

April 30<sup>th</sup>, 2024

Monae Johnson  
Secretary of State  
500 East Capital Ave  
Pierre, SD 57501

RE: Petitions to the Board of Elections for Declaratory Ruling

Dear Secretary of State Johnson,

I am in receipt of your response letter dated April 19<sup>th</sup>, 2024 regarding my three original petitions. First you asked for codified law for an authority for where you may act, that is found under 12-17B-2:

**12-17B-2. Requirements for automatic tabulating, electronic ballot marking, and election voting equipment systems--Approval of changes or modifications.**

Any automatic tabulating or electronic ballot marking system used in an election shall enable the voter to cast a vote for all offices and on all measures on which the voter is entitled to vote. No automatic tabulating, electronic ballot marking, or election voting equipment system may be connected to the internet. No ballot marking device may save or tabulate votes marked on any system. Each system shall fulfill the requirements for election assistance commission standards certification and be approved by the State Board of Elections prior to distribution and use in this state. No system may be approved unless the system fulfills the requirements as established by the State Board of Elections. Any changes or modifications to an approved system shall be approved by the State Board of Elections prior to distribution and use.

In this statute, it is clear that the State Board of Elections has oversight of the approval process of the systems, in reviewing the requirements are fulfilled prior to distribution and before every use in an election.

The second point is that the Secretary of State has additional administrative rules that enhance the requirements of the statute above through 5:02:09:02:

**5:02:09:02. Approval of automatic tabulating systems required before distribution.** Prior to distribution in South Dakota, a company or corporation dealing in automatic tabulating or electronic ballot marking systems shall give written notice to the state board of elections and demonstrate that its system complies with SDCL [12-17B-2](#) and § 5:02:09:02.01 or 5:02:09:02.03 and is certified as fulfilling the requirements of the Election Assistance Commission 2015 voting system standards by an independent test authority accredited by the Election Assistance Commission. If the State Board of Elections approves the system, it shall issue a certificate of approval.

Any changes or modifications in an approved automatic tabulating or electronic ballot marking system may be certified by the State Board of Elections with or without the demonstration described in this section for initial approval. The modification for the already approved system must have been certified as fulfilling the requirements of the Election Assistance Commission voting system 2015 standards by an independent test authority accredited by the Election Assistance Commission or been certified to meet the national standard by another state. Any change or modification determined to be de minimis by the independent test authority does not need state board of elections certification.

In this administrative rule, it is clear that the State Board of Elections has oversight of the approval process of the systems that have been modified as well, in that they may review the system to ensure the requirements are fulfilled prior to distribution.

There is history within the State Board of Elections of certifying a system and then when it did not comply with a rule, then decertifying a system, then after working with the vendor, for a solution, the system was later certified, with a larger system.

- 1) Oct 19<sup>th</sup>, 2015 – State Board of Elections meeting to review and approve ES&S ExpressVote ballot marking device. It was approved. (Page 2) [https://www.sdsos.gov/about-the-office/assets/boe\\_minutes/SignedMINSBOE10.19.pdf](https://www.sdsos.gov/about-the-office/assets/boe_minutes/SignedMINSBOE10.19.pdf)
- 2) May 23<sup>rd</sup>, 2016 – State Board of Elections meeting to decertify the ES&S ExpressVote ballot marking device due to paper not meeting the requirements for layout and not able to prevent ballot stamp from smearing on the paper. Decertification was approved. (Pages 1-3) [https://www.sdsos.gov/about-the-office/assets/boe\\_minutes/SignedMINSBOE05.23.pdf](https://www.sdsos.gov/about-the-office/assets/boe_minutes/SignedMINSBOE05.23.pdf)
- 3) June 15<sup>th</sup>, 2017 – State Board of Elections meeting to approve the ES&S 5.2.2.0, which included the ExpressVote equipment, was approved. (Pages 2-3) <https://www.sdsos.gov/SignedApprovedBOEMinsJune15.2017.pdf>

Since it is clear that the State Board of Elections has taken action in the past to ensure the law, rules and standards are being met, and it is vital to ensure the confidence of the electorate, we must ensure that the VVSG requirement of 7.4.2 Protection Against Malicious Software, be followed and our election system vendor develop and document the procedures to be followed to ensure that such protection is maintained in a current status, so that as a state we can ensure the security of our elections.

Sincerely,

Rick Weible  
803 Elk St.  
Elkton, SD 57026