majority of the States, but not all the acts that a notary may perform in every state. In some states (under common law) the duties of the notary public were expanded over time, so that notaries basically performed the functions of a justice of the peace. A minority of these states (Maine, Florida and South Carolina, according to the Association) then codified some of these functions, one of them being the celebration of a marriage. The Department understands, however, that in effect these few States have authorized notaries to perform acts that are not notarial, at least not in the traditional sense or the sense authorized in the majority of the states or by 22 U.S.C. 4215 and 4221. Thus, the Department does not believe that 22 U.S.C. 4215 and 4221 or its notarial regulations provide a basis to authorize its consular or other notarial officers to perform such extraordinary acts that are more typically associated with Justices of the Peace or attorneys. Support for this view is found in the definition of a notary public in one commonly cited

A notary public is defined as a public, civil, or ministerial officer, and an impartial agent of the state, who in the performance of his duties, exercises a delegation of the state's sovereign power, as in attesting the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained, and in administering oaths and attesting to the authenticity of signatures.

58 AM. JUR. 2D *Notaries Public* section 1 (1995).

We do agree, however, that a change in the wording of the Department's regulations would be useful to ensure that there is no misunderstanding of the notarial authorities of Department officials. Given our understanding that 22 U.S.C. 4215 and 4221 authorize the performance of oaths, affirmations and other ministerial duties of notaries, not extraordinary acts (such as celebrating a marriage) which are not traditional notarial acts and which are authorized by a minority of the states, we have substituted for the first sentence of Section 92.4(a) the following three sentences:

All notarizing officers are required, when application is made to them within the geographic limits of their consular district, to administer to and take from any person any oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to perform within the United States. The term "notarial act" as used herein shall not include the performance of extraordinary acts, such as marriages, that have not been

traditionally regarded as notarial, notwithstanding that notary publics may be authorized to perform such acts in some of the states of the United States. If a request is made to perform an act that the notarizing officer believes is not properly regarded as notarial within the meaning of this regulation, the officer shall not perform the act unless expressly authorized by the Department upon its determination that the act is a notarial act within the meaning of 22 U.S.C. 4215 and 4221.

Another comment was received from the Office of Inspection of Notarial Deeds, Tribunal Supremo, Puerto Rico:

We foresee no difficulties with the implementation of this rule with the exceptions provided. However, [it is] respectfully requested [that the Department] consider in the rule whether the documents which bear the signature of a designated employee in his official capacity similar to a consular officer, require *or not* to be accompanied by a certification stating that the signature of the designated employee is genuine and that the signer has the official capacity to sign the document.

The issue of whether a certification would need to accompany any notarial act performed by a designated State Department employee has been considered. Due to the fact that our designated employees will have the same statutory authority as a consular officer, the Department has concluded that attaching such certificates to notarial acts performed by designated employees will not be necessary. The Department will maintain records of employees designated under these regulations to ensure that their official acts can subsequently be verified if questioned, for example, in litigation.

As noted when this rule was first proposed, the new regulation does not provide for designated U.S. citizen State Department employees to perform authentications, but the Department hopes to be able to extend the rule to encompass authentications in the future. The authentication of documents for use in civil proceedings in the federal courts is currently governed by Rule 44(a)(2) of the Federal Rules of Civil Procedure. It is unclear whether that rule can be read to include authentications performed by nonconsular officer U.S. citizen employees designated by the Department to perform notarial services. The Bureau for Consular Affairs plans to initiate consultations with the appropriate judicial officials to clarify the interpretation of Rule 44 and, if necessary, to ask that Rule 44 be amended to encompass all notarial officials under this proposed rule, thereby permitting further amendments

to the Department's notarial regulations to include authentications.

Similarly, the regulation does not allow the designated employees to perform notarial services in connection with patents and patent applications. The taking of oaths regarding patent applications is governed by 35 U.S.C. 115, which provides for patent application oaths to be administered by "diplomatic and consular officers." The Department of State is now seeking an amendment to the statute to permit notarial officers to accept patent applications.

Another service which designated employees are unable to perform is the taking of testimony in any criminal action or proceeding pursuant to a commission issued by a court in the United States. Such testimony is governed by 18 U.S.C. 3492, which authorizes consular officers to receive commissions to take testimony. Again, the Department is now seeking an amendment to the statute to permit notarial officers to permit notarizing officers to receive commissions to authenticate documents and take testimony.

The acceptability of notarials performed by designated U.S. citizen State Department employees for State law purposes is of course governed by the laws of the various states. The Department hopes that any State laws that do not allow acceptance of such notarials will be amended as necessary to achieve this result, and will be inviting consultations to this end.

The Department believes that, with these qualifications, notarials performed by designated U.S. citizen State Department employees will be acceptable for all purposes, and particularly for all Federal law purposes. The Bureau of Consular Affairs will be consulting with other interested federal agencies to ensure this result to the extent possible consistent with current statutory authorities.

This regulation is not expected to have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. It will not impose information collection requirements under the provisions of the Paperwork Reduction Act of 1980. This rule has been reviewed as required under E.O. 12778 and certified to be in compliance therewith. This rule is exempt from review under E.O. 12866 but is consistent therewith and is being shared with potentially interested federal agencies to ensure that they are aware of the changes it will entail in consular operations.