State of California

SECRETARY OF STATE

STATEMENT OF FINDINGS AND DECISION OF THE SECRETARY OF STATE TO SEEK RELIEF AGAINST ELECTION SYSTEMS & SOFTWARE, INC. (ES&S) REGARDING THE AUTOMARK A200

Legal Authority

California law prohibits the use of any "voting system, in whole or in part…unless it has received the approval of the Secretary of State prior to any election at which it is to be first used." (Elec. Code § 19201(a).)

Prior to considering any new voting system for approval, or any change to a currently certified voting system, the Secretary of State conducts a thorough examination and review of the proposed system that typically includes:

(a) A review of the application and documentation of the system;
(b) End-to-end functional examination and testing of the system;
(c) Volume testing under election-like circumstances of the system and/or all voting devices with which the voter directly interacts;
(d) Demonstration for and review by targeted stakeholders, including county elections officials, and representative advocates for voters with accessibility needs; and
(e) A public hearing and public comment period.

When a voting system or part of a voting system has been approved by the Secretary of State, it shall not be changed until the Secretary of State has been notified in writing and has determined that the change does not impair its accuracy and efficiency sufficient to require a reexamination and reapproval. (Elec. Code § 19213.)

Under California law, the Secretary of State has the power to seek, among other things, monetary damages, refunds, civil penalties, and injunctive relief for failure to notify the Secretary of State and receive Secretary of State authorization before changing a certified voting system, or part of a voting system.

Under California law, the Secretary of State has the power to bring a civil action to recover civil penalties of $50,000 per act against a business for "knowingly, and without authorization, inserting or causing the insertion of uncertified hardware, software, or firmware into a voting

machine, voting device, voting system, vote tabulating device, or ballot tally software." (Elec. Code § 18564.5(a)(5).)

Under California law, the Secretary of State has the power to bring a civil action to recover civil penalties of $50,000 per act against a business that "fails to notify the Secretary of State prior to any change in hardware, software, or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified or conditionally certified for use in this state." (Elec. Code § 18564.5(a)(6).)

In addition to the remedies set forth in Elections Code § 18564.5, the Secretary of State may seek all of the following relief for an unauthorized change in hardware, software, or firmware to any voting system certified or conditionally certified in California:

- Monetary damages from the offending party or parties, not to exceed ten thousand dollars ($10,000) per violation. Each voting machine found to contain the unauthorized hardware, software, or firmware shall be considered a separate violation.

- Immediate commencement of decertification proceedings for the voting system in question.

- Prohibiting the manufacturer or vendor of a voting system from doing any elections-related business in the state for one, two, or three years.

- Refund of all moneys paid by a locality for a compromised voting system, whether or not the voting system has been used in an election.

- Any other remedial actions authorized by law to prevent unjust enrichment of the offending party. (Elec. Code § 19214.5(a)(1)-(5).)

The Secretary of State may also seek injunctive relief requiring any vendor or manufacturer of a voting machine, voting system, or vote tabulating device to comply with the requirements of the Elections Code. (Elec. Code § 19215; Elec. Code § 18564.5.)

The Secretary of State has the power to investigate any alleged violations of the Elections Code. (Elec. Code § 19102.)

Before seeking relief under Elections Code §19214.5, the Secretary of State must hold a public hearing. (Elec. Code §19214.5(b).)

The decision of the Secretary of State to seek relief under Elections Code §19214.5 must be in writing and state the findings of the Secretary. (Elec. Code §19214.5(c).)

Factual Findings

The following facts are based on information gathered independently by the Secretary of State, drawn from the Secretary of State's public hearing held on October 15, 2007, and provided to the Secretary of State by Election Systems & Software, Inc. (ES&S).

1. On June 1, 2005, voting system vendor Election Systems & Software, Inc. (ES&S) received federal certification (NASED #N-1-16-22-12-001) for its Optical Scan voting system, including a ballot-marking device component, called the AutoMARK A100, Version 1.0.

2. On August 3, 2005, the ES&S AutoMARK A100, Version 1.0, was certified for use in California as part of the ES&S Optical Scan voting system.

3. The California certification document contained the express condition that: "No substitution or modification of the voting systems shall be made with respect to any component of the voting systems, including the Procedures, until the Secretary of State has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval." (*Conditional Approval of Use of Election System and Software, Inc. Optical Scan Voting System*, Secretary of State, August 3, 2005.)

4. From March through August, 2006, ES&S delivered 972 AutoMARK A200 machines to five California counties: Colusa, Marin, Merced, San Francisco City & County, and Solano. County elections officials believed they had bought and received certified AutoMARK A100 machines.

5. As early as June 2006, some or all of the five counties began using the AutoMARK A200 machines in their elections, *before* the machines had ever been approved by the state or federal government.

6. On August 31, 2006, ES&S received federal certification for the Unity 3.0.1.1 voting system. This certification included approval for both AutoMARK A100 and A200 units with Version 1.1.2258 firmware (NASED # N-2-02-22-22-006).

7. In late August and early September 2006, the Secretary of State's office conducted a volume test of 100 AutoMARK ballot-marking devices containing Version 1.1.2258 firmware as part of an ES&S application for California certification of its new Unity 3.0.1.1 voting system. The test revealed numerous serious errors, and ES&S subsequently withdrew its application for certification of the new system. The Unity 3.0.1.1 voting system was never certified for use in California.

8. On July 11, 2007, nearly one year later, the Secretary of State discovered for the first time the existence of two AutoMARK hardware models: A100 and A200. The discovery was made during a conference call with ES&S about its new application for state certification of the Unity 3.0.1.1 voting system, which as noted above, had failed testing

in 2006. The following is a summary of factual admissions made by ES&S during the July 11, 2007, conference call:

- ES&S stated its new application for certification of the Unity 3.0.1.1 voting system included a component called the AutoMARK A200, with firmware Version 1.1.2258.

- ES&S stated ES&S had already submitted for California testing both AutoMARK A100 and A200 units with Version 1.1.2258 firmware in August-September 2006.

- ES&S stated that at the time it submitted both the AutoMARK A100 and A200 (referring to them as "Phase I and Phase II") for testing in the fall of 2006, ES&S had already deployed both models in California.

9. On July 17, 2007, following the conference call, ES&S sent the Secretary of State one photograph of the A100 model with its cover open and one photograph of the A200 model with its cover open, showing visible differences between the two models.

10. On July 23, 2007, ES&S sent the Secretary of State an e-mail containing a spreadsheet confirming in detail the verbal statement ES&S made on July 11, 2007, that in mid-2006 it had deployed AutoMARK A200 units in California. The spreadsheet showed ES&S delivered 972 AutoMARK A200 units to five California counties as follows:

Colusa County	20 machines
Marin County	130 machines
Merced County	104 machines
San Francisco City & County	558 machines
Solano County	160 machines
Total	972 machines

11. From July through October 2007, the Secretary of State undertook an independent investigation to confirm the statements and documentation provided by ES&S regarding its deployment of AutoMARK A200 units in California.

12. ES&S did not provide notice to the Secretary of State that it changed the AutoMARK, nor did ES&S obtain authorization for the changes from the Secretary of State, before it sold and delivered 972 units of the AutoMARK A200 in California in 2006, as required by Elections Code §19213 and §18564.5.

13. On October 15, 2007, the Secretary of State held a public hearing on the ES&S AutoMARK issue, as required by Elections Code §19214.5(b).

14. At the public hearing, ES&S asserted that the Secretary of State had been notified of the changes to the AutoMARK; however, ES&S provided no evidence before, during, or after the hearing that it had notified the Secretary of State, in writing or otherwise, or that it had obtained authorization from the Secretary of State, before it sold and delivered 972 AutoMARK A200 units in California.

15. At the public hearing ES&S asserted that prior Secretaries of State had interpreted Elections Code §19213 and §18564.5 to require notice to the Secretary of State only of some, but not all, changes to a voting system; however, ES&S provided no evidence before, during, or after the hearing to substantiate that assertion.

16. At the public hearing ES&S conceded that it had made hardware changes to the AutoMARK ballot marking device, but asserted that the changes were "de minimus." However, under Elections Code § 19213, it is not the vendor's role to characterize the extent of changes to a voting system and determine whether the changes to the voting system "impair its accuracy and efficiency" and whether "reexamination and reapproval" of the system is required. Rather, it is the Secretary of State who must make that determination after written notice has been provided by the vendor. (Elec. Code § 19213.)

Therefore, *I, Debra Bowen, Secretary of State for the State of California, find and determine, based on the legal authority and factual findings set forth above, the following:*

- **ES&S violated Elections Code §19213 and §18564.5 multiple times during the period March 2006 through August 2006, when it failed to notify or obtain approval from the Secretary of State, as required by Elections Code §19213 and §18564.5, before (1) making changes to the AutoMARK ballot marking device component of its certified Optical Scan voting system; and (2) selling and delivering to five California counties 972 AutoMARK units containing unauthorized changes.**

- **ES&S failed to comply with an express condition of the Secretary of State's August 3, 2005, Conditional Approval of Use of Election System and Software, Inc. Optical Scan Voting System, which specifies that: "No substitution or modification of the voting systems shall be made with respect to any component of the voting systems, including the Procedures, until the Secretary of State has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval."**

- **As Secretary of State, I will seek the following relief, at a minimum and as provided by statute, through a civil action against ES&S:**

  - **Pursuant to Elections Code §18564.5(a)(5), civil penalties of $50,000 per act for knowingly, and without authorization, inserting or causing the insertion of uncertified hardware, software, or firmware into a voting machine, voting device, voting system, vote tabulating device, or ballot tally software.**

  - **Pursuant to Elections Code §18564.5(a)(6), civil penalties of $50,000 per act for failing to notify the Secretary of State prior to any change in hardware, software, or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified or conditionally certified for use in this state.**

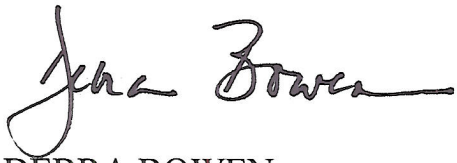
- **Pursuant to Elections Code §19214.5(a):**

  (1) Monetary damages from the offending party or parties, not to exceed ten thousand dollars ($10,000) per violation. For purposes of this subdivision, each voting machine found to contain the unauthorized hardware, software, or firmware shall be considered a separate violation.

  (2) Refund of all moneys paid by a locality for a compromised voting system, whether or not the voting system has been used in an election.

  (3) Any other remedial actions authorized by law to prevent unjust enrichment of the offending party.

IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of California, this 19th day of November, 2007.



DEBRA BOWEN
Secretary of State