

**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.

Source: [SL 1994, ch 110](#), § 6; [SL 2005, ch 92](#), § 3; [SL 2018, ch 81](#), § 2, eff. Feb. 5, 2018.

----- 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.

Source: 2 SDR 5, effective July 30, 1975; 6 SDR 25, effective September 24, 1979; 16 SDR 203, effective May 28, 1990; 21 SDR 77, effective October 24, 1994; 22 SDR 95, effective January 18, 1996; 29 SDR 113, effective January 30, 2003; 32 SDR 109, effective December 26, 2005; 33 SDR 230, effective

July 1, 2007; 35 SDR 306, effective July 1, 2009; 46 SDR 42, effective September 30, 2019; 47 SDR 37, effective October 6, 2020.

----- 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:

“No automatic tabulating, electronic ballot marking, or election voting equipment system may be connected to the internet.” SDCL12-17B-2 makes it clear that we must safe guard our election systems from internet connections, including cellular modems in the tabulators that could connect to the internet, intranet, or a cellular network.

- a. ES&S submitted marketing materials (Exhibit A) indicating that modems were EAC approved to the State Board of Elections for approval of its EVS 6.0.4.0 in its meeting held August 13th, 2019.

<https://boardsandcommissions.sd.gov/bcuploads/BallotMarkingDevice&Tabulators.pdf> (Pages 3-4)

- b. During the testing overview conducted July 22-24, 2019 with Stefen Pluta, Department of Homeland Security, and Jim Edman, South Dakota Bureau of Information and Telecommunications present, there was no physical examination of the DS200 tabulator reported in an effort to ensure adherence to the law that the tabulators did not have any capability to connect to the internet. (Exhibit B)

<https://boardsandcommissions.sd.gov/bcuploads/2019EVS6040Report.pdf>

- c. The ES&S EVS 6.0.4.0 Voting System was approved by the State Board of Elections on Aug 13th, 2019 without any discussion of the modems.

<https://boardsandcommissions.sd.gov/bcuploads/DraftBOEMinutes8.13.19.pdf>

- d. On Jan 7th, 2020, US Election Assistance Commission received a complaint regarding ES&S misrepresentations regarding EAC certification of voting machines with modems:

We write to you to request that the Election Assistance Commission (EAC) initiate an inquiry and investigation into Elections Systems & Software (ES&S). ES&S may have violated, and likely continues to violate, Sections 5.14 and 5.15.1 of the EAC Testing and Certification Program Manual Version 2.0 (May 31, 2015) (TCPM)¹ by representing or implying that the DS200 with modem configuration is EAC certified when in fact only the DS200 *without* modem is EAC certified.² ES&S also may have violated Section 5.16 by failing to warn purchasers that adding an uncertified modem to the DS200 will void the EAC certification of the voting system in its entirety. The EAC should investigate this misconduct, require corrective action, and determine whether to suspend ES&S's manufacturer registration.

<https://freespeechforpeople.org/wp-content/uploads/2020/01/EAC.ESS-Letter-re-modems-with-Attachments-01.07.20.pdf>

- e. On March 20, 2020, the US Election Assistance Commission wrote ES&S and directed the following actions: (Exhibit C)
 - i. Provide a plan to remove all misrepresented marketing material from circulation.
 - ii. Notify current and potential customers who received the misrepresented information that previous information was inaccurate.
 - iii. Distribute the revised information to those same customers.
- f. On April 3rd, 2020, ES&S issued a generic letter to customers, that advises the removal of EAC stickers where tabulators include modeming capabilities. (Exhibit D)

In addition, your jurisdiction may have received DS200 units which include a sticker on the back of the unit stating that the DS200 has been certified by the EAC. In order to ensure compliance with the EAC Testing and Certification Program, ES&S requests that you remove all such stickers from those DS200s which include modem capability. If you would like ES&S to remove these stickers, please contact your Account Manager and arrangements will be made for ES&S to come on-site and remove such stickers.

- g. On April 3rd, 2020, ES&S issued a generic letter to other customers that does not have the removal of EAC stickers notification. (Exhibit E)
- h. On Aug 13th, 2020, Politico wrote an article about the EAC ordering ES&S to correct their misleading claims, the EAC corrective actions, and the article also indicated that 11 states were shipped DS200 tabulators equipped with modems, and has never identified the states that received them.

What's next: ES&S will play a major role in the November election. The company has previously said that more than 33,000 DS200 optical scan machines with modems are in use in 11 states and the District of Columbia but has never identified which jurisdictions this includes beyond D.C.

<https://www.politico.com/news/2020/08/13/election-voting-machine-misleading-claims-394891>

- i. On page 2 of all ES&S administration manuals it is clear 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>

j. Many of the DS200's currently in use in South Dakota were purchased and received around the time the 33,000 mislabeled DS200's were shipped across the country.

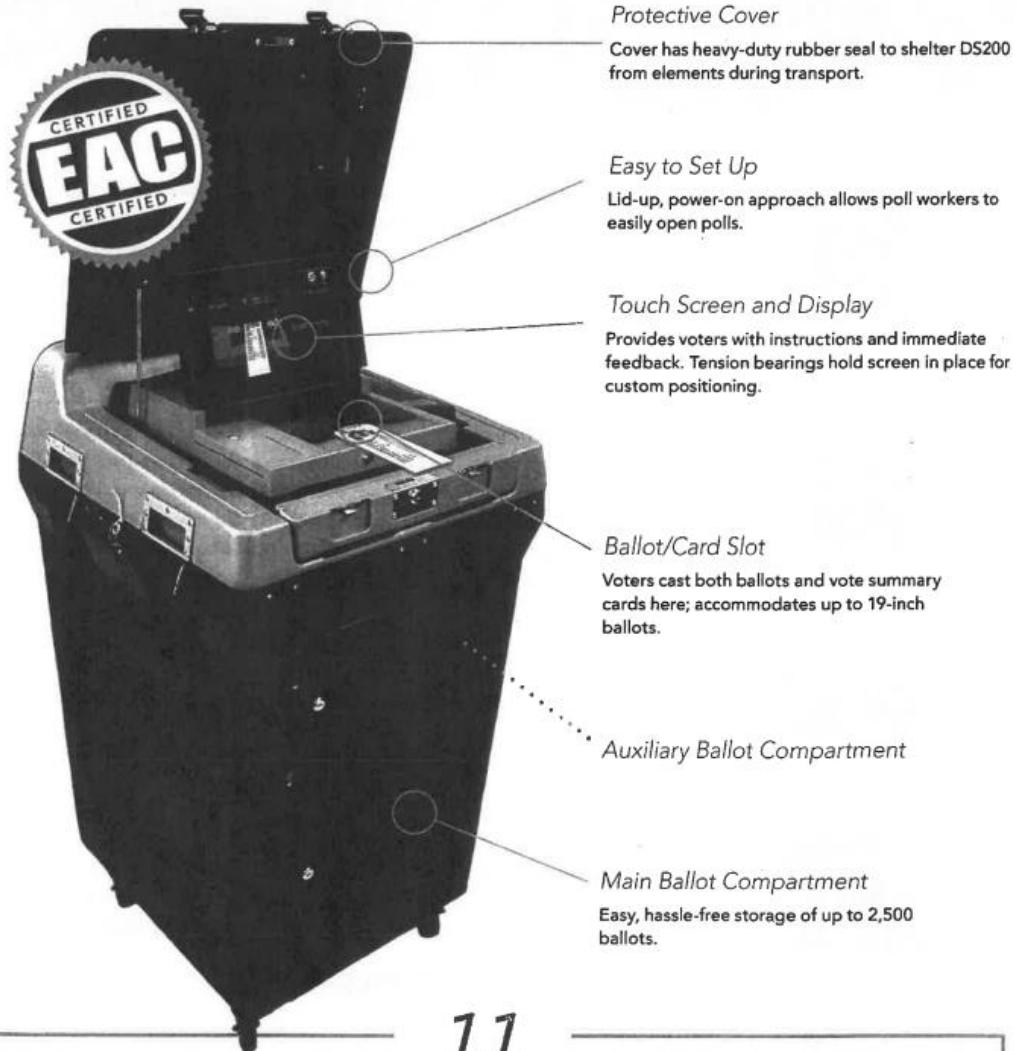
3. The precise issue to be answered by the board's declaratory ruling is:
- a. Did ES&S comply with the US Elections Assistance letter dated March 20, 2020 by:
 - i. Notifying current and potential customers who received the misrepresented information that previous information was inaccurate.
 - ii. Distributing the revised information to those same customers.
 - b. Is the State Board of Elections in receipt of either letter from ES&S? (Exhibit D or E)
 - c. Did the State of South Dakota conduct an audit or ask for an audit to ensure that there are no modems in South Dakota's DS200 tabulators?
 - d. Is the State Board of Elections aware that the EAC has the authority to conduct reviews of fielded voting systems to ensure compliance with their Testing and Certification Program?
 - e. What assurances and evidence, independently of any statements from ES&S, can the State Board of Elections make to the public, to ensure them, that there are no modems in any of the voting systems in South Dakota?

Dated at (Elkton, SD), this 8th day of August, 2025.



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

DS200[®] *Precinct Scanner & Tabulator*



11

The number of 14-inch flat ballots processed per minute

DS200 Key Features

The DS200 is a precinct-based scanner and vote tabulator equipped with the latest in ES&S' patented technology. Fully certified and compliant with EAC guidelines, the DS200 enhances the voting experience for voters and election officials alike. Our patented IMR™ and PTRAC® technology ensures even the most poorly marked ballots are read accurately and consistently — protecting voter intent. All of this is designed to make everyone's job easier.

ACCURATE



The DS200 combines the ES&S-patented Intelligent Mark Recognition (IMR™) and patented Positive Target Recognition & Alignment Compensation (PTRAC®) systems to accurately track and pinpoint target locations. This technology accommodates ballots inserted at angles or with erroneous marks to uphold voter intent. This precision improves the reliability of elections.

SECURE



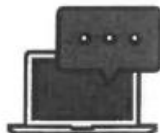
Like all ES&S tabulation equipment, the DS200 includes physical security features such as locking panels and security seals to secure sensitive components and election files, and a key-locked case for transport and shipping. The DS200 operating system controls, limits and detects unauthorized access to all critical data. The system also includes safeguards, such as data encryption and digital signatures, that help protect sensitive data and verify authenticity, including certification of all firmware.

RELIABLE



Having both battery backup and thermal paper means you never have to worry about power outages or printer ink.

COMPATIBLE



Works in conjunction with:

- ExpressVote® Universal Voting System
- DS450® High-Throughput Scanner & Tabulator
- DS850® High-Speed Scanner & Tabulator
- Electionware® Election Management Software
- AutoMARK® Ballot Marking Device
- Election Reporting Manager®

COMPREHENSIVE



- Optional wireless modem results transfer with encryption
- Primary data storage device
- Backup data storage
- Data sent via Secure File Transfer Protocol (SFTP) server

For more information visit www.essvote.com

Exhibit B

South Dakota State Board of Elections **ES&S Voting System (EVS) 6.0.4.0 State Certification**

Pursuant to South Dakota Codified Law (SDCL) § 12-17B-2, please accept this report as official application for certification of Election Systems and Software (ES&S) EVS 6.0.4.0. The testing of all equipment was conducted on July 22-24, 2019 in Pierre, SD.

The following individuals were present:

ES&S

State Certification Manager: Mark Manganaro

South Dakota Secretary of State's office

Secretary of State: Steve Barnett

Deputy Secretary of State: Jason Lutz

Director, Division of Elections: Kea Warne

State Election Coordinator: Christine Lehrkamp

HAVA Coordinator: Rachel Soulek

Elections & Federal Project Coordinator: Rory Mennenger

Election Assistant: Bailey Tibbs

Other Participants

Jackie Sieverding, Union County Auditor

Jane Naylor, Aurora County Auditor

Jennifer Deyo, Hughes County Auditor Staff

Kylie Stoddard, Hughes County Auditor Staff

Philena (Phil) Burtch, Stanley County Auditor

Susan Lamb, Sully County Auditor

Shawna Shaw, Potter County Auditor

Stefen Pluta, Department of Homeland Security

Jim Edman, Bureau of Information and Telecommunications

System Testing Overview

The components and versions of EVS 6.0.4.0 are as follows:

Software

ElectionWare, v. 5.0.4.0

- ElectionWare integrates the election administration functionality into a unified application. Its intended use is to define an election and create the resultant media files used by the ExpressVote, DS200 tabulator, DS450 tabulator, the DS850 Central Ballot Scanner, and Election Reporting Manager (ERM).

Event Log Service, v. 1.6.0.0

- ES&S Event Log Service is a Windows Service that runs in the background of any active ES&S Election Management software application to monitor the proper functioning of the Windows Event Viewer. The ES&S Event Log Service closes any active ES&S software application if the system detects the improper deactivation of the Windows Event Viewer.

Removable Media Service, v. 1.5.1.0

- Removable Media Service (RMS) is an application that runs in the background of the EMS client workstation and supports the installation and removal of election and results media.

Hardware

DS200 Central Digital Tabulator, v. 2.17.4.0

- Used in Aurora, Bon Homme, Haakon, Harding, Jerauld, Kingsbury, Sanborn, Perkins, Mellette, Corson, Campbell, Walworth & Ziebach counties
- DS200 digital tabulator is a paper ballot tabulator that is designed for use as a polling place tabulator or a central count tabulator, South Dakota counties will use as a central count tabulator. Both sides of the ballot are scanned at the same time using a high-resolution image-scanning device.

DS450 Central Count Tabulator, v. 3.1.1.0

- Used in Clay, Lyman, Turner & Tripp counties
- The DS450 is a mid-range tabulator that simultaneously scans the front and back of a paper ballot and/or vote summary card. TruGrip™ technology insures that multiple sets of rollers are controlling the ballot in the transport at all times. This provides for reliable handling of ballots; even folded ballots. It can also read ballots in any of four orientations. It sorts tabulated ballots into discrete output bins without interrupting scanning.

DS850 Central Count Tabulator, v. 3.1.1.0

- Used in Beadle, Brookings, Brown, Codington, Davison, Lincoln, Meade, Minnehaha and Pennington counties.
- The DS850 is a high-speed, digital scan central ballot tabulator that uses cameras and imaging algorithms to capture voter selections on the front and back of a ballot, evaluate results and then sort ballots into discrete bins without interrupting scanning. A dedicated audit printer generates a continuous event log. Machine level reports are produced from a second, laser printer. The scanner saves voter selections to an internal hard disk and exports results to a USB Memory stick for processing with ElectionWare Reporting Software.

ExpressVote Universal Voting System, v. 2.4.5.0

- The ExpressVote is a universal voting device designed for all voters, with a printed voter-verifiable paper record. This system combines paper-based voting with touch screen technology. The ExpressVote includes a mandatory vote summary screen that requires voters to confirm or revise selections prior to printing the summary of ballot selections using the internal thermal printer.
- The ExpressVote enables voters who are visually or physically impaired and voters more comfortable reading or hearing instructions to privately make their selections. The ExpressVote supports navigation through touchscreen, physical keypad or ADA support peripheral such as a sip and puff device.

Testing Overview

During the test, the 500 ballots were split between five precincts including a split precinct in Precinct One. The SOS staff tested primary election and general election ballots. Tabulated ballots contained 10 choices and contained choices on both the front and back, except for the ExpressVote which prints all selections on one side. The ballots for testing were at least 90% fully voted with the remainder containing overvoted and undervoted ballots. An additional 15 ballots were also processed as absentee ballots in which each ballot was folded in the same manner as absentee ballots.

250 optical scan ballots were hand marked by staff which were then tabulated on a DS200, DS450 and DS850.

Description of ExpressVote Universal Voting Device Testing

Pursuant to ARSD § 5:02:09:02.03, 250 ExpressVote pre-printed ballot cards were marked using three ExpressVote machines. Each card was accurately marked and displayed each race that was marked. Each card was then accurately tabulated pursuant to ARSD § 5:02:09:02.01 on a DS200, DS450 and DS850. The ExpressVote machine was unplugged and the battery back-up system was successfully tested to allow voting to continue uninterrupted for two hours without external power. One error message was displayed when a staff person tried to insert a primary election ballot, which the error message indicated that the machine was not programmed for that election. The ballot was ejected without opening the machine.

Description of Automatic Tabulating System Testing

Pursuant to ARSD § 5:02:09:02.01, the 250 ExpressVote cards that were marked using the ExpressVote were then tabulated by a DS200, DS450 and a DS850. During the testing, the DS850 successfully detected the blank ballots and tabulated the optical scan ballots and the ExpressVote cards at a rate well over the required 15 ballots a minute. During the testing, the DS450 successfully detected the blank ballots and tabulated the optical scan ballots and the ExpressVote cards at a rate well over the required 15 ballots a minute. The DS200 correctly sorted the blank ballots by sorting them to a different side of the ballot box and accurately processed the ballots at a rate of 10 ballots per minute, the required time frame.

Conclusion

All testing of the equipment was successful and met all requirements pursuant to codified law and administrative rule and EVS 6.0.4.0 is recommended for distribution in South Dakota with the ExpressPass exception. Attached is the Secretary of State's certification report and the Election Assistance Commission Grant of Certification and Certificate of Conformance.



U. S. ELECTION ASSISTANCE COMMISSION
VOTING SYSTEM TESTING AND CERTIFICATION PROGRAM
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

March 20, 2020

Sent via e-mail

Steve Pearson, Senior Vice President of Certification
Election Systems & Software
11208 John Galt Blvd.
Omaha, NE 69137

Re: DS200 Misrepresentation

Dear Mr. Pearson,

On January 7, 2020, the U.S. Election Assistance Commission (EAC) received a complaint from two organizations, Free Speech for People and National Election Defense Coalition, stating that:

1. ES&S may have violated Sections 5.14 and 5.15.1 of the EAC Testing and Certification Program Manual Version 2.0 by representing or implying that the DS200 with modem configuration is EAC certified when in fact only the DS200 without modem is EAC certified.
2. ES&S also may have violated Section 5.16 by failing to warn purchasers that adding a modem to the DS200 will void the EAC certification of the voting system in its entirety.

The complaint requested that the EAC conduct an investigation, require corrective action, and determine whether to suspend ES&S's manufacturer registration.

On the same day, I requested that ES&S submit all marketing material for all ES&S EAC-certified voting systems by COB on January 10, 2020. ES&S requested to extend the deadline to January 17th due to unavailability of ES&S's marketing manager. ES&S submitted the marketing material, including their response to the complaint, on January 17th. In their response, ES&S stated they have remedied the issue by removing all references in its current corporate marketing materials related to the "optional use" of modems.

I have reviewed the marketing material submitted by ES&S and confirm that ES&S has several documents that state that the DS200 is "fully certified and compliant with EAC guidelines" while also listing a modem as optional. This misrepresentation is in violation of the EAC's Testing and Certification Program. I am pleased that ES&S has taken prompt action to revise their marketing material. In order to be in compliance with our Program, ES&S must take the following corrective actions:

- Provide a plan to remove all misrepresented marketing material from circulation.
- Notify current and potential customers who received the misrepresented information that previous information was inaccurate.
- Distribute the revised information to those same customers.

In several other documents, ES&S states, "All ES&S tabulation systems are submitted to rigorous and extensive independent test campaigns as part of the Election Assistance Commission's (EAC) Voting System Certification Program." I find this statement to be a misrepresentation since ES&S has state-certified voting systems that have not been tested or certified under the EAC's Program. In order to be in compliance with our Program, ES&S must take the following corrective actions:

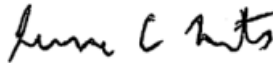
- Revise the marketing material to properly represent voting systems that have been certified by the EAC.
- Provide a plan to remove all misrepresented marketing material from circulation.
- Notify current and potential customers who received the misrepresented information that previous information was inaccurate.
- Distribute the revised information to those same customers.

As you are aware, the EAC has the authority to conduct reviews of fielded voting systems to ensure compliance with our Testing and Certification Program. We will conduct reviews of EAC-certified DS200s to ensure that they comply with our Program.

Finally, according to Section 5.15.4 of the Testing and Certification Program Manual, you have 15 days from receipt of this letter to comply with the recommended corrective actions. Failure to comply will result in the EAC publicly announcing that the voting system no longer complies with its original certification, and could include initiating decertification actions and/or suspension of manufacturer registration.

You are a valued stakeholder and I appreciate your proactive and prompt response.

Sincerely,



Jerome Lovato
Director, Voting System Testing and Certification

cc: Mona Harrington, Acting Executive Director
Amanda Joiner, Associate Counsel

Exhibit D



April 3, 2020

VIA ELECTRONIC MAIL

CONTACT NAME
STATE/CUSTOMER NAME
ADDRESS
ADDRESS

RE: Election Systems & Software, LLC ("ES&S") DS200® Marketing Materials

Dear CONTACT NAME:

It has recently been brought to our attention that certain ES&S DS200 precinct scanner and tabulator (DS200) marketing materials may contain potential inaccuracies. In prior DS200 marketing materials you may have received from ES&S, ES&S states that the DS200 has been certified by the United States Election Assistance Commission (EAC), while also listing the use of modems as an option for the DS200. Please be advised that the DS200 has been fully certified by the EAC, however the certification does not include modem capability.

Please be advised that it was never the intent of ES&S to state or imply that DS200 modem capability was EAC certified. Further, ES&S made known to states which allow modemming that the modemming configuration has not been approved by the EAC. As you know, the DS200 has been fully certified and approved by your state for use in your jurisdiction with the use of modems. Your jurisdiction may continue to use the DS200 with modem capability as certified by your state.

In order to avoid any confusion with respect to ES&S' EAC certified voting systems and ES&S' voting systems which allow for the modemming of unofficial results, ES&S has removed all references in its current corporate marketing materials related to the "optional use" of modems. To view updated corporate marketing materials for the DS200, please visit www.essvote.com/products/ds200/.

In addition, your jurisdiction may have received DS200 units which include a sticker on the back of the unit stating that the DS200 has been certified by the EAC. In order to ensure compliance with the EAC Testing and Certification Program, ES&S requests that you remove all such stickers from those DS200s which include modem capability. If you would like ES&S to remove these stickers, please contact your Account Manager and arrangements will be made for ES&S to come on-site and remove such stickers.

We thank you for being a customer of ES&S. If you have any questions or need additional information, please contact your Account Manager and they will respond accordingly.

Sincerely,

A handwritten signature in blue ink, which appears to read "Steve Pearson".

Steve Pearson
Senior Vice President of Certification

Exhibit E



April 3, 2020

VIA ELECTRONIC MAIL

CONTACT NAME
STATE/CUSTOMER NAME
ADDRESS
ADDRESS

RE: Election Systems & Software, LLC ("ES&S") DS200® Marketing Materials

Dear CONTACT NAME:

It has recently been brought to our attention that certain ES&S DS200 precinct scanner and tabulator (DS200) marketing materials may contain potential inaccuracies. In prior DS200 marketing materials you may have received from ES&S, ES&S states that the DS200 has been certified by the United States Election Assistance Commission (EAC), while also listing the use of modems as an option for the DS200. Please be advised that the DS200 has been fully certified by the EAC, however the certification does not include modem capability.

Please be advised that it was never the intent of ES&S to state or imply that DS200 modeming capability was EAC certified. Further, ES&S made known to states which allow modeming that the modeming configuration has not been approved by the EAC.

In order to avoid any confusion with respect to ES&S' EAC certified voting systems and ES&S' voting systems which allow for the modeming of unofficial results, ES&S has removed all references in its current corporate marketing materials related to the "optional use" of modems. To view updated corporate marketing materials for the DS200, please visit www.essvote.com/products/ds200/.

We thank you for being a customer of ES&S. If you have any questions or need additional information, please contact your Account Manager and they will respond accordingly.

Sincerely,

A handwritten signature in blue ink, appearing to read "Steve Pearson".

Steve Pearson
Senior Vice President of Certification