

CALIFORNIA DEPARTMENT OF JUSTICE

TITLE 11. LAW

DIVISION 1. ATTORNEY GENERAL

CHAPTER 18. ELECTRONIC RECORDING DELIVERY SYSTEM

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

A County Recorder may accept for recording, in lieu of a written paper, a digitized or digital image of certain recordable instruments. The Electronic Recording Delivery Act of 2004 (the “Act”) permits electronic delivery, recording, and return of certain types of instruments through an electronic recording delivery system (ERDS) upon approval by the county board of supervisors and certification by the Attorney General (AG). (Gov. Code, § 27390 et seq.)

In 2016, the Legislature passed Assembly Bill (AB) 2143 (Chapter 380, Statutes of 2016) expanding the types of instruments that may be recorded electronically and the types of entities that may submit instruments electronically. AB 2143 deleted provisions of the Act limiting electronic recording to title insurers, underwritten title companies, institutional lenders, or governmental entities. The Act now permits all entities to record electronically under certain conditions. AB 2143 deleted provisions requiring certain instruments to be in digitized rather than digital form. The Act now permits all instruments to be recorded electronically in digital form.

AB 2143 authorizes a County Recorder to enter into a contract with an authorized submitter for the delivery for recording, and return to the party requesting recording, of a digital or digitized record that is an instrument to be recorded consistent with specified provisions. (Gov. Code, § 27391, subd. (c)(1).) AB 2143 also requires an authorized submitter, as specified, and any agent submitting documents on behalf of an authorized submitter, to provide proof of financial responsibility in the form of general liability coverage, in an amount to be set by the AG through rule or regulation in consultation with interested parties. (Gov. Code, § 27391, subd. (c)(2).)

The Act requires the AG, in consultation with interested parties, to adopt regulations for ERDS review, approval, and oversight. The Department of Justice (Department) proposes to amend the technology requirements within the regulation to remove overly restrictive requirements and allow County Recorders the ability to upgrade their ERDS to standards-based technologies, as needed.

BENEFITS ANTICIPATED FROM REGULATORY ACTION

This rulemaking action will benefit the safety and welfare of California residents by ensuring a secure information transmission system, which protects the integrity and security of electronically-recorded documents and prevents fraud.

SPECIFIC PURPOSE AND NECESSITY OF EACH SECTION

Article 5. Baseline Requirements and Technology Standards.

§ 999.138. Security Requirements for Computer Workstations.

Subdivision (a) was amended to remove the requirement that all endpoints be Hardened following the National Institute of Standards and Technology (NIST) Special Publication 900-70 Revision 4, National Checklist for IT Products-Guidelines for Checklist Users and Developers (publication date, February 2018) and instead require that all endpoints are secure. This amendment is necessary because the previous language drew questions from County Recorders regarding the applicability and implementation of the checklists. The new language addresses this concern by reverting to prior language that was in place for a number of years and in the Department's experience, provided sufficient guidance. Each agency is subject to recurring security audits, which help ensure that technological standards are maintained and reflect the most updated and applicable guidelines.

Subdivision (a)(3) was amended to remove the requirements that workstations meet all of the specified checklists and instead require the workstations to have a host-based firewall configured to restrict inbound and outbound connections. Similar to the reasons stated above, this amendment is necessary to provide County Recorders with technological standards they can readily implement and to preserve the integrity and confidentiality of the transmitted documents during the delivery process in the most cost-effective way.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Department concludes:

- (1) It is unlikely that the proposal would create or eliminate jobs within the state because the amendments only revise security standards for those County Recorders that elect to utilize ERDS.
- (2) It is unlikely that the proposal would create new businesses or eliminate existing businesses within the state because the amendments only revise security standards for those County Recorders that elect to utilize ERDS.
- (3) It is unlikely that the proposal would result in the expansion of businesses currently doing business within the state because the amendments only revise security standards for those County Recorders that elect to utilize ERDS.

The Department also concludes that:

- (1) The proposal would benefit the health and welfare of California residents by reverting to a performance, rather than a prescriptive, standard governing the secure transmission of electronically-recorded documents. By resolving questions from County Recorders about ERDS requirements and standards, this proposed regulation furthers the objectives to ensure ERDS

security, which includes protecting the public from fraud, thus securing Californians' safety, welfare, and privacy.

(2) The proposal would not have a discernible benefit on worker safety because these regulations only revise security standards for those County Recorders that elect to utilize ERDS.

(3) The proposal may slightly benefit the state's environment. By removing overly restrictive requirements, the regulations may encourage more County Recorders to offer electronic recording, which may result in less paper use.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS, OR SIMILAR DOCUMENTS RELIED UPON

The Department did not identify any technical, theoretical, or empirical study, report, or similar document in the preparation of the regulation. On May 12, 2020, the ERDS Advisory Committee held a stakeholder meeting at which interested persons were invited to participate in discussions about the regulation and the changes to the security requirements.

EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an additional determination that the proposed action would not have a significant, statewide adverse economic impact on directly affecting businesses, including the ability of California businesses to compete with businesses in other state as the proposed changes only affect County Recorders. These standards apply to a select number of individuals, who voluntarily elect to participate in the program, and serve to provide consolidated and centralized guidelines. There are no new requirements in this proposed regulatory action that would be imposed on businesses, thus there would be no adverse economic impact directly affecting businesses.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Department determines that the proposed regulations do not affect small businesses.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Department has determined that no alternatives were presented to, or considered by, the Department that would be more effective in carrying out the purpose of the proposed regulation or would be as effective and less burdensome to affected private persons that the proposed regulation. In consultation with stakeholders, the Department is replacing newly-enacted overly restrictive security requirements with a previous cost-effective standard that still ensures the secure transmission of electronically-recorded documents.

Performance Standard as Alternative:

The Department made every effort to consider performance standards where possible by removing overly restrictive requirements. To the extent a regulation prescribes a specific action or procedure, the requirement is necessary to ensure the secure transmission of electronically-recorded documents.