



# DEBRA BOWEN

## CALIFORNIA SECRETARY OF STATE NEWS RELEASE

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### Secretary of State Debra Bowen Sues ES&S Over Sale of Unauthorized Equipment to California Counties

*Secretary seeks at least \$15 million in penalties and reimbursement for counties*

**SACRAMENTO** – Secretary of State Debra Bowen today filed suit against Election Systems & Software, Inc. (ES&S) for nearly \$15 million after a four-month investigation revealed the company had repeatedly violated state law.

Secretary Bowen is suing ES&S for \$9.72 million in penalties for selling 972 machines that contained hardware changes that were never submitted to, or reviewed by, the Secretary of State. Furthermore, she is seeking nearly \$5 million to reimburse the five counties that bought the machines believing they were buying certified voting equipment.

“ES&S ignored the law over and over and over again, and it got caught,” said Bowen, the state’s top elections officer. “California law is very clear on this issue. I am not going to stand on the sidelines and watch a voting system vendor come into this state, ignore the laws, and make millions of dollars from California’s taxpayers in the process.”

The sales in question involve ES&S’s AutoMARK ballot-marking devices that 14 California counties use to comply with the federal Help America Vote Act (HAVA) requirement that voters with disabilities have a way to cast ballots privately and independently. Unlike direct recording electronic (DRE) devices, the AutoMARK prints a voted ballot that is counted by an optical scanner along with other paper ballots.

In July 2007, Secretary Bowen learned that ES&S had sold AutoMARK A200s – a version of the AutoMARK A100 that had been altered without authorization from the Secretary of State – to five counties in 2006. The counties collectively spent about \$5 million for the equipment: Colusa bought 20 machines, Marin bought 130, Merced bought 104, San Francisco bought 558, and Solano bought 160.

Elections officials in the five counties believed they were purchasing the certified AutoMARK A100s when, in fact, they had purchased AutoMARK A200s. At least some of the five counties used the AutoMARK A200s in elections.

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Under California law, no voting system or part of a voting system can be sold or used in the state until it is fully tested and certified by the Secretary of State. Vendors also are required by law to get the Secretary's approval of any changes to a certified voting system. However, ES&S failed to notify, or receive approval from, the Secretary of State before making changes to the AutoMARK A100 and selling the 972 AutoMARK A200 machines that contained the unauthorized changes to the five counties.

The Secretary of State's office held a public hearing on the matter on October 15, 2007. At that hearing, ES&S asserted the Secretary of State was notified about changes to the AutoMARK. However, ES&S provided no evidence before, during, or after the hearing to substantiate its claim. The company also contended the changes to the AutoMARK A100 were so minor that ES&S was not required to submit them to the Secretary of State for review. However, Elections Code section 19213 states unequivocally that it is the Secretary of State, not a voting system vendor, who decides whether any proposed changes require the Secretary to re-examine the system.

In August 2005, the prior California Secretary of State conditionally certified the ES&S AutoMARK A100 for use in California. One of the conditions of certification was that "[n]o substitution or modification of the voting systems shall be made with respect to *any* component of the voting systems... 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." This condition echoes Elections Code sections 19214.5 and 18564.5, which require notice to, and approval by, the Secretary of State for *any* changes to a certified voting system.

Secretary Bowen issued her official findings and decision in the matter this morning. The Attorney General, who is representing the Secretary of State in the case, filed the complaint on the Secretary's behalf in San Francisco Superior Court today. Both documents are available at [http://www.sos.ca.gov/elections/ess\\_automark\\_hearing.htm](http://www.sos.ca.gov/elections/ess_automark_hearing.htm). Secretary Bowen is seeking the following penalties under California Elections Code sections 18564.5 and 19214.5:

- Damages of \$10,000 per violation, totaling an estimated \$9.72 million for the 972 machines sold in California. Half would go to the counties where the violations occurred and the other half would go to the Secretary of State for use in bolstering voting system security efforts.
- A refund of approximately \$5 million to the five counties for what they paid to ES&S, regardless of whether the voting system was used in an election.
- Penalties of \$50,000 per act for the unauthorized insertion of uncertified hardware into a voting machine.
- Penalties of \$50,000 per act for failing to notify the Secretary of State before changing a voting system certified for use in California.

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