support the issuance of identity credentials.

To qualify as a Trusted Enrollment Agent™, an individual must be a notary public with a

¹ See Judith Spencer, Chair, Federal Public Key Infrastructure Policy Authority, X.509 CERTIFICATE POLICY FOR THE FEDERAL BRIDGE CERTIFICATION AUTHORITY (FPCA), Version 2.16 May 14, 2010, page 15, last viewed online at: http://www.idmanagement.gov/fpkipa/documents/FBCA_CP_RFC3647.pdf.

² The Department of Homeland Security's Handbook for Employers: Instructions for Completing Form I-9 (Employment Eligibility Verification Form) states that an employer may designate someone to fill out the I-9 form for the employer "such as a personnel officer, foreman, agent or anyone else acting in your interest, such as a notary public" (page 36-37).

valid commission, complete the NNA's certification program and engage with the NNA as an independent contractor.

TEAs are ideal identity proofers because as notaries public they identify document signers for notarizations every day.³ Notaries satisfy the policies of many certification authorities, which require that an individual seeking a credential must be identified by "... [a]n entity certified by a State or Federal Entity as being authorized to confirm identities".⁴ In fact, notaries already perform similar services in high-value mortgage loan finance transactions today using essentially the same skills.⁵

However well suited notaries are to be identity proofers, qualifying as a notary public⁶ alone does not thoroughly prepare one with all the skills necessary to verify identities in a federated identity management framework. Additional qualifications and training are needed. TEAs can provide in-person identity proofing services because they possess the following additional qualifications and training.

First, all TEA applicants must complete an accredited⁷ course in notary best practices and state notary laws,⁸ and then pass an examination of this course.⁹

³ "Regardless of the kind of document notarized, at the heart of every notarization is the obligation of the notary to ascertain that the individual who makes or acknowledges a signature is really the person he or she claims to be" (MICHAEL L. CLOSEN, ET AL., NOTARY LAW & PRACTICE: CASES AND MATERIALS 149 (1997)).

⁴ See Spencer, *supra* note 1.

⁵ Known as "signing agents," these mobile notary professionals provide document signing services for all types of real estate finance transactions, including purchase, refinance, home equity lines of credit, reverse mortgage, loan modification and commercial transactions.

⁶ In most states, an applicant for a notary commission must complete a simple application, pay an application fee and take an oath of office to uphold state laws when notarizing.

⁷ The NNA is accredited by the Accrediting Council for Continuing Education and Training (ACCET), recognized by the U.S. Department of Education as the accrediting body for post-secondary continuing education.

⁸ While the number of states mandating education and testing of notary commission applicants is increasing, currently only the states of California and Missouri require mandatory education for both new and renewing notary commission applicants. The states of Colorado, Florida, Montana, Nevada, North Carolina, Oregon and Pennsylvania require education for first-time commission applicants. Delaware requires education for persons applying for an electronic notary commission. Some counties in Ohio also require education for notary commission applicants.

⁹ California, Colorado, Connecticut, the District of Columbia, Hawaii, Louisiana, Maine, Nebraska, North Carolina, New York, Ohio (most counties), Oregon and Utah require examination of notary commission applicants.

Second, a TEA is certified¹⁰ by the NNA in the duties and responsibilities of a Trusted Enrollment AgentTM and in the specific identification and authorization procedures of the identity credential issuer contracting with the NNA. The TEA is instructed not only in the personal written identification and the other supporting documents credential applicants must bring to the proofing session to satisfy the requirements of the credential issuer, but also on how properly to complete the identification and authentication documentation evidencing successful proofing of the applicant's identity. The TEA is additionally instructed in how to protect the personal identifying information of credential applicants and courier or transmit the signed identity verification documents from the proofing session to the credential issuer at the conclusion of the transaction.

Surprisingly few states initiate formal background checks of notary applicants and most that do only run a check when an applicant discloses on the commission application that he or she has been convicted of a felony.¹¹ This is why a TEA must undergo a comprehensive background screening that conforms to standards developed by the mortgage finance industry satisfying the Interagency Guidelines Establishing Standards for Safeguarding Customer Information¹² of the Gramm-Leach-Bliley Act.

Once a TEA has been qualified by the NNA, he or she executes an independent contractor's agreement with the NNA to provide services as outlined and then is available to begin receiving assignments.

¹⁰ The term of TEA certification is 2 years and continuing education is required to be recertified.

¹¹ Arizona, California, Colorado, Connecticut, Massachusetts and New Hampshire initiate background checks of all notary commission applicants, with California being the sole state which requires commission applicants to be fingerprinted. Texas conducts random background investigations on commission applicants.

¹² The Interagency Guidelines were jointly issued the Office of the Comptroller of the Currency, Department of the Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Department of the Treasury to establish standards relating to the safety and security of customer records and information for the financial institutions subject to their respective jurisdictions. The Interagency Guidelines were last viewed online at:
<http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=13625711666+0+2+0&WAISSaction=retrieve>.

A TEA's primary duties include the following functions:

- (1) Positively identify the applicant for an identity credential by visually inspecting original personal written identification documents and obtaining photocopies of the identification documents to return with the signed papers.
- (2) Witness the applicant sign the identity verification forms for the ID proofing session and notarize any signatures as necessary.
- (3) Obtain any other documents or credentials as may be required by the credential issuer to satisfy identification and authentication procedures. For example, some credential issuers may require a formal letter of employment signed by the employer of the credential applicant on the employer's letterhead authorizing the applicant to receive a credential.
- (4) Instruct the applicant in the next steps in obtaining the identity credential with the issuing organization. This step could involve providing any security authorization codes or other instructions from the credential issuer for satisfying the remaining procedures for issuance of the credential.
- (5) Courier the documents from the ID proofing session to the shipper for overnight delivery, or transmit the documents electronically via fax, to the credential issuer.

The duties performed by the Trusted Enrollment AgentTM require the TEA to act in a dual capacity: as an identity proofer and a notary public. In the tasks of identifying the applicant for the issuance of the identity credential as outlined above, the TEA acts as an identity proofer. In the specific task of notarizing the applicant's signature on the identity verification form (#2 above), the TEA acts in his or her capacity as a notary public. The TEA's role as identity proofer and notary in the same transaction has important ramifications for identify verification and

liability that will be discussed in the paragraphs which follow.

B. Identity Verification Methods and Requirements

The specific identity verification methods and requirements followed by a Trusted Enrollment AgentTM in proofing the identity of an applicant for a credential are determined by the governing framework or policy of the credential issuer.

At the in-person identity proofing session, the TEA inspects each personal identification document presented by the applicant to ensure that on its face the document appears genuine, confirms that the photograph and any physical description matches the person and checks for signs of alteration, tampering or forgery — a process familiar to the TEA because it is done as a matter of course for any notarization. The TEA then inspects the signatures appearing on the applicant's personal identification documents, identity verification forms for the identity proofing and those appearing in the TEA's notary journal to ensure that they are reasonably similar.¹³

In vetting the identity of the credential applicant, the TEA records certain information from each personal identification document on the identity verification form¹⁴ for the proofing session in accordance with the policy of the governing framework.

The policy of the credential issuer may require the applicant's signature on the identity verification form to be notarized. The TEA must witness the applicant sign the form in the TEA's presence and administer an oath¹⁵ or affirmation to the applicant. State law may also

¹³ The TEA is not a handwriting expert. However, the TEA, through applying common sense, may observe an applicant laboring over a signature and reasonably conclude that the person could be attempting a forgery.

¹⁴ Such information could include the document type, issue date, origin of issuance, expiration date and identification number.

¹⁵ Notaries are universally considered oath administering officials and authorized to administer oaths in any circumstances.

require that the notarial act be recorded in a notary journal.¹⁶

The notarization requirement presents an interesting legal issue for the Trusted Enrollment AgentTM who, as alluded to earlier, fulfills a dual role in the transaction. As an identity proofer, the TEA follows the applicable guidelines in reviewing the qualifying personal identification documents for the issuance of the identity credential. In many cases, one or both identification documents presented by the applicant will satisfy state notary laws for the notarization of the signature on the identity verification form. However, in certain situations, the applicant's written identification may not satisfy state notary laws for the notarization of the signature on the identity verification form. In such a case,¹⁷ the TEA may be required to secure another acceptable means of identification¹⁸ in order to notarize the applicant's signature, or to halt or postpone the appointment for the applicant's failure to provide satisfactory evidence of identity for the notarial act.

Finally, the TEA performing the identity proofing must sign a statement certifying that the applicant personally appeared before the TEA for the identity proofing, signed the identity verification form or forms in the TEA's presence and presented the qualifying personal identification documents required. The TEA makes this certification as a designated identity

¹⁶ The following states require notaries to keep a notary journal for one or more notarial acts: Alabama, Arizona, California, Colorado, Delaware (for electronic notarizations), District of Columbia, Hawaii, Kentucky (for protests) Maine (for marriages), Maryland, Massachusetts, Mississippi, Missouri, Montana, Nevada, North Dakota (for protests), Ohio (for protests) Oregon, Pennsylvania, Tennessee (if the notary charges a fee), Texas and Virginia (for electronic notarizations).

¹⁷ For example, if an applicant presents a corporate ID card with a photograph and a voter's registration card as permitted under the guidelines of one credential issuer, a California and Florida notary public will be required to obtain additional identification as "satisfactory evidence of identity" for the notarization. *See* CAL. CIV. CODE § 1185(b) and FLA. STAT. ANN. § 117.05(5)(b)(1).

¹⁸ For example, most states permit a notary to identify a signer based upon the notary's personal knowledge of the signer. (*see* IOWA CODE ANN. § 9E.9(6)(b) and N.M. STAT. ANN. § 14-12A-2[E].) A document signer may present a "credible witness" personally known to the Notary and signer, who swears or affirms that he or she knows the signer (*see* N. H. REV. STAT. § 456-B:2 VI and OKLA. STAT. ANN. TIT. 49 § 113[F]). Alternatively, in some jurisdictions two credible witnesses who personally know the signer and present an acceptable written identification document to the notary may identify the signer (*see* NEB. REV. STAT. § 64-105[2][ii] and TENN. CODE ANN. § 66-22-106[c][1]).

proofer and not as a notary.¹⁹

C. Mapping to Government and Industry Identity Assurance Levels

In the current use cases, issuers of identity credentials conforming to identity assurance level 3 are utilizing Trusted Enrollment AgentsTM for the requisite identity proofing.²⁰

Current credential issuance rules do not require identity proofers to be identified at the same level of assurance as the applicant for a credential, unless the identity proofer is granted a trusted role within the system.²¹ Trusted Agents — individuals who verify the identities of credential applicants on behalf of a Registration Authority or Local Registration Authority — fulfill a trusted role and must be issued a credential at the same identity level of assurance. TEAs are not considered Trusted Agents and do not assume a trusted role. However, there is nothing to prevent a TEA from becoming a Trusted Agent.²² Hence, there is no formal requirement that a TEA be identified at the same level of assurance as the credential applicants for whom the TEA performs identity proofing services.

D. Recordkeeping and Privacy Considerations

The NNA requires each TEA to record an entry in the TEA's journal for any notarial act performed in connection with an identity proofing as a best practice, even if statute in the TEA's state does not require notaries to maintain a journal. The journal entry provides a record of the notarial act that is useful in resolving disputes and evidence that the notary used reasonable care in executing the notarization.

¹⁹ The U.S. Department of Homeland Security advises employers that a notary public may be an agent of the employer for the purpose of completing the Form I-9. The NNA instructs its members that it may complete the certification on an I-9 form as an agent of the employer, but not as a notary by writing the title "notary public" or affixing a notary seal on the I-9 form.

²⁰ See Section G. later in this paper.

²¹ See supra note 1 at 36.

²² To become a Trusted Agent in many identity frameworks, a person must meet certain qualifications, possess an appropriate identity credential and sign certain legal agreements.

For every notarial act, and unless otherwise specified by applicable state law or regulations, the TEA must record in a journal or register at the time of notarization the following information:

- (1) The type of notarial act.
- (2) The date and time of day.
- (3) The type, title, or a description of the document or proceeding.
- (4) The signature, printed name, and address of each applicant.
- (5) The evidence of identity of each applicant, in the form of either: (a) a statement that the person is “personally known” to the notary; (b) a notation of the type of identification document, its issuing agency, its serial or identification number²³, and its date of issuance or expiration; or (c) the signature, printed name and address of each credible witness²⁴ swearing or affirming to the person’s identity, and, for credible witnesses who are not personally known to the notary, a description of identification documents relied on by the notary.
- (6) The thumbprint²⁵ of each applicant or, in the case of an electronic journal, the thumbprint or other recognized biometric identifier of each applicant if the journal has the capability of capturing, storing, and retrieving the identifier.
- (7) The part of the ID proofing fee that is attributed to the notarial act.
- (8) In the case of an electronic notarization, a description of the electronic signature

²³ A growing number of states are prohibiting notaries from recording serial numbers or other personal identifying information in notary journals. *See* MASS. EXEC. ORDER NO. 455 (04-04) (May 15, 2004), § 11(c)(5), R.I. EXEC. ORDER NO. 09-08 § 3(e) and 3(e)(5)(ii) and TEX. ADMIN. CODE § 87.40(a)(1).

²⁴ *See supra* note 18.

²⁵ Only California requires a thumbprint to be left in the notary’s journal for certain documents (deeds, quitclaim deeds, deeds of trust affecting real property and powers of attorney). Illinois requires each grantor of residential real property situated in Cook County, Illinois, to leave a thumbprint on the “notarial record” completed by the notary for certain documents of conveyance. This notarial record is not retained by the notary, but deposited with the notary’s employer, if the employer qualifies under statute, or the Cook County Recorder of Deeds.

sound, symbol, or process used by the applicant along with the name of any authority issuing or registering the electronic device used to create the electronic signature of the applicant.

A TEA's journal is generally considered a public record²⁶ that is available for inspection and review.²⁷ The NNA recommends that prior to allowing a person to inspect or obtain a photocopy of a journal entry, the notary should be presented with a written request that details the month and year of the notarial act, the name of the person whose signature was notarized and the type of document or transaction.²⁸ The written request provides a means for screening out persons without a justifiable and lawful need to obtain the personal identifying and transaction information stored in the notary's journal. The notary's journal also may be accessed by subpoena or by duly authorized law enforcement personnel conducting an official investigation.²⁹

The journal entry is not the only record of an identity proofing that contains personal identifying information. The identity verification form itself is another document that must be handled with care, as must any photocopies of personal identification documents themselves.

Since the Trusted Enrollment AgentTM is responsible for couriering all documents from the identity proofing session and ensuring that they are securely shipped or transmitted via fax to the credential issuer, the TEA must take measures to protect the documents while they are in the TEA's care. For example, if the documents are transmitted via fax to the credential issuer, the credential issuer may require documents to be faxed using a dedicated fax machine and not scanned and faxed using a fax modem of a personal computer, a process which creates an

²⁶ See ARIZ. REV. STAT. ANN. § 41-313(B)(1).

²⁷ See ARIZ. REV. STAT. ANN. § 41-319(F).

²⁸ See THE NOTARY PUBLIC CODE OF PROFESSIONAL RESPONSIBILITY, (Nat'l Notary Ass'n) at 23.

²⁹ See MASS. EXEC. ORDER No. 455 (04-04) (May 15, 2004), § 12(a) and CAL. GOV'T CODE § 8206(d).

electronic copy of the identity proofing documentation that resides on the TEA's computer. Once the credential issuer confirms reception of the faxed identity verification forms, an instruction is sent to the TEA to destroy all paper copies of the identity verification forms from the identity proofing session.

E. Liability Considerations and Other Legal Issues

If the identity proofing requires performance of a notarial act, the Trusted Enrollment Agent™ may be liable under state notary laws³⁰ to any person financially injured by the TEA's negligence or official misconduct.³¹ The extent of a notary's liability is unlimited, but it is important to clarify in this context that liability is limited to the notarial act executed on the identity verification form and not for any service performed by the TEA acting solely as an identity proofer.

The following acts could subject the TEA to liability in the context of an identity proofing situation where such acts resulted in financial or other loss to the applicant or relying party:

- (1) Failure of the TEA to hold a current notary commission at the time he or she performed the notarial act.
- (2) Failure to require the applicant signing the identity verification form to be in the physical presence of the notary at the time of notarization.
- (3) Failure to positively identify the applicant for the notarial act in accordance with the laws of the state.

³⁰ See 5 ILCS 312/7-101 — “A notary public and the surety on the notary's bond are liable to the persons involved for all damages caused by the notary's official misconduct.”

³¹ See 5 ILCS 312/7-104 — “The term “official misconduct” generally means the wrongful exercise of a power or the wrongful performance of a duty and is fully defined in Section 33-3 of the Criminal Code of 1961. The term “wrongful” as used in the definition of official misconduct means unauthorized, unlawful, abusive, negligent, reckless, or injurious.”

- (4) Completion of a notarial certificate³² containing statements the notary knows are false.
- (5) Failure to faithfully discharge fully and faithfully any of the duties or responsibilities required of a notary.

The NNA warrants the certification of TEAs with insurance coverage in the amount of \$1 million per claim and \$5 million aggregate for liability arising from certifications and background checks for TEAs and provides liability coverage for all other claims or damages of two times the total fees paid to NNA under the contract up to \$1 million.

F. Oversight

A TEA is accountable to the notary-regulating official of the TEA's commissioning state for improper conduct related to notarial acts performed in connection with identity proofing documentation.

Notary-regulating officials typically have authority to receive complaints from the public against the conduct of a notary public, initiate investigations into alleged misconduct, hold hearings to adjudicate formal charges, and to administer appropriate sanctions against the commission of a notary who has been found to have violated notary public laws and rules. The remedies available to the commissioning official are denial of an application for a commission or reappointment, suspension of a commission during the current term, revocation of the commission and the imposition of civil fines.

Depending upon the severity of the offense, a notary may be criminally liable for misconduct. Depending upon the state, certain aggravated offenses are categorized as

³² The notarial certificate is that portion of the document containing the notary's statement of facts surrounding the notarial act performed.

misdemeanors³³ and felonies.³⁴

The NNA also supervises all TEAs who perform identity proofings. It has established a list of infractions and a remediation process. Some violations, such as a failure to properly complete the documentation for an identity proofing session, may require the TEA to cure the error at his or her own expense by going back out to identify the applicant a second time. Other offenses are more serious and may be incurable. For example, disclosing an applicant's personal identifying information to anyone outside of the identity proofing transaction will result in an irremediable disqualification as a TEA.

Each infraction has been assigned a level of severity and rated according to a point system. TEAs who compile a certain number of points within a given time period may be required to retake the educational course or complete other requirements to maintain status as a TEA.

The independent contractor's agreement executed between the NNA and the individual TEA documents the potential infractions and the remediation process and binds a TEA to perform identity proofing services in accordance with the provisions of the TEA certification training and the independent contractor's agreement.

G. Current Use Cases

TEAs currently provide identity proofing services for organizations in the aerospace and defense supply chain and the biopharmaceutical and healthcare communities.

³³ See NEV. REV. STAT. § 240.155(2), where notarizing without the document signer appearing physically before the notary is a gross misdemeanor.

³⁴ See N.C. GEN. STAT. § 10B-60(d)(2) and (3), where a notary who performs an acknowledgment, verification or proof, or administers an oath or affirmation knowing it is false or fraudulent is guilty of a Class I Felony.