

TITLE 11 - DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL

NOTICE OF PROPOSED RULEMAKING

PROPOSED REGULATORY ACTION

Notice is hereby given that the Department of Justice (DOJ), Office of the Attorney General, proposes to add Article 1 (commencing with Section 100), Article 2 (commencing with Section 200), Article 3 (commencing with Section 300), Article 4 (commencing with Section 400), Article 5 (commencing with Section 500), Article 6 (commencing with Section 600), Article 7 (commencing with Section 700), Article 8 (commencing with Section 800), and Article 9 (commencing with Section 900), to Chapter 17 of Division 1 of Title 11, California Code of Regulations, which authorizes a county recorder, upon approval by resolution of the board of supervisors, to establish an electronic recording delivery system for the delivery for recording specified digitized and digital electronic records. The Attorney General is responsible for the system certification, regulations and oversight.

PUBLIC HEARING

The DOJ will hold a public hearing from 9:00 a.m. to 12:00 p.m. on October 24, 2006 at the Water Resources Building located at 1416 Ninth Street, Sacramento, CA 95814 in the auditorium located on the ground level. The auditorium is wheelchair accessible. At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The DOJ requests but does not require that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the DOJ. The written comment period closes at 5:00 p.m. on October 24, 2006. The DOJ will consider only comments received at the DOJ office by that time.

For convenience purposes, a Written Comment(s) Form is available at the ERDS web page at <http://ag.ca.gov/erds1/index.htm> and can be downloaded and mailed, faxed or submitted electronically to the ERDS e-mail address listed below.

Submit comments to:

Terri Newby, Bureau Chief  
Department of Justice - ERDS  
P.O. Box 160526  
Sacramento, CA 95816 - 0526  
OR, FAX # (916) 227-0595, OR, ERDS@doj.ca.gov

## AUTHORITY AND REFERENCE

Government Code sections 27393 and 27395(f) authorizes the DOJ to adopt the proposed regulations, which would implement, interpret, or make specific section 27391 et. seq. of the Government Code.

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

### **I. Introduction**

The Electronic Recording Delivery Act of 2004 (Assembly Bill 578, Statutes of 224, Ch. 621, § 2.) requires the Attorney General to develop, certify, regulate and oversee an electronic recording system. The purpose of the system is to allow County Recorders to establish a limited and specified type of electronic recording alternative for recording deeds and other instruments affecting title, rights or interest in real property in California.

### **II. Background**

County Recorders are authorized to record written documents that transfer title to or impose liens on property, or give a right to a debt or duty. (Govt. Code § 27320 et seq.) The recording process traditionally has involved the transmission of original paper documents. On January 1, 1997, Government Code section 27279(b) was amended to allow County Recorders to accept for recording digitized images of recordable instruments, in lieu of a written paper if certain conditions are met. County recorders may accept digitized images from any local, state or federal agency, so long as the technology used to create the image conforms to all applicable statutes regulating document reliability. (Govt. Code § 27279.) Presently, the county recorders of San Bernardino and Orange County may accept digitized images of recordable instruments where certain conditions are met. (Govt. Code § 27279.1.)

The Electronic Recording Delivery Act of 2004 (“Act”) was enacted “to develop a system to permit the electronic delivery, recording, and return of instruments affecting right, title, or interest in real property.” (Govt. Code § 27391.) In addition, the Act permits county recorders, under specified conditions, to accept and record “a digitized or digital electronic record that is an instrument of reconveyance, substitution of trustee, or assignment of deed of trust . . .” (Govt. Code § 27397.5.) The Act was intended to help reduce fiscal pressures on the counties, as evidenced in the Legislature’s rationale for characterizing the bill as an urgency statute:

“In order that county recorders may alleviate fiscal constraints by implementing electronic recording delivery systems at the earliest possible time, it is necessary for this act to take effect immediately.”  
(AB 578, sec. 3.)

### III. Existing Law

Under the Act, in order to establish an electronic recording system, a county recorder must be authorized by resolution of the board of supervisors and obtain system certification by the Attorney General. (Govt. Code § 27392.) Pursuant to Government Code section 27396, the Attorney General is charged with several obligations to monitor the security of an electronic recording delivery system in close cooperation with county recorders and public prosecutors. Among those:

- (1) local inspection and review of a County Recorder's electronic recording delivery system. (Govt. Code § 27393(c).)
- (2) approval of computer security auditors. (Govt. Code § 27394(b).)
- (3) approval of software and other services. (Govt. Code § 27392(b).)
- (4) criminal records checks and requests for subsequent arrest notification. (Govt. Code § 27395.)
- (5) suspension of an electronic recording system. (Govt. Code § 27396.)
- (6) action seeking declaratory or injunctive relief, restitution for damages or economic loss, rescission, or other equitable relief for any violation of the Act or regulations adopted pursuant to the Act. (Govt. Code § 27396 (b)(1).)

The Act provides the Attorney General with responsibility to adopt regulations, in consultation with interested parties, governing "the review, approval, and oversight" of the systems. (Govt. Code § 27393.) More specifically, Government Code section 27393 (b) authorizes the Attorney General to promulgate the following:

- (1) Establishment of baseline technological and procedural specifications for electronic recording delivery system.
- (2) Requirements for security, capacity, reliability, and uniformity.
- (3) Requirements as to the nature and frequency of computer security audits.
- (4) A statement of a detailed and uniform definition of the term "source code" consistent with paragraph (7) of subdivision (b) of Section 27390, and as used in this article, and applicable to each county's electronic recording delivery system.
- (5) Requirements for placement of a copy of the operating system, source code, compilers, and all related software associated with each county's electronic recording delivery system in an approved escrow facility prior to that system's first use.
- (6) Requirements to ensure that substantive modifications to an operating system, compilers, related software, or source code are approved by the Attorney General.
- (7) Procedures for initial certification of vendors offering software and other services to counties for electronic recording delivery systems.
- (8) Requirements for system certification and for oversight of approved systems.
- (9) Requirements for fingerprinting and criminal records checks required by Section 27395, including a list of employment positions or classifications subject to criminal records checks under subdivision (f) of that section.
- (10) Requirements for uniform index information that shall be included in every digitized or digital electronic record

- (11) Requirements for protecting proprietary information accessed pursuant to subdivision (e) of Section 27394 from public disclosure.
- (12) Requirements for certification under Section 27397.5(c).

The Attorney General may promulgate any other regulations necessary to fulfill his or her obligations. (Govt. Code § 27393(c).) Additionally, Government Code section 27395 (f) requires the Attorney General to promulgate by regulation and by agreement with the county recorder the definition of “secure access.” These regulations must be completed before any county may put its electronic recording delivery system into operation.

There is no existing, comparable federal statute or regulation.

#### **IV. Committees Formed**

Due to the complexity of security issues and the nature of the competing interests, the ERDS program established an Advisory Committee, in compliance with section 27393 of the Government Code, to ensure conformity with the direction taken by the ERDS program. The Advisory Committee met several times to review and comment on draft policies, procedures and requirements that were the basis for administering the electronic recording delivery system and the foundation for the regulations. The ERDS program also formed Subcommittees to further discuss and resolve issues that resulted from discussion at the Advisory Committee meetings. Once the draft policies, procedures and requirements were approved, the ERDS program completed the corresponding regulations, again allowing the Advisory Committee review and Subcommittee resolution of issues. The ERDS program has given interested parties on-going access to the regulatory materials in order to reduce the amount of comments during the OAL comment period. A list of Advisory Committee and Subcommittee meetings is provided below. In a further attempt to educate the ERDS program with industry practices, DOJ staff toured various Title entities and County Recorder offices with the intent to gain a better understanding of each operation. Additionally, DOJ staff has attended conferences as well as presented program updates to the various interested parties.

- March 29, 2005 - Advisory Committee Meeting
- May 9, 2005 – Subcommittee Meeting
- May 18, 2005 – Subcommittee Meeting
- July 28, 2005 – Subcommittee Meeting
- November 11, 2005 – Advisory Committee Meeting
- December 14, 2005 – Draft Policies, Procedures and Requirements Distribution
- March 1, 2006 – Draft Policies, Procedures and Requirements Distribution
- May 5, 2006 - Draft Policies, Procedures and Requirements Distribution
- June 27, 2006 - Advisory Committee Meeting
- July 7, 2006 - Subcommittee Meeting
- August 3, 2006 - Subcommittee Meeting

## V. Summary of Proposed Regulations

The regulations are divided into nine articles. Article 1 describes the scope of the regulations to establish the guidelines, procedures, and standards following the enactment of an electronic recording system (“system”). Article 2 defines the various terms used throughout the regulations. Article 3 sets out the fees under the regulatory scheme. Article 4 describes the fingerprinting and criminal record checks requirements administered by the California Department of Justice and required of specified individuals with access to a system. Article 5 establishes the minimum baseline technological requirements for a system. The regulations define the standards and provide guidelines in the areas of security, reliability, and uniformity. Article 6 outlines the certification requirements incumbent on County Recorders in order to obtain certification of their system. The regulations also specify the responsibilities of a County Recorder in administering and ensuring the security of a system. The regulations address the application process and application for substantive modifications of a system, change in County Recorder, and withdrawal of certification, and the replacement of certificates. Article 7 specifies the Computer Security Auditor criteria for certification and the application for certification process. The regulations also address the withdrawal of certification and the replacement of certificates. Article 8 specifies the Vendor of System Software criteria for certification and the application for certification process. The regulations also address the renewal, expiration, withdrawal of certification, and the replacement of certificates. Article 9 on audits and oversights specifies the Electronic Recording Delivery System Program’s responsibilities for oversight and regulation of a County Recorder’s system. The regulations describe the role of Computer Security Auditors and explain the use, type, format and requirements of audits. The regulations also address local inspections, incident reporting, and suspension and termination of certificates.

## VI. Incorporation by Reference

Documents and forms that are incorporated by reference within these regulations are listed below (Title 1 California Code of Regulations, section 20(c)(3)).

Publications: To review, refer to: <http://csrc.nist.gov/publications/index.html> and <http://csrc.nist.gov/publications/nistpubs/index.html>

- FIPS 180-2, Secure Hash Standard (Change Notice) – Publication date: December 1, 2003
- FIPS 140-2, Security Requirements for Cryptographic Modules – Publication date: May 25, 2001, (Supercedes FIPS, PUB 140-1 dated January 11, 1994)
- FIPS 197, Advanced Encryption Standard (AES) – Publication date: November 26, 2001
- FIPS 198, The Keyed-Hash Message Authentication Code (HMAC) – Publication date: April 8, 2002

- Draft Special Publication 800-88, Guidelines for Media Sanitization – Publication date: February 3, 2006
- NIST Special Publication 800-63, Electronic Authentication Guideline: Recommendations of the National Institute of Standards and Technology (publication updated) – Publication date: April 2006 Version 1.0.2, document original release date June 2004
- SP 800-70, Security Configuration Checklists Program for IT Products- Guidance for Checklists Users and Developers – May 2005

Forms: All forms are contained within this package for reference.

- Request for Live Scan Service – BCII 8016 (Rev 04/01)
- Fingerprint Card - FD 258 – (Rev 05/11/99)
- Request for Exemption From Mandatory Electronic Fingerprint Submission Requirement – BCII 9004 – (03/05)
- No Longer Interested Notification – BCII 8302 – (Rev 03/05)
- ERDS Application for System Certification – ERDS 0001A – (Rev 07/06)
- ERDS Application for Sub-County System Certification – ERDS 0001B (06/06)
- ERDS Application for DOJ Computer Security Auditor – ERDS 0002 (Rev 08/06)
- ERDS Application for Vendor of ERDS Software Certification - ERDS 0003 (Rev 08/06)
- ERDS Attachment to ERDS 0002 - Computer Security Auditor Significant Experience Reference(s) – ERDS 0004 (06/06)
- ERDS Request for Replacement of Certificate and/or Documents – ERDS 0006 (Rev 08/06)
- ERDS Fax Transmission Cover Sheet – ERDS 0007 – (06/06)
- ERDS Change of ERDS Role – ERDS 0008 – (Rev 07/06)
- ERDS Attachment to ERDS 0003 -Vendor Application Form For Reference(s) – ERDS 0009 – (Rev 08/06)
- ERDS Application for Withdrawal – ERDS 0010 – (06/06)
- ERDS Statement of Understanding – ERDS 0011 – (Rev 07/06)
- ERDS Acknowledgement of Responsibilities – ERDS 0012 – (Rev 07/06)
- ERDS Request for Approval of Substantive Modification – ERDS 0013 – (Rev 07/06)

## DISCLOSURES REGARDING THE PROPOSED ACTION

The DOJ has made the following initial determinations:

### LOCAL MANDATE:

- Mandate on local agencies and school districts: None

FISCAL IMPACT:

- Cost to any local agency or school district for which 17500-17630 require reimbursement? None
- Other non-discretionary cost or savings imposed upon local agencies? None
- Costs or savings to any state agency? None
- Costs or savings in federal funding to the state? None

EFFECT ON HOUSING COSTS: None

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE. None

It has been determined that because private sector participation is voluntary, they are not otherwise affected.

ASSESSMENT REGARDING EFFECT ON JOBS/BUSINESSES

Adoption of these regulations will not:

1. Create or eliminate jobs within California
2. Create new businesses or eliminate existing businesses within California; or
3. Affect the expansion of businesses currently doing business within California

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

BUSINESS REPORT - Not applicable.

SMALL BUSINESS

The proposed action does not affect small businesses because participation by all parties involved is voluntary. The process of recording documents with a County Recorder may continue to be processed manually. Therefore, those businesses choosing not to participate with electronic recording shall continue with their current business practices.

ALTERNATIVES STATEMENT

In accordance with Government Code section 11346.5(a)(13), the DOJ must determine that no reasonable alternative considered by the DOJ, or that has otherwise been identified and brought to the attention of the DOJ would be either more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed regulations. Any person interested in presenting statements or arguments with respect to alternatives to the proposed regulations may do so during the written comment period.

## CONTACT PERSONS

Please direct inquiries concerning the proposed administrative action to Terri Newby at (916) 227-3049. The backup contact person is Alberto Gonzalez at (916) 324-5369. The mailing address for these contact persons is:

Department of Justice – ERDS  
P.O. Box 160526  
Sacramento, CA 95816-0526

## AVAILABILITY STATEMENTS:

### AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The DOJ will have the rulemaking file available for inspection and copying throughout the rulemaking process. To view the publications listed in Section VI of the Informative Digest - Incorporation by Reference, within this document, due to the size of each document, access must be made by visiting <http://csrc.nist.gov/publications/index.html> and <http://csrc.nist.gov/publications/nistpubs/index.html>. The proposed text of the regulations, the Initial Statement of Reasons, the modified text of the regulations (if any), forms and all information upon which the rulemaking is based are available at the DOJ - ERDS web page at <http://ag.ca.gov/erds1/index.htm>. You may also obtain copies by contacting the ERDS program at (916) 227-8907, by submitting your request to the above address or by visiting the DOJ at 4949 Broadway, Sacramento, CA, 95820.

### 15-DAY CHANGES

After considering all timely and relevant comments received, the DOJ may adopt the proposed regulations substantially as described in this notice. If the DOJ makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the DOJ adopts the regulations as advised. The DOJ will accept written comments on the modified text for 15 days after the date on which they are made available. Copies of any modified text will be available at the DOJ - ERDS web page at <http://ag.ca.gov/erds1/index.htm>. You may also obtain a written copy of any modified text by contacting the ERDS program at (916) 227-8907, by submitting your request to the above address or by visiting the DOJ at 4949 Broadway, Sacramento, CA, 95820.

### AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon completion, the final statement of reasons will be available at the DOJ - ERDS web page at <http://ag.ca.gov/erds1/index.htm>. You may also obtain a written copy of any modified text by contacting the ERDS program at (916) 227-8907, by submitting your request to the above address or by visiting the DOJ at 4949 Broadway, Sacramento, CA, 95820.

## AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in strikeout format (if any), as well as the Final Statement of Reasons once it is completed can be accessed through our DOJ - ERDS web page at <http://ag.ca.gov/erds1/index.htm> .