

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Board of Elections

RULE CITATION: 08 NCAC 04 .0309

DATE: November 16, 2022

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Extend the period of review

COMMENT:

*Pursuant to G.S. 163-165.7(f), the State Board of Elections (hereinafter "Board") "shall prescribe rules for the adoption, handling, operation, and honest use of certified voting systems, including all of the following: ... (9) Notwithstanding G.S. 132-1.2, procedures for the review and examination of any information placed in escrow by the vendor pursuant to G.S. 163-165.9A..."*

*Rule .0309 requires each person seeking to review and examine any information placed in escrow by the vendor pursuant to G.S. 163-165.9A (hereinafter "authorized person") to enter into a "nondisclosure agreement" with another unidentified party. Presumably the other party to the agreement is either the State or the vendor; however, the rule is ambiguous regarding the other party or parties to the nondisclosure agreement.*

*Requiring authorized persons to enter into a contractual agreement and expose themselves to a potential cause of action and liability appears to exceed the Board's authority to establish procedures pursuant to G.S. 163-165.7. If the rule creates a cause of action to which the State is not a party, this rule well exceeds the authority granted to the Board.*

*In Subparagraph (5), the authorized person would be contractually bound to submit copies of any notes taken during the authorized person's examination of materials. The recipient of the notes is ambiguous. Here, the Board mandates that the authorized person enter into a contract the terms of which the Board could have mandated directly by adopting a rule through the Administrative Procedures Act.*

William W. Peaslee  
Commission Counsel

*Further, the terms which the Board requires the agreement to contain are either unnecessary or ambiguous.*

*For example, Subparagraph (3) would contractually require the authorized person to be bound by the terms of the agreement and rule .0308 of the administrative code. Under what circumstances would a party to an agreement not be bound to the terms of the agreement? Would the authorized person not already be bound by the administrative code? If a party was not bound by the code, could a party contractually agree to be bound by the code?*

*In Subparagraph (4), the authorized person would be contractually bound to “exercise the highest degree of reasonable care”. This term is unclear and ambiguous. The Board cannot escape the requirements that rules in the administrative code be clear and unambiguous by requiring the entry into a contractual agreement with equally ambiguous terms.*

*The proposed rule was published in the North Carolina Register pursuant to G.S. 150B-21.2. <sup>1</sup> Subparagraph (9) was not in the proposed rule. It was added post publication and adopted by the agency.*

*Pursuant to G.S. 150B -18, “A rule is not valid unless it is adopted in substantial compliance with [Article 2A].”*

*Pursuant to G.S. 150B- 21.2(g), “An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of [G.S. 150B-21.2].”*

*Pursuant to G.S. 150B-21.2(g), “An adopted rule differs substantially from a proposed rule if it does one or more of the following: (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests. (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule. (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule. When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part.”*

*Subparagraph (9) places additional terms in the nondisclosure agreement to which authorized persons would have to agree. By these unpublished terms, the authorized person would be required to give notice to and cooperate with “such parties” to obtain a protective order in the event that the authorized persons becomes or “is likely to be compelled” by law to disclose any escrowed information. Further, the subparagraph would require the authorized person to obtain “written opinion of counsel,” presumably their own and at their own expense, and exercise “all reasonable efforts.”*

*The addition of the heretofore unpublished Subparagraph (9) is a “substantial change” as defined in G.S. 150B-21.2(g)(2) and (3). Accordingly, the public has been denied notice of the Board’s requirements and denied an opportunity to comment prior to adoption.*

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<sup>1</sup> VOLUME 36, ISSUES 19, PAGE 1527 OF THE NORTH CAROLINA REGISTER [\\*VOLUME-36-ISSUE-19-APRIL-1-2022.PDF \(NC.GOV\)](#)

*Staff recommends objection to the above-referenced rule for failure to comply with the APA as it contains substantial changes that did not meet the notice and comment requirements of the permanent rulemaking process.*

Staff further recommend objection for the Board's lack of statutory authority to adopt the rule and the ambiguity contained in the rule.

1 **INTRODUCTORY STATEMENT**

2 The following rule, 08 NCAC 04 .0309, was adopted by the State Board of Elections on July 14, 2022 with changes.  
3 Notice of the proposed rule was published in the North Carolina Register on April 1, 2022, Volume 36, Issue 19, pages  
4 1524 –1527.

5  
6 **08 NCAC 04 .0309 NONDISCLOSURE AGREEMENT FOR REVIEW OF INFORMATION IN**  
7 **ESCROW**

8 All persons seeking to gain authorization to review and examine the information placed in escrow by a voting system  
9 vendor under 08 NCAC 04 .0308 shall execute a confidentiality and nondisclosure ~~agreement~~ agreement, which  
10 obligates the authorized person, as that term is defined in 08 NCAC 04. 0308, to exercise the highest degree of  
11 reasonable care to maintain the confidentiality of all proprietary and security related information to which the  
12 authorized person is granted access pursuant to 08 NCAC 04 .0308. The agreement shall require the authorized person  
13 to agree to the following terms, and no additional terms shall be imposed in the agreement. The agreement shall  
14 contain only the following terms and conditions, requiring the authorized person to:

- 15 (1) Not disclose or reveal any proprietary information to which the Authorized Person is granted access,  
16 pursuant to G.S. 132-1.2, to any person outside of the individuals or entities identified in G.S. 163-  
17 165.7(a)(6), testing and certification program staff at the U.S. Election Assistance Commission, or  
18 election infrastructure security staff for the U.S. Department of Homeland Security’s Cybersecurity  
19 and Infrastructure Security Agency, Agency, any proprietary information to which the Authorized  
20 Person is granted access, pursuant to G.S. 132 1.2.
- 21 (2) Not disclose or reveal any feature, component, or perceived flaw or vulnerability of the information  
22 placed in escrow by a voting system vendor, pursuant to G.S. 132-1.7(a2), G.S. 132-1.7(b), and G.S.  
23 132-6.1(c), to any person outside of other persons authorized under 08 NCAC 04. 0308, the State  
24 Board, ~~or the vendor,~~ testing and certification program staff at the U.S. Election Assistance  
25 Commission, or election infrastructure security staff for the U.S. Department of Homeland  
26 Security’s Cybersecurity and Infrastructure Security Agency, Agency, any feature, component, or  
27 perceived flaw or vulnerability of the information placed in escrow by a voting system vendor,  
28 pursuant to G.S. 132 1.7(a2), G.S. 132 1.7(b), and G.S. 132 6.1(c).
- 29 (3) Agree that the review of the information placed in escrow by a voting system vendor shall take place  
30 in accordance with the terms and conditions of the agreement and 08 NCAC 04 .0308.
- 31 (4) Agree that the authorized person's obligation to exercise the highest degree of reasonable care to  
32 maintain the confidentiality of all proprietary and security-related information survives the  
33 agreement and shall continue permanently.
- 34 (5) Agree to submit copies of any notes taken during the examination of the information in escrow to  
35 the State Board.
- 36 (6) Acknowledge that the authorized person is responsible for any unauthorized disclosure that they  
37 cause and shall pay for any and all damages they caused by any through unauthorized disclosure of

1 the information under review ~~by the authorized person, except where such disclosure comports with~~  
2 Subparagraph (9) below.

3 (7) ~~Acknowledge~~Acknowledges that the North Carolina State Board of Elections and the voting system  
4 vendor may enforce the agreement through any legal remedy provided under North Carolina or  
5 federal law.

6 (8) Consent to the personal jurisdiction of the courts of North Carolina and agree that the Superior Court  
7 of Wake County is a proper venue for any action arising from the agreement.

8 ~~(9) Comply with the following requirements in the event that Where~~ the authorized person becomes or  
9 is likely to be compelled by law to disclose any of the escrow information:

10 ~~(a)(A)~~ Notice of Disclosure. The authorized person shall provide the vendor and the State Board  
11 with prompt written notice so that such parties, or either of them, may seek a protective  
12 order or other appropriate remedy and/or waive compliance with the provisions of this  
13 Subparagraph;

14 ~~(b)(B)~~ Cooperation to Seek Protective Order. The authorized person shall cooperate with such  
15 parties to obtain a protective order or other appropriate remedy; and

16 ~~(c)(C)~~ Limited Disclosure. In the event that a protective order or other remedy is not obtained, or  
17 the other parties waive compliance with the provisions of this Agreement, the authorized  
18 person shall:

19 (i) disclose only the portion of information that such person is legally required to  
20 disclose in the written opinion of its counsel; and

21 (ii) exercise all reasonable efforts to obtain reliable assurances that confidential  
22 treatment will be afforded to the information.

23 The executed agreement shall be delivered to the North Carolina State Board of Elections prior to access being granted  
24 pursuant to 08 NCAC 04 .0308.

25  
26 *History Note: Authority 42 U.S.C. 5195c; G.S. 132-1.2; 132-1.7; 132-6.1; 163-22; 163-165.7; 163-165.9A; 163-*  
27 *166.7;*  
28 *Eff.*

## § 150B-2. Definitions.

As used in this Chapter,

- (1b) "Adopt" means to take final action to create, amend, or repeal a rule.

## § 150B-21.2. Procedure for adopting a permanent rule.

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's Web site containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The period of time during which and the person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public

hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.

**§ 150B-21.10. Commission action on permanent rule.**

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

**§ 150B-21.5. Circumstances when notice and rule-making hearing not required; circumstances when submission to the Commission not required.**

(a) Amendment. - An agency is not required to publish a notice of text in the North Carolina Register, hold a public hearing, or submit the amended rule to the Commission for review when it proposes to amend a rule to do one of the following:

- (1) Reletter or renumber the rule or subparts of the rule.
- (2) Substitute one name for another when an organization or position is renamed.
- (3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- (4) Change information that is readily available to the public, such as an address, email address, a telephone number, or a Web site.
- (5) Correct a typographical error.
- (6) Repealed by Session Laws 2019-140, s. 1(a), effective July 19, 2019.

(a1) Response to Commission. - An agency is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to change the rule in response to a request or an objection by the Commission, unless the Commission determines that the change is substantial.

**§ 163-165.7. Voting systems: powers and duties of State Board.**

(a) **(Effective until December 1, 2019, for certain counties - see note)** Only voting systems that have been certified by the State Board of Elections in accordance with the procedures set forth by the State Board of Elections and subject to the standards set forth in this section and that have not been subsequently decertified shall be permitted for use in elections in this State. Those certified voting systems shall be valid in any election held in the State or in any county, municipality, or other electoral district in the State. Subject to all other applicable rules adopted by the State Board of Elections and, with respect to federal elections, subject to all applicable federal regulations governing voting systems, paper ballots marked by the voter and counted by hand shall be deemed a certified voting system. The State Board of Elections shall certify optical scan voting systems, optical scan with ballot markers voting systems, and direct record electronic voting systems if any of those systems meet all applicable requirements of federal and State law. The State Board may certify voting systems only if they meet the requirements set forth in this section and only if they generate either a paper ballot or a paper record by which voters may verify their votes before casting them and which provides a backup means of counting the vote that the voter casts. Those voting systems may include optical scan and direct record electronic (DRE) voting systems. Among other requirements as set by the State Board of Elections, the certification requirements shall require at least all of the following elements:

- (1) That the vendor post a performance bond or letter of credit to cover damages resulting from defects in the voting system, expenses associated with State or federal decertification of the voting system, and to protect against the vendor's insolvency or financial inability to make State or federally mandated modifications or updates to the voting system. Damages may include, among other items, any costs of conducting a new county or statewide election attributable to those defects. The bond or letter of credit shall be maintained in the amount determined by the State Board as sufficient for the cost of a new statewide election or in the amount of ten million dollars (\$10,000,000), whichever is greater.
- (2) That the voting system comply with all federal requirements for voting systems.
- (3) That the voting system must have the capacity to include in voting district returns the votes cast by voters outside of the precinct associated with that voter's voter registration.
- (4) With respect to electronic voting systems, that the voting system generate a paper record of each individual vote cast, which paper record shall be maintained in a secure fashion and shall serve as a backup record for purposes of any hand-to-eye count, hand-to-eye recount, or

other audit. Electronic systems that employ optical scan technology to count paper ballots shall be deemed to satisfy this requirement.

- (5) With respect to DRE voting systems, that the paper record generated by the system be viewable by the voter before the vote is cast electronically, and that the system permit the voter to correct any discrepancy between the electronic vote and the paper record before the vote is cast.
- (6) With respect to all voting systems using electronic means, that the vendor provide access to all of any information required to be placed in escrow by a vendor pursuant to G.S. 163-165.9A for review and examination by the State Board of Elections; the Department of Information Technology; the State chairs of each political party recognized under G.S. 163-96; the purchasing county; and designees as provided in subdivision (9) of subsection (f) of this section.
- (7) That the vendor must quote a statewide uniform price for each unit of the equipment.
- (8) That the vendor must separately agree with the purchasing county that if it is granted a contract to provide software for an electronic voting system but fails to debug, modify, repair, or update the software as agreed or in the event of the vendor having bankruptcy filed for or against it, the source code described in G.S. 163-165.9A(a) shall be turned over to the purchasing county by the escrow agent chosen under G.S. 163-165.9A(a)(1) for the purposes of continuing use of the software for the period of the contract and for permitting access to the persons described in subdivision (6) of this subsection for the purpose of reviewing the source code.

As part of the certification requirements, the State Board of Elections shall address the mandatory terms of the contract for the purchase of the voting system and the maintenance and training related to that voting system.

(a) **(Effective June 20, 2018, as to certain counties, and December 1, 2019, as to all other counties - see note)** Only voting systems that have been certified by the State Board of Elections in accordance with the procedures set forth by the State Board of Elections and subject to the standards set forth in this section and that have not been subsequently decertified shall be permitted for use in elections in this State. Those certified voting systems shall be valid in any election held in the State or in any county, municipality, or other electoral district in the State. Subject to all other applicable rules adopted by the State Board of Elections and, with respect to federal elections, subject to all applicable federal regulations governing voting systems, paper ballots marked by the voter and counted by hand shall be deemed a certified voting system. The State Board of Elections shall certify optical scan voting systems, optical scan with ballot markers voting systems, and direct record electronic voting systems if any of those systems meet

all applicable requirements of federal and State law. The State Board may certify voting systems only if they meet the requirements set forth in this section and only if they generate a paper ballot which provides a backup means of counting the vote that the voter casts. Those voting systems may include optical scan and direct record electronic (DRE) voting systems that produce a paper ballot. Among other requirements as set by the State Board of Elections, the certification requirements shall require at least all of the following elements:

- (1) That the vendor post a performance bond or letter of credit to cover damages resulting from defects in the voting system, expenses associated with State or federal decertification of the voting system, and to protect against the vendor's insolvency or financial inability to make State or federally mandated modifications or updates to the voting system. Damages may include, among other items, any costs of conducting a new county or statewide election attributable to those defects. The bond or letter of credit shall be maintained in the amount determined by the State Board as sufficient for the cost of a new statewide election or in the amount of ten million dollars (\$10,000,000), whichever is greater.
- (2) That the voting system comply with all federal requirements for voting systems.
- (3) That the voting system must have the capacity to include in voting district returns the votes cast by voters outside of the precinct associated with that voter's voter registration.
- (4) With respect to electronic voting systems, that the voting system generate a paper ballot of each individual vote cast, which paper ballot shall be maintained in a secure fashion and shall serve as a backup record for purposes of any hand-to-eye count, hand-to-eye recount, or other audit. Electronic systems that employ optical scan technology to count paper ballots shall be deemed to satisfy this requirement.
- (5) With respect to DRE voting systems, that the paper ballot generated by the system be viewable by the voter before the vote is cast electronically, and that the system permit the voter to correct any discrepancy between the electronic vote and the paper ballot before the vote is cast.
- (6) With respect to all voting systems using electronic means, that the vendor provide access to all of any information required to be placed in escrow by a vendor pursuant to G.S. 163-165.9A for review and examination by the State Board of Elections; the Department of Information Technology; the State chairs of each political party recognized under G.S. 163-96; the purchasing county; and designees as provided in subdivision (9) of subsection (f) of this section.

- (7) That the vendor must quote a statewide uniform price for each unit of the equipment.
- (8) That the vendor must separately agree with the purchasing county that if it is granted a contract to provide software for an electronic voting system but fails to debug, modify, repair, or update the software as agreed or in the event of the vendor having bankruptcy filed for or against it, the source code described in G.S. 163-165.9A(a) shall be turned over to the purchasing county by the escrow agent chosen under G.S. 163-165.9A(a)(1) for the purposes of continuing use of the software for the period of the contract and for permitting access to the persons described in subdivision (6) of this subsection for the purpose of reviewing the source code.

As part of the certification requirements, the State Board of Elections shall address the mandatory terms of the contract for the purchase of the voting system and the maintenance and training related to that voting system.

(b) Federal Assistance. - The State Board may use guidelines, information, testing reports, certification, decertification, recertification, and any relevant data produced by the Election Assistance Commission, its Standards Board, its Board of Advisors, or the Technical Guidelines Development Committee as established in Title II of the Help America Vote Act of 2002 with regard to any action or investigation the State Board may take concerning a voting system. The State Board may use, for the purposes of voting system certification, laboratories accredited by the Election Assistance Commission under the provisions of section 231(2) of the Help America Vote Act of 2002.

(c) Only electronic poll books or ballot duplication systems that have been certified by the State Board in accordance with procedures and subject to standards adopted by the State Board, or which have been developed or maintained by the State Board, shall be permitted for use in elections in this State. Among other requirements as set by the State Board, the certification requirements shall require that a vendor meet at least all of the following elements:

- (1) That the vendor post a bond or letter of credit to cover damages resulting from defects in the electronic poll book or ballot duplication system. Damages may include, among other items, any costs of conducting a new election attributable to those defects.
- (2) That the vendor provide access to all of any information required to be placed in escrow by a vendor pursuant to G.S. 163-165.9A for review and examination by the State Board, the Department of Information Technology, the State chairs of each political party recognized under G.S. 163-90, the purchasing county, and designees as provided in subdivision (9) of subsection (f) of this section.
- (3) That the vendor must quote a statewide uniform price for each unit of the equipment.

- (4) That the vendor must separately agree with the purchasing county that if it is granted a contract to provide software for an electronic poll books or ballot duplication system but fails to debug, modify, repair, or update the software as agreed or, in the event of the vendor having bankruptcy filed for or against it, the source code described in G.S. 163-165.9A(a) shall be turned over to the purchasing county by the escrow agent chosen under G.S. 163-165.9A(a)(1) for the purposes of continuing use of the software for the period of the contract and for permitting access to the persons described in subdivision (2) of this subsection for the purpose of reviewing the source code.

(d) The State Board may also, upon notice and hearing, decertify types, makes, and models of voting systems. Upon decertifying a type, make, or model of voting system, the State Board shall determine the process by which the decertified system is discontinued in any county. A county may appeal a decision by the State Board concerning the process by which the decertified system is discontinued in that county to the Superior Court of Wake County. The county has 30 days from the time it receives notice of the State Board's decision on the process by which the decertified system is discontinued in that county to make that appeal.

(e) Prior to certifying a voting system, the State Board of Elections shall review, or designate an independent expert to review, all source code made available by the vendor pursuant to this section and certify only those voting systems compliant with State and federal law. At a minimum, the State Board's review shall include a review of security, application vulnerability, application code, wireless security, security policy and processes, security/privacy program management, technology infrastructure and security controls, security organization and governance, and operational effectiveness, as applicable to that voting system. Any portion of the report containing specific information related to any trade secret as designated pursuant to G.S. 132-1.2 shall be confidential and shall be accessed only under the rules adopted pursuant to subdivision (9) of subsection (f) of this section. The State Board may hear and discuss the report of any such review under G.S. 143-318.11(a)(1).

(f) **(Effective until December 1, 2019 - see note)** Subject to the provisions of this Chapter, the State Board of Elections shall prescribe rules for the adoption, handling, operation, and honest use of certified voting systems, including all of the following:

- (1) Procedures for county boards of elections to utilize when recommending the purchase of a certified voting system for use in that county.
- (2) Form of official ballot labels to be used on voting systems.
- (3) Operation and manner of voting on voting systems.
- (4) Instruction of precinct officials in the use of voting systems.
- (5) Instruction of voters in the use of voting systems.
- (6) Assistance to voters using voting systems.

- (7) Duties of custodians of voting systems.
- (8) Examination and testing of voting systems in a public forum in the county before and after use in an election.
- (9) Notwithstanding G.S. 132-1.2, procedures for the review and examination of any information placed in escrow by a vendor pursuant to G.S. 163-165.9A by only the following persons:
  - a. State Board of Elections.
  - b. Department of Information Technology.
  - c. The State chairs of each political party recognized under G.S. 163-96.
  - d. The purchasing county.

Each person listed in sub-subdivisions a. through d. of this subdivision may designate up to three persons as that person's agents to review and examine the information. No person shall designate under this subdivision a business competitor of the vendor whose proprietary information is being reviewed and examined. For purposes of this review and examination, any designees under this subdivision and the State party chairs shall be treated as public officials under G.S. 132-2.

- (10) With respect to electronic voting systems, procedures to maintain the integrity of both the electronic vote count and the paper record. Those procedures shall at a minimum include procedures to protect against the alteration of the paper record after a machine vote has been recorded and procedures to prevent removal by the voter from the voting enclosure of any paper record or copy of an individually voted ballot or of any other device or item whose removal from the voting enclosure could permit compromise of the integrity of either the machine count or the paper record.

- (11) Compliance with section 301 of the Help America Vote Act of 2002.

(f) **(Effective December 1, 2019 - see note)** Subject to the provisions of this Chapter, the State Board of Elections shall prescribe rules for the adoption, handling, operation, and honest use of certified voting systems, including all of the following:

- (1) Procedures for county boards of elections to utilize when recommending the purchase of a certified voting system for use in that county.
- (2) Form of official ballot labels to be used on voting systems.
- (3) Operation and manner of voting on voting systems.
- (4) Instruction of precinct officials in the use of voting systems.
- (5) Instruction of voters in the use of voting systems.
- (6) Assistance to voters using voting systems.
- (7) Duties of custodians of voting systems.

- (8) Examination and testing of voting systems in a public forum in the county before and after use in an election.
- (9) Notwithstanding G.S. 132-1.2, procedures for the review and examination of any information placed in escrow by a vendor pursuant to G.S. 163-165.9A by only the following persons:
- a. State Board of Elections.
  - b. Department of Information Technology.
  - c. The State chairs of each political party recognized under G.S. 163-96.
  - d. The purchasing county

Each person listed in sub-subdivisions a. through d. of this subdivision may designate up to three persons as that person's agents to review and examine the information. No person shall designate under this subdivision a business competitor of the vendor whose proprietary information is being reviewed and examined. For purposes of this review and examination, any designees under this subdivision and the State party chairs shall be treated as public officials under G.S. 132-2.

- (10) With respect to electronic voting systems, procedures to maintain the integrity of both the electronic vote count and the paper ballot. Those procedures shall at a minimum include procedures to protect against the alteration of the paper ballot after a machine vote has been recorded and procedures to prevent removal by the voter from the voting enclosure of any individually voted paper ballot or of any other device or item whose removal from the voting enclosure could permit compromise of the integrity of either the machine count or the paper ballot.

- (11) Compliance with section 301 of the Help America Vote Act of 2002.

(g) The State Board of Elections shall facilitate training and support of the voting systems utilized by the counties. The training may be conducted through the use of videoconferencing or other technology.

(h) Neither certification of electronic poll books, ballot duplication systems, or voting systems under this section shall constitute a license under Chapter 150B of the General Statutes.

(i) The State Board in writing may decertify or otherwise halt the use of electronic poll books in North Carolina. Any such action is appealable only to the Superior Court of Wake County.

(j) No voting system used in any election in this State shall be connected to a network, and any feature allowing connection to a network shall be disabled. Prohibited network connections include the Internet, intranet, fax, telephone line, networks established via modem, or any other wired or wireless connection. (2001-460, s. 3; 2003-226, s. 11; 2005-323, s. 1(a)-(d); 2006-264, s. 76(a); 2007-391, s. 6(d); 2008-187, s. 33(b); 2009-541, s. 19; 2013-381, s. 30.3; 2015-103, ss. 6(b), 10, 11(a); 2015-241, s.

7A.4(gg); 2016-109, s. 9(b); 2017-6, s. 3; 2018-13, ss. 3.6A, 3.7(a), 3.8(a), 3.11(b); 2018-146, ss. 3.1(a), (b), 4.5(f).)