

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: State Board of Elections

RULE CITATION: 08 NCAC 04 .0308

DEADLINE FOR RECEIPT: January 12, 2024

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Page 1, Lines 27-29: Explain why this Subparagraph is necessary. It does not appear that the Board has established any threshold criteria concerning training or experience for one to be designated an authorized person. Accordingly, why is the resume necessary? What will the Board do with this information?

Page 2, Lines 11-12: As written, an authorized person could not file a claim in court or seek injunctive relief upon the discovery of a flaw. Is that correct?

Page 2, Lines 19: From whom would the authorization come and what is the procedure to request authorization?

Page 2, Line 29: 21-26: Consider "consents in writing".

Page 3, Lines 8-9: By what process are the tools "preapproved"? What criteria will be used in the approval process?

Page 3, Lines 19-20: Consider making the second sentence its own Part.

Page 3, Line 36: Change "must" to "shall".

Page 4, Line 2: Change "must" to "shall".

Page 4, Lines 2-3: As written, a campus identification card issued by a community college will suffice. Is that correct?

Page 4, Line 10: Change "may" to "shall".

Page 4, Line 12: Change "may" to "shall".

Page 4, Lines 12-13: Consider making the second sentence its own Part.

William W. Peaslee
Commission Counsel

Date submitted to agency: December 28, 2023

Page 4, Lines 18-21: Consider making each sentence its own Part.

Page 4, Line 22: Define “manual” source code review.

Page 4, Line 22: What are “code analysis tools”? How will these be considered, using what criteria, and by whom?

Page 4, Lines 23-25: What is the difference between “review and examination” as used in the statute and “interact with and perform testing”?

Page 4, Line 32: “designated in writing” to whom?

Page 4, Line 34: Define or delete “reasonable”.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee
Commission Counsel

Date submitted to agency: December 28, 2023

1 08 NCAC 04 .0308 is adopted, following publication in the North Carolina Register, Volume 38:01 at pages 3 through
2 6, as follows:
3

4 **08 NCAC 04 .0308 AUTHORIZED ACCESS TO VOTING SYSTEM INFORMATION IN ESCROW**

5 (a) Subject to the provisions of this Rule, upon written request from a person or entity authorized under G.S. 163-
6 165.7(a)(6) to a vendor of a certified voting system in this state, the vendor shall make available for review and
7 examination any information placed in escrow under G.S. 163-165.9A to an authorized person. The person or entity
8 making the request shall simultaneously provide a copy of the request to the State Board. Any request from the State
9 chairs of a political party recognized under G.S. 163-96 shall be made no later than 90 days before the start of one-
10 stop absentee voting in the state. This Rule does not address or restrict the pre-certification review of a vendor's source
11 code under G.S. 163-165.7(e).

12 (b) Authorized Persons. Only authorized persons may review and examine the information placed in escrow by a
13 voting system vendor. For the purpose of this Rule, "authorized person" means a person who:

- 14 (1) Is an agent:
 - 15 (A) designated by majority vote in a public meeting by the State Board or a purchasing county's
16 board of commissioners;
 - 17 (B) designated in writing by the chair of a political party recognized under G.S. 163-96; or
 - 18 (C) designated in writing by the Secretary of Department of Information Technology. No more
19 than three people may be designated by an authorized entity under G.S. 163-165.7(f)(9);
- 20 (2) Has submitted to a criminal history record check, to be facilitated by the State Board, as provided
21 for in G.S. 163-27.2(b) and has not been convicted of a disqualifying offense. Disqualifying offenses
22 shall be all felonies, and any misdemeanors that involve theft, deception, the unlawful concealment
23 or dissemination of information, falsification or destruction of records, or the unlawful access to
24 information or facilities. The requirement to submit to a criminal history record check does not apply
25 to State employees who have already submitted to a criminal history record check for State
26 employment;
- 27 (3) Has submitted to the State Board a résumé detailing the person's experience with voting systems
28 and information technology, to include any training or experience pertaining to computer code
29 development or analysis;
- 30 (4) Has submitted to the State Board a sworn affidavit, under penalty of perjury, attesting that the
31 person:
 - 32 (A) has never been found by a court of law, administrative body, or former or current employer
33 to have disclosed without authorization confidential information that the person had access
34 to;
 - 35 (B) has never been, either in their private capacity or in any capacity as an agent for another
36 person or entity, subject to any civil or criminal claims alleging misappropriation of a trade
37 secret, violation of confidentiality agreement or nondisclosure agreement, copyright
38 infringement, patent infringement, or unauthorized disclosure of any information protected

1 from disclosure by law, except to the extent any such claims were dismissed with prejudice
2 and not pursuant to a settlement agreement;

3 (C) has never had a security clearance issued by a federal agency revoked for any reason other
4 than expiration of the clearance;

5 (D) if granted access to review and examine the information placed in escrow:

6 (i) will not disclose or reveal any proprietary information to which the Authorized Person
7 is granted access, pursuant to G.S. 132-1.2, to any person outside of the individuals or
8 entities identified in G.S. 163-165.7(a)(6), testing and certification program staff at the U.S.
9 Election Assistance Commission, or election infrastructure security staff for the U.S.
10 Department of Homeland Security's Cybersecurity and Infrastructure Security;

11 (ii) will not disclose or reveal any feature, component, or perceived flaw or vulnerability
12 of the information placed in escrow by a voting system vendor, pursuant to G.S. 132-
13 1.7(a2), G.S. 132-1.7(b), and G.S. 132-6.1(c), to any person outside of other persons
14 authorized under this Rule, the State Board, the vendor, testing and certification program
15 staff at the U.S. Election Assistance Commission, or election infrastructure security staff
16 for the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security;

17 (iii) will submit copies of any notes taken during the examination of the information in
18 escrow to the State Board;

19 (iv) acknowledges that, should the person disclose without authorization any information
20 placed in escrow that is protected under state or federal law, the person will be subject to
21 any remedies provided by law for such unauthorized disclosure, which could include
22 monetary damages; and

23 (v) will provide the vendor and the State Board with prompt written notice if the person
24 becomes or is likely to be compelled by law to disclose any of the escrow information, will
25 cooperate with the vendor and the State Board to obtain a protective order or other
26 appropriate remedy, and, in the event any escrow information must be disclosed pursuant
27 to legal compulsion, will disclose only the portion of information that the person is legally
28 required to disclose in the written opinion of its counsel; and

29 (5) Has consented in writing to searches of their person and effects, similar in nature to searches that
30 members of the public submit to when entering the office buildings of the General Assembly, to be
31 conducted upon entry into the secure facility described in Subparagraph (d)(1) of this Rule; and

32 (6) Is a citizen of the United States.

33 (c) Within 30 days of meeting the definition of an authorized person in Paragraph (b) of this Rule, the Executive
34 Director of the State Board shall issue a written authorization to the person or entity making the request under
35 Paragraph (a) of this Rule to review and examine information placed in escrow by a voting system vendor. The
36 authorization shall be presented by the person or entity to the vendor prior to gaining access to such information under
37 this Rule.

1 (d) Conditions of Access. When providing access to information in escrow pursuant to this Rule, the State Board and
2 vendor shall ensure the following conditions are met:

3 (1) The information in escrow shall be made available by the vendor on up to three computers provided
4 by the vendor (one for each potentially designated agent under G.S. 163-165.7(f)(9)) that are not
5 connected to any network and are located within a secure facility, as described in Part (d)(3)(A)
6 below, designated by the State Board of Elections. Such computers shall be preloaded with software
7 tools necessary for use in viewing, searching, and analyzing the information subject to review,
8 including tools permitting automated source code review that are preapproved by the vendor and
9 the State Board. Such computers shall have the following access controls:

10 (A) Credentials shall be traceable to individuals. Generic login accounts are not authorized.
11 Sharing of accounts and reuse of credentials is prohibited. Each user must have their own
12 assigned login account.

13 (B) Only one administrative account shall be present on the system to allow for the initial
14 provisioning of necessary applications and setup of security controls.

15 (C) Where passwords are used to authenticate authorized individuals, login accounts shall use
16 complex passwords. A sufficiently complex password is one that is not based on common
17 dictionary words and includes no fewer than 10 characters, and includes at least one
18 uppercase letter, one lowercase letter, one number, and a special character.

19 (D) Screen lock times shall be set to no longer than 10 minutes. All computers shall be locked
20 or logged out from whenever they are not being attended and used.

21 (E) The entire hard drive on any computer must have full disk encryption. Where possible, the
22 minimum encryption level shall be AES-256.

23 (F) After the information subject to review and software tools for viewing are loaded on the
24 computers, all ports shall be sealed with tamper-evident seals.

25 (G) After the ports are sealed, no input/output or recording devices may be connected to the
26 computers. The State Board shall provide for the secure storage of any equipment used for
27 the duration of the review.

28 (2) The computers shall be air-gapped and shall not be connected to a network, and any feature allowing
29 connection to a network shall be disabled. Prohibited network connections include the Internet,
30 intranet, fax, telephone line, networks established via modem, or any other wired or wireless
31 connection.

32 (3) The secure facility designated by the State Board under Subparagraph (1) of this Paragraph is the
33 specific location where the computing equipment will be stored and the review conducted, and may
34 be a secured portion of a building. All conduct within the facility shall meet the following
35 conditions:

36 (A) For the entire review period, the facility must be secured from access by any person not
37 designated under Subparagraph (b)(1), Part (d)(3)(F), and Subparagraph (d)(7) of this Rule.

- 1 (B) Only individuals authorized under Subparagraph (b)(1), Part (d)(3)(F), and Subparagraph
2 (d)(7) of this Rule may enter the facility. Such individuals must present government-issued
3 photo identification upon initial entry, and may be asked to show identification multiple
4 times throughout the review period.
- 5 (C) Each time an individual accesses the facility, the State Board or its designee shall record
6 the name of the individual, the time of their entry, the time of their departure, and a
7 description of any materials brought in or out of the facility.
- 8 (D) All equipment used in the review, as specified in Subparagraph (d)(1) of this Rule, must
9 remain in the facility during the review period.
- 10 (E) No authorized person pursuant to this Rule may possess any removable media device, cell
11 phone, computer, tablet, camera, wearable, or other outside electronic device within the
12 facility where the person is accessing information in escrow. No authorized person may
13 attempt to connect the computers used in the review to any network.
- 14 (F) State personnel who are designated by the Executive Director of the State Board of
15 Elections and who also satisfy the conditions set forth in Subparagraphs (b)(2) through
16 (b)(5) shall have access to the facility where the review is being conducted at all times, to
17 monitor the process and ensure that all requirements of this Rule are complied with.
18 Persons entering the facility shall submit to inspection, as provided for in Subaragraph
19 (b)(5), and shall be denied entry if they possess any unauthorized devices. State personnel
20 designated pursuant to this subsection shall inspect the computers used in the review before
21 and after the review for compliance with Subparagraphs (d)(1) and (d)(2).
- 22 (4) Authorized persons are permitted to perform manual source code review and use code analysis tools,
23 as provided in Subparagraph (1) of this Paragraph, to analyze the source code. This source code
24 review shall be performed using “read only” access and any authorized person shall not interact with
25 or perform testing of the software components.
- 26 (5) Any review performed pursuant to this Rule shall occur during the State Board’s regular business
27 hours and shall last no longer than ten business days. Such review shall not occur during the period
28 from the start of one-stop absentee voting through the conclusion of statewide canvassing of the
29 vote.
- 30 (6) Authorized persons and the vendor are each responsible for bearing their own costs in conducting
31 the review pursuant to G.S. 163-165.7(a)(6).
- 32 (7) Up to three representatives of the vendor may be designated in writing by a corporate executive of
33 the vendor to supervise the review at all times. Such representatives shall not interfere with the
34 review and shall be afforded a reasonable opportunity to inspect the facility for compliance with
35 these conditions prior to the review commencing. State Board staff designated under Subparagraph
36 (3) of this Paragraph shall monitor the review, without obstructing the review process.

1 (e) Dispute Resolution. Any dispute that arises between an authorized person and a vendor concerning the execution
2 of review pursuant to this Rule may be presented to the State Board of Elections in the form of a petition seeking
3 relief. The party seeking such relief shall serve their petition on the opposing party, and the opposing party shall have
4 14 days to respond. The State Board shall make a decision on the petition based on the written submissions, or it may
5 schedule a hearing to consider the petition.

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7 *History Note: Authority 42 U.S.C. 5195c; G.S. 132-1.2; 132-1.7; 132-6.1; 163-22; 163-27.2; 163-165.7; 163-*
8 *165.9A; 163-166.7; 163-275;*
9 *Eff. Feb. 1, 2024*