

Dear County Official,

Due to the extensive amount of evidence of the following facts:

1. Election records are to be made available to the public unless specifically listed in State Law as not publicly available.
2. The United States Election Assistance Commission (EAC) sets the standards for election machine certifications.
3. The United States Election Assistance Commission certifies electronic election tabulating machines for use in elections.
4. Since 2005, when South Dakota adopted 12-17B-2, which states, "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." **This made the US Election Assistance, Voluntary Voting Systems Guidelines 1.0, no longer voluntary, but now required before distribution and every time a system is used for each election.**
5. The EAC Certificate for ES&S EVS 6.1.1.0 resides on the South Dakota SOS site. The first page of the certificate shows that Voting systems is tested to the Voluntary Voting Guidelines Version 1.0 (VMSG 1.0).

https://www.eac.gov/sites/default/files/voting_system/files/EVS6100Cert_Scope_%2528FINAL%2529.pdf

	United States Election Assistance Commission	
Certificate of Conformance		
ES&S EVS 6.1.1.0		
<p>The voting system identified on this certificate has been evaluated at an accredited voting system testing laboratory for conformance to the <i>Voluntary Voting System Guidelines Version 1.0 (VMSG 1.0)</i>. Components evaluated for this certification are detailed in the attached Scope of Certification document. This certificate applies only to the specific version and release of the product in its evaluated configuration. The evaluation has been verified by the EAC in accordance with the provisions of the <i>EAC Voting System Testing and Certification Program Manual</i> and the conclusions of the testing laboratory in the test report are consistent with the evidence adduced. This certificate is not an endorsement of the product by any agency of the U.S. Government and no warranty of the product is either expressed or implied.</p>		
Product Name: <u>EVS</u>		
Model or Version: <u>6.1.1.0</u>		
Name of VSTL: <u>Pro V&V</u>		
EAC Certification Number: <u>ESSEVS6110</u>	<i>Executive Director</i>	
Date Issued: <u>July 27, 2020</u>		Scope of Certification Attached

6. The third page of that very certificate very clearly explains how the cast vote records are generated, and that it is a base function of the election equipment used by all counties.

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.

7. Only EAC certified election equipment is certified for use in South Dakota.
8. The Voluntary Voting System Guidelines require the following items:

2.1.5 System Audit

This subsection describes the context and purpose of voting system audits and sets forth specific functional requirements. Election audit trails provide the supporting documentation for verifying the accuracy of reported election results. They present a concrete, indestructible archival record of all system activity related to the vote tally, and are essential for public confidence in the accuracy of the tally, for recounts, and for evidence in the event of criminal or civil litigation.

2.1.6 Election Management System

The Election Management System (EMS) is used to prepare ballots and programs for use in casting and counting votes, and to consolidate, report, and display election results. An EMS shall generate and maintain a database, or one or more interactive databases, that enables election officials or their designees to perform the following functions:

- Define political subdivision boundaries and multiple election districts as indicated in the system documentation
- Identify contests, candidates, and issues
- Define ballot formats and appropriate voting options
- Generate ballots and election-specific programs for voting equipment
- Install ballots and election-specific programs
- Test that ballots and programs have been properly prepared and installed
- Accumulate vote totals at multiple reporting levels as indicated in the system documentation
- Generate the post-voting reports required by Subsection 2.4
- Process and produce audit reports of the data as indicated in Subsection 5.5

2.1.10 Data Retention

United States Code Title 42, Sections 1974 through 1974e state that election administrators shall preserve for 22 months “all records and paper that came into (their) possession relating to an application, registration, payment of poll tax, or other act requisite to voting.” This retention requirement applies to systems that will be used at anytime for voting of candidates for federal offices (e.g., Member of Congress, United States Senator, and/or Presidential Elector). **Therefore, all voting systems shall provide for maintaining the integrity of voting and audit data during an election and for a period of at least 22 months thereafter.**

For 22-month document retention, the general rule is that all printed copy records produced by the election database and ballot processing systems shall be so labeled and archived. **Regardless of system type, all audit trail information spelled out in Subsection 5.5 shall be retained in its original format, whether that be real-time logs generated by the system, or manual logs maintained by election personnel. The election audit trail includes not only in-process logs of election-night and subsequent processing of absentee or provisional ballots, but also time logs of baseline ballot definition formats, and system readiness and testing results.**

Chapter 7: Security requirements of all election systems. Section 7.8 – the requirement for Independent Verification Systems, is where the initial description and definition of cast vote records being two separate records, the ballot image, and the results file of the scan of that ballot image, is addressed. These are required election materials, and all South Dakota counties are in violation of Federal and State Law.

e. The electronic ballot image records shall be able to be exported for auditing or analysis on standards-based and /or COTS information technology computing platforms.

i. **The exported electronic ballot image records shall be in a publicly available, non-proprietary format.**

Discussion: It is advantageous when all electronic records, regardless of manufacturer, use the same format or can easily be converted to a publicly available, non-proprietary format; for example, the OASIS Election Markup Language (EML) Standard.

ii. The records should be exported with a digital signature, which shall be calculated on the entire set of electronic records and their associated digital signatures.

Discussion: This is necessary to determine if records are missing or substituted.

- iii. The voting system vendor shall provide documentation as to the structure of the exported ballot image records and how they shall be read and processed by software.
- iv. The voting system vendor shall provide a software program that will display the exported ballot image records and that may include other capabilities such as providing vote tallies and indications of undervotes.
- v. The voting system vendor shall provide full documentation of procedures for exporting electronic ballot image records and reconciling those records with the paper audit records.

Source – EAC Voluntary Voting System Guidelines Volume 1 V 1.0 -
https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.0_Volume_1.PDF

- 9. The EAC mandated audit logs and cast vote records as a required function of electronic tabulating machines since 2005.
- 10. The National Institute for Science and Technology set the national standards for cast vote records. These standards are consistent amongst all machine vendors in the United States.
<https://pages.nist.gov/CastVoteRecords/>
- 11. All counties in South Dakota use ES&S tabulating machines to count said county resident's votes.
- 12. All ES&S tabulating machines electronically and digitally scan, count and tally votes cast on paper ballots in South Dakota.
- 13. All ES&S tabulating machines create cast vote records as the digital interpretation of a scanned ballot.
- 14. No proprietary voter identifying information is recorded on a cast vote record.
- 15. Ballot images created of scanned voted ballots are a standard tabulating machine feature.
- 16. Ballot images are required for proper auditing procedures set forth by the EAC.
- 17. Ballot images were allegedly shut off in South Dakota by order of a former Secretary of State, and Monae Johnson's office may be advising ES&S to turn off ballot image capturing for the 2024 Primary and General elections, where there are Federal candidates on the ballot.
- 18. Ballot images are required according to SDCL 12-17B-2.
- 19. In the words of an ES&S Executive: *"Just so we're all on the same page, I just want to point out that when you cast a ballot to an ES&S tabulator, two items are created. One is a ballot image. The other is a cast vote record. They are two separate entities. They are not merged together. They do not exist together, but they relate to one another. They're tied together, but they are two separate documents. All right? And since we don't capture images in South Dakota, when you try to bring in the software to look at that image, it simply says, "No image available," because that image was not captured. The cast vote record is a hundred percent, always available."*
 MS. ANDERSON: *But you can't identify a voter using.....*
 ES&S Executive: *"There's nothing identifying. Cannot identify on either one of those."*
- 20. All digital election results produced by ES&S electronic ballot tabulating machines are downloaded onto flash drives. Pennington, Davison, Lincoln and Minnehaha counties have this data stored on the Electionware computer and most likely the county network drive.
- 21. All of this digital data created by using ES&S electronic tabulating machines is federal election material and must be produced and preserved for twenty-two months per federal law.
- 22. A computer with Electionware must be used to decrypt the stored election data, not CREATE the data. The tabulators create the data, and all counties in South Dakota are required to create and store this data.

23. Sixty-two counties in South Dakota without Electionware cannot properly view, assess, verify or audit the county elections per the EAC guidelines.
[https://www.eac.gov/sites/default/files/electionofficials/EMG/EAC Election Management Guidelines_508.pdf](https://www.eac.gov/sites/default/files/electionofficials/EMG/EAC_Election_Management_Guidelines_508.pdf)
24. The Secretary of State Monae Johnson, Deputy Diedrick, Rachel Soulek, Rep. Peterson, Rep. Mulally, Rep. Reimer, Minnehaha County Auditor Anderson, along with Mike Mathis, ES&S executives and staff, Jerad Schwab, and members of the community have confirmed, in person with ES&S that the above statements are true.
You have assumed all liability for any negligence and malfeasance by contracting a third-party vendor for their services in counting our votes in secret, by signing your names on the contracts, and by violating the chain of custody of the ballots by counting them at a central count location with ES&S machines, without the approval of the citizens whose votes you are counting.

By signing contracts with ES&S, you have assumed all responsibility for:

25. Completing a **full** software training session for each product selected.
- Communication from your county has made it apparent that your election office is not fully trained on each product your county is using.
26. Reviewing a **complete** set of user manuals.
- The user manuals provided by ES&S that are 20 pages long are not the complete set. The complete user manual for your ballot scanner is over 130 pages long.
27. Implementation of any security protocols, physical, network or otherwise which are necessary for the proper operation of the ES&S equipment and software.
- None of the ES&S tabulators in South Dakota contain any antivirus protection.**
 - EAC VVSG 1.0 : 7.1 Scope This section describes essential security capabilities for a voting system, encompassing the system's hardware, software, communications and documentation. No predefined set of security standards will address and defeat all conceivable or theoretical threats. The Guidelines articulate requirements to achieve acceptable levels of integrity and reliability.
 - The requirements apply to the broad range of hardware, software, communications components, and documentation that comprises a voting system.
 - 7.4 Software Security Voting systems shall meet specific security requirements for the installation of software and for protection against malicious software.**
 - 7.4.2 Protection Against Malicious Software Voting systems shall deploy protection against the many forms of threats to which they may be exposed such as file and macro viruses, worms, Trojan horses, and logic bombs. Vendors shall develop and document the procedures to be followed to ensure that such protection is maintained in a current status.**
 - The EAC VVSG guidelines became law when the State of South Dakota implemented SDCL 12-17B-2. **Currently – your election machines are out of compliance and conducting an election with them will not be a valid event.** Certifying a Federal Election with an invalid system would be a prosecutable offense.
 - None of the ES&S Election Management Systems have current antivirus software.** The last updated version was 2019. Using these systems is a security risk, which is a national security risk and the DHS labeled U.S. election infrastructure as National Critical Infrastructure in 2017.
 - Using these non-compliant systems will be a national security risk.
28. The connectivity of your network.
- Why does your contract with ES&S mention network connectivity for your machines when it is illegal in South Dakota? How is your jurisdiction absolutely certain that there is no network connectivity in your machines?

THEREFORE, BE ADVISED:

52 USC §20701. Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, **all records and papers which come into his possession** relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. **Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both.**

52 U.S.C. § 20702. Theft, destruction, concealment, mutilation, or alteration of records or papers; penalties

Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 20701 of this title to be retained and preserved shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

12-20-31. Destruction of ballots and pollbooks--Period for which held--Pending recount or contest.

The officer in charge of an election may destroy voted ballots and pollbooks from a nonfederal election sixty days following the election at which such ballots were voted. However, they may not be destroyed if any recount or contest of such election is pending. The officer in charge of an election may destroy voted ballots, pollbooks and all other election material relating to a federal election twenty-two months after the election at which the ballots were voted. For the purpose of this section, a federal election is any election to nominate or elect persons to the United States Congress or other national elected position, including national issues or questions. If a ballot is used for a federal election and a state or local election, **the ballots and all other election material shall be maintained for twenty-two months. All federal election material may be removed from the ballot box if it is maintained in such a manner as to guarantee the safety and integrity of such material.**

SDCL 22-11-23. Falsification of public records--Misdemeanor.

Any person who knowingly makes a false entry in any public record, or falsely alters any public record is guilty of a Class 2 misdemeanor. However, if the false entry or alteration is committed by a public officer or employee having custody of the record, the offense is a Class 1 misdemeanor.

SDCL 22-11-24. Destruction or impairment of public record--Felony.

Any person who, without the authority to do so, knowingly and intentionally destroys, mutilates, conceals, removes, or impairs the availability of any public record is guilty of a Class 6 felony. However, if the provisions of this section are violated by a public officer or employee having custody of the record, the offense is a Class 5 felony.

SDCL 22-11-25. Unlawful retention of public record--Misdemeanor.

Any person who, lacking the authority to retain a public record in his or her possession, knowingly refuses to deliver it up upon proper request of any person lawfully entitled to receive such record, is guilty of a Class 2 misdemeanor. However, if the knowing refusal to deliver is committed by a public officer or employee having custody of the record, the offense is a Class 1 misdemeanor.

SCL 22-11-26. Forfeiture of public officer's office for record violations--Discharge of public employee--Refusal to discharge employee--Misdemeanor.

Any public officer found guilty of violating §§ 22-11-23 to 22-11-25, inclusive, shall forfeit the office unless the office is subject to impeachment.

Any public employee found guilty of violating any provision of §§ 22-11-23 to 22-11-25, inclusive, shall be discharged. Any public officer having authority to discharge a public employee, who refuses to comply with this section, is guilty of a Class 2 misdemeanor.

52 USC §21101. Adoption of voluntary guidance by Commission

(a) In general : To assist States in meeting the requirements of part A of this subchapter, the Commission shall adopt voluntary guidance consistent with such requirements in accordance with the procedures described in section 21102 of this title.

https://www.eac.gov/sites/default/files/eac_assets/1/28/VVSG.1.0_Volume_1.PDF

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.

We are sending the above statutes for your consideration as you prepare to conduct the primary and general elections of 2024, both of which include Federal candidates on the ballot.

All ES&S tabulators produce ballot images, cast vote records and audit logs. Regardless of your counties possession or lack thereof of an election management system, your election equipment produces these records and federal law requires you to keep these records for 22 months.

Federal law requires you to keep ballot images as part of federal election material. If your county does not save the created images, you will be in violation of federal and state law.

You are required to have current antivirus protection on all of your election system components per Federal and State Law.

Bad legal advice can put a party at risk of being an accessory to fraud. The party giving the bad legal advice could possibly be committing ethics violations when the truth about these records has been revealed and provided to you.

In civil litigation, allegations of fraud might be based on a misrepresentation of fact that was either intentional or negligent. A claim of fraud based on a negligent misrepresentation differs in that

the speaker of the false statement may have actually believed it to be true; however, the speaker lacked reasonable grounds for that belief.

Legal definition of Fraud: An intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of the truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture.

Constructive Fraud: Constructive fraud consists in any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud. The state and county election officials cannot, in good faith, continue to deny obvious facts. We strongly urge you to reconsider your position by immediately providing the public records requested by the citizens of South Dakota and to issue an apology to those who have spent three years of time, effort and money fighting for something that should have been widely acknowledged, used, analyzed and accessible for nearly two decades now.

The citizens of South Dakota are well educated, informed and versed on election records and election law. We implore you consider your oath of office, your duty as a civil servant, and the responsibility you have assumed and that you bear in counting the votes of the electorate. We will be watching and we will require all Federal and State laws be followed accordingly.