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02/04/2004

DRAFT dated 2/6/04

To: Daniel D. McMillan

DIEBOLD ELECTION SYSTEMS, INC.

Re: Issues Regarding California Secretary of State Investigation

I. BACKGROUND

During the November 10, 2003 Voting Systems and Procedures (“VSPP”) meeting, the VSPP conditionally certified DESI’s modified DRE voting system – the Accu Vote-TSx (previously Accu Vote-TS). The VSPP imposed the following three conditions: (1) DESI pays for an audit of its hardware, firmware, and software currently in use in all counties; (2) DESI cooperates in full with the auditors and the Secretary of State with the internal review of the Accu Vote-TSx; and (3) DESI be present and participate in the next public meeting. DESI satisfied the first and third condition, but the VSPP found that DESI did not comply with the second condition because DESI did not meet with the VSPP staff and team of consultants on Nov. 17, and DESI produced certain documents to the VSPP late.

On December 5, 2003, R & G Associates completed its audit and on December 15 they issued a Final Report of their review of California counties using DESI voting systems. The report revealed, among other findings, that DESI had supplied counties with uncertified voting systems that were used in actual elections. On December 16, 2003, at the VSPP public meeting, the president of DESI, Bob Urosovich admitted that DESI was negligent in providing certain counties with uncertified voting systems. Also during that meeting, the VSPP determined that the conditional certification of the Accu Vote-TSx remain conditional until further review and analysis is completed.

The VSPP has continued to investigate DESI's business in California and has recently asked that DESI comply with a document request. The VSPP is trying to determine two things: (1) the magnitude of the modifications/changes that DESI made to its software; and (2) whether DESI *knowingly* supplied California counties with uncertified systems. If the VSPP finds that the changes DESI made to its software had a major impact on California elections and/or if DESI *knowingly* violated election laws, the VSPP will likely withdraw its conditional certification of the Accu Vote-TSx and/or report DESI's election law violations to the California Attorney General and/or to the District Attorneys for the affected counties (Lassen, Trinity, and Los Angeles).

II. ISSUES AND SHORT ANSWERS

A. **Issue:** Whether the California Secretary of State can issue a conditional certification of a voting system (or, of a modified version of a voting system that was previously certified)? **Short Answer:** Probably not. The Secretary of State Procedures for certifying voting systems ("SSP")¹ permit conditional certification, but if the SSP are invalid and without legal effect,² the Secretary of State must rely on the California Elections Code, which does not contain any provision allowing for conditional certification. The California Elections Code contains explicit procedures for examining and certifying voting systems. The Secretary of State must examine every voting system submitted by vendors without undue delay and issue a report within 30 days after the examination stating whether the voting system is accurate and efficient and can safely be used in elections. *See* Cal. Elec. Code §§ 19202 & 19207. If the Secretary of

¹ The SSP are found in a document located on the Secretary of State's website. The full title of the document is as follows: "Procedures for Approving, Certifying, Reviewing, Modifying, and Decertifying Voting Systems, Vote Tabulating Systems, Election Observer Panel Plans, and Auxiliary Equipment, Materials and Procedures"

² The SSP may not be enforceable "regulations" because they have not been reviewed by the Office of Administrative Law or subjected to the rulemaking requirements of the Administrative Procedure Act.

State's "report states that the voting system can be used, it shall be deemed approved by the Secretary of State and machines or devices of its kind may be adopted for use at elections." Cal. Elec. Code § 19208.

B. Issue: Whether the Secretary of State (or the VSPP acting on behalf of the Secretary of State)³ has authority to investigate alleged violations of the California Elections Code? **Short Answer:** Probably not in this case. The Secretary of State may examine vote-counting computer programs and other records of elections officials that the Secretary of State finds necessary in making his determination that California election laws have been violated, but once the Secretary of State determines that a violation occurred, the Secretary of State must report the violation to the Attorney General or to the appropriate District Attorney. *See* Cal. Gov't Code § 12172.5.⁴ In this case, the Secretary of State has already determined that DESI violated the California Elections Code, so the Secretary of State's duty is to notify the proper authority. To the extent the SSP constitute regulations, the Secretary of State may have the authority to investigate violations of those regulations and subpoena any necessary records. *See* Cal. Elec. Code § 19102.⁵

C. Issue: Whether the California of Secretary of State can withdraw his approval of a voting? **Short Answer:** Yes. The Secretary of State may withdraw his approval of a voting system if he determines that the voting system is defective, obsolete, or is otherwise unacceptable. *See* Cal. Elec. Code § 19222.

³ The Secretary of State and the VSPP are often used interchangeably throughout this memorandum.

⁴ Government Code section 12172.5 provides: "If, at any time, the Secretary of State concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General. In these instances, the Secretary of State may assist the county elections officer in discharging his or her duties."

1. **Issue:** Whether the California Secretary of State can withdraw his *conditional* approval of a voting system without adhering to section 19222 of the California Elections Code? **Short Answer:** Probably (assuming conditional approval is legal). A conditional approval implies that the system is not approved until the condition is satisfied. Thus, if the Secretary of State finds that DESI did not satisfy a condition of approval, then the system will never receive final approval.⁶

III. DISCUSSION

A. Conditional Certification Of Modified Voting System

The California Elections Code has separate provisions relating to approval of a new voting system and approval of a change or modification to an approved voting system. Section 19213 of the California Elections Code, pertaining to modifications of voting systems, provides: “When a voting system or a part of a voting system has been approved by the Secretary of State, it shall not be changed or modified until the Secretary of State has been notified in writing and determined that the change or modification does not impair its accuracy and efficiency sufficient to require a reexamination and reapproval pursuant to this article.” In this case, DESI modified its Accu Vote-TS and is seeking approval from the Secretary of State. According to section 19213, the Secretary of State must determine whether the changes made to the Accu Vote-TS, which are incorporated into the Accu Vote-TSx, impaired the system’s accuracy and efficiency. It is unclear whether the Secretary of State followed the process specified in section 19213.

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⁵ Section 19102 provides: “The Secretary of State may investigate any alleged violation of his or her regulations with power to subpoena all necessary records.”

⁶ Whether withdrawing conditional approval for not satisfying the condition that DESI cooperate with the current investigation is discussed in section III. A. of this memorandum.

Based on the VSPP public meeting minutes of November 10, 2003, it appears that the Secretary of State has subjected the modified the Accu Vote TSx to the reexamination and reapproval process pursuant to the section 19213 of the California Elections Code.⁷ Therefore, the California Elections Code sections regarding certification of a new system most likely apply to this case.

The California Elections Code defines the procedures for certification and it does not include a provision permitting conditional certification. The process of certification begins when the vendor applies to the Secretary of State for approval of the vendor's voting system. *See* Cal. Elec. Code § 19202. The Secretary of State is then required to examine the voting system and report on its accuracy and efficiency without undue delay. Cal. Elec. Code § 19202. Within 30 days after completing the examination, the Secretary of State must file a report stating whether the voting system can safely be used in an election. Cal. Elec. Code § 19207. If the Secretary of State's "report states that the voting system can be used, it shall be deemed approved by the Secretary of State and machines or devices of its kind may be adopted for use at elections." Cal. Elec. Code § 19208. However, before the Secretary of State gives his decision approving or withholding approval of any voting system, the Secretary of State must hold a public hearing to give interested people an opportunity to speak for or against approval of the voting system. Cal. Elec. Code § 19204.

In this case, the VSPP (acting on behalf of the Secretary of State) has held numerous public hearings regarding the approval of DESI's Accu Vote-TSx; the public has voiced their opinions for and against certification of the TSx; and, the time for final approval of the TSx

⁷ The VSPP meeting minutes provide: "Based on the successful completion of testing by both federal ITAs and by the State technical consultant, it is the recommendation of staff that Diebold Election Systems application [for the TSx] be approved for use in California, subject to the standard terms and conditions for approval." *See*

should have expired. It is unclear whether the Secretary of State has issued a report stating whether the Accu Vote-TSx can safely be used in an election. Most likely, no report exists because of the Secretary of State's decision to issue a conditional approval. The problem is that conditional approval is not a decision that is authorized by the California Elections Code.

For its authority, the Secretary of State is most likely relying on the SSP section governing conditional certification. Section 507 of the SSP provides that “[a]ny approval may contain additional requirements of one or more actions or procedures, as determined by the review of the application.” This section appears to allow for conditional certification if one of the elements required to be completed on the application is not met. The application has eleven elements,⁸ none of which appear to permit conditioning approval of a new system on complying with an audit regarding past violations. Cooperation with the Secretary of State in investigating the extent of past violations is probably not a legitimate basis to condition approval of a new voting system.

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VSPP, Nov. 10 Minutes, p. 5. Additionally, the TS system, which was originally certified, underwent full regression testing. *See* VSPP, Nov. 10 Minutes, p. 12.

⁸ Section 504 of the SSP includes the following elements: (a) A review of California Elections Code sections which address the application; (b) A review of federal statutes or regulations which address the application; (c) A copy of the approved Qualification Test results released directly to the Secretary of State by a Nationally Approved Test Laboratory (NRTL); (d) A review, if applicable, of transcripts or other materials from prior meetings or hearings on the proposed system, procedure, or modification either in whole or in part; (e) A review, if applicable, of any procedures manuals, guidelines or other materials adopted for use with the system addressed by the application; (f) A review of any effect the application will have on the security of the election system; (g) A review of any effect the application will have on the accuracy of the election system; (h) A review of any effect the application will have on the ease and convenience with which voters use the system; (i) A review of any effect the application will have on the timeliness of vote reporting, and, (j) A review of any effect the application will have on the overall efficiency of the election system. (k) A Description of Deposit Materials showing that the Ballot Tally Software Source Code has been deposited in Escrow with an Escrow Company approved pursuant to Chapter 6, Division 7, Title 2 of the California Administrative Code, beginning with Section 20630.

B. Investigative Authority

The California Secretary of State is the Chief Elections Officer for the State of California. *See* Cal. Gov't Code § 12172.5; Cal. Const. Art. 5, §§ 2 & 11. The Secretary of State is responsible for administering the provisions of the Elections Code, “ensuring that elections are efficiently conducted and that state election laws are enforced.” Cal Gov't Code § 12172.5. To determine whether an election law has been violated, the Secretary of State may examine vote-counting computer programs, and other records or elections officials that the Secretary of State finds are necessary. *See* Cal. Gov't Code § 12172.5.⁹ This section, however, does not give the Secretary of State authority to conduct a full-scale investigation. Moreover, it only authorizes the Secretary of State to examine certain records so that the Secretary of State can make a decision whether an election law violation has occurred.

Once the Secretary of State concludes that an election law violation has occurred, the Secretary of State is bound to report that violation to the proper authorities. California Government Code section 12172.5 specifies:

If, at any time, the Secretary of State concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General. In these instances, the Secretary of State may assist the county elections officer in discharging his or her duties.”

Cal. Gov't Code § 12172.5. This section implicitly limits the discretion of the Secretary of State once a violation has occurred. The Secretary of State's duties, as an administrative state agency, do not include conducting investigations into the extent of the election law violation. The

⁹ Section 12172.5 provides: “In order to determine whether an elections law violation has occurred the Secretary of State may examine voted, unvoted, spoiled and canceled ballots, vote-counting computer programs, absent voter envelopes and applications, and supplies referred to in Section 15082 of the Elections Code. The Secretary of State may also examine any other records of elections officials as he or she finds necessary in making his or her determination, subject to the restrictions set forth in Section 6253.5.”

necessary. Any withdrawal by the Secretary of State of his or her previous approval of a voting system or part of a voting system shall not be effective as to any election conducted within six months of that withdrawal.

The Secretary of State may withdraw his approval of any voting system, but he generally must give six months notice to the vendor. The Secretary of State may give a shorter notice if he has good cause. Regardless of when notice is given, any withdrawal of approval of a voting system will not have any effect on elections within six months of the withdrawal.

1. Withdrawal Of Conditional Approval

Section 19222 most likely does not apply to withdrawal of conditional approval of a voting system. The Secretary of State's approval of the Accu Vote-TSx is dependent upon DESI satisfying the condition that it cooperates with the current investigation. Thus, if DESI fails to cooperate, the Accu Vote-TSx is not approved. And, if the Accu Vote-TSx is never approved by the Secretary of State, then section 19222 of the California Elections Code probably does not apply.

IV. CONCLUSION

In sum, the actions take by the Secretary of State may be illegitimate and beyond the scope of the agency's authority. The Secretary of State has already determined that DESI violated election laws. The audit revealed that DESI provided certain counties with uncertified versions of software and those versions were used in elections (Bob Urosovich admitted this much). Therefore, under Government Code section 12172.5, the Secretary of State must notify the Attorney General or the District Attorneys for the counties where the violations occurred (Lassen, Trinity, Los Angeles). The Secretary of State is improperly extending its conditional approval of the Accu Vote-TSx on the condition that DESI cooperate in an unauthorized investigation.

[THIS WILL BECOME TEXT FOR EMAIL -- THIS DOCUMENT ITSELF WILL NOT BE NEEDED IN MEMO FORM]

“Dan McMillan asked that I forward you the following email.”

[ATTACH DOCUMENT REFERENCED -- 2093965]

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To: dettinger@diebold.com
cc: kgantt@dieboldes.com; Lyle Ganske; John Majoras

Re: DESI Action Plan and Budget

Warren:

Attached is the draft Action Plan and Budget Estimate. As you will see, I have used realistic estimates (rather than low-ball numbers) so you can make an informed decision about how to proceed in light of the company's assessment of the risks it faces. We can adjust our level of activity to match your risk and budget needs, but this is my best judgment of what needs to be done. Please let me know whether you or any of the board members or officers have any questions. I am keeping Lyle Ganske and John Majoras apprised of these matters.

Regards,

Daniel D. McMillan

bcc: Patrick Toher; Kevin Dorse