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September 28, 2009

VIA HAND DELIVERY

Honorable Christine A. Varney
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: Elections Systems & Software, Inc. Acquisition of Diebold's Premier Election Solutions

Dear Ms. Varney:

I am writing on behalf of Voter Action to request a meeting to discuss our concerns about the September 2, 2009, acquisition by Elections Systems & Software, Inc. ("ES&S") of the Diebold Inc. election systems business, known as Premier Election Solutions ("Premier"). Voter Action is a national non-profit organization that provides assistance to citizens and local communities with issues arising from privatization of key election functions, including the vote-counting process through the use of electronic election equipment.

Voter Action believes consumers of voting equipment—the voting public and election officials across the United States—face the imminent threat of higher prices, lower quality, and reduced service and innovation. Accordingly, Voter Action urges the Justice Department to take prompt action to unwind this transaction and ensure ES&S does not irrevocably integrate or waste Premier's competitive assets. This transaction threatens the democratic process itself.

As the events of the 2000 election dramatically have shown, the supply of reliable, quality voting equipment is critical to our democratic system. The ES&S acquisition of Diebold's Premier business threatens to undermine competition for such reliable, quality voting equipment as mandated by federal and state electoral reforms in the wake of the 2000 election events. More, not less, competition is necessary to ensure states and local communities have access to reliable systems.

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The ES&S/Premier Monopoly Threatens U.S. Elections

With combined shares apparently in excess of 70%, this transaction has merged the two leading suppliers of electronic balloting equipment, systems, and software. At least 44 out of 50 states use an ES&S or Premier (Diebold) product. (*See* enclosed data collected by the Pew Charitable Trusts.)¹ ES&S itself has boasted that ES&S voting systems alone “counted approximately 50% of the votes in the last four major elections.”²

Unique Potential for Adverse Effects on the Democratic Process

The ES&S/Premier acquisition is absolutely unique in its potential for disturbing U.S. election processes and results. The lack of competition in the supply of reliable and secure voting equipment and services is well documented. Voter Action compiles public information on efforts by state and local governments to counter the deceptive and anticompetitive practices of voting machine vendors. (*See* enclosed Voter Action Report, “Examples of State and Local Government Actions Against Deceptive and Other Unlawful Practices by Voting Machine Companies”).³ The ability to engage in such conduct will only increase with the merger of the two leading vendors.

Voter Action understands that many states and local communities have used the rivalry between ES&S and Diebold’s Premier to improve competition in quality and service, an area where the loss of competition is bound to result in yet worse service and quality. Allowing ES&S to acquire Premier will only increase the power of ES&S over local communities by eliminating ES&S’ leading rival for sales and services.

Quite simply, this is an audacious market share grab; ES&S is eliminating its closest rival to reduce competition for critical electoral equipment and outsourced services. There is simply no legitimate reason for this acquisition of monopoly power under the antitrust laws. Premier adds nothing that ES&S does not already offer. Prior to the acquisition, ES&S already was marketing itself as the industry’s only end-to-end supplier of electronic voting equipment and services.⁴ Before the acquisition, ES&S claimed to offer “the industry’s only integrated, end-to-end election management suite of solutions.” ES&S claimed to offer “‘one-stop-shop’ full service election coordination from start to finish” without Premier.⁵ To emphasize the point, ES&S also claims to be “the industry’s only integrated end-to-end election management software

¹ Data collected by the Pew Charitable Trusts, available at http://www.pewcenteronthestates.org/template_page.aspx?id=42332. *See also* “Voting machine firms’ merger questioned,” The Washington Times, Sep. 22, 2009, available at <http://www.washingtontimes.com/news/2009/sep/22/voting-machine-merger-alarming>

² <http://www.opednews.com/articles/ES-S-Acquires-Premier-Elec-by-Lani-Massey-Brown-090903-993.html>

³ http://www.voteraction.org/files/VA_Summary_of_Cases_2008.pdf

⁴ <http://www.essvote.com/HTML/about/about.html>

⁵ <http://www.essvote.com/HTML/about/dyk.html>

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solution.”⁶ There is no apparent justification for the transaction other than the acquisition of greater market power.

Recent press accounts underscore the widely recognized anticompetitive effects of this acquisition and its impact on elections across the United States:

- “ES&S Buys Premier (Diebold) Election Systems, for Near-Monopoly in U.S. Vote Count”⁷
- “ES&S virtually owns the election process”⁸
- “Sale Would Give One Voting Machine Company Most of US Market”⁹
- “In some states such as Ohio, the merger would reportedly make ES&S the sole provider of touch-screen or optical-scan voting systems in nearly every precinct in the state.”¹⁰
- “The increased size and influence of ES&S could make it harder for smaller, innovative companies to enter the market, ... The market power (of ES&S) will be so significant.”¹¹
- “[T]his sale could make a bad situation worse. ... states and cities, which have long complained about the low quality and high cost of the machines, would have less choice or bargaining power.”¹²
- “ES&S’ purchase of Diebold/Premier results in a single company, larger than all of their remaining major competitors combined, counting the majority of votes cast in the U.S.”¹³
- “Over the years, ES&S has shown itself, through our own reporting at least, to be amongst the worst of all the major e-voting players when it comes to the exploitation of ‘local jurisdiction dependency.’ ... That ability to use heavy-handed tactics will undoubtedly increase, as the options become still fewer for election officials set on using private companies to help carry out their public elections.”¹⁴

⁶ <http://www.essvote.com/HTML/products/management.html>

⁷ <http://electiondefensealliance.org/ES%2526S-Buyout>

⁸ <http://www.opednews.com/articles/ES-S-Acquires-Premier-Elec-by-Lani-Massey-Brown-090903-993.html>

⁹ <http://www.commondreams.org/newswire/2009/09/17-13>

¹⁰ *Id.*

¹¹ <http://www.cbsnews.com/stories/2009/09/04/business/main5288587.shtml>

¹² http://www.nytimes.com/2009/09/10/opinion/10thu2.html?_r=1&th&emc=th

¹³ <http://ampedstatus.com/diebold-finds-election-division-buyer-ess-to-control-most-us-elections>

¹⁴ *Id.*

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- “Voting Machine Monopoly Threatens Elections ... [C]onsolidation in the industry could make it harder for election administrators to negotiate affordable contracts and will lessen both competition and innovation.”¹⁵

This Unprecedented Combination Affects a Broad Range of Election Products and Services

The ES&S/Premier (Diebold) combination affects a broad range of election products and services that have been a public trust since the founding of our Republic. Following the 2000 election, many local communities across the country turned to the use of electronic balloting systems. These systems include not only an electronic ballot-marking device (*e.g.*, touch screen), but also integrated ballot design, voter registration and election auditing functions.

Elections officials have increasingly outsourced to the private sector key election functions at every level. Communities that conduct elections are making procurement decisions on a range of services, including the:

- Design and layout of each ballot;
- Printing of ballots;
- Recording and counting of votes via electronic voting machines and central tabulators using proprietary software;
- Maintenance of voter registration databases;
- Control over electronic poll books; and
- Auditing and recounting of elections when proprietary software is involved.

The Industry’s Anticompetitive History Underscores the Need for Urgent Action to Preserve Competition in the Election Services Industry

ES&S is apparently no stranger to antitrust problems. In 1997 the Antitrust Division appropriately stepped in to prevent the acquisition by ES&S’ predecessor (American Information Systems) of Business Records Corp., a rival supplier of voting tabulation equipment (see enclosed press release). Since that time, the industry has become increasingly concentrated – more dependent on a small number of certified vendors for balloting equipment, technology, and related services.

Consumers can only look to more recent allegations of anticompetitive conduct by ES&S for examples of what to expect from this combination.

For example, Voter Action understands that it is a practice of ES&S to require the purchase of related supplies, equipment and services to the purchase of its electronic ballot

¹⁵ <http://www.verifiedvotingfoundation.org/article.php?id=6715>

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machines. Voter Action has learned that ES&S has demanded customers purchase services traditionally conducted by the local election staff and separate vendors, from ballot design to the printing of ballots. Prior to the acquisition, Voter Action understood that electoral officials that preferred to purchase supplies and services from competing vendors or that wanted greater control over the balloting design and process could select Diebold's Premier business. Those customers would lose that choice in voting equipment and pay more for voting equipment with reduced quality.

Collusion would be just that more likely as a result of this transaction. For example, Voter Action is aware of a past investigation by the Florida Attorney General's Office into allegations of a concerted boycott of a customer by ES&S, Premier (Diebold), and the only other state-certified vendor of voting machines in Florida.¹⁶ The investigation was apparently dropped when Premier (Diebold) reversed its position and agreed to renew sales to the boycotted customer. And the unilateral effects of the combined firm's economic power against communities and other political units would also almost certainly be adverse.

This is an industry in which the customers—local communities—are often very small and lack in the resources to counter anti-competitive and deceptive practices. These communities rely on the incentive of Premier and ES&S to remain competitive. Voter Action, as an organization concerned with the outsourcing of key election functions, works closely with state and local elections officials to promote election integrity. (*See* enclosed background on Voter Action efforts concerning the election process.)

Absent action by the Justice Department, Voter Action is concerned that this transaction will give ES&S further market power and dominance over local communities that had previously used the competition between ES&S and Premier to secure a more competitive bid for more reliable and secure voting equipment and services.

Sincerely,



J. Mark Gidley

Enclosures

cc: Noah A. Brumfield

¹⁶ *See, e.g.*, Florida Antitrust Civil Investigative Demand issued to Diebold (Mar. 2006), available at [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-6NCL8G/\\$file/Diebold_subpoena.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-6NCL8G/$file/Diebold_subpoena.pdf)