

CALIFORNIA DEPARTMENT OF JUSTICE
TITLE 11. LAW
DIVISION 1. ATTORNEY GENERAL
CHAPTER 18. ELECTRONIC RECORDING DELIVERY SYSTEM

NOTICE OF PROPOSED RULEMAKING

Notice published September 11, 2020

The Department of Justice (Department) proposes to amend section 999.138 of Title 11, Division 1, Chapter 18, Article 5 of the California Code of Regulations to administer the requirements of the Electronic Recording Delivery Act set forth in Government Code section 27390, et seq.

PUBLIC HEARING

The Department has not scheduled a public hearing on this proposed regulatory action. However, the Department will hold a virtual public hearing if it receives a written request for a public hearing from any interested person, or their authorized representative, no later than 15 days before the close of the written comment period.

WRITTEN COMMENTS PERIOD

Any interested person or their authorized representative may submit written comments relevant to the proposed regulatory action. The written comment period closes on October 26, 2020 at 11:59 p.m. Only written comments received by that time will be considered. Submit written comments to:

Department of Justice
Justice Data and Investigative Services Bureau
Attn: Mike VanWinkle
P.O. Box 160968
Sacramento, CA 95816-0968
erds@doj.ca.gov

NOTE: Written and oral comments, attachments, and associated contact information (e.g., address, phone, email, etc.) become part of the public record and can be released to the public upon request.

AUTHORITY AND REFERENCE

Authority: Government Code section 27393.

Reference: Government Code sections 27393 (b)(2) and 27397.5.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations:

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.) The Act requires the AG, in consultation with interested parties, to adopt regulations for ERDS review, approval, and oversight.

Effect of the Proposed Rulemaking:

The regulation proposed in this rulemaking action would address questions that have arisen regarding changes that took effect on January 1, 2020. The proposed rulemaking would revert some of the language governing security requirements for computer workstations back to what had been in place for several years prior to the most recent rulemaking action. While the program strives to maintain a high-level of information technology (IT) security for documents transmitted via ERDS, it has been determined that the pre-existing language and requirements were sufficient. The proposed language allows County Recorders to ensure that all ERDS workstations meet and maintain current IT security standards that preserve the confidentiality of the transmitted documents in the most cost-effective way.

Anticipated Benefits of the Proposed Regulations:

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.

Comparable Federal Regulations:

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

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Department has determined that this proposed regulation is not inconsistent or incompatible with existing state regulations. After conducting a review for any regulations that would relate to or affect this area, the Department has concluded that this is the only regulation that concerns ERDS security requirements.

Forms Incorporated by Reference:

None.

Materials Relied Upon:

None.

Other Statutory Requirements:

The Electronic Recording Delivery Act authorizes the Department to adopt regulations in consultation with interested parties. (Gov. Code, § 27393.) On May 12, 2020, the Electronic Recording Delivery System 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.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Department’s Initial Determinations:

Mandate on local agencies or school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other non-discretionary costs or savings imposed on local agencies: The proposal will result in additional savings of approximately \$215,000 in the current State Fiscal Year and each State Fiscal Year thereafter by reducing the workload of vendors hired by County Recorders to implement electronic recording.

Cost or savings in federal funding to state: None.

Cost impacts on representative person or business: The proposed action would allow County Recorders to maintain secure workstations without incurring costs to meet overly restrictive requirements.

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

Significant effect on housing costs: None.

Significant, statewide adverse economic impact directly affecting businesses, including ability to compete: The Department has made an initial determination that the proposed action will 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, because the proposed changes only affects 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.

Results of the Economic Impact Assessment (EIA):

The Department concludes that it is (1) unlikely that the proposal will create or eliminate jobs within the state, (2) unlikely that the proposal will create new businesses or eliminate existing businesses within the state, (3) unlikely that the proposal will result in the expansion of businesses currently doing business within the state.

Benefits of the proposed action: By resolving concerns about ERDS requirements and standards, this proposed regulation furthers objectives to ensure ERDS security, which includes protecting the public from fraud, thus securing Californians' safety, welfare, and privacy.

Business report requirement: None.

Small business determination: The Department has determined that the proposed action does not affect small businesses because the proposed regulation affects only those individuals who voluntarily elect to use an ERDS.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department 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 private persons and equally effective in implementing the statutory policy or other provision of law.

The Department has determined that the proposed regulation is the most effective way to ensure that secure transmissions are utilized and ERDS are maintained with clear standards.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Department of Justice
Justice Data and Investigative Services Bureau
Attn: Mike VanWinkle
P.O. Box 160968
Sacramento, CA 95816-0968
(916) 210-3157
erds@doj.ca.gov

Questions regarding procedure, comments, or the substance of the proposed action should be addressed to the above contact person. In the event the contact person is unavailable, inquiries regarding the proposed action may be directed to the following backup contact person:

Department of Justice
Justice Data and Investigative Services Bureau
Attn: John Navarrete
P.O. Box 160968
Sacramento, CA 95816-0968
(916) 210-4237
erds@doj.ca.gov

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Department will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this Notice of Proposed Rulemaking (Notice) is published in the Notice Register, the rulemaking file consists of this Notice, the Text of Proposed Regulations (the “express terms” of the regulations), the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based. The text of this Notice, the express terms, the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based are available on the Department’s website at <https://oag.ca.gov/jdis/regs#erds>. Please refer to the contact information listed above to obtain copies of these documents.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the Department analyzes all timely and relevant comments received during the 45-day public comment period, the Department will either adopt the regulations substantially as described in this notice or make modifications based on the comments. If the Department 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 Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of the name and address indicated above. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, a copy of the Final Statement of Reasons will be available on the Department’s website at <https://oag.ca.gov/jdis/regs#erds>. Please refer to the contact information listed above to obtain a written copy of the Final Statement of Reasons.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of this Notice, the express terms, the Initial Statement of Reasons, and any information upon which the proposed rulemaking is based are available on the Department's website at <https://oag.ca.gov/jdis/regs#erds>.