

**COMMISSION ON STATE MANDATES**

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March 14, 2014

Ms. Renee Bischof  
Elections Division Manager  
County of Santa Barbara  
4440 Calle Real - A  
Santa Barbara, CA 93110

*And Parties, Interested Parties, and Interested Persons (See Mailing List)*

Re: **Final Staff Analysis and Proposed Statement of Decision**  
*Post Election Manual Tally (PEMT), 10-TC-08*  
Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122,  
20123, 20124, 20125, 20126 and 20127; Register 2008, No.43  
County of Santa Barbara, Claimant

Dear Ms. Bischof:

The final staff analysis and proposed statement of decision for the above-named matter is enclosed for your review.

**Hearing**

This matter is set for hearing on **Friday, March 28, 2014**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

**Special Accommodations**

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Heidi Palchik at (916) 323-3562 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Halsey".

Heather Halsey  
Executive Director

**ITEM 5**  
**TEST CLAIM**  
**FINAL STAFF ANALYSIS**  
**AND**  
**PROPOSED STATEMENT OF DECISION**

Former California Code of Regulations, Title 2, Sections 20120, 20121,  
20122, 20123, 20124, 20125, 20126 and 20127<sup>1</sup>

Register 2008, No. 43

*Post Election Manual Tally (PEMT)*

10-TC-08

County of Santa Barbara, Claimant

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**EXECUTIVE SUMMARY**

Attached is the proposed statement of decision for this matter. This executive summary and proposed statement of decision also function as the final staff analysis, as required by section 1183.07 of the Commission on State Mandates' (Commission) regulations.

**Overview**

The test claim seeks reimbursement for regulations requiring new standards and procedures to conduct post election manual tallies (PEMT) of votes for those races with very narrow margins of victory during elections conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The emergency regulations were effective from October 20, 2008 until April 12, 2009, coinciding with the November 2008 Presidential General Election. The claimant, County of Santa Barbara, requests reimbursement to comply with the regulations from November 10, 2008 through November 28, 2008, only in the amount of \$250,126.00. The claimant estimates statewide costs in the amount of \$817,479.00.

**Procedural History**

On November 2, 2009, the California State Association of Counties (CSAC) notified Commission staff of its intent to develop a legislatively determined mandate (LDM) for the test claim regulations. On November 12, 2009, Commission staff notified CSAC and the Department of Finance (Finance) that the statute of limitations for filing a test claim would be tolled pursuant to Government Code section 17573(b).

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<sup>1</sup> The regulations were adopted as emergency regulations by Register 2008, No. 43, operative October 20, 2008. They were readopted and renumbered operative April 13, 2009 by another register (Register 2009, No. 16), which has not been pled in this test claim. Thus, the Commission's jurisdiction is limited to the regulations adopted by Register 2008, No. 43, effective from October 20, 2008 to April 12, 2009.

On March 28, 2011, the County of Santa Barbara filed the test claim with the Commission. On May 11, 2011, Finance requested an extension of time to comment on test claim. On June 13, 2011, Finance submitted comments on the test claim. On July 12, 2011, the claimant submitted rebuttal comments.

On November 5, 2013, a notice of dismissal of test claim was issued on the ground that the notice to develop an LDM was filed more than 12 months after the regulations became effective and, thus, after the statute of limitations expired. On November 6, 2013, the notice of dismissal was rescinded on the assertion that the notice to develop an LDM was filed before the expiration of the statute of limitations, when calculated based on the date the claimant first incurred costs, rather than 12 months after the effective date of the regulations. Notice was also provided that the test claim was set for hearing on January 24, 2014.

On November 18, 2013, a draft staff analysis and proposed statement of decision was issued for comment. On December 2, 2013, claimant requested an extension of time to file comments and postponement of the hearing. Commission staff approved this request on December 3, 2013, and rescheduled the hearing for March 28, 2014. CSAC submitted comments on the draft staff analysis on December 12, 2013, and filed a declaration that its comments were filed under penalty of perjury on January 16, 2014. On January 17, 2014, claimant submitted comments on the draft staff analysis.

### Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.<sup>2</sup>

### Claims

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Subject	Description	Staff Recommendation
California Code of Regulations, title 2, sections 20120 and 20127, as adopted by	Section 20120 states that the purpose of the regulations is to “establish standards and procedures for conducting	<b>Deny.</b> Sections 20120 and 20127, in themselves, do not impose any mandated requirements on counties, but

<sup>2</sup> *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802.

<p>Register 2008, No. 43 (eff. Oct. 20, 2008)</p>	<p>increased manual tallies in contests in which the margin of victory is very narrow.” It also states that the regulations apply to “all elections in this state conducted in whole or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory.” Section 20127 requires elections officials to complete all tasks and make all reports required by the regulations within the canvass period established by Elections Code sections 10262 and 15372.</p>	<p>define the scope of the program.</p>
<p>California Code of Regulations, title 2, section 20121, as adopted by Register 2008, No. 43. (eff. Oct. 20, 2008)</p>	<p>This section requires county elections officials, for elections conducted in whole or in part on a voting system, to determine the margin of victory for single winner elections, multi-winner elections, and ballot measure contests in each contest based upon the semifinal official canvass results. For any contest in which the margin of victory is less than 0.5%, the elections officials is required to conduct a manual tally of 10% of randomly selected precincts in public view.</p>	<p><b><i>Partially Approve.</i></b> At the time the regulation became effective, counties were required by federal law (Help America Vote Act, HAVA) to have at least one voting system at each polling place during federal elections, including the November 2008 Presidential General Election, in order to “be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” Thus, counties are mandated to comply with the new requirements imposed by test claim regulation.</p> <p>Under pre-existing law, Elections Code section 15360 requires counties using voting systems to manually tally 1% of the precincts regardless of the margin of victory for any given race. Since the existing 1%</p>

		<p>manual tally, which is always performed if a voting system is used, can be included within the 10% manual tally required by section 20121(b) of the test claim regulations, the new requirement imposed by the regulation is to conduct a manual tally of 9% of the precincts when the margin of victory is narrow. In addition, section 20121(b) requires that the manual tally be conducted “employing the methods set forth in Elections Code section 15360 . . . .” Elections Code section 15360(c) requires the elections official to use the random number generator when selecting 9% of the precincts to manually tally the results for any contest with a narrow margin of victory.</p>
<p>California Code of Regulations, title 2, section 20122, as adopted by Register 2008, No. 43. (eff. Oct. 20, 2008)</p>	<p>This section directs the county to determine whether a 10% manual tally is required by determining the margin of victory for contests voted upon in more than one jurisdiction and for legislative or statewide contests, as specified.</p>	<p><b>Approve.</b> Section 20122(a)(b) imposes a state-mandated new program or higher level of service on counties and costs mandated by the state.</p>
<p>California Code of Regulations, title 2, section 20123, as adopted by Register 2008, No. 43. (eff. Oct. 20, 2008)</p>	<p>This section requires the county to document and disclose to the public any variances between the semifinal official canvass results and the manual tally results.</p>	<p><b>Partially Approve.</b> At the time the regulation became effective, counties were required by federal law (HAVA) to have at least one voting system at each polling place during federal elections, including the November 2008 Presidential General Election, in order to “be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and</p>

		<p>independence) as for other voters.” Thus, counties are mandated to comply with the new requirements imposed by test claim regulation.</p> <p>Under pre-existing law, a variance found on the manual tally of 1% of the precincts required by Elections Code section 15360 was also required to be identified and reported to the public. Since the 1% manual tally is included within the 10% manual tally, section 20123 imposes a new requirement to document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for 9% of the precincts.</p>
<p>California Code of Regulations, title 2, section 20124, as adopted by Register 2008, No. 43.</p>	<p>This section instructs the county on how to calculate the variance percentage to determine if the additional manual tallies are required.</p>	<p><b>Approve.</b> At the time the regulation became effective, counties were required by federal law (HAVA) to have at least one voting system at each polling place during federal elections, including the November 2008 Presidential General Election, in order to “be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” Thus, counties are mandated to comply with the new requirements imposed by test claim regulation.</p>
<p>California Code of Regulations, title 2, 20125, as adopted by Register 2008, No. 43. (eff. Oct. 20, 2008)</p>	<p>This section requires the county to keep and make available to the public a log to record the manual tally process, including the results of each round of</p>	<p><b>Approve.</b> At the time the regulation became effective, counties were required by federal law (HAVA) to have at least one voting system at each</p>

	<p>manual tallying for each precinct included in the sample, how variances are resolved, and details any actions taken that are contrary to the regulations. The county is also required to track, record, and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.</p>	<p>polling place during federal elections, including the November 2008 Presidential General Election, in order to “be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” Thus, counties are mandated to comply with the new requirements imposed by test claim regulation.</p>
<p>California Code of Regulations, title 2, 20126, as adopted by Register 2008, No. 43. (eff. Oct. 20, 2008)</p>	<p>This section requires the county to make any semifinal official canvass precinct results available to the public before the manual tally of the results begins. This section also required the county to comply with the public notice requirements of Elections Code section 15360 when conducting the post election manual tally.</p>	<p><b><i>Partially Approve.</i></b> At the time the regulation became effective, counties were required by federal law (HAVA) to have at least one voting system at each polling place during federal elections, including the November 2008 Presidential General Election, in order to “be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” Thus, counties are mandated to comply with the new requirements imposed by test claim regulation.</p> <p>The requirement to make semifinal official canvass precinct results available to the public before the manual tally of the results begins is not new and does <i>not</i> impose a new program or higher level of service.</p> <p>The regulation allows one notice to be issued to govern both the 1% manual tally required under existing law and the 10% manual</p>

		<p>tally required by the test claim regulation. Thus, the costs to prepare the notice for the 1% manual tally and to issue and post the combined notice are <i>not</i> new. However, revising the notice to include the additional information in the notice regarding the time and place of the initial selection of precincts for the 9% manual tally and any additional random selection of precincts that may become necessary to comply with the escalation requirements is new and mandates a higher level of service.</p>
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**Analysis**

**A. The Commission Has Jurisdiction to Hear and Determine This Claim.**

The PEMT regulations were adopted and became operative on October 20, 2008. The claimant incurred actual costs as a result of the regulations less than one month later beginning November 10, 2008. The test claim was filed on March 28, 2011.

Government code section 17551(c) provides a 12 month statute of limitations (from the effective date of the statute or executive order or from the date of first incurring costs) for filing a test claim. Under Government Code section 17573(b), the one year statute of limitations is tolled during negotiations on a legislatively determined mandate (LDM) *from* the date a local agency contacts Finance or responds to a Finance request to initiate a joint request for a LDM - *to* the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted to the Legislature, *or to* the date on which one of the parties notifies the other of its decision to not submit a joint request to the Legislature for an LDM.

The notice of intent to develop an LDM was timely filed on November 2, 2009, based on the fact that the claimant first incurred costs to comply with the regulations on November 10, 2008. On April 5, 2011, the Commission received additional notice that the parties decided to not submit a joint request for an LDM to the Legislature and the tolling period ended. The statute of limitations was properly tolled when the test claim was filed on March 28, 2011.

Thus, the Commission has jurisdiction to hear and determine the claim.

**B. The Test Claim Regulations Impose a Reimbursable State-Mandated Program on Counties within the Meaning of Article XIII B, Section 6 of the California Constitution.**

Staff finds that the new requirements imposed by the test claim regulations are mandated by the state. At the time the test claim regulations were adopted, counties were mandated by federal



law (Help America Vote Act, or HAVA) to have at least one voting system at each polling place during federal elections, including the November 2008 Presidential General Election, in order to “be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” In addition, with the November 2008 Presidential General Election only 16 days away when the regulations became effective, counties could not, as a practical matter, stop using their already-approved electronic voting systems and change to a manual system to avoid the test claim regulations. Under state law, any modification to a voting system (from electronic to manual) is required to be approved by the SOS before it can be used in any election. All changes to voting systems require an examination by the SOS, review by the Attorney General’s Office, and a notice and hearing for members of the public before any election occurs.

Staff further finds that the regulations refer to existing law in Elections Code section 15360, which requires a manual tally of the ballots tabulated by voting systems in one percent of the precincts chosen at random by the elections official to verify the accuracy of the automated count and, thus, some of the requirements imposed by the test claim regulations were not new. The new mandated requirements, however, are unique to counties and provide a service to the public by increasing public confidence in the accuracy of election results, thus imposing a new program or higher level of service. Staff also finds that the test claim regulations impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514 for the costs incurred following the November 2008 General Election.

Accordingly, the staff finds that California Code of Regulations, title 2, sections 20121-20126 (Register 2008, No. 43) impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the costs incurred by counties for election officials to perform the following new requirements within the canvass period established by Elections Code sections 10262 and 15372, for the November 2008 General Election only:<sup>3</sup>

1. After each election, determine the margin of victory as defined for single winner elections, multi-winner elections, and ballot measure contests in each contest based upon the semifinal official canvass results.<sup>4</sup>
2. For contests voted upon in more than one jurisdiction:
  - a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a ten percent manual tally is required by California Code of Regulations, title 2, section 20121(b), by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest.<sup>5</sup>
  - b) For a legislative or statewide contest, the elections official shall determine whether a 10 percent manual tally is required by California Code of Regulations, title 2, section 20121(b), based upon the semifinal official canvass results and

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<sup>3</sup> California Code of Regulations, title 2, section 20127.

<sup>4</sup> California Code of Regulations, title 2, section 20121(a).

<sup>5</sup> California Code of Regulations, title 2, section 20122(a).

margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the SOS.<sup>6</sup>

3. For any contest in which the margin of victory is *less than* one-half of one percent,
  - a) Randomly select precincts, using a random number generator, until *nine percent* of the precincts in the contest have been selected.
  - b) Manually tally the results for that contest from the precincts selected for the *nine percent* sample. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally. The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment<sup>7</sup>
  - c) When manually tallying the results, take appropriate measures to ensure that direct recording electronic ballots that were cancelled before being cast and ballots that are damaged or defective are not inadvertently tallied as valid ballots in the manual tally process.<sup>8</sup>
4. Document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for *nine percent* of the precincts.<sup>9</sup>
5. For any contest with one or more variances, calculate the variance percentage by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances.<sup>10</sup>
6. If the variance percentage represents at least one-tenth of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest.<sup>11</sup> Additional precincts shall be tallied in randomly selected blocks of five percent until the total number of variances presumed to exist – re-calculated pursuant to California Code of Regulations, title 2, section 20124(a) – is smaller than 10 percent of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.<sup>12</sup>

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<sup>6</sup> California Code of Regulations, title 2, section 20122(b).

<sup>7</sup> California Code of Regulations, title 2, section 20121(b)(e)(f).

<sup>8</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>9</sup> California Code of Regulations, title 2, section 20123(b).

<sup>10</sup> California Code of Regulations, title 2, section 20124(a).

<sup>11</sup> California Code of Regulations, title 2, section 20124(a).

<sup>12</sup> California Code of Regulations, title 2, section 20124(b).

7. Preserve the voter verifiable paper audit trail (VVPAT) records, memory cards and devices, and direct recording electronic voting machines and notify the SOS if any variance is found between the manually tallied VVPAT and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem.<sup>13</sup>
8. Keep and make available to the public a log to record the manual tally process for all precincts selected, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to California Code of Regulations, title 2, sections 20120 et seq.<sup>14</sup>
9. Track, record in the log, and report to the public by each precinct, the number of undervotes and overvotes discovered in the manual tally of a contest.<sup>15</sup>
10. Revise the notice prepared pursuant to section 15360(d), to include the time and place of the initial selection of precincts for the additional *nine percent* manual tally and any additional random selection of precincts which may become necessary to comply with escalation requirements.<sup>16</sup>

*However, the costs to prepare the notice for the one percent manual tally required by Elections Code section 15360(d), and to issue and post the combined notice are not new.*

11. Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows the public to verify the tally.

All other activities or regulations pled are denied.

### **Conclusion**

Staff concludes that California Code of Regulations, title 2, sections 20121-20126 (Register 2008, No. 43) impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for county elections officials to perform the activities specified in the statement of decision.

### **Staff Recommendation**

Staff recommends that the Commission adopt the proposed statement of decision to partially approve the test claim. Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the statement of decision following the hearing.

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<sup>13</sup> California Code of Regulations, title 2, section 20124(c).

<sup>14</sup> California Code of Regulations, title 2, section 20125(a).

<sup>15</sup> California Code of Regulations, title 2, section 20125(b).

<sup>16</sup> California Code of Regulations, title 2, section 20126(b).

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

California Code of Regulations, Title 2,  
Sections 20120, 20121, 20122, 20123, 20124,  
20125, 20126 and 20127<sup>17</sup>

Register 2008, No. 43

Filed on March 28, 2011

By County of Santa Barbara, Claimant.

Case No.: 10-TC-08

*Post Election Manual Tally (PEMT)*

STATEMENT OF DECISION PURSUANT  
TO GOVERNMENT CODE SECTION  
17500 ET SEQ.; CALIFORNIA CODE OF  
REGULATIONS, TITLE 2, DIVISION 2,  
CHAPTER 2.5, ARTICLE 7.

*(Adopted March 28, 2014)*

**STATEMENT OF DECISION**

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on March 28, 2014. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the proposed statement of decision to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

**Summary of the Findings**

The test claim seeks reimbursement for regulations requiring new standards and procedures to conduct post election manual tallies (PEMT) of votes for those races with very narrow margins of victory during elections conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The emergency regulations were effective from October 20, 2008 until April 12, 2009, coinciding with the November 2008 Presidential General Election. The claimant, County of Santa Barbara, requests reimbursement to comply with the regulations from November 10, 2008 through November 28, 2008 only, in the amount of \$250,126.09. The claimant estimates statewide costs of \$817,479.96.

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<sup>17</sup> The regulations were adopted as emergency regulations by Register 2008, No. 43, operative October 20, 2008. They were readopted and renumbered operative April 13, 2009 by another register (Register 2009, No. 16), which has not been pled in this test claim. Thus, the Commission's jurisdiction is limited to the regulations adopted by Register 2008, No. 43, effective from October 20, 2008 to April 12, 2009.

The Commission finds that the new requirements imposed by the test claim regulations are mandated by the state. At the time the test claim regulations were adopted, counties were mandated by federal law (Help America Vote Act, or HAVA) to have at least one voting system at each polling place during federal elections, including the November 2008 Presidential General Election, in order to “be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” In addition, with the November 2008 Presidential General Election only 16 days away when the regulations became effective, counties could not, as a practical matter, stop using their already-approved electronic voting systems and change to a manual system to avoid the test claim regulations. Under state law, any modification to a voting system (from electronic to manual) is required to be approved by the Secretary of State (SOS) before it can be used in any election. All changes to voting systems require an examination by the SOS, review by the Attorney General’s Office, and a notice and hearing for members of the public before any election occurs.

The Commission further finds that the requirements of the test claim regulations refer to and overlap with pre-existing requirements in Elections Code section 15360, which requires a manual tally of the ballots tabulated by voting systems in one percent of the precincts chosen at random by the elections official to verify the accuracy of the automated count and, thus, some of the requirements included in the test claim regulations were not new. The new mandated requirements, however, are unique to counties and provide a service to the public by increasing public confidence in the accuracy of election results, thus imposing a new program or higher level of service. Staff also finds that the test claim regulations impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514 for the costs incurred following the November 2008 General Election.

Accordingly, the Commission concludes that California Code of Regulations, title 2, sections 20121-20126 (Register 2008, No. 43) impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the costs incurred by counties for election officials to perform the following new requirements within the canvass period established by Elections Code sections 10262 and 15372, following the November 2008 General Election only:<sup>18</sup>

1. After each election, determine the margin of victory as defined for single winner elections, multi-winner elections, and ballot measure contests in each contest based upon the semifinal official canvass results.<sup>19</sup>
2. For contests voted upon in more than one jurisdiction:
  - a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a 10 percent manual tally is required by California Code of Regulations, title 2,

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<sup>18</sup> California Code of Regulations, title 2, section 20127.

<sup>19</sup> California Code of Regulations, title 2, section 20121(a).

section 20121(b), by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest.<sup>20</sup>

- b) For a legislative or statewide contest, determine whether a 10 percent manual tally is required by California Code of Regulations, title 2, section 20121(b), based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the SOS.<sup>21</sup>
3. For any contest in which the margin of victory is *less than* one-half of one percent,
  - a) Randomly select precincts, using a random number generator, until *nine percent* of the precincts in the contest have been selected.
  - b) Manually tally the results for that contest from the precincts selected for the *nine percent* sample. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally. The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment<sup>22</sup>
  - c) When manually tallying the results, take appropriate measures to ensure that direct recording electronic ballots that were cancelled before being cast and ballots that are damaged or defective are not inadvertently tallied as valid ballots in the manual tally process.<sup>23</sup>
4. Document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for *nine percent* of the precincts.<sup>24</sup>
5. For any contest with one or more variances, calculate the variance percentage by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances.<sup>25</sup>
6. If the variance percentage represents at least one-tenth of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest.<sup>26</sup> Additional precincts shall be tallied in randomly selected blocks of five percent until the total number of variances presumed to exist – re-

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<sup>20</sup> California Code of Regulations, title 2, section 20122(a).

<sup>21</sup> California Code of Regulations, title 2, section 20122(b).

<sup>22</sup> California Code of Regulations, title 2, section 20121(b)(e)(f).

<sup>23</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>24</sup> California Code of Regulations, title 2, section 20123(b).

<sup>25</sup> California Code of Regulations, title 2, section 20124(a).

<sup>26</sup> California Code of Regulations, title 2, section 20124(a).

calculated pursuant to California Code of Regulations, title 2, section 20124(a) – is smaller than ten percent of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.<sup>27</sup>

7. Preserve the voter verifiable paper audit trail (VVPAT) records, memory cards and devices, and direct recording electronic voting machines and notify the SOS if any variance is found between the manually tallied VVPAT and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem.<sup>28</sup>
8. Keep and make available to the public a log to record the manual tally process for all precincts selected, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to California Code of Regulations, title 2, sections 20120 et seq.<sup>29</sup>
9. Track, record in the log, and report to the public by each precinct, the number of undervotes and overvotes discovered in the manual tally of a contest.<sup>30</sup>
10. Including in the notice prepared pursuant to 15360(d) the time and place of the initial selection of precincts for the additional *nine percent* manual tally and any additional random selection of precincts which may become necessary to comply with escalation requirements.<sup>31</sup>

*However, the costs to prepare the notice pursuant to 15360(d) and to issue or post the notice are not new.*

11. Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows the public to verify the tally.

All other activities or regulations pled are denied.

## COMMISSION FINDINGS

### I. Chronology

- |          |   |
|----------|---|
| 11/02/09 | California State Association of Counties (CSAC) notified Commission staff of its intent to develop a legislatively determined mandate (LDM) for the test claim regulations.   |
| 11/12/09 | Commission staff notified CSAC and the Department of Finance (Finance) that the statute of limitations for filing a test claim would be tolled as of October 22, 2009 pursuant to Government Code section 17573(b). |

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<sup>27</sup> California Code of Regulations, title 2, section 20124(b).

<sup>28</sup> California Code of Regulations, title 2, section 20124(c).

<sup>29</sup> California Code of Regulations, title 2, section 20125(a).

<sup>30</sup> California Code of Regulations, title 2, section 20125(b).

<sup>31</sup> California Code of Regulations, title 2, section 20126(b).

03/28/11	Claimant, County of Santa Barbara, filed test claim <i>Post Election Manual Tally</i> , 10-TC-08 with the Commission.
04/05/11	Commission staff was notified that the parties were no longer negotiating an LDM.
05/11/11	Finance requested an extension of time to comment on test claim.
06/13/11	Finance submitted comments on the test claim.
07/12/11	Claimant submitted rebuttal comments.
11/05/13	Commission staff issued a notice of dismissal of test claim on the ground that the notice to develop an LDM was filed more than 12 months after the regulations became effective and, thus, after the statute of limitations expired.
11/06/13	Commission staff rescinded the notice of dismissal because the notice to develop an LDM was filed before the expiration of the statute of limitations based on when the claimant first incurred costs.
11/18/13	Commission staff issued draft staff analysis.
12/02/13	Claimant requested an extension of time to file comments and postponement of the hearing.
12/03/13	Commission staff approved extension of time to file comments and postponed the hearing to March 28, 2014.
12/12/13	CSAC filed comments on the draft staff analysis.
01/16/14	CSAC filed a declaration that its 12/12/13 comments were filed under penalty of perjury.
01/17/14	Claimant filed comments on the draft staff analysis.

## **II. Background**

The test claim seeks reimbursement for the implementation of new standards and procedures to conduct post election manual tallies (PEMT) of votes for those races with very narrow margins of victory during elections conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The emergency test claim regulations were effective from October 20, 2008 until April 12, 2009, coinciding with the November 2008 Presidential General Election. The claimant, County of Santa Barbara, requests reimbursement to comply with the regulations from November 10, 2008 through November 28, 2008 only, in the amount of \$250,126.09. Claimant estimates statewide costs of \$817,479.96.

### **A. Preexisting Law Regarding Election Canvassing and, for Counties with a Voting System, the One-Percent Manual Tally.**

The PEMT regulations are best explained in the context of pre-existing laws applicable to counting or “canvassing” ballots, voting systems, and manual tally requirements.



## 1. Election Canvassing

In California, elections are administered at the county level and either the county clerk or registrar of voters is required to perform the duties imposed by the Elections Code.<sup>32</sup> The Elections Code requires county elections officials in every election to conduct a semifinal official canvass and an official canvass of ballots by processing, tabulating, and compiling election results. The semifinal official canvass<sup>33</sup> begins immediately upon the close of the polls and continues until all precincts are accounted for.<sup>34</sup> County elections officials are required to tabulate all vote-by-mail ballots and precinct ballots, compile the results, and then transmit the semifinal official results for candidates for office and ballot measures to the Secretary of State (SOS) in the manner and according to the schedule prescribed by the SOS. Although most of the activities required to complete the semifinal official canvass occur once the polls are closed on election day, counties may begin processing vote-by-mail ballots seven business days before the election. County elections officials verify the signatures on the return envelopes for the vote-by-mail ballots, remove the voted ballots, and process them through their vote tallying system. The results from these ballots, however, are not tabulated until after the close of polls on election day. Vote-by-mail ballots that are not counted by election day and those ballots received on election day, either through the mail or at the precincts, are tabulated during the official canvass of the vote.<sup>35</sup>

The official canvass begins no later than the Thursday following the election, is open to the public, and continues daily until completed.<sup>36</sup> County elections officials must complete the official canvass no later than the 28th day after the election and submit a certified statement of the results of the election to the SOS by the 31st day.<sup>37</sup> The activities undertaken during the official canvass include the following listed in Elections Code section 15302:

- Processing and counting any valid vote-by-mail and provisional ballots not included in the semifinal official canvass. Provisional ballots are cast by voters whose names do not appear on the precinct roster.

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<sup>32</sup> Government Code section 26802 states the following: “Except as provided by law, the county clerk shall register as voters any electors who apply for registration and shall perform any other duties required of him or her by the Elections Code. In those counties in which a registrar of voters office has been established, the registrar of voters shall discharge all duties vested by law in the county clerk that relate to and are a part of election procedure.”

<sup>33</sup> Elections Code section 353.5 defines the "semifinal official canvass" as “the public process of collecting, processing, and tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on election night. The semifinal official canvass may include some or all of the vote by mail and provisional vote totals.”

<sup>34</sup> Elections Code sections 15150, *et seq.*

<sup>35</sup> California Secretary of State, “The Official Canvass of the Vote” <<http://www.sos.ca.gov/elections/official-canvass.htm>> as of September 1, 2013.

<sup>36</sup> Elections Code section 15301.

<sup>37</sup> Elections Code sections 15372 and 15375.

- Inspecting all materials and supplies returned by poll workers.
- Reconciling the number of signatures on the roster with the number of ballots recorded on the ballot statement.
- Reconciling the number of ballots counted, spoiled, canceled, or invalidated due to identifying marks or overvotes with the number of votes counted, including vote-by-mail and provisional ballots.
- Counting any valid write-in votes.
- Reproducing any damaged ballots, if necessary.
- Hand counting the ballots cast in one (1) percent of the precincts, chosen at random by the elections official.
- Reporting final results to the SOS, as required.<sup>38</sup>

Elections officials are required to adopt semifinal official and official canvass procedures to conform to the applicable voting systems procedures that have been approved by the SOS. The procedures must be available for public inspection no later than 29 days before each election.<sup>39</sup>

## 2. Voting Systems and the One-Percent Manual Tally

Counties are authorized to use any kind of voting system, any combination of voting systems, or any combination of voting system and paper ballots, provided that the use of the voting system or systems has been approved by the SOS or specifically authorized by law. “Voting system” means “any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast or tabulate votes, or both.”<sup>40</sup> At the time the test claim regulations were adopted, the authority to use voting systems was provided in former Elections Code section 19210, enacted in 1994 and derived from a 1976 statute, which stated:

The governing board may adopt for use at elections any kind of voting system, any combination of voting systems, any combination of voting system and paper ballots, provided that the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law. The voting system or systems may be used at any or all elections held in any county, city, or any of their political subdivisions for voting, registering, and counting votes cast. When more than one voting system is used to count ballots, the names of the candidates shall, insofar as possible, be placed upon the primary voting system. When more than one voting system or combination of voting system and paper ballots is used to count ballots, a single ballot measure or the candidates for a

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<sup>38</sup> See California Secretary of State, “The Official Canvass of the Vote” <<http://www.sos.ca.gov/elections/official-canvass.htm>> as of September 1, 2013.

<sup>39</sup> Elections Code section 15003.

<sup>40</sup> Elections Code section 362, as added by Statutes 1994, chapter 920.

single office may not be split between voting systems or between a voting system and paper ballots.<sup>41</sup>

Voting systems must be approved by the SOS through a process that includes examination by expert electronic technicians, a written report that is sent to county boards of supervisors, and a public hearing.<sup>42</sup> The systems must also be inspected for accuracy and periodically reviewed to determine if they are defective, obsolete, or otherwise unacceptable. The SOS has the right to withdraw approval previously granted to any voting system that is defective or unacceptable after review.<sup>43</sup>

If a county uses a voting system during the official canvass, Elections Code section 15360 requires the official conducting the election to conduct a *manual* tally of the ballots tabulated by those devices cast in one percent of the precincts chosen at random by the elections official to verify the accuracy of the automated count.<sup>44</sup> Elections Code section 15360(a), as last amended in 2007 and before the adoption of the test claim regulations, states the following:

During the official canvass of every election in which a voting system is used, the official conducting the election shall conduct a public manual tally of the ballots tabulated by those devices, including vote by mail voters' ballots, cast in 1 percent of the precincts chosen at random by the elections official. If 1 percent of the precincts is less than one whole precinct, the tally shall be conducted in one precinct chosen at random by the elections official.

In addition to the 1 percent manual tally, the elections official shall, for each race not included in the initial group of precincts, count one additional precinct. The manual tally shall apply only to the race not previously counted.

Additional precincts for the manual tally may be selected at the discretion of the elections official.<sup>45</sup>

The manual tally required by Elections Code section 15360 is a public process, with the election official providing at least a five-day public notice of the time and place of the manual tally and of the time and place of the selection of the precincts, batches, or direct recording electronic voting machines subject to the public manual tally prior to conducting the selection and tally.<sup>46</sup>

### **B. The Help America Vote Act: Voting Systems for Individuals with Disabilities.**

Adopted in October 2002, the federal Help America Vote Act (HAVA) allocated funds to states to approve election administration and replace punch card and lever voting machines. One of the

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<sup>41</sup> Statutes 1994, chapter 920; derived from former Elections Code section 15112, added by Statutes 1976, chapter 246.

<sup>42</sup> Elections Code sections 19204, 19206, 19207, 19208 and 19209.

<sup>43</sup> Elections Code sections 19220-19222.

<sup>44</sup> Elections Code section 336.5.

<sup>45</sup> Statutes 2007, chapter 508.

<sup>46</sup> Elections Code section 15360 (d).

required uses of HAVA funds is “Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.”<sup>47</sup> States are required to use HAVA funds to, among other things, “replace punch card voting systems or lever voting systems (as the case may be) in qualifying precincts within that State with a voting system.”<sup>48</sup> HAVA requires, effective January 1, 2006, voting systems used in federal elections to:

(A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;

(B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place;<sup>49</sup> [Emphasis added.]

The U.S. Attorney General has opined that states are required to comply with the requirements in section 301-303 of HAVA, including those outlined above, regardless of whether the states choose to accept funding under Title I or Title II of HAVA.<sup>50</sup>

**C. The Secretary of State’s Review of Voting Systems in 2007 Led to the Adoption of PEMT Requirements that Were Later Invalidated by the Court Because They Were Not Adopted in Accordance with the Administrative Procedures Act.**

In 2007, the SOS, pursuant to the authority in Elections Code section 19222, conducted a "top-to-bottom review" of several voting machines certified for use in California. The purpose of the review was "to determine whether currently certified voting systems provide acceptable levels of security, accessibility, ballot secrecy, accuracy and usability under federal and state standards."

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<sup>47</sup> 42 USC 15301 (b)(1)(H).

<sup>48</sup> Voting systems are defined in section 301 of HAVA (42 USC 15481 (b)) as:

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used-- (A) to define ballots; (B) to cast and count votes; (C) to report or display election results; and (D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used-- (A) to identify system components and versions of such components; (B) to test the system during its development and maintenance;

(C) to maintain records of system errors and defects; (D) to determine specific system changes to be made to a system after the initial qualification of the system; and (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

<sup>49</sup> 42 USC 15481 (a)(3).

<sup>50</sup> Exhibit I, U.S. Department of Justice, Civil Rights Division, Voting Section, “Frequently Asked Questions.”

At the conclusion of the review, the SOS decertified and conditionally recertified three voting systems. The SOS also decertified a fourth voting system that was not able to be tested during the review, but was later conditionally recertified.<sup>51</sup> The SOS simultaneously issued a conditional re-approval of each of the voting systems that set forth approximately 40 preconditions to their use. One of the conditions required counties that chose to use the machines subject to the “top-to-bottom-review” to follow “post-election manual count auditing requirements” in addition to the one-percent manual tally required by existing law. In October 2007, the conditional re-approvals were amended, with the post election manual count condition revised to state that “Elections officials must comply with requirements as set forth by the Secretary of State in the document entitled ‘Post-Election Manual Tally Requirements’ and any successor document.” In addition, the SOS issued a stand-alone document entitled “Post-Election Manual Tally Requirements.”<sup>52</sup> The PEMT requirements were implemented for the June 2008 Statewide Direct Primary Election in seven counties where a margin of victory that was less than one-half of one percent required manual tallies of those counties in ten percent of the precincts. The other counties had no margin of victory below the one-half of one percent threshold.<sup>53</sup>

The County of San Diego challenged the PEMT requirements in court, and on August 31, 2008, the Fourth District Court of Appeal held that the SOS had the general authority under the Elections Code to adopt PEMT requirements, but should have adopted them as regulations under the Administrative Procedures Act.<sup>54</sup> The court held that the PEMT requirements adopted in 2007 were therefore void.<sup>55</sup>

#### **D. The Test Claim Regulations Were Adopted as Emergency Regulations to Apply to the November 2008 Election.**

Effective October 20, 2008, the SOS adopted the emergency regulations at issue in this test claim (title 2, §§ 20120 - 20127) so that the PEMT requirements would apply to the November 2008 Presidential General Election. The regulations apply to “all elections in the state conducted in whole or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory.”<sup>56</sup> The regulations provide that if a contest has an overall margin of victory of less than one-half of one percent, county elections officials are required to randomly select ten percent of the precincts

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<sup>51</sup> Senate Committee on Elections, Reapportionment, and Constitutional Amendments, Analysis of AB 2023 (2009-2010 Reg. Sess.) amended April 27, 2010, pages 3-4.

<sup>52</sup> SOS, Informative Digest, Notice Publication/Regulations Submission , Finding of Emergency and Informative Digest for the Emergency PEMT regulations (former Cal. Code Regs., tit. 2, §§ 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127), October 9, 2008.

<sup>53</sup> Letter from Lowell Finley, Deputy Secretary of State, to the Office of Administrative Law Research Attorney, regarding the proposed emergency regulations, October 17, 2008.

<sup>54</sup> *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501.

<sup>55</sup> *Id.* at page 520.

<sup>56</sup> California Code of Regulations, title 2, section 20120(b).

and manually tally the results for that contest from the precincts randomly selected.<sup>57</sup> To comply, the following activities are required to be completed by county elections officials within the canvass period established by Elections Code sections 10262 and 15372:<sup>58</sup>

- After each election, determine the margin of victory as defined for single winner elections, multi-winner elections, and ballot measure contests in each contest based upon the semifinal official canvass results.<sup>59</sup>
- For contests voted upon in more than one jurisdiction:
  1. In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a 10 percent manual tally is required by California Code of Regulations, title 2, section 20121(b), by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest.<sup>60</sup>
  2. For a legislative or statewide contest, the elections official shall determine whether a 10 percent manual tally is required by California Code of Regulations, title 2, section 20121(b), based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the SOS.<sup>61</sup>
- For any contest in which the margin of victory is *less than* one-half of one percent, conduct a manual tally, employing the methods set forth in Elections Code section 15360, of ten percent randomly selected precincts. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally.<sup>62</sup>
- The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.<sup>63</sup>
- Take appropriate measures to ensure that direct recording electronic ballots that were cancelled before being cast and ballots that are damaged or defective are not inadvertently tallied as valid ballots in the manual tally process.<sup>64</sup>
- Document and disclose to the public any variances between the semifinal official canvass results and the manual tally results.<sup>65</sup>

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<sup>57</sup> California Code of Regulations, title 2, sections 20120(b), 20121.

<sup>58</sup> California Code of Regulations, title 2, section 20127.

<sup>59</sup> California Code of Regulations, title 2, section 20121(a).

<sup>60</sup> California Code of Regulations, title 2, section 20122(a).

<sup>61</sup> California Code of Regulations, title 2, section 20122(b).

<sup>62</sup> California Code of Regulations, title 2, section 20121(b)(e).

<sup>63</sup> California Code of Regulations, title 2, section 20121(f).

<sup>64</sup> California Code of Regulations, title 2, section 20121(i)(j).

- For any contest with one or more variances, calculate the variance percentage by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances.<sup>66</sup>
- If the variance percentage represents at least one-tenth of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest.<sup>67</sup> Additional precincts shall be tallied in randomly selected blocks of five percent until the total number of variances presumed to exist – recalculated pursuant to California Code of Regulations, title 2, section 20124(a) – is smaller than 10 percent of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.<sup>68</sup>
- Keep and make available to the public a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to California Code of Regulations, title 2, sections 20120 et seq.<sup>69</sup>
- Track, record in the log, and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.<sup>70</sup>
- Make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins.<sup>71</sup>
- Comply with the notice requirements established in Elections Code section 15360 when conducting any post-election manual tallying required by California Code of Regulations, title 2, sections 20120 et seq. This notice requirement may be satisfied by providing a single notice containing the times and places of: (1) the initial selection of precincts for the one percent manual tally and any ten percent manual tally required; (2) the beginning

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<sup>65</sup> California Code of Regulations, title 2, section 20123(b). A variance is “any difference between the machine tally and the manual tally for a contest. (Cal. Code Regs., tit. 2, § 20123(a).)

<sup>66</sup> California Code of Regulations, title 2, section 20124(a).

<sup>67</sup> California Code of Regulations, title 2, section 20124(a).

<sup>68</sup> California Code of Regulations, title 2, section 20124(b).

<sup>69</sup> California Code of Regulations, title 2, section 20125(a).

<sup>70</sup> California Code of Regulations, title 2, section 20125(b).

<sup>71</sup> California Code of Regulations, title 2, section 20126(a).

of the manual tally process; and (3) any additional random selection of precincts which may become necessary to comply with escalation requirements.<sup>72</sup>

- Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows the public to verify the tally.<sup>73</sup>

During the November 2008 Presidential General Election, all 58 counties in California used an approved voting system.<sup>74</sup>

### **III. Positions of the Parties**

#### **A. Claimant's Position**

The claimant, County of Santa Barbara, alleges that the test claim regulations impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution. According to the claimant, “the additions of § 20121 – Increased manual tally in contests with narrow margins of victory, and § 20124 – Manual tally escalation requirements for variances had the greatest impact on elections officials.”<sup>75</sup> Claimant states that it had three contests to which the PEMT regulations applied. Claimant requests reimbursement in the amount of \$250,126.09 for the following new activities performed between November 10, 2008 and November 26, 2008:<sup>76</sup>

1. Conducted internal meetings with other counties and with the Secretary of State to clarify the requirements outlined in the emergency regulations.
2. Conducted meetings with Elections Division staff to determine activities to be completed in preparation for the manual tally.
3. Identified which local contests are required to be tallied.
4. Coordinated with Sheriff for security of ballots at offsite location.
5. Identified location for conducting manual tally and complete contract for location.
6. Recruited staff from poll worker list and temporary agencies.
7. Organized manual tally boards; ensured poll workers do not tally ballots for precincts they worked on Election Day.
8. Prepared Poll and Vote by Mail boxes for transport.

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<sup>72</sup> California Code of Regulations, title 2, section 20126(b).

<sup>73</sup> California Code of Regulations, title 2, section 20126(c).

<sup>74</sup> SOS, “Voting Systems in Use for the November 4, 2008 General Election” See <<http://www.sos.ca.gov/voting-systems/oversight/county-vsyst/vote-sys-used-by-counties-08-11-04.pdf>> as of February 1, 2014.

<sup>75</sup> Exhibit A, County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)* page 7.

<sup>76</sup> Exhibit A, County of Santa Barbara, Test Claim 10-TC-08, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara.



9. Prepared spreadsheet to track results of manual tally.
10. Boxed up tally sheets and supplies for transport to offsite tally location.
11. Ensured secure transport of ballots to/from offsite manual tally location.
12. Setup tables with board numbers and supplies.
13. Called roll and assign staff to their tally board/table.
14. Updated spreadsheet with Vote by Mail ballot manual tally results.
15. Checked totals to determine if variance exists and if escalation of precincts tallied is required.
16. Randomly selected precincts in 5% increments for contests requiring escalation.
17. Prepared report of cost for Post Election Manual Tally.

In addition, the claimant requests reimbursement for the costs listed below to rent additional space and hire additional poll workers. These costs were incurred by the claimant because the largest contest tallied was the 19<sup>th</sup> State Senate District encompassing 253 of the 318 precincts in the county. If the county had to tally all 253 precincts by the end of the canvass period, it would not have had the space or staff to complete the tally requirements imposed by the test claim regulations and the other existing canvass tasks. Thus, in order to comply with the test claim regulations, the county incurred the following additional costs:

- Identified a location to rent for conducting the manual tally.
- Coordinated with the Sheriff for the security of ballots at an offsite location.
- Recruited additional staff from poll worker lists and temporary agencies to work on manual tally boards.
- Organized manual tally boards to ensure that poll workers were not on boards tallying ballots for precincts they worked on Election Day.
- Created and boxed up all tally sheets and supplies for transport to offsite tally location.
- Rented a box truck to transport ballots to/from offsite manual tally location.
- Ensured secure transport of ballots and tally sheets to/from offsite manual tally location.

Claimant further states that there are no ongoing costs to comply with this program since the regulations expired. Claimant estimates statewide costs to comply with the regulations for the November 2008 General Election in the amount of \$817,479.96. This estimate is based on information gathered in a survey conducted by the California Association of County Elections Officials.<sup>77</sup>

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<sup>77</sup> Exhibit A, County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)* page 10

Claimant states that it incurred costs of \$250,126.09, which “represents the lowest possible expenditure in order to completely comply with the requirements set forth in the Post Election Manual Tally Requirements in Close Contest Emergency Regulations.”<sup>78</sup>

Claimant submitted comments in response to the draft staff analysis, which determined that the test claim regulations were not mandated by the state since counties had discretion under state law to use a voting system or manually count ballots when canvassing votes and, thus, were not legally compelled by state law to comply with the regulations. The draft staff analysis further indicated that no evidence was filed to support a finding that counties were practically compelled to comply with the test claim regulations. Claimant argues now that it was compelled to comply with the regulations for the following reasons:

- The county had already begun using an approved voting system at the time the regulations were adopted and became effective on October 20, 2008, to comply with the vote by mail period, beginning 29 days before the November 4, 2008 election, in which voters can vote by mail in the office of the election official pursuant to Elections Code section 3018;
- The November 4, 2008 election was a federal election and, under federal law (HAVA), a voting system is required to be available at each polling place for individuals with disabilities;
- To comply with HAVA, the county sought the approval from the SOS to certify a blended voting system, using an existing voting system and the AutoMARK Voter Assist Terminal. The County’s voting system was approved in 2006, and modified in 2007. The written notification for any changes is a condition of the County’s use of the blended system. The condition states that “no substitution or modification of the voting system shall be made with respect to any component of the voting system, including the Use Procedures, until the Secretary has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval.” Thus, any subsequent change to the “Use Procedures” required written notice and approval of the SOS. And, Elections Code section 15002 requires the SOS to review and amend the procedures for the use of voting systems by January 1<sup>st</sup> of each even-numbered year.
- Elections Code section 15003 further requires elections officials to adopt semifinal official and official canvass procedures to conform to the applicable voting system procedures that have been approved. That section also requires these procedures to be available for public inspection no later than 29 days before the election.

Claimant concludes by stating that it could not have changed its system on October 20, 2008, when the emergency regulations became effective, because it was already in the process of conducting the November 4, 2008 election and could not comply with the deadlines in the Elections Code to make any changes.

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<sup>78</sup> *Id.* at page 9.

## **B. Department of Finance's Position**

In comments submitted in June 2011, Finance requests that the Commission:

... consider whether the regulations merely adopt the already-promulgated post election manual tally requirements in close contests pursuant to *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501.

Should the CSM ... find that to be the case, the emergency regulations would then not impose a reimbursable state mandate on local elections officials within the meaning of article XIII B, section 6 of the California Constitution because the requirements of the emergency regulations would already be required by the above court case. As such, the claim would then be denied pursuant to the court decision exception in Government Code section 17556, subdivision (b) ...

## **C. California State Association of Counties Position**

The California State Association of Counties (CSAC) commented on the draft staff analysis arguing that the test claim regulations impose a reimbursable state-mandated program. CSAC notes that the emergency regulations became effective on October 20, 2008, "which was 16 days before the *only* statewide election during which the regulations were effective." According to CSAC, by October 20, every county's decision to use a voting system for the election was already certified by the SOS and was irrevocable. Thus, counties could not have avoided the regulations' requirements by making a different decision.

CSAC also states that some counties began offering early voting on October 6, using voting systems, so that by October 20, thousands of votes had already been cast. Consequently, the November 4, 2008 election had already been "conducted . . . in part on a voting system" before the regulations became effective. The regulations were therefore immediately triggered and could not have been avoided by counties.

CSAC also points out that four counties (Kings, Merced, Monterey, and Yuba) are "preclearance" counties, meaning that they must obtain permission from the Civil Rights Division of the U.S. Department of Justice (USDOJ) or from the U.S. District Court for the District of Columbia before changing their voting procedures. USDOJ is required to respond to requests within 60 days; and although expedited preclearance can be requested, it is not guaranteed. CSAC states that on such short notice, these four counties could not have changed the method by which votes were cast or tabulated without preclearance.

Additionally, SOS must certify the component of each county's election regarding provisions for voters with disabilities, which includes describing how the voters' ballots will be cast and tabulated. According to CSAC, the process must be certified by SOS long before 16 days prior to an election and could not have been changed on such short notice.

CSAC further notes that every county had already used a "voting system" to begin conducting the election. CSAC then states:

As noted above, the regulations in question took effect very close to the election. Since "software" is expressly included in the definition of a "voting system," and since "ballot cards" and "test procedures" are expressly included in the definition of "software," the fact that ballot cards had already been issued—and in some

cases returned—and test procedures had already been performed mean that, at the time the regulations became effective, the election had already been conducted, in part, on voting systems in every county.

CSAC also argues that the way the regulations were written means that any single county’s use of a voting system made every county subject to the regulation, which applied “to all elections officials within the State of California for all elections in this state conducted in whole or in part on a voting system.” For statewide elections, CSAC asserts that this language does not leave the option to each county individually. Any single county’s decision to use a voting system would make the regulation apply to every county because the statewide election would have been conducted “in part” on a voting system. Since at the time the regulations became effective the election had already been conducted in part on a voting system (because votes had been cast and ballot cards issued and returned and test procedures carried out) no county had an option to evade the required activities.

CSAC states that counties are required by federal and state law to use voting systems in elections. CSAC cites part of the SOS website that HAVA required county elections officials to buy and deploy new voting systems. By 2006, HAVA required counties to have a type of voting device that the SOS only authorizes as part of a voting system.

CSAC also cites Elections Code section 19227(b)<sup>79</sup> that requires at least one approved voting unit for individuals who are blind or visually impaired. CSAC argues that subdivision (c), which makes this requirement optional under some circumstances, is “only a ministerial option based on whether sufficient funds are available and not a discretionary option.” CSAC notes that a voting unit is a component of a voting system, and the SOS certifies their use only as part of a voting system.

#### **IV. Discussion**

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>80</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>81</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

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<sup>79</sup> This provision is currently in Elections Code section 19242 as of Statutes 2013, chapter 602.

<sup>80</sup> *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

<sup>81</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>82</sup>
2. The mandated activity either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>83</sup>
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>84</sup>
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>85</sup>

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.<sup>86</sup> The determination of whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>87</sup> In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>88</sup>

**A. The Commission Has Jurisdiction to Hear and Determine this Test Claim.**

The PEMT regulations were adopted and became operative on October 20, 2008.<sup>89</sup> The claimant incurred actual costs as a result of the regulations less than one month later, beginning November 10, 2008.<sup>90</sup> The test claim was filed on March 28, 2011. Although the test claim was

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<sup>82</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>83</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>84</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig*, (1988) 44 Cal.3d 830, 835.

<sup>85</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

<sup>86</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

<sup>87</sup> *County of San Diego, supra*, 15 Cal.4th 68, 109.

<sup>88</sup> *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>89</sup> Register 2008, No. 43, operative October 20, 2008.

<sup>90</sup> Exhibit A, County of Santa Barbara, Test Claim 10-TC-08, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara.

filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the Commission has jurisdiction to hear and determine this test claim.

Government Code section 17551(c) states that a test claim shall be filed not later than 12 months following the effective date of a statute or executive order or within 12 months of incurring increased costs, which in this case, would be October 20, 2009. Under section 1183(c) of the Commission's regulations, "within 12 months of incurring increased costs" means that the test claim can be filed by "June 30 of the fiscal year *following* the fiscal year in which increased costs were first incurred by the test claimant." In this case, the deadline using the date of first incurring costs would be June 30, 2010.

The parties to this claim, however, attempted to negotiate a legislatively determined mandate (LDM), pursuant to Government Code sections 17573 and 17574, for the reimbursement of costs for the PEMT regulations. Under Government Code section 17573(b), the statute of limitations in section 17551 for filing a test claim is tolled during those negotiations *from* the date a local agency contacts the Department of Finance or responds to a Finance request to initiate a joint request for an LDM - *to* the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted to the Legislature, *or to* the date on which one of the parties notifies the other of its decision to not submit a joint request to the Legislature for an LDM. Section 17573(b) states the following:

The statute of limitations specified in Section 17551 shall be tolled from the date a local agency, school district, or statewide association contacts the Department of Finance or responds to a Department of Finance request to initiate a joint request for a legislatively determined mandate pursuant to subdivision (a), to (1) the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted pursuant to subdivision (a), or (2) the date on which the Department of Finance, or a local agency, school district, or statewide association notifies the other party of its decision not to submit a joint request. A local agency, school district, or statewide association, or the Department of Finance shall provide written notification to the commission of each of these dates.

The courts have explained that when the Legislature "tolls" the statute of limitations, it means that the clock has stopped and will start when the tolling period has ended. Whatever period of time that remained when the clock is stopped is available when the clock is restarted to file the claim.

Under California law, tolling generally refers to a suspension of a statute of limitations. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 674, 108 Cal.Rptr.3d 171, 229 P.3d 83 citing *Woods v. Young* (1991) 53 Cal.3d 315, 326, fn. 1, 279 Cal.Rptr. 613, 807 P.2d 455 [“Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.”]; *Cuadra v. Millan* (1998) 17 Cal.4th 855, 72 Cal.Rptr.2d 687, 952 P.2d 704, overruled on a different point in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4, 91 Cal.Rptr.2d 273, 989 P.2d 701, citing 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 407, p. 513 [“The statute [of limitations] may be tolled (i.e., *its operation suspended*) by various

circumstances, events or acts.’ ”].) Federal decisional authority is in accord. (*Chardon v. Soto* (1983) 462 U.S. 650, 652, fn. 1, 103 S.Ct. 2611, 77 L.Ed.2d 74; *Board of Regents v. Tomanio* (1980) 446 U.S. 478, 486, 100 S.Ct. 1790, 64 L.Ed.2d 440.)<sup>91</sup>

Thus, in order for the Commission to have jurisdiction to hear and determine a test claim when negotiations for a joint request for an LDM are underway and ultimately fail, parties are required to either (1) file a test claim within the statute of limitations provided in Government Code section 17551(c), continue negotiations with the state, and request that the Commission stay its proceedings on the test claim pursuant to section 17573(h); or (2) file the notice required under section 17573(b) with the Commission before the statute of limitations on the test claim statute or executive order expires showing that negotiations for an LDM have started. Pursuant to section 17573(b), the parties are required to provide written notification to the Commission of the date local agencies initiate or respond to a request to initiate a joint LDM, and in this case, notice was provided that the LDM process started on November 2, 2009 – 13 days *after* the statute of limitations would have expired if the statute of limitations is based on 12 months following the effective date of the regulations pled in the claim (which would be October 20, 2009).

The claimant alleges, however, that it first incurred costs on November 10, 2008, and requests that the statute of limitations be determined based on whether the claim was filed within 12 months of incurring increased costs, which as defined in section 1183(c) of the Commission’s regulations, means the test claim can be filed by “June 30 of the fiscal year *following* the fiscal year in which increased costs were first incurred by the test claimant.” Under this provision the statute of limitations is June 30, 2010. Since the notice of intent to develop an LDM was filed on November 2, 2009, *before* the June 30, 2010 deadline for filing the test claim, the notice was timely and the statute of limitations properly tolled until April 5, 2011, when the parties decided to not submit a joint request for an LDM to the Legislature and the tolling period ended. Under the law, whatever period of time that remained when the clock was stopped was available when the clock was restarted after the tolling period ended. The test claim here was filed on March 28, 2011, before the tolling period ended.

Since the Legislature has provided two alternative statutes of limitation to be used by a claimant, without any express limitation as to which option a claimant may use, the Commission finds that the test claim was timely filed and the Commission has jurisdiction to hear and determine the claim.

**B. The Test Claim Regulations Impose a State-Mandated New Program or Higher Level of Service on Counties within the Meaning of Article XIII B, Section 6 of the California Constitution.**

**1) Sections 20120 and 20127 of the test claim regulations do not mandate any new requirements, but define the scope and purpose of the regulations.**

Section 20120 states that the purpose of the regulations is to “establish standards and procedures for conducting increased manual tallies in contests in which the margin of victory is very narrow.” It also states that the regulations apply to “all elections in this state conducted in whole

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<sup>91</sup> *Don Johnson Productions, Inc. v. Rysher Entertainment* (2012) 209 Cal.App.4th 919, 929.

or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory.” Section 20127 requires elections officials to complete all tasks and make all reports required by the regulations within the canvass period established by Elections Code sections 10262 and 15372. Sections 20120 and 20127, in themselves, do not impose any mandated requirements on counties, but define the scope and purpose of the program. Therefore, the Commission finds that sections 20120 and 20127 do not mandate a new program or higher level of service on counties.

2) **Sections 20121-20126 of the test claim regulations impose new requirements on counties.**

The plain language of the test claim regulations, as summarized below, requires county elections officials, in counties that use a voting system in an election, to perform the following activities within the canvass period established by Elections Code sections 10262 and 15372:<sup>92</sup>

- After each election, the elections official shall determine the margin of victory as defined for single winner elections, multi-winner elections, and ballot measure contests in each contest based upon the semifinal official canvass results.<sup>93</sup>
- For contests voted upon in more than one jurisdiction:
  1. In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a ten percent (10%) manual tally is required by California Code of Regulations, title 2, section 20121(b), by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest.<sup>94</sup>
  2. For a legislative or statewide contest, the elections official shall determine whether a ten percent (10%) manual tally is required by California Code of Regulations, title 2, section 20121(b), based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the SOS.<sup>95</sup>
- For any contest in which the margin of victory is *less than* one half of one percent (0.5%), the elections official shall conduct a manual tally, employing the methods set forth in Elections Code section 15360, of ten percent (10%) randomly selected precincts. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally.<sup>96</sup>

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<sup>92</sup> California Code of Regulations, title 2, section 20127.

<sup>93</sup> California Code of Regulations, title 2, section 20121(a).

<sup>94</sup> California Code of Regulations, title 2, section 20122(a).

<sup>95</sup> California Code of Regulations, title 2, section 20122(b).

<sup>96</sup> California Code of Regulations, title 2, section 20121(b)(e).



- The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.<sup>97</sup>
- The elections official shall take appropriate measures to ensure that direct recording electronic (DRE) ballots that were cancelled before being cast and ballots that are damaged or defective are not inadvertently tallied as valid ballots in the manual tally process.<sup>98</sup>
- The elections official must document and disclose to the public any variances between the semifinal official canvass results and the manual tally results.<sup>99</sup>
- For any contest with one or more variances, the elections official shall calculate the variance percentage by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances.<sup>100</sup>
- If the variance percentage represents at least one-tenth (10%) of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest.<sup>101</sup> Additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist – re-calculated pursuant to California Code of Regulations, title 2, section 20124(a) – is smaller than ten percent (10%) of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.<sup>102</sup>
- Preserve the voter verifiable paper audit trail (VVPAT) records, memory cards and devices, and direct recording electronic (DRE) voting machines and notify the SOS if any variance is found between the manually tallied VVPAT and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem.<sup>103</sup>
- The elections official shall keep and make available to the public a log to record the manual tally process, including the results of each round of manual tallying for each

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<sup>97</sup> California Code of Regulations, title 2, section 20121(f).

<sup>98</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>99</sup> California Code of Regulations, title 2, section 20123(b). A variance is “any difference between the machine tally and the manual tally for a contest. (Cal. Code Regs., tit. 2, § 20123(a).)

<sup>100</sup> California Code of Regulations, title 2, section 20124(a).

<sup>101</sup> California Code of Regulations, title 2, section 20124(a).

<sup>102</sup> California Code of Regulations, title 2, section 20124(b).

<sup>103</sup> California Code of Regulations, title 2, section 20124(c).

precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to California Code of Regulations, title 2, sections 20120 et seq.<sup>104</sup>

- The elections official shall track, record in the log, and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.<sup>105</sup>
- The elections official shall make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins.<sup>106</sup>
- The elections official shall comply with the notice requirements established in Elections Code section 15360 when conducting any post-election manual tallying required by California Code of Regulations, title 2, sections 20120 et seq. This notice requirement may be satisfied by providing a single notice containing the times and places of: (1) the initial selection of precincts for the one percent (1%) manual tally and any ten percent (10%) manual tally required; (2) the beginning of the manual tally process; and (3) any additional random selection of precincts which may become necessary to comply with escalation requirements.<sup>107</sup>
- The elections official shall permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows the public to verify the tally.<sup>108</sup>

Some of these regulations refer to pre-existing law in Elections Code section 15360 and, thus, need to be interpreted to determine what is newly required. For example, the second bulleted activity above is required by section 20121(b) of the regulations, which provides that for any contest in which the margin of victory is *less than* one-half of one percent, the elections official shall conduct a manual tally, employing the methods set forth in Elections Code section 15360, of 10 percent randomly selected precincts. Section 20121(c) states that “[p]recincts manually tallied under Elections Code section 15360 may be included as part of the ten percent (10%) manual tally.” As indicated in section II. Background, Elections Code section 15360 was in effect at the time the test claim regulations were adopted and requires county elections officials in counties using voting systems to manually tally one percent of the precincts regardless of the margin of victory for any given race. Since the existing one percent manual tally, which is always performed if a voting system is used, can be included within the 10 percent manual tally required by section 20121(b) of the test claim regulations, the new requirement imposed by the regulation is to conduct a manual tally of *nine percent* of the precincts when the margin of victory is narrow.

In addition, section 20121(b) requires that the manual tally be conducted “employing the methods set forth in Elections Code section 15360 . . . .” Elections Code section 15360(c)

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<sup>104</sup> California Code of Regulations, title 2, section 20125(a).

<sup>105</sup> California Code of Regulations, title 2, section 20125(b).

<sup>106</sup> California Code of Regulations, title 2, section 20126(a).

<sup>107</sup> California Code of Regulations, title 2, section 20126(b).

<sup>108</sup> California Code of Regulations, title 2, section 20126(c).

requires the elections official to randomly choose the precincts subject to the manual tally by using a “random number generator or other method specified in regulations adopted by the Secretary of State. . . .” No regulations were adopted by the SOS regarding the random selection of precincts. Thus, the elections official is required to use the random number generator when selecting nine percent of the precincts to manually tally the results for any contest with a narrow margin of victory.

Section 20123(b) requires the elections official to document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for the ten percent sample of precincts. A “variance” is defined in the regulation to mean “any difference between the machine tally and the manual tally for a contest.” Under pre-existing law, a variance found on the manual tally of one percent of the precincts required by Elections Code section 15360 was also required to be identified and reported to the public. Elections Code section 15360(e) stated that the elections official is required to identify and report “any discrepancies between the machine count and the manual tally and a description of how each of these discrepancies was resolved.” Thus, section 20123(b) imposes a new requirement to document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for *nine percent* of the precincts.

The activities required by section 20125 of the regulations are new for all precincts, however. That section requires the elections official to keep and make available to the public a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to California Code of Regulations, title 2, sections 20120 et seq. The elections official shall also track, record in the log, and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.

Section 20126(a) requires the elections official to make any semifinal official canvass precinct results available to the public before the manual tally of the results from those precincts begins. This requirement is *not* new. Under pre-existing law, Elections Code section 15251, a code section within the chapter governing the semifinal official canvass, stated the following: “Upon receipt of the result of votes cast from the precinct boards, the elections official shall compile and make available to the public the results so received as to offices and measures.” Thus, the Commission finds that section 20126(a) does not impose a new requirement on county elections officials.

Finally, the second to the last bulleted activity is governed by section 20126(b) of the regulations, which requires the elections official to comply with the notice requirements established in Elections Code section 15360 when conducting any post-election manual tally required by California Code of Regulations, title 2, sections 20120 et seq. This notice requirement may be satisfied by providing a single notice containing the times and places of: (1) the initial selection of precincts for the one percent manual tally and any 10 percent manual tally required; (2) the beginning of the manual tally process; and (3) any additional random selection of precincts which may become necessary to comply with escalation requirements. Under existing law, Elections Code section 15360(d) established a five-day notice requirement of the time and place of the one percent manual tally and of the time and place of the selection of precincts (i.e., the beginning of the manual tally process). Since section 20126 of the regulations allows one notice to be issued to govern both the one percent manual tally required under

existing law and the 10 percent manual tally required by the test claim regulations, the costs to prepare the notice for the one percent manual tally required by Elections Code section 15360(d), and to issue and post the combined notice are *not* new. However, revising the notice to include the time and place of the initial selection of precincts for the additional *nine percent* manual tally and any additional random selection of precincts which may become necessary to comply with escalation requirements is new.

All other remaining activities that are bulleted above were not required by pre-existing law and are newly required of counties.

Accordingly, the Commission finds that the test claim regulations impose the following new requirements on county elections officials, which shall be completed within the canvass period established by Elections Code sections 10262 and 15372,<sup>109</sup> in counties that use a voting system in an election:

1. After each election, determine the margin of victory as defined for single winner elections, multi-winner elections, and ballot measure contests in each contest based upon the semifinal official canvass results.<sup>110</sup>
2. For contests voted upon in more than one jurisdiction:
  - a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a 10 percent manual tally is required by California Code of Regulations, title 2, section 20121(b), by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest.<sup>111</sup>
  - b) For a legislative or statewide contest, the elections official shall determine whether a 10 percent manual tally is required by California Code of Regulations, title 2, section 20121(b), based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the SOS.<sup>112</sup>
3. For any contest in which the margin of victory is *less than* one-half of one percent:
  - a) Randomly select precincts, using a random number generator, until *nine percent* of the precincts in the contest have been selected.
  - b) Manually tally the results for that contest from the precincts selected for the *nine percent* sample. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally. The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.<sup>113</sup>

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<sup>109</sup> California Code of Regulations, title 2, section 20127.

<sup>110</sup> California Code of Regulations, title 2, section 20121(a).

<sup>111</sup> California Code of Regulations, title 2, section 20122(a).

<sup>112</sup> California Code of Regulations, title 2, section 20122(b).

<sup>113</sup> California Code of Regulations, title 2, section 20121(b)(e)(f).

- c) When manually tallying the results, take appropriate measures to ensure that direct recording electronic ballots that were cancelled before being cast and ballots that are damaged or defective are not inadvertently tallied as valid ballots in the manual tally process.<sup>114</sup>
4. Document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for *nine percent* of the precincts.<sup>115</sup>
5. For any contest with one or more variances, calculate the variance percentage by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances.<sup>116</sup>
6. If the variance percentage represents at least one-tenth of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest.<sup>117</sup> Additional precincts shall be tallied in randomly selected blocks of five percent until the total number of variances presumed to exist – recalculated pursuant to California Code of Regulations, title 2, section 20124(a) – is smaller than 10 percent of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.<sup>118</sup>
7. Preserve the voter verifiable paper audit trail (VVPAT) records, memory cards and devices, and direct recording electronic voting machines and notify the SOS if any variance is found between the manually tallied VVPAT and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem.<sup>119</sup>
8. Keep and make available to the public a log to record the manual tally process for all precincts selected, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to California Code of Regulations, title 2, sections 20120 et seq.<sup>120</sup>

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<sup>114</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>115</sup> California Code of Regulations, title 2, section 20123(b).

<sup>116</sup> California Code of Regulations, title 2, section 20124(a).

<sup>117</sup> California Code of Regulations, title 2, section 20124(a).

<sup>118</sup> California Code of Regulations, title 2, section 20124(b).

<sup>119</sup> California Code of Regulations, title 2, section 20124(c).

<sup>120</sup> California Code of Regulations, title 2, section 20125(a).

9. Track, record in the log, and report to the public by each precinct, the number of undervotes and overvotes discovered in the manual tally of a contest.<sup>121</sup>
10. Revise the notice prepared pursuant to section 15360(d), to include the time and place of the initial selection of precincts for the additional *nine percent* manual tally and any additional random selection of precincts which may become necessary to comply with escalation requirements.<sup>122</sup>

*However, the costs to prepare the notice for the one percent manual tally required by Elections Code section 15360(d), and to issue and post the combined notice are not new.*

11. Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows the public to verify the tally.<sup>123</sup>

**3) The new regulatory requirements are mandated by the state.**

The California Supreme Court, in *Department of Finance v. Commission on State Mandates (Kern High School Dist.)*, held that when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled. As the court said:

[W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*<sup>124</sup>

Even if the plain language of a statute does not legally compel compliance, the courts have indicated that local agencies may be practically compelled and thus, mandated by the state to comply with new requirements under limited circumstances. Practical compulsion requires a concrete showing, with evidence in the record, that a local agency faces certain and severe penalties, such as double taxation or other draconian consequences for not using voting systems, or is left with no reasonable means but to use a voting system in order to carry out its core mandatory function to provide election services to the public.<sup>125</sup> In the 2009 case, *Department of Finance v. Commission on State Mandates (POBRA)*, the court addressed the evidence needed to support a finding of practical compulsion. The case was based on a Commission decision that the Peace Officer's Bill of Rights Act (POBRA) imposed a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for

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<sup>121</sup> California Code of Regulations, title 2, section 20125(b).

<sup>122</sup> California Code of Regulations, title 2, section 20126(b).

<sup>123</sup> California Code of Regulations, title 2, section 20126(c).

<sup>124</sup> *Id.* at page 731. (Emphasis added.)

<sup>125</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 731, 743, 749-754; *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 884-887; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1362-1368.

counties, cities, school districts, and special districts that employ peace officers.<sup>126</sup> Although school districts and special districts had authority to employ peace officers, the Commission found that school districts were practically compelled to employ peace officers based on the district's "obligation to protect pupils from other children, and also to protect teachers themselves from the violence by the few students whose conduct in recent years has prompted national concern."<sup>127</sup> This line of reasoning was rejected by the court on the ground that there was no evidence in the record to support a finding practical compulsion. The court stated that the "'necessity' that is required to show practical compulsion would involve concrete evidence in the record that the districts would face 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences." The court further stated that a local agency may be practically compelled to comply with a state program if there is a showing that, as a practical matter, doing so is the only reasonable means to carry out its core mandatory function.<sup>128</sup>

In this case, the PEMT regulations apply to all elections (federal, state, or local) conducted in whole or in part on a voting system.<sup>129</sup> Since 1994, Elections Code section 19210 has generally authorized county governing boards to adopt voting systems for use in elections as follows:

The governing board *may* adopt for use at elections any kind of voting system, any combination of voting systems, any combination of a voting system and paper ballots, provided the use of the voting system or systems involved has been approved by the Secretary of State or specifically authorized by law.<sup>130</sup>

Despite the authority provided by this statute, the claimant and CSAC argue they are mandated by state and federal law to have voting systems at each polling place and, thus, are mandated by the state to comply with the test claim regulations.

As analyzed below, the Commission agrees that counties are required by federal law to have at least one voting system equipped for individuals with disabilities at each polling place for all federal elections. In addition, courts have suggested that the federal ADA and Rehabilitation Act require voting systems for all elections to ensure that individuals with disabilities have meaningful access to vote. The test claim regulations, which became effective October 20, 2008, were adopted so that the PEMT requirements would apply to the November 2008 Presidential General Election, a federal election. Thus, counties had no choice but to comply with the test claim regulations.

On October 29, 2002, the federal HAVA was enacted and signed into law.<sup>131</sup> Title III of HAVA requires voting equipment *used in federal elections* to "be accessible for individuals with

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<sup>126</sup> See Commission on State Mandates, Statement of Decision CSM-4499.

<sup>127</sup> Commission on State Mandates, Decision CSM 05-RL-4499-01, p. 26, citing *In re Randy G.* (2001) 26 Cal.4th 556, 562-563.

<sup>128</sup> *Id* at page 1368.

<sup>129</sup> California Code of Regulations, title 2, section 20120(b), emphasis added.

<sup>130</sup> Statutes 1994, chapter 920; derived from former Elections Code section 15112, added by Statutes 1976, chapter 246.

<sup>131</sup> 42 U.S.C. sections 15301-15545, Public Law No. 107-252.

disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters” by demanding “at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities in each polling place.<sup>132</sup> State and local voting authorities had to comply with the accessibility provision by January 1, 2006.<sup>133</sup> The U.S. Attorney General is required to enforce the uniform and nondiscriminatory election technology and administration requirements that apply to the states under Title III of HAVA.<sup>134</sup> The U.S. Department of Justice has prepared a “frequently asked questions” document regarding Title III of HAVA, and when asked if a state is required to comply with Title III of HAVA if it does not seek or accept federal funding, the U.S. Department of Justice responded as follows:

Unless a State is specifically excluded from one of HAVA’s requirements, each State must comply with Sections 301, 302, and 303 of Title III of HAVA as of the effective dates in those sections. This is true regardless of whether that State chooses to accept federal funding under Title I or Title II.<sup>135</sup>

There is also case law suggesting that a failure to provide, at each polling place, accessible voting systems *at any election* may violate the American with Disabilities Act (ADA) and section 504 of the federal Rehabilitation Act. These federal laws do not require voting systems for the disabled, but they do grant individuals with disabilities the right to reasonable modifications to have meaningful access to a covered entity’s services, programs, and activities, as long as that modification will not constitute an undue burden or fundamentally alter the nature of the program or activity.<sup>136</sup> In *California Council of the Blind v. County of Alameda*, the federal district court considered allegations that the voting machines in the County of Alameda were insufficient and not operational and, thus, violated the ADA and Rehabilitation Act.<sup>137</sup> The plaintiffs argued that advancements in technology make it possible for blind and visually impaired individuals to vote privately and independently just as sighted voters do. Plaintiffs further alleged that certain electronic voting machines utilize electronic ballots and possess an audio ballot feature that can read aloud instructions and voting options. When a tactile keyboard and headphones are connected to an accessible voting machine and the audio ballot is functioning properly, a blind voter can use the audio ballot feature and the tactile keypad to privately and independently complete and submit a ballot. Plaintiffs acknowledged that the County provided at least one voting machine at each polling place in compliance with HAVA, but the machines were not fully operational at all polling sites from the moment the sites were

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<sup>132</sup> 42 U.S.C. section 15481(a)(3)(A)(B).

<sup>133</sup> 42 U.S.C. section 15481(d).

<sup>134</sup> 42 U.S.C. section 15111.

<sup>135</sup> Exhibit I, U.S. Department of Justice, Civil Rights Division, Voting Section, “Frequently Asked Questions.”

<sup>136</sup> Rehabilitation Act of 1973, section 504, 29 U.S.C. section 794(a); ADA of 1990, 42 U.S.C. section 12132.

<sup>137</sup> Exhibit I, *California Council of the Blind v. County of Alameda* (2013) ---F.Supp.2d. --- (2013 WL 5770560 (N.D.Cal.))



open on Election Day to the moment they were closed. The court found that “requiring blind and visually impaired individuals to vote with assistance of a third party, if they are to vote at all, at best provides these individuals with an inferior voting experience ‘not equal to that afforded others.’” The court further determined that, when voting with the assistance of a third party,

Blind and visually impaired voters are forced to reveal a political opinion that others are not required to disclose. Thus, the County cannot fulfill its obligation to ensure effective communication by providing third party assistants to blind and visually impaired voters, because “in order to be effective, auxiliary aids and services must be provided . . . in such a way as to protect the *privacy and independence* of the individual with a disability.”<sup>138</sup>

The court, therefore, denied the County’s motion to dismiss, finding that the plaintiffs sufficiently stated a claim under the ADA and Rehabilitation Act.<sup>139, 140</sup>

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<sup>138</sup> Citing to ADA regulations, 28 C.F.R. section 35.160(b)(2).

<sup>139</sup> The court in *California Council of the Blind* further addressed Elections Code section 19227, which requires the SOS to adopt rules and regulations governing voting technology and systems that provide blind and visually impaired individuals with access that is equivalent to that provided to individuals who are not blind or visually impaired. The statute further requires that a voting system shall be in place at each polling place “if sufficient funds are available” to implement the requirement. The court, in its 2013 opinion, noted that the requirement to have at least one voting system at each polling place was not enforceable until the SOS adopted regulations.

<sup>140</sup> The courts have not finally ruled on the merits of the complaint in *California Council of the Blind*, since the case came to the court on a motion to dismiss. There are older reported cases, however, that find there is no ADA violation for failing to have an electronic voting system. In *American Ass'n of People with Disabilities v. Shelley* (2004) 324 F.Supp.2d 1120, 1125-1126, the court found as follows:

The evidence does not support the conclusion that the elimination of the DREs would have a discriminatory effect on the visually or manually impaired. Although it is not disputed that some disabled persons will be unable to vote independently and in private without the use of DREs, it is clear that they will not be deprived of their fundamental right to vote. Each plaintiff declares that he or she has voted in the past and intends to vote in the future. Title II of the ADA precludes the exclusion of the disabled from the services, programs or activities of any public entity. 42 U.S.C. § 12132. Title II requires only that programs be made “readily accessible to and usable by” people with disabilities. 28 C.F.R. § 35.150. The evidence establishes that long before the conditional certification of DREs, counties utilized a number of programs to provide handicapped persons with ready access to voting equipment. As provided in the controlling regulations, a public entity may employ such means as “assignment of aides to beneficiaries ... or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.” 28 C.F.R. § 35.150(b)(1).

Thus, at the time the test claim regulations became effective, counties were mandated by federal law to have a voting system in place during the November 2008 General Election and legally compelled to comply with the test claim regulations.

Even if the federal requirements did not exist, claimant and CSAC have stated facts sufficient to find that counties were practically compelled to comply with the test claim regulations during the November 2008 General Election. Local agencies may be practically compelled to comply with a state program if there is a showing that, as a practical matter, doing so is the only reasonable means to carry out its core mandatory function.<sup>141</sup> A core mandatory function of counties is to conduct elections.<sup>142</sup> When the test claim regulations took effect on October 20, 2008, all California counties had voting systems in place at each polling site. Under state law, any modification to a voting system (from electronic to manual) is required to be approved by the SOS before it can be used in any election.<sup>143</sup> All changes to voting systems require an examination by the SOS, review by the Attorney General's Office, and a notice and hearing for members of the public before any election occurs.<sup>144</sup> With the election only 16 days away, counties could not, as a practical matter, stop using the already-approved electronic voting system and change to a manual system to avoid the test claim regulations.

Accordingly, the Commission finds that counties were mandated by the state, within the meaning of article XIII B, section 6, to comply with the new requirements imposed by California Code of Regulations, title 2, sections 20121-20126 (Register 2008, No. 43).

**4) The new mandated activities constitute a new program or higher level of service.**

The Commission further finds that these mandated requirements are unique to counties and provide a service to the public. The regulations were adopted to increase public confidence in the accuracy of California elections. According to the SOS, electronic voting systems pose a risk

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It cannot be disputed that casting a vote independently and secretly would be preferred over casting a vote with the assistance of a family member or other aide. However, the ADA does not require accommodation that would enable disabled persons to vote in a manner that is comparable in every way with the voting rights enjoyed by persons without disabilities. Rather, it mandates that voting programs be made accessible, giving a disabled person the opportunity to vote. [Footnote omitted.] Nothing in the Americans with Disabilities Act or its Regulations reflects an intention on the part of Congress to require secret, independent voting. Nor does such a right arise from the fact that plaintiff counties attempted to provide such an accommodation. Plaintiffs did not acquire rights by virtue of the temporarily discontinued experiment with electronic voting machines.

<sup>141</sup> *Id* at page 1368.

<sup>142</sup> Government Code section 26802.

<sup>143</sup> Elections Code sections 19200, *et seq.*

<sup>144</sup> Elections Code sections 19203 and 19204 (as last amended by Stats.1994, ch. 920).

of being tampered with, and are prone to errors and inaccuracies.<sup>145</sup> PEMT requirements were cited as a particularly effective risk mitigation procedure to ensure the trustworthiness and accuracy of election results. The SOS also stated that the existing one-percent manual tally was not adequate in contests with a very narrow margin of victory.<sup>146</sup> Thus, the new requirements mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

**C. California Code of Regulations, Title 2, Sections 20121-20126 (Register 2008, No. 43), Result in Increased Costs Mandated by the State for the Costs Incurred by Counties Following the November 2008 General Election.**

In order for the activities required by the test claim regulations to be reimbursable under article XIII B, section 6 of the California Constitution, they must impose “costs mandated by the state,” defined as any increased cost that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service.<sup>147</sup>

The claimant asserts that all activities required by the test claim regulations result in increased costs mandated by the state within the meaning of Government Code section 17514. The test claim is supported by a declaration from the County of Santa Barbara for the new activities performed between November 10, 2008 and November 26, 2008.<sup>148</sup> Claimant states that it incurred costs of \$250,126.09, which “represents the lowest possible expenditure in order to completely comply with the requirements set forth in the Post Election Manual Tally Requirements in Close Contest Emergency Regulations.”<sup>149</sup> The claimant also estimates statewide costs \$814,479.96 to comply with the regulations for the November 2008 General Election based on a survey conducted by the California Association of County Elections Officials.<sup>150</sup>

In its comments on the test claim, Finance asked the Commission to consider whether the PEMT requirements were already declared to be existing law by the court’s decision in *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501. If so, the requirements imposed by the emergency regulations would not impose “costs mandated by the state” pursuant Government Code section 17556(b), which states:

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<sup>145</sup> SOS, Notice Publication/Regulations Submission, Finding of Emergency and Informative Digest for the Emergency PEMT regulations (Cal. Code Regs., tit. 2, §§ 20120-20127), October 9, 2008.

<sup>146</sup> Letter from Lowell Finley, Deputy Secretary of State, to the Office of Administrative Law Research Attorney, regarding the proposed emergency regulations, October 17, 2008.

<sup>147</sup> Government Code section 17514.

<sup>148</sup> County of Santa Barbara, Test Claim 10-TC-08, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara (Exhibit A.)

<sup>149</sup> *Id.* at page 9.

<sup>150</sup> *Id.* at page 10.

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

[(a)] . . . [(a)]

(b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.

In *County of San Diego v. Bowen*, the court held that the SOS had statutory authority to adopt the PEMT requirements, but that they must be adopted as regulations pursuant to the Administrative Procedure Act. For this reason, the court held that the 2007 PEMT requirements were void.<sup>151</sup> The court did not find that the requirements imposed by the test claim regulations were existing law, or that the SOS was required to adopt the regulations at all. Therefore, the Commission finds that Government Code section 17556(b) is not relevant and does not apply to this test claim.

Accordingly, the Commission finds that the test claim regulations impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514 for the costs incurred following the November 2008 General Election.

## V. Conclusion

The Commission concludes that California Code of Regulations, title 2, sections 20121-20126 (Register 2008, No. 43) impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the costs incurred by counties for election officials to perform the following new requirements within the canvass period established by Elections Code sections 10262 and 15372, for the November 2008 General Election only:<sup>152</sup>

1. After each election, determine the margin of victory as defined for single winner elections, multi-winner elections, and ballot measure contests in each contest based upon the semifinal official canvass results.<sup>153</sup>
2. For contests voted upon in more than one jurisdiction:
  - a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a 10 percent manual tally is required by California Code of Regulations, title 2, section 20121(b), by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest.<sup>154</sup>

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<sup>151</sup> *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 520.

<sup>152</sup> California Code of Regulations, title 2, section 20127.

<sup>153</sup> California Code of Regulations, title 2, section 20121(a).

<sup>154</sup> California Code of Regulations, title 2, section 20122(a).

- b) For a legislative or statewide contest, the elections official shall determine whether a ten percent manual tally is required by California Code of Regulations, title 2, section 20121(b), based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the SOS.<sup>155</sup>
3. For any contest in which the margin of victory is *less than* one-half of one percent,
    - a) Randomly select precincts, using a random number generator, until *nine percent* of the precincts in the contest have been selected.
    - b) Manually tally the results for that contest from the precincts selected for the *nine percent* sample. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally. The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.<sup>156</sup>
    - c) When manually tallying the results, take appropriate measures to ensure that direct recording electronic ballots that were cancelled before being cast and ballots that are damaged or defective are not inadvertently tallied as valid ballots in the manual tally process.<sup>157</sup>
  4. Document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for *nine percent* of the precincts.<sup>158</sup>
  5. For any contest with one or more variances, calculate the variance percentage by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances.<sup>159</sup>
  6. If the variance percentage represents at least one-tenth of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest.<sup>160</sup> Additional precincts shall be tallied in randomly selected blocks of five percent until the total number of variances presumed to exist – recalculated pursuant to California Code of Regulations, title 2, section 20124(a) – is smaller than 10 percent of the overall margin of victory in that contest, based on the

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<sup>155</sup> California Code of Regulations, title 2, section 20122(b).

<sup>156</sup> California Code of Regulations, title 2, section 20121(b)(e)(f).

<sup>157</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>158</sup> California Code of Regulations, title 2, section 20123(b).

<sup>159</sup> California Code of Regulations, title 2, section 20124(a).

<sup>160</sup> California Code of Regulations, title 2, section 20124(a).

semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.<sup>161</sup>

7. Preserve the voter verifiable paper audit trail (VVPAT) records, memory cards and devices, and direct recording electronic voting machines and notify the SOS if any variance is found between the manually tallied VVPAT and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem.<sup>162</sup>
8. Keep and make available to the public a log to record the manual tally process for all precincts selected, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to California Code of Regulations, title 2, sections 20120 et seq.<sup>163</sup>
9. Track, record in the log, and report to the public by each precinct, the number of undervotes and overvotes discovered in the manual tally of a contest.<sup>164</sup>
10. Revise the notice prepared pursuant to section 15360(d), to include the time and place of the initial selection of precincts for the additional *nine percent* manual tally and any additional random selection of precincts which may become necessary to comply with escalation requirements.<sup>165</sup>

*However, the costs to prepare the notice for the one percent manual tally required by Elections Code section 15360(d), and to issue and post the combined notice are not new.*

11. Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows the public to verify the tally.

All other activities or regulations pled are denied.

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<sup>161</sup> California Code of Regulations, title 2, section 20124(b).

<sup>162</sup> California Code of Regulations, title 2, section 20124(c).

<sup>163</sup> California Code of Regulations, title 2, section 20125(a).

<sup>164</sup> California Code of Regulations, title 2, section 20125(b).

<sup>165</sup> California Code of Regulations, title 2, section 20126(b).

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 14, 2014, I served the:

**Final Staff Analysis and Proposed Statement of Decision**

*Post Election Manual Tally (PEMT), 10-TC-08*  
Former California Code of Regulations, Title 2, Sections 20120, 20121, 20122,  
20123, 20124, 20125, 20126 and 20127; Register 2008, No.43  
County of Santa Barbara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 14, 2014 at Sacramento, California.



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Heidi J. Palchik  
Commission on State Mandates  
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(916) 323-3562

# COMMISSION ON STATE MANDATES

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**Claim Number:** 10-TC-08

**Matter:** Post Election Manual Tally (PEMT)

**Claimant:** County of Santa Barbara

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Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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