

Brehm, Robert (ELECTIONS)

From: Malito, Steve A. <SAM@dhclegal.com>
Sent: Friday, May 31, 2019 5:02 PM
To: Valentine, Todd (ELECTIONS); Lovullo, Brendan (ELECTIONS)
Cc: Ryan, Judd; Brehm, Robert (ELECTIONS); Quail, Brian (ELECTIONS); Capetanakis, Charles
Subject: The Question that Stopped ESS' Express Vote Certification

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Gentlemen,

It is 5:01 pm on Friday, May 31, 2019. Let us just say at the outset that we are shocked and disappointed that we have to send this email on behalf of our client. At the very least, we expected you to respond with your question. Having said that, we also held out hope that you would realize that the statute, not the regulation controls and that we would instead have received an email withdrawing said as yet to be articulated question which would also confirm that certification has or will be immediately resumed. Having received neither at the close of business today, we ask that you read on.

We write you on behalf of Election Systems & Software ("ESS&S"), specifically to follow up on Wednesday's meeting, wherein you informed our firm, and our client, that the NYS BOE has taken an action, which we believe to be arbitrary and capricious, to halt the certification process of ES&S's Express Vote XL ("XL") machine.

As we understand it, the certification process was improperly halted on Tuesday, May 28, 2019, due to concerns that you had about the XL not fitting into the definition of an optical scan voting system found in section 6209.1(u) of the NYS BOE 2018 Regulations. You both indicated that you had "questions" or a "question" about this section of your Rules as it relates to the XL, but it was not clear what the exact question was that caused the action to halt the certification. You both further stated that you would reduce any question to writing by today, but as of this date we have not received any related inquiries or concerns.

As of this writing, we have not received an inquiry or email. Accordingly, ES&S has authorized our firm to take any and all legal action necessary to preserve their rights as your arbitrary and capricious actions have put ES&S in a position to lose, for no apparent reason, many business opportunities to sell the XL system to New York State customers.

Guide yourselves accordingly