# Department of Justice Requires Divestiture of Consummated Acquisition of Voting Equipment Systems

The Obama administration this week has demonstrated its continuing willingness to challenge consummated mergers and to impose significant requirements on an acquiring company in order to reconstitute the competitive viability of the purchased entity. On March 8, 2010, the Department of Justice's Antitrust Division ("Department") and nine state attorneys general filed a civil antitrust lawsuit against the nation's largest manufacturer of voting equipment systems, Election Systems & Software ("ES&S"), as well as a proposed settlement agreement. According to the complaint, ES&S's acquisition of Premier Election Services Inc. ("Premier") from Diebold, Inc. — which was valued at $5 million and consummated six months prior to the filing of the complaint — harmed competition and constituted a violation of Section 7 of the Clayton Act. This is the third time in fiscal 2010 that the Department has challenged a consummated transaction the value of which was below the Hart-Scott-Rodino ("HSR") reporting threshold.

Prior to the challenged acquisition, ES&S and Premier were the nation's two largest manufacturers of systems used to tally votes in federal, state and local elections. In 2008, ES&S and Premier had combined to provide approximately 70 percent of installed voting equipment systems used in the United States. ES&S and Premier voting equipment systems had been certified or approved in 42 and 33 states respectively, which was, according to the Department, "more states, by far," than any other manufacturer. According to the Department, customers considered ES&S and Premier to be each other's closest competitor, despite the existence of several other companies in the market.

On September 2, 2009, ES&S purchased Premier for $5 million and 70 percent of certain receivables. Because the purchase price of the transaction fell far below the HSR reporting threshold, ES&S was not required to report the transaction to the Department and the Federal Trade Commission prior to the purchase. Although the transaction had already been consummated and Premier's assets had been comingled within ES&S, the Department chose to investigate and take action to unwind the transaction pursuant to its authority under the Clayton Act.

The complaint alleges that ES&S and Premier were the "closest competitors" in the market for voting equipment systems because they offered systems that were certified in the greatest number of jurisdictions, offered the most complete suites of voting equipment systems, and had achieved reputations for manufacturing reliable equipment, which was critical to prospective purchasers. Three other firms compete in the market for voting equipment systems, but none, according to the Department, is likely to "replace the constraint Premier once exercised on ES&S's bidding behavior" because each is limited by "the level of certification obtained, lack of a full product line, and the lack of proven equipment." Moreover, the complaint alleges, the high barriers to entry in the market all but ensured that no new competitor would be able to enter the market and meaningfully compete with ES&S.

The proposed settlement agreement, which was filed simultaneously with the complaint, requires ES&S to recreate Premier's asset base, and to divest it to another company approved by the Department within 60 days of the order being accepted by the U.S. District Court for the District of Columbia. ES&S will be

required to divest all of the assets it acquired from Premier — including the intellectual property associated with Premier voting equipment systems, Premier's customer contract rights, tooling and fixed assets, and inventory of parts and components — and to manufacture products for and supply products to the new company until it can establish its own manufacturing capability. In addition, ES&S will be required to waive all contractual obligations that would otherwise prohibit Premier equipment owners from seeking services from another vendor, which will create new competition in the provision of services that did not exist prior to the acquisition.

The action taken by the Department of Justice in this case is noteworthy:

- First, it clearly demonstrates that the Department will challenge mergers that it considers anticompetitive, regardless of the size of the transaction. Here, a small acquisition, worth an estimated $5 million, far below the $63 million HSR threshold, triggered aggressive prosecution.
- Second, it demonstrates that the Department is willing to challenge — and force parties to unwind — consummated transactions. Clients, therefore, are advised to proactively address antitrust concerns on *all* transactions to ensure that deals are not annulled by subsequent prosecution.

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