

Background Checks for Notary Signing Agents

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Background checks are a hot topic for notary signing agents. Affected notaries are strongly questioning whether "mandated" background checks are as black-and-white an issue as they are being told, or whether the facts present a more nuanced picture.

We believe it's the latter. While it's true that some financial institutions and their service providers may be requiring background checks now, others aren't because they have opted for different information security procedures. Here's what we've gleaned about "mandated" background checks notary signing agents, and why this measure may be more an option than a requirement for financial institutions and their service providers.

BACKGROUND

Gramm-Leach-Bliley/Financial Modernization Act of 1999

In 1999, the United States Congress passed sweeping legislation to modernize federal regulations affecting banks, securities firms, and insurance companies. This legislation was the Gramm-Leach-Bliley Act, or the Financial Services Modernization Act of 1999 ("the Act").

The Act included privacy provisions created to make financial institutions responsible for protecting their customers' sensitive financial information. Background checks for notary signing agents are not mentioned in these provisions... that level of detail would later materialize in implementing rules created by various federal agencies.

This is standard procedure following passage of an act by Congress. The true "rules" (regulations) that carry out the objectives of an act are created by the federal agencies that have regulatory oversight over those who are governed by the act. Federal rules are truly the enforceable laws behind an act.

Information Security Standards Specifically, the Gramm-Leach-Bliley Act required certain federal agencies to establish, through rulemaking, standards for financial institutions to follow relative to the safety and privacy of customer information.

Under this mandate, four federal agencies² published the "Interagency Guidelines Establishing Information Security Standards" in 2001. In 2005, these agencies completed work on a Small-Entity Compliance Guide, written to help financial institutions comply with the Security Guidelines. The Compliance Guide explains that under the Security Guidelines, each financial institution must:

▶ Develop and maintain an effective information security program tailored to the complexity of its operations.

In developing an information security program, financial institutions are required by the Security Guidelines to consider, and adopt if appropriate, a variety of information security measures. Background checks (for employees with responsibilities for or access to customer information) appear on this list of security measures.

The Security Guidelines also require each financial institution to:

▶ Require, by contract, its affiliated and non-affiliated third-party service providers that have access to its customer information to take appropriate steps to protect the security and confidentiality of this information.

The Security Guidelines define "service provider" as any party that is permitted access to a financial institution's customer information through the provision of services directly to the institution. This includes third parties such as the title companies and mortgage document preparation companies that utilize notaries to perform signing agent services.

The Compliance Guide further elaborates on bank/service provider contracts as follows:

▶ The contract provisions in the Security Guidelines apply to all of a financial institution's service providers. After exercising due diligence in selecting a company, the [financial] institution must enter into and enforce a contract with the company that requires it to implement appropriate measures designed to implement the objectives of the Security Guidelines.

Certainly, "appropriate" information security measures required in bank contracts with third-party service providers might include background checks for employees, or for non-employees such as notary signing agents. But the Security Guidelines clearly indicate that background checks are recommended but optional, not flatly mandated. Broad claims that the Gramm-Leach-Bliley Act "mandates" background checks for notary signing agents are at odds with this fact.

More accurately, the decision to require background checks will depend on each bank's assessment of its own information security needs. It will depend on the unique circumstances of each bank's contractual arrangement with its service providers. Some bank/service provider contracts might specifically require background checks, some might simply require "appropriate security measures" that meet the Security Guidelines' objectives. Some service providers won't require background checks because they aren't deemed as "appropriate" as some other security measures.

CONCLUSION

For now, ASN recommends that notary signing agents do the following:

- 1. Communicate directly with the title companies and signing companies that hire you-don't let a third party tell you what the entity that hires you will require of you.
- 2. Ask the companies that hire you to explain their specific policy on background checks. We've found that some companies don't require them. We've also found that some require them for certain types of loan closings and not for others. If a company is requiring background checks, it should be able to tell you what type of background check is being run, what criteria is being checked, which vendor is providing the service, how much it's going to cost, and whether the notary or the company will pay for it.
- Ask if the title or signing company requiring a background check whether it will accept any previously
 performed check that satisfies the company's background check criteria. That is, if your background
 check satisfies the title or signing company's criteria, we hope it doesn't matter which reputable vendor
 performed the service.
- 4. Ask whether your cost for obtaining a background check will be reflected in higher fees paid to you.

5. Ask what internal security measures are going to protect your private information, once it's been turned over for purposes of a background check. For example, notaries are reporting multiple hits on their credit histories, occurring after their information has already been used to obtain a background check. In more extreme cases, these repeated hits lower the subject's credit score. (ASN hopes to address this alarming issue on behalf of its members... stay tuned for further information.)

The American Society of Notaries realizes that resolving questions related to background checks is important to our notary signing agent members. We continue to obtain guidance from the appropriate federal agencies and private trade associations, and will keep our members apprised of any new developments as they arise.

¹ The agencies responsible for developing safeguards standards were: the Federal Trade Commission; Office of the Comptroller of the Currency; the Federal Reserve Board; the Federal Deposit Insurance Corporation; the Office of Thrift Supervision; the National Credit Union Administration; the Secretary of the Treasury; and the Securities and Exchange Commission.

² The Office of the Comptroller of the Currency (U.S. Treasury); the Office of Thrift Supervision (U.S. Treasury); the Federal Reserve, and the Federal Deposit Insurance Corporation.