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ELECTIONS DIVISION

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September 15, 2016

County Clerk/Registrar of Voters (CC/ROV) Memorandum #16295

TO: All County Clerks/Registrars of Voters

FROM: /s/ Steven J. Reyes
Chief Counsel

RE: General Election: One Percent Manual Tally

The purpose of this CCROV is to provide guidance to county elections officials on the provisions of Elections Code section 15360 (One Percent Manual Tally) with respect to vote-by-mail and provisional ballots.

Summary

It is the position of the Secretary of State that the one percent manual tally requirement set forth in Elections Code section 15360 does not require provisional ballots or all vote-by-mail ballots to be included in the tally. Such a requirement would be inconsistent with the stated purpose of the one percent manual tally, which is to tabulate ballots in which voting system devices are used “[d]uring the official canvass”.

Furthermore, Sections 15360(a)(1)(B)(ii) and (a)(2)(B)(iii)(II) specifically provide elections officials with the discretion to include additional precincts and batches of vote-by-mail ballots.

Discussion/Background

As most counties are aware, litigation is currently underway in San Diego County Superior Court challenging, amongst other things, whether or not provisional ballots are to be included in the one percent manual tally (*Citizens Oversight, Inc. v. Vu*, San Diego County Superior Court case number 37-2016-00020273-CL-MC-CTL). On July 25, 2016, the court issued an unpublished minute order denying the petitioner’s motion for a temporary restraining order. However, the minute order stated that Elections Code section 15360 requires that provisional ballots are to be included in the one percent manual tally. Several counties have received inquiries from the plaintiff about their manual tally plans for the

November General and have inquired as to the position of the Secretary of State on the matter.

Please note that the minute order is not the final judgment from the San Diego County Superior Court. In addition, if the directives in the minute order become the final judgment, the final judgment would apply to San Diego County only.

Legislative History and Language of the Statute

Section 15360 does not mention inclusion of provisional ballots in the manual tally. Further, Section 15360 does not require that all voted vote-by-mail ballots are to be included in the manual tally. Examination of the legislative history of Section 15360 provides a clear explanation as to why.

In 2006, two bills were passed by the Legislature to clarify the requirements of Section 15360: Senate Bill (SB) 1235 (Bowen, Chapter 893 of the Statutes of 2006) and Assembly Bill (AB) 2769 (Benoit, Chapter 894 of the Statutes of 2006). One of the purposes of both bills was to clarify that the one percent manual count of automated election results must not only include votes cast at the polls, but also some vote-by-mail ballots and ballots cast at early voting locations. Prior to these bills being introduced, not all counties were including ballots cast at early voting locations and/or vote-by-mail ballots in the one percent manual tally.

SB 1235 and AB 2769 were both introduced with language stating that provisional ballots were to be included in the one percent manual tally. As these bills progressed through the Legislature, county elections officials raised concerns regarding potential difficulties in including absentee (vote-by-mail) and provisional ballots in the manual tally. One major concern raised was that during the official canvass of votes, many county elections officials assign ballots cast by vote-by-mail voters to the precinct the voter would have voted in had they voted at a polling place. However, some counties are unable to assign ballots back to the precinct level due to the logistical complexities of handling ballots. In these instances, county elections officials report results by "ballot style" (e.g., all the ballots that have exactly the same candidates and measures are all counted in one group) and do not actually sort the ballots back to the precinct level. For counties unable to assign ballots back to the precinct, it is administratively difficult and time consuming to locate and include these vote-by-mail ballots in the manual count for a precinct.

In addition to the concern stated above, a June 13, 2006, letter from the California Association of Clerks and Election Officials to then State Senator Debra Bowen included the following:

The purpose of the 1% manual tally is to check the accuracy of the tabulation of the vote counting equipment at the precinct level. The absentee ballots and the provisional ballots are not included in the

Election Day precinct count so including these ballots does not verify the accuracy of the voting equipment used at the precincts.

Provisional ballots cannot be processed until all the voter's history is updated in the system, which takes up to ten days to complete. Provisional ballots are then verified for status and, if approved, are added to the precinct tally counts through the Central Count machines. They are not tabulated with precinct specific equipment.

After these concerns were raised, the first amendments to each bill (August 7, 2006, for SB 1235, and May 26, 2006, for AB 2769) removed the language that would have required the one percent manual tally to include provisional ballots.

Additionally, it is important to note Section 15360's use of the phrase "[d]uring the official canvass". The tasks associated with the canvass include verifying, authenticating, and counting all valid ballots, which includes provisional ballots. If the one percent manual tally were to include all valid provisional ballots, the canvass would in essence be complete and it would be impossible to conduct the tally "during" the canvass.

As the Legislature took the specific affirmative action to remove the requirement that provisional ballots be included in the one percent manual tally and the specific language of Section 15360 indicating that the tally is to be conducted "during" the canvass, it is clear to this office that county elections officials have no obligation to include provisional ballots in their one percent manual tally.

Conclusion

Any interpretation of Section 15360 that requires inclusion of provisional ballots and the inclusion of all voted vote-by-mail ballots will very likely lead to a realization of the concerns raised by counties during the 2006 legislative process. In addition, Section 15360(d) requires at least a five-day public notice prior to the commencement of the one percent manual tally. As provisional ballots are typically processed at the end of the canvass process, if provisional ballots were required to be in the one percent manual tally, for some counties the five-day public notice could delay the canvass and the certification of election results beyond the deadlines set forth in the Elections Code. Therefore, the Secretary of State's position is that neither provisional ballots nor all vote-by-mail ballots are required to be included in the one percent manual tally.

If you have any questions please contact Robbie Anderson at Robbie.Anderson@sos.ca.gov or (916) 695-1566.