



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

November 17, 2022

Paul Cox, Esq.
North Carolina Board of Elections
Sent via email only to: paul.cox@ncsbe.gov

Re: Objection to 08 NCAC 04 .0308 and .0309.

Dear Mr. Cox:

At its meeting on November 17, 2022, the Rules Review Commission (“RRC”) objected to the above captioned rules in accordance with G.S. 150B-21.10.

Specifically, the RRC adopted the opinions of counsel attached hereto and incorporated by reference.

Please respond to these objections in accordance with the provisions of G.S. 150B-21.12.

If you have any questions regarding the Commission’s actions, please let me know.

Sincerely,
/s/ William W. Peaslee
William W. Peaslee
Commission Counsel

Attachments

Donald R. van der Vaart, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

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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 State Board of Elections

RULE CITATION: 08 NCAC 04 .0308

DARE: November 14, 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 Administrative Procedures Act (hereinafter "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..."

08 NCAC 04 .0308 concerns authorization to access voting system information held in escrow pursuant to G.S. 163-165.7.

The proposed rule was published in the North Carolina Register pursuant to G.S. 150B-21.2. ¹ The proposed rule stated in Part (d)(3)(F), "State personnel may require persons entering and/or leaving the facility to submit to inspection and the removal of unauthorized devices." The rule did not state the basis upon which the State personnel would require "inspection", nor did it state with any specificity what the "inspection" would entail.

In response to the Request for Changes, the Board changed "may" to "shall" thus requiring persons to submit to an "inspection."

¹ VOLUME 36, ISSUES 19, PAGE 1525 OF THE NORTH CAROLINA REGISTER [*VOLUME-36-ISSUE-19-APRIL-1-2022.PDF \(NC.GOV\)](#)

In response to the Request for Changes, the Board identified Subparagraph (b)(5) as the definition of “inspection.” The proposed rule did not have a Subparagraph (b)(5). Subparagraph (b)(5) was added post-publication but prior to adoption by the Board. Subparagraph (b)(5) requires persons to issue a written consent “to searches of their person and effects” immediately prior to and during review of the subject information prior to be considered an “authorized person”.

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 differ 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.”

A requirement that a person consent to a bodily search, or a search of their personal effects, could not have been reasonably expected based upon the proposed text of the rule. The proposed rule was devoid of any reference to such intrusive searches. While the proposed rule stated that persons entering and/or leaving the facility “may” be subject to “inspection,” this term was undefined at publication in the North Carolina Registry. See Volume 36, Issues 19, Page 1526 of the North Carolina Register, Part (d)(1)(F).

Further, the addition of Subparagraph (b)(5) addresses a subject matter not addressed in the proposed rule, to wit: the written surrender of personal privacy before and during a facility visit as a condition of access.

The addition of the heretofore unpublished Subparagraph (b)(5) 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 intentions to require bodily searches and a written consent thereto, and denied an opportunity to comment prior to adoption.

Staff recommends objection to the above-referenced rule for failure to comply with the APA because the Board adopted a rule that differs substantially from the proposed rule and thereafter did not meet the notice and comment requirements of the permanent rulemaking process.

Assuming arguendo that the Board complied with the APA regarding its post-publication adoption, the Board’s rules do not define either the term “searches of their person” or “inspection.”

In its reply, the Board stated that “typically the agency does not specify this procedure in a rule to such granular level as to specify the method of search of persons or possessions” and cites the rules of other adopted agencies.

Here, the adopted rule requires persons to issue a written consent to “searches of their persons” and be subject to searches of their persons without knowing the methods being used, or the indignities which might be suffered as the result of the ambiguous language of the rule, both as proposed and as adopted.

Staff recommends objection to the above-referenced rule as the rule is unclear and ambiguous.

Lastly, the rule, as amended, states in Part (c)(3)(F), “Persons ... leaving the facility shall submit to ... the removal of any unauthorized device.” As written, the Board appears to adopt a rule requiring the removal of the unauthorized device from the person leaving the facility presumably by Board personnel. The Board is empowered to establish procedures for the review and examination of the escrowed material. While the Board has authority to search for and prohibit devices in a facility by rule properly adopted pursuant to the APA, it is the staff’s opinion that the Board lacks the authority to seize property. If the Board lacks the authority to adopt the language of the rule, the adoption of the rule would also violate the APA.

Staff recommends objection to the above-referenced rule as the Board lacks statutory authority to adopt the rule as written and by adopting the rule without authority has violated the APA.

Staff further brings the Commission’s attention to another concern about the authority of the Board. In Paragraph (a), the rule limits the Chairs of each political party to review and examine a voting system to once every two years. The statute is silent on the issue of how many times an examination may be made.

In response to a question about the Board’s authority in the Request for Changes, the Board replied:

G.S. § 163-165.7(f) – “the State Board of Elections shall prescribe rules for the . . . handling . . . of certified voting systems, including . . . : (9) . . . procedures for the review and examination of any information placed in escrow by a vendor. . .”

G.S. § 163-22(a) – “State Board shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable. . .”

Given how disruptive, time consuming, and resource-intensive continuous management of these requests would be to the conduct of primaries and elections, a limitation on the number of requests is a reasonable procedure. A reasonable limit on request frequency, corresponding with the length of a general election cycle, does not materially diminish the right to access items placed in escrow by voting system vendors.

The Board’s response conflates the necessity or reasonableness of the rule with its authority to adopt the language. While the Board has authority to adopt “procedures,” it is unclear whether a limitation on the number of times a party Chair may examine the voting system is a “procedure”.

§ 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).)

Proposed Rule Published in N.C. Registry

Fiscal impact. Does any rule or combination of rules in this notice create an economic impact? Check all that apply.

- State funds affected
- Local funds affected
- Substantial economic impact (\geq \$1,000,000)
- Approved by OSBM
- No fiscal note required

Chapter 04 - Voting Equipment

SECTION .0300 – APPROVAL AND OPERATION OF VOTING SYSTEMS

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

(a) Subject to the provisions of this Rule, upon written request from a person or entity authorized under G.S. 163-165.7(a)(6) to a vendor of a certified voting system in this state, the vendor shall make available for review and examination any information placed in escrow under G.S. 163-165.9A to an authorized person. The person or entity making the request shall simultaneously provide a copy of the request to the State Board. The State chairs of each political party recognized under G.S. 163-96 shall be granted no more than one request for review and examination of a certified version of a voting system every two years.

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

- (1) Is an agent:
 - (A) designated by majority vote in a public meeting by the State Board or a purchasing county's board of commissioners;
 - (B) designated in writing by the chair of a political party recognized under G.S. 163-96; or
 - (C) designated in writing by the Secretary of Department of Information Technology. No more than three people may be designated by an authorized entity under G.S. 163-165.7(f)(9).
- (2) Has submitted to a criminal background check as provided for in G.S. 163-27.2(b) and been approved by the Executive Director of the State Board. The Executive Director of the State Board has the discretion to deny a person authorization under this Rule based on one or more convictions returned by the criminal background check indicating the person is unsuitable to review and examine the information placed in escrow. The Executive Director shall resolve any doubts concerning the person's suitability in favor of election integrity and security. A single conviction for a minor offense, as defined in the State Board of Elections' Criminal Background Check Policy, does not constitute a basis to deny a person authorization. The requirement to submit to a criminal background check does not apply to State employees who have already submitted to a criminal background check for State employment.
- (3) Has submitted to the State Board of Elections a sworn affidavit, under penalty of perjury, attesting that the person:
 - (A) has never been found by a court of law, administrative body, or former or current employer to have disclosed without authorization information that the person had access to;
 - (B) has never been subject to any civil claims alleging misappropriation of trade secret, violation of confidentiality agreement or nondisclosure agreement, copyright infringement, patent infringement, or unauthorized disclosure of any information protected from disclosure by law, except to the extent any such claims were dismissed with prejudice and not pursuant to a settlement agreement;
 - (C) has never had a security clearance issued by a Federal agency revoked for any reason other than expiration of the clearance.
- (4) Has entered into the Confidentiality and Nondisclosure Agreement with the vendor and State Board of Elections as provided in 08 NCAC 04 .0309.

(c) Upon meeting the definition of an authorized person in Paragraph (b) of this Rule, the Executive Director of the State Board shall issue a written authorization to the person or entity making the request under Paragraph (a) of this Rule to

review and examine information placed in escrow by a voting system vendor. The authorization shall be presented by the person or entity to the vendor prior to gaining access to such information under this Rule.

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

- (1) The information in escrow shall be made available by the vendor on up to three computers provided by the vendor (one for each potentially designated agent under G.S. 163-165.7(f)(9)) that are not connected to any network and are located within a secure facility designated by the State Board of Elections. Such computers shall be preloaded with software tools necessary for use in viewing, searching, and analyzing the information subject to review, including tools permitting automated source code review that are preapproved by the vendor and the State Board. Such computers shall have the following access controls:
 - (A) Credentials must be traceable to individuals. Generic login accounts are not authorized. Sharing of accounts and reuse of credentials is prohibited, each user must have their own assigned login account.
 - (B) Only one administrative account will be present on the system to allow for the initial provisioning of necessary applications and setup of security controls.
 - (C) Where passwords are used to authenticate authorized individuals, login accounts must use complex passwords. An example of a sufficiently complex password is one that is not based on common dictionary words and includes no fewer than 10 characters, and includes at least one uppercase letter, one lowercase letter, one number, and a special character.
 - (D) Screen lock times must be set to no longer than 10 minutes. All computers shall be locked or logged out from whenever they are not being immediately attended and used.
 - (E) The entire hard drive on any computer must have full disk encryption. Where possible, the minimum encryption level shall be AES-256.
 - (F) After the information subject to review and software tools for viewing are loaded on the computers, all ports shall be sealed with tamper-evident seals.
 - (G) After the ports are sealed, no input/output or recording devices may be connected to the computers. The State Board shall provide for the secure storage of any equipment used for the duration of the review.
- (2) The computers must be air-gapped and shall not 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.
- (3) The secure facility designated by the State Board under Subparagraph (1) of this Paragraph is the specific location where the computing equipment will be stored and the review conducted. All conduct within the facility shall meet the following conditions:
 - (A) The facility must be secured from unauthorized access for the entire review period.
 - (B) Only individuals authorized under Subparagraph (b)(1), Part (d)(3)(F), and Subparagraph (d)(9) of this Rule may enter the facility. Such individuals must present government-issued photo identification upon initial entry, and may be asked to show identification multiple times throughout the review period.
 - (C) Each time an individual accesses the facility, the name of the individual, the time of their entry, the time of their departure, and a description of any materials brought in or out of the facility shall be logged.
 - (D) All equipment used in the review must remain in the facility during the review period.
 - (E) No authorized person pursuant to this Rule may possess any removable media device, cell phone, computer, tablet, camera, wearable, or other outside electronic device within the facility where the person is accessing information in escrow. No authorized person may attempt to connect the computers used in the review to any network.
 - (F) State personnel who are designated by the Executive Director of the State Board of Elections shall have access to the facility where the review is being conducted at all times, to monitor the process and ensure that all requirements of this Rule are complied with. State personnel may require persons entering and/or leaving the facility to submit to inspection and the removal of any unauthorized devices. State personnel designated pursuant to this subsection shall have the right to inspect the computers used in the review before and after the review.

- (4) Authorized persons are permitted to perform manual source code review and use code analysis tools, as provided in Subparagraph (1) of this Paragraph, to analyze the source code. This source code review shall be performed using "read only" access and any authorized person shall not interact with or perform testing of the software components.
- (5) Any review performed pursuant to this Rule shall occur during regular business hours and shall last no longer than two work weeks. Such review shall not occur during the period from the start of one-stop absentee voting through the conclusion of statewide canvassing of the vote.
- (6) Authorized persons and the vendor are each responsible for bearing their own costs in conducting the review pursuant to G.S. 163-165.7(a)(6).
- (7) Up to three representatives of the vendor may be designated in writing by a corporate executive of the vendor to supervise the review at all times. Such representatives shall not interfere with the review, and shall be afforded a reasonable opportunity to inspect the facility for compliance with these conditions prior to the review commencing. State Board staff designated under Subparagraph (3) of this Paragraph shall have the right to monitor the review, without interfering with the review process.

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

Authority G.S. 132-1.2; 132-1.7; 132-6.1; 163-22; 163-27.2; 163-165.7; 163-165.9A; 163-166.7; 163-275; 42 U.S.C. 5195c.

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. ¹ 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.

¹ 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.

§ 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.
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- (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).)