

**From:** [Glines, Kathy](#)  
**To:** [Elections](#)  
**Subject:** Administrative Rules comments  
**Date:** Tuesday, June 20, 2023 8:29:26 AM  
**Attachments:** [Co Auditor admin rules comments.docx](#)

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SD State Board of Elections  
c/o Office of the Secretary of State  
500 East Capitol Avenue  
Pierre, SD 57501  
[elections@state.sd.us](mailto:elections@state.sd.us)

To the Honorable State Board of Elections:

The County Auditors have joined as a group to review the proposed administrative rules that you will be considering at your meeting on June 28, 2023. We would like to submit the attached comments for your consideration. We also felt that it would be better to submit as a group rather than individually commenting to avoid redundancy.

On behalf of the South Dakota County Auditors, please accept the attached comments.

*Kathy Glines*

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*Our office hours have changed! We are now open from 7:30 to 12:00; 12:30 to 5:00 Monday thru Thursday and open from 7:30 to 11:30 on Fridays*

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- **5:02:04:18** Notice of Runoff election: Need to remove “August”. In 2024 the eight weeks will put the runoff election on July 30<sup>th</sup> HB 1112 It is recommended that the following adjustment to the rule be made:

5:02:04:18. Notice of statewide runoff election. The notice of the statewide runoff election shall be in the following form:

NOTICE OF RUNOFF ELECTION STATE OF SOUTH DAKOTA

Because no candidate for \_\_\_\_\_ received the required thirty-five percent of the vote in the primary election held on June \_\_\_\_, \_\_\_\_, a runoff election will be held on Tuesday, **August (eight weeks from the date of the first primary)** \_\_\_\_, \_\_\_\_, in each county in the state. The polling places will be the same as those used in the primary election, and the polls will be open from seven a.m. to seven p.m. \_\_\_\_\_ local time.

The candidates for nomination for \_\_\_\_\_, as determined by the official state canvass, are \_\_\_\_\_

Secretary of State, South Dakota Source: 12 SDR 43, effective September 23, 1985; 29 SDR 113, effective January 30, 2003; 40 SDR 40, effective September 9, 2013; 44 SDR 94, effective December 4, 2017.

General Authority: SDCL 12-1-9(3). Law Implemented: SDCL 12-6-51.1, 12-12-1.

- **5:02:19:11 Oath of recount board** No change from original oath HB 1114

5:02:19:11. Oath of recount board. Before performing recount duties, each recount board member shall take an oath in the following form:

I, A.B., do solemnly swear (or affirm) that I will perform the duties of recount board member according to law and the best of my ability and that I will act in an impartial manner in conducting the recount about to be held. Source: 35 SDR 48, effective September 8, 2008. General Authority: SDCL 12-1-9(10). Law Implemented: SDCL 12-21-2.

- **5:02:09:01.01 Notice of testing automatic tabulating equipment**

HB 1124 states that “The person in charge of the election shall notify the county chair of each political party with a candidate on the ballot, any independent candidate or candidate without party affiliation on the ballot, and the ballot question committees for or against an initiated or referred measure or initiated constitutional amendment”. We have had different parties qualify to be on the ballot, and we have had different parties lose their status to be on the ballot. The wording in the proposed rule could cause the rule to be re-visited after every General Election. It is recommended that the following adjustments be made:

5:02:09:01.01. Notice of testing automatic tabulating equipment. The notice of testing the automatic tabulating equipment shall be in the following form: NOTICE OF TESTING AUTOMATIC TABULATING EQUIPMENT (This notice must be given at least one week prior, but not more than ten days prior, to the date of testing and posted in the same manner as a public meeting agenda, pursuant to § 1-25-1.1) Notice is hereby given to the public, the county chair of each political party with a candidate on the ballot, any independent candidate or candidate without party affiliation on the ballot, and the ballot question committees for or against an initiated or referred measure or initiated constitutional amendment. the county chairs of the Republican Party, \_\_\_\_\_, Democrat Party \_\_\_\_\_, Libertarian Party \_\_\_\_\_, Independent Candidate(s) \_\_\_\_\_, candidates with no party affiliation \_\_\_\_\_, and Ballot Question Committees \_\_\_\_\_ that the automatic tabulating equipment will be tested to ascertain that it will correctly count the votes for all offices and measures that are to be cast at the \_\_\_\_\_ election held on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. The test will be conducted on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ o'clock (a.m.) (p.m.) at the following location: \_\_\_\_\_. Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. \_\_\_\_\_ Person in charge of election Source: 2 SDR 5, effective July 30, 1975; 6 SDR 25, effective September 24, 1979; 27 SDR 146, effective July 9, 2001. General Authority: SDCL 12-1-9(3). Law Implemented: SDCL 12-17B-5

- **5:02:09:01.02 Testing of tabulating equipment HB 1124**

No changes from original rule. Need to add that ballots with no ballot stamp be tested and adjust the structure of the rule

*"In addition to these tests, any test deck may be processed any time before or after completion of the official count."*

5:02:09:01.02. Test of tabulating equipment. The person in charge of the election shall conduct tests of the automatic tabulating equipment as required in SDCL 12-17B-5 and 12-17B-12. The tests shall be conducted by processing a preaudited group of ballots in a test deck marked to record a predetermined number of valid votes for each candidate and each measure. A tally sheet shall be created prior to the machine count to fully show how the sample of ballots is marked and what the machine vote totals must be to prove an errorless count. If more than one ballot is used in the election, a test deck shall be made for each ballot that is unique in any way. The test deck(s) shall include for each office and ballot question:

- (1) One or more ballots with a vote for each candidate and each side of a ballot question;
- (2) One or more ballots which have votes in excess of the number **overvote** allowed by law for each office and question; **and one or more ballots which contain an undervote**
- (3) ~~One or more ballots which contain an undervote.~~ One or more ballots that do not have a ballots stamp
- (4) The test procedure shall include the processing of at least one ballot completely blank to verify that the machine is correctly configured according to SDCL 12-17B-13.1.**

At least twenty-five test ballots shall be included in the total of all test decks. Individual test decks for individual ballots shall be of sufficient size to prove the accuracy of the system. If absentee ballots are to be received folded, at least ten percent of the test ballots in any individual test deck shall be similarly folded. The person conducting the test of the tabulating equipment shall date and sign the printout, verifying that the results of the machine's printed paper vote totals exactly match the tally sheet from which the sample of ballots was marked. The test deck(s), tally sheet, and signed printout must be secured and retained with the official ballots.

~~The test procedure shall include the processing of at least one ballot completely blank to verify that the machine is correctly configured according to SDCL 12-17B-13.1.~~

If more than one tabulating machine is to be used in the election, each machine shall be fully tested according to the ballot(s) which each machine will be used to count in the election.

In addition to these tests, any test deck may be processed any time before or after completion of the official count. Source: 8 SDR 81, effective January 10, 1982; 21 SDR 77, effective October 24, 1994; 23 SDR 236, effective July 17, 1997; 29 SDR 113, effective January 30, 2003; 33 SDR 230, effective July 1, 2007. General Authority: SDCL 12-17B-17(3). Law Implemented: SDCL 12-17B-5, 12-17B-12.

- **5:02:09:02.02 Sealing of tabulation equipment HB 1124**

Section 3. That chapter 12-17B be amended with a NEW SECTION: After the conclusion of the testing of the automatic tabulating equipment, no software or firmware updates may be made to the automatic tabulating equipment until after the certification of the election results. Each automatic tabulating device must be sealed with a unique numbered seal. The person in charge of the election shall verify immediately prior to the official counting of the ballots that the seal has not been tampered with since the testing period and certification process pursuant to section 1 of this Act. The State Board of Elections shall promulgate rules, pursuant to chapter 1-26, prescribing the method of sealing automatic tabulating equipment pursuant to this section

It is our understanding that the person in charge of the election will conduct a public test of the tabulation equipment. Once the public test is completed, the tabulators will be sealed. Prior to the tabulator testing that is required before the official counting of the ballots, the person in charge of the election will verify that the seals have not been tampered with. Upon that satisfaction the seals may be “broke” by the person in charge of the election to allow the machine to be turned on and ballots to be counted.

The following change is recommended:

5:02:09:02.02. Sealing tabulating equipment. After successfully testing tabulating equipment at the public testing, said equipment must be sealed in accordance with the following:

- **5:02:16:01.01 Ballot Box Security** HB 1165 Section 21

Section 21. That chapter 12-19 be amended with a NEW SECTION: The person in charge of the election may not establish or place, or allow any individual to establish or place, an absentee ballot drop box within the official's jurisdiction. A completed absentee ballot may only be returned to an office of the individual in charge of the election pursuant to § 12-19-7. For the purposes of this section, the term, absentee ballot drop box, means a receptacle or container into which an individual may deposit a completed absentee ballot. This term excludes a county auditor's means for physically securing a completed absentee ballot. 23.536.22 8 1165 HB1165 ENROLLED ballot as required by § 12-19-10 or 12-19-42, including a secured and monitored receptacle or container at the office of the individual in charge of the election. The State Board of Elections shall promulgate rules, pursuant to chapter 1-26, prescribing the requirements to ensure the security of the receptacle or container located at the office of the individual in charge of the election. A violation of this section is a Class 2 misdemeanor.

It is felt that this is an overreach of the intent of HB 1165. The intent was to prohibit the use of drop boxes outside of the county auditor's office or office area. It is recommended that the entire rule be deleted and not adopted.

**5:02:16:01.01. Ballot box security.**

Prior to the first ballot being placed into a ballot box, ballot boxes must be physically examined by the individual in charge of the election, or the individual's designee, to ensure the ballot box is empty. After the ballot box is physically examined and found to be empty, the ballot box must be sealed by a metal lock and key. Paper seals must be applied to each opening into the ballot box. The time, date, and individual who physically examined and sealed the ballot box shall be recorded on a piece of paper and signed by the individual who physically examined and sealed the ballot box. After the paper is signed by the individual who physically examined and sealed the ballot box, the signed paper must be placed into the ballot box by the individual who signed, examined, and sealed the ballot box.

The ballot box must remain unopened and the seal(s) intact until such time as the ballot box is presented for the counting of the vote. The individual in charge of the election shall examine the seal(s) for evidence of tampering and record that finding as to time and date in the logbook, then sign the logbook.

Ballot boxes located at the office of the individual in charge of the election must be stored in a locked enclosure with access limited to the individual in charge of the election or that individual's designees.

Every entry into the locked enclosure where the ballot box is stored shall be recorded in a logbook by the person making entry into the locked enclosure as to the name of the individual, the date, the time of entry, and the time of exit from the locked enclosure. The logbook must remain with the ballot box.

Ballot boxes may be removed from the locked enclosure and located in the office or office area of the individual in charge of the election if the individual in charge of the election, or the individual's designees, are physically present and at all times able to observe the ballot box.

Source: General Authority: SDCL 12-1-9(4) Law Implemented: SDCL 12-19-9.3

- **5:02:10:09 Nursing Home facilities HB 1165 Section 10**

Section 10. That § 12-19-9.1 be AMENDED: 12-19-9.1. If there is any nursing facility, assisted living center, or hospital, as defined in § 34-12-1.1, within any county from which there might reasonably be expected to be five or more absentee applications, the county auditor shall notify the person in charge of that facility and the chair of the county central committee of each party and any other person who has filed a request to be notified of the date and time at which representatives of the auditor's office will be present to assist the residents of that facility to vote, utilizing the absentee procedure. Any political party, independent candidate, and nonpolitical candidate may assign a person to accompany the county auditor's representatives. At the date and time announced, the county auditor's representative shall deliver ballots to and assist all persons at that facility who desire such assistance ~~and who have applied for absentee ballots to vote~~. This section applies only to a ~~general~~ a primary or general election.

If a person in charge of an election conducts absentee voting at a nursing facility, assisted living center, or hospital, as defined in § 34-12-1.1, the voter shall complete a combined absentee ballot application/ form and return envelope, and the identification and affidavit requirements provided in § 12-19-2.1 are waived. The State Board of Elections shall promulgate rules, pursuant to chapter 1-26, prescribing the procedures by which the county auditor will conduct absentee voting, collect completed ballots, and secure completed ballots at a nursing facility, assisted living center, or hospital, as defined in § 34-12-1.1.

**12-18-25. Assistance of disabled or illiterate voter by person of his choice.**

Any voter who by reason of physical disability or illiteracy is unable to read or mark a ballot may receive the assistance of any person whom such voter may select.

There is concern on how this is keeping the filling out of the ballot being considered private...there are several people being allowed to be "in the presence of". There is concern that this rule is an overreach of the intent of the HB 1165, Section 10, which did very little to amend the existing law regarding this matter. It is recommended that the entire rule be deleted and not adopted

**05:02:10:09. Nursing facility, assisted living center, or hospital absentee voting.**

~~When the auditor or the auditor's designee is at a nursing facility, assisted living center, or hospital as defined in SDCL 34-12-1.1 (hereinafter facility) to conduct absentee voting, all residents who wish to vote absentee shall be given an absentee ballot. The ballot must be filled out in private, in the presence of the auditor or the auditor's designee. Any notified person listed in SDCL 12-9-9.1 may also be present. The auditor or the auditor's designee shall be present during the entire time the absentee voting is being conducted.~~

~~A resident of the facility voting absentee shall be given instructions that read as follows:~~

- ~~• Mark your ballot privately.~~
- ~~• Place your ballot in the return envelope and seal it securely.~~
- ~~• Complete the statement on the back of the return envelope and (bold) SIGN IT (unbold).~~
- ~~• Give the ballot to the auditor or the auditor's designee.~~
- ~~• If you need assistance with any of the above, contact the auditor or the auditor's designee for assistance.~~

~~The ballot box used at a facility must be a ballot box secured at the auditor's office and used only for absentee voting at a facility.~~



While at the facility, the auditor or the auditor's designee shall place the completed absentee ballot into a ballot box labeled with the name of the facility, the date and time the absentee voting took place.

The ballot box may be used at more than one facility and a separate label attached for each facility.

The ballot box must be transported to the auditor's office by the auditor or the auditor's designee and secured in accordance with state law. Source: General Authority: SDCL 12-9-1(4)(9) Law Implemented: SDCL 12-19-9.1

- **5:02:08:45 Form for precinct committeeman/woman** SB 86 No problems with this rule

5:02:08:45. Form for precinct committeeman or committeewoman. The statement for precinct committeeman or committeewoman shall be in the following form: Precinct Committeeman or Committeewoman Statement I, \_\_\_\_\_, of \_\_\_\_\_ County, declare myself a candidate for the position of \_\_\_\_\_ (insert party) Party Precinct \_\_\_\_\_ (insert committeeman or committeewoman) for Precinct No. \_\_\_\_\_. My mailing address is \_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_ my residence address is \_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_, my email address is \_\_\_\_\_, and my telephone number is \_\_\_\_\_. I understand that to be a Precinct Committeeman or Committeewoman, I am a resident of the precinct, I am a registered voter of the political party named above at the time I sign this statement, and if elected, will serve in the office. I certify all of the above information to be true. Print Name \_\_\_\_\_ Date \_\_\_\_\_ Signature \_\_\_\_\_ Telephone Number \_\_\_\_\_ Source: 36 SDR 209, effective June 30, 2010; 45 SDR 9, effective July 30, 2018. General Authority: SDCL 12-1-9(7). Law Implemented: SDCL 12-5-4, 12-6-3.2, 12-5-4

- **5:02:03:01 Voter Registration Form**

Suggesting that wording be added to the form requesting that their voter registration be cancelled

- **5:02:03:14 Acknowledgement notice** SB140 It is felt that the form should not advise people to call the office to complete the registration – that it should be clear that they need to come in and complete the form in person and that the Auditor will not “pencil in” the necessary information. Please make the following changes:

5:02:03:14. Acknowledgement notice for invalid or incomplete voter registration applications. The acknowledgement notice sent by nonforwardable mail to each person who submits a voter registration application to the county auditor that is invalid or incomplete and cannot be filed shall be in the following form: Invalid or Incomplete Voter Registration Acknowledgement Notice  
 \_\_\_\_\_ Your voter registration is not valid because you are not eligible to be a registered voter. Reason: \_\_\_\_\_

\_\_\_\_\_ Your voter registration has not been processed because your application is incomplete. Please ~~call or~~ visit our office to complete your registration. You will not be able to vote unless you have provided the needed information within 30 days from the date set forth on this acknowledgment notice which is \_\_\_\_\_. ~~To complete your voter registration or if~~ If you have further questions, please call our office at \_\_\_\_\_.  
 Thank You, \_\_\_\_\_ County Auditor

\_\_\_\_\_ Source: 21  
 SDR 77, effective October 24, 1994; 22 SDR 95, effective January 18, 1996; 28 SDR 99, effective January 17, 2002; 44 SDR 94, effective December 4, 2017. General Authority: SDCL 12-4-35. Law Implemented: SDCL 12-4-5.3

- **05:02:21:01 Voter Cancellation Form**

Requires voter signature but allows “relationship to voter”. After consideration of this – we are opposed to the form. In the proposed form we feel it will invite voter fraud because there is no way to identify if it truly was the voter that is requesting that their voter registration be cancelled. No Drivers License number, no date of birth.....nothing that would allow the auditor to prove beyond a reasonable doubt that someone else isn’t requesting that the voter be removed and not the actual voter themselves.

05:02:21:01. Voter Cancellation Form. To cancel your voter record in South Dakota's Statewide Voter Registration System, complete and sign this form, and return it to your County Auditor.

Contact information may be found here: <https://vip.sdsos.gov/CountyAuditors.aspx> Voter's

Printed Name: \_\_\_\_\_ First Middle Last Date of Birth: \_\_\_\_\_

MM DD YYYY Residential Address:

\_\_\_\_\_ Street Address

City, State, and Zip Code I hereby request the

above voter be removed from the South Dakota list of registered voters for one of the following reasons:

~~I, the undersigned, have moved out of state (requires voter's signature or mark); I, the undersigned,~~

~~request that my name be removed (requires voter's signature or mark); The voter is deceased (requires~~

obituary or death certificate). \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_ Signature\*

[illegible]

~~/ Email if County has Questions~~

- **05:04:06:10 File security**

Is this for the auditor's office or for the vendor that supports the voter registration file or for the Secretary of States office? If this is required of the Auditor, will there be funding to provide the extra cyber security beyond what the counties already have in place. It is also felt that some of the wording is making a political statement and that an administrative rule is not the place for those statements. If it is determined that this is a requirement for the vendor and/or SOS please consider removing the following wording. It is recommended that the entire rule be deleted and not adopted if is going to be a requirement for the counties.

05:04:06:10. Voter Registration File Security. At a minimum, the computerized voter registration file must implement the following:

1. A stateful layer 3, and 7 firewall at the perimeter in order to block malicious traffic ~~from known and unknown adversarial actors along with experienced personnel to operate and maintain the rules and underlying software and firmware on which the firewall system operates.~~
2. Anti-malware solutions that ensure the underlying operating system(s) maintains its intended function, integrity, and exclusive ownership of the governing maintaining body.
3. Software vulnerability analysis pre- deployment to production environments. Underlying code, libraries and included packages require continuous evaluation throughout the software development lifecycle through automated trusted tools to ensure erroneous code, unauthenticated access or potential privilege escalation vehicles shall not be introduced.
4. Trusted White hat vulnerability analysis for protected systems to evaluate, identify and document risks within the application which are then provided to development and management personnel to appropriately mitigate any potential findings on a scheduled and reoccurring basis.
5. Personnel background checks for those with access to restricted systems within the application development lifecycle ~~ensure that only benevolent, patriots dedicated to a secure election process, act in good faith to deliver quality, well-guarded code and application infrastructure.~~

Source: SL 2001, ch 66, § 1; SL 2010, ch 74, § 10; SL 2011, ch 77, § 1. General Authority: SDCL 12-1-9(A)  
Law Implemented: SDCL 12-4-37

- **05:02:23:01 Oath of post-election audit board.**

05:02:23:01. Oath of post-election audit board. Before performing post-election audit duties, each post-election audit board member shall take an oath in the following form:

I, A.B., do solemnly swear (or affirm) that I will perform the duties of post-election audit board member in good faith, with impartiality, according to law, to the best of my ability in conducting

the post-election audit about to be held, and that I meet the qualifications to serve as a member of the post-election audit board. Source: General Authority: SDCL 12-1-9(11). Law Implemented: SDCL 12-17B-18

We would like to see a rule change on the Instructions to voters that would eliminate showing the voter how to vote "WRONG". This would have to be scheduled for a future meeting

**5:02:05:02.01. Instructions to the voters using optical scan ballots.** The instructions to be posted in two locations in the polling place in at least 48 point type for optical scan ballots must be in the following form:

#### TO MARK THE BALLOT

Completely fill in the oval (●) next to the name or ballot question. Use only the pencil or marker given to you!

Do not make any marks other than filling the oval.



WRONG



WRONG



WRONG



RIGHT

Do not erase anything on your ballot.

Do not rip your ballot or make holes in it.

Do not write in a name.