

CALIFORNIA DEPARTMENT OF JUSTICE

NOTICE OF PROPOSED RULEMAKING ACTION
(To be Published on March 1, 2019)

TITLE 11. LAW
DIVISION 1. ATTORNEY GENERAL

Notice is hereby given that the Department of Justice (DOJ), pursuant to the authority vested in it by Government Code (GC) Section 27393, proposes to amend the California Code of Regulations, Title 11, Division 1, Chapter 18, Articles 2, 4, 5, 6, 7, and 9, Sections 999.108, 999.122, 999.128, 999.129, 999.131, 999.132, 999.133, 999.134, 999.136, 999.137, 999.138, 999.139, 999.140, 999.141, 999.142, 999.143, 999.144, 999.145, 999.146, 999.147, 999.148, 999.149, 999.150, 999.154, 999.165, 999.166, 999.167, 999.168, 999.176, 999.178, 999.190, 999.195, 999.196, 999.197, 999.217, 999.218, 999.219, 999.220, 999.221, and 999.223, and to repeal Article 4, Sections 999.130, 999.135, and 999.153, in order to administer the requirements of the Electronic Recording Delivery Act set forth in GC Section 27390, et seq.

PUBLIC HEARING

The DOJ has not scheduled a public hearing on this proposed action. However, the DOJ will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her duly authorized representative, no later than 15 days before the close of the written comment period. The request must be in writing and must comply with the requirements of GC Section 11346.8(a). If a public hearing is requested, a notice of the time, date, and place of the hearing will be provided by separate notice.

WRITTEN COMMENTS PERIOD

The public comment period for this regulatory action will begin on March 1, 2019. Any interested party, or his or her duly authorized representative, may submit written comments relevant to the proposed regulatory action. Written comments on this regulatory proposal must be received no later than April 15, 2019 at 5:00 p.m., and addressed to the following:

Mike VanWinkle, Department of Justice Administrator I
California Department of Justice
Bureau of Criminal Identification and Investigative Services
PO Box 160526
Sacramento, CA 95816
Electronic Mail: erds@doj.ca.gov
FAX: (916) 227-0595

Or

John Navarette, Field Representative
California Department of Justice

Bureau of Criminal Identification and Investigative Services
PO Box 160526
Sacramento, CA 95816
Electronic Mail: erds@doj.ca.gov
FAX: (916) 227-0595

Please note that under the California Public Records Act (GC Section 6250 et seq.), your written and oral comments, attachments, and associated contact information (e.g., your address, phone, email, etc.) become part of the public record and can be released to the public upon request.

AUTHORITY AND REFERENCE

Authority: Sections 27392, 27393, 27394, 27395, 27397.5, Government Code

Reference: Sections 811.2, 12510, 15000, 27390, 27391, 27392, 27393, 27394, 27395, 27396, 27397, 27397.5, Government Code

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

Background and Effect of the Proposed Rulemaking:

A county recorder may, in lieu of a written paper, accept for recording 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. (Gov. Code, § 27390 et seq.) GC Section 27393 directs the DOJ to develop regulations for the review, approval, and oversight of electronic recording delivery systems (ERDS).

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 electronic record that is an instrument to be recorded consistent with specified provisions. (Gov. Code, § 27391, subd. (c)(1)). AB 2143 further requires general liability coverage, in an amount to be set by the Attorney General through rule or regulation in consultation with interested parties. (Gov. Code, § 27391, subd. (c)(2).)

The regulations proposed in this rulemaking action would make specific the amount of general liability coverage required of an authorized submitter and/or agent pursuant to GC Section

27391(c)(2), set in the amount of one million (\$1,000,000) dollars, align references to standards and guidelines with the latest publication dates, clarify the requirements for a county recorder entering into a contract with an authorized submitter, and upgrade ERDS standards-based technologies.

Objectives and Benefits of the Proposed Regulation:

The objective of the proposed rulemaking action is to ensure that secure information transmissions are utilized and ERDS are maintained, thus furthering the intent of the authorizing statute to protect sensitive transmissions and protecting the privacy of the citizens of California.

Comparable Federal Regulations

There are no existing federal regulations or statutes comparable to the proposed regulations.

Determination of Inconsistency and Incompatibility with Existing State Regulations

The DOJ has determined that this proposed regulation is not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the DOJ has concluded that these are the only regulations that concern ERDS.

DOCUMENTS INCORPORATED BY REFERENCE

The following documents will be incorporated in the regulation by reference as specified by section:

1. Federal Information Processing Standard (FIPS) 180-4, Secure Hash Standard, August 2015, Section 999.129, and Section 999.136.
2. National Institute of Standards and Technology (NIST) Special Publication 800-88 Revision 1, Guidelines for Media Sanitization, December 2014, Section 999.129 and Section 999.139.
3. NIST Special Publication 800-63-3, Digital Identity Guidelines, June 2017, Section 999.129 and Section 999.141.
4. NIST Special Publication 800-70 Revision 3, National Checklist Program for IT Products- Guidelines for Checklist Users and Developers, February 2018, Section 999.129, Section 999.138, and Section 999.143.
5. NIST Special Publication 800-52 Revision 1, Guidelines for the Selection, Configuration, and Use of Transport Layer Security (TLS) Implementations, April 2014, Section 999.129 and Section 999.144.
6. FIPS 202, SHA-3 Standard: Permutation-Based Hash and Extendable-Output Functions, August 2015, Section 999.129 and Section 999.136.

7. FIPS 140-2, Security Requirements for Cryptographic Modules, May 2001 (change notice dated, December 2002), Section 999.129 and Section 999.137.
8. Application for Withdrawal, Form # ERDS 0010, May 2011, Section 999.196.
9. Request for Replacement of Certificate and/or Documents, Form # ERDS 0006, May 2011, Section 999.197.

MANDATED BY FEDERAL LAW OR REGULATIONS

The proposed regulations are not mandated by federal law or regulations.

OTHER STATUTORY REQUIREMENTS

None.

DISCLOSURES REGARDING THE PROPOSED REGULATION

The DOJ has made the following initial determinations:

Local Mandate/Fiscal Impact

The DOJ has determined that the proposed regulatory action would not create costs or savings to any State agency or in federal funding to the State, costs or mandates to any local agency or school district, whether or not reimbursable by the State pursuant to GC, Title 2, Division 4, Part 7 (commencing with Section 17500), or other nondiscretionary costs or savings to State or local agencies.

Housing Costs

The DOJ has also made the initial determination that the proposed regulatory action will not have a significant effect on housing costs.

Significant Statewide Adverse Economic Impact Directly Affecting Business, Including Ability to Compete

The DOJ has made an initial determination that the proposed regulatory action would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, or on representative private persons.

STATEMENT OF THE RESULTS OF THE ECONOMIC IMPACT ASSESSMENT (EIA)

Effect on Jobs/Businesses

The DOJ has determined that the proposed regulatory action would not affect the creation or

elimination of jobs within the State of California, or the creation of new business or elimination of existing businesses, or the expansion of businesses currently doing business within the State of California. This determination is based on the fact that this proposed action will not impose any significant cost or other adverse economic impact on entities who voluntarily use ERDS. Furthermore, this proposed action would have no impact on any other businesses or jobs.

Benefits of the Proposed Regulation

By clarifying and making specific aspects of the ERDS requirements and standards, these proposed regulations further the objectives of ensuring the security of the ERDS, which includes protecting the public from fraud, thus protecting the safety, welfare, and privacy of the citizens of California.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The DOJ 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

The proposed regulations will not require the submission of reports from a business.

SMALL BUSINESS

The proposed regulations will have no significant economic impact on small businesses and private persons. The proposed regulations affect only those individuals who voluntarily elect to use an ERDS. The DOJ is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

ALTERNATIVES INFORMATION

Before taking final action on the amendments, the DOJ must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to its attention, would be 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 action, or would be more cost-effective to affected persons and equally effective in implementing the statutory policy or other provision of law.

The DOJ invites interested persons to present statements or arguments, with respect to alternatives, to the proposed regulations during the 45-day written comment period.

CONTACT PERSONS

Inquiries concerning the substance of the proposed regulatory action may be directed to the designated agency contact persons: Mike VanWinkle, Department of Justice Administrator I, Bureau of Criminal Identification and Investigative Services, at (916) 210-3157. The back-up

contact for these inquiries is John Navarrete, Field Representative, Bureau of Criminal Identification and Investigative Services, at (916) 210-4237.

AVAILABILITY OF DOCUMENTS

The DOJ has prepared an Initial Statement of Reasons (ISOR) for the proposed rulemaking action and a listing of the exact regulations proposed.

Copies of the ISOR and the full text of the proposed regulatory language, or other information upon which the rulemaking is based may be obtained from the DOJ contact persons in this notice, or may be accessed through the Attorney General's website below.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

This regulatory proceeding will be conducted in accordance with the California Administrative Procedure Act, GC, Title 2, Division 3, Part 1, Chapter 3.5 (commencing with Section 11340).

After the DOJ analyzes all timely and relevant comments received during the 45-day public comment period, the DOJ will either adopt the regulations as described in this notice, or make modifications based on the comments. If the DOJ makes modifications which are sufficiently related to the original text of the proposed regulations, the amended text, with the changes clearly indicated, will be made available for an additional 15-day public comment period, before the DOJ adopts the regulations. The DOJ will accept written comments on the modifications to the regulations during the 15-day public comment period.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the agency contact persons in this notice, or may be accessed on the Attorney General's website listed below.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

This notice, the ISOR, and all subsequent regulatory documents for this rulemaking are available on the Attorney General's website at <http://oag.ca.gov/meetings/public-participation>.