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To: Daniel McMillan

DIEBOLD ELECTION SYSTEMS, INC.

Re: *Supplement to 11/24/2003 Memorandum Analyzing the Alameda County Agreement*

I. INTRODUCTION

During the conference call with Karen Gantt on January 28, 2004, it was disclosed that DESI modified a California State certified voting system as an experiment to remedy various technical problems with the system. After DESI made these modifications, it obtained federal qualification for the modified system, but failed to obtain California State certification.

II. ISSUE AND SHORT ANSWER

A. Issue: Whether a California State approved voting system¹ may be modified for experimental use without the Secretary of State's approval? **Short Answer:** Probably not. The California Elections Code provision allowing for experimental use of a voting system in an election without Secretary of State certification most likely only applies to new and uncertified voting systems. *See* Cal. Elec. Code § 19211.² Once a voting system has been approved by the Secretary of State, any change or modification to the system must be approved by the Secretary of State before it may be used in an election. *See* § 19213.³

¹ A voting system is defined broadly under California law as "any mechanical, electromechanical, or electronic system and its software, or any combination of these used to cast or tabulate votes, or both." Cal. Elec. Code § 363.

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

³ Section 19213 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

III. DISCUSSION

The California Elections Code section 19211, entitled “Experimental Use,” permits a local governing body to use an uncertified voting system for experimental use. Section 19211 provides: “The governing board, without formally adopting a system that it might lawfully adopt, may provide for its experimental use at an election in one or more precincts. Its use at the election is as valid for all purposes as if it were lawfully adopted.” The “governing board” refers to the “election board,” as defined in Section 319, as “the board of supervisors of each county, the city council or other governing body of a city, or any board of officer to whom similar powers and duties are given by any charter.” Thus, if the local election board decides to adopt a voting system for experimental use in an election, DESI does not need to obtain certification from the Secretary of State.

However, the issue here is whether a voting system that was previously approved by the Secretary of State can be changed or modified for an experimental use without obtaining approval from the Secretary of State. Most likely, a local election board may not use a modified version of the voting system that was previously approved by the Secretary of State without having the Secretary of State approve the change. The California Elections Code requires all changes and modifications to previously approved systems be further approved by the Secretary of State. *See* § 19213 (“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 determines

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reexamination and reapproval pursuant to this article. The Secretary of State may adopt rules and regulations governing the procedures to be followed in making his or her determination as to whether the change or modification impairs accuracy or efficiency.” Section 19213 only requires approval of modifications to “approved voting systems,” so if the system was never approved in the first instance, then arguably section 19211 permits such experimental use – *i.e.*, experimental change. However, this argument, and section 19211, are in conflict with

that the change or modification does not impair the system's accuracy or efficiency").

Consequently, it appears that the experimental use exception provided for in section 19211 may only be invoked when a voting system has not undergone or received the Secretary of State's approval. Thus, DESI must obtain Secretary of State approval of any change or modification that DESI makes to any its California State certified voting systems before the systems may be used in an election.

DESI may, however, argue that it did not need to obtain approval from the Secretary of State for its changed or modified voting system if the system is considered a new voting system. DESI's argument would be that the change was not a modification of an approved system, but instead was a completely new system. A "system" includes any combination of any mechanical, electromechanical, or electronic system and its software. *See* § 363. Under this broad definition, even a change to part of voting system may constitute a new system under certain circumstances.⁴ Still, DESI would probably need the local governing board to affirm that its use of DESI's new or changed system was for experimental use.

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section 19201 specifying that "[n]o voting system, in whole or in part, shall be used unless it has received the approval of the Secretary of State, prior to any election at which it is first to be used."

⁴ A change to part of a voting system creates the problem that the entire system has been modified, because even if part of a voting system is considered a new system and the local governing body adopts that part of the voting system for experimental use, the whole system is not new. A modified part of the whole system may be new, but the whole system is now changed as a result of the modified part. Therefore, the whole system would most likely need to get further approval from the Secretary of State before it could be used in an election.