



U. S. ELECTION ASSISTANCE COMMISSION
OFFICE OF GENERAL COUNSEL
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

August 7, 2020

Sent via e-mail

Courtney Hostetler
Free Speech For People
1320 Centre St. #405
Newton, MA 02459
chostetler@freespeechforpeople.org

Susan Greenhalgh
National Election Defense Coalition
susan@freespeechforpeople.org

Re: Request to Investigate ES&S for Misrepresentations

Dear Ms. Hostetler and Ms. Greenhalgh,

This letter is in response to the letter from Free Speech For People dated January 7, 2020, that requested the EAC “initiate an inquiry and investigation into Election Systems & Software (ES&S)” for “representing or implying that the DS200 with modem configuration is EAC certified when in fact on the DS200 *without* modem is EAC certified.” I will set forth the events that occurred after receiving the letter and what steps remain regarding this matter.

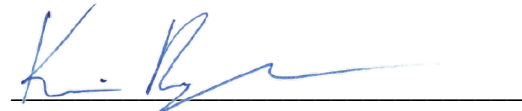
Upon receiving the letter on January 7, 2020, EAC Director of Voting System Testing and Certification Jerome Lovato immediately contacted Steve Pearson, ES&S’ Senior Vice President of Certification (see attached email from Jerome Lovato to Steve Pearson dated January 7, 2020 at 6:24 PM). ES&S was notified in this email that EAC had received a letter regarding possible misrepresentations in ES&S marketing materials and requested ES&S submit all marketing material for all ES&S EAC-certified voting systems by close of business Friday, January 10, 2020 for review. ES&S requested additional time (January 17th) to gather marketing materials, which request was granted by EAC. On January 17, 2020, ES&S provided EAC with a response letter and stated that a USB drive containing marketing materials was being overnighted to EAC (see attached letter from ES&S dated January 17, 2020). ES&S stated in its letter that “in order to avoid any confusion”, “ES&S has removed all references in its current corporate marketing materials related to the ‘optional use’ of modems.”

EAC staff subsequently reviewed the marketing material provided by ES&S and determined that several documents stated that the DS200 was “fully certified and compliant with EAC guidelines” along with language listing modem components as optional additions. EAC viewed this as a violation of the EAC’s Testing and Certification Program. EAC wrote a letter to ES&S on March 20, 2020 (see attached) setting forth corrective actions that ES&S was required to take within 15 days of receipt of the letter. ES&S responded on April 3rd with assurances of corrective actions taken or would be taken. ES&S

submitted a revised letter on April 17th. Both letters are attached. EAC will be conducting field reviews to ensure ES&S has complied with corrective actions.

I hope this update has been informative. Thank you for bringing this matter to our attention.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin Rayburn", is written over a horizontal line.

Kevin Rayburn
General Counsel

cc: Mona Harrington



Request for marketing material

15 messages

Jerome Lovato <jlovato@eac.gov>

Tue, Jan 7, 2020 at 6:24 PM

To: "Pearson, Steve" <smpearson@essvote.com>

Cc: Mona Harrington <mharrington@eac.gov>, Jessica Bowers <jbowers@eac.gov>, Paul Aumayr <paumayr@eac.gov>, "McKay, Sue" <slmckay@essvote.com>

Hi Steve,

We received a letter from Free Speech for People and the National Election Defense Coalition today regarding possible misrepresentation of ES&S EAC-certified voting systems. In particular, the letter included marketing material that appears as if the ES&S DS200 with modems has been certified by the EAC. In order to properly respond to this letter and ensure compliance with the EAC's Testing and Certification Program, I am requesting that ES&S submit all marketing material for all ES&S EAC-certified voting systems by COB this Friday, January 10th.

Please let me know if you have any questions.

Thank you,

Jerome Lovato

Director, Voting System Testing and Certification

U.S. Election Assistance Commission

Ph. 202-805-4613

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January 17, 2020

VIA EMAIL
AND OVERNIGHT DELIVERY

Jerome Lovato
Director, Voting System Testing and Certification
U.S. Election Assistance Commission
1335 East West Highway, Suite 4300
Silver Spring, Maryland 20910

RE: Request for Election Systems & Software, LLC (“ES&S”) Marketing Material

Dear Mr. Lovato:

ES&S is in receipt of your request for ES&S’ marketing materials associated with ES&S’ United States Election Assistance Commission’s (“EAC”) certified voting systems. Due to the volume and size of the materials being provided, ES&S is sending to your attention by overnight mail today, a thumb drive which contains ES&S’ corporate marketing materials for ES&S’ EAC Certified EVS 5.2.0.0 version through ES&S’ most recent EAC certified EVS 6.1.0.0 version. Although many of the materials being provided are public documents and have been provided to customers as well as displayed on our website, ES&S respectfully requests that the EAC not publicly disclose any information provided without first contacting ES&S to determine if such materials being requested contain ES&S proprietary and confidential information or links to such ES&S’ proprietary and confidential information.

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

In all cases, ES&S’ voting system releases capable of modeming unofficial results are separate releases that are tested by NVLAP/EAC accredited voting system testing laboratories on behalf of those jurisdictions which allow for modeming of unofficial election results. In no case has ES&S ever represented to these jurisdictions these releases to be EAC certified.

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. Included please see updated ES&S corporate marketing materials for ES&S’ products, including ES&S’ DS200 marketing material as this is the only ES&S voting system unit which can allow for modeming of unofficial election results.

If you have any questions or need additional information, please do not hesitate to contact me directly.

Sincerely,

Steve Pearson
Senior Vice President of Certification

cc: Kathy Rogers – ES&S



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:

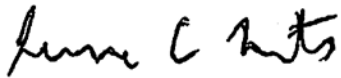
- Revise the marketing material to properly represent voting systems that have been certified by the EAC.
- Provide a plan to remove all misrepresented marketing material from circulation.
- Notify current and potential customers who received the misrepresented information that previous information was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



April 3, 2020

VIA EMAIL
AND OVERNIGHT DELIVERY

Jerome Lovato
Director, Voting System Testing and Certification
U.S. Election Assistance Commission
1335 East West Highway, Suite 4300
Silver Spring, Maryland 20910

**RE: Election Systems & Software, LLC (“ES&S”) DS200® Modem Marketing
Material Complaint**

Dear Mr. Lovato:

I am in receipt of your letter dated March 20, 2020, which sets forth certain findings by the Election Assistance Commission (“EAC”) regarding ES&S’ marketing materials for its DS200 precinct voting system tabulator (“DS200”) and other ES&S voting tabulation systems. ES&S has reviewed your letter and provides the following response to the findings identified by the EAC.

The EAC alleges that ES&S made certain misrepresentations in its DS200 marketing materials with respect to the DS200 being “fully certified and compliant with EAC guidelines” while also listing the use of a modem in the DS200 as an option for customers. As previously communicated to the EAC with respect to the use of modems with the DS200, it was never the intent of ES&S to state or imply that ES&S’ DS200 modeming capability was EAC certified. Further, ES&S makes those states which allow for modeming fully aware that the modeming configuration has not been approved by the EAC. Notwithstanding the foregoing and in order to avoid any confusion with respect to ES&S’ EAC certified voting systems and ES&S’ voting systems which allow for modeming, ES&S has and/or will take the following corrective actions as request by the EAC:

- ES&S has revised all of its DS200 marketing materials included on its website, as well as revised all print marketing materials for its DS200, to make it clear that the EAC has not certified the DS200 with the use of modeming;
- ES&S will send the enclosed letter to all of its DS200 customers who use the DS200 with modem, informing them that the DS200 with modem has not been certified by the EAC; and
- ES&S will post a notice to its customer portal advising all ES&S’ customers that the DS200 with modem has not been certified by the EAC.

In addition to the above finding by the EAC, the EAC alleges that ES&S’ also made certain representations in other ES&S marketing documents by stating that “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.”

Jerome Lovato
April 3, 2020
Page: 2

The EAC believes this statement is inaccurate since ES&S has state-certified voting systems that have not been tested or certified under the EAC's Certification and Testing Program. ES&S disagrees with the EAC's finding with respect to this statement, as all ES&S tabulation systems are submitted to independent test campaigns as part of the EAC Voting System Certification Program.

Please be advised that all ES&S tabulation systems are submitted for review and approval through the EAC Testing and Certification Program. This applies even to those ES&S tabulation systems which ES&S submits to states that do not require EAC certification and approval. All current ES&S tabulation systems which have been approved for use by those states which do not require EAC approval have been approved by the EAC. Therefore, ES&S' statement is factual and is not a misrepresentation as the EAC concluded in its findings. As such, ES&S does not believe that any corrective actions are necessary with respect to this statement.

As you are fully aware, the United States is currently involved with the unprecedented COVID-19 pandemic that has forced many employees of ES&S and its customers to take drastic actions through social distancing by working from home voluntarily or mandated through stay at home orders issued by a customer's state or local government. As a result of the COVID-19 pandemic, it may take ES&S additional time in notifying its customers as requested by the EAC. To that end, ES&S will make commercially reasonable efforts to provide its DS200 modem customers with the enclosed letter, as well as post its notice to ES&S' customer portal by no later than April 15, 2020.

If you have any questions or need additional information, please do not hesitate to contact me directly.

Sincerely,



Steve Pearson
Senior Vice President of Certification

cc: Kathy Rogers – ES&S



Election Systems
& Software

MAINTAINING VOTER CONFIDENCE.
ENHANCING THE VOTING EXPERIENCE.

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11208 John Galt Boulevard · Omaha, NE 68137 USA
Phone: 402.593.0101 · Toll-Free: 1.800.247.8683 · Fax: 402.593.8107
www.essvote.com

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. 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 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/.

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,

Steve Pearson
Senior Vice President of Certification



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www.essvote.com

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,

Steve Pearson
Senior Vice President of Certification



April 17, 2020

(This letter contains revisions to the original letter provided on April 3, 2020)

VIA ELECTRONIC MAIL: jlovato@eac.gov
AND OVERNIGHT DELIVERY

Jerome Lovato
Director, Voting System Testing and Certification
U.S. Election Assistance Commission
1335 East West Highway, Suite 4300
Silver Spring, Maryland 20910

**RE: Election Systems & Software, LLC (“ES&S”) DS200® Modem Marketing
Material Complaint**

Dear Mr. Lovato:

I am in receipt of your letter dated March 20, 2020, which sets forth certain findings by the Election Assistance Commission (“EAC”) regarding ES&S’ marketing materials for its DS200 precinct voting system tabulator (“DS200”) and other ES&S voting tabulation systems. ES&S has reviewed your letter and provides the following response to the findings identified by the EAC.

The EAC alleges that ES&S made certain misrepresentations in its DS200 marketing materials with respect to the DS200 being “fully certified and compliant with EAC guidelines” while also listing the use of a modem in the DS200 as an option for customers. As previously communicated to the EAC with respect to the use of modems with the DS200, it was never the intent of ES&S to state or imply that ES&S’ DS200 modeming capability was EAC certified. Further, ES&S makes those states which allow for modeming fully aware that the modeming configuration has not been approved by the EAC. Notwithstanding the foregoing and in order to avoid any confusion with respect to ES&S’ EAC certified voting systems and ES&S’ voting systems which allow for modeming, ES&S has and/or will take the following corrective actions as request by the EAC:

- ES&S has revised all of its DS200 marketing materials included on its website, as well as revised all print marketing materials for its DS200, to make it clear that the EAC has not certified the DS200 with the use of modeming;
- ES&S will send the enclosed letter to all of its DS200 customers who use the DS200 with modem, informing them that the DS200 with modem has not been certified by the EAC; and
- ES&S will post a notice to its customer portal advising all ES&S’ customers that the DS200 with modem has not been certified by the EAC.

In addition to the above finding by the EAC, the EAC alleges that ES&S’ also made certain representations in other ES&S marketing documents by stating that “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." The EAC believes this statement is inaccurate since ES&S has state-certified voting systems that have not been tested or certified under the EAC's Certification and Testing Program. ES&S respectfully disagrees with the EAC's finding as to this statement, as all ES&S tabulation systems are submitted to independent test campaigns as part of the EAC Voting System Certification Program. This applies even to those ES&S tabulation systems which ES&S submits to states that do not require EAC certification and approval.

All current ES&S DS200 tabulation systems which have been approved for use by those states which do not require EAC approval have successfully undergone EAC and VSTL testing. These same tabulation systems serve as the baseline for all ES&S tabulation systems which feature post-voting modeming. ES&S incorporates the modem capability onto these baseline EAC certified tabulation systems and creates a separate release for review and approval by those states which allow for the use of modems. Therefore, ES&S' statement is factual as all of its baseline tabulation systems are submitted through the EAC Testing and Certification Program and such statement is not a misrepresentation as the EAC concluded in its findings. As such, ES&S does not believe that any corrective actions are necessary with respect to this statement.

As you are fully aware, the United States is currently involved with the unprecedented COVID-19 pandemic that has forced many employees of ES&S and its customers to take drastic actions through social distancing by working from home voluntarily or mandated through stay at home orders issued by a customer's state or local government. As a result of the COVID-19 pandemic, it may take ES&S additional time in notifying its customers as requested by the EAC. To that end, ES&S will make commercially reasonable efforts to provide its DS200 modem customers with the enclosed letter, as well as post its notice to ES&S' customer portal by no later than April 15, 2020.

If you have any questions or need additional information, please do not hesitate to contact me directly.

Sincerely,



Steve Pearson
Sr. Vice President, Certification

Enclosure

cc: Kathy Rogers – ES&S