

**ITEM 5**  
**FINAL STAFF ANALYSIS**  
**PROPOSED PARAMETERS AND GUIDELINES**

Elections Code Section 14310  
Statutes 2000, Chapter 260 (SB 414)

*Voter Identification Procedures*  
03-TC-23

County of San Bernardino, Claimant

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**EXECUTIVE SUMMARY**

This item proposes the adoption of parameters and guidelines, and is the first in a group of claims that analyzes requests made to the Commission to adopt a unit cost reasonable reimbursement methodology (RRM) in the parameters and guidelines pursuant to Government Code section 17557 and 17518.5. The requests propose the adoption of a single unit cost RRM to be claimed by all eligible claimants in the state for the reimbursement of costs to comply with the mandated program for initial and future periods of reimbursement. In most cases, the unit costs are proposed for reimbursement in lieu of the actual costs incurred by a claimant in a fiscal year. In this case, the proposal requests that a claimant be given a choice to claim reimbursement for the unit cost proposed or the actual costs incurred. These proposals raise many questions of law and fact, and as discussed in the analysis, before the Commission can adopt a unit cost, the Commission must determine if the facts and proposals meet the requirements of Government Code section 17518.5.

**Background**

This test claim, filed by County of San Bernardino, addresses an amendment to Elections Code section 14310, regarding counting “provisional ballots.” A provisional ballot is a regular ballot that has been sealed in a special envelope, signed by the voter, and then deposited in the ballot box. Provisional ballots can be required for several reasons, generally to prevent unregistered individuals from voting, or to prevent registered voters from voting twice. For example, provisional ballots may be required when poll workers cannot immediately verify an individual’s name on the official roster, or if a voter requested an absentee ballot, but instead comes to the polling place without bringing the absentee ballot.

The test claim statute, Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1), to add a requirement that elections officials “compare the signature on each provisional ballot envelope with the signature on the voter’s affidavit of registration.”

In 2006, the Commission adopted the statement of decision. The Commission found that although prior law required that “the elections official shall examine the records with respect to all provisional ballots cast,” the law did not require that each signature on a provisional ballot be

directly compared to the signature on the voter's registration affidavit. This is akin to the analysis by the court in *Long Beach Unified School Dist.* (1990) 225 Cal.App.3d 155, 173, which found a higher level of service was mandated when general law on an existing program is changed to require performance of activities in a very specific manner.

The Commission adopted a statement of decision on October 4, 2006, and concluded that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for performing the following specific new activity as part of statutorily-required elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

The Commission further concluded that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

Pursuant to Government Code section 17557, reimbursement for this program begins July 1, 2002.

### **Procedural History of Parameters and Guidelines**

Section 1183.12 of the Commission's regulations authorizes the Commission, within 10 days of adopting the statement of decision, to draft the parameters and guidelines and issue them for comment to assist the claimant and expedite the process. Staff utilized this process and issued the proposed parameters and guidelines for comment on October 10, 2006. The claimant filed initial comments proposing a unit time RRM to be included in the parameters and guidelines. In January 2008, the claimant notified the Commission that it was working with Department of Finance to develop a joint RRM and statewide cost estimate pursuant to Government Code section 17557.1 and, thus, the adoption of parameters and guidelines was stayed.

An agreement on a joint RRM and statewide costs estimate was not reached, however. In June 2010, the claimant informed the Commission that it was no longer developing a joint RRM with the Department of Finance, and submitted revised proposed parameters and guidelines requesting that the Commission adopt parameters and guidelines pursuant to Government Code sections 17557 and 17518.5 that allow a claimant to claim reimbursement based on actual costs incurred, or by using the proposed unit cost RRM of \$1.80 per provisional ballot. The proposed unit cost is based on "various survey and time study data" from counties showing a median time of 1.88 minutes to check the signatures on provisional ballots.

The Department of Finance opposes the proposed unit cost RRM of \$1.80 per ballot as not reasonable. Finance asserts, based on site visits to two election offices, that a more reasonable average time to comply with the mandate is 30 seconds per provisional ballot, rather than the 1.88 minutes used by the claimant to calculate the proposed unit cost.

The State Controller's Office initially agreed that the program here is suitable for a unit cost RRM, but suggested changes to the proposal.

A draft staff analysis was issued in February 2012, recommending the denial of the claimant's request for reimbursement of proposed one-time activities to comply with the program and the claimant's proposed unit cost RRM, on the ground that there is no evidence to support these requests. The draft staff analysis also recommended that the Commission adopt parameters and guidelines identifying the one reimbursable activity identified in the statement of decision that can be claimed based on a showing of the actual costs incurred by the claimant.

The claimant has not filed comments on the draft staff analysis and has informed staff that it will not be attending the hearing.

The Department of Finance agrees with the draft staff analysis and recommendation. The State Controller's Office filed comments on the draft staff analysis, correcting typographical errors and requesting other clarifying changes to the language in the proposed parameters and guidelines. Staff incorporated the Controller's request for nonsubstantive clarifications and corrections in the proposed parameters and guidelines. The Controller also requested that "timesheets" be added to the list of examples of corroborating documentation that may be used to support reimbursement claims. The Commission's general practice when substantive changes are proposed for the boilerplate language is to conduct workshops where all parties are noticed and may discuss the proposed changes. Therefore, until such a workshop is conducted, it is premature to include this language in the parameters and guidelines, and staff did not make the change.

When the draft staff analysis was issued, the parties for all of the proposed RRMs were invited to comment on the analysis because the issues regarding evidence requirements apply to all of the proposed RRMs.

The Commission received comments on the draft staff analysis from the school district claimants in the *Behavioral Intervention Plans* claim, who also propose a unit cost RRM for that program. These interested persons disagree with the draft staff analysis on the RRM evidentiary requirements and argue that:

- The Legislature intended to base reasonable reimbursement methodologies on items such as surveys, and not on sworn statements of actual costs, as the draft staff analysis suggests.
- There is nothing in the Commission's regulations to give notice to claimants that submissions regarding the RRM must be based on sworn statements of costs. "Notice is an essential component of fairness, particularly here where the Commission's interpretation is so different from the statutory wording and from the LAO discussions which the Commission itself cites. At this late date, claimants are woefully prejudiced if held to such a standard."
- The draft staff analysis' narrow interpretation of permissible evidence impedes, rather than facilitates, the Commission's mission to see that the state reimburses each local agency and school district for all costs mandated by the state. The more labored and exacting the Commission's decisions are, the longer this process takes and the more likely it is that local agencies will never be reimbursed at all.

These comments are addressed in the analysis.

## **Staff Analysis**

### ***A. Reimbursable Activities***

The claimant's proposed parameters and guidelines include reimbursement for the following one-time activities:

1. Updating policies and procedures to implement the reimbursable activities listed in Section IV., B, of these parameters and guidelines.
2. Modifying Registrar of Voter's computer system to record the mandated provisional ballot signature comparing activities.
3. Training employees who perform the reimbursable activities listed in Section IV., B, of these parameters and guidelines.

These activities are not mandated by the plain language of the test claim statute, and there is no explanation or evidence in the record explaining why these activities are reasonably necessary to comply with the mandate, as required by section 1183.12 of the Commission's regulations. For example, with respect to the second requested activity, it is not clear why counties would need to modify computer systems to check the signatures for this program. The mandate requires counties to use the same procedures for provisional ballots that it already uses to check signatures for absentee ballots.

Thus, without evidence in the record, staff recommends that the Commission deny the claimant's request to authorize reimbursement for the one-time activities. The proposed parameters and guidelines list only the activity mandated by the test claim statute as follows:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310(c)(1).)

### ***B. Claim Preparation and Submission - Proposed Unit Cost RRM for Ongoing Costs***

#### **1. Claimant's Proposal**

The proposed unit cost RRM of \$1.80 per ballot is for the ongoing costs to check the signatures on provisional ballots. The claimant's proposal uses the median time of 1.88 minutes per provisional ballot, determined from "various survey data and time study data" from counties, multiplied by average salaries of employees. The unit cost is then adjusted each year by the Implicit Price Deflator. Under the proposal, a claimant could choose to claim reimbursement for costs using the RRM *or* by filing a claim based on actual costs incurred.

For the reasons described below, staff finds that the claimant's submittal does not include any evidence to support a finding that the proposed \$1.80 unit cost reasonably represents the costs incurred by an eligible claimant to comply with the mandated program.

2. The purpose of Government Code section 17518.5 is to reimburse local government in a way that reasonably represents their costs mandated by the state pursuant to article XIII B, section 6 of the California Constitution.

Government Code section 17557 addresses the adoption of parameters and guidelines to reimburse eligible claimants for their costs mandated by the state. Subdivision (f) states that when adopting parameters and guidelines, the Commission is required to consult with various parties, including the Legislature, to consider an RRM “that balances accuracy with simplicity.” Subdivision (b) then authorizes the Commission to adopt an RRM as part of the parameters and guidelines.

Government Code section 17518.5 was initially enacted in 2004 and defines an RRM as “a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514.” Section 17518.5 allows for an RRM to be “based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual costs.” The statute requires that the RRM be based on cost information provided by associations of local agencies and school districts, or projections of other local costs; and considers the variation in costs among local government to implement the mandate in a cost-efficient manner.

Government Code section 17518.5 diverts from the traditional requirement of supporting a reimbursement claim filed with the State Controller’s Office with detailed documentation of actual costs incurred and, instead, allows the Commission to adopt an RRM, including a single standard unit cost, based on “approximations” of local costs mandated by the state to be claimed by any eligible claimant in the state.

By determining a unit cost RRM based on approximations or averages of local costs pursuant to section 17518.5, some local entities may receive more than their actual costs incurred to comply with a state-mandated program and some may receive less. And, thus, for any given program with a unit cost, there may be some entities that are not reimbursed the full costs actually incurred, as the courts have determined is required by article XIII B, section 6. Nevertheless, the Legislature has the power to enact statutes, such as Government Code section 17518.5, that provide “reasonable” regulation and control of the rights granted under the Constitution. The Commission must presume that Government Code section 17518.5 meets this standard and is constitutionally valid.

Additionally, the Commission has the duty of applying Government Code section 17518.5 in a constitutional manner. If the Commission approves a unit cost that does not comply with the requirements of section 17518.5 and does not represent a reasonable approximation of costs incurred by any eligible claimant to comply with the mandated program, then the Commission’s decision could be determined unconstitutional and invalid by the courts.

Therefore, the Commission must determine if the proposed unit cost meets the requirements of section 17518.5 and reasonably represents the costs incurred by any eligible claimant to comply with the mandated program.

3. The evidentiary requirements of Government Code section 17557 and 17518.5 for an RRM adopted by the Commission.

The Government Code describes two types of RRM proceedings. One type of RRM is a joint RRM based on a settlement agreement between the Department of Finance and the local entities pursuant to Government Code section 17557.1 and 17557.2. The Commission can approve a joint RRM simply with a showing that an agreement between the Department of Finance and a local entity has been reached, and that the joint methodology is broadly supported by a wide

range of local agencies or school districts. Section 1183.13(b)(2) of the Commission’s regulations implements the joint settlement RRM by allowing the Commission to consider “letters in support of a draft reasonable reimbursement methodology submitted *pursuant to Government Code section 17557.1*,” to show that the proposal is broadly supported by a wide range of local agencies or school districts. This language in section 1183.13(b)(2) applies only to a joint settlement RRM allowed by Government Code section 17557.1 and does not apply to the second type of RRM at issue in this case - a proposed RRM in the parameters and guidelines adopted by the Commission pursuant to Government Code sections 17557 and 17518.

In this matter, the claimant requests the Commission’s adoption of an RRM in the parameters and guidelines pursuant to Government Code section 17557 and 17518.5. Under this process, an agreement reached by the parties that is broadly supported by local government is not required. Instead, section 17518.5 requires the Commission to make specific findings. Section 17518.5(d) states that an RRM, including one that proposes a standard unit cost, shall:

- Be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs; and shall
- Consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner.

There has been a lot of discussion about the meaning of these words and, in particular, the meaning of “cost-efficient” in the second bullet. “Cost-efficient” is not defined in Government Code sections 17500 et seq. However, words and phrases in a statute are construed according to the plain and ordinary meaning of the language used and in context with the statutory scheme. The courts will typically look to dictionary definitions to determine the ordinary meaning.

In this case, the word “efficient” is defined in Webster’s II New College Dictionary as “acting or producing effectively with a minimum of waste or unnecessary effort.” This definition is consistent with other phrases used in Government Code section 17500 et seq., all of which require reimbursement for reasonable and necessary costs incurred to comply with the mandated program. For example, claimants are eligible to receive reimbursement for activities that are “reasonably necessary” for the performance of the mandate; and the costs which are “excessive or unreasonable” may be reduced by the State Controller’s Office.<sup>1</sup> Section 1183.13 of the Commission’s regulations further makes it clear that “costs to implement the mandate in a cost-efficient manner” in section 17518.5 includes “only those costs for the activities that were determined to be reimbursable by the commission in the Statement of Decision, and the costs for the most reasonable methods of complying with the mandate.”

Section 17518.5 also acknowledges that the costs incurred for any given mandate are going to vary with each local entity. Variances in costs are due to many factors including, but not limited to, the time taken by each entity to comply with the mandate; the level of staff used by the entity to implement the mandate; the salary range provided; the cost for materials, supplies, and equipment used; contract costs; the population served; and the extent of outside occurrences that impact or trigger the mandated program. The variables in this case include the time taken to

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<sup>1</sup> Government Code sections 17557, 17561.

check each signature, the salary level of the staff used to comply with the mandate, and whether the county used computers to perform the mandate.

In addition, the statute allows the proposed unit cost RRM to be based on actual cost information incurred by a representative sample of eligible claimants in one fiscal year to be applied and projected to costs incurred in past or future fiscal years. The statute also allows the proposed unit cost RRM to be based on other projections or estimates of costs incurred by a representative sample of eligible claimants for the initial period of reimbursement and for future fiscal years. Nevertheless, as indicated above, a finding must be made that the proposal reasonably represents the costs incurred by any local entity to comply with the mandated program for all fiscal years in the period of reimbursement.

Since the Commission's decision on a proposed unit cost RRM can be challenged in court pursuant Government Code section 17559(b) by either an eligible claimant or the state, the proposed unit cost, and the facts that form the bases of the unit cost, must be supported by substantial evidence in the record. Government Code section 17559(b) has long provided that "A claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence." Code of Civil Procedure section 1094.5 is a claim for administrative mandamus that requires the court to determine whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision. An administrative agency commits an abuse of discretion under section 1094.5 if the decision is not supported by the findings or the findings are not supported by the evidence.<sup>2</sup>

When the Legislature added section 17518.5 to the Government Code to authorize the adoption of an RRM, it did not change the existing requirement in section 17559 that all of the Commission's findings of fact be supported with substantial evidence in the record. Statutory enactments must be considered in the context of the entire statutory scheme of which they are a part and be harmonized with the statutory framework as a whole. In 2011, the Commission clarified its regulations to specifically identify the quasi-judicial matters that are subject to these evidentiary rules, and these matters include proposed parameters and guidelines and requests to amend parameters and guidelines. Thus, staff disagrees with the assertion made by the *BIPS* claimants that the statutes and the Commission's regulations do not provide notice of the evidentiary requirements for quasi-judicial questions of fact. Existing law requires substantial evidence in the record for all Commission decisions involving questions of fact, including those involving an RRM proposal included in parameters and guidelines.

The proponent of the RRM has the burden of proof on the issue and must prove that the elements required by section 17518.5 exist and are supported by evidence in the record.

Pursuant to the Commission's regulations, the technical rules of evidence and witnesses that are required in court are not required before the Commission. Under the Commission's process, evidence to support or rebut any issue can be by either oral or written testimony provided under oath or affirmation.<sup>3</sup> Hearsay evidence may be used only for the purpose of supplementing or

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<sup>2</sup> *Topanga Assoc. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.

<sup>3</sup> California Code of Regulations, title 2, section 1187.5.

explaining other evidence, but shall *not* be sufficient itself to support a finding unless it would be admissible over objection in civil actions. Hearsay evidence is defined as an out-of-court statement (either oral or written) that is offered to prove the truth of the matter stated. Under the evidentiary requirements for the courts, written testimony in the form of a declaration or affidavit is considered hearsay because the declarant is an out-of-court witness making statements about the truth of the matters asserted and is not available for cross examination. However, under the relaxed rules of evidence in section 1187.5 of the Commission's regulations, written testimony made under oath or affirmation is considered direct evidence and may properly be used to support a fact.

Out-of-court statements that are *not* made under oath or affirmation, however, are hearsay. Unless there is an exception provided by law, hearsay evidence alone cannot be used to support a finding under Government Code section 17518.5 because unsworn out-of-court statements are generally considered unreliable. There are many exceptions to the hearsay rule, however. If one of the exceptions applies, then an out-of-court statement is considered trustworthy under the circumstances and may be used to prove the truth of the matter stated.

In addition, the Commission may take judicial notice of any facts which may be judicially noticed by the courts.<sup>4</sup> Such facts include the official acts of any legislative, executive, or judicial body; records of the court; and other facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination.

The Commission's regulation governing evidence is borrowed from the evidence requirements of the Administrative Procedures Act (Gov. Code, § 11513). The courts have interpreted the evidentiary requirement for administrative proceedings as follows:

While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight [citations omitted], and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.<sup>5</sup>

Thus, proposed unit cost RRM's based on the actual or estimated costs of local government must be supported by evidence in the record to show that the cost information, projections, or approximations of costs used to support the proposed unit cost RRM are only for activities that were determined to be reimbursable in the test claim decision and for other reasonable methods and costs of complying with the mandate. Cost data or projections based on excessive costs or costs that go beyond the scope of the mandate are not reimbursable. In addition, evidence needs

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<sup>4</sup> California Code of Regulations, title 2, section 1187.5. See also, Evidence Code sections 451 and 452.

<sup>5</sup> *Desert Turf Club v. Board of Supervisors for Riverside County* (1956) 141 Cal.App.2d 446, 455.



to support the finding that the proposed unit cost reasonably represents the costs incurred by any eligible claimant to comply with the mandated program.

4. There is no evidence in the record to support the proposed unit cost RRM in this case.

In this case, the claimant supports the proposed unit cost RRM of \$1.80 per provisional ballot with a declaration signed under penalty of perjury from Bonnie Ter Keurst, Reimbursable Projects Section Manager for the Office of the Auditor/Controller-Recorder, County of San Bernardino. The declaration describes the history of the joint RRM negotiations with the Department of Finance and the California Association of Clerks and Elections Officials; negotiations regarding a 2006 survey conducted by the Department of Finance to reach a joint RRM agreement; and subsequent time studies conducted on various elections by counties using both manual and automated processes. The declaration further states that Ms. Ter Keurst received a proposed unit cost from the Department of Finance of \$1.74 during the negotiations, and that the County believed that the proposal was not weighted properly. The last paragraph of the declaration states the following:

Based on my analyses of the various survey data and time study data, I believe that \$1.80 per ballot, as indicated in Exhibit S, is the best estimate of costs. The data I used is based on cost information from a representative sample of eligible claimants and information provided by an association. My spreadsheets demonstrate that I have considered the variation in costs among local agencies to implement the mandate in a cost-efficient manner.

There is no evidence in the record, however, to support the proposed RRM.

Ms. Ter Keurst's declaration states that the proposal is based on "various survey data and time study data." Although the spreadsheet in Exhibit S shows the Department of Finance's calculations based on an average time per provisional ballot of 1.50 minutes, and a San Bernardino calculation based on an average time per ballot of 1.88 minutes, it is not clear which survey or time study the claimant used to calculate the "average" time it takes to check the signatures on the provisional ballots. Ms. Ter Keurst's declaration identifies several time studies and surveys conducted during the negotiation phase for a joint RRM with the Department of Finance that includes a time study, case sampling, and compilation of results for the November 7, 2006 election; a survey questionnaire to counties by the Department of Finance on December 15, 2006; a supplementary survey distributed on July 24, 2007, that incorporated a general election, primary election and a special election; a time study with eight counties based on the February 2008 election; survey results regarding the number of provisional ballots cast in "the recent statewide elections;" and a spreadsheet detailing eight counties' claims for fiscal year 2002 through 2006 for the Permanent Absentee Voter Mandate program. Although the survey questionnaire sent by the Department of Finance contained language allowing a county to certify the responses to its questionnaire ("to the best of my ability and knowledge, that the above information is reasonably accurate and verifiable"), no data or responses directly from the counties have been filed with Commission.

Moreover, it is not clear from the declaration, the spreadsheet, or the record if the reported times in the spreadsheet to comply with the mandate were estimated by counties or were recorded as the actual time to check a signature on a provisional ballot during an election. If the times were estimated, there is no indication how time was estimated, or who performed the estimate.

There are also spreadsheets of salary data in the record. However, there is no evidence in the record from a county showing the salaries of the employees performing the mandate.

In addition, Ms. Ter Keurst states in one of her e-mail attachments that there are many ways to manipulate the numbers to come to a proposed unit cost and that she used the median time reported to check signatures. It is not clear from this record why the data was manipulated in the manner proposed by the claimant.

As filed, the survey data identified in the spreadsheets that the claimant is using to develop the proposed unit cost cannot be considered evidence of either actual or estimated costs incurred by counties to perform the mandate because the spreadsheets of responses prepared by Ms. Ter Keurst and the Department of Finance are hearsay. The county responses identified in the spreadsheets are out-of-court statements that are *not* provided under oath or affirmation from the responder. As indicated in Ms. Ter Keurst's declaration, the claimant is using the out-of-court responses to prove the truth of the matters asserted; i.e. that "the data I used is based on cost information from a representative sample of eligible claimants and information provided by an association" and that "[m]y spreadsheets demonstrate that I have considered the variation of costs among local agencies to implement the mandate in a cost-efficient manner." For these reasons, the courts have held that survey data is hearsay and cannot be considered evidence unless a hearsay exception applies.<sup>6</sup>

Thus, with this record, the Commission cannot determine the reliability of the numbers used by the claimant; whether the costs used to calculate the proposed unit cost were incurred only for the activity determined to be reimbursable by the Commission in the statement of decision; or whether the proposed unit cost reasonably represents the costs incurred by a county to comply with the mandate during the period of reimbursement, which begins July 1, 2002, and for the fiscal years in the future.

The only evidence that can be taken from Ms. Ter Keurst's declaration and the attachments is that Ms. Ter Keurst engaged in many discussions with the Department of Finance in an attempt to reach a joint RRM; that the claimant and the Department of Finance, at one point, were fairly close to reaching an agreement (with the parties' proposals just \$.06 apart); and that Ms. Ter Keurst prepared the spreadsheet and calculated the numbers identified in Exhibit S to her declaration.

In order for the Commission to properly consider the claimant's proposal as currently prepared and based on cost information from counties, evidence in the form of sworn declarations or testimony from a "representative sample" of the counties responding with time and salary data would need to be provided that shows how the numbers were derived and that the numbers are based on the limited mandate approved by the Commission. If sworn evidence is provided by a representative sample of eligible claimants, the Commission can consider the remaining out-of-court responses from counties under section 1187.5 of its regulations to supplement or explain the proposal. Alternatively, documentation that may be considered under the official records exception to hearsay that contains the information used to calculate the proposed average time taken per provisional ballot and the proposed rate of salary of the employee performing the mandate, could be used as part of the record. In addition, further explanation is needed to show how the numbers were "manipulated."

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<sup>6</sup> *People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1269.

Thus, until evidence is filed to support the elements required by Government Code section 17518.5, the Commission cannot reach the merits of the claimant's proposal here to determine if the unit cost reasonably represents the costs mandated by the state by any eligible claimant.

**Conclusion**

Therefore, on this record, staff recommends that the Commission deny the proposed unit cost RRM, and adopt parameters and guidelines identifying the one reimbursable activity identified in the statement of decision that can be claimed based on a showing of the actual costs incurred by the claimant.

**Staff Recommendation**

Staff recommends that the Commission adopt the proposed parameters and guidelines, beginning on page 35. Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

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## STAFF ANALYSIS

### Claimant

County of San Bernardino

### Chronology

- 10/01/2003 Claimant files test claim with the Commission
- 10/10/2006 Commission adopts Statement of Decision and issues proposed parameters and guidelines (Exhibit A)
- 12/06/2006 Claimant submits comments on staff's proposed parameters and guidelines, and proposes a reasonable reimbursement methodology (RRM) (Exhibit B)
- 01/09/2007 Department of Finance (DOF) submits comments on proposed parameters and guidelines (Exhibit C)
- 01/03/2008 Claimant informs Commission that claimant is working with the Department of Finance (DOF) and election officials on developing a joint RRM (Exhibit D)
- 06/01/2010 Claimant notifies Commission that it is no longer developing a joint RRM with the Department of Finance, and intends to submit revised proposed parameters and guidelines that include an RRM for adoption by the Commission (the letter is dated December 22, 2009, but filed on June 1, 2010) (Exhibit E)
- 06/01/2010 Claimant submits revised proposed parameters and guidelines and proposed RRM (Exhibit E)
- 07/08/2010 State Controller's Office submits comments on revised proposed parameters and guidelines (Exhibit F)
- 07/23/2010 Department of Finance submits comments on revised proposed parameters and guidelines (Exhibit G)
- 07/27/2011 Prehearing conference held with all parties to pending requests for unit cost RRMs
- 08/12/2011 Staff issues request for additional briefing on the requirements of Government Code section 17518.5 (Exhibit H)
- 12/20/2011 School district claimants in the *Behavioral Intervention Plans* test claim (CSM 4464) respond to request for additional briefing (Exhibit I)
- 02/03/12 Draft staff analysis and proposed parameters and guidelines issued (Exhibit J)
- 02/21/12 State Controller's Office files comments on the draft staff analysis (Exhibit K)
- 02/23/12 Department of Finance files comments on the draft staff analysis (Exhibit L)
- 02/23/12 Claimants in the *Behavioral Intervention Plans* test claim (CSM 4464) file comments on the RRM analysis in the draft staff analysis (Exhibit M)

## **I. Background**

### Summary of the Mandate

This test claim, filed by County of San Bernardino, addresses an amendment to Elections Code section 14310, regarding counting “provisional ballots.” A provisional ballot is a regular ballot that has been sealed in a special envelope, signed by the voter, and then deposited in the ballot box. Provisional ballots can be required for several reasons, generally to prevent unregistered individuals from voting, or to prevent registered voters from voting twice. For example, provisional ballots may be required when poll workers cannot immediately verify an individual’s name on the official roster, or if a voter requested an absentee ballot, but instead comes to the polling place without bringing the absentee ballot.

The test claim statute, Statutes 2000, chapter 260, amended Elections Code section 14310, subdivision (c)(1), to add a requirement that elections officials “compare the signature on each provisional ballot envelope with the signature on the voter’s affidavit of registration.”

The Commission found that although prior law required that “the elections official shall examine the records with respect to all provisional ballots cast,” the law did not require that each signature on a provisional ballot be directly compared to the signature on the voter’s registration affidavit. This is akin to the analysis by the court in *Long Beach Unified School Dist.* (1990) 225 Cal.App.3d 155, 173, which found a higher level of service was mandated when general law on an existing program is changed to require performance of activities in a very specific manner.

The Commission adopted a statement of decision on October 4, 2006, and concluded that Elections Code section 14310, subdivision (c)(1), as amended by Statutes 2000, chapter 260, mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for performing the following specific new activity as part of statutorily-required elections:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter’s affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310(c)(1).)

The Commission further concluded that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

Pursuant to Government Code section 17557, the period of reimbursement for this claim begins July 1, 2002.

### Background for Parameters and Guidelines

Section 1183.12 of the Commission’s regulations authorizes the Commission, within 10 days of adopting the statement of decision, to draft the parameters and guidelines and issue them for comment to assist the claimant and expedite the process. Staff utilized this process and issued the proposed parameters and guidelines for comment on October 10, 2006. The claimant also proposed that a reasonable reimbursement methodology (RRM) be included in the proposed parameters and guidelines. The claimant subsequently noticed the Commission that it was

working with Department of Finance to develop a joint RRM instead of an RRM being included in the parameters and guidelines. However, claimant later informed the Commission that it was no longer developing a joint RRM with the Department of Finance, and instead submitted revised proposed parameters and guidelines requesting that the Commission adopt a unit cost RRM in the parameters and guidelines at \$1.80 per provisional ballot.

## **II. Discussion**

Staff reviewed the claimant's proposed parameters and guidelines and the comments received. Staff made non-substantive, technical changes for purposes of clarification, consistency with language in parameters and guidelines adopted since January 2003, and conformity to the statement of decision and statutory language. Substantive changes were made to the following sections of the proposed parameters and guidelines:

### **A. Reimbursable Activities**

Government Code section 17557(a) and section 1183.1, subdivision (a)(4), of the Commission's regulations authorize the Commission to include the "most reasonable methods of complying with the mandate" in the parameters and guidelines. The "most reasonable methods of complying with the mandate" are "those methods not specified in statute or executive order that are necessary to carry out the mandated program." A finding that an activity is necessary to carry out the mandated program must be supported by evidence in the record.<sup>7</sup>

The claimant's proposed parameters and guidelines include reimbursement for the one-time activities listed below. These activities are not required by the test claim statute, nor were they found to be a mandate by the Commission. The claimant alleges that the following activities are necessary to carry out the mandate:

1. Updating policies and procedures to implement the reimbursable activities listed in Section IV., B, of these parameters and guidelines.
2. Modifying Registrar of Voter's computer system to record the mandated provisional ballot signature comparing activities.
3. Training employees who perform the reimbursable activities listed in Section IV., B, of these parameters and guidelines.

Although the claimant asserts that these activities are necessary to implement the mandate, there is no explanation explaining why these activities are reasonably necessary to comply with the mandate, as required by section 1183.12 of the Commission's regulations. For example, with respect to the second requested activity, it is not clear why counties would need to modify computer systems to check the signatures for this program. The mandate requires counties to use the same procedures for provisional ballots that it already uses to check signatures for absentee ballots.

Moreover, to date, evidence to support these assertions has not been filed in either the test claim record for this claim or the record on the parameters and guidelines.<sup>8</sup>

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<sup>7</sup> Government Code section 17559; California Code of Regulations, title 2, sections 1183.14, 1187.5.

<sup>8</sup> *Ibid.*

Thus, without evidence in the record, staff recommends that the Commission deny the claimant's request to authorize reimbursement for the proposed one-time activities. The proposed parameters and guidelines list only the activity mandated by the test claim statute as follows:

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310, subd. (c)(1).)

## **B. Claim Preparation and Submission - Proposed Unit Cost RRM**

### **Claimant's Proposal and Supporting Documentation**

The claimant is also proposing a unit cost RRM to be included in the parameters and guidelines.

In its initial proposal filed in December 2006, the claimant proposed a unit time of 36 seconds per provisional ballot. Under the original proposal, costs were calculated as follows: number of provisional ballots x 36 seconds x the productive hourly rate of the employees performing the mandate. The unit time of 36 seconds was based on the time it took San Bernardino County to perform the mandate on 560 provisional ballots submitted for the November 7, 2006 election. The narrative on the proposal states the following:

Since the above activities are repetitious in nature and can be performed in a small time increment, the County of San Bernardino is proposing a unit cost method to be incorporated in the Ps and Gs. A time study was performed in a joint effort by the County Registrar of Voters and our office. A two (2) Pass Category process was developed for provisional ballots: Pass 1 and Pass 2. The Pass 1 category involved pulling up the signature on the voter's affidavit of registration, and comparing with the signature on each provisional ballot envelope. When the signatures did not match, the provisional ballot was placed aside as Pass 2. The Pass 2 category involved further research in pulling up the provisional voter's signature.

Since the Statutes of 2000, Chapter 260 mandates the comparison of signatures only; our time study was just limited to Pass 1 category activities. We have enclosed copies of our time study documents for your review and approval. Based on our time study, we conclude that:

- a) it takes an average of 0.01 hour (or 36 seconds) to compare signatures on each provisional ballot envelope with the signature on the voter's affidavit of registration; and
- b) it costs the county an average of \$0.45 to perform the above mandated activities for each provisional ballot.

In January 2007, the Department of Finance indicated that it would not oppose a unit cost, and began to work with the County on a joint RRM and statewide estimate of costs pursuant to Government Code section 17557.1.

On June 1, 2010, the Commission received a notice of withdrawal from the joint development of the RRM, and the claimant submitted revised parameters and guidelines that include a proposed

RRM unit cost to be adopted by the Commission.<sup>9</sup> The proposed unit cost RRM is for ongoing costs at \$1.80 per provisional ballot, which is based on the median time of 1.88 minutes per provisional ballot, determined from “various survey data and time study data.” The unit cost is then adjusted each year by the Implicit Price Deflator. Under the proposal, a claimant could choose to claim using the RRM *or* by filing a claim based on actual costs incurred.

The claimant supports the proposal with a declaration signed under penalty of perjury from Bonnie Ter Keurst, Reimbursable Projects Section Manager for the Office of the Auditor/Controller-Recorder, County of San Bernardino. The declaration describes the history of the joint RRM negotiations with the Department of Finance and the California Association of Clerks and Elections Officials; negotiations regarding a 2006 survey conducted by the Department of Finance to reach a joint RRM agreement; and subsequent time studies conducted on various elections by counties using both manual and automated processes. The declaration further states that Ms. Ter Keurst received a proposed unit cost from the Department of Finance of \$1.74 during the negotiations, and that the County believed that the proposal was not weighted properly. The last paragraph of the declaration states the following:

Based on my analyses of the various survey data and time study data, I believe that \$1.80 per ballot, as indicated in Exhibit S, is the best estimate of costs. The data I used is based on cost information from a representative sample of eligible claimants and information provided by an association. My spreadsheets demonstrate that I have considered the variation in costs among local agencies to implement the mandate in a cost-efficient manner.

Attached to the declaration are documents described by Ms. Ter Keurst as follows:

- Exhibit A – a copy of an email from the Department of Finance to Ms. Ter Keurst stating the Department’s interest in working on a joint RRM.
- Exhibit B – a survey letter sent by the Department of Finance to all county election officials dated December 15, 2006, asking for survey responses to ten questions with respect to the November 7, 2006 election. The questions requested information regarding the average time it took to verify the signatures, whether signatures were verified by staff or computer software, and the average cost of processing valid provisional ballots.

A spreadsheet of responses from the survey is also attached. According to Ms. Ter Keurst’s declaration, the survey results were prepared by the Department of Finance.<sup>10</sup> The survey result sheet shows responses from 30 counties. Most counties had staff verify the signatures. One county used only computers and three counties used both staff and computers to verify signatures.

- Exhibit C – a spreadsheet with resulting data from surveys completed between December 2006 and July 2007 by Ms. Ter Keurst, the Department of Finance, and Alice Jarboe of the California Association of Clerks and Elections Officials.

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<sup>9</sup> The document was filed on June 1, 2010, but is dated December 22, 2009.

<sup>10</sup> Actual survey responses from the counties have not been filed with the Commission.



Surveys were “refined” to ensure the questions were clear and the answers complete.

The spreadsheet of responses shows data from 58 counties. The data reflects the number of provisional ballots cast, permanent or temporary staff used, seconds per ballot, total hours, total cost, average cost per ballot, and whether the county incurred costs of \$1,000 (33 counties did not reach \$1,000). The bottom of the spreadsheet shows that the average time per ballot was 180 seconds,<sup>11</sup> and the average cost per ballot was \$3.40.

- Exhibit D – an email from the Department of Finance to Ms. Ter Keurst dated May 23, 2008, regarding the Department of Finance’s spreadsheet showing estimated unit cost rates on the provisional ballots time study conducted on the February 5, 2008 primary election.
- Exhibit E – response from Ms. Ter Keurst to Department of Finance’s May 23, 2008 proposal on estimated unit costs. The response indicates a concern that the numbers proposed seemed artificially low, and should be different if different averaging methodologies and hourly rates were used. The response further disagrees with a proposed unit time of 1.8 minutes per provisional ballot, and also states that “the average times from the time study were 2.42, 2.03 and 1.96. The median was the lowest and it was 1.88.” The response further disagrees with the proposed indirect cost rate applied to all counties. Ms. Ter Keurst also believed that the proposed numbers needed to be compared with the November 2006 survey responses that were received from most all counties, and that the Finance proposal was “significantly lower than a number that would make 50% of the agencies whole.”
- Exhibit F- an email from Alice Jarboe dated June 26, 2008, attaching a spreadsheet on indirect cost rate proposals and a spreadsheet of 20 county responses from a preliminary of total provisional ballots counties received from 2003 through June 2008 election.
- Exhibit G – email from Ms. Ter Keurst to Alice Jarboe stating that “they [Finance] are going to look at changing their calc to incorporate the productive hourly rate as well as looking at the rates on other claims.”
- Exhibit H – spreadsheet prepared by the Department of Finance detailing eight (8) counties’ claims for the *Permanent Absentee Voter* mandate from 2002-2006, regarding productive hourly rates of employees working on that program and the indirect cost rates claimed.
- Exhibit I – an email trail between Ms. Ter Keurst, Alice Jarboe, and Department of Finance staff, dated August 6, 2008, showing that the Department of Finance proposed a unit cost of \$1.74 per provisional ballot. The Department of Finance email states the following:

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<sup>11</sup> This spreadsheet shows that the time taken by the claimant, County of San Bernardino, to check signatures on each provisional ballot was 58 seconds (22 seconds longer than what was asserted under the claimant’s first proposed RRM for the November 2006 election).

The Voter Identification spreadsheet for the 2006/2007 fiscal year reflecting the additional Program 083 (Permanent Absentee Voters) cost information for San Jose, San Diego, Orange County, and Ventura is attached for your review. The results show that the average hourly rate is approximately \$63.33, and the costs per ballot for 1.5 and 1.8 minutes are \$1.58 and \$1.90, respectively. After comparing your estimates of \$1.73 and \$2.13 with the spreadsheet's actual amounts and calculating a standard deviation of 22 cents, we found that the average amount of \$1.74 is a representative cost per ballot. If you find that this amount is reasonable, then please share with the other counties and we will share with our management, as well.

- Exhibit J – email from Ms. Ter Keurst to the Department of Finance dated August 15, 2008, memorializing a conversation where Ms. Ter Keurst disagreed with the figures used in the Department's proposal. Ms. Ter Keurst's declaration states that "I thought that the figure was weighted improperly. I agreed to put together spreadsheets with various analyses of the data to see which we thought was most fair."

The email trail includes an internal email from the Department of Finance, copied to Ms. Ter Keurst, explaining the proposal further. The email states the following:

Bonnie will try to get us an updated copy of the Voter Identification survey before Friday. She pointed out that our reasonableness check was heavily weighted by Kern and Ventura. I explained that we were just looking for reasonableness and that this review as to verify the reasonableness of the range of estimated costs determined by the comprehensive survey and that we proposed \$1.74 based on our site visit time estimates since that was also within the original range of cost estimates. Adjusting for the weights, our rate would be a little higher, possibly in the \$1.80 range. I think we can use the more comprehensive survey for submission to the Commission but our smaller review of the 2006 reimbursement claims will only be used internally. We can start preparing the letter for the Commission with Bonnie, and finalize the documents for adoption (Joint RRM & Statewide Estimate of Costs) after final review of the comprehensive survey. Bonnie will confirm that the CACEO intends to respond on behalf of the counties supporting the RRM once we finalize the number.

- Exhibit K – email from Ms. Ter Keurst to the Department of Finance dated September 9, 2008, which states the following:

I have attached the workpaper that I sent about three weeks ago as well as the updated workpapers from the results of the time study. What I have added in the "Scenarios" is a comparison of 1) the time study average salary rate using the calculated median time

of 1.88, 2) the rate as recorded by your offices averaged by county and 3) the [sic] our proposed rate of \$1.80.

I have been working with the numbers to somehow say with finality that this is the only way to look at it, but the reality is that there are a lot of numbers and we can manipulate them in any number of ways to make a case ... so I went back to the reasonableness tests – testing against the numbers we received from the 2006 surveys. I removed anything that could possibly indicate a miscommunication of the survey questions and looked at an equitable middle point based on the mandate as we discussed.

- Exhibit L – spreadsheet prepared by Ms. Ter Keurst’s “reworking the DOF figures.”
- Exhibit M – San Bernardino’s February 2008 time study data (results) from 8 counties.
- Exhibit N – San Bernardino’s cost calculations from February 2008 time studies.
- Exhibit O – San Bernardino’s salary calculation from February 2008 time studies.
- Exhibit P – San Bernardino’s unit time calculation from February 2008 time studies.
- Exhibit Q – San Bernardino’s analysis involving different scenarios of original 2006 Finance survey results.
- Exhibit R – San Bernardino’s analysis involving the same scenarios to the 2008 time studies.
- Exhibit S – San Bernardino’s spreadsheet analysis showing the claimant’s current proposed unit cost of \$1.80 per provisional ballot, based on the median time of 1.88 minutes per ballot.

The claimant did not file comments on the draft staff analysis and proposed parameters and guidelines.

### **Responses from the Department of Finance on the proposed unit cost RRM and draft staff analysis**

The Department of Finance filed comments on July 23, 2010, opposing the proposed unit cost RRM as not reasonable. Finance asserts, based on site visits to two election offices, that a more reasonable average time to comply with the mandate is 30 seconds per provisional ballot, rather than the 1.88 minutes used by the claimant to calculate the proposed unit cost. Finance states the following:

As mentioned in the proposed Ps&Gs, our collaborative effort over the past few years to jointly develop an RRM with the claimant has been unsuccessful. Finance believes the unit time calculations are not representative of the actual signature verification processing time because we estimate the process, inclusive of a second pass, to verify a provisional ballot signature with the signature on the voter’s registration affidavit, takes an average of approximately 30 seconds. The

claimant, however, proposes an RRM based on a unit time calculation of 1.88 minutes. Our belief is based on our site visit to two local election offices where we observed their signature verification process for provisional ballots.<sup>12</sup> This processing time is also comparable to the RRM rate of 36 seconds as proposed by Bonnie Ter Keurst in her declaration on page 1.

Finance, however, notes that the proposed unit processing time includes additional activities related to managerial reviews for provisional ballot signatures requiring more analysis or researching tasks, e.g., determining if a voter submitted an absentee ballot, prior to the signature verification. These activities are not reasonably necessary to carry out the mandate. As a result, Finance believes that the proposed unit rate of 1.88 minutes does not accurately reflect the signature verification processing time. It also should be noted that the processing time is less than 30 seconds, on average, for local election offices that have automated systems to directly verify the provisional ballot signature.

Finance concludes that an RRM rate would be an efficient way to streamline the reimbursement process; however, we would not support an RRM that is based on unit calculations that are not reasonable based on RRM requirements of Government Code Sections 17518.5 and 17557 subdivision (f), which requires the RRM to balance accuracy with simplicity.

The Department of Finance filed comments on the draft staff analysis on February 23, 2012, concurring with the recommendation to deny the proposed unit cost RRM and to adopt parameter and guidelines based on actual costs incurred.

### **Responses from the State Controller's Office on the proposed unit cost RRM and draft staff analysis**

The State Controller's Office supports the proposed RRM rate of \$1.80 per ballot, but argues that the RRM should be applied exclusively to the ongoing activity, and that eligible claimants should be not given an option to claim using a unit cost or actual costs. The Controller's Office states that; "Since the RRM rate was developed using a large number of representative eligible claimants the SCO recommends that reimbursement be limited to the RRM of \$1.80 for each provisional absentee ballot processed by the eligible claimant." The Controller's Office further states that the parameters and guidelines need to identify the base year of the RRM rate to be adjusted annually by the Implicit Price Deflator.

The State Controller's Office filed comments on the draft staff analysis, correcting typographical errors in the proposed parameters and guidelines and requesting other clarifying changes to the language. Staff incorporated the Controller's request for nonsubstantive clarifications and corrections in the proposed parameters and guidelines. The Controller also requested that "timesheets" be added to the list of examples of corroborating documentation that may be used to support reimbursement claims. The Commission's general practice when substantive changes are proposed for the boilerplate language is to conduct workshops where all parties are noticed and may discuss the proposed changes. Therefore, until such a workshop is conducted, it is premature to include this language in the parameters and guidelines, and staff did not make the change.

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<sup>12</sup> The Department of Finance has not filed any evidence to support this assertion.

## Interested Person Comments

On February 23, 2012, school district claimants in the *Behavioral Intervention Plans* test claim (CSM 4464) filed comments on the draft staff analysis with respect to the analysis on the evidentiary requirements of proposed unit cost RRM. These comments assert that:

- The Legislature intended to base RRM on items such as surveys, and not on sworn statements of actual costs, as the draft staff analysis suggests. These claimants state the following:

Although an RRM must reasonable represent actual costs, what in fact constitutes an agency's 'actual cost' may be ascertained by approximations and other projections. Indeed, the Legislature's own language – that an RRM balance accuracy with simplicity – means that it anticipated and authorized reimbursement that was not for "actual" costs. . . .Government Code section 17518.5 only requires that the RRM be "based on cost information from a representative sample ... or projections of other local costs," and further provides that "whenever possible," the RRM "shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs ... rather than detailed documentation of actual costs." (Emphasis in original.)

One of the Sections 17518.5's implementing regulations confirms that an RRM may be based on something less than evidence of *actual* costs: "An interested party may submit cost information or other cost projections that can be the basis of a reasonable reimbursement methodology, and letters in support of a draft reasonable reimbursement methodology ...[.]" 2 C.C.R.§1183.13(b)(2). Both the statutes and the regulation cited would be nullities if the Commission requires local agencies to first determine *actual* costs before proposing an RRM.

- There is nothing in the Commission's regulations to give notice to claimants that submissions regarding the RRM must be based on sworn statements of costs. "Notice is an essential component of fairness, particularly here where the Commission's interpretation is so different from the statutory wording and from the LAO discussions which the Commission itself cites. At this late date, claimants are woefully prejudiced if held to such a standard." These claimants further state that:

We believe public agencies have spent increasingly scarce resources developing and executing detailed surveys of costs to support reasonable reimbursement methodologies. Many of these surveys, including the survey completed by the BIP claimants over five years ago and which took months to complete and analyze, cannot be replicated. It may also prove very difficult to locate survey respondents after the fact to request declarations under penalty of perjury – some individuals may no longer work for the same agency or they may have retired or moved out of state. Thus in our view if the Commission plans to require documentation of actual costs under oath to support RRM, it should propose a regulation to that effect and apply the rule only prospectively.

- The draft staff analysis’ narrow interpretation of permissible evidence impedes, rather than facilitates, the Commission’s mission to see that the state reimburses each local agency and school district for all costs mandated by the state. The more labored and exacting the Commission’s decisions are, the longer this process takes and the more likely it is that local agencies will never be reimbursed at all.

These comments are addressed in the staff analysis.

### **Staff Analysis**

In addition to the request here, there are several unit cost RRM proposals pending before the Commission. These proposals raise many questions of law and fact, and as discussed below, show that some evidence is required to support the elements identified in Government Code section 17518.5 before the Commission can consider a proposed unit cost RRM that applies to all eligible claimants in the state for both the initial and future periods of reimbursement.

- 1. The purpose of Government Code section 17518.5 is to reimburse local government in a way that reasonably represents their costs mandated by the state pursuant to article XIII B, section 6 of the California Constitution***

Government Code section 17557 addresses the adoption of parameters and guidelines to reimburse eligible claimants for their costs mandated by the state. Subdivision (f) states that when adopting parameters and guidelines, the Commission is required to consult with various parties, including the Legislature, to consider an RRM “that balances accuracy with simplicity.” Subdivision (b) then authorizes the Commission to adopt an RRM as part of the parameters and guidelines.

Government Code section 17518.5 defines an RRM as follows:

- “Reasonable reimbursement methodology” means a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514.
- A reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or projections of other local costs.
- A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner.
- Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual costs . . . .
- A reasonable reimbursement methodology may be developed by any of the following:
  - (1) The Department of Finance.
  - (2) The Controller.

- (3) An affected state agency.
- (4) A claimant.
- (5) An interested party.

Government Code section 17518.5, along with the other statutes in this part of the Government Code, is intended to implement article XIII B, section 6.<sup>13</sup> Article XIII B, section 6 provides: “Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government [defined to include school districts], the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service [with exceptions not applicable here]....”

This reimbursement obligation was “enshrined in the Constitution ... to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources.<sup>14</sup> Section 6 recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. Its purpose 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. With certain exceptions, section 6 ‘[e]ssentially’ requires the state ‘to pay for any new government programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]’”<sup>15</sup>

Section 17561 is the primary code section that sets forth the State's duty to reimburse once a mandate is determined by the Commission and parameters and guidelines are adopted. Section 17561(a) states: “The state *shall* reimburse each local agency and school district for *all* ‘costs mandated by the state,’ as defined in Section 17514.” (Emphasis added.) Government Code section 17514 defines “costs mandated by the state” as any increased cost incurred as a result of any statute or executive order that mandates a new program or higher level of service.

Pursuant to Government Code section 17557 and section 1183.1 of the Commission’s regulations, activities that are eligible for reimbursement are those that are expressly mandated by the statute or executive order approved by the Commission in the statement of decision and those that the Commission determines during the parameters and guidelines phase that are reasonably necessary for the performance of the state-mandated program. The courts have

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<sup>13</sup> Government Code section 17500.

<sup>14</sup> *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282; *CSBA v. State of California* (2011) 192 Cal.App.4th 770, 785-786.

<sup>15</sup> *CSBA, supra*, 192 Cal.App.4th 770, 785-786; *County of San Diego v. State of California, supra*, 15 Cal.4th at p. 81; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1188–1189; *County of Sonoma v. Commission on State Mandates, supra*, 84 Cal.App.4th at p. 1282; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 985.

interpreted the Constitutional and statutory scheme as requiring “full” payment of the actual costs incurred by a local entity once a mandate is determined by the Commission.<sup>16</sup>

In order to be reimbursed, eligible claimants file reimbursement claims with the State Controller’s Office for the costs incurred and have traditionally been required to support their claims with detailed documentation of actual costs.<sup>17</sup> Upon receipt, the State Controller’s Office can audit the claims, and reduce any claim that is excessive or unreasonable.<sup>18</sup>

Government Code section 17518.5 was initially enacted in 2004 to authorize the Commission to adopt an RRM in the parameters and guidelines. An RRM is defined in the statute as “a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514.” The statute allows for an RRM to be “based on general allocation formulas, uniform cost allowances, and other *approximations* of local costs mandated by the state, rather than detailed documentation of actual costs.” (Emphasis added.) The statute requires that the RRM be based on cost information provided by associations of local agencies and school districts, or projections of other local costs; and consider the variation in costs among local government to implement the mandate in a cost-efficient manner.

The Legislative Analyst’s Office(LAO) states the RRM is intended to reduce local costs to file claims, reduce state costs to process and audit claims, and reduce disputes regarding mandate claims and appeals to the Commission regarding State Controller claim reductions.<sup>19</sup> LAO further describes the RRM as “an average cost estimate that establishes a fair, but approximate, reimbursement level for state–mandated local programs.” LAO discussed the RRM approach in its analysis and recommendations regarding the 2008-09 Budget Bill for K-12 education mandates as follows:

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<sup>16</sup> *CSBA v. State of California* (2011) 192 Cal.App.4th 770, 786; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284. The court in *County of Sonoma* recognized that the goal of article XIII B, section 6 was to prevent the state from forcing extra programs on local government in a manner that negates their careful budgeting of expenditures, and that a forced program is one that results in “increased actual expenditures.” The court further noted the statutory mandates process that refers to the reimbursement of “actual costs incurred.”

See also, Government Code sections 17522 defining “annual reimbursement claim” to mean a claim for “actual costs incurred in a prior fiscal year; and Government Code section 17560(d)(2) and (3), referring to the Controller’s audit to verify the “actual amount of the mandated costs.”

<sup>17</sup> Government Code section 17560.

<sup>18</sup> Government Code section 17561.

<sup>19</sup> “State-Local Working Group Proposal to Improve the Mandate Process,” Legislative Analyst’s Office, June 21, 2007, page 3. See also, Assembly Bill Analysis of AB 2856 (2004), concurrence in Senate Amendments of August 17, 2004; Assembly Bill Analysis of AB 1222 (2007), concurrence in Senate Amendments of September 4, 2007. These bill analyses identify the purpose of the RRM process is to “streamline the documentation and reporting process for mandates.”



Responding to school district concerns, SCO helped two districts develop a revised claim for a mandate related to Standardized Testing and Reporting (STAR) testing. In both districts, the SCO's initial audits disallowed virtually the district's entire claim—in part, because claims sought reimbursement for nonmandated activities. Recognizing that the districts performed the mandated testing duties, the SCO developed a methodology to estimate what each district could reasonably claim from the state. Based on this process, the SCO issued a revised audit statement that allowed a portion of the claims submitted by the two districts.

While the SCO's approach to the STAR audits represents a significant change in the role of auditors, we think it may offer a way to simplify the mandate reimbursement process. Specifically, instead of requiring all districts to develop detailed expenditure reports to justify their annual mandate claims, the state could adapt the methodology used by the Controller's staff to develop a proposed reasonable reimbursement methodology (RRM).

State law permits the use of an RRM as a way of simplifying mandate claims based on a representative sample of local cost data. *The underlying concept of the RRM is to develop an average cost estimate that establishes a fair, but approximate, reimbursement level for state-mandated local programs.* One of the barriers to developing an RRM has been the state's lack of confidence in district claim data. The cost profile approach used for two districts' STAR mandate claims provides a possible way to collect consistent, reliable, cost data that would provide the basis for a proposed RRM. (Emphasis added.)<sup>20</sup>

Thus, section 17518.5 diverts from the traditional requirement of supporting a reimbursement claim with detailed documentation of actual costs incurred and, instead, allows the Commission to adopt a single standard unit cost, based on "approximations" of local costs mandated by the state, to be claimed by any eligible claimant in the state.

By determining a unit cost based on approximations or averages of local costs pursuant to section 17518.5, some local entities may receive more than their actual costs incurred to comply with a state-mandated program and some may receive less. And, thus, for any given program with a unit cost, there may be some entities that are not reimbursed the full costs actually incurred. Nevertheless, the Legislature has the power to enact statutes, such as section 17518.5, that provide "reasonable" regulation and control of the rights granted under the Constitution.<sup>21</sup> The Commission must presume that Government Code section 17518.5 meets this standard and is constitutionally valid.<sup>22</sup>

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<sup>20</sup> Reports of the Legislative Analyst's Office may properly be used to determine the legislative intent of a statute. (*Kaufman & Broad Communities, Inc. v. Performance Plastering* (2005) 133 Cal.App.4th 26, 31.)

<sup>21</sup> *Chesney v. Byram* (1940) 15 Cal.2d 460, 465.

<sup>22</sup> *CSBA, supra*, 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

Additionally, the Commission has the duty of applying Government Code section 17518.5 in a constitutional manner. If the Commission approves a unit cost that does not comply with the requirements of section 17518.5 and does not represent a reasonable approximation of costs incurred by any eligible claimant to comply with the mandated program, then the Commission's decision could be determined unconstitutional and invalid by the courts.<sup>23</sup>

In this respect, Commission staff requested comments from the parties and interested parties to the pending claims that propose a unit cost RRM on the following question: "At some point is the range of figures used to develop the unit cost so wide that it violates the constitutional requirement that local agencies be reimbursed for their mandate-related costs?" Only the representatives of the claimants to the *Behavioral Intervention Plans* (BIPS) claim responded directly to the question, arguing that the initial enactment of the RRM language and the subsequent amendment evidence the Legislature's conclusion that levels of mandate reimbursement may range widely and still be constitutional:

[In 2004], Section 17518.5 was added to the Government Code, which required RRMs to meet certain conditions, including the following: "The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner;" and "For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner." [Citation omitted.]

That 50% requirement makes it clear that in 2004 the Legislature had authorized reimbursement that would be quite different from actual costs for claimants—allowing for the possibility that 50% of claimants would be over-reimbursed and 50% would be under-reimbursed. However, in 2007 both of these requirements were eliminated and replaced with subdivisions (b) and (c).

Since 2007, the current requirements for RRMs are considerably less specific and more flexible than the former requirements. Now, there is no requirement that a minimum percentage of claimants' projected costs be fully offset or that the total amount to be reimbursed statewide covers the total of local estimated costs. Since 2007, Section 17518.5 requires only that RRMs "be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs," and that the RRM "consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner." [Citation omitted.] In other words, the statute expressly contemplates variation and leaves open the possibility for a potentially large degree of variation in the costs offset.<sup>24</sup>

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<sup>23</sup> *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.

<sup>24</sup> Exhibit I, comments filed on December 20, 2011, by Diana McDonough and Melanie Seymour of Fagen Friedman & Fulfroost, LLP, representing San Diego Unified School District, San Joaquin County Office of Education, and Butte County Office of Education (claimants in the BIPS test claim (CSM 4464)).

Staff agrees that the 2007 amendment to section 17518.5 provides for more flexibility when adopting a unit cost RRM. However, each proposal needs to be determined on its facts and the evidence in the record. And as described above, the unit cost must represent a reasonable approximation of the costs incurred by an eligible claimant to implement the state-mandated program in order to comply with the constitutional requirement that all costs mandated by the state be reimbursed to that entity. Although it is argued in the comment above that “a large degree of variation” is constitutional, that may not be the case. Depending on the facts of the program and the evidence in the record, a unit cost based on a significant or large variation of costs reported may not reasonably represent the costs incurred by an eligible claimant and, thus, may not comply with the requirements of article XIII B, section 6 of the California Constitution.

Therefore, the Commission must determine if the proposed unit cost meets the requirements of section 17518.5 and reasonably represents the costs incurred by any eligible claimant to comply with the mandated program.

**2. *The evidentiary requirements of Government Code section 17557 and 17518.5 for an RRM adopted by the Commission***

The Government Code describes two types of RRM proceedings. One type of RRM is a joint RRM based on a settlement agreement between the Department of Finance and the local entities pursuant to Government Code section 17557.1 and 17557.2. The Commission can approve a joint RRM simply with a showing that an agreement between the Department of Finance and a local entity has been reached, and that the joint methodology is broadly supported by a wide range of local agencies or school districts. Section 1183.13(b)(2) of the Commission’s regulations implements the joint settlement RRM by allowing the Commission to consider “letters in support of a draft reasonable reimbursement methodology submitted *pursuant to Government Code section 17557.1,*” to show that the proposal is broadly supported by a wide range of local agencies or school districts. This language in section 1183.13(b)(2) applies only to a joint settlement RRM allowed by Government Code section 17557.1 and does not apply to the second type of RRM at issue in this case - a proposed RRM in the parameters and guidelines adopted by the Commission pursuant to Government Code sections 17557 and 17518.5 - as asserted in the February 23, 2012 comments from the school district claimants in the *BIPS* claim.<sup>25</sup>

In this matter, the claimant requests the Commission’s adoption of an RRM in the parameters and guidelines pursuant to Government Code section 17557 and 17518.5. Under this process, an agreement reached by the parties that is broadly supported is not required. Instead, section 17518.5 requires the Commission to make specific findings. Section 17518.5(d) states that an RRM, including one that proposes a standard unit cost, shall:

- Be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs; and shall
- Consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner.

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<sup>25</sup> Exhibit M.

There has been a lot of discussion about the meaning of these words and, in particular, the meaning of “cost-efficient” in the second bullet. “Cost-efficient” is not defined in Government Code sections 17500 et seq. However, words and phrases in a statute are construed according to the plain and ordinary meaning of the language used and in context with the statutory scheme. The courts will typically look to dictionary definitions to determine the ordinary meaning.<sup>26</sup>

In this case, the word “efficient” is defined in Webster’s II New College Dictionary as “acting or producing effectively with a minimum of waste or unnecessary effort.”<sup>27</sup> This definition is consistent with other phrases used in Government Code section 17500 et seq., all of which require reimbursement for reasonable and necessary costs incurred to comply with the mandated program. For example, claimants are eligible to receive reimbursement for activities that are “reasonably necessary” for the performance of the mandate; and the costs which are “excessive or unreasonable” may be reduced by the State Controller’s Office.<sup>28</sup> Section 1183.13 of the Commission’s regulations further makes it clear that “costs to implement the mandate in a cost-efficient manner” in section 17518.5 includes “only those costs for the activities that were determined to be reimbursable by the commission in the Statement of Decision, and the costs for the most reasonable methods of complying with the mandate.”

Section 17518.5 also acknowledges that the costs incurred for any given mandate are going to vary with each local entity. Variances in costs are due to many factors including, but not limited to, the time taken by each entity to comply with the mandate; the level of staff used by the entity to implement the mandate; the salary range provided; the cost for materials, supplies, and equipment used; contract costs; the population served; and the extent of outside occurrences that impact or trigger the mandated program. The variables in this case include the time taken to check each signature, the salary level of the staff used to comply with the mandate, and whether the county used computers to perform the mandate.

In addition, the statute allows the proposed unit cost RRM to be based on actual cost information incurred by a representative sample of eligible claimants in one fiscal year to be applied and projected to costs incurred in past or future fiscal years. The statute also allows the proposed unit cost RRM to be based on other projections or estimates of costs incurred by a representative sample of eligible claimants for the initial period of reimbursement and for future fiscal years. Nevertheless, the proposed unit cost must reasonably represent the costs incurred by any eligible claimant to comply with the mandated program during all fiscal years in the period of reimbursement.

Since the Commission’s decision on a proposed unit cost RRM can be challenged in court pursuant Government Code section 17559(b) by either an eligible claimant or the state, the proposed unit cost, and the facts that form the bases of the unit cost, must be supported by substantial evidence in the record. Government Code section 17559(b) has long provided that “A claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the commission on the ground that the commission’s decision is not supported by substantial evidence.” Code of Civil

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<sup>26</sup> *People v. Whitlock* (2004) 113 Cal.App.4th 456.

<sup>27</sup> Page 360.

<sup>28</sup> Government Code sections 17557, 17561.

Procedure section 1094.5 is a claim for administrative mandamus that requires the court to determine whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision. An administrative agency commits an abuse of discretion under section 1094.5 if the decision is not supported by the findings or the findings are not supported by the evidence.<sup>29</sup>

When the Legislature added section 17518.5 to the Government Code, it did not change the existing requirement in section 17559 that all of the Commission's findings of fact be based on substantial evidence in the record. Statutory enactments must be considered in the context of the entire statutory scheme of which they are a part and be harmonized with the statutory framework as a whole.<sup>30</sup> In 2011, the Commission clarified its regulations to specifically identify the quasi-judicial matters that are subject to these evidentiary rules, and these matters include proposed parameters and guidelines and requests to amend parameters and guidelines.<sup>31, 32</sup> Thus, the plain language of the statutory and regulatory mandates scheme requires that evidence in the record be filed to support the adoption of an RRM. Thus, staff disagrees with the assertion made by the *BIPS* claimants that the statutes and the Commission's regulations do not provide notice of the evidentiary requirements for quasi-judicial questions of fact. Existing law requires substantial evidence in the record for all Commission decisions involving questions of fact, including those involving an RRM proposal included in parameters and guidelines.

The proponent of the RRM has the burden of proof on the issue and must prove that the elements required by section 17518.5 exist and are supported by evidence in the record.<sup>33</sup>

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<sup>29</sup> *Topanga Assoc. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.

<sup>30</sup> *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.

<sup>31</sup> California Code of Regulations, title 2, section 1187 (Register 2010, No. 44.)

<sup>32</sup> The courts, in recent lawsuits dealing with questions of fact, have determined that the Commission's conclusions were not supported by any evidence in the record and, thus, the Commission's decisions were determined invalid pursuant to Government Code section 17559 and Code of Civil Procedure section 1094.5. (See, *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 [Peace Officer Procedural Bill of Rights, on the issue of practical compulsion]; *State of California Department of Finance, State Water Resources Control Board, et al. v. Commission on State Mandates and County of San Diego, et al.*, Sacramento County Superior Court, Case No. 34-2010-80000604 [Discharge of Stormwater Runoff, on the issue of whether the permit requirements are considered to fall within the Maximum Extent Practicable standard of federal law]; *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region v. Commission on State Mandates and County of Los Angeles, et al.*, Los Angeles County Superior Court, Case No. BS130730 [Municipal Storm Water and Urban Runoff Discharges, on the issue of whether the permit requirements are considered to fall within the Maximum Extent Practicable standard of federal law]).

<sup>33</sup> Evidence Code section 500; *Cornell v. Reilly* (1954) 127 Cal.App.2d 178, holding that the party asserting the affirmative in an administrative proceeding has the burden of proof.

Pursuant to the Commission's regulations, the technical rules of evidence and witnesses that are required in court are not required before the Commission. Under the Commission's process, evidence to support or rebut any issue can be by either oral or written testimony provided under oath or affirmation.<sup>34</sup>

Hearsay evidence may be used only for the purpose of supplementing or explaining other evidence, but shall *not* be sufficient itself to support a finding unless it would be admissible over objection in civil actions.<sup>35</sup> Hearsay evidence is defined as an out-of-court statement (either oral or written) that is offered to prove the truth of the matter stated. Under the evidentiary requirements for the courts, written testimony in the form of a declaration or affidavit is considered hearsay because the declarant is an out-of-court witness making statements about the truth of the matters asserted and is not available for cross examination. However, under the relaxed rules of evidence in section 1187.5 of the Commission's regulations, written testimony made under oath or affirmation is considered direct evidence and may properly be used to support a fact.<sup>36</sup>

Out-of-court statements that are *not* made under oath or affirmation, however, are hearsay. Unless there is an exception provided by law, hearsay evidence alone cannot be used to support a finding under Government Code section 17518.5 because out-of-court statements are generally considered unreliable. The witness is not under oath, there is no opportunity to cross-examine the witness, and the witness cannot be observed at the hearing.<sup>37</sup> There are many exceptions to the hearsay rule, however. If one of the exceptions applies, then an out-of-court statement is considered trustworthy under the circumstances and may be used to prove the truth of the matter stated.<sup>38</sup>

In addition, the Commission may take judicial notice of any facts which may be judicially noticed by the courts.<sup>39</sup> Such facts include the official acts of any legislative, executive, or judicial body; records of the court; and other facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination.

The Commission's regulation governing evidence is borrowed from the evidence requirements of the Administrative Procedures Act (Gov. Code, § 11513). The courts have interpreted the evidentiary requirement for administrative proceedings as follows:

While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or

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<sup>34</sup> California Code of Regulations, title 2, section 1187.5.

<sup>35</sup> California Code of Regulations, title 2, section 1187.5.

<sup>36</sup> *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597.

<sup>37</sup> *People v. Cudjo* (1993) 6 Cal.4th 585.

<sup>38</sup> See Evidence Code sections 1200 et seq. for the statutory hearsay exceptions.

<sup>39</sup> California Code of Regulations, title 2, section 1187.5. See also, Evidence Code sections 451 and 452.

photographs; ordinarily, hearsay evidence standing alone can have no weight [citations omitted], and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.<sup>40</sup>

Accordingly, even with a proposed unit cost RRM based on the estimated costs of local government, evidence in the record is required to show that the cost information, projections, or approximations of costs used to support the proposed unit cost RRM are only for activities that were determined to be reimbursable in the test claim decision and for other reasonable methods and costs of complying with the mandate. Costs data or projections based on excessive costs or costs that go beyond the scope of the mandate are not reimbursable. In addition, evidence needs to support the finding that the proposed unit cost reasonably represents the costs incurred by any eligible claimant to comply with the mandated program.

**3. *There is no evidence in the record to support the proposed unit cost RRM in this case***

In this case, there is no evidence in the record to support the proposed RRM. The last paragraph of Ms. Ter Keurst's declaration describes the RRM proposal as follows:

Based on my analyses of the various survey data and time study data, I believe that \$1.80 per ballot, as indicated in Exhibit S, is the best estimate of costs. The data I used is based on cost information from a representative sample of eligible claimants and information provided by an association. My spreadsheets demonstrate that I have considered the variation of costs among local agencies to implement the mandate in a cost-efficient manner.

Ms. Ter Keurst's declaration states that the proposal is based on "various survey data and time study data." Although the spreadsheet in Exhibit S shows the Department of Finance's calculations based on an average time per provisional ballot of 1.50 minutes, and a San Bernardino calculation based on an average time per ballot of 1.88 minutes, it is not clear which survey or time study the claimant used to calculate the "average" time it takes to check the signatures on the provisional ballots. Ms. Ter Keurst's declaration identifies several time studies

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<sup>40</sup> *Desert Turf Club v. Board of Supervisors for Riverside County* (1956) 141 Cal.App.2d 446, 455. In that case, the board of supervisors denied a permit to use land subject to a zoning ordinance as a race track. The board based its decision on testimony, letters and phone calls from members of the public opposing horse racing and betting on moral grounds. The court held that there was no evidence in the record to support the decision. On remand, the court directed the board to "reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by state law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced." *Id.* at p. 456.

and surveys conducted during the negotiation phase for a joint RRM with the Department of Finance that includes a time study, case sampling, and compilation of results for the November 7, 2006 election; a survey questionnaire to counties by the Department of Finance on December 15, 2006; a supplementary survey distributed on July 24, 2007, that incorporated a general election, primary election and a special election; a time study with eight counties based on the February 2008 election; survey results regarding the number of provisional ballots cast in “the recent statewide elections”; and a spreadsheet detailing eight counties’ claims for fiscal year 2002 through 2006 for the Permanent Absentee Voter Mandate program. Although the survey questionnaire sent by the Department of Finance contained language allowing a county to certify the responses to its questionnaire (“to the best of my ability and knowledge, that the above information is reasonable accurate and verifiable”), no data or responses directly from the counties have been filed with Commission.

Moreover, it is not clear from the declaration, the spreadsheet, or the record if the reported times in the spreadsheet to comply with the mandate were estimated by counties or were recorded as the actual time to check a signature on a provisional ballot during an election. If the times were estimated, there is no indication how time was estimated, or who performed the estimate.<sup>41</sup>

There are also spreadsheets of salary data in the record. However, there is no evidence in the record from a county showing the salaries of the employees performing the mandate.

In addition, Ms. Ter Keurst states in one of her e-mails (Exhibit K to the declaration) that there are many ways to manipulate the numbers to come to a proposed unit cost and that she used the median time reported to check signatures. It is not clear from this record why the data was manipulated in the manner proposed by the claimant.

As filed, the survey data identified in the spreadsheets that the claimant is using to develop the proposed unit cost cannot be considered evidence of either actual or estimated costs incurred by counties to perform the mandate because the spreadsheets of responses prepared by Ms. Ter Keurst and the Department of Finance are hearsay. The county responses identified in the spreadsheets are out-of-court statements that are *not* provided under oath or affirmation from the responder. As indicated in Ms. Ter Keurst’s declaration, the claimant is using the out-of-court responses to prove the truth of the matters asserted; i.e. that “the data I used is based on cost information from a representative sample of eligible claimants and information provided by an association” and that “[m]y spreadsheets demonstrate that I have considered the variation of costs among local agencies to implement the mandate in a cost-efficient manner.” For these reasons, the courts have held that survey data is hearsay and cannot be considered evidence unless a hearsay exception applies.<sup>42</sup>

Thus, with this record, the Commission cannot determine the reliability of the numbers used by the claimant; whether the costs used to calculate the proposed unit cost were incurred only for

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<sup>41</sup> Although the claimant provides specific times to the second (i.e., 1.8 minutes), which suggests that actual times are being used to project a unit cost, there are also statements in the record suggesting that estimates were used. For example, the Department of Finance’s survey questionnaire asks for “averages” and requests certification that the information is “reasonably accurate.”

<sup>42</sup> *People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1269.



the activity determined to be reimbursable by the Commission in the statement of decision; or whether the proposed unit cost reasonably represents the costs incurred by a county to comply with the mandate during the period of reimbursement, which begins July 1, 2002, and for the fiscal years in the future.

The only evidence that can be taken from Ms. Ter Keurst’s declaration and the attachments is that Ms. Ter Keurst engaged in many discussions with the Department of Finance in an attempt to reach a joint RRM; that the claimant and the Department of Finance, at one point, were fairly close to reaching an agreement (with the parties’ proposals just \$.06 apart); and that Ms. Ter Keurst prepared the spreadsheet and calculated the numbers identified in Exhibit S to her declaration.

In order for the Commission to properly consider the claimant’s proposal as currently prepared and based on cost information from counties, evidence in the form of sworn declarations or testimony from a “representative sample” of the counties responding with time and salary data would need to be provided that shows how the numbers were derived and that the numbers are based on the limited mandate approved by the Commission. If sworn evidence is provided by a representative sample of eligible claimants, the Commission can consider the remaining out-of-court responses from counties under section 1187.5 of its regulations to supplement or explain the proposal. Alternatively, documentation that may be considered under the official records exception to hearsay<sup>43</sup> that contains the information used to calculate the proposed average time taken per provisional ballot and the proposed rate of salary of the employee performing the mandate, could be used as part of the record. In addition, further explanation is needed to show how the numbers were “manipulated.”

Thus, until evidence is filed to support the elements required by Government Code section 17518.5, the Commission cannot reach the merits of the claimant’s proposal here to determine if the unit cost reasonably represents the costs mandated by the state by any eligible claimant.

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<sup>43</sup> Evidence Code section 1280. In this respect, a unit cost proposal submitted in a request to amend the parameters and guidelines that is based on reimbursement claims filed with the State Controller’s Office under penalty of perjury could be considered evidence of the costs incurred to comply with a mandated program. In such cases, the Commission would need to have actual copies of the reimbursement claims from a representative sample of eligible claimants (see, Evid. Code, § 1530), or a declaration from the State Controller’s Office stating that the reported numbers accurately reflect the amounts claimed, or some other method of proving the truth of the costs asserted.

### **III. Conclusion**

Therefore, on this record, staff recommends that the Commission deny the proposed unit cost RRM, and adopt parameters and guidelines identifying the one reimbursable activity identified in the statement of decision that can be claimed based on a showing of the actual costs incurred by the claimant.

### **Staff Recommendation**

Staff recommends that the Commission adopt the proposed parameters and guidelines, beginning on page 35. Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

**Proposed for Adoption: March 23, 2012**

**Claimant's Revised  
Proposed Parameters and Guidelines  
As Modified by Staff**

Elections Code Section 14310

Statutes 2000, Chapter 260 (SB 414)

*Voter Identification Procedures*  
03-TC-23

County of San Bernardino, Claimant

**I. SUMMARY OF THE MANDATE**

The test claim statute requires that elections officials compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration using the procedures that apply to the comparison of signatures on absentee ballots. On October 4, 2006, the Commission on State Mandates (Commission) adopted a statement of decision finding that the test claim statute mandates a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for performing the following specific new activity as part of statutorily-required elections:

~~The Commission approved this test claim for the following reimbursable activity:~~

- Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310(c)(1)).

The Commission further concluded that in a case where a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

**II. ELIGIBLE CLAIMANTS**

Any city, county, ~~and or~~ city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement ~~of those costs~~.

**III. PERIOD OF REIMBURSEMENT**

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of San Bernardino filed the test claim on October 1, 2003, establishing eligibility for reimbursement for the 2002-2003 fiscal year. Therefore, costs incurred pursuant to Elections Code section 14310 are reimbursable on or after July 1, 2002.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.

2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a local agency may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to government Code section 17558(c), between November 15 and February 15, a local agency filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Gov. Code, § 17560(b).)
5. If the total costs for a given fiscal year do not exceed \$1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

#### IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, ~~training packets~~, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of effort are not appropriate for time studies. Claimants wishing to use time studies to support salary and benefit costs are required to comply with the State Controller's Time-Study Guidelines before a time study is conducted. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following ongoing activities ~~is are~~ reimbursable:

##### A. One-Time Activities

1. ~~Update policies and procedures to implement the reimbursable activities.~~

~~2. Modify election computer system to record the mandated provisional ballot signature comparing activities.~~

~~3. Train employees who perform the reimbursable activities.~~

~~B. Ongoing Activities~~

- ~~1. Using the procedures that apply to the comparison of signatures on absentee ballots, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration. If the signatures do not compare, the ballot shall be rejected. (Elec. Code, § 14310(c)(1).)~~

When a local government calls a special election that could have otherwise been legally consolidated with the next local or statewide election, holding the special election is a voluntary decision on the part of the local government, and the downstream costs for checking signatures on provisional ballots are not reimbursable.

## V. CLAIM PREPARATION AND SUBMISSION

~~Claimants may claim costs mandated by the state pursuant to the reasonable reimbursement methodology or by filing an actual cost claim as described below.~~

~~A. Reasonable Reimbursement Methodology — Ongoing costs only~~

~~The Commission is adopting a reasonable reimbursement methodology to reimburse local agencies and school districts for all direct and indirect costs, as authorized by Government Code section 17557, subdivision (b), in lieu of payment of total actual costs incurred for the reimbursable activities specified in Section IV. above. for all direct and indirect costs for the on-going activities identified in section IV.B of these parameters and guidelines to maintain trash receptacles. (Gov. Code, §§ 17557, subd. (b) & 17518.) The RRM is in lieu of filing detailed documentation of actual costs. Under the RRM, the unit cost of \$6.74, during the period of July 1, 2002 to June 30, 2009, for each trash collection or "pickup" is multiplied by the annual number of trash collections (number of receptacles times pickup events for each receptacle), subject to the limitation of no more than three pickups per week. Beginning in fiscal year 2009-2010, the RRM shall be adjusted annually by the implicit price deflator as forecast by the Department of Finance.~~

~~1. Reasonable Reimbursement Methodology~~

~~The definition of reasonable reimbursement methodology is in Government Code section 17518.5 as follows:~~

- ~~(a) Reasonable reimbursement methodology means a formula for reimbursing local agency and school districts for costs mandated by the state, as defined in Section 17514.~~
- ~~(b) A reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or other projections of local costs.~~
- ~~(c) A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost efficient manner.~~

~~(d) — Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state rather than detailed documentation of actual local costs. In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.~~

~~(e) — A reasonable reimbursement methodology may be developed by any of the following:~~

~~(1) The Department of Finance.~~

~~(2) The Controller.~~

~~(3) An affected state agency.~~

~~(4) A claimant.~~

~~(5) An interested party.~~

## 2. — Formula

~~The reasonable reimbursement methodology shall allow each eligible claimant to be reimbursed at the rate of \$1.80 per provisional ballot envelop examined by the agency for all direct and indirect costs of performing the activities, as described in Section IV, Reimbursable Activities.~~

~~The rate per provisional ballot shall be adjusted each year by the Implicit Price Deflator referenced in Government Code section 17523.~~

~~Reimbursement is determined by multiplying the rate per provisional ballot for the appropriate fiscal year by the number of provisional ballots examined by the agency.~~

## B. — Actual Cost Claims

~~Although the Commission adopted a reasonable reimbursement methodology for this mandated program, any claimant may instead choose to file a reimbursement claim based on actual costs.~~

~~Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time as the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.~~

~~Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure~~

~~section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.~~

~~Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.~~

~~The claimant is allowed to claim and be reimbursed for increased costs for reimbursable activities identified above. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.~~

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable costs must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

#### 1-A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

##### 1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

##### 2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

##### 3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

##### 4. Fixed Assets ~~and Equipment~~

Report the purchase price paid for fixed assets ~~and equipment~~ (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes,

delivery costs, and installation costs. If the fixed asset ~~or equipment~~ is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

#### 5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

#### 2.- B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.); (2) direct salaries and wages; or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to



distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected.

## **VI. RECORD RETENTION**

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter<sup>1</sup> is subject to the initiation of an audit by the State Controller's Office no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the State Controller's Office to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the State Controller's Office during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

## **VII. OFFSETTING REVENUES AND REIMBURSEMENTS**

Any offsetting revenues the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

## **VIII. STATE CONTROLLER'S OFFICE CLAIMING INSTRUCTIONS**

Pursuant to Government Code section 17558, subdivision (b), the State Controller's Office shall issue claiming instructions, for each mandate that requires state reimbursement, not later than ~~60~~ 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

## **IX. REMEDIES BEFORE THE COMMISSION**

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller's Office or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the State Controller's Office to modify the claiming

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<sup>1</sup> This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

instructions and the State Controller's Office shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

**X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES**

The statement of decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the statement of decision, is on file with the Commission.