

I. In Focus This Week

Potential sale of Premier to ES&S raises antitrust questions, other concerns *Sen. Schumer asks DOJ to investigate, Hart InterCivic files federal lawsuit*

By [M. Mindy Moretti](#)

When [Election Systems and Software](#) (ES&S) announced that it was purchasing [Premier Election Solutions](#) (Premier) from Diebold, no one seemed particularly surprised by the announcement.

“I have been in this industry for 13 years, so nothing surprises me. Honestly, that was my reaction,” said Michelle M. Shafer, vice president of communications and external affairs for [Sequoia Voting Systems](#).

Should the sale go through, ES&S will be purchasing Premier for a reported \$5 million in cash, plus payments representing 70 percent of any cash collected on outstanding accounts receivable as of August 31.

Diebold, Inc. purchased Global Election Systems for about \$31 million in January 2002 and since then has endured numerous lawsuits and problems with requirements that varied by state. According to published reports, Diebold has been looking to sell its elections division since early 2006.

ES&S is the largest election system company in the U.S. and serves 1,985 jurisdictions in more than 43 states with approximately 67 million registered voters (45 percent of the voting precincts). Premier Solutions controls 23 percent of U.S. voting precincts. The other three remaining major vendors are Sequoia Voting Systems (18 percent), [Hart InterCivic](#) (9 percent), and Canadian-based [Dominion Voting Systems, Inc.](#) (5 percent).

Doug Lewis, executive director of the [Election Center](#), notes that due to the nature of the elections industry, no one should be surprised when a company goes out of business or chooses to be purchased.

He noted that the [Help America Vote Act of 2002](#), created an almost unrealistic market for voting machines that now with a few exceptions, has changed because most jurisdictions are no longer purchasing new voting equipment or can afford to purchase new equipment.

“Economic reality is economic reality when you get right down to it and there’s going to be consolidation in this industry and this is probably just the beginning,” Lewis said.

Still, despite the lack of surprise, the reactions to the potential sale were fast, furious and varied. [Champagne County, Ill.](#) Clerk Mark Sheldon voiced his support on his [blog](#) saying that, “ES&S is an excellent company. I’m confident that they’ll pull off this transition well.”

Current Diebold customers, such as the state of [Maryland](#), expressed a bit more concern.

“Like all election officials, we are concerned about the impact that this sale will have on the voting system market. Clearly there is one less large vendor and therefore significantly less competition,” said Ross Goldstein, deputy state administrator. “Without competition, innovations, continued research and development, and a jurisdiction’s ability to obtain favorable pricing is greatly reduced.”

Despite reservations, Goldstein does see some minor advantages to the consolidation like the ability for jurisdictions to work together.

“Maryland has the advantage that all of the contracts are managed centrally, as opposed to separately among various counties. The central management and large scale nature of the contracts allows us certain leverage to ensure quality services and support,” Goldstein said.

“One development that has been helpful and is probably even more urgently needed now, is frequent communication and interaction with other clients of the vendor. Sharing experiences, hearing about possible pitfalls, and collectively holding the vendor to a standard of service may be a way to effectively managing this newly created giant.”

Still, there are concerns about one company controlling so much of the industry. Pam Smith with [Verified Voting](#) expressed unease about the impacts of having fewer vendors could have on the industry.

“Is it a bad thing [to having fewer elections vendors]? Here’s the thing, from the most basic level it shouldn’t matter who makes or sells the voting equipment with respect to transparency and security, if the system you have is auditable and that robust audits are being conducted, then it shouldn’t matter because you have some safeguards,” Smith said. “But in practical terms, how does this play out for a county that wants a new system or to improve the system it has?”

Smith noted that competition is often one those things that keeps pricing low and gives more negotiating power to jurisdictions that want get new, upgrade old or simply change voting systems. Smith also pointed out consolidating election vendors may also stifle innovation in new systems, equipment and ideas like open-source voting.

It’s the concerns about a monopoly on the industry that this week prompted Sen. Charles Schumer (D-N.Y.) to send a [letter](#) to the [U.S. Department of Justice](#) urging the full review of the sale.

In the letter sent to Attorney General Eric Holder, Schumer, who heads the Senate Rules and Administration Committee and is a senior member of the Senate Judiciary Committee, requested the Justice Department’s Antitrust Division probe the deal based on anti-competitiveness concerns.

“If this acquisition proceeds, one company could control over three-quarters of the U.S. market for voting systems. Given other factors, including high barriers to entering the market, I am deeply concerned that local governments and taxpayers will not be getting a fair deal because too much market power will be held in too few hands,” Schumer wrote.

This is not the first time that ES&S has been involved (or potentially involved) in a DOJ review. In 1997, American Information Systems purchased Business Records Corporation and became the company now known as ES&S. At the time, DOJ stepped in and forced a divestiture of the optical scan voting equipment business to another company, Sequoia Voting Systems.

A spokesperson for the Department said DOJ did not have a comment on the letter or any potential review at this time.

In addition to Schumer’s letter to DOJ, late last week, Texas-based, Hart InterCivic filed a [lawsuit](#) against Diebold Inc. and ES&S in U.S. District Court in Delaware.

“Simply put, we’re not surprised by this announcement. The more important question is what Hart intends to do about it,” the company wrote in an e-mail to its customers on Monday. “Our reaction to this transaction is straightforward: we believe it to be unlawful and, accordingly, Hart filed a complaint this afternoon against Diebold and ES&S in the United States District Court for the District of Delaware, seeking to stop this transaction.”

The suit seeks a temporary and permanent injunction against the sale because it “poses a significant and imminent threat of irreparable antitrust injury to plaintiffs. The transaction also poses a significant and imminent threat to irreparable harm to the other vendors...”

"In an industry with long expected product lifecycles and high switching costs, we know incumbency is a significant determinant of market share," the company e-mail said. "If allowed, we further believe the creation of a monopolistic-sized voting system supplier will lead to substantial anticompetitive barriers, decreased innovation and limited choices for jurisdictions."

Lewis questions to what end opponents of the sale are hoping for should DOJ or the lawsuit stop the sale.

"You can't force someone to stay in business," Lewis said. "So the sale doesn't go through and Premier still goes out of business."

Lewis speculated that the potential sale of Premier to ES&S and the subsequent request for DOJ review and the Hart lawsuit is just the start of things to come.

According to Shafer at Sequoia, the company has no intentions of either joining the current lawsuit or filing its own lawsuit with regard to this matter.

"The elections industry is not for the faint of heart. And that goes for everyone involved — from our nation's election officials, first and foremost, to advocates and academics to voting technology providers," Shafer said.

II. Election Reform News This Week

- In round two of the battle over voter ID in the Hoosier state, [the Indiana Court of Appeals today declared Indiana's voter ID law unconstitutional](#) because it does not apply uniformly to all voters. The three-judge panel unanimously held that the requirement that voters present government-issued photo identification at the polls runs afoul of the Indiana Constitution's "Equal Privileges and Immunities Clause," which provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Two reasons were cited by the Court of Appeals: the law doesn't require absentee voters to provide an affidavit affirming their identity even while requiring photo identification for in-person voters; and the law exempts residents of state-licensed care facilities from the ID requirement if their facility happens to be a polling place. But the court suggests that the legislature could address those concerns while retaining the voter ID requirement. Gov. Mitch Daniels told the Indianapolis Star that he had yet to read the [ruling](#).
- Several New York jurisdictions made their first foray into the world of paper ballots and optical scan counting for this week's primary election and the results were varied. Things seemed to go off without a hitch in [Chemung and Schuyler](#) counties where one county elections commissioner noted that things might have been too easy because voters kept thinking they had to do more in order to cast their ballots. In [Albany County](#), a software glitch that was supposed to have been fixed by the manufacturer prior to the election held up some early morning voting. In [Onondaga County](#), 74-year-old Howard Snow was the first county voter to try out the new system. "It was easy enough to do, but you feel awfully ignorant," Snow told the local paper referring to having to be corrected not to mark the ballot with an X, but to fill in the bubble. In [Madison County](#), voters were slowed a bit as the precinct-based scanning machine booted up, but once it got going Tuesday morning, no other problems were reported. In [Putnam County](#), everything went well while the polls were open, but some problems were experienced when it came time to count the votes. The tally also posed some problems in [Washington County](#). Some voters did express concerns about the [lack of privacy](#) afforded by the new paper-ballot system compared to the old curtained lever voting machines. But not all jurisdictions made the switch for the primary. In [New York City](#), the state's much-loved lever machines were still in use and the biggest complaints coming out of precincts there were incorrect ballots.
- There are storm clouds over paradise this week as [a judge in Hawaii has made permanent an oral ruling](#) that bars the state Office of Elections from using electronic voting machines or

transmitting election results over the Internet or telephone lines. Circuit Judge Joseph Cardoza, whose written ruling on the matter was filed Thursday, sided with five Maui plaintiffs who argued the electronic voting methods should have been subject to public hearings through the administrative rule-making process. How the ruling might affect the 2010 elections was not immediately known. Chief Election Officer Kevin Cronin told the *Honolulu Advertiser* his office was reviewing Cardoza's decision and was not prepared to comment on specifics. In addition, on Wednesday, two top state Senate Democrats said they have [no confidence in the state's chief elections officer](#) after a briefing where he struggled with several questions about his budget and legal challenges to the state Office of Elections.

- The Ashland County, Ohio Board of Elections on Tuesday authorized its attorney to [immediately file a complaint with the Court of Common Pleas to retrieve funding from Ashland County commissioners](#). Democratic member Dave Samsel, an attorney himself, told the *Ashland Times-Gazette* that the board's attorney, Don Hoover, recommended the board file now because it gives both parties the opportunity to discuss the complaint. Getting to this point has been a yearlong process. The board is looking to retrieve \$27,500 it claims commissioners cut from its budget. The elections board voted July 29 to seek outside legal counsel to fight the budget cuts. Board members met with commissioners that same day to retrieve the money previously cut but were denied. Commissioners say they advanced \$27,500 in January 2009 so the elections board could pay 2008 carryover expenses. In the two rounds of general fund appropriation reductions this year, board of elections funding has been cut \$45,418. Because the request was denied, the board hired counsel in August at a cost not to exceed \$5,000 to retrieve the money. The board's next step is to officially file the complaint with the court.
- According to the *Omaha News World*, [satellite early voting may finally be coming to Nebraska](#) after partisan bickering three years ago killed a proposal to the state's voters cast early ballots at grocery stores, libraries and other nontraditional locations. Now officials are making another run at the idea. If all goes well, Hall County voters could become the guinea pigs for "satellite voting" next year. County Election Commissioner Dale Baker said she hopes to have the program available for the 2010 primary election. "I'm more than anxious to try something new — anything to make it easier for people to cast their ballots," she said. "This is one step closer to making it that much easier."

III. Research and Report Summaries

electionline provides brief summaries of recent research and reports in the field of election administration. Please e-mail links to research to sgreene@pewtrusts.org.

[Electoral Laws and Turnout, 1972-2008](#) - Jan E. Leighley, Jonathan Nagler, paper prepared for presentation at the Fourth Annual Conference on Empirical Legal Studies, November, 2009, University of Southern California: New research on changes in voter registration laws from 1972-2008 examines the effects of these changes on voter turnout and the impact they have had on people in different demographic groups. These changes include the number of days prior to election day that registration closes; the availability of election day registration (EDR); the availability of early voting, and the availability of absentee voting. EDR is found to increase both overall turnout and convert between one out of six and one out of seven non-voters to voting via EDR. 18 to 24-year olds saw a 12.4 percentage point increase in turnout due to adoption of EDR while no positive turnout effect is observed for those aged 61 - 75. Early and no-fault absentee voting are found to have no consistent impact on turnout.

[Documenting Disfranchisement: Voter Identification at Indiana's 2008 General Election](#) - Michael J. Pitts and Matthew D. Neumann, *Journal of Law and Politics*, Forthcoming: Focusing on the 2008 general election in Indiana, the article finds that more than a thousand persons went to the polls and cast a provisional ballot due to a lack of valid identification and that the vast majority — 902 - of those provisional ballots went uncounted. Comparing Indiana with other states, the research shows Indiana to be among the nation's leaders in rejecting provisional ballots for lack of valid identification.

IV. Opinion

National: [Department of Justice, II, III](#); [Tom Perez](#)

Alabama: [Election reform](#)

District of Columbia: [Election integrity](#)

Massachusetts: [Election costs](#)

Michigan: [Detroit voting system](#)

Minnesota: [Instant-runoff voting, II, III, IV](#)

Mississippi: [Voter ID](#)

Montana: [Vote-by-mail](#)

New Jersey: [Vote-by-mail](#)

North Carolina: [One-stop voting](#)

Oklahoma: [Voting system](#)

Tennessee: [Elections funding](#)

***some sites require registration*

V. Job Opportunities

All job listings must be received by 12 p.m. Eastern on Wednesday for publication in our Thursday newsletter. Job listings are free but may be edited for length. Whenever possible, include Internet information. Please email job postings to mmoretti@electionline.org