



***PUBLIC HEARING BEFORE THE SECRETARY OF STATE OF CALIFORNIA***

***THE HONORABLE DEBRA BOWEN***

***OCTOBER 15, 2007***

***ELECTION SYSTEMS & SOFTWARE, INC./AUTOMARK***

**INTRODUCTION**

Election Systems & Software, Inc. ("ES&S") has been notified by the California Secretary of State, the Honorable Debra Bowen, that a public hearing will be held on October 15, 2007, concerning her office's intent to examine issues related to the certification of certain AutoMARK voter assist terminals deployed in California. ES&S respectfully submits this response to what it believes are the issues which the Secretary of State intends to examine.

**ELECTION SYSTEMS & SOFTWARE, INC.**

ES&S has the greatest respect for federal and state level certification processes. We have been in the field of elections for more than three decades. We have a long history of working with election officials and striving to comply with those extensive and thorough examinations of our voting technologies. ES&S products are rigorously tested by independent testing authorities and election officials. Our systems are certified to meet or exceed industry standards at both the federal and state levels. Throughout our history, we have been committed to providing solutions that maintain voter confidence and enhance the voting experience.

ES&S is committed to providing voting systems that improve the voting process for all voters by continuing to create technology that meets or exceeds evolving requirements. To that end, ES&S offers secure, accurate and the most reliable voting solutions to voters and election administrators around the world. Additionally, ES&S assists jurisdictions in meeting the



requirements of the Help America Vote Act of 2002 ("HAVA"), by providing products, such as the AutoMARK, that are accessible to voters with disabilities.

### **THE HELP AMERICA VOTE ACT OF 2002 ("HAVA")**

HAVA was drafted, in part, to address the widespread election administration problems that led to the controversy surrounding the 2000 U.S. presidential election. HAVA was enacted into law on October 29, 2002.

The stated purpose of HAVA is:

To establish a program to provide funds to states to replace punch card voting systems, to establish the Election Assistance Commission to assist in administration of federal elections and to otherwise provide assistance with the administration of certain federal election laws and programs, to establish minimum election administration standards for state and units of local government with responsibility for the administration of federal elections, and for other purposes.

Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666.

In order to receive funding under HAVA, a state must submit a plan setting forth: (1) how the state intends to use HAVA funds; (2) how a state will distribute HAVA funds to local jurisdictions and other applicable election entities; (3) how the state will provide voters, election officials and election workers education regarding the election process; (4) how the state will adapt voting system guidelines that are consistent with HAVA's provisions; and (5) how the state's plan will be managed.

With respect to voting systems guidelines, HAVA requires that systems meet certain minimum standards including, but not limited to, providing a voting system that is:

accessible to individuals with disabilities, including accessibility for the blind and visually impaired, including, providing the same opportunity for voting participation (privately and independently) as is available to the general voting population.



## **THE AUTOMARK VOTER ASSIST TERMINAL**

As stated, one of the solutions which ES&S has offered to its customers for use by voters with disabilities is a device known as the AutoMARK. The AutoMARK is a standalone voter assist terminal. It was designed specifically to allow voters with disabilities to mark a paper ballot, privately, independently and securely. The AutoMARK does not store, count or tabulate voted ballots. It can only be used to mark optical scan ballots for tabulation by another device or to confirm the vote choices on a voted ballot.

The AutoMARK was a product provided by a company known as AutoMARK Technical Systems, LLC ("ATS"). In April 2004, ES&S contracted with ATS for the manufacture of the AutoMARK. ATS in turn contracted with Ricoh Electronics, Inc. ("RicoH") of Tustin, California, to actually manufacture the AutoMARK voting equipment. Ricoh is a well-known and experienced manufacturer in the technology industry. The AutoMARK was well-received in the marketplace. Indeed, Secretary Bowen has publicly endorsed the AutoMARK on more than one occasion.<sup>1</sup>

Under ES&S' contract with ATS, ATS was responsible for obtaining federal qualification of the AutoMARK voting equipment. During the relevant time frame, that qualification was accomplished through the National Association of State Election Directors ("NASED").

## **THE NASED QUALIFICATION PROCESS**

As stated, at the relevant time frame, NASED was the body charged with qualifying voting systems at the national level before a vendor sought state level certification.<sup>2</sup> NASED had certain fundamental requirements for voting systems that were to be tested and qualified against rigorous standards. These fundamental requirements were accuracy, integrity,

---

<sup>1</sup> Attachment No. 1 contains copies of statements by Secretary Bowen where she has endorsed the AutoMARK after the implementation and deployment of the Phase 2 AutoMARK.

<sup>2</sup> The Election Assistance Commission ("EAC") officially took over the responsibility of voting system qualification in August, 2006.



reliability, safety and ease of use. The rigorous qualification standards that were employed by NASED were applied to a voting system's hardware, software, telecommunications and documentation, that were intended for use to: (a) prepare the voting system for use in election; (b) produce the appropriate ballot format; (c) test that the voting system and ballot materials have been properly prepared and are ready for use; (d) record and count votes; (e) consolidate and report results; and (f) display results on site or remotely and maintain and produce all audit trail information.

The qualification tests performed by NASED validate that a voting system meets the requirements of the standards it employs and performs according to the vendor's specifications for the system. Such tests encompass the examination of software; the inspection and evaluation of system documentation, tests of hardware under conditions simulating the intended storage, operation, transportation and maintenance environment; operational tests to evaluate system performance and function under normal and abnormal conditions; and examination of the vendor's system development, testing, quality assurance and configuration management practices. All of NASED qualification tests address an individual system's components or elements, as well as the integrated system as a whole.

### **INDEPENDENT TESTING AUTHORITIES**

Since 1994, qualification tests for voting systems have been performed by independent testing authorities ("ITAs") certified by NASED.<sup>3</sup> NASED certifies ITAs for either the full scope of qualification testing or a distinct subset of the total scope of testing.

Upon the successful completion of the aforementioned qualification testing by an ITA, the ITA issues a qualification test report to NASED and the vendor recommending approval of

---

<sup>3</sup> The ITAs are currently the responsibility of the EAC.



the voting system. The qualification test report remains valid for as long as the voting system remains unchanged. Upon receipt of test reports that address the full scope of testing, those reports are reviewed by the NASED technical committee and, if approved, NASED issues a qualification number that indicates the system has been tested by certified ITA(s) for compliance with the standards and qualifies for the certification process of states that have adopted the standards.

After a system has been qualified for certification, subsequent examination of a system may be required if modifications are made to hardware, software or telecommunications, including the installation of software on different hardware. Vendors request review of modifications by the appropriate ITA based on the nature and scope of the modifications made and the scope of the ITA's role in NASED qualification. The ITA, as empowered by NASED, determined the extent to which the modifications should be resubmitted for qualification testing and the extent of testing to be conducted. ITAs have been recognized to be in the best position to assess the likely impact of all technical changes in the voting system.

Generally, a voting system remains qualified under the standards against which it was tested, as long as no modifications are made to the system which have not been approved by an ITA. However, if a new threat to a particular voting system is discovered, it is the prerogative of NASED to determine which qualified voting systems are vulnerable, whether those systems need to be retested, and the specific test(s) to be conducted. In addition, when new standards supersede the standards under which the system was qualified, it is the prerogative of NASED to determine when systems that were qualified under the earlier standards will lose their qualification, unless they are tested to meet current standards.



More specifically, with respect to any hardware modifications, an Engineering Change Request ("ECR") is submitted to the ITA when a manufacturer is required to modify the qualified hardware due to discontinued components, updates for efficiencies of manufacturing and serviceability. The intent of the ECR process is to provide for the review and approval of hardware modifications to a qualified voting system, that is modifications that are considered to be de minimis, (i.e. those that do not affect the form, fit or function of the voting system), without affecting the voting system's qualification. The process requires that all proposed ECRs must first be reviewed by the ITA that performed the original qualification testing of the hardware device. NASED empowered the ITAs with the discretionary authority to determine if the proposed updates are in fact de minimis changes and therefore do not affect the voting system's qualification.

Upon submission, the ITA analyzes the ECR and determines what, if any, testing needs to be done. This could range from no testing to a full battery of tests requiring a new NASED qualification number. An example of something that would fall in between the above would be environmental tests because of de minimis hardware changes.

Once the ITA completes its tests, the results of the analysis are recorded on the ECR form. Those are then transmitted to the vendor and the vendor may proceed accordingly based upon the results of those tests and the direction from the ITA.

It is significant to note that if the hardware changes are de minimis in nature, no new voting system is created, no new NASED qualification number is required or assigned and the vendor is allowed to proceed with its manufacturing process under the guise that the voting system has remained the same - - unchanged and unaffected - - and still NASED qualified.



Further, in the subject timeframe, the historical practice and course of dealing did not require the vendor to notify the states of these type of de minimis hardware modifications. Nothing occurred which would affect the qualification of the voting system. Nothing occurred that impaired the accuracy or efficiency of the voting system. The voting system was not compromised in any manner. Indeed, the historical practice and course of dealing was such that states were not requiring notice of these de minimis hardware changes that had absolutely no effect on the previously qualified voting system, as they were not equipped to deal with these numerous technical hardware changes and relied upon the ITA's judgment regarding the same. Moreover, these type of de minimis changes were only submitted by the ITAs to NASED on a biannual basis, unless otherwise incorporated in a new voting system qualification request.

In contrast, if a modification was made to a voting system such as a functional change in software, clearly it was incumbent upon the vendor not only to submit the same to an ITA to determine if a new NASED qualification number was required, but also to notify a state of the same, because the functionality of the system would be affected. This circumstance is in contrast to when de minimis hardware changes are made and the functionality of the voting system is not affected.

#### **AUTOMARK PHASE I CERTIFICATION**

On June 1, 2005, ATS received NASED qualification with its Phase 1 AutoMARK units with ES&S Unity software version 2.4.3 (NASED number N-1-16-22-12-001). SysTest Labs ("SysTest")<sup>4</sup> performed the qualification testing.

On August 3, 2005, ES&S received California certification on the AutoMARK Phase 1 units with Unity software version 2.4.3, which software had been previously NASED certified.

---

<sup>4</sup> SysTest is also a fully accredited Election Assistance Commission Voting Systems Test Lab and is currently the responsibility of EAC instead of NASED.



## **AUTOMARK PHASE 2**

Beginning in the late fall of 2005, ATS determined that certain de minimis changes to the hardware should be made to the AutoMARK that would make the device easier for jurisdictions or vendors to service, increase the ease of manufacturing and decrease the cost of production. Notably, the revisions were not being made to address any engineering or system issue with the AutoMARK, and therefore were not proposed to mitigate any problems.

These hardware revisions generally consisted of:<sup>5</sup>

1. The relocation of two circuit boards;
2. Simplification of cable routing and the cables themselves; and
3. Various changes in mounting bracket supports (designed to make maintenance of the unit easier).

In no way did any of these changes alter the equipment's functional operation, accuracy, efficiency or reliability. In addition, because the AutoMARK voter assist terminal is not a ballot tabulator, but, rather a ballot marking device, these changes had no impact on the manner in which votes were recorded or tabulated. ES&S, at all times, was informed and believed that these hardware changes were de minimis, had no impact on the functionality of the voting system and were implemented primarily for ease of manufacturing. Moreover, the firmware version did not change from the Phase 1 AutoMARK. It was still version 1.0 firmware. In other words, the firmware that would run on what was labeled the Phase 2 (or A200) AutoMARK was backwards compatible, meaning it would also run the Phase 1 AutoMARK. Again, that was firmware version 1.0. This additionally confirmed no functionality was affected.

ATS proceeded with these manufacturing design efficiencies and they were submitted to SysTest (the ITA which had originally qualified the hardware for the Phase 1 AutoMARK) for

---

<sup>5</sup> Attachment No. 2 more fully describes the efficiency modifications and includes photographs of the same.



consideration. These were done through a series of ECRs<sup>6</sup> and, as a result, SysTest determined that only two tests needed to be performed, an environmental test and a test to determine the level of electronic emissions.<sup>7</sup> Those tests were performed in January and February of 2006 and the Phase 2 AutoMARK passed both tests. ATS was so notified by SysTest of the approval of the changes under its NASED authority and that the modifications could be incorporated in the manufacturing process.<sup>8</sup> SysTest also determined that no further tests were necessary. No new or different NASED qualification was involved and both the Phase 1 and Phase 2 AutoMARKs carry the same NASED qualification number. Accordingly, armed with the NASED qualification, ATS was free to implement these hardware efficiencies in its manufacturing process and commenced to do so.

Based upon historical practice and course of dealing, ES&S did not seek further federal or state certification with regard to these de minimis hardware efficiencies which resulted in the Phase 2 AutoMARK as, with respect to those manufacturing efficiencies, ES&S understood that the voting system is viewed as it was when previously qualified, that is certified both at the federal and state levels, and therefore remained unchanged and unaffected.

## **SUBSEQUENT CERTIFICATIONS INVOLVING THE PHASE 2 AUTOMARK**

### **A. NASED QUALIFICATIONS**

ES&S began to take delivery of the Phase 2 AutoMARKs in March of 2006, together with the remaining Phase 1 AutoMARKs that had been previously manufactured. During this same period, SysTest had also been reviewing a voting system involving new ES&S Unity software in an ES&S voting system that involved both Phase 1 and Phase 2 AutoMARKs. On March 8,

---

<sup>6</sup> Attachment No. 3 are the ECRs.

<sup>7</sup> Attachment No. 4 are the two tests performed by SysTest.

<sup>8</sup> This notification is contained on the ECR forms.



2006, SysTest issued a completion letter for its review of that system indicating that the voting system had passed its qualified testing. On April 6, 2006, SysTest submitted its qualification test report to NASED's technical committee for review.<sup>9</sup> Notably, it was not until after April 6, 2006, that ES&S began shipping AutoMARK Phase 2 (with firmware version 1.0) units to California. Unfortunately, there was a significant delay between the submission of the SysTest qualification test report to NASED and NASED's approval thereof that had nothing to do with the test itself. In any event, on August 31, 2006, ATS received NASED approval of its voting system for both Phase 1 and Phase 2 units, along with ES&S Unity releases 3.0 and 3.0.1.0. (NASED Nos. N-2-16-22-22-002 and N-2-16-22-22-003, respectively). Also on August 31, 2006, ES&S received NASED approval of version 3.0.1.1 and 3.0.1.1 (A) (NASED Nos. N-2-02-22-006 and N-2-02-22-22-007, respectively), which involved Phase 1 and Phase 2 AutoMARKs. The Phase 2 AutoMARK in this voting system did carry a new ATS firmware version, but have never been deployed in California. The hardware was the same.

ES&S immediately commenced California certification of the above voting system that had previously received NASED approval, which included Phase 1 and Phase 2 AutoMARKs. That voting system passed every test except the very end. There were not, as alleged by the Secretary of State's Office "numerous serious errors" identified. A mass volume ballot test, however, indicated that 4 out of 11,000 ballots had not been read properly. Therefore, in light of this event only, ES&S chose to withdraw its certification request and to seek recertification at a later time.

---

<sup>9</sup> Attachment No. 5 is the SysTest qualification test report.



## **B. SAN FRANCISCO RANK CHOICE VOTING SYSTEM CERTIFICATION**

Significantly, on October 25, 2006, California did certify the Phase 2 AutoMARK (with firmware version 1.0) in a voting system certification for San Francisco's Rank Choice Voting System (RCV).<sup>10</sup> Only Phase 2 units were utilized in that certification process and it was specifically approved by the then California Secretary of State, Bruce McPherson.

The original California certification of the voting system involving the AutoMARK was granted by the State of California on August 3, 2005.<sup>11</sup> In that certification, paragraph 5(b) states as follows:

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 reexamination and approval.

With respect to that 2005 California certification, only Phase 1 AutoMARKs were utilized.

As stated, however, in the October, 2006 California certification, only Phase 2 AutoMARKs were utilized and were specifically and expressly identified in a letter dated October 10, 2006, by California's technical consultant, Steve Freeman.<sup>12</sup> Yet at no time did the Secretary of State's Office consider that the hardware efficiencies that resulted in Phase 2 AutoMARKs constituted modifications to the voting system which would have required the written notification spelled out in the 2005 certification. To the contrary, the report prepared by the Secretary of State's Office of Voting Systems Technology Assessment on October 11, 2006, expressly stated that there had been no change in the AutoMARK from its previous

---

<sup>10</sup> Attachment No. 6 is the October 25, 2006, RCV City and County of San Francisco Certification.

<sup>11</sup> Attachment No. 7 is the August 3, 2005, certification.

<sup>12</sup> Attachment No. 8 is the October 10, 2006, Freeman letter.



certification.<sup>13</sup> This statement was made with the full knowledge that Phase 2 AutoMARKs were the only AutoMARKs used in the October, 2006 certification and only Phase 1 AutoMARKs were used in the 2005 certification. The only logical conclusion that can be drawn from these certifications is that the Secretary of State's Office did not consider the de minimis hardware efficiencies that resulted in the Phase 2 AutoMARK to rise to the level of a "change or modification" to the voting system that would require written notification under California law under the previous certification that had been granted. In the alternative, the Secretary of State's Office considered the foregoing sufficient written notification of the same and, in light of the October, 2006 certification process, determined the Phase 2 AutoMARK did not affect the accuracy or efficiency of the voting system.

#### **ISSUES RAISED BY THE SECRETARY OF STATE OF CALIFORNIA**

The Secretary of State's Office has raised the applicability of Ca. Elec. Code § 19213 in its Public Hearing Notice, to-wit:

When a voting system or 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 reexamination and re-approval 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.

In addition, the Secretary of State's Office, in its pre-hearing report, has additionally raised the applicability of Ca. Elec. Code § 18564.5 which states that the Secretary of State may bring a civil action against a person or entity who:

---

<sup>13</sup> Attachment No. 9 is the October 11, 2006, Secretary of State's Office of Voting Systems Technology Assessment.



- (a)(5) Knowingly, and without authorization, inserts or causes the insertion of uncertified hardware, software, or firmware, for whatever purpose, into any voting machine, voting device, voting system, vote tabulating device or ballot tally software.
- (a)(6) 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.

ES&S believes that it is not in violation of either of the foregoing statutes. Moreover, even if some technical violation has occurred, the State is equitably estopped from enforcing the same against ES&S in light of the large amount of time the State has been on notice with regard to the manufacture and deployment of the Phase 2 AutoMARK and also the certification which has already been obtained in California with respect to the same.

**A. HISTORICAL COMPLIANCE**

It is not in dispute that only de minimis hardware changes were made to the Phase 1 AutoMARK which resulted in the Phase 2 AutoMARK. These changes were fully reviewed and tested by SysTest, the approved and accredited ITA that certified the AutoMARK hardware in the first instance. SysTest determined that these changes were in fact de minimis, no further testing was necessary, that the functionality of the voting system was not affected and therefore qualified the same under the previous NASED qualification. In short, these type of hardware efficiencies do not amount to "changes or modifications" of a voting system contemplated by the statute which would require any further action or notification.

Such was consistent with the historical practice and course of dealing with the various states at the time the Phase 2 AutoMARK came into existence.

Such was consistent with how the Office of the Secretary of State of California viewed such de minimis hardware revisions.



Such was clearly the understanding of ES&S or it would have provided written notification at the time of the revisions.

To be clear, however, this was not a knowing or willful action by ES&S to avoid any review by California's election officials of its voting systems. To the contrary, the success ES&S has enjoyed as an election company is partially based upon its rigorous efforts to comply with voting system certification requirements as understood at the time. ES&S at all times acted in good faith based upon its belief and understanding of how states dealt with these type of de minimis technical hardware revisions, including California.

Accordingly, based upon the foregoing, ES&S believes that it has fully complied with its certification and notification requirements regarding the AutoMARK in California as they then were interpreted and administered by the Secretary of State's Office.

## **B. ESTOPPEL**

In the alternative, the Secretary of State is estopped from enforcing the strict and technical compliance which the statutes seek to impose because of the large amount of time the State has been on notice with regard to the manufacture and deployment of the Phase 2 AutoMARK and the certification which has previously been obtained in California with respect to the same. To that end, it is important to repeat and retrace the history of the AutoMARK through the NASED qualification system and the California certification system with specific emphasis on the personnel involved in those processes. As stated previously, once the ITAs have fully finished their testing requirements of an entire voting system, a report is submitted to the NASED technical committee recommending approval of the voting system. Two individuals which were on that committee during the subject time period were Paul Craft and Steve Freeman.



In April of 2006, prior to any deployment of the Phase 2 AutoMARK in California, SysTest presented to NASED's technical committee (Messrs. Craft and Freeman), its report approving a voting system involving ES&S' Unity software version 3.0.1.0, which voting system included the Phase 2 AutoMARK. Accordingly, those individuals would have had knowledge of hardware modifications to the Phase 1 AutoMARK at that time as the submitted Technical Data Package ("TDP") would have included the hardware environmental tests which were conducted by SysTest regarding the Phase 2 AutoMARK.

In July of 2006, ES&S made application to the State of California for certification of the voting system which had previously been submitted to NASED in April, 2006 and for which it was waiting approval of the same. Again, the submission of the application would have required ES&S to include in its TDP the SysTest hardware testing reports which clearly identified the Phase 2 AutoMARK.

On August 31, 2006, Paul Craft, on behalf of the NASED technical committee, completed his review of the voting system SysTest report given to him in April of 2006, and granted NASED approval to the ES&S voting system which was the subject of that report, which included the Phase 2 AutoMARK.

Significantly, Paul Craft and Steve Freeman were also the personnel hired by the State of California's Secretary of State's Office to conduct the certification testing of the same voting system for California. That testing utilized both Phase 1 and Phase 2 AutoMARKs. Clearly, California was acutely aware of the deployment of the Phase 2 AutoMARK in August of 2006, if not substantially earlier.

This is significant because in October of 2006, the Secretary of State's Office reviewed ES&S' application for conditional certification of the City and County of San Francisco's RCV



System. Steve Freeman conducted the technical aspect of the review of that voting system. In a letter dated October 10, 2006, he specifically notes that the system that he reviewed and tested involved the Phase 2 AutoMARK. Based upon that letter, the California Secretary of State's Office issued its report dated October 11, 2006, wherein it specifically notes that the version of the AutoMARK utilized in the testing for certification in California on August 3, 2005, remained "unchanged" from that previous certification. This statement was made despite the fact that clearly only Phase 2 AutoMARKs were utilized in the October, 2006 certification and Phase 1 AutoMARKs in the August, 2005 certification. The significance of that statement is that the Secretary of State's Office clearly recognized that there were no changes or modifications significant enough to require written notification under California statutes. In other words, the hardware modifications were de minimis and the State did not consider the different model numbers a new "version" of the AutoMARK.

Based upon the foregoing, the Secretary of State's Office issued its certification certificate on October 25, 2006, certifying the RCV voting system which included the Phase 2 AutoMARK for use in the City and County election for San Francisco.

In light of all the foregoing, ES&S believes that it is improper for the Secretary of State's Office to take the position that it has never received any type of written notification with regard to the Phase 2 AutoMARK. Moreover, it was reasonable for ES&S to assume that based upon the certification by the same technical personnel which granted NASED approval to the Phase 2 AutoMARK, and the Secretary's certification of the Phase 2 AutoMARK for use in the San Francisco RCV election, that a determination had been made by the Secretary of State's Office that the Phase 2 AutoMARK does not affect the accuracy or reliability of any voting system and therefore no further action was required then or previously. Indeed, despite its knowledge of the



Phase 2 AutoMARK no mention was made at all that ES&S failed to give any notices and such was consistent with the historical practice at that time.

Moreover, such would be a reasonable position for ES&S to take because those events happened over a year ago and it is just recently that the Office of the Secretary of State is now asserting that somehow ES&S is in violation of election laws that previous administrations had not interpreted nor applied in the same fashion.



## CONCLUSION

ES&S recognizes that the environment for testing voting systems is in a state of flux and is committed to comply with those requirements as they are now interpreted and applied. It must be recognized, however, that during the past five years California has had five Secretaries of State which is indicative of changes that have occurred in the area of voting systems, certification and compliance. During that same period of time, ES&S has also dealt with the tremendous amount of change at the federal level with the transition from NASED to the EAC for voting system testing and certification, the sun-setting of the 1990 Voluntary Voting Systems Standards ("VVSS"), to the 2002 VVSS and now the 2005 Voluntary Voting System Guidelines which go into effect in 2007.

In summary, the AutoMARK (Phase 1 and Phase 2 hardware) and software in use across the country have been federally certified. All AutoMARKS deployed in California have been reviewed and tested in a California state certification process.

It is against this backdrop that ES&S acted in good faith in what it believed to be historical practice and course of dealing with regard to the de minimis hardware modifications which resulted in the Phase 2 AutoMARK. Accordingly, ES&S respectfully requests that the Office of the Secretary of State find that ES&S is not in violation of the California Election Code, and proceed to issue a no cause letter regarding the implementation and deployment of the Phase 2 AutoMARK.

Respectfully submitted,

ELECTION SYSTEMS & SOFTWARE, INC.