

CALIFORNIA DEPARTMENT OF JUSTICE

INITIAL STATEMENT OF REASONS
FOR PROPOSED AMENDMENT TO THE
ELECTRONIC RECORDING DELIVERY SYSTEM REGULATIONS

PROBLEM STATEMENT

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.)

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 Attorney General through rule or regulation in consultation with interested parties. (Gov. Code, § 27391, subd. (c)(2).)

The Act requires the Attorney General, in consultation with interested parties, to adopt regulations for the review, approval, and oversight of electronic recording delivery systems (ERDS). The Department of Justice (DOJ) proposes to amend existing regulations addressing the new statutory requirements imposed by AB 2143, and to remove references to Type 1 and Type 2 instruments. Under existing regulations, Type 1 instruments refer to instruments that may only be recorded electronically in digitized form, while Type 2 instruments refer to instruments that may be recorded electronically in both digitized and digital form. AB 2143 makes the distinction between Type 1 and Type 2 instruments unnecessary.

The DOJ is additionally proposing updates to the technology requirements within the regulations to remove overly restrictive or outdated requirements and allow county recorders the ability to upgrade their ERDS to standards-based technologies as needed.

A small number of references to DOJ ERDS forms were unintentionally omitted from a past regulatory action that updated revision dates on forms incorporated by reference in the

regulations. The omitted forms have been incorporated within these proposed regulations. Industry standards incorporated by reference within existing regulations have also been updated.

BENEFITS

The DOJ has determined that the proposed amendments will benefit the general welfare of all California citizens by guaranteeing the maintenance of ERDS and the utilization of secure information transmissions, thus ensuring the integrity and security of the documents being transmitted. Furthermore, the proposed amendments will provide the specificity necessary to align the regulations with requirements mandated by the passage of AB 2143, thus furthering the intent of the statute.

PURPOSE AND NECESSITY

Article 2. Definitions.

Section 999.108: Reference to “these regulations” is being replaced with “this chapter” to remove ambiguity and vagueness.

The term “Approved Escrow Company” is being removed because it will no longer be a term used in the regulations.

The term “Availability” is being added to align with federal standards.

The term “Authorized Access” is being removed as a result of the deletion of references to Type 1 and Type 2 instruments within the regulations.

The term “Authorized Submitter” is being removed to avoid duplication of statute.

The term “Certificate Authority” is being removed because it will no longer be a term used in the regulations.

The term “Certified Vendor of ERDS Software” is replacing and redefining the previous term “Vendor.”

The term “Computer Security Auditor” is being removed to avoid duplication of statute.

The term “Confidentiality” is being added to align with federal standards.

The definition of “Developer” is being revised as part of its separation from the term “Vendor.”

The term “Digital Electronic Record” is being removed to avoid duplication of statute.

The term “Digital Signature” is being removed because it will no longer be a term used in the regulations.

The term “Digitized Electronic Record” is being removed to avoid duplication of statute.

The definition of “ERDA” is being revised to clarify that the Electronic Recording Delivery Act of 2004 refers to current statute.

The definition of “ERDS Server” is being revised to authorize systems to break functions up across multiple servers.

The term “Hardened” is being added because it is a technical term not easily understood by a lay person.

The term “Integrity” is being added to align with federal standards.

The term “Instrument” is being removed due to a wider variety of documents that will be allowed to be electronically recorded. Due to the enactment of AB 2143, county recorders will be electronically recording a wider variety of documents. The removal of the term “Instrument” is necessary to permit the wider variety of documents that will be allowed to be electronically recorded, as it currently limits instruments to two set types. The removal of references to instrument types is also necessary to standardize security requirements for ERDS, rather than to have separate security standards for each document type.

The term “Licensed and Supported Operating System” is being added because it is a technical term not easily understood by a lay person.

The last sentence for the term “Live Scan” is being removed because it is unnecessary and irrelevant.

The term “ORI” is being removed because it not a term currently used in the regulations.

The term “Public Entity” is being revised to align with the term as defined in Government Code (GC) section 811.2.

The term “PKI” is being removed because it will no longer be a term used in the regulations.

The term “RSA” is being removed because it will no longer be a term used in the regulations.

The reference to Type 1 and Type 2 instruments in the definition of “Secure Access” is being removed to reflect the proposed change to focus on one level of security. AB 578 (Chapter 621, Statutes of 2004) restricted document types and necessitated the use of the two instrument types. AB 2143 now permits all document types within the same payload, and thus makes the distinction between Type 1 and Type 2 instruments obsolete. The definition is also being expanded to include Certified Vendor of ERDS Software personnel or a Developer acting in lieu of a Certified Vendor of ERDS Software. It is necessary to expand the definition of “Secure Access” to include Certified Vendor of ERDS Software personnel or a Developer acting in lieu of a Certified Vendor of ERDS Software to align this definition with those secure access roles requiring fingerprinting in Section 999.122.

The term “Security Testing” is being removed to avoid duplication of statute.

The term “SHA” is being removed because it not a term currently used in the regulations.

The term “Source Code” is being removed to avoid duplication of statute.

The term “Single-County” is being added to clarify that it is the alternative to “Multi-County,” a term that is already present in the definitions section of the original text.

The term “TLS” is being removed because it will no longer be a term used in the regulations other than as part of a title of a publication incorporated by reference.

The definition of “Uniform Index Information” is being revised to avoid duplication of Section 999.134 of the regulations.

The term “Vendor” has been redefined into two separate terms “Certified Vendor of ERDS Software” and “Developer.”

The word “or” was added to the definition of “Workstation” because it is a more accurate depiction of how a computer interacts with an ERDS.

Article 4. Fingerprinting and Criminal Record Checks.

Section 999.122: This section is being amended to update language to reflect new and revised key terms and to remove obsolete references to instrument type.

Article 5. Baseline Requirements and Technology Standards.

Section 999.128: This section is being amended to remove definitions and instead refer to industry standard terms. Revised definitions appear in Section 999.108.

The removal of detailed security objectives is necessary to align with established industry standard terms. Alternate definitions for established industry standard terms create discrepancies and confusion.

Section 999.129: This section is being amended to update revision dates of industry standards incorporated by reference and to incorporate additional security standards.

Updating the Federal Information Processing Standards (FIPS) and National Institute of Standards and Technology (NIST) standards references with the most recent revision dates is necessary to ensure that technology is kept secure through the use of updated guidelines. Adding additional security standards is necessary to ensure alignment of ERDS technologies with federal standards.

Section 999.130: This section is being repealed to remove obsolete references to instrument type. The removal of this section is necessary due to legislative changes that have removed limitations on Type 1 documents and eliminated the need for these categories.

Section 999.131: This section is being amended to remove obsolete references to instrument type.

Section 999.132: This section is being amended to remove obsolete references to instrument type and to remove redundant references to “digital electronic records” or “digitized electronic records.”

Section 999.133: This section is being amended to remove obsolete references to instrument type, redundant references to “digital electronic records” or “digitized electronic records,” and overly restrictive design language from existing regulations. Removing the restrictive design language is necessary to ensure that the use of emerging technologies in the future is not limited.

Removing language requiring that submitted ERDS payloads be retrievable by a County Recorder is essential to eliminate inconsequential regulations, as this is unnecessary to specify.

Section 999.134: This section is being amended to remove redundant references to “digital electronic records” or “digitized electronic records.”

Section 999.135: This section is repealed to remove language duplicative of statute. The existing regulation mirrors Government Code section 27391.

Section 999.136: This section is being amended to remove obsolete references to instrument type, remove redundant references to “digital electronic records” or “digitized electronic records,” and to align security requirements with federal standards.

Specifying examples of malware “such as” viruses, worms, Trojan Horses, spyware, “or” adware is necessary to ensure that malware is not limited to these items and that this list may include other items that may come into existence at a later date.

Replacing obsolete standards with references to current federal standards is necessary to ensure the security of ERDS. Hashing is the best known method for maintaining data integrity, and aligning the hashing requirements with FIPS publications ensures uniformity with federal standards.

The addition of malware and executable software to the existing list of external sources prohibited from being contained in submitted documents is necessary to distinguish delineated items as being either malware or executable software.

Section 999.137: This section is being amended to remove obsolete references to instrument type and to replace obsolete standards language with references to current industry standards.

The replacement of obsolete standards with current industry standards is necessary to ensure the security of ERDS. To address this need, this section is being retitled, the language is being updated to address the encryption requirements, and authentication requirements are being moved to Section 999.141.

Section 999.138: This section is being amended to remove obsolete references to instrument type, to update security standards for computer workstations, and to broaden options for compliance with the workstation security requirements.

Updating the security requirements for computer workstations with NIST standards and broadening options for compliance by incorporating multiple industry and federal checklists is necessary to ensure that technology is kept secure and in alignment with federal and industry standards. Incorporating several checklists provides a County Recorder with the flexibility to choose between multiple industry and federal standards in achieving compliance.

Section 999.139: This section is being amended to remove obsolete references to instrument type and to update revision dates of industry standards incorporated by reference. Updating the NIST standards reference with the most recent revision date is necessary to ensure that technology is kept secure through the use of updated guidelines.

Section 999.140: This section is being amended to remove obsolete references to instrument type, clarify ERDS accounts shall be assigned on an individual basis, and remove restrictive language in order to permit a county recorder to use discretion in determining how to implement current authentication standards.

Clarifying that ERDS accounts shall be assigned on an individual basis is necessary to ensure that accounts are only assigned to individuals, which alleviates misinterpretation of the uniquely identified user language and maintains the security requirements of ERDS.

Section 999.141: This section is being amended to remove obsolete references to instrument type, to update revision dates of industry standards incorporated by reference, and to replace restrictive authentication security standards language with a reference to current industry standards.

Replacing limiting, restrictive standards language with a single reference to federal standards is necessary to authorize the use of discretion to choose from various technologies listed within the current authentication security industry standards. This ensures alignment with federal standards, while reducing the frequency with which the regulations must be updated due to technological advances.

Section 999.142: This section is being amended to remove obsolete references to instrument type, to remove redundant references to “digital electronic records” or “digitized electronic records,” to set a timeframe for the disabling of a user's ERDS account and credentials after a status change, to remove redundant language prohibiting shared user accounts, and to clarify who is subject to fingerprint and financial responsibility requirements.

Removing language prohibiting shared user accounts in Section 999.142 (a)(3) eliminated a redundancy with (a)(2), which specifies that a unique user account and credentials shall be issued to each person.

Setting a 30-day timeframe for the disabling of a user's ERDS account and credentials after a status change is necessary to ensure that accounts are disabled within a reasonable timeframe according to industry best practices.

Specifying that an Authorized Submitter without access to ERDS is not subject to the fingerprint requirement but is subject to general liability coverage requirements is necessary because such a Submitter does not have a logon and user account in the ERDS.

Section 999.143: This section is being amended to remove obsolete references to instrument type, to update revision dates of industry standards incorporated by reference, to broaden the scope of authorized security technologies, to specify industry standard best practices for alerting, using anti-malware software, input validation, and supported software.

Updating the security requirements for ERDS servers with NIST standards and broadening options for compliance by incorporating multiple industry and federal checklists is necessary to ensure that technology is kept secure and in alignment with federal and industry standards. Incorporating several checklists permits flexibility to choose between multiple industry and federal standards in achieving compliance.

Incorporating additional requirements to this section is necessary to ensure the protection of the ERDS from malware, unauthorized file changes, and malicious inputs, and to ensure that it is running up-to-date patched and supported hardware.

Section 999.144: This section is being amended to remove obsolete references to instrument type and to create less restrictive network security requirements. Removing the mandates on the use of specific technologies and instead replacing them with broader federal standards for network security is necessary to enable the use of new technologies as advancements are made.

Section 999.145: This section is being amended to remove obsolete references to instrument type, and to remove the requirement that an inventory for all keys used for physical access to an ERDS server be completed every 90 calendar days and instead specify that a process for security of physical access be determined by the County Recorder.

The second sentence was reworded in subdivision (c)(2) for clarity .

Section 999.146: This section is being amended to remove obsolete references to instrument type, to remove language specifying a timeout limit, in order to authorize a County Recorder to select criteria for setting the timeout, and to remove unclear language specifying that a unique name out of sequence be an auditable event.

The removal of the timeout limit is necessary due to it being too restrictive. Its removal allows County Recorders to define the timeframe that is reasonable for their systems.

The removal of unclear language specifying that a unique name out of sequence be an auditable event is necessary because it restricts design and is not an adequate security control.

Section 999.147: This section is being amended to remove the language referencing the “safety” of ERDS, where “security” of ERDS is more applicable, and to incorporate the updated definition of Vendor.

Section 999.148: This section is being amended to remove overly restrictive escrow requirements to specify that the escrow facility and company selection be at the discretion of the County Recorder. Removal of the requirement that an escrow company be selected from the current Secretary of State’s list is necessary to align the regulations with the Act, which permits escrow company selection to be at the discretion of the County Recorder.

Section 999.149: This section is being amended to remove obsolete references to instrument type.

Section 999.150: This section is being amended to include Developer with the Certified Vendor of ERDS Software, in order to include County Recorder in-house developed software, and to remove overly restrictive escrow requirements.

Section 999.153: This section is being repealed to remove language referencing access to materials in order to reduce the burden of maintaining escrow agreements that required the Computer Security Auditor to be incorporated. This requirement is unnecessary because the Computer Security Auditor can request access to the source code from the ERDS.

Section 999.154: This section is being amended to incorporate the updated definition of Vendor.

Article 6. Electronic Recording Delivery System Certification.

Section 999.165: This section is being amended to mandate Authorized Submitters and/or agents to provide a certificate of insurance evidencing an amount of general liability coverage, to remove obsolete references to instrument type and to remove redundant references to “digital electronic records” or “digitized electronic records,” to remove language duplicative of Section 999.176 requiring the submission of the Change of ERDS Role form # ERDS 0008 (May 2011), and to incorporate the updated definition of Vendor.

The changes in this section are necessary to set the amount of general liability coverage at the industry standard of \$1,000,000.

Section 999.166: This section is being amended to remove language requiring that a County Recorder must contact the ERDS Program for an ERDS Certification application, which is available online, to remove language duplicative of Section 999.108 specifying that a Sub-County is a County Recorder, to incorporate the updated definition of Vendor, to remove obsolete references to instrument type, and to remove redundant references to “digital electronic records” or “digitized electronic records.”

Section 999.167: This section is being amended to remove obsolete references to instrument type.

Section 999.168: This section is being amended to authorize the County Recorder to immediately secure any possible vulnerabilities within the system without obtaining prior approvals, to remove duplicative language requiring that a brief description of a change of the functionality be included on the Request for Approval of Substantive Modification(s) form # ERDS 0013 (May 2011), and to incorporate the updated definition of Vendor.

Language from subdivision (b)(3) is deleted because it is duplicative and already stated in the process for initial certification.

Removal of the language requiring receipt of a successful modified system audit prior to placing substantive modifications in the production environment is necessary to cover all scenarios where it would be beneficial for the County Recorder to implement the substantive modification prior to completing the modified system audit. This authorizes the County Recorder to immediately secure any possible vulnerabilities within the system without obtaining prior approvals.

The language in subdivision (b)(3) is being removed because it reiterates what was already provided during the initial certification phase. The removal is necessary to prevent confusion. For a substantive modification, it is only necessary to provide a copy of the Certified Vendor of ERDS Software contract to determine exactly what substantive modifications were made, not a restatement of which parties were used to develop the ERDS.

Section 999.176: This section is being amended to clarify the addition or deletion process for individuals assigned to an ERDS role that requires fingerprinting, and to incorporate the updated definition of Vendor.

To clarify the addition or deletion process for individuals assigned to an ERDS role that requires fingerprinting, it is necessary to remove the list of categories of entities to which these requirements may apply because this is implicit in the list of who has Secure Access.

Section 999.178: This section is being amended to remove an obsolete reference to “authorized access.”

Article 7. Computer Security Auditor.

Section 999.190: This section is being amended to remove duplicative language requiring that a Computer Security Auditor must contact the ERDS Program for a Computer Security Auditor Approval application, which is available online, and to incorporate the updated definition of Vendor.

Section 999.195: This section is being amended to clarify the process for the renewal of an approval issued to a Computer Security Auditor, and to incorporate the updated definition of Vendor.

Section 999.196 and 999.197: This section is being amended to update revision dates of DOJ ERDS forms. These updated forms were unintentionally omitted during previous rulemaking activities.

Article 9. Audits and Oversight.

Section 999.217: This section is being amended to remove obsolete references to instrument type, to allow the County Recorder the ability to implement emergency changes to the ERDS, and to remove incorrect references to the “safety” of ERDS.

The removal of subdivision (f) is necessary to allow a County Recorder the ability to implement emergency changes to the ERDS to correct recently discovered software vulnerabilities that could affect the security and availability of the ERDS.

Section 999.218: This section is being amended to remove obsolete references to “authorized access.”

Section 999.219: This section is being amended to mandate that an Authorized Submitter and/or agent provide a certificate of insurance evidencing an amount of general liability coverage and to align the log requirements with those outlined in Section 999.146(a).

During a local inspection, verifying that either an auditable log is being maintained for two years or a computer security audit has taken place within the last two years is necessary to maintain consistency within the regulations, specifically the requirements outlined in Section 999.146(a).

Section 999.220: This section is being amended to remove the outdated requirement that a specified Fax Transmission Cover Sheet be utilized to notify the ERDS Program of a reportable incident and to remove similarly outdated language requiring a fax notification, and to instead authorize notification to be made through U.S. Mail or electronic mail.

Section 999.221: This section is being amended to remove the language referencing the “safety” of ERDS, where “security” of ERDS is more applicable.

Section 999.223: This section is being amended to remove the language referencing the “safety” of ERDS, where “security” of ERDS is more applicable and to correct a spelling error.

DOCUMENTS RELIED UPON

The DOJ did not identify any technical, theoretical or empirical study, report, or similar document in the preparation of these regulations. On April 6, 2017, the Electronic Recording Delivery System Advisory Committee held a public meeting at which interested persons were invited to participate in discussions about the regulations and the appropriate minimum amount

of general liability coverage applicable to ERDS participants. During the regulation drafting process, the committee received input from various county recorders, real estate professionals, and delivery system providers and determined that the industry standard of one million dollars for general liability coverage, which many county recorders already require, was an appropriate minimum amount.

ECONOMIC IMPACT ASSESSMENT

Creation/Elimination of California Jobs:

The DOJ has determined that the amendments will not create or eliminate jobs in California. The amendments affect only those county recorders that elect to utilize ERDS.

Creation/Elimination/Expansion of California Businesses:

The DOJ has determined that the amendments are not expected to create, eliminate, or expand business within the State of California. The amendments are being proposed to address the requirements of AB 2143 and to update the technology standards.

Benefits to the Public:

The DOJ has determined that the regulations will facilitate the protection of public security. The proposed changes will ensure that technological standards are maintained and reflect the most updated guidelines, and that all entities possess minimum liability insurance in an amount determined adequate to protect against liability and cover potential losses.

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

The DOJ did not consider any alternatives to the proposed regulations. The DOJ and the ERDS Advisory Committee have determined there are no alternatives to lessen any adverse economic impact on small businesses or that would be as effective and less burdensome to private persons other than the proposed regulations. In consultation with the ERDS Advisory Committee, the DOJ made the determination that the general liability coverage required by AB 2143 should be set at the industry standard of one million dollars.

The DOJ has determined this regulatory action will not impose any sufficient costs or other adverse economic impact on county recorders due to the program being voluntary.

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

The proposed regulatory action will not have a significant adverse economic impact on businesses because 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 a business, thus there would be no adverse economic impact directly affecting business.

SPECIFIC TECHNOLOGY OR EQUIPMENT MANDATES

The DOJ did not conduct any studies or compile any reports for specific technologies; however, the technology is based on the specified editions of the NIST/FIPS publications that have been incorporated by reference into the proposed text of the regulations.

MANDATED BY FEDERAL LAW OR REGULATIONS

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