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April 25, 2014

**RECEIVED**  
April 25, 2014  
**Commission on  
State Mandates**

Ms. Heather Halsey  
Executive Director  
Commission on State Mandates  
980 9th Street, Suite 300  
Sacramento, CA 95814

Re: Claim No. 10-TC-08 "Post Election Manual Tally (PEMT)" Claimant's comments to Department of Finance comments on the Commission on State Mandates Final Staff Analysis and Statement of Decision

Dear Ms. Halsey,

This letter is the County of Santa Barbara's (Claimant's) comments on the Department of Finance letter submitted to the Commission on March 25, 2014.

In its letter, the Department of Finance (DOF) requested that the Commission on State Mandates (CSM) staff reconsider its proposed decision based on two points. First, they allege that the subject regulations resulted in an increased cost to the one percent manual tally that was already required, not a "new mandate" or "higher level of service". Secondly, that the Help America Vote Act (HAVA) does not require a mechanical or electronic voting system in order to meet the requirement that "individuals with disabilities, including the visually impaired, have the opportunity to vote independently and in private."

In response to the first allegation, Santa Barbara County disputes the Department of Finance's interpretation. DOF argues that this increase is not "new" or a "higher level of service", but rather this increase results in additional costs, citing *Lucia Mar Unified School District v. Honig, (1988) 44 Cal. 3d 830*. *Lucia Mar* does not support DOF's position. *Lucia Mar* states that "local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state." *Lucia Mar, at 835*. In that case, the commission denied a school district's claim, finding no reimbursable mandate because, although Education Code section 59300 increased plaintiff's costs for educating students at state-operated schools, it did not impose on the districts a new program or higher level of service. The trial court and Court of Appeal agreed, but the Supreme Court reversed the judgment of the Court of Appeal, holding that Section 59300 does impose a new program or higher level of service. The additional 9% manual tally is a new program or higher level of service because the Post Election Manual Tally Requirements in Close Contest (PEMT) exceed the requirements of the one percent manual tally required by California Elections Code Section 15360. The requirements impose and increase in the actual level and quality of governmental services provided.

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

#### Determine the margin of victory

With the addition of § 20121 the elections officials were required to determine the margin of victory in each contest based on the results as reported in the semifinal official canvass of results and the type of contest; single-winner, multi-winner, or ballot measure contests. As defined in Elections Code 353.5 the “semifinal official canvass” is the public process of collecting, processing, and tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on election night.

#### Contest in more than one jurisdiction

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

#### Escalation requirements

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

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

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

PEMT regulations § 20123, § 20125 and § 20126 expanded the scope of requirements of E.C. section 15360 to account for the additional 9% of precincts. This is an increase to the actual level and quality of the governmental service provided, not just an increase in cost.

We agree with the Commission's staff findings and proposed statement of decision that California Code of Regulations, title, sections 20121-20126 impose a reimbursable state-mandated program (Proposed Decision, page 12).

Contrary to DOF's position, the increase in the number of ballots counted by the counties does correspond with increased duties, and it does increase public confidence in the accuracy of the election results.

In a memorandum from the Secretary of State's (SOS) Office to the County Clerk/Registrar of Voters dated October 9, 2008 (CCROV # 08298), advising of the proposed emergency regulations for the Post Election Manual Tally to be filed with the Office of Administrative Law, the SOS Office states,

“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... 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.”

We respectfully request that the Commission reconsider its proposed Statement of Decision as to California Code of Regulations, title 2, section 20127, as the County believes this section represents a new program or higher level of service which resulted in increased costs to the County. Section 20127 requires that for any contest in which an increased manual tally is required, the elections official shall complete all tasks and make all reports required by this chapter within the canvass period established by Elections Code sections 10262 and 15372. Previously, the County was not required to complete such a large amount of tallying activity within the official canvass period. Also, the additional work was required to be done in such a short period of time so that the public could quickly receive the election results, which increases their value, and have confidence in those results. This timing requirement also increased the costs of such additional services.

We further dispute the second allegation, that the Help America Vote Act (HAVA) does not require a mechanical or electronic voting system in order to meet the requirement that “individuals with disabilities, including the visually impaired, have the opportunity to vote independently and in private.” 42 U.S.C. § 15841 (a)(3)(B) requires the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place to satisfy the requirement for access for individuals with disabilities. HAVA defines a voting system as (emphasis added):

**(b) Voting system defined**

In this section, the term “voting system” means—

**(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—**

**(A) to define ballots;**

- (B) to cast and count votes;
- (C) to report or display election results; and
- (D) to maintain and produce any audit trail information; and
- (2) the practices and associated documentation used—
  - (A) to identify system components and versions of such components;
  - (B) to test the system during its development and maintenance;
  - (C) to maintain records of system errors and defects;
  - (D) to determine specific system changes to be made to a system after the initial qualification of the system; and
  - (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

The type of voting system used must be accessible and furthermore, must be certified by the State of California for use in an election regardless of whether it uses a paper ballot or not. The use of a paper ballot voting system does not preclude the requirement to have one accessible unit at each polling location, nor does it preclude the requirement to conduct the Post Election Manual Tally in Close Contests.

The County of Santa Barbara appreciates the opportunity to comment on the Department of Finance's comments to the Commission on State Mandate's Final Staff Analysis and Proposed Statement of Decision and for your consideration of our comments in any revised analysis and proposed statement of decision.

If you have any questions regarding this letter, please contact Renee Bischof, Chief Deputy Register of Voters at (805) 696-8963.


Sincerely,



Renee Bischof  
Chief Deputy Registrar of Voters  
Santa Barbara County

Post Election Manual Tally (PEMT) 10-TC-08  
Declaration Supporting Comments on  
the Department of Finance Comments to the  
Draft Analysis and Proposed Statement of Decision

I, Renee Bischof, Chief Deputy Registrar of Voters for the County of Santa Barbara, declare under penalty of perjury, that the information provided herein is true and complete to the best of my personal knowledge, information or belief and that this declaration is executed this 25th day of April, 2014, at Santa Barbara, California.

A handwritten signature in cursive script, reading "Renee Bischof", is written above a solid horizontal line.

Renee Bischof  
Chief Deputy Registrar of Voters  
County of Santa Barbara

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

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

On April 28, 2014, I served the:

**Claimant Rebuttal Comments**

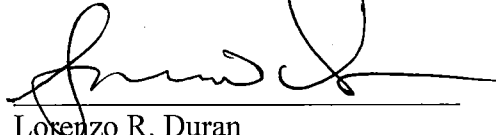
*Post Election Manual Tally (PEMT), 10-TC-08*

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

County of Santa Barbara, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 28, 2014 at Sacramento, California.



Lorenzo R. Duran  
Commission on State Mandates  
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# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 4/16/14

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

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

**Claimant:** County of Santa Barbara

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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