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Justice Department Requires Key Divestiture in Election Systems & Software/Premier Election Solutions Merger

Divestiture Will Restore Competition in Voting Equipment Systems, Nine State Attorneys General Join in Department's Resolution

WASHINGTON — The Department of Justice announced today that it will require Election Systems & Software (ES&S) to divest voting equipment systems assets it purchased in September 2009 from Premier Election Solutions Inc. in order to restore competition. The assets to be divested include the means to produce all versions of Premier's hardware, software and firmware used to record, tabulate, transmit or report votes, including the Assure 1.2 system, and a license to better serve disabled voters. The department said that today's settlement will restore competition in voting equipment systems in the United States and that, without the divestiture, the acquisition would result in higher prices, lower quality and a reduced incentive to innovate.

The Department of Justice's Antitrust Division, along with nine state attorneys general, filed a civil antitrust lawsuit today in U.S. District Court in Washington, D.C., alleging that the transaction harmed competition. At the same time, the department filed a proposed settlement that, if approved by the court, would resolve the department's competitive concerns. The state attorney general offices are: Arizona, Colorado, Florida, Maine, Maryland, Massachusetts, New Mexico, Tennessee and Washington.

"The proposed settlement will restore competition, provide a greater range of choices and create incentives to provide secure, accurate and reliable voting equipment systems now and in the future," said Molly S. Boast, Deputy Assistant Attorney General for the Department of Justice's Antitrust Division.

According to the complaint, the acquisition substantially reduced competition as it combined the two largest providers of systems used to tally votes in federal, state and local elections in the United States. ES&S's acquisition of Premier made ES&S the provider of more than 70 percent of the voting equipment systems in the United States. The department said that because the cash value of the deal between ES&S and Premier was \$5 million, far below the mandatory reporting threshold for mergers under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the department's investigation of the transaction did not begin until the companies had combined their assets and dismantled many of Premier's operating divisions. The department said that today's settlement provides quick, effective relief that resolves the department's competitive concerns, and enables local and state jurisdictions to obtain competitive bids for their immediate voting equipment systems needs.

Under the terms of the settlement, ES&S must divest all of the intellectual property associated with all versions –past, present and in development –of the Premier voting equipment systems to another company. ES&S also must divest all Premier tooling and fixed assets, as well as inventory of parts and components. In order to allow the divestiture buyer to better serve disabled voters, ES&S must also grant a fully paid-up, irrevocable, perpetual license to use the AutoMARK, ES&S’s ballot marking device for which Premier had a limited license prior to the acquisition. The buyer of the divestiture assets will have the right to modify and improve both Premier products and the AutoMARK.

ES&S must sell the divestiture assets to a buyer approved by the department. The settlement prohibits ES&S from bidding on new voting equipment system contracts using the Premier equipment. The department also required that ES&S grant the divestiture buyer an opportunity to compete to provide services to Premier customers currently under contract with ES&S, giving customers the option to switch to the divestiture buyer or to remain with ES&S. The department said that this option addresses customer concerns that an outright divestiture of service contracts would disrupt the administration of upcoming primaries and general elections. ES&S also must provide access to knowledgeable Premier employees and agree to offer a supply agreement to allow the divestiture buyer time to establish its own manufacturing of voting equipment systems.

The proposed settlement, if approved by the court, would be in effect for 10 years. The proposed settlement requires ES&S to complete the divestiture within 60 days, or five days after the entry of the proposed settlement by the court, whichever is later. The department may agree to the extension of this time period by no more than 60 days. If ES&S does not complete the divestiture within this time period, a trustee selected by the department and approved by the court will be appointed by the court to complete the divestiture.

ES&S is a Delaware corporation with its headquarters in Omaha, Neb. Prior to its acquisition of Premier, ES&S was already the largest provider of voting equipment systems in the United States, had systems installed in at least 41 states, and collected revenue of \$149.4 million in 2008.

Premier, prior to its acquisition, was a subsidiary of Diebold Inc. and was incorporated in Delaware with its headquarters in Allen, Texas. Premier was the second largest provider of voting equipment systems in the United States, had equipment installed in 33 states, and collected revenue of approximately \$88.3 million in 2008.

As required by the Tunney Act, the proposed settlement, along with the department’s competitive impact statement, will be published in the Federal Register. Any person may submit written comments concerning the proposed settlement during the 60-day comment period to Maribeth Petrizzi, 450 Fifth Street, N.W., Suite 8700, Washington, D.C., 20530. At the conclusion of the 60-day comment period, the U.S. District Court for the District of Columbia may enter the proposed settlement upon finding that it is in the public interest.