

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

California Code of Regulations, Title 2,  
Division 7, Chapter 3, Sections 20120, 20121,  
20122, 20123, 20124, 20125, 20126 and  
20127<sup>1</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)*

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

*(Adopted July 25, 2014)*

*(Served July 30, 2014)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 25, 2014. Ann Rierson and Renee Bischof appeared on behalf of the claimant. Lee Scott and Susan Geanacou appeared on behalf of the Department of Finance.

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 the proposed decision to approve the test claim at the hearing by a vote of 7-0.

**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, alleging costs of \$250,126.09. The claimant estimates statewide costs of \$817,479.96.

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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.

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 direct recording electronic voting system or other voting system equipped for individuals with disabilities, including those that are blind and visually impaired, at each polling site 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.”<sup>2</sup> Federal case law also suggests that a failure to provide, at each polling place, accessible electronic voting systems for the disabled *at any election* may violate the American with Disabilities Act (ADA) and section 504 of the federal Rehabilitation Act.<sup>3</sup>

In addition, counties could not, practically speaking, stop using their already-approved electronic voting systems to avoid the test claim regulations. When the test claim regulations took effect on October 20, 2008, all California counties had voting systems in place at each polling site, vote by mail had been underway for 13 days and several counties had begun early voting at the polls days or weeks earlier. With election day proper only 16 days away and voting already underway, counties could not, as a practical matter, stop using the already-approved electronic voting system and change to a paper ballot only voting process to avoid the test claim regulations. Moreover, adopting a paper voting system would require counties to have their ballots and ballot cards approved by the Secretary of State (SOS).<sup>4</sup> If the counties wished to purchase their ballot cards directly from the manufacturer, SOS permission is required and the request must comply with a specified format.<sup>5</sup> And the order in which federal and state candidates appear on the ballot must be certified by the SOS and transmitted to elections officials, with exceptions for some state candidates.<sup>6</sup>

Thus, the new requirements imposed by the test claim regulations are mandated by the state.

The Commission further finds that the requirements of the test claim regulations refer to and overlap with preexisting 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 required to be performed in addition to the one percent manual tally, 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.

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<sup>2</sup> 42 USC 15481 (a)(3).

<sup>3</sup> Exhibit G. *California Council of the Blind v. County of Alameda* (N.D.Cal.2013) 985 F.Supp.2d 1229.

<sup>4</sup> Elections Code section 13260.

<sup>5</sup> California Code of Regulations, title 2, §§ 20235-20236.

<sup>6</sup> Elections Code section 13112.

Finally, 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.

Accordingly, the Commission concludes that former California Code of Regulations, title 2, division 7, chapter 3, 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 (i.e. November 10, 2008-November 28, 2008), following the November 2008 General Election only:<sup>7</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>8</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>9</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>10</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>11</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

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<sup>7</sup> California Code of Regulations, title 2, section 20127.

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

<sup>9</sup> California Code of Regulations, title 2, section 20122(a).

<sup>10</sup> California Code of Regulations, title 2, section 20122(b).

<sup>11</sup> California Code of Regulations, title 2, section 20121(b)(e)(f).

damaged or defective are not inadvertently tallied as valid ballots in the manual tally process.<sup>12</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>13</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>14</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>15</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 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>16</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>17</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>18</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>19</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

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<sup>12</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>13</sup> California Code of Regulations, title 2, section 20123(b).

<sup>14</sup> California Code of Regulations, title 2, section 20124(a).

<sup>15</sup> California Code of Regulations, title 2, section 20124(a).

<sup>16</sup> California Code of Regulations, title 2, section 20124(b).

<sup>17</sup> California Code of Regulations, title 2, section 20124(c).

<sup>18</sup> California Code of Regulations, title 2, section 20125(a).

<sup>19</sup> California Code of Regulations, title 2, section 20125(b).

random selection of precincts which may become necessary to comply with escalation requirements.<sup>20</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 in this test claim do not constitute reimbursable state-mandated programs or higher levels of service subject to article XIII B, section 6 of the California Constitution and are therefore denied.

## COMMISSION FINDINGS

### I. Chronology

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|----------|---|
| 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).                   |
| 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.   |

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<sup>20</sup> California Code of Regulations, title 2, section 20126(b).

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.
03/14/14	Commission staff issued the final staff analysis and proposed statement of decision for the March 28, 2014 hearing.
03/24/14	Finance submitted comments on the final staff analysis and requested postponement of hearing.
03/25/14	Commission staff requested comments from claimant and the SOS in response to Finance's comments, and rescheduled the hearing to May 30, 2014.
04/15/14	Claimant requested an extension of time to file comments to April 25, 2014.
04/25/14	Claimant filed comments on the final staff analysis.
05/15/14	Commission staff issued the revised final staff analysis and proposed decision for the May 30, 2014 hearing.
05/16/14	Claimant requested postponement of the hearing until July 25, 2014, which was approved for good cause.

## **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 26, 2008, and alleges costs 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 preexisting 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>21</sup> The

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<sup>21</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."

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>22</sup> begins immediately upon the close of the polls and continues until all precincts are accounted for.<sup>23</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 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>24</sup>

The official canvass begins no later than the Thursday following the election, is open to the public, and continues daily until completed.<sup>25</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>26</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.
- 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.

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<sup>22</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>23</sup> Elections Code sections 15150, *et seq.*

<sup>24</sup> Exhibit G. California Secretary of State, "The Official Canvass of the Vote" <<http://www.sos.ca.gov/elections/official-canvass.htm>> accessed on September 1, 2013.

<sup>25</sup> Elections Code section 15301.

<sup>26</sup> Elections Code sections 15372 and 15375.

- 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>27</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>28</sup>

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

By state statute, 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>29</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 single office may not be split between voting systems or between a voting system and paper ballots.<sup>30</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>31</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>32</sup>

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<sup>27</sup> Exhibit G. See California Secretary of State, “The Official Canvass of the Vote” <<http://www.sos.ca.gov/elections/official-canvass.htm>> accessed on September 1, 2013.

<sup>28</sup> Elections Code section 15003.

<sup>29</sup> Elections Code section 362, as added by Statutes 1994, chapter 920.

<sup>30</sup> Statutes 1994, chapter 920; derived from former Elections Code section 15112, added by Statutes 1976, chapter 246.

<sup>31</sup> Elections Code sections 19204, 19206, 19207, 19208 and 19209.

<sup>32</sup> Elections Code sections 19220-19222.

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>33</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>34</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>35</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 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>36</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>37</sup> HAVA requires, effective January 1, 2006, voting systems used in federal elections to:

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<sup>33</sup> Elections Code section 336.5.

<sup>34</sup> Statutes 2007, chapter 508.

<sup>35</sup> Elections Code section 15360 (d).

<sup>36</sup> 42 USC 15301 (b)(1)(H).

<sup>37</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

(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>38</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 listed above, regardless of whether the states choose to accept funding under Title I or Title II of HAVA.<sup>39</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." 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>40</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

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(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>38</sup> 42 USC 15481 (a)(3).

<sup>39</sup> Exhibit G. U.S. Department of Justice, Civil Rights Division, Voting Section, "Frequently Asked Questions."

<sup>40</sup> Exhibit G. Senate Committee on Elections, Reapportionment, and Constitutional Amendments, Analysis of AB 2023 (2009-2010 Reg. Sess.) amended April 27, 2010, pages 3-4.

document entitled “Post-Election Manual Tally Requirements.”<sup>41</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>42</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>43</sup> The court held that the PEMT requirements adopted in 2007 were therefore void.<sup>44</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>45</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 and manually tally the results for that contest from the precincts randomly selected.<sup>46</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>47</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>48</sup>
- For contests voted upon in more than one jurisdiction:

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<sup>41</sup> Exhibit G. 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>42</sup> Exhibit G. 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>43</sup> *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501.

<sup>44</sup> *Id.* at page 520.

<sup>45</sup> California Code of Regulations, title 2, section 20120(b).

<sup>46</sup> California Code of Regulations, title 2, sections 20120(b), 20121.

<sup>47</sup> California Code of Regulations, title 2, section 20127.

<sup>48</sup> California Code of Regulations, title 2, section 20121(a).

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>49</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>50</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 of randomly selected precincts. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally.<sup>51</sup>
  - The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.<sup>52</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>53</sup>
  - Document and disclose to the public any variances between the semifinal official canvass results and the manual tally results.<sup>54</sup>
  - 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>55</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

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<sup>49</sup> California Code of Regulations, title 2, section 20122(a).

<sup>50</sup> California Code of Regulations, title 2, section 20122(b).

<sup>51</sup> California Code of Regulations, title 2, section 20121(b)(e).

<sup>52</sup> California Code of Regulations, title 2, section 20121(f).

<sup>53</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>54</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>55</sup> California Code of Regulations, title 2, section 20124(a).

manually tallied for that contest.<sup>56</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>57</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>58</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>59</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>60</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 of the manual tally process; and (3) any additional random selection of precincts which may become necessary to comply with escalation requirements.<sup>61</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>62</sup>

During the November 2008 Presidential General Election, all 58 counties in California used an approved voting system.<sup>63</sup>

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<sup>56</sup> California Code of Regulations, title 2, section 20124(a).

<sup>57</sup> California Code of Regulations, title 2, section 20124(b).

<sup>58</sup> California Code of Regulations, title 2, section 20125(a).

<sup>59</sup> California Code of Regulations, title 2, section 20125(b).

<sup>60</sup> California Code of Regulations, title 2, section 20126(a).

<sup>61</sup> California Code of Regulations, title 2, section 20126(b).

<sup>62</sup> California Code of Regulations, title 2, section 20126(c).

<sup>63</sup> Exhibit G. 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.

### 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>64</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 28, 2008:<sup>65</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.
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.

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<sup>64</sup> Exhibit A. County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)* page 7.

<sup>65</sup> Exhibit A. County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)* Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara.

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>66</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>67</sup>

Claimant commented on 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;

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<sup>66</sup> Exhibit A. County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)* page 10.

<sup>67</sup> *Id.* at page 9.

- 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 reexamination 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.

Claimant filed comments on April 25, 2014 responding to the arguments raised by Finance.<sup>68</sup> Claimant argues that the test claim regulations impose a new program or higher level of service because the requirements exceed the requirements of the one percent manual tally required by existing law, and increase the actual level and quality of governmental services provided to the public. Claimant states that sections 20123, 20125, and 20126 of the regulations expanded the scope of the requirements in existing law to account for the additional nine percent of precincts. Claimant further argues that the required activities in sections 20121, 20122, and 20124 of the regulations are new as follows:

...The additional 9% manual tally is a new program or higher level of service because the Post Election Manual Tally Requirements in Close Contest (PEMT) exceed the requirements of the one percent manual tally required by California Elections Code Section 15360. The requirements impose and [sic] increase in the actual level and quality of governmental services provided.

Elections Code Section 15360 requires elections officials to conduct a manual tally of 1% of randomly selected precincts for each contest on the ballot. The PEMT regulations did not merely increase the sample size to 10%, the addition of sections § 20121 – Increased manual tally in contests with narrow margins of victory, § 20122 – Contests voted upon in more than one jurisdiction, and § 20124

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<sup>68</sup> Exhibit I.

– Manual tally escalation requirements for variances went beyond the scope of E.C. 15360.

Determine the margin of victory

With the addition of § 20121 the elections officials were required to determine the margin of victory in each contest based on the results as reported in the semifinal official canvass of results and the type of contest; single-winner, multi-winner, or ballot measure contests. As defined in Elections Code section 353.5 the “semi-final official canvass” is 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.

#### Contest in more than one jurisdiction

Prior to the adoption of § 20122, elections officials in other jurisdictions acted independently from one another in the conduct of the manual tally provisions set for [sic] in Elections Code section 15360. With the addition of § 20122, for contests voted in more than one jurisdiction, the overall margin of victory in all jurisdictions in which votes were cast for that contest needed to be determined. If the combined margin of victory was more than one half of one percent, a ten percent manual tally was not required. If the combined margin of victory was less than one half of one percent, a ten percent manual tally was required to be completed.

#### Escalation Requirements

With the addition of § 20124 when variances occurred between the semifinal results and the manual tally result the elections officials were required to do the following:

1. Calculate the variance for each contest.
2. Determine if additional precincts were required to be tallied, which occurred if the variance percentage represented at least 10% of the margin of victory for that contest.
3. Tally randomly selected precincts in 5% increments until the total number of variances re-calculated was smaller than 10% of the margin of victory for that contest or until all ballots have been tallied, whichever came first.
4. Notify the Secretary of State’s Office if any variances exists between manually tallied voter verifiable paper audit trail records and electronic vote results that could not be accounted for by an obvious mechanical problem. In this instance all VVPAT records, memory cards/devices, and direct recording electronic voting machines were required to be preserved for investigation by the Secretary of State.

As an alternative to the 10% manual tally with escalation requirements, the elections official had the option to conduct a 100% manual tally of the ballots in a given contest meeting the Post Election Manual Tally requirements.<sup>69</sup>

The claimant further states that the new and additional requirements are mandated by the state because under federal law (HAVA), counties are required to use at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place to satisfy the requirement for access for individuals with disabilities and, thus, had no choice but to comply with the test claim regulations. And, finally, claimant asserts that section 20127 of the regulations requires reimbursement under article XIII B, section 6 because the requirement to complete the new tasks within the canvass period, increased the value of the services provided by the county and increased the costs incurred by the county.

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

Finance contends that the test claim regulations do not result in a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. 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) ...<sup>70</sup>

In March 2014, Finance filed comments arguing that preexisting law has always required county election officials to conduct post-election manual tallies under certain limited circumstances. Although under the test claim regulations, the manual tally is increased from one percent to 10 percent, the tally is not a new program or higher level of service, but merely results in increased costs that are not reimbursable. Finance states the following:

Here, while the subject regulation has increased the size of the actual manual tally from 1 percent to 10 percent in specific circumstances, this increase is not "new" or "a higher level of service." Rather, this increase results in additional costs (i.e., increased sample size). (See *Lucia Mar Unified Sch. Dist. v. Honig* (1988) 44 Cal. 3d 830.) Moreover, the Proposed Decision mistakenly concludes that the requirement is new because it increases "public confidence in the accuracy of election results." (Proposed Decision, p. 12.) As noted above, post-election manual tallies have always existed. The mere increase in the number of ballots

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<sup>69</sup> Exhibit I.

<sup>70</sup> Exhibit B.

counted by counties does not correspond with increased duties or increased "public confidence."<sup>71</sup>

Finance further argues that counties are not required by state or federal law to have an electric or mechanical voting system, so they are not legally compelled to comply with the test claim regulations. Specifically, Finance states the following:

Second, the Proposed Decision seems to suggest that HAVA (Help America Vote Act) requires locals to have at least one "direct recording electronic voting system or other voting system" to assist the visually impaired. (42 U.S.C § 15481 (a)(3).) While it is true that most voting systems have an electronic or mechanical component, the relied on HAVA provision is an "access" statute, requiring that individuals with disabilities, including the visually impaired, have the opportunity to vote independently and in private. It does not mandate a mechanical or electronic system. HAVA states that while a voter must be able to verify his or her selection in a private and independent manner, the term "'verify' may not be defined in a manner that makes it impossible for a paper ballot voting system . . . {42 U.S.C § 15481 (c)(2).) And HAVA specifically states that the methods of complying with this relied on section is left to the discretion of the state. (42 U.S.C § 15485.) Last, other sources, including the Secretary of State's State Plan (2008) show that the relied on provision of HAVA is about access and not a specific type of voting system. Thus, Finance asks that the Commission reconsider its determination of federal law in the Proposed Decision.<sup>72</sup>

### **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

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<sup>71</sup> Exhibit H.

<sup>72</sup> Exhibit H.

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 former Elections Code section 19227(b)<sup>73</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

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<sup>73</sup> This provision is currently in Elections Code section 19242 as of Statutes 2013, chapter 602.

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>74</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>75</sup>

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

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>76</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>77</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>78</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>79</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>80</sup> The determination of whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>81</sup> In making its decisions, the Commission must strictly construe article XIII B,

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<sup>74</sup> *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

<sup>75</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>76</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>77</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at pp. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>78</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>79</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>80</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

<sup>81</sup> *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>82</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>83</sup> The claimant incurred actual costs as a result of the regulations less than one month later, beginning November 10, 2008.<sup>84</sup> The test claim was filed on March 28, 2011. Although the test claim was 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 1183.1(b) 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.

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<sup>82</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>83</sup> Register 2008, No. 43, operative October 20, 2008.

<sup>84</sup> Exhibit A, County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)*, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara.

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>85</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 1183.1(b) 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

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<sup>85</sup> *Don Johnson Productions, Inc. v. Rysher Entertainment* (2012) 209 Cal.App.4th 919, 929.

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 Partial 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 do not mandate counties to perform any required activities, but establish the timing and 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 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. In comments on the proposed decision, the claimant argues that section 20127 is a new program or higher level of service that requires reimbursement for the costs of completing the activities within the canvass period:

Section 20127 requires that for any contest in which an increased manual tally is required, the elections official shall complete all tasks and make all reports required by this chapter within the canvass period established by Elections Code sections 10262 and 15372. Previously, the County was not required to complete such a large amount of tallying activity within the official canvass period. Also, the additional work was required to be done in such a short period of time so that the public could quickly receive the election results, which increases their value, and have confidence in those results. This timing requirement also increased the costs of such additional services.<sup>86</sup>

Section 20127, itself, does not mandate counties to perform any activities, but establishes the timing for the performance of the activities required by the other regulations pled in this claim. It states the following:

For any contest in which an increased manual tally is required by this chapter, the elections official shall *complete all tasks and make all reports required by this chapter within the canvass period established by Elections Code sections 10262 and 15372.* [Emphasis added.]

Thus, section 20127, alone, does not establish a state-mandated program. However, to the extent the Commission finds that the remaining regulations require counties to perform new activities

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<sup>86</sup> Exhibit I.

that impose a reimbursable state-mandated program pursuant to article XIII B, section 6, reimbursement will be required for *all* increased costs incurred to comply with the mandated program in accordance with the law and within the time period established by section 20127.<sup>87</sup>

Accordingly, sections 20120 and 20127, in themselves, do not impose any mandated activities 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>88</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>89</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>90</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>91</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%) of randomly selected precincts. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally.<sup>92</sup>
- The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.<sup>93</sup>

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<sup>87</sup> California Constitution, article XIII B, section 6. Government Code section 17514.

<sup>88</sup> California Code of Regulations, title 2, section 20127.

<sup>89</sup> California Code of Regulations, title 2, section 20121(a).

<sup>90</sup> California Code of Regulations, title 2, section 20122(a).

<sup>91</sup> California Code of Regulations, title 2, section 20122(b).

<sup>92</sup> California Code of Regulations, title 2, section 20121(b)(e).

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

- 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>94</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>95</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>96</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>97</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>98</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>99</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 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>100</sup>

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<sup>94</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>95</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>96</sup> California Code of Regulations, title 2, section 20124(a).

<sup>97</sup> California Code of Regulations, title 2, section 20124(a).

<sup>98</sup> California Code of Regulations, title 2, section 20124(b).

<sup>99</sup> California Code of Regulations, title 2, section 20124(c).

<sup>100</sup> California Code of Regulations, title 2, section 20125(a).

- 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>101</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>102</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>103</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>104</sup>

Finance contends that these requirements are not new because a one percent manual tally has always been required. According to Finance, the test claim regulations resulted in a mere increase in the number of ballots counted by counties, but no corresponding increase in the duties performed.<sup>105</sup>

The claimant counters by arguing that:

Elections Code Section 15360 requires elections officials to conduct a manual tally of 1 % of randomly selected precincts for each contest on the ballot. The PEMT regulations did not merely increase the sample size to 10%, the addition of sections § 20121 - Increased manual tally in contests with narrow margins of victory, § 20122 - Contests voted upon in more than one jurisdiction, and § 20124 - Manual tally escalation requirements for variances went beyond the scope of E.C. 15360.<sup>106</sup>

Although some of the test claim regulations refer to preexisting law in Elections Code section 15360 and, thus, need to be interpreted to determine what is newly required, the Commission finds that the test claim regulations impose new requirements on counties that were not required under preexisting law.

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<sup>101</sup> California Code of Regulations, title 2, section 20125(b).

<sup>102</sup> California Code of Regulations, title 2, section 20126(a).

<sup>103</sup> California Code of Regulations, title 2, section 20126(b).

<sup>104</sup> California Code of Regulations, title 2, section 20126(c).

<sup>105</sup> Exhibit H.

<sup>106</sup> Exhibit I.

The second bulleted activity above (regarding contests voted on in more than one jurisdiction) is required by section 20121(b) of the regulations, and requires 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 of 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 when margin of victory is *less than* one half of one percent (0.5%), 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. The Commission further finds that section 20121(b) did not simply increase the size of the manual tally and the costs incurred by counties, as suggested by Finance. Section 20121(b) requires counties to perform *new additional* duties to manually tally the votes in nine percent of the precincts employing the methods set forth in Elections Code section 15360. Elections Code section 15360(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. These duties were not required under prior law.

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 preexisting 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 preexisting 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 preexisting 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>107</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>108</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>109</sup>

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<sup>107</sup> California Code of Regulations, title 2, section 20127.

<sup>108</sup> California Code of Regulations, title 2, section 20121(a).

<sup>109</sup> California Code of Regulations, title 2, section 20122(a).

- 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>110</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>111</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>112</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>113</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>114</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>115</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>110</sup> California Code of Regulations, title 2, section 20122(b).

<sup>111</sup> California Code of Regulations, title 2, section 20121(b)(e)(f).

<sup>112</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>113</sup> California Code of Regulations, title 2, section 20123(b).

<sup>114</sup> California Code of Regulations, title 2, section 20124(a).

<sup>115</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>116</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>117</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>118</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>119</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>120</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>121</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>122</sup>

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

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

<sup>118</sup> California Code of Regulations, title 2, section 20125(a).

<sup>119</sup> California Code of Regulations, title 2, section 20125(b).

<sup>120</sup> California Code of Regulations, title 2, section 20126(b).

<sup>121</sup> California Code of Regulations, title 2, section 20126(c).

<sup>122</sup> *Kern High School Dist., supra*, 30 Cal.4th 727, 731. (Emphasis added.)

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>123</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 counties, cities, school districts, and special districts that employ peace officers.<sup>124</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>125</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>126</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>127</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>128</sup>

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<sup>123</sup> *Id.* at pages 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.

<sup>124</sup> Exhibit G. Commission on State Mandates, Statement of Decision CSM-4499.

<sup>125</sup> Exhibit G. 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>126</sup> *POBRA, supra*, 170 Cal.App.4th at page 1368.

<sup>127</sup> California Code of Regulations, title 2, section 20120(b), emphasis added.

<sup>128</sup> Statutes 1994, chapter 920; derived from former Elections Code section 15112, added by Statutes 1976, chapter 246.

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. Finally, 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.

a) *Counties are compelled by federal law to use voting systems in federal elections.*

On October 29, 2002, the federal HAVA was enacted and signed into law.<sup>129</sup> Title III of HAVA requires voting equipment *used in federal elections* 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” by demanding “at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities in each polling place.”<sup>130</sup> State and local voting authorities had to comply with the accessibility provision by January 1, 2006.<sup>131</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>132</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>133</sup>

In comments submitted on the proposed decision, Finance argues that HAVA does not require states to have voting systems. Rather, Finance argues that the requirement in HAVA for direct recording electronic voting systems to assist the visually impaired is an ‘access’ statute requiring that individuals with disabilities have the opportunity to vote independently and in private, but HAVA does not mandate counties to use a mechanical or electronic system. Finance further emphasizes the plain language of HAVA, which states that while a voter must be able to verify his or her selection in a private and independent manner, the term ‘verify’ may not be defined in

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<sup>129</sup> 42 U.S.C. sections 15301-15545, Public Law No. 107-252.

<sup>130</sup> 42 U.S.C. section 15481(a)(3)(A)(B).

<sup>131</sup> 42 U.S.C. section 15481(d).

<sup>132</sup> 42 U.S.C. section 15111.

<sup>133</sup> Exhibit G. U.S. Department of Justice, Civil Rights Division, Voting Section, “Frequently Asked Questions.”

a manner that makes it impossible for a paper ballot voting system.<sup>134</sup> In addition, the provisions of HAVA also provide that the methods of complying with this relied on section is left to the discretion of the state.<sup>135</sup>

Claimant filed comments to rebut Finance, arguing that HAVA requires a mechanical or electronic voting system in order to meet the requirement that "individuals with disabilities, including the visually impaired, have the opportunity to vote independently and in private."<sup>136</sup>

While it is correct that HAVA allows states to use paper ballot systems for voting, and contains voting and auditing requirements that are applicable to paper ballots, the plain language of HAVA still mandates states to have *at least one* direct recording electronic voting system or other voting system equipped for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, at each polling place.

HAVA, in 42 U.S.C. section 15481(a)(1)(A), establishes the general requirements for each voting system, including that the system shall (1) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted; (2) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted; (3) notify the voter that the voter has selected more than one candidate for a single office; and (4) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted. "Voting system," as used in section 15481, is defined in section 42 U.S.C. section 15481(b) as "the total combination of mechanical, electromechanical, or electronic equipment (including software, firmware and documentation required to program, control, and support the equipment) that is used to define ballots, to cast and count ballots, to report or display election results, and to produce and maintain any audit trail information." In addition, the definition includes the practices and documentation used to identify system components, to test the system, to maintain records, to determine changes needed to improve the system, and to make available any materials to the voter (such as notices, instruction, forms, or paper ballots). Thus, with respect to *casting and counting ballots*, "voting system" is defined to mean the combination of mechanical, electromechanical, or electronic equipment.

Section 15481(a)(1)(B) also recognizes the use of paper ballots for casting and counting ballots. That section provides that a state or jurisdiction that uses a paper ballot voting system may comply with the requirement to notify the voter that the voter has mistakenly selected more than one candidate for a single office by also establishing a voter education program that informs voters about over-votes and providing the voter with instructions on how to correct or replace the ballot before it is cast and counted. Section 15841(c)(2) also clarifies that the requirement *in subdivision (a)(1)(A)(i)* (to permit the voter to "verify" in a private and independent manner the votes selected by the voter on the ballot before the ballot is cast and counted) may be satisfied by using a paper ballot voting system as follows:

*For purposes of subsection (a)(1)(A)(i) of this section [requiring that the voting system "permit the voter to verify, in a private and independent manner, the votes*

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<sup>134</sup> 42 U.S.C section 15481(c)(2).

<sup>135</sup> 42 U.S.C. section 15485. Exhibit H.

<sup>136</sup> Exhibit I.

selected by the voter on the ballot before the ballot is cast and counted”] the term “verify” may not be defined in a manner that makes it impossible for a paper ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements. [Emphasis added.]

Thus, HAVA continues to preserve the option of using paper ballot voting for casting and counting ballots as long as the process allows the voter to verify the votes selected and correct any over-votes in a private and independent manner.

However, even if a state uses paper ballots, the plain language of section 15481(a)(3) requires at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities, including a system equipped for the blind and visually impaired, be placed at each polling place as follows:

(1) Accessibility for individuals with disabilities

The voting system shall -

- (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; and*
- (C) if purchased with funds made available under subchapter II of this chapter on or after January 1, 2007, meet the voting system standards for disability access (as outlined in this paragraph). [Emphasis added.]<sup>137</sup>

The voting system does not have to a direct recording electronic voting system, but pursuant to subdivision (b), can be any “mechanical, electromechanical, or electronic equipment” used for such purposes. These would include, for example, electronic ballot marking devices or tactile ballot templates with headphones.

Thus, although a state or jurisdiction may use paper ballots for voting, they are also required by federal law to have at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling site.

In addition, case law suggests that a failure to provide, at each polling place, accessible voting systems for the disabled *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>138</sup> In *California Council of the Blind v. County of Alameda*, the

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<sup>137</sup> See also, *American Ass’n. of People with Disabilities v. Shelley* (2004) 324 F.Supp.2d 1120, 1127.

<sup>138</sup> Rehabilitation Act of 1973, section 504, 29 U.S.C. section 794(a); ADA of 1990, 42 U.S.C. section 12132.

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>139</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 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>140</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>141,142</sup>

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<sup>139</sup> Exhibit G. *California Council of the Blind v. County of Alameda* (N.D.Cal.2013) 985 F.Supp.2d 1229.

<sup>140</sup> Citing to ADA regulations, 28 C.F.R. section 35.160(b)(2).

<sup>141</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>142</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

Thus, at the time the test claim regulations became effective, counties were mandated by federal law to have at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling site during the November 2008 General Election and legally compelled to comply with the test claim regulations.

b) Counties were also practically compelled to comply with the test claim regulations.

Even if the federal requirements did not exist, claimant and CSAC have submitted evidence in the record to support a finding 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>143</sup> A core mandatory function of counties is to conduct elections.<sup>144</sup> When the test claim regulations took effect on October 20, 2008, all California counties had voting systems in place at each polling site, vote by mail had been underway for 13 days and several counties had begun early voting at the polls days or weeks earlier. With election day proper only 16 days away and voting already underway, counties could not, as a practical matter, stop using the already-approved electronic voting system and change to a paper ballot only voting process to avoid the test claim

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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 CF.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).

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>143</sup> *POBRA*, *supra*, 170 Cal.App.4th 1355, 1368.

<sup>144</sup> Government Code section 26802.

regulations. Moreover, adopting a paper voting system would require counties to have their ballots and ballot cards approved by the SOS.<sup>145</sup> If the counties wished to purchase their ballot cards directly from the manufacturer, SOS permission is required and the request must comply with a specified format.<sup>146</sup> And the order in which federal and state candidates appear on the ballot must be certified by the SOS and transmitted to elections officials, with exceptions for some state candidates.<sup>147</sup> Given these requirements and the proximity of the election to the effective date of the regulations, 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 new mandated requirements constitute a new program or higher level of service. In the *San Diego Unified School District* case, the California Supreme Court defined a higher level of service as “an increase in the actual level or quality of governmental services provided.”<sup>148</sup> The court went on to say that the commonly understood sense of “higher level of service” consists of: “(i) the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to the enactment of [the test claim statute or regulation], (ii) the requirements were intended to provide an enhanced service to the public ....” The court also recognized that the statute or executive order must be unique to government.<sup>149</sup> In this case, the SOS explained the following reasons for, and cited studies to support, the emergency regulations package that became the test claim regulations:

- Public confidence in election results is essential to the legitimacy of our system of government.
- In a December 2000 national Gallup poll, 67% of respondents said they little or no confidence in the nation’s vote counting, and more recent polls cited by the SOS also reflect a low level of confidence.
- The SOS issued the original PEMT requirements in October 2007 only after months of extensive research and expert consultation that revealed the vulnerability of electronic voting system to error and tampering, and the value of enhanced PEMT to ensure the integrity and accuracy of results produced by those systems in close contests.
- The PEMT requirements were successfully implemented in the June 2008 Statewide Primary Elections in seven counties where initial margins of victory smaller than .5% called for manual tallies of those contests in 10% of the precincts. The PEMT requirements were restructured into the format of formal regulations without changing their operation or effect.

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<sup>145</sup> Elections Code section 13260.

<sup>146</sup> California Code of Regulations, title 2, §§ 20235-20236.

<sup>147</sup> Elections Code section 13112.

<sup>148</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

<sup>149</sup> *Id.* at page 878.

- Numerous scientific studies have proven that electronic voting poses serious new threats to the integrity and accuracy of election results, including a different and more serious risk of tampering.
- Electronic voting systems are also prone to errors and inaccuracies even in the absence of malicious tampering.
- PEMT requirements are a check on the trustworthiness and accuracy of results and one that research shows is particularly effective.
- There is clear evidence to show that the one percent manual tally is not adequate to ensure voting system integrity and accuracy, based on findings of the Post Election Audit Standards Working Group convened by the Secretary of State in 2007, including a finding that a one percent manual tally was inadequate to detect many errors or fraud that could alter the outcome in a close contest.
- There is clear evidence that ballots have been miscounted by electronic voting systems in California elections and that thousands of the state’s vote counting machines have been compromised.<sup>150</sup>

In accordance with these findings of the SOS, the test claim regulations requiring a higher manual tally in cases where the margin of victory is narrow provides an enhanced service to the public. Additionally, the regulations are unique to government in that they expressly apply only to “the Secretary of State and all elections officials within the State of California.”<sup>151</sup> In sum, the Commission finds that the regulations meet the California Supreme Court’s definition of 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), Impose Increased Costs Mandated by the State on 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>152</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

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<sup>150</sup> Exhibit G. Letter from Lowell Finley, Deputy Secretary of State, to the Office of Administrative Law Research Attorney, regarding the proposed emergency regulations, October 17, 2008, pages 1-6.

<sup>151</sup> California Code of Regulations, title 2, section 20120(b).

<sup>152</sup> Government Code section 17514.

performed between November 10, 2008 and November 26, 2008.<sup>153</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>154</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>155</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:

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:

[¶] . . . [¶]

(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>156</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, division 7, chapter 3, 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

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<sup>153</sup> Exhibit A. County of Santa Barbara, Test Claim 10-TC-08, *Post Election Manual Tally (PEMT)*, Declaration of Renee Bischoff, Elections Division Manager for the County of Santa Barbara.

<sup>154</sup> *Id.* at page 9.

<sup>155</sup> *Id.* at page 10.

<sup>156</sup> *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 520.

incurred by county 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>157</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>158</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>159</sup>
  - 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>160</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>161</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>162</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>163</sup>

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<sup>157</sup> California Code of Regulations, title 2, section 20127.

<sup>158</sup> California Code of Regulations, title 2, section 20121(a).

<sup>159</sup> California Code of Regulations, title 2, section 20122(a).

<sup>160</sup> California Code of Regulations, title 2, section 20122(b).

<sup>161</sup> California Code of Regulations, title 2, section 20121(b)(e)(f).

<sup>162</sup> California Code of Regulations, title 2, section 20121(i)(j).

<sup>163</sup> California Code of Regulations, title 2, section 20123(b).

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>164</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>165</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>166</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>167</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>168</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>169</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>170</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.*

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<sup>164</sup> California Code of Regulations, title 2, section 20124(a).

<sup>165</sup> California Code of Regulations, title 2, section 20124(a).

<sup>166</sup> California Code of Regulations, title 2, section 20124(b).

<sup>167</sup> California Code of Regulations, title 2, section 20124(c).

<sup>168</sup> California Code of Regulations, title 2, section 20125(a).

<sup>169</sup> California Code of Regulations, title 2, section 20125(b).

<sup>170</sup> California Code of Regulations, title 2, section 20126(b).

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 in this test claim do not constitute reimbursable state-mandated programs or higher levels of service subject to article XIII B, section 6 of the California Constitution and are therefore denied.

**COMMISSION ON STATE MANDATES**

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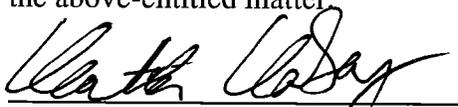
**RE: Adopted Decision**

*Post Election Manual Tally (PEMT), 10-TC-08*

Former California Code of Regulations, Title 2, Division 7, Chapter 3, Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127; Register 2008, No.43

County of Santa Barbara, Claimant

On July 25, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.

  
Heather Halsey, Executive Director

Dated: July 30, 2014