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DRAFT 9/8/03, 9:00 a.m.

To: Daniel D. McMillan

DIEBOLD ELECTION SYSTEMS

Re: California Elections Code--Counting of Votes

I. BACKGROUND

On September 3, 2003, Jim March, a voting activist, posted downloadable files of Diebold Elections Systems' code and sample data (Diebold's vote tally software) on his website, located at <http://www.equalccw.com/dieboldtestnotes.html>. Mr. March alleges that one of the files is a set of data from the San Luis Obispo County primary election on March 5, 2002. Apparently, the file indicates that the Diebold optical scan machines used in the San Luis Obispo County primary election released a vote tabulation at 3:31 p.m., approximately five hours before the poll closed. The machine used in this election was the Diebold Accu-Vote ES-2000. The Diebold machines in all 57 precincts allegedly tabulated the votes while the election was in progress and tagged the file to a Diebold employee. The file then found its way to the Diebold FTP website.

Diebold is investigating the incident reported by Jim March. At the moment, Diebold believes that the votes tabulated at 3:31 p.m. from the San Luis Obispo County primary election on March 5, 2002 were from absentee ballots. This memorandum discusses the pertinent provisions of the California Elections Code concerning the tabulating/counting of votes cast at a polling place and by absentee voters. This memorandum summarizes our initial research on the

California Elections Code concerning tabulation of votes before the closing of the polls and penalties for violation of the California Elections Code.¹

II. QUESTIONS PRESENTED AND SHORT ANSWERS

A. Question: Can votes legally be tabulated before the polls close? **Short Answer:** No. The California Elections Code specifies that no votes shall be counted “until the polls close in that county.” Cal. Elec. Code § 15152.² This rule applies to votes counted manually or by machine. *Id.*

B. Question: Do different rules apply concerning the release of absentee votes versus votes cast at the polling place? **Short Answer:** Most likely not. Although there is some ambiguity in the statute, it appears that neither an election official or any other person may count absentee ballots until the polls close in that county. *See, e.g.,* §§ 15101, 15109 & 15152.

Additional research needs to be conducted on this issue.

C. Question: What are the penalties for violating the California Elections Code? **Short Answer:** The penalties for violating provisions of the California Elections Code range from fines to imprisonment. *See, e.g.,* §§ 18001, 18564, 18568, & 18502.

III. ANALYSIS

A. General Rules Pertaining To Tabulation Of Votes

As a general rule, votes may not be counted until the polls close. “Neither the elections official, any member of a precinct board, nor any other person shall count any votes, either for a ballot proposition or candidate, until the close of the polls in that county.” § 15152. This rule

¹ We are in the process of conducting further research on several potentially significant issues. We were unable to access some potentially relevant secondary material over the weekend, and once we review the material, we will supplement this memorandum with any pertinent information. We will also supplement this memorandum with applicable research and analysis once we learn more facts surrounding the San Luis Obispo County 2002 primary election.

² All further statutory citations are to the California Elections Code, unless otherwise indicated.

applies to counting “done by manual tabulation or by a vote tabulating machine.” *Id.* The exception to this rule is a snap tally, or early tabulation. *See* §§ 14440-14443. A snap tally may be conducted if the governing body of the jurisdiction holding an election decides that certain offices or measures are of special interest. § 14440.³

After the polls close, the election officials begin the counting process. The first step in this process is to perform the semifinal official canvass of the votes. “The ‘semifinal canvass’ is the public process of collecting, processing, and tallying ballots and, for state or statewide elections, reporting results to the Secretary of State on election night.” § 353.5. “The semifinal official canvass shall commence immediately upon the close of the polls and shall continue without adjournment until all precincts are accounted for.” § 15150.

The final step in the vote tallying process is the official canvass, which must begin no later than the Thursday following the election. *See* § 15301. “The ‘official canvass’ is the public process of processing and tallying all ballots received in an election, including, but not limited to, provisional ballots and absentee ballots not included in the semifinal official canvass.” § 335.5. “The official canvass also includes the process of reconciling ballots, attempting to prohibit duplicate voting by absentee and provisional voters, and performance of the manual tally of 1 percent of all precincts.” *Id.*

³ Section 14440 provides: “Before any election, the governing body of the jurisdiction holding the election shall decide that certain offices or measures to be voted on are more than ordinary public interest and require an early tabulation and announcement. The decision shall be transmitted to the elections official not less than 30 days before the election.” Section 14443 provides: “If ballots are counted by means of electronic, electromechanical, or punchcard device, the elections official may provide for early tabulation and announcement of the returns in a manner consistent with the use of the tabulating devices.”

B. Rules Regarding Absentee Votes

Although a jurisdiction may begin processing absentee ballots prior to the election, it may not access or release a vote count until the polls close. *See* § 15101 (b).⁴ A jurisdiction with computer capability may begin processing absentee ballots seven days before the election. *Id.* Processing the absentee ballots includes “opening absentee ballot return envelopes, removing ballots, duplicating any damaged ballots, and preparing ballot to be machine read, or machine reading them” *Id.* Processing the absentee ballots does not include accessing or releasing the vote count. The California Elections Code specifies that “under no circumstances may a vote count be accessed or released until 8:00 p.m. on the day of the election.” *Id.* “Results of any absentee ballot tabulation or count shall not be released prior to the close of the polls on the day of the election.” § 15101 (c).

The canvassing of absentee ballots is generally the same as the canvassing of votes cast at a precinct. *See, e.g.*, § 15109 (“Except as otherwise provided in this chapter, the counting and canvassing of absentee ballots shall be conducted in the same manner and under the same regulations as used for ballots cast in a precinct polling place”); § 353.5 (“The semifinal official canvass may include some or all of the absentee and provisional vote totals”); § 15150 (“For every election the elections official shall conduct a semifinal canvass by tabulating absentee and precinct ballots and compiling the results”).

On its face, the above referenced sections concerning absentee ballots seem to imply that it is permissible to tabulate absentee ballots before the polls close so long as the tabulations are

⁴ Section 15101 (b) provides: “Any jurisdiction having the necessary computer capability may start to process absentee ballots on the seventh day prior to the election. Processing absentee ballots includes opening absentee ballot return envelopes, removing ballots, duplicating any damaged ballots, and preparing the ballots to be machine read, or machine reading them, **but under no circumstances may a vote count be accessed or released until 8 p.m. on the day of the election.** All other jurisdictions shall start to process absentee ballots at 5 p.m. on the day before the election.” (emphasis added).

not accessed or released. Indeed, section 15101 (c) specifies that the “[r]esults” are not to be released until the polls close. This implies that the results can be tabulated or counted provided the results are not released before the polls close. Section 15109 specifies that absentee votes are to be counted in the same manner as other votes “[e]xcept as otherwise provided in this chapter.” Thus, to the extent section 15101 (c) permits an early tabulation of absentee votes, this would be consistent with our interpretation of the statute. However, our research is not conclusive on this issue.

Certain selected secondary material suggest that the counting of absentee ballots before the polls close would be improper. For example, the California Secretary of State website contains a section titled, “The Official Canvass of the Vote,” which describes certain procedures to be followed when counting votes. In a paragraph discussing absentee ballots, the following sentence is set forth: “**Under no circumstances** may [the elections officials] tabulate the results until after the close of the polls on election day.” California Secretary of State, *The Official Canvass of the Vote* (2000), available at http://www.ss.ca.gov/elections/elections_oc.htm (emphasis in original). To the extent this statement accurately describes the process of counting absentee ballots, it indicates that the tabulation of results from absentee ballots before the closing of the polls would be improper.

Furthermore, the requirement that processing and counting absentee ballots be conducted in public has been construed to preclude the counting of absentee ballots before the polls close. Section 15104 (a) provides: “The processing of absentee ballot return envelopes, and the processing and counting of absentee ballots shall be open to the public, both prior to and after the election.” An older California Attorney General opinion construing earlier, but similar statutory provisions stated that “no counting of absentee ballots can take place prior to the close of the

polls because there would necessarily be a release of such information to bystanders since such counting must be in public.” 39 Cal. Ops. Atty 117 (1962). Accordingly, it appears that an absentee vote tabulation is improper during an election or any time prior to the closing of the polls.

C. Penalties For Violation Of California Elections Code

The California Elections Code contains penal provisions ranging from monetary fines to imprisonment. If a penal provision does not prescribe a fine, the court has discretion to impose a fine. *See* § 18001.⁵ Several relevant penal provisions are discussed below:

1. Interference with voting machine

It is illegal for any person to interfere, or attempt to interfere, with the secrecy of voting, the correct operation of a voting machine, voting system, vote tabulating device, ballot tally software or program source codes. § 18564. Section 18564 of the California Elections Code provides:

Any person is guilty of a felony, punishable by imprisonment in a state prison for two, three, or four years who, before or during an election: (a) tampers with, interferes with, or attempts to interfere with, the correct operation of, or willfully damages in order to prevent the use of, any voting machine, voting device, voting system, vote tabulating device or ballot tally software program source codes, (b) interferes or attempts to interfere with the secrecy of voting or ballot tally software program source codes, (c) knowingly, and without authorization, makes or has in his or her possession a key to a voting machine that has been adopted and will be used in elections in this state, (d) willfully substitutes or attempts to substitute forged or counterfeit ballot tally software program sources codes.

⁵ “Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars (\$1,000) in cases of misdemeanors and ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed.”

§ 18564.⁶ This section is most likely designed to prevent people from interfering with the ordinary and smooth operation of electronic voting systems.

2. Carry away or destroy ballots

A person may not carry away ballots lawfully polled:

Every person is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the state prison for 16 months or two to three years, or by both the fine and imprisonment, **who**: (a) aids in changing or destroying any poll list or official ballot, (b) aids in wrongfully placing any ballots in the ballot container or in taking any therefrom, (c) adds or attempts to add ballots to those legally polled at any election by fraudulently putting them into the ballot container, either before or after the ballots therein have been counted, (d) adds to or mixes with, or attempts to add to or mix with, the ballots polled, any other ballots, while they are being counted or canvassed or at any other time, with intent to change the result of the election, or allows another to do so, when in his or her power to prevent it, (e) **carries away or destroys**, attempts to carry away or destroy, or knowingly allows another to carry away or destroy, any poll list, ballot container, or **ballots lawfully polled** or who willfully detains, mutilates, or destroys any election returns, (f) removes any unvoted ballots from the polling place before the completion of the ballot count.

§ 18568 (emphasis added). Although this section appears to prohibit people from physically carrying ballots away or attempting to physically destroy ballots, a court may extend it to punish people who electronically remove ballots from a mechanical voting tabulation device.

3. Illegal handling/counting of votes

Section 18575 makes it illegal for anyone other than an election officer from to handle, count, or canvass ballots:

Every person is guilty of a felony, and on conviction shall be punished by imprisonment in the state prison for two, three or four years, **who** at any election: (a) without first having been appointed and qualified, acts as an election officer, (b) **not being an election**

⁶ We may have an argument that Mr. March and others violated section 18564 of the California Elections Code by accessing Diebold's voting software and publishing Diebold's source code.

officer, performs or discharges any of the duties of an election officer in regard to the handling, counting, or canvassing of any ballots.

§ 18575 (emphasis added). This section provides that only authorized people, such as an election officer may count votes. To the extent that an unauthorized person handles or counts votes, he or she is in violation of section 18575.

4. Interference with election process (catch-all)

As evidenced above, the policy of the California Elections Code penal provisions is to prevent interference with the vote and the voting process. Section 18502 attempts to maintain the integrity of the vote and the voting process by making it illegal to interfere with a fair and lawful election and canvass of the vote. Section 18502 provides:

Any person who in any manner interferes with the officers holding an election or conducting a canvass, or with the voters lawfully exercising their rights of voting at an election, as to prevent the election or canvass from being fairly held and lawfully conducted, is punishable by imprisonment in the state prison for 16 months or two or three years.

§ 18502. This section proscribes any activity that would interfere with an election officer's duties to ensure a fair and lawful election and canvass of the vote. Thus, it is most likely illegal under this section to interfere with the manner or timing of counting votes.

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