

ITEM 7
PROPOSED DECISION
AND
PARAMETERS AND GUIDELINES

Former California Code of Regulations, Title 2, Sections 20120, 20121,
20122, 20123, 20124, 20125, 20126 and 20127¹

Register 2008, No. 43

Post Election Manual Tally (PEMT)

10-TC-08

County of Santa Barbara, Claimant

EXECUTIVE SUMMARY

I. SUMMARY OF THE MANDATE

These parameters and guidelines address regulations requiring new standards and procedures to conduct post election manual tallies (PEMT) of votes for races with very narrow margins of victory during elections conducted in whole or in part on a mechanical, electromechanical, or electronic voting system.

On July 25, 2014, the Commission on State Mandates (Commission) adopted a decision on the test claim finding that test claim regulations impose a partially reimbursable state-mandated program on county election agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514. The Commission approved the test claim for the reimbursable activities found under Section IV. Reimbursable Activities.

II. PROCEDURAL HISTORY

The test claim decision was adopted on July 25, 2014. Commission staff issued draft expedited parameters and guidelines for comment on July 30, 2014. The State Controller's Office (Controller) submitted comments on the draft expedited parameters and guidelines on August 20, 2014. Cost Recovery Systems, Inc. (CRS) filed late comments on August 29, 2014.

III. DISCUSSION

A. Section II, Eligible Claimants

The draft expedited parameters and guidelines issued by Commission staff state that eligible claimants are: "Any county and city and county that incurs increased costs as a result of this mandate are eligible to claim reimbursement."

¹ The regulations were adopted as emergency regulations by Register 2008, No. 43, operative from October 20, 2008 to April 12, 2009. The Commission does not have jurisdiction over their re-adoption and renumbering by Register 2009, No. 16, operative April 13, 2009.

On August 29, 2014, CRS submitted comments requesting that cities be included as eligible claimants. CRS states that because cities also administer elections, they would be subject to the same requirements under the PEMT regulations.

The Commission disagrees. As explained in the decision, because the November 2008 Presidential General Election was a statewide election consolidated with municipal elections, cities would not be eligible claimants because city elections officials were not required to comply with the test claim regulations.

B. Section III, Period of Reimbursement

Government Code section 17557(c) requires the Commission to specify in the parameters and guidelines the fiscal years for which local agencies shall be reimbursed for costs incurred as a result of the mandated program. The period of reimbursement is established as the fiscal year before the fiscal year the test claim is submitted. Government Code section 17557(e) states that “[a] test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.” Government Code section 17551(c) establishes a statute of limitations for submitting test claims with the Commission as follows: “Local agency and school district test claims shall be filed not later than 12 month following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.”

The PEMT regulations were adopted and became operative on October 20, 2008.² The claimant first incurred actual costs as a result of the regulations less than one month later, beginning November 10, 2008.³ The test claim was filed on March 28, 2011. However, although the test claim was filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the Commission found that it had jurisdiction to hear and determine the test claim since the statute of limitations for filing this test claim was properly tolled pursuant to Government Code section 17573(b).

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

The Controller, in comments on the draft expedited parameters and guidelines, requests clarification of the period of reimbursement and suggests that the period of reimbursement should begin in 2009-2010 since the test claim was filed on March 28, 2011 (the 2010-2011

² Register 2008, No. 43, operative October 20, 2008.

³ Exhibit A, Test Claim Decision, page 23.

fiscal year).⁴ However, the Controller’s interpretation would ignore that the statute of limitations for filing this claim was properly tolled under Government Code section 17573(b), stopping the clock and providing additional time to file the claim in order to negotiate an LDM. The Commission was required by the statutes to take jurisdiction and make findings on the test claim. Moreover, the regulations were only effective from October 20, 2008 until April 12, 2009, and costs were only incurred under the program for a few weeks in fiscal year 2008-2009, until November 28, 2008, coinciding with the November 2008 Presidential General Election and canvass period. A finding that establishes the period of reimbursement in a year when test claim regulations were not in effect defeats the claimants’ right to reimbursement and ignores the effect of the tolling, which expressly gives the parties additional time to negotiate an LDM and then file a test claim if negotiations fail. Such a conclusion would lead to an absurd result.⁵

The Legislature expressly considered the effect of the period of reimbursement when an LDM is *approved* by the Legislature. Government Code sections 17573 and 17574 do establish periods of reimbursement for programs approved as an LDM, “notwithstanding [the period of reimbursement provisions in] Government Code section 17557(e).” However, sections 17573 and 17574 are silent on the period of reimbursement when LDM negotiations fail and a test claim is later filed within the tolled time.

Nevertheless, to carry out the Legislature’s intent when enacting the tolling provision in Government Code section 17573(b), the reimbursement period in Government Code section 17557(e) must be applied as if the claim were filed absent the tolling and within the original time limitations required by Government Code section 17551(c).

Accordingly, Section III of the proposed parameters and guidelines includes a paragraph explaining the tolling provision and the period of reimbursement from October 20, 2008 until November 28, 2008.

C. Section IV, Reimbursable Activities

The Commission’s regulations require the parameters and guidelines to identify the activities found to be mandated by the state and any activities determined to be reasonably necessary.⁶ The draft expedited parameters and guidelines identified the activities as approved by the Commission in the test claim decision.

In comments on the draft expedited parameters and guidelines, the Controller requests adding the word “former” to the citation for the repealed PEMT regulations in the parameters and guidelines. This change has been made.

The Controller also requests changes to some of the citations identified in the reimbursable activities “to be consistent with the footnotes.” These proposed changes were not made, however, because changing the citations would misquote the regulations.

D. Section IX, Remedies Before the Commission

⁴ The Controller also pointed out a typographical error in the draft expedited parameters and guidelines, which identified the test claim filing date as March 28, 2008, rather than March 28, 2011. The parameters and guidelines correct that error.

⁵ *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1221.

⁶ California Code of Regulations, title 2, section 1183.7(d).

The Controller requests a change to a citation to the Commission's regulations, from section 1183.17 to 1183.2. This change was not made because the Commission's regulations were amended and renumbered effective July 1, 2014 and so the citation is correct.

IV. STAFF RECOMMENDATION

Staff recommends that the Commission adopt the attached proposed decision and parameters and guidelines and authorize staff to make any non-substantive, technical corrections following the hearing.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES
FOR:

Former California Code of Regulations, Title 2,
Sections 20120, 20121, 20122, 20123, 20124,
20125, 20126 and 20127⁷
Register 2008, No. 43

Period of reimbursement is from
October 20, 2008 through November 28, 2008.

Case No.: 10-TC-08

Post Election Manual Tally (PEMT)

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

(Adopted September 26, 2014)

DECISION

The Commission on State Mandates (Commission) adopted this decision and parameters and guidelines during a regularly scheduled hearing on September 26, 2014. [Witness list will be included in the adopted decision.]

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

The Commission adopted the decision and parameters and guidelines by a vote of [Vote count will be included in the adopted decision].

I. SUMMARY OF THE MANDATE

These parameters and guidelines address regulations requiring new standards and procedures to conduct post election manual tallies (PEMT) of votes for races with very narrow margins of victory during elections conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The activities include determining the margin of victory and whether a ten percent manual tally is required for each contest. For races with less than a one-half percent margin of victory, counties select and manually tally nine percent of the precincts in the contest, and perform related duties.

On July 25, 2014, the Commission on State Mandates (Commission) adopted a decision on the test claim finding that test claim regulations (former Cal. Code Regs., tit. 2, §§ 20120 – 20127) impose a partially reimbursable state-mandated program on county election agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514. The Commission approved the test claim for the reimbursable activities found under Section IV. Reimbursable Activities.

⁷ The regulations were adopted as emergency regulations by Register 2008, No. 43, operative from October 20, 2008 to April 12, 2009. The Commission does not have jurisdiction over their re-adoption and renumbering by Register 2009, No. 16, operative April 13, 2009.

II. PROCEDURAL HISTORY

The test claim decision was adopted on July 25, 2014.⁸ Commission staff issued draft expedited parameters and guidelines on July 30, 2014.⁹ The State Controller's Office (Controller) submitted comments on the draft expedited parameters and guidelines on August 20, 2014, recommending changes to the test claim filing date and reimbursement eligibility dates, and to citations.¹⁰ Cost Recovery Systems, Inc. (CRS) filed late comments on August 29, 2014, requesting that cities be added as eligible claimants.¹¹

III. COMMISSION FINDINGS

A. Section II, Eligible Claimants

The draft expedited parameters and guidelines state that eligible claimants are: "Any county and city and county that incurs increased costs as a result of this mandate are eligible to claim reimbursement."

On August 29, 2014, CRS filed comments requesting that cities be included as eligible claimants. CRS states that because cities also administer elections, they are subject to the same requirements under the PEMT regulations.

The Commission disagrees. It is true that the regulations expressly apply to "elections officials,"¹² which are defined by statute to include both county as well as city elections officials,¹³ and that city officials conduct municipal elections.¹⁴

The regulations in this case, however, apply only to the November 2008 Presidential General Election, which, as a November election held in an even-numbered year, was a statewide election.¹⁵ Statewide elections are generally required to be consolidated with municipal elections held on the same date,¹⁶ and the canvassing rules that govern statewide elections apply to consolidated elections.¹⁷ In consolidated elections, county elections officials canvass the election.¹⁸ That is why the regulations were promulgated from the Secretary of State to county

⁸ Exhibit A.

⁹ Exhibit B.

¹⁰ Exhibit C.

¹¹ Exhibit D.

¹² See former California Code of Regulations, title 2, section 20120(b).

¹³ Elections Code section 320.

¹⁴ Elections Code section 10262(a). According to Elections Code section 330: "'Municipal election' means elections in general law cities and where applicable in chartered cities."

¹⁵ Elections Code 1001.

¹⁶ Elections Code section 10402.5.

¹⁷ Elections Code section 10418.

¹⁸ Government Code section 25201. Elections Code sections 10413 and 10262 (b).

clerks/registrars of voters,¹⁹ and why the Economic Impact Statement filed with the March 2009 reauthorization of the regulations lists only counties as entities that had incurred costs.²⁰

Because any municipal elections held during the November 2008 Presidential General Election would have been consolidated with the statewide election, cities are not eligible claimants because city elections officials were not required to comply with the test claim regulations. Moreover, no evidence has been submitted into the record of any costs incurred by a city under the test claim regulations.

Therefore, the Commission finds that any county or city and county that incurs increased costs as a result of this mandate is eligible to claim reimbursement.

B. Section III, Period of Reimbursement

Government Code section 17557(c) requires the Commission to specify in the parameters and guidelines the fiscal years for which local agencies shall be reimbursed for costs incurred as a result of the mandated program. The period of reimbursement is established as the fiscal year before the fiscal year the test claim is submitted. Government Code section 17557(e) states that “[a] test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.” Government Code section 17551(c) establishes a statute of limitations for submitting test claims with the Commission as follows: “Local agency and school district test claims shall be filed not later than 12 month following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.”

The PEMT regulations were adopted and became operative on October 20, 2008.²¹ The claimant first incurred actual costs as a result of the regulations less than one month later, beginning November 10, 2008.²² The test claim was filed on March 28, 2011. However, although the test claim was filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the Commission found that it had jurisdiction to hear and determine the test claim since the statute of limitations for filing this test claim was properly tolled.

The claimant first incurred costs in this case on November 10, 2008, and under section 17551(c) and 1183.1(b) of the Commission’s regulations, the deadline for filing the claim was June 30, 2010. However, on October 22, 2009, the California State Association of Counties (CSAC) submitted a letter of intent to the Commission on State Mandates in accordance with Government Code section 17573 to develop a Legislatively Determined Mandate (LDM) for the

¹⁹ Exhibit D. California Secretary of State, memo to County Clerk/Registrar of Voters, October 21, 2008. See <<http://www.sos.ca.gov/elections/ccrov/pdf/2008/october/08304jh.pdf>> accessed on September 2, 2014.

²⁰ Exhibit D. California Secretary of State, memo to County Clerk/Registrar of Voters, March 24, 2009. See <<https://www.sos.ca.gov/elections/ccrov/pdf/2009/march/09048jb.pdf>> accessed on September 2, 2014.

²¹ Register 2008, No. 43, operative October 20, 2008.

²² Exhibit A, page 23.

PEMT emergency regulations.²³ On November 12, 2009, the Commission notified CSAC and the Department of Finance of their receipt of the letter of intent and advising that the statute of limitation for filing a test claim shall be tolled as of October 22, 2009, pursuant to Government Code section 17573(b).²⁴

Thus, the parties initially attempted to negotiate and jointly request an LDM pursuant to Government Code sections 17573 and 17574 for the reimbursement of costs to comply with the PEMT regulations. Under Government Code section 17573(b), the statute of limitations in section 17551(c) for filing a test claim is tolled during those negotiations *from* the date a local agency contacts the Department of Finance or responds to a Finance request to initiate a joint request for an LDM - *to* the date that the Budget Act for the subsequent fiscal year is adopted if a joint request is submitted to the Legislature, *or to* the date on which one of the parties notifies the other of its decision to not submit a joint request to the Legislature for an LDM. The Commission determined that since the notice of intent to develop an LDM was filed with the Commission on November 2, 2009, *before* the June 30, 2010 deadline for filing the test claim under Government Code section 17551(c) (based on when costs were first incurred by the claimant),²⁵ the notice was timely and the statute of limitations required by section 17551(c) was properly tolled until April 5, 2011, when the parties filed notice that they were not submitting a joint request for an LDM to the Legislature. Under the law, whatever period of time that remained to file a test claim when the clock was stopped on November 2, 2009, here 240 days, was available when the clock was restarted after the tolling period ended.²⁶ The statute of limitations is suspended during the time the limitation period is tolled.²⁷ In this case, the claimant timely filed the test claim on March 28, 2011, 8 days before the clock restarted on April 5, 2011, when notice of the failure of negotiations was received by Commission staff, and well before the tolled statute of limitations would have expired on November 15, 2011.

The Controller, in comments on the draft expedited parameters and guidelines, requests clarification of the period of reimbursement and suggests that it should begin June 30, 2009 based on Government Code section 17557(e), which as explained above, establishes the period of reimbursement as the fiscal year before the fiscal year the test claim is submitted with the Commission. However, the Controller's interpretation would ignore that the statute of limitations for filing this claim was properly tolled under Government Code section 17573(b), stopping the clock and providing additional time to file the claim in order to negotiate an LDM

²³ California State Association of Counties, letter notifying Commission staff of intent to develop a legislatively determined mandate (LDM), filed November 2, 2009 (although the letter was dated October 22, 2009).

²⁴ Commission on State Mandates, letter notifying CSAC and the Department of Finance that the statute of limitations for filing a test claim would be tolled as of October 22, 2009, November 12, 2009.

²⁵ Government Code section 17574(d) provides that a test claim shall not be filed if the statute of limitations specified in Government Code section 17551(c) expired before the date an LDM was adopted.

²⁶ *Don Johnson Productions, Inc. v. Rysher Entertainment* (2012) 209 Cal.App.4th 919, 929.

²⁷ *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.

to a date *after* the regulations were repealed. The Commission was required by the statutes to take jurisdiction and make findings on the test claim. Moreover, the regulations were only effective from October 20, 2008 until April 12, 2009, and costs were only incurred under the program for a few weeks in fiscal year 2008-2009 until November 28, 2008, coinciding with the November 2008 Presidential General Election and canvass period. A finding that establishes the period of reimbursement in a year when test claim regulations were not in effect defeats the claimants' right to reimbursement and ignores the effect of the tolling, which expressly gives the parties additional time to negotiate an LDM and then file a test claim if negotiations fail. Such a conclusion would lead to an absurd result.²⁸

The Legislature expressly considered the effect of the period of reimbursement when an LDM is approved by the Legislature. Government Code sections 17573 and 17574 do establish periods of reimbursement for programs approved as an LDM, "notwithstanding [the period of reimbursement provisions in] Government Code section 17557(e)."²⁹ However, sections 17573 and 17574 are silent on the period of reimbursement when LDM negotiations fail and a test claim is later filed within the tolled time.

Nevertheless, in order to carry out the Legislature's intent when enacting the tolling provision in Government Code section 17573(b), the reimbursement period in Government Code section 17557(e) must be applied as if the claim were timely filed. As discussed above, the clock stops when the statute of limitations is tolled and thus, it is as if the claim were actually filed by the June 30, 2010 deadline for a 2008-2009 period of reimbursement. Since the PEMT regulations did not become effective until October 20, 2008, and costs were only incurred until November 28, 2008 (the end of the canvass period of the November 2008 Presidential General Election), the period of reimbursement for this program is from October 20, 2008 through November 28, 2008.

²⁸ *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1221.

²⁹ For example, section 17573(d) provides that a joint request for an LDM may be submitted to the Legislature at any time after the enactment of a statute or executive order, regardless of whether a test claim is pending with the Commission. Section 17573(d) further states that "[i]f a test claim is pending before the commission, the period of reimbursement established by that filing shall apply to a joint request filed pursuant to this section." If the Legislature adopts the LDM and the claimant to the pending test claim agrees to the reimbursement terms of the LDM, then section 17574(a)(4) requires the claimant to withdraw the test claim. In addition, if an LDM is adopted by the Legislature, Government Code section 17574(c) also allows filing a subsequent test claim when the Legislature amends the reimbursement methodology of the LDM, the term of the LDM is amended and the local agency rejects reimbursement under the new term, and when the Legislature fails to appropriate funds or does not repeal or suspend the mandate. Under these limited circumstances, a test claim may be filed on the same statute or executive order as the LDM within six months, and a period of reimbursement is established by section 17574(e) beginning with the fiscal year of the Legislature's subsequent action or inaction on the LDM. Government Code section 17574(e) states: "Notwithstanding the period of reimbursement specified in subdivision (e) of Section 17557, a test claim filed pursuant to this section *shall establish eligibility for reimbursement beginning with the fiscal year of an action described in subparagraph (A), (B), (C), or (D) of paragraph (1) of subdivision (c).*"

Therefore, the following paragraph was added to Section III of the parameters and guidelines explaining the tolling of the statute of limitations for an LDM and the resulting 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 test claim regulations were adopted and became operative on October 20, 2008. The claimant incurred actual costs as a result of the regulations beginning November 10, 2008. The test claim was filed on March 28, 2011. Although the test claim was filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the statute of limitations was tolled pursuant to Government Code sections 17573 and 17574 and the claim was thus timely filed.

In cases where the statute of limitations is properly tolled pursuant to Government Code section 17573(b), the reimbursement period in Government Code section 17557(e) must be applied as if the claim were filed absent the tolling and within the original time limitations required by Government Code section 17551(c). Pursuant to Government Code section 17551(c) and section 1183.1(b) of the Commission's regulations, the deadline for filing this test claim was June 30, 2010, based on the date when costs were first incurred by the claimant, establishing a period of reimbursement in fiscal year 2008-2009. Since the test claim regulations did not become effective until October 20, 2008, and costs were only incurred until November 28, 2008 (the end of the canvass period of the November 2008 Presidential General Election), ***the period of reimbursement for this program is from October 20, 2008 through November 28, 2008.***

C. Section IV, Reimbursable Activities

The Commission's regulations require the parameters and guidelines to identify the activities found to be mandated by the state and any activities determined to be reasonably necessary.³⁰ No reasonably necessary activities were requested, so the parameters and guidelines simply identify the activities listed in the test claim decision, which directly quote the test claim regulations, except where needed to be consistent with the Commission's findings (e.g., a nine-percent tally is reimbursable instead of the ten-percent tally required under the regulations) and for purposes of clarification.

The Controller requests adding the word "former" to a citation of the repealed test claim regulation (§ 20121(b)). This change was made.

The Controller also requests changes to the regulatory citations for Activities 2(a) and (b), addressing contests voted upon in more than one jurisdiction to "be consistent with footnotes 2 and 3, respectively." The Controller's proposed change to Activity 2(a) is in strikeout and underline as follows:

³⁰ California Code of Regulations, title 2, section 1183.7(d).

a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a 10 percent manual tally is required by former California Code of Regulations, title 2, section ~~20121(b)~~ 20122(a) by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest.³¹

The Commission denies this request. The language in Activity 2(a) is taken directly from former section 20122(a) of the test claim regulations. Changing the citation incorporated in that paragraph would misquote the plain language of the regulation.

The Controller also requests the following change to Activity 2(b), marked in strikeout and underline:

b) For a legislative or statewide contest, the elections official shall determine whether a ten percent manual tally is required by former California Code of Regulations, title 2, section ~~20121(b)~~ 20122(b) based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the Secretary of State.³²

The Commission also denies this request. Although the citation to former section 20121(b) is not in the plain language of section 20122(b), it is the correct citation to the first part of the language in section 20122(b) requiring that the “the elections official shall determine whether a ten percent manual tally is required.” Former section 20121(b) states:

(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%).

The remaining language then instructs the elections official, in contests voted upon in more than one jurisdiction, to base that determination “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.”

In short, the activities identified in the parameters and guidelines are taken directly from the Commission’s decision on the test claim.

D. Section IX, Remedies Before the Commission

Section IX of the proposed parameters and guidelines includes the following boilerplate paragraph:

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the Controller or any other authorized state agency

³¹ Former California Code of Regulations, title 2, section 20122(a).

³² Former California Code of Regulations, title 2, section 20122(b).

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 Controller to modify the claiming instructions and the Controller 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(d), and California Code of Regulations, title 2, section 1183.17.

The Controller requests that the citation in the second paragraph be changed from section 1183.17 to 1183.2 of the Commission's regulations. The Commission denies this request. The Commission's regulations were amended and renumbered effective July 1, 2014, so the citation is correct.

IV. CONCLUSION

Based on the foregoing analysis, the Commission hereby adopts the proposed decision and parameters and guidelines.

PROPOSED PARAMETERS AND GUIDELINES

Former California Code of Regulations, Title 2, Division 7, Chapter 3,
Sections 20121, 20122, 20123, 20124, 20125, 20126

Register 2008, No. 43

Post Election Manual Tally (PEMT)

10-TC-08

The period of reimbursement is from October 20, 2008 (the effective date of the test claim regulations) through November 28, 2008 (the end of the canvass period).

I. SUMMARY OF THE MANDATE

These parameters and guidelines address activities associated with regulations requiring new standards and procedures to conduct post election manual tallies of votes for races with very narrow margins of victory during elections conducted in whole or in part on a mechanical, electromechanical, or electronic voting system. The activities include determining the margin of victory and whether a ten percent manual tally is required for each contest. For races with less than a one-half percent margin of victory, counties select and manually tally nine percent of the precincts in the contest and perform related duties.

On July 25, 2014, the Commission on State Mandates (Commission) adopted a decision on the test claim finding that test claim regulations impose a partially reimbursable state-mandated program on county election agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514. The Commission approved the test claim for the reimbursable activities found under Section IV. Reimbursable Activities.

II. ELIGIBLE CLAIMANTS

Any county or city and county that incurs increased costs as a result of this mandate is eligible to claim reimbursement.

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 test claim regulations were adopted and became operative on October 20, 2008. The claimant incurred actual costs as a result of the regulations beginning November 10, 2008. The test claim was filed on March 28, 2011. Although the test claim was filed nearly two and a half years after the effective date of the regulations and the date actual costs were incurred, the statute of limitations was tolled pursuant to Government Code sections 17573 and 17574 and the claim was thus timely filed.

In cases where the statute of limitations is properly tolled pursuant to Government Code section 17573(b), the reimbursement period in Government Code section 17557(e) must be applied as if the claim were filed absent the tolling and within the original time limitations required by Government Code section 17551(c). Pursuant to Government Code section 17551(c) and section 1183.1(b) of the Commission's regulations, the

deadline for filing this test claim was June 30, 2010, based on the date when costs were first incurred by the claimant, establishing a period of reimbursement in fiscal year 2008-2009. Since the test claim regulations did not become effective until October 20, 2008, and costs were only incurred until November 28, 2008 (the end of the canvass period of the November 2008 Presidential General Election), *the period of reimbursement for this program is from October 20, 2008 through November 28, 2008.*

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 (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, 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.

For each eligible claimant that incurs increased costs, the following activities are reimbursable from October 20, 2008, through November 28, 2008:

1. After each election, determine the margin of victory as defined for single winner elections, multi-winner elections, and ballot measure contests in each contest based upon the semifinal official canvass results.¹
2. For contests voted upon in more than one jurisdiction:
 - a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a 10 percent manual tally is required by former California Code of Regulations, title 2, section 20121(b), by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest.²
 - b) For a legislative or statewide contest, the elections official shall determine whether a ten percent manual tally is required by former California Code of Regulations, title 2, section 20121(b), based upon the semifinal official canvass results and margin of victory for the entire district for a legislative contest or the entire state for a state contest posted on the canvass website of the Secretary of State.³
3. For any contest in which the margin of victory is *less than* one-half of one percent,
 - a) Randomly select precincts, using a random number generator, until *nine percent* of the precincts in the contest have been selected.
 - b) Manually tally the results for that contest from the precincts selected for the *nine percent* sample. The manual tally shall begin as soon as practicable after the random selection of precincts for the manual tally. The manual tally shall be conducted in public view by hand without the use of electronic scanning equipment.⁴
 - c) When manually tallying the results, take appropriate measures to ensure that direct recording electronic ballots that were cancelled before being cast and ballots that are damaged or defective are not inadvertently tallied as valid ballots in the manual tally process.⁵
4. Document and disclose to the public any variances between the semifinal official canvass results and the manual tally results for *nine percent* of the precincts.⁶
5. For any contest with one or more variances, calculate the variance percentage by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For single winner

¹ Former California Code of Regulations, title 2, section 20121(a).

² Former California Code of Regulations, title 2, section 20122(a).

³ Former California Code of Regulations, title 2, section 20122(b).

⁴ Former California Code of Regulations, title 2, section 20121(b)(e)(f).

⁵ Former California Code of Regulations, title 2, section 20121(i)(j).

⁶ Former California Code of Regulations, title 2, section 20123(b).

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.⁷

6. If the variance percentage represents at least one-tenth of the margin of victory for that contest based on the semifinal official canvass results, then additional precincts must be manually tallied for that contest.⁸ Additional precincts shall be tallied in randomly selected blocks of five percent until the total number of variances presumed to exist – re-calculated pursuant to California Code of Regulations, title 2, section 20124(a) – is smaller than 10 percent of the overall margin of victory in that contest, based on the semifinal official canvass results, or until all ballots have been manually tallied, whichever occurs first.⁹
7. Preserve the voter verifiable paper audit trail (VVPAT) records, memory cards and devices, and direct recording electronic voting machines and notify the Secretary of State if any variance is found between the manually tallied VVPAT and corresponding electronic vote results that cannot be accounted for by some obvious mechanical problem.¹⁰
8. Keep and make available to the public a log to record the manual tally process for all precincts selected, including the results of each round of manual tallying for each precinct included in the sample, how variances were resolved, and details of any actions taken that are contrary to California Code of Regulations, title 2, sections 20120 et seq.¹¹
9. Track, record in the log, and report to the public by each precinct, the number of undervotes and overvotes discovered in the manual tally of a contest.¹²
10. Revise the notice prepared pursuant to Elections Code section 15360(d), to include the time and place of the initial selection of precincts for the additional *nine percent* manual tally and any additional random selection of precincts which may become necessary to comply with escalation requirements.¹³

The costs to prepare the notice for the one percent manual tally required by Elections Code section 15360(d), and to issue and post the combined notice are not new and are not reimbursable.
11. Permit the public to observe all parts of the manual tally process, including the random selection of precincts, in a manner that allows the public to verify the tally.

⁷ Former California Code of Regulations, title 2, section 20124(a).

⁸ Former California Code of Regulations, title 2, section 20124(a).

⁹ Former California Code of Regulations, title 2, section 20124(b).

¹⁰ Former California Code of Regulations, title 2, section 20124(c).

¹¹ Former California Code of Regulations, title 2, section 20125(a).

¹² Former California Code of Regulations, title 2, section 20125(b).

¹³ Former California Code of Regulations, title 2, section 20126(b).

V. CLAIM PREPARATION AND SUBMISSION

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 cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

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. 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

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset 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.

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 2 Code of Federal Regulations (CFR) Part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using 10 percent of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10 percent.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR part 225, appendix A and B (OMB Circular A-87 attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR part 225, appendix A and B (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(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter¹⁴ is subject to the initiation of an

¹⁴ This refers to title 2, division 4, part 7, chapter 4 of the Government Code.

audit by the Controller 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 Controller 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 Controller 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 revenue 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 CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 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 these parameters and guidelines and the decisions on the test claim and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(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 Controller 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 Controller to modify the claiming instructions and the Controller 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(d), and California Code of Regulations, title 2, section 1183.17.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The decisions adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.