

**State of South Dakota  
State Board of Elections  
Petition for Declaratory Rulings**

Pursuant to the provisions of SDCL [1-26-15](#), I (**Rick Weible**) of (**803 Elk St, Elkton SD 57026**), am (**a resident of Brookings County, SD**), and do hereby petition the South Dakota State Board of Elections for its declaratory ruling in regard to the following:

1. The state statute or State Board of Elections rule or order or form in question is:

-----Start of State Statute-----

**[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.

----- End of State Statute-----

-----Start of State Board of Elections Rule-----

**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.

----- End of State Board of Elections Rule -----

2. The facts and circumstances which give rise to the issue to be answered by the board's declaratory ruling are:

Under the Help America Vote Act of 2002, it is clear that voting systems under section 301 (b)(1) (D) are able “to maintain and produce any audit trail information;” and the requirement is further developed under the Voluntary Voting Systems Guidelines 1.0, Chapter 7 section 8 (7.8 Independent Verification System). This audit trail information, considered records under 52 USC 20701, must be preserved and maintained after any Federal Election for 22 months.

ES&S has supplied, programmed and maintained all of the DS200, DS450 and DS850 tabulators used in the state of South Dakota in the 2024 Primary and General Elections.

- a. ES&S EVS 6.1.1.0 is the most recently certified system that the State Board of Elections approved for use in the state of South Dakota, approved in August of 2021, and it was the standard used in the South Dakota 2024 Primary and General Elections.

<https://boardsandcommissions.sd.gov/bcuploads/ES&S%20EVS6110%20Certificate%20and%20Scope%20of%20Conformance%2007-27-2020.pdf.pdf>

- b. The ES&S EVS 6.1.1.0 EAC Certificate of Conformance clearly shows that the DS200, DS450, and DS850 (page 2) produce cast vote records.

**DS200®** is a polling place paper-based voting system, specifically a digital scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic cast vote records (CVR).

**DS450®** is a central scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic CVRs.

**DS850®** is a central scanner and tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card in any of four orientations for conversion of voter selection marks to electronic CVRs.

[https://www.eac.gov/sites/default/files/voting\\_system/files/ES%26S%20EVS6110%20Certificate%20and%20Scope%20of%20Conformance%2007-27-2020.pdf.pdf](https://www.eac.gov/sites/default/files/voting_system/files/ES%26S%20EVS6110%20Certificate%20and%20Scope%20of%20Conformance%2007-27-2020.pdf.pdf)

- c. The default settings for the ballot handling after a ballot is cast is to save all images. The default settings was tested and certified by the EAC and then certified by the South Dakota State Board of Elections. There was no testing with the settings off to determine if the system would remain certifiable.
- d. During a meeting held on June 16<sup>th</sup>, 2023 with a delegation from the South Dakota Secretary of State's Office, Mr. Tucker Omel, Senior Sales Engineer with ES&S, stated “The setting, the default setting is to capture images. We have to go through extra effort to turn it off...” (page 60)  
[https://www.sdcanvassing.com/\\_files/ugd/944eb0\\_9daad6d7ac76443fb04f2586523b5a96.pdf](https://www.sdcanvassing.com/_files/ugd/944eb0_9daad6d7ac76443fb04f2586523b5a96.pdf)

- e. In an April 29<sup>th</sup>, 2024 email from Jared Schwab, Representative of ES&S, to Minnehaha County Auditor, Leah Anderson, Mr. Schwab confirmed to Mrs. Anderson that the State had directed ES&S to program all media in the state with the setting to not save the ballot images.

**From:** Schwab, Jared <jared.schwab@essvote.com>  
**Sent:** Monday, April 29, 2024 12:42 PM  
**To:** Anderson, Leah <landerson@minnehahacounty.gov>  
**Subject:** Re: Ballot Images Email

Hey Leah,

Yeah I don't recall us ever sending out communication on that specifically outside of that best practice document. We did get confirmation from the state that they're having us program everyone's media with that setting set to not save any ballot images.

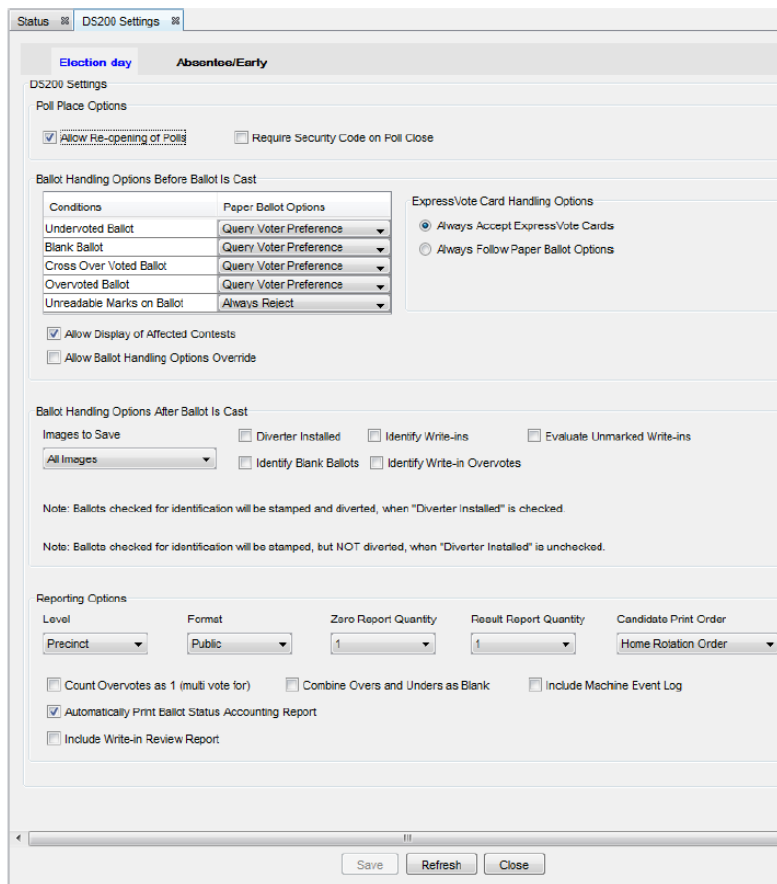
Thanks,  
Jared

Get [Outlook for iOS](#)

- f. Here is a copy of a manual from ES&S showing the default settings when they program the flash drives for the DS200's to use in elections.

### 2.3.3 DS200 Settings

Use DS200 Settings to set up poll place options, configure ballot images and handling, and select report options for the DS200 tabulator. From the **Manage** menu, select **DS200 Settings**.



Status DS200 Settings

**Election day** Absentee/Early

DS200 Settings

Poll Place Options

☒ Allow Re-opening of Polls ☐ Require Security Code on Poll Close

Ballot Handling Options Before Ballot Is Cast

Conditions	Paper Ballot Options
Undervoted Ballot	Query Voter Preference
Blank Ballot	Query Voter Preference
Cross Over Voted Ballot	Query Voter Preference
Overvoted Ballot	Query Voter Preference
Unreadable Marks on Ballot	Always Reject

Express/Vote Card Handling Options

☒ Always Accept Express/Vote Cards ☐ Always Follow Paper Ballot Options

☒ Allow Display of Affected Contests ☐ Allow Ballot Handling Options Override

Ballot Handling Options After Ballot Is Cast

Images to Save: ☐ Diverter Installed ☐ Identify Write-ins ☐ Evaluate Unmarked Write-ins

☐ Identify Blank Ballots ☐ Identify Write-in Overvotes

Note: Ballots checked for identification will be stamped and diverted, when "Diverter Installed" is checked.

Note: Ballots checked for identification will be stamped, but NOT diverted, when "Diverter Installed" is unchecked.

Reporting Options

Level:  Format:  Zero Report Quantity:  Result Report Quantity:  Candidate Print Order:

☐ Count Overvotes as 1 (multi vote for) ☐ Combine Overs and Unders as Blank ☐ Include Machine Event Log

☒ Automatically Print Ballot Status Accounting Report

☐ Include Write-in Review Report

Save Refresh Close

- g. On page 2 of all ES&S administration manuals it is clear that ES&S understands the requirements by placing this notice in the manual:

**“United States Election Assistance Commission Notification for Approved Voting Systems**

In accordance with the United States Election Assistance Commission (EAC) Testing and Certification Program Manual, Version 2.0, ES&S hereby notifies the purchaser that any changes or modifications to an EAC approved voting system which have not been tested and certified by the EAC will void the EAC certification for such EAC approved voting system.”

Example - <https://votingsystems.cdn.sos.ca.gov/vendors/ess/evs6302/evs6302-use-proc.pdf>

- h. ES&S programed all the DS200s, DS450s, and DS850s for use in South Dakota’s Elections in 2020, 2022, and in 2024.
- i. There are no meeting minutes since August of 2021 by the South Dakota State Board of Elections indicating an application by ES&S seeking approval of any changes or modifications to any prior approved voting system seeking to change any part of the configuration of the voting systems.
- j. Both the Secretary of State and ES&S failed to abide by the state laws and rules, which clearly require approval of a change or modification to an already approved configuration by the South Dakota State Board of Elections prior to distribution and use in South Dakota.
3. The precise issue to be answered by the board's declaratory ruling is:
- Did ES&S obtain a determination before making, specifically in regard to the following: “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.”?
  - If so, when did the state receive that determination from ES&S?
  - Is the Secretary of State of South Dakota authorized to change or modify a voting system including directing ES&S to turn off the save ballot images, without the approval of the State Board of Elections?

Dated at ( Elkton, SD ), this 8<sup>th</sup> day of August, 2025.



\_\_\_\_\_  
Rick Weible  
803 Elk St., Elkton, SD 57026  
Signature of petitioner