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OFFICE OF VOTING SYSTEMS TECHNOLOGY ASSESSMENT
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October 9, 2008

County Clerk/Registrar of Voters (CC/ROV) Memorandum # 08298

TO: All County Clerks/Registrars of Voters

FROM: _____
Ryan Macias
Voting Systems Analyst

RE: Proposed Emergency Regulations: Post Election Manual Tally Requirements

Attached are proposed emergency regulations for the Post Election Manual Tally Requirements. The Secretary of State is filing the proposed emergency regulations with the Office of Administrative Law (OAL). She expects a decision from the OAL on or about Monday, October 20, 2008. If OAL approves the emergency regulations, they will become effective immediately upon filing with the Secretary of State.

Any comments can be filed with the Office of Administrative Law.

Attachments (2)

TITLE 2. ADMINISTRATION
DIVISION 7. SECRETARY OF STATE

EMERGENCY REGULATIONS

Finding of Emergency

The Secretary of State finds that an emergency exists, and that the adoption of the foregoing regulations is necessary for the immediate preservation of the public peace, health and safety, or general welfare, as required by subdivision (b) of Section 11346.1 of the Government Code.

Specific Facts Showing the Need for Immediate Action

Overview: The Secretary of State reasonably believed that the Post Election Manual Tally Requirements (PEMT) were not regulations subject to the requirements of the Administrative Procedure Act (APA), Government Code section 11340 et seq. In forming this view, the Secretary relied on the advice of counsel and subsequently on a Superior Court decision in a case challenging her authority to issue the PEMT. On August 29, 2008, the Court of Appeal upheld the Superior Court's ruling that the Secretary has authority to require post election manual tallies as a condition of voting system certification, but reversed the trial court's ruling on the APA issue. See *County of San Diego v. Debra Bowen* (2008) 166 Cal.App.4th 501. By then, it was too late to promulgate the PEMT as permanent regulations through the full APA process and have them in effect for the November 4, 2008, General Election.

Soon after taking office in January 2007, Secretary of State Debra Bowen, pursuant to the authority granted by section 19222 of the Elections Code, initiated an in-depth scientific review of voting systems previously approved for use in California elections. The project came to be known as the Top-To-Bottom Review (TTBR).

On August 3, 2007, the Secretary of State made compliance with forthcoming post-election manual tally requirements a condition of re-approval of each of the voting systems examined in the TTBR. At that time, the Secretary did not believe such requirements would constitute regulations subject to the requirements of the APA. This belief was based in part upon the decision of the United States District Court for the Central District of California in *American Association of People with Disabilities v. Shelley*. On October 25, 2007, the Secretary issued the written requirements. Two months passed before San Diego County sought a judicial determination that the Secretary of State did not have the authority to impose the PEMT and, in the alternative, that the PEMT were regulations subject to the APA. On January 22, 2008, the Superior Court denied the Counties' request for relief. The trial court entered judgment on March 7, 2008. The Counties filed a Joint Notice of Appeal on March 19, 2008.

On August 29, 2008, the Court of Appeal upheld the trial court's ruling that the Secretary of State had authority to make the PEMT a condition of re-approval of voting systems following the

TTBR. The Court of Appeal reversed the trial court's ruling on the APA issue, holding that the PEMT were regulations subject to the requirements of the APA. The APA process typically requires at least four months before permanent regulations become effective, more if there are substantive changes to the proposed regulations during the process. Had the Secretary of State filed the proposed PEMT regulations with the Office of Administrative Law the day following the court decision, there would not have been enough time to complete the full APA process and have the PEMT in effect as permanent regulations in time for the November 4, 2008, General Election.

The TTBR showed that voting systems in widespread use throughout California are vulnerable to error and tampering. Escalating post election hand counts of ballots cast in randomly selected precincts are essential to confirm the correctness of the results reported by these voting systems, particularly in contests in which the apparent margin of victory is quite small. The PEMT were successfully implemented by the handful of counties in which close contests triggered their use following the June 3, 2008, Statewide Primary Election. Unless the PEMT are in effect as emergency regulations for the November 4, 2008, General Election, the accuracy and integrity of the results in close contests, as well as public confidence in those results, could be compromised.

Accordingly, immediate action is required to implement these regulations on an emergency basis.

Authority and Reference

Authority: Section 12172.5, Government Code and Sections 10, 19200, 19201, 19205, 19222, Elections Code.

Reference: Sections 19200, 19201, 19205, 19222, Elections Code.

Informative Digest

In 2007, the Secretary retained the University of California and a team of computer security experts to evaluate the security, reliability and accessibility of voting systems approved for use in California. Upon completion of this review, on August 3, 2007, the Secretary withdrew her approval of the voting systems studied by the review team, including certain Diebold, Sequoia and Hart InterCivic voting systems. The Secretary simultaneously issued a conditional re-approval of each of the voting systems that set forth approximately 40 preconditions to their use.

One of the conditions common to each of the re-approvals required the counties that chose to use the machines subject to the TTBR to follow, "post-election manual count auditing requirements," in addition to those already required by statute. The conditional re-approvals were amended on October 25, 2007, with the post election manual count condition revised to state this point more precisely: "Elections officials must comply with . . . requirements as set forth by the Secretary of State in the document entitled 'Post-Election Manual Tally Requirements' and any successor document." That same day, the Secretary issued a stand-alone document entitled "Post-Election Manual Tally Requirements" (the PEMT).

The PEMT sets forth a comprehensive post election manual tally procedure. The PEMT requires that: (i) "Elections officials shall conduct a manual tally of 10% of randomly selected precincts for any contest where the margin of victory is less than one half of one percent (0.5%)"; (ii) in contests that span multiple jurisdictions (e.g., statewide contests), "if the margin of victory within a given jurisdiction is more than 0.5%, but the overall margin . . . is less than 0.5%, then each jurisdiction involved in the contest shall conduct a manual tally of 10% of the precincts in which voters cast ballots for that contest in the jurisdiction"; and (iii) the tallies "must be completed within the canvass period established by Elections Code § 10262 and § 15372." See Elections Code sections 335.5 [defining " 'official canvass' "] and 353.5 [defining 'semifinal official canvass' "].

On December 18, 2007, the County of San Diego and Deborah Seiler, in her official capacity as the Registrar of Voters for the County of San Diego (County of San Diego), filed a complaint for declaratory and injunctive relief and a petition for writ of mandate in the superior court, asking the court to void the PEMT. County of San Diego argued that the Secretary had overstepped her statutory authority in issuing the PEMT and that, even if she possessed the authority to issue the PEMT, she could only do so pursuant to the APA. In January 2008, the parties stipulated to permitting the counties of Kern, Riverside and San Bernardino to intervene in the case.

On January 22, 2008, the Superior Court denied the counties' request for relief. The court concluded that the Secretary had acted within her legislatively delegated authority in issuing the challenged requirements, and that because the PEMT did not constitute a "regulation," the Secretary was not required to comply with the APA. The trial court entered judgment on March 7, 2008. The counties filed a Joint Notice of Appeal on March 19, 2008. They also filed a motion seeking expedited review and a decision in the appeal prior to the November 4, 2008, election. The Court of Appeal granted the motion to expedite. On August 29, 2008, 66 days before the election, the Court of Appeal issued its decision. The court upheld the trial court's ruling that the Secretary has authority to issue the PEMT. The court reversed the trial court's ruling that the PEMT were not regulations and therefore not subject to the APA.

Identification of Each Technical, Theoretical, and Empirical Study, Report, or Similar Document On Which the Secretary of State Relies

In proposing these emergency regulations, the Secretary of State relies upon the following documents:

- TTBR Red Team report on Premier Voting Solutions/Diebold, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- TTBR Red Team report on Sequoia Voting Systems, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- TTBR Red Team report on Hart InterCivic, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- ES&S Red Team report, available at http://www.sos.ca.gov/elections/elections_vs_ess.htm

- TTBR Source Code Team report on Premier Voting Solutions/Diebold, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- TTBR Source Code Team report on Sequoia Voting Systems, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- TTBR Source Code Team report on Hart InterCivic, available at http://www.sos.ca.gov/elections/elections_vsr.htm
- ES&S Source Code report, available at http://www.sos.ca.gov/elections/elections_vs_ess.htm
- Source Code report on Sequoia Voting System 4.0, available at http://www.sos.ca.gov/elections/elections_vs_sequoia.htm
- Post-Election Audit Standards Working Group report, available at http://www.sos.ca.gov/elections/elections_peas.htm

Local Mandate Determination

Mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: The Secretary of State has determined that the proposed regulations will impose a reimbursable mandate on those counties where narrow margins of victory require Post Election Manual Tallies pursuant to the regulations.

Fiscal Impact Estimate

In submitting these regulations to the Office of Administrative Law, the Secretary of State incorporates form STD 399, a copy of which is attached to this document.

Cost or savings to any state agency: The Secretary of State has determined that the proposed regulations will not impose an additional cost to the Secretary of State or any other state agency.

Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: The Secretary of State has determined that the proposed regulations may impose a cost to less than one quarter of the 58 counties in each election in an amount that could range from under $1,000 to a high of approximately $10,000 to conduct post election manual tallies in contests in which the margin of victory is less than 0.5% according to the semifinal official results. This estimate is based on a survey of the seven counties that used the PEMT procedures in the June 2008 election, in which counties reported costs ranging from a low of $160 to a high of $9,131.

Other non-discretionary cost or savings imposed upon local agencies: The Secretary of State has determined that the proposed regulations will not impose other non-discretionary costs or savings upon local agencies.

Cost or savings in federal funding to the state: The Secretary of State has determined that the proposed regulations will not result in cost or savings in federal funding to the state.

TEXT OF PROPOSED EMERGENCY REGULATIONS

Add Sections 20120, 20121, 20122, 20123, 20124, 20125, 20126 and 20127 of Chapter 3 to Division 7 of Title 2 of the California Code of Regulations.

Chapter 3. Post Election Manual Tallies.

§ 20120. Purpose and Applicability.

(a) The purpose of this chapter is to establish standards and procedures for conducting increased manual tallies in contests in which the margin of victory is very narrow.

(b) This chapter applies to the Secretary of State and all elections officials within the State of California for all elections in this state conducted in whole or in part on a voting system, the approval of which is conditioned by the Secretary of State on performance of increased manual tallies in contests with narrow margins of victory.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20121. Increased manual tally in contests with narrow margins of victory.

(a) After each election, the elections official shall determine the margin of victory in each contest based upon the semifinal official canvass results, as defined in Elections Code section 353.5.

(1) For single-winner elections, the margin of victory is the difference between the percentage of votes won by the candidate with the number of votes needed to win the seat and the percentage of votes won by the candidate with the next lowest number of votes.

(2) For multi-winner elections, the margin of victory is the difference between the percentage of votes won by the candidate with the lowest number of votes needed to win a seat and the percentage of votes won by the candidate with the next lowest number of votes. For example, for a contest with three open seats, the margin of victory would be the difference between the percentage of the votes won by the third and fourth place candidates.

(3) For ballot measure contests, including recall contests, the margin of victory is the difference between the percentages of votes for and against the ballot measure.

(b) For any contest in which the margin of victory is less than one half of one percent (0.5%), the elections official shall conduct a manual tally, employing the methods set forth in Elections Code section 15360, of ten percent (10%) of randomly selected precincts. The ten percent (10%) manual tally shall apply only to votes cast in the contest

or contests with a margin of victory less than one half of one percent (0.5%), not to other contests on the same ballot in which the margin of victory equals or exceeds one half of one percent (0.5%).

(c) Precincts manually tallied under Elections Code section 15360 may be included as part of the ten percent (10%) manual tally.

(d) In any contest in which a ten percent (10)%) manual tally would otherwise be required pursuant to subdivision (b), an elections official may instead conduct a one hundred percent (100%) manual tally of the ballots.

(e) The elections official shall begin the manual tally as soon as practicable after the random selection of precincts for the manual tally.

(f) The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.

(g) Individuals performing the manual tally shall not at any time during the manual tally process be informed of the corresponding machine tally results.

(h) A poll worker participating in the manual tally shall not be assigned to tally the results from a precinct in which that individual served as a poll worker on Election Day.

(i) The elections official shall take appropriate measures to ensure that direct recording electronic (DRE) ballots that were cancelled before being cast are not inadvertently tallied as valid ballots in the manual tally process.

(j) The elections official shall take appropriate measures to ensure that damaged or defective ballots are not inadvertently tallied as valid ballots in the manual tally process.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20122. Contests voted upon in more than one jurisdiction.

(a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a ten percent (10%) manual tally is required by section 20121, subdivision (b) by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest. The examples in subdivisions (a)(1) and (a)(2) below of contests voted upon in two counties illustrate the application of the general rule stated in this subdivision (a).

(1) If the margin of victory in a contest voted upon in counties A and B is less than one half of one percent (0.5%) within county A but the overall margin of victory in

counties A and B combined is more than one half of one percent (0.5%), then a ten percent (10%) manual tally is not required in either county.

(2) If the margin of victory in a contest voted upon in counties A and B is more than one half of one percent (0.5%) within county A but the overall margin of victory in counties A and B combined is less than one half of one percent (0.5%), then County A shall conduct a manual tally of a randomly selected ten percent (10%) of the County A precincts in which voters cast ballots for that contest and County B shall conduct a manual tally of a randomly selected ten percent (10%) of the County B precincts in which voters cast ballots for that contest.

(b) For a legislative or statewide contest, the elections official shall determine whether a ten percent (10%) manual tally is required based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the Secretary of State.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20123. Determination, counting and disclosure of variances.

(a) A "variance" is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at least the same proportion in the remaining ballots cast in the contest. The examples in subdivisions (a)(1) through (a)(3) illustrate how the number of variances in a contest should be calculated.

(1) If the manual tally establishes that the machine tally erroneously attributed a vote for Candidate A to Candidate B, two variances result because the vote totals for Candidate A and for Candidate B are each changed by one vote in the manual tally.

(2) If the manual tally establishes that the machine tally erroneously attributed a vote for Measure 1 as a vote against Measure 1, two variances result because the vote totals for Measure 1 and against Measure 1 are each changed by one vote in the manual tally.

(3) If the manual tally determines that a vote was cast in a contest on a ballot that the machine tally interpreted as an undervote in the contest, one variance results because the machine tally undervote becomes a vote for a candidate or a vote for or against a measure in the manual tally.

(b) An elections official must document and disclose to the public any variances between the semifinal official canvass results and the manual tally results.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20124. Manual tally escalation requirements for variances.

(a) The elections official shall calculate the variance percentage for any contest with one or more variances by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single-winner contests, only variances that narrow the margin between the winner and any of the losers shall be included in the total number of variances. For multi-winner contests, only variances that narrow the margin of victory between any of the winners and any of the losers shall be included in the total number of variances. If the variance percentage represents at least one-tenth (10%) of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest as provided in subdivision (b).

(b) Additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist – re-calculated using the method above – is smaller than ten percent (10%) of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.

(c) If any variance is found between manually tallied voter verifiable paper audit trail (VVPAT) records and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem, then the VVPAT records, memory cards and devices, and direct recording electronic (DRE) voting machines must be preserved and the Secretary of State must be notified in order to allow for an investigation to determine the cause of the problem. The Secretary of State shall conduct the investigation in such a manner as to minimize adverse impact on the conclusion of the canvass and certification of the election, as well as preparation for any upcoming elections.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20125. Records To Be Maintained During And After The Manual Tally Process.

(a) The elections official shall keep a log to record the manual tally process, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to this chapter. The elections official shall make the log available to the public.

(b) The elections official shall track, record in the log and report to the public by precinct the number of undervotes and overvotes discovered in the manual tally of a contest.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20126. Public Right To Observe.

(a) The elections official shall make any semifinal official canvass precinct tally results available to the public before the manual tally of the results from those precincts begins.

(b) The elections official shall comply with the notice requirements established in Elections Code §15360 when conducting any post-election manual tallying required by this chapter. This notice requirement may be satisfied by providing a single notice containing the times and places of:

(1) the initial selection of precincts for the one percent (1%) manual tally and any ten percent (10%) manual tally required;
(2) the beginning of the manual tally process; and
(3) any additional random selection of precincts which may become necessary to comply with escalation requirements.

(c) The elections official shall permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows them to verify the tally. The elections official shall not permit members of the public to touch ballots, voter verifiable paper audit trails or other official materials used in the manual tally process or to interfere in any way with the process.

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20127. Completion Within Official Canvass Period.

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

Note: Authority cited: Section 12172.5, Government Code; Sections 10, 19100, 19205, 19222, Elections Code.
Reference: Sections 19100, 19205, 19222, Elections Code.