STATE OF CALIFORNIA–OFFICE OF ADMINISTRATIVE LAW

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	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
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For use by Office of Administrative Law (OAL) only

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY: Secretary of State

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	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

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): No. 2009-0324-01EE; No. 2008-1009-02E

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, 201223, 20124, 20125, 20126, 20127, 20128

AMEND:

TITLE(S):

REPEAL:

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☐ 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.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☒ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

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)

- ☐ Effective 30th day after filing with Secretary of State
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Jennie Bretschneider	(916) 653-7244		jbretschneider@sos.ca.gov

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.**

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SIGNATURE OF AGENCY HEAD OR DESIGNEE: Jennie Bretschneider

DATE: April 3, 2009

TYPED NAME AND TITLE OF SIGNATORY: Jennie Bretschneider, Assistant Chief Deputy Secretary of State

Proposed Revisions: Redline Version
TEXT OF PROPOSED EMERGENCY REGULATIONS

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

Chapter 3. Post Election Manual Tallies.

§ 20120. Purpose and Applicability.

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

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

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

§ 20121. 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~~, as defined in Elections Code section 353.5~~.

(1) For ~~single-winner elections~~Vote for One contests, the "margin of victory" is the difference between the percentage of overall votes ~~won by~~cast for the first place candidate or position ~~with the number of votes needed to win the seat~~ and the percentage of overall votes ~~won by~~cast for the second place candidate or position. ~~with the next lowest number of votes~~.

(2) For ~~multi-winner elections~~ Vote for Multiple contests, the "margin of victory" is the difference between the percentage of overall votes ~~won by~~cast for the candidate with the lowest number of votes needed to win a seat and the percentage of overall votes ~~won by~~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 ~~won by~~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 percentages of "yes" votes of overall votes ~~for the measure~~ and ~~against the ballot measure~~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, ~~of ten percent (10%) of randomly selected precincts~~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 ~~ten percent (10%)~~ 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%).

(~~c~~d) Precincts manually tallied under Elections Code section 15360 may be included as part of the ~~ten percent (10%)~~ manual tally required pursuant to subdivision (b).

(~~d~~e) In any contest in which a ~~ten percent (10)%)~~ 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 ~~a~~ one hundred percent (100%) ~~manual tally~~ of the ~~ballots~~ precincts involved in the contest, then the elections official must comply with the escalation requirements in section 20125.

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

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

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

(~~h~~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.

(~~i~~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.

(~~j~~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.

§ 2012~~2~~3. Contests voted upon in more than one jurisdiction.

(a) In any contest voted upon in more than one jurisdiction, the elections official in each jurisdiction in which votes were cast in the contest shall determine whether a ~~ten percent (10%)~~ manual tally is required by section 2012~~1~~2, subdivision (b) by calculating the overall margin of victory in all jurisdictions in which votes were cast in the contest. The examples in subdivisions (a)(1) and (a)(2) below of contests voted upon in two counties illustrate the application of the general rule stated in this subdivision (a).

(1) If the margin of victory in a contest voted upon in counties A and B is less than one half of one percent (0.5%) within county A but the overall margin of victory in counties A and B combined is ~~more than~~ one half of one percent (0.5%) or more, then a ~~ten percent (10%)~~ 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 ~~more than~~ 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 ~~a~~ randomly selected ~~ten percent (10%) of the~~ County A precincts in which voters cast ballots for that contest, and County B shall conduct a manual tally of ~~a~~ randomly selected ~~ten percent (10%) of the~~ County B precincts in which voters cast ballots for that contest, pursuant to section 20122, subdivision (b).

(b) ~~(b)~~ For a legislative, Congressional, or statewide contest, the ~~elections official~~Secretary of State shall determine whether a ~~ten percent (10%)~~ 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. ~~posted on the canvass website of the Secretary of State~~.

(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.

§ 2012~~3~~4. Determination, counting and disclosure of variances.

(a) ~~A "variance" is any difference between the machine tally and the manual tally for a contest. For purposes of determining whether additional precincts must be manually tallied under section 20124, variances found in the manual tally sample for a given contest are presumed to exist in at least the same proportion in the remaining ballots cast in the contest.~~ 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 ~~the number of~~ variances ~~in a contest~~ should be ~~calculated.~~ 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 ~~1~~A as a vote against Measure ~~1~~A, two variances result because the vote totals for Measure A~~1~~ and against Measure ~~1~~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.

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

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

§ 20124~~5~~. Manual tally escalation requirements for variances.

(a) The elections official shall calculate the variance percentage for any contest with one or more variances by dividing the total number of variances found in the manual tally sample for the contest by the total number of votes cast for that contest in the manual tally sample. For ~~single-winner~~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 ~~multi-winner~~ 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-tenth (10%)~~ 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 ~~ten percent (10%)~~ 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.

§ 20125~~5~~6. 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~~6~~. 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 ~~initial~~ selection of precincts for the one percent (1%) manual tally and any ~~ten percent (10%)~~ selection of precincts which may be required if a manual tally is required by this chapter for any contest; and

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

~~(3) any additional random selection of precincts which may become necessary to comply with escalation requirements.~~

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

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

§ 20128~~7~~. 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.