

Date of Hearing: April 6, 2016

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Susan Talamantes Eggman, Chair

AB 2143 (Irwin) – As Introduced February 17, 2016

SUBJECT: County recorder: electronic recording.

SUMMARY: Allows additional persons and entities to deliver electronic records to county recorders for recording and expands the types of electronic records that may be delivered to a county recorder for recording. Specifically, **this bill:**

- 1) Deletes current law that limits the types of documents that can be submitted electronically for recording, pursuant to a contract between a county recorder and a title insurer, underwritten title company, institutional lender, or an entity of local, state or federal government, to the following: a digitized electronic record that is an instrument affecting a right, title, or interest in real property.
- 2) Allows any digital or digitized electronic record that is required to be recorded by a county recorder, as specified, to be submitted electronically for recording, pursuant to a contract between a county recorder and a title insurer, underwritten title company, institutional lender, or an entity of local, state or federal government.
- 3) Allows a county recorder to enter into a contract with an authorized submitter not authorized pursuant to 2), above, for the delivery for recording, and return to the party requesting recording, of a digital or digitized electronic record that is required to be recorded by a county recorder.
- 4) Allows a contract between a county recorder and an authorized submitter described in 3), above, to provide for the delivery of documents by an agent, and prohibits an agent from being a vendor of electronic recording delivery systems.
- 5) Requires an authorized submitter described in 3), above, and any agent submitting documents on behalf of an authorized submitter to provide proof of financial responsibility by providing a certificate of insurance evidencing an amount of general liability coverage of at least \$1 million.
- 6) Requires the Attorney General (AG) to adopt regulations governing the requirements for general liability coverage required by 5), above.
- 7) Amends provisions that allow a county recorder to include in the county's electronic recording delivery system (ERDS) a secure method for accepting for recording a digital or digitized electronic record that is an instrument of reconveyance, substitution of trustee, or assignment of deed of trust from specified submitters who can forgo a security audit and a criminal records check if the county recorder and the AG certify certain security measures for these submissions.

EXISTING LAW:

- 1) Authorizes, pursuant to the Electronic Recording Delivery Act of 2004 (ERDA), a county recorder to establish an ERDS upon approval by the county board of supervisors (Board) and certification by the AG.
- 2) Allows county recorders to contract with the following entities to accept the following types of documents through their ERDS:
 - a) Title insurers, underwritten title companies, institutional lenders, or any entity of local, state or federal government may submit a digitized electronic record that is an instrument affecting a right, title, or interest in real property. These submitters must complete security clearance measures, including a computer security audit and a criminal records check; and,
 - b) Title insurers, underwritten title companies, institutional lenders, or any entity of local, state or federal government may submit a digital or digitized electronic record that is an instrument of reconveyance, a substitution of trustee, or an assignment of deed of trust. These submitters can forgo the computer security audit and criminal records check if the county recorder and the AG certify that the method of submission will not permit a submitter or its employees and agents, or any third party, to modify, manipulate, insert, or delete information in the public record, maintained by the county recorder, or information in electronic records submitted pursuant to a), above.
- 3) Allows a county recorder to refuse to enter into a contract with any party or to terminate or suspend access to a system for any good faith reason including, but not limited to, a determination by the county recorder that termination or suspension is necessary to protect the public interest, to protect the integrity of public records, or to protect homeowners from financial harm, or if the volume or quality of instruments submitted by the requester is not sufficient to warrant electronic recordation.
- 4) Allows a county recorder to also terminate or suspend access to a system if a party commits a substantive breach of the contract, the requirements of ERDA, or the regulations adopted by the AG pursuant to ERDA.
- 5) Prohibits any ERDS from becoming operational without system certification by the AG and outlines the requirements for certification including, but not limited to, security testing and operating procedures to ensure security and lawful use of the county ERDS. The AG may withdraw certification for good cause.
- 6) Requires the AG, in consultation with interested parties, to adopt regulations for the review, approval, and oversight of ERDS. These regulations include such items as: technological specifications; requirements for security, capacity, reliability, and uniformity; requirements as to the nature and frequency of computer security audits; procedures for the initial certification of vendors offering software and other services to counties for ERDS; requirements for system certification and oversight; requirements for fingerprinting and criminal record checks on those who have access to the ERDS; and, other items.

- 7) Requires an ERDS to be subject to local inspection and review by the AG, as specified, and requires specified computer security audits, reports, and monitoring of a county's ERDS.
- 8) Requires that if a county recorder, a computer security auditor, the county's district attorney (DA), or the AG reasonably believes that an ERDS is vulnerable to fraud or intrusion, the county recorder, the county board, the DA, and the AG must be notified immediately.
- 9) Requires a county recorder to immediately take the necessary steps to guard against any compromise of the ERDS, including, if necessary, the suspension of an authorized submitter or of the ERDS.
- 10) Prohibits a person from being a computer security auditor or from being granted secure access to an ERDS if he or she has been convicted of a felony, has been convicted of a misdemeanor related to theft, fraud, or a crime of moral turpitude, or if he or she has a pending criminal charge for any of these crimes.
- 11) Requires any person who has secure access to an ERDS to undergo state and federal criminal background checks.
- 12) Authorizes the AG to request subsequent arrest notification service for all computer security auditors and individuals with secure access to the ERDS.
- 13) Requires the AG to monitor the security of ERDS statewide, in close cooperation with county recorders and public prosecutors.
- 14) Authorizes the AG to suspend any system in the event of an emergency involving multiple fraudulent transactions linked to one county's system, and to bring a court action seeking injunctive relief, restitution, rescission, or other equitable relief.
- 15) Requires the AG to conduct an evaluation of ERDS and report to the Legislature by June 30, 2009.
- 16) Defines a "digital electronic record" as a record containing information that is created, generated, sent, communicated, received, or stored by purely electronic means, but not created in paper form.
- 17) Defines a "digitized electronic record" as a scanned image of the original paper document.
- 18) Defines an "authorized submitter" as a person who has entered into a contract with a county recorder pursuant to 2) a), above, and is not disqualified pursuant to ERDA's security clearance requirements, as specified.

FISCAL EFFECT: This bill is keyed fiscal.

COMMENTS:

- 1) **Bill Summary.** This bill expands the ERDA to allow a greater number of people and institutions to submit electronic records to county recorders under the provisions of the ERDA. It deletes provisions that allow only title insurers, underwritten title companies,

institutional lenders, or any entity of local, state or federal government to submit electronic documents and allows any person or entity that provides a certificate of insurance evidencing an amount of general liability coverage of at least \$1 million to submit electronic records. The bill also expands the types of records that can be submitted, to include digital records. (A digital record is a record that was not created in paper form, but contains information that is created, generated, sent, communicated, received, or stored by purely electronic means.) ERDA is currently limited to digitized records (a scanned image of the original paper document), except in very limited instances. This bill is sponsored by the County Recorders Association of California.

- 2) **Author's Statement.** According to the author, "Current law allows specified title organizations and financial institutions to electronically record certain legal documents with county recorders provided that they register with the Department of Justice and meet minimum liability requirements. AB 2143 will expand electronic recording to all entities that register with the Department of Justice and hold minimum liability insurance. Since 2004, electronic recording has proven to be safe, efficient, and cost effective for both private enterprise and government entities. It's time to expand this to all entities and bring California into the 21st century."
- 3) **Background.** County recorders are responsible generally for examining and recording all documents that deal with establishing ownership of land in counties. This includes the recording of title documents, notes, and home loan payoffs by homeowners, title companies, mortgage companies and government agencies involved in real estate transactions. The recording process traditionally has involved the transmission of original paper documents.

AB 578 (Leno), Chapter 621, Statutes of 2004, established ERDA and created a statewide system for county recorders to record electronic records of real property instruments. AB 578 required the AG to adopt regulations for certification and oversight of ERDS and associated software and other services. AB 578 followed several years of legislative action regarding electronic recording.

Pursuant to the requirements of AB 1906 (Brewer), Chapter 463, Statutes of 1998, the AG's Task Force on Electronic Recordation (Task Force) presented its recommendations in July 1999. The Task Force found that by transmitting digital images of documents over telecommunication lines, rather than delivering them in person to county offices, business representatives could save local agencies and themselves time and money. However, the Task Force warned, "the use of these new technologies, while providing opportunities for substantial improvement of service," also exposes the most sensitive of public records to the possibility of "corruption, damage, or destruction." In addition, pilot projects in Orange and San Bernardino counties were approved by the Legislature in 1996 and 1998.

In order to establish an ERDS, a county recorder must be authorized by resolution of the county board and must obtain system certification from the ERDS Program, which is administered by the AG. A county's ERDS must meet specified security standards and all persons with a secure access role are required to undergo fingerprint criminal history checks (with one exception, which will be discussed below).

Among its many provisions, ERDA required the AG to conduct an evaluation of ERDS and report to the Legislature by June 30, 2009. Due to the lengthy regulatory process, the report was completed before any ERDS were certified. The report focused largely on the activities of the AG in complying with the requirements of ERDA as they pertained to the development of regulations and program procedures. However, the report also included information from the experiences of Orange County and San Bernardino County. Both counties reported significant cost savings and potential improvements in security and real estate fraud prevention due to the security protections built into their electronic recording systems.

Both the AG and the County Recorders Association of California, sponsor of this measure, attest that there have been no instances of fraud connected with the use of ERDS since it became operational. To date, the AG has certified ERDS for 24 counties.

The County Recorders Association of California are seeking to allow a number of high-volume submitters, such as attorneys and companies that submit numerous real estate documents in paper form today, to electronically submit records to recorders. They state that the bill is not intended to allow individuals to submit single documents electronically. The safeguards in existing law, as well as the liability insurance requirement in this bill, appear to be sufficient provisions to achieve this intent.

- 4) **Suggested Amendments.** The Committee may wish to consider the following amendments:
 - a) **Clarify Intent by Striking Section 3.** Section 3 of the bill amends a code section that allows certain submitters who are submitting only an instrument of reconveyance, substitution of trustee, or assignment of deed of trust to avoid a security audit and a criminal records check if the county recorder and the AG certify certain security measures for these submissions. This code section was put into place because both the submitters and the documents being submitted were considered to be very low-risk for fraud. The amendments to this code section appear to have been a drafting error, and do not reflect the intent of the bill. The Committee may wish to strike Section 3 of the bill.
 - b) **Sunset Date.** This bill represents a substantial increase in the types of documents that can be submitted electronically for recording, as well as the people and entities that may do so. The 2009 report from the AG was not able to adequately evaluate the program or propose any suggestions for legislation (which was intended to include recommendations for expanding ERDA). The Committee may wish to add a sunset date of January 1, 2027, to this bill in order to guarantee legislative review of the bill's expanded authorizations.
 - c) **Technical Amendment.** ERDA contains a definition of "authorized submitter" that does not encompass the additional submitters that this bill would authorize. The Committee may wish to make technical amendments to ensure an accurate cross-reference.
- 5) **Previous Legislation.** AB 1738 (Committee on Local Government), Chapter 520, Statutes of 2005, required a federal background check to be conducted before any person could be authorized secure access to an ERDS.

AB 578 (Leno), Chapter 621, Statutes of 2004, established ERDA and created a statewide system for county recorders to record electronic records of real property instruments.

AB 1906 (Brewer), Chapter 463, Statutes of 1998, extended the pilot program allowing Orange County and San Bernardino County to accept digitized property records from title companies, and required the AG to appoint a task force to address technical, legal, security, and economic issues associated with electronic recordation.

AB 3296 (Brewer), Chapter 842, Statutes of 1996, allowed Orange County and San Bernardino County to accept digitized property records from title companies under specified conditions, until January 1, 1999.

6) **Arguments in Support.** The County Recorders Association of California, sponsor of this bill, writes, "The 2004 Electronic Recording Delivery Act (ERDA) authorized specified entities to electronically record documents. Millions of documents have been recorded by means of an electronic recording delivery system since the enactment of ERDA. In California there are no known instances of fraud perpetrated by use of electronic recording delivery systems. County Recorders and authorized submitters have experienced positive results from the ERDA...The process of recording digital and digitized documents...is expedited and more efficient compared to paper documents."

7) **Arguments in Opposition.** None on file.

REGISTERED SUPPORT / OPPOSITION:

Support

County Recorders Association of California [SPONSOR]
California Association of Realtors
California State Association of Counties

Opposition

None on file

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