



Texas Secretary of State
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Election Advisory No. 2017-21

To: Election Officials

From: Keith Ingram, Director of Elections

Date: November 16, 2017

RE: Expansion of definition of DRE (OAG Opinion - KP-0170)

On October 24, 2017, the Office of the Attorney General issued Opinion No. [KP-0170 \(PDF\)](#) ("opinion") which opined on the definition of "direct recording electronic voting machine" ("DRE") as it is defined in Subsection 121.003(12) of the Texas Election Code, and whether this definition could include "electronic voting machines that also produce marked paper ballots." This opinion concluded that voting machines that produce marked paper ballots may qualify as DREs as long as they meet the statutory requirements of a DRE. Additionally, the opinion provided that under Texas law, the definition of a DRE does not specify that a DRE must only constitute a single piece of equipment.

In light of this recent OAG opinion, this Election Advisory address several items relating to the affected voting systems.

EAC Certification Requirements

Under Section 122.001 (a)(3) of the Texas Election Code, a voting system may not be used in an election unless the system "complies with the voting system standards adopted by the Election Assistance Commission." All components certified for use in Texas elections must be certified by the Election Assistance Commission ("EAC"). However, the definition of DRE under the Texas Election Code, as interpreted by KP-0170, may include more than a single piece of equipment and may include a marked paper ballot. Therefore, under Texas law, a combination of EAC-certified components, when presented together, may constitute a DRE system. If the component parts of the DRE system have been certified by the EAC, they would meet the requirement under Section 122.001(a)(3) for EAC certification. The

Secretary of State has determined that a DRE system is EAC-certified when it consists of (1) a ballot marking device, and (2) a precinct ballot counter, both pieces of equipment are used together in one polling place, and both pieces of equipment have been certified by the EAC.

Currently, there are two vendors in Texas that have systems that may constitute a DRE voting system based on their component parts.

1. Hart Intercivic Verity Voting 1.0 and 2.0: These systems, as certified on December 15, 2016 (as updated on October 26, 2017), include, among other components, the Verity Touch Writer with Access (EAC-certified ballot marking device) and Verity Scan (EAC-certified precinct scanner).
2. ES&S EVS 5.2.1.0, 5.2.2.0, and 5.4.0.0: These systems, as certified on December 15, 2016 (as updated on October 26, 2017) (EVS 5.2.1.0), and July 28, 2017 (as updated on October 26, 2017) (EVS 5.4.0.0 and EVS 5.2.2.0) include, among other components, the ExpressVote (EAC-certified ballot marking device) and the DS200 (EAC-certified precinct scanner).

Modifications to Existing Certifications

If a vendor has a system that has been previously certified by the Secretary of State for use in Texas elections and would like the certification modified to include the use of the system as a DRE system under the expanded, Texas-specific definition of a DRE system, when that system was not examined as DRE system during the certification process, the vendor must seek a modification to the certification under Chapter 122, Subchapter C, Texas Election Code. An application must be submitted for review in accordance with Section 122.063 of the Texas Election Code. The Secretary of State will review the application and determine whether the modified design satisfies applicable requirements, in accordance with Section 122.064 of the Texas Election Code.

Future Certification Procedures

If a vendor seeking certification of a system which has not been previously certified, would like the equipment considered as a DRE system under the expanded, Texas-specific definition of a DRE system, they must indicate this on their application for certification and complete the relevant portions of Form 101 that apply to DRE systems.

DRE Requirements

Under Section 129.002(a) of the Texas Election Code, DRE systems must “provide the voter with a screen in summary format of the voter’s choice for the voter to review before the vote is actually cast.” To meet this requirement, all systems certified as a DRE system under the expanded, Texas-specific definition, must allow for voting on the component that contains the full presentation of the voter’s ballot and summary screen. The tabulation portion of the voting process may occur on a component that is separate from the component the voter uses to make their selections and mark their ballot.

*Section 123.005 of the Texas Election Code provides that only one kind of voting system may be used at a polling place in an election. In order to comply with this section, all voting (ballot marking) must occur on the DRE device that records the voter's choices even if the tabulation occurs on a separate device. Voters may not separately mark by hand a pre-printed ballot, but instead, must utilize the DRE device when marking their ballot in the polling place. Additionally, DRE systems are precinct-based systems. Even when a central accumulation station is established for the accumulation of vote totals, the counting/tabulation of ballots occurs at the election day precinct or polling place. Therefore, the counting/tabulation component of the DRE system must also be utilized at the polling place. Accordingly, voters cannot utilize the DRE device to mark their ballot, then deposit their marked ballot or cast vote record into a pre-locked, pre-sealed ballot box for transfer to a central counting station for counting/tabulation.

NOTE: If equipment malfunctions or there are irregularly marked ballots, there are circumstances where the ballots **MUST** be transferred to the central counting station for counting/tabulation. These are exceptions to the requirement that DRE voting/ballot marking and counting/tabulation must occur at the precinct polling place. Please see [Advisory 2017-17](#) for more details.

Requirements for systems with paper components

DRE systems that have a paper-based component will be expected to meet requirements associated with paper-based systems to the extent they can be feasibly and consistently applied to a DRE system. Various sections of the Texas Election Code provide that if (and only if) a paper-based Texas Election Code requirement can feasibly be applied to a DRE system, and is not inconsistent with provision(s) applicable to voting systems and/or DRE systems, it should be applied to a DRE system. See, e.g., TEX. ELEC. CODE § 121.001; TEX. ELEC. CODE § 129.001(b). The following paper-based system requirements can feasibly and consistently be applied to a DRE system under the expanded, Texas-specific definition of a DRE system, which have a paper-based component.

1. **Partial Manual Count:** Section 127.201(g) of the Texas Election Code exempts DREs from having to complete the partial manual count. DRE systems under the expanded, Texas-specific definition of a DRE system, which have a paper-based component, are **required** to complete the partial manual count unless it has been waived by the Secretary of State pursuant to Section 127.201(f) of the Texas Election Code.
2. **Recounts:** Section 214.042 of the Texas Election Code provides that a recount must be conducted electronically or manually. For a DRE system under the expanded, Texas-specific definition of a DRE system, this means that the paper component that contains the voter's selections (full ballot or cast vote record) is the ballot of record for the purposes of a recount. If an electronic recount is requested, the paper ballot or cast vote record **must** be rescanned. An electronic recount cannot simply consist of rereading the electronic media containing device totals. If a manual recount is requested, the paper ballot or cast vote record will be hand tallied.
3. **Preservation of Voted Ballots:** The paper ballots or cast vote records are required to be preserved for a period of at least 60 days after the date of the election in a locked ballot box in accordance with Section 66.058(b) of the Texas Election Code. On the 61st day, the general custodian of election records may transfer them to another

secure container for the remainder of the preservation period in accordance with Section 66.058(b) of the Texas Election Code. Additionally, the electronic media that contains the vote totals must also be preserved for the duration of the preservation period.

Countywide Polling Place Program

Section 43.007(d)(4) of the Texas Election Code provides that the Secretary of State shall only select counties to participate in the countywide polling place program that use DRE systems. Section 43.007(d)(5) of the Texas Election Code further provides that the Secretary of State can only select counties to participate in the program that “have the appropriate technological capabilities.” As a result of KP-0170, DRE systems under the expanded, Texas-specific definition of a DRE system, which have a paper-based component, are now available for use in the countywide polling place program.

For new applicants to the countywide polling place program: The Secretary of State will review new applications to determine whether a county is using traditional DREs or a DRE system under the expanded, Texas-specific definition of a DRE system, and whether the setup described in the application demonstrates that the county has the “appropriate technological capabilities” to successfully participate in the program.

For counties that have already achieved “successful” status in the countywide polling place: If a county wishes to purchase new equipment that falls under the expanded, Texas-specific definition of a DRE system (and use that system as a DRE system), the purchase contract will be reviewed by the Secretary of State in the ordinary course in accordance with Section 123.035 of the Texas Election Code. If the purchase contract for the system which meets the expanded, Texas-specific definition of a DRE system is approved (which presumes the system has been certified as a DRE system through the modification procedure referenced in Subchapter C of Chapter 122 of the Texas Election Code), then the county’s successful designation will not be affected and no further action is needed to use the DRE system in the countywide polling place program.

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