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## FISCAL IMPACT REPORT

ORIGINAL DATE 06/18/2020

SPONSOR Maestas/Papen LAST UPDATED \_\_\_\_\_ HB 3

SHORT TITLE Remote Notarial Acts SB \_\_\_\_\_

ANALYST Nichols/Klundt

### REVENUE (dollars in thousands)

Section	Estimated Revenue			Recurring or Nonrecurring	Fund Affected
	FY20	FY21	FY22		
4		Possible minor GRT revenue impact for liquor sales	Possible minor GRT revenue impact for liquor sales	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

LFC Files  
 New Mexico statutes  
 American College of Trust and Estate Counsel

#### Responses Received From

New Mexico Attorney General (NMAG)  
 Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

House Bill 3 would provide the governor with authority during a declared public health emergency to alter or suspend in-person requirements relating to notarial acts, the execution of wills, and the holding of shareholder meetings.

The proposed bill would also allow for the delivery of alcoholic beverages with the delivery of food.

Section 1 of the bill would add a new section to the Notary Public Act, allowing the governor to suspend the in-person appearance requirement for notarial acts, and also allow for virtual or remote performance of notarial acts.

## **House Bill 3– Page 2**

Section 2 would add a new section to Chapter 45, Article 2 NMSA1978, allowing the governor to suspend the in-person appearance requirement for witnessing the execution of wills, and also allow for virtual or remote means of witnessing the execution of a will.

Section 3 would add a new section to the Business Corporation Act, allowing the governor to suspend the in-person appearance requirement for shareholder meetings and also allow for virtual or remote shareholder meetings.

Section 4 would add a new section to the Liquor Control Act, allowing the governor to allow Liquor Control Act licensees to sell and deliver alcoholic beverages along with the sale and delivery of food.

The proposed bill has an emergency clause and would become effective immediately upon signature by the governor. Sections 1 through 4 of the bill would be repealed on June 30, 2021.

### **FISCAL IMPLICATIONS**

There is no appropriation contained in this bill. Section 4 of the bill could result in small increases in gross receipts tax (GRT) revenues through increased liquor sales, and could also result in small cost increases to the Department of Public Safety (DPS) for increased enforcement activities related to the sale of alcohol.

### **SIGNIFICANT ISSUES**

The Office of the Attorney General did not identify any significant issues but did report, “Making changes to a wide variety of laws through inserting a single boilerplate emergency provision effective on the Governor’s Order is somewhat unusual. Ordinarily, the legislature might be more inclined to draft new sections of the Emergency Powers Code, (See Section 12-9b-1 stating that “Chapter 12, Articles 10, 10A, 11 and 12 NMSA 1978 may be cited as the “Emergency Powers Code”) in order to provide such emergency powers – or to embed the changes within amendments to the relevant Acts. However, there is no specific legal problem with structuring it as drafted – especially given the automatic repeal of all the changes in less than a year. Even if the delayed repeal provision were removed, the proposed emergency language changes are limited by actions permitted under the Public Health Emergency Response Act.”

The Secretary of State (SOS) noted that the Notary Public Act requires physical presence for notarial acts, and subjects the notary to fines or criminal penalties without it. According to SOS, the definition of key words and concepts in the Act – “acknowledgment”, “affirmation” , “credible witness”, “jurat” , and “oath” – require physical presence before the notary public. The proposed emergency authority runs counter to the reading of the statute, and it is long-standing precedent that “the Notary is not authorized to take the acknowledgment of the person signing the instrument unless such person appears in person before the Notary and attaches his signature to the instrument in the presence of such Notary” (1921 N.M. AG LEXIS 928, \*1, 1921 Op. Atty Gen. N.M. 47, 48).

SOS indicates that if the governor receives emergency authority to make changes to the Notary Public Act, it will continue to process notary applications and reappointments that are otherwise compliant with the Notary Public Act.

SOS has no administrative authority over shareholder meetings.

New Mexico requires in-person witnessing of wills. Some states allow remote witnessing, and others have made temporary provisions due to the COVID-19 public health emergency. For example, New York Governor Andrew Cuomo issued an executive order in April 2020 authorizing wills and trusts to be witnessed remotely by virtual means.

### **ADMINISTRATIVE IMPLICATIONS**

Allowing liquor licenses to deliver alcohol may create minor additional enforcement requirements for DPS.

### **TECHNICAL ISSUES**

According to SOS, proposed changes to the Notary Public Act run counter to the reading of the statute, and precedent requiring in-person presence for notarial acts. Notaries are subject to fines or criminal penalties if they execute notarial acts without an in-person signature. However, the Governor’s Executive Order (“EO”) 2020-015 (March 15, 2020, superseded by EO 2020-039 issued June 11, 2020) already permitted notaries public to authenticate documents electronically without risking disciplinary action.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The Office of the Attorney General reported notaries public have already been permitted to authenticate documents electronically without risking disciplinary action under EO 2020-015 (superseded by EO 2020-039).

Businesses and corporations with boards of directors of five or more persons have already been prohibited from meeting face-to-face under the Governor’s existing EO 2020-024 issued April 9, 2020.

Virtual witnessing processes for wills has not yet supplanted ordinary authentication. However, since Courts have accommodated the need for physical distancing in other instances including those requiring constitutional protections (confrontation of witnesses, for instance) it does not seem problematic that attestation of wills can be done smoothly, legally or effectively.

Allowing liquor licenses to deliver alcohol along with food may help to create additional income sources for restaurants negatively impacted by the COVID-19 public health emergency.