



DEBRA BOWEN | SECRETARY OF STATE | STATE OF CALIFORNIA
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March 24, 2009

County Clerk/Registrar of Voters (CC/ROV) Memorandum #09048

TO: All County Clerks/Registrars of Voters

FROM:

A handwritten signature in blue ink that reads "Jennie Bretschneider".

Jennie Bretschneider

Assistant Chief Deputy Secretary of State

RE: Emergency Regulations: Post Election Manual Tally Requirements -
Readoption

On March 24, 2009, the Secretary of State submitted to the Office of Administrative Law (OAL), the attached packet requesting readoption of the PEMT Emergency Regulations with specific revisions reducing the initial sample size for certain contests and reducing the escalation requirements. The notice period prior to readoption of emergency regulations is five (5) days. Please submit any public comments on the proposed readoption by Monday March 30, 2009, to the Secretary of State. You may send comments via email to: votingsystems@sos.ca.gov.

If approved by OAL, the readopted emergency regulations will be in effect for the May 19, 2009, Statewide Special Election.

If you have any questions, please feel free to contact me at jbretschneider@sos.ca.gov or (916) 653-7244.

Attachments (3)

ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)

STD. 399 (Rev. 2-88)

See SAM Sections 6600 - 6680 for Instructions and Code Citations

DEPARTMENT NAME Secretary of State	CONTACT PERSON Pam Giarrizzo, Chief Counsel	TELEPHONE NUMBER 9166537244
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		NOTICE FILE NUMBER Z

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- a. Impacts businesses and/or employees
- b. Impacts small businesses
- c. Impacts jobs or occupations
- d. Impacts California competitiveness
- e. Imposes reporting requirements
- f. Imposes prescriptive instead of performance standards
- g. Impacts individuals
- h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: Statewide Local or regional (list areas): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

Yes No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? \$ _____

- a. Initial costs for a small business: \$ _____ Annual ongoing costs: \$ _____ Years: _____
- b. Initial costs for a typical business: \$ _____ Annual ongoing costs: \$ _____ Years: _____
- c. Initial costs for an individual: \$ _____ Annual ongoing costs: \$ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 2-98)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): \$ _____

4. Will this regulation directly impact housing costs? Yes No If yes, enter the annual dollar cost per housing unit: \$ _____ and the number of units: _____

5. Are there comparable Federal regulations? Yes No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: \$ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of: specific statutory requirements, or goals developed by the agency based on broad statutory authority? Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? \$ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: \$ _____	Cost: \$ _____
Alternative 1:	Benefit: \$ _____	Cost: \$ _____
Alternative 2:	Benefit: \$ _____	Cost: \$ _____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? Yes No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.)
Cal/EPA boards, offices and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 2-98)

1. Will the estimated costs of this regulation to California business enterprises exceed \$10 million? Yes No (If No, skip the rest of this section)

2. Briefly describe each equally as effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: \$ _____ Cost-effectiveness ratio: _____

Alternative 1: \$ _____ Cost-effectiveness ratio: _____

Alternative 2: \$ _____ Cost-effectiveness ratio: _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years)

1. Additional expenditures of approximately \$ 680,000 in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

a. Is provided in (Item _____, Budget Act of _____) or (Chapter _____, Statutes of _____)

b. will be requested in the 2009-10 Governor's Budget for appropriation in Budget Act of _____ (FISCAL YEAR)

2. Additional expenditures of approximately \$ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

a. implements the Federal mandate contained in _____

b. implements the court mandate set forth by the _____ court in the case of _____ vs. _____

c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ election; (DATE)

d. is issued only in response to a specific request from the _____, which is/are the only local entity(s) affected;

e. will be fully financed from the _____ (FEES, REVENUE, ETC.) authorized by Section _____ of the _____ Code;

f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit.

3. Savings of approximately \$ _____ annually.

4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law and regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 2-98)

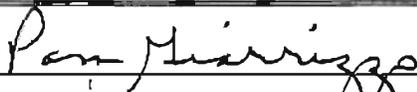
- 5. No fiscal impact exists because this regulation does not affect any local entity or program.
- 6. Other.

B. FISCAL EFFECT ON STATE GOVERNMENT *(Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)*

- 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year. It is anticipated that State agencies will:
 - a. be able to absorb these additional costs within their existing budgets and resources.
 - b. request an increase in the currently authorized budget level for the _____ fiscal year.
- 2. Savings of approximately \$ _____ in the current State Fiscal Year.
- 3. No fiscal impact exists because this regulation does not affect any State agency or program.
- 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS *(Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)*

- 1. Additional expenditures of approximately \$ _____ in the current State Fiscal Year.
- 2. Savings of approximately \$ _____ in the current State Fiscal Year.
- 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.
- 4. Other.

SIGNATURE		TITLE
		Chief Counsel
AGENCY SECRETARY ¹		DATE
APPROVAL/CONCURRENCE		3/24/09
DEPARTMENT OF FINANCE ²	PROGRAM BUDGET MANAGER	DATE
APPROVAL/CONCURRENCE		

1. The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6600-6680, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.
2. Finance approval and signature is required when SAM sections 6600-6670 require completion of the Fiscal Impact Statement in the STD. 399.

STD. 399 Attachment
Fiscal Impact Statement
A. Fiscal Impact on Local Government

Current Fiscal Year: \$20,000 to \$680,000

The estimate of additional expenditures ranging from \$20,000 to \$680,000 in the current State Fiscal Year is based upon: 1) the Secretary of State's survey of the seven counties that conducted Post Election Manual Tallies in the June 2008 Primary Election (copy attached); and 2) a survey conducted by the California Association of County Elections Officials (CACEO) after the November 2008 General Election (copy attached). While not all counties have responded to the CACEO survey, according to the CACEO data, counties incurred PEMT audit costs of approximately \$680,000 in the November 2008 General Election.

The PEMT Emergency Regulations are triggered only in a very small fraction of contests on each ballot: those contests with a margin of victory of less than one half of one percent (0.5%), based on the semifinal official results. In the November 2008 General Election, the PEMT Emergency Regulations were triggered in zero of the 13 statewide contests (0/13), one of the 53 Congressional Contests (1/53), and one of the 100 Legislative contests (1/100).

Since the average percentage of contests that will be subject to the PEMT Emergency Regulations in future elections is likely less than 1%, the estimate of additional expenditures is based on the assumption that less than 1% of contests will be subject to the PEMT Emergency Regulations in the May 19, 2009, Statewide Special Election, and in local elections held during the remainder of the State Fiscal Year.

In addition, the reduction in sample sizes and escalation requirements proposed in the attached proposed regulations compared to the previously adopted emergency regulations, will likely reduce overall costs incurred by local elections officials.

Funding will be requested in the 2009-10 Governor's Budget for appropriation in the Budget Act of 2009

0890-108-0001--For local assistance, funding to counties.....XX,XXX

Provisions:

1. The funds authorized in this item may be apportioned to the counties by the Controller, consistent with the requirements of Provision 2, in amounts not to exceed the following:

(a) County... XX,XXX

2. Upon receipt of a report, signed and certified as true and accurate by the county clerk or county registrar of voters, that identifies the total costs for staff salaries, services and supplies, and postage, the Controller shall pay the reported costs of the counties for the XXXXX election (s).

Two Subsequent Fiscal Years

FY 2009-10: \$20,000 to \$680,000

This estimate is also based on a survey of costs in the June and November 2008 Statewide Elections. Only one statewide election, the June 2010 Statewide Primary Election, is scheduled in FY 2009-10.

FY 2010-11: \$20,000 to \$680,000

This estimate is also based on the survey of costs in the June and November 2008 Statewide Elections. Only one statewide election, the November 2010 Statewide General Election, is scheduled in FY 2010-11.

June 2008 Statewide Primary
PEMT Cost Chart

	County	Staff Hours	Total Cost	Overall cost of election for the county	Total ballots cast in the contest	% of precincts hand tallied	Total ballots hand tallied	Cost per ballot hand tallied	Cost per ballots in the contest
1.	Alameda								
2.	Fresno								
3.	Imperial								
4.	Marin	8	\$160	\$	532	100%	515 ¹	\$0.31	\$0.30
5.	Riverside	136 ²	\$1,300	\$	43,011	10%	336	\$3.86	\$0.03
6.	San Mateo	24	\$500	\$	13,344 ³	10%	⁴ 955	\$0.52	\$0.04
7.	Santa Clara	227	\$9,131 ⁵	\$	11,286	15%	2,079	\$4.39	\$0.81
	Average	99	\$2,773		17,043		971	\$2.27	\$0.30

¹ An additional 17 ballots (14 provisional, and 3 duplicated ballots) were counted in the final tally of ballots, which occurred after the manual tally began. Those ballots were not included in the manual tally.

² Riverside based its estimate on 17 people for one day. The estimate does not include ROV management hours.

³ San Mateo conducted two PEMT audits: local measures N (8,532 ballots) and P (4,812 ballots).

⁴ A total of four additional precincts (containing X ballots) were counted for the PEMT audits.

⁵ These costs include one-time costs associated with preparing and conducting the first ever PEMT audit in Santa Clara County. According to the Santa Clara County PEMT report to the SOS: "The PEMT required a total 192 hours of extra help staff time, including preparation, training, and conducting the PEMT. An additional 35 hours were required for [managers] to draft procedures, prepare materials, supervise the process, and make reports."

**TITLE 2. ADMINISTRATION
DIVISION 7. SECRETARY OF STATE**

EMERGENCY REGULATIONS

Finding of Emergency

The Secretary of State finds that an emergency continues to exist, and that readoption for 90 days of the attached regulations, which are substantially equivalent to the emergency regulations previously adopted by the Secretary of State, 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.

On October 20, 2008, the Office of Administrative Law (OAL) approved the Emergency Regulations on Post Election Manual Tallies (PEMT Emergency Regulations) submitted by the Secretary of State. The PEMT Emergency Regulations were filed with the Secretary of State and became effective immediately for a period of 180 days ending April 17, 2009. The PEMT Emergency Regulations were successfully implemented by 41 counties in which close contests triggered their use following the November 4, 2008, General Election.

Since adoption of the PEMT Emergency Regulations, the Secretary of State has made substantial progress and proceeded with diligence toward compliance with subdivision (e) of section 11346.1 of the Government Code. In January 2009, the Secretary of State established a Post Election Manual Tally Regulations Working Group (PEMT Working Group), consisting of elections officials from nine California counties, for the purpose of identifying improvements that could be made to the PEMT Emergency Regulations before they are submitted to OAL as proposed permanent regulations. The Working Group has met via conference call regularly for the past eight weeks and has provided substantial input and reviewed several sets of proposed revisions to the PEMT Emergency Regulations. The Working Group will continue to convene until the Secretary of State adopts permanent regulations. In addition, the Secretary of State has carefully evaluated the individual reports submitted by the 41 counties that conducted PEMT audits after the November 4, 2008, General Election; for the purpose of determining whether to make adjustments to the PEMT Emergency Regulations to improve cost-effectiveness before they are adopted as permanent regulations. The Secretary of State has also sought and received comments from a number of interested parties, including local elections officials aside from those serving on the PEMT Working Group, election integrity advocates, and specialists in the post-election auditing field.

During this process of developing appropriate revisions, the state Legislature reached an agreement on the state budget deficit, approved a set of budget measures to be placed on the statewide ballot, and called a Statewide Special Election for May 19, 2009. However, as noted

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above, the PEMT Emergency Regulations are set to expire on April 17, 2009.

While the Secretary of State has made substantial progress and proceeded with diligence toward the adoption of permanent regulations, the Secretary of State and interested parties are still in the process of finalizing appropriate revisions to the PEMT Emergency Regulations for adoption as permanent regulations. Therefore, permanent regulations will not be in place in time for the May 19, 2009, election.

Unless the attached regulations, which are substantially equivalent to the PEMT Emergency Regulations previously adopted by the Secretary of State, are readopted for an additional 90 days and in effect as emergency regulations for the May 19, 2009, Statewide Special 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 readopt 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).

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

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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.

On October 20, 2008, the Office of Administrative Law (OAL) approved Emergency Regulations on Post Election Manual Tallies (PEMT Emergency Regulations) submitted by the Secretary of State. The PEMT Emergency Regulations were filed with the Secretary of State and became effective immediately for a period of 180 days ending April 17, 2009. The PEMT Emergency Regulations were successfully implemented by 41 counties in which close contests triggered their use following the November 4, 2008, General Election.

The PEMT Emergency Regulations set forth a comprehensive post election manual tally procedure, requiring 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"; (iii) "additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist . . . is smaller than ten percent (10%) of the overall margin of victory in that contest . . . or until all ballots have been manually tallied, whichever occurs first; and (iv) 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' "].

The attached regulations, proposed for a 90-day readoption, are substantially equivalent to the PEMT Emergency Regulations. The attached regulations require: (i) "Elections officials shall conduct a manual tally . . . where the margin of victory is less than one half of one percent (0.5%), as follows: For statewide contests . . . two percent (2%) . . . For legislative and Congressional contests, and any contest involving 100 precincts or more . . . five percent (5%) . . . For any contest involving fewer than 100 precincts . . . ten percent (10%) of randomly selected precincts; (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 a percentage of the precincts in which voters cast ballots for that contest in the jurisdiction, with the percentage

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depending on the size of the contest (see above); (iii) "additional precincts shall be tallied in randomly selected blocks of five percent (5%) until the total number of variances presumed to exist . . . is smaller than one half (50%) of the overall margin of victory in that contest . . . or until all ballots have been manually tallied, whichever occurs first; and (iv) 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' "].

The modifications reflected in the attached regulations are as follows:

- o Reduction in the initial sample size from ten percent (10%) down to five percent (5%) for large contests and down to two percent (2%) for statewide contests.
- o Reduction in the requirement to count additional precincts (escalation), by increasing rate of variances permitted – from ten percent (10%) to half (50%) of the overall margin of victory – before escalation is required.
- o Technical and non-substantive modifications to clarify definitions and provisions and to ensure consistent use of terms throughout the regulations.

These modifications do not substantially change the overall structure of the PEMT Emergency Regulations, which continue to require: (i) a manual tally of a percentage of precincts for all contests with an overall margin of victory of less than one half of one percent (0.5%); (ii) equivalent requirements for contests that span multiple jurisdictions; (iii) escalation in blocks of five percent (5%) where significant variances are found; and (iv) completion within the canvass period. Therefore, the attached regulations are substantially equivalent to previously adopted PEMT Emergency Regulations, as required by subdivision (h) of section 11346.1 of the Government Code.

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

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- 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 on local elections offices, depending on whether a given jurisdiction has one or more contests in which the margin of victory is less than 0.5% according to the semifinal official results. In the June 2008, Primary Election, counties reported costs ranging from a low of \$160 to a high of \$9,131. In the November 2008, General Election, jurisdictions reported costs ranging from zero to a high of approximately \$248,000. However, the attached regulations will reduce costs incurred by local elections officials in future elections because of the reduced sample sizes and reduced escalation requirement.

In general, the PEMT Emergency Regulations are triggered only in a very small fraction of contests on each ballot – those contests with a margin of victory of less than one half of one percent (0.5%), based on the semifinal official results.

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.

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS:	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	
AGENCY WITH RULEMAKING AUTHORITY			AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE		TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Post Election Manual Tally Requirements In Close Contests	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) Emergency Number 2008-1009-02E
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT (readopt substantially equivalent) 20120, 20121, 20122, 20123, 20124, 20125, 20126, 20127, 20128
	AMEND
TITLE(S) Title 2	REPEAL

3. TYPE OF FILING

<input type="checkbox"/> Regular Rulemaking (Gov. Code § 11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§ 11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, § 11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, § 100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§ 11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, § 11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input checked="" type="checkbox"/> Emergency (Gov. Code, § 11346.1(b))		<input type="checkbox"/> Other (Specify) _____	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, § 44 and Gov. Code § 11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, § 100)

<input type="checkbox"/> Effective 30th day after filing with Secretary of State	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> § 100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
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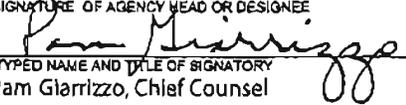
6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM § 6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON

Pam Giarrizzo	TELEPHONE NUMBER (916) 653-7244	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) PGiarrizzo@sos.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 3/24/09
TYPED NAME AND TITLE OF SIGNATORY Pam Giarrizzo, Chief Counsel	

For use by Office of Administrative Law (OAL) only

TEXT OF PROPOSED EMERGENCY REGULATIONS FOR READOPTION

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. Definitions.

(a) "Semifinal official canvass" shall have the meaning set forth in Elections Code section 353.5

(b) "Vote for One" means an election for an office in which the voter may select only one candidate.

(c) "Vote for Multiple" means an election for an office in which the voter may select two or more candidates.

(d) "Variance" means any difference between the machine tally and the manual tally for a contest, including, but not limited to, differences due to machine malfunction, operator error, or voter error in marking a ballot.

20122. 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.

(i) For Vote for One contests, the "margin of victory" is the difference between the percentage of overall votes cast for the first place candidate or position and the percentage of overall votes cast for the second place candidate or position.

(2) For Vote for Multiple contests, the "margin of victory" is the difference between the percentage of overall votes cast for the candidate with the lowest number of votes needed to win a seat and the percentage of overall votes cast for 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 overall votes cast for the third and fourth place candidates, respectively.

(3) For ballot measure contests, including recall contests, the margin of victory is the difference between the percentage of "yes" votes of overall votes and the percentage of overall votes required for the measure to pass.

(b) For any contest in which the margin of victory based upon the semifinal official canvass results 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, as follows:

(1) For statewide contests, the manual tally shall include two percent (2%) of randomly selected precincts in each jurisdiction.

(2) For legislative and Congressional contests, and any contest involving 100 precincts or more, the manual tally shall include five percent (5%) of randomly selected precincts in each jurisdiction in which votes were cast in the contest.

(3) For any contest not subject to paragraphs (1) or (2) of subdivision (b) of this section, and involving fewer than 100 precincts, the manual tally shall include ten percent (10%) of randomly selected precincts in each jurisdiction in which votes were cast in the contest.

(c) The manual tally required pursuant to subdivision (b) 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%).

(d) Precincts manually tallied under Elections Code section 15360 may be included as part of the manual tally required pursuant to subdivision (b).

(e) In any contest in which a two percent (2%), five percent (5%), or ten percent (10%) manual tally would otherwise be required pursuant to subdivision (b), an elections official may instead conduct a manual tally of a higher percentage of randomly selected precincts. If the manual tally does not include one hundred percent (100%) of the precincts involved in the contest, then the elections official must comply with the escalation requirements in section 20125.

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

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

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

(i) 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.

(j) 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.

(k) 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.

§ 20123. 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 manual tally is required by section 20122, 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 one half of one percent (0.5%) or more, then a manual tally is not required by section 20122, subdivision (b), in either county.

(2) If the margin of victory in a contest voted upon in counties A and B is one half of one percent (0.5%) or more 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 randomly selected County A precincts in which voters cast ballots for that contest, and County B shall conduct a manual tally of randomly selected County B precincts in which voters cast ballots for that contest, pursuant to section 20122, subdivision (b).

(b) For a legislative, Congressional, or statewide contest, the Secretary of State shall determine whether a manual tally is required by section 20122, subdivision (b), based upon the semifinal official canvass results and margin of victory for the entire district for

a legislative or Congressional contest or the entire state for a state contest.

(c) 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 conduct its own manual tally pursuant to this chapter. Any escalation required by section 20125 shall be determined based on the variance percentage within the jurisdiction. If within a jurisdiction the variance percentage in the manual tally conducted pursuant to section 20122, subdivision (b), is less than half (50%) of the overall margin of victory in the contest, based on the semifinal official canvass results, then no additional precincts must be manually tallied for the contest in that jurisdiction. If within a jurisdiction the variance percentage in the manual tally conducted pursuant to section 20122, subdivision (b), is at least half (50%) of the overall margin of victory in the contest, based on the semifinal official canvass results, then additional precincts must be manually tallied pursuant to section 20125.

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

Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20124. Determination, counting and disclosure of variances.

(a) An elections official must document and disclose to the public any variances between the semifinal official canvass results and the manual tally results. The examples in subdivisions (a)(1) through (a)(3) illustrate how variances should be documented and disclosed.

(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 A as a vote against Measure A, two variances result because the vote totals for Measure A and against Measure A 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 under-vote in the contest, one variance results because the machine tally under-vote becomes a vote for a candidate or a vote for or against a measure in the manual tally.

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

Reference: Sections 19100, 19205, 19222, Elections Code.

§ 20125. 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 Vote for One 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 Vote for Multiple 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 half (50%) 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 section 20122, 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 one half (50%) 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.

§ 20126. 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.

§ 20127. 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 section 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 selection of precincts for the one percent (1%) manual tally and any selection of precincts which may be required if a manual tally is required by this chapter for any contest; and

(2) the 1% manual tally process and of any manual tally which may be required by this chapter.

(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.

§ 20128. 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, unless a court has granted an extension, pursuant to Elections Code section 15701.

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

Reference: Sections 19100, 19205, 19222, Elections Code.