UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. ELECTION SYSTEMS & SOFTWARE, Inc., *Defendant*.	CASE NO.: JUDGE: DECK TYPE: Antitrust DATE STAMP:

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendant Election Systems and Software, Inc. ("ES&S") executed a Purchase Agreement on September 2, 2009, pursuant to which ES&S agreed to acquire Premier Election Solutions, Inc. and PES Holdings, Inc. (collectively, "Premier"), and other subsidiaries of Diebold, Inc ("Diebold"). ES&S's acquisition of Premier was consummated on the same day. Since the acquisition, Premier no longer functions as an independent subsidiary, but has been integrated into ES&S's corporate structure.

The United States and the States of Arizona, Colorado, Florida, Maine, Maryland, New Mexico, Tennessee, and Washington, and the Commonwealth of Massachusetts (the "Plaintiff

States"), filed a civil antitrust Complaint on March 8, 2010, seeking injunctive and other relief to remedy the likely anticompetitive effects arising from ES&S's acquisition of Premier. The Complaint alleged that the acquisition combined the two largest providers of voting equipment systems in the United States, and the two firms that had been, for many customers, the closest bidders for the provision of voting equipment systems. This combination resulted in a substantial reduction in competition for the provision of voting equipment systems in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The loss of Premier as an independent competitor likely would result in higher prices, a reduction in quality, and less innovation in the U.S. voting equipment systems market.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order ("APSO") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of ES&S's consummated acquisition of Premier. Under the proposed Final Judgment, which is explained more fully below, ES&S is required to divest all of the assets needed for an acquirer to compete to provide voting equipment systems, including the intellectual property related to the Premier voting equipment systems that it purchased from Diebold; the tooling and fixed assets used to manufacture those systems; and existing inventory and parts related to the Premier voting equipment systems (collectively, "Divestiture Assets"). In addition, ES&S is required to divest a fully paid-up, non-exclusive, irrevocable license to ES&S's AutoMARK products. Under the proposed Final Judgment, only the Acquirer may offer Premier systems to compete for a new voting equipment system procurement, including orders that would require replacement of more than fifty percent of an installed system. To facilitate the Acquirer's ability to service the existing installations of Premier voting equipment systems, the

proposed Final Judgment also requires that ES&S waive all non-competition agreements for employees and waive any contractual terms that would otherwise prevent customers from selecting the Acquirer as their voting equipment system service provider. ES&S must also provide transition services to the Acquirer. Under the terms of the APSO, ES&S will take certain steps to ensure that the Divestiture Assets are preserved in their current condition and segregated from ES&S.

The United States and ES&S have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment until the divestiture is consummated and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

A. The Defendant

Election Systems and Software, Inc. is the largest provider of voting equipment systems in the United States. Prior to its acquisition of Premier, ES&S provided 47 percent of installed systems, in at least 41 states, and collected revenue of $149.4 million in 2008. Premier, now an ES&S subsidiary, was the second largest provider of voting equipment systems in the United States prior to its acquisition, with approximately 23 percent of all installed systems in 33 states, and collected revenue of approximately $88.3 million in 2008. On September 2, 2009, ES&S acquired Premier and other Diebold Inc., subsidiaries, for $5 million in cash, and 70 percent of

certain receivables.[1]

B. The Competitive Effects of the Acquisition on the U.S. Market for Voting Equipment Systems

1. Relevant Markets

Since the 2002 implementation of the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301-15545, most Americans rely on voting equipment systems to electronically cast their votes in local, state and federal elections. HAVA authorized funding for voting equipment systems to replace mechanical voting devices, such as lever and punch card machines, and established a new federal certification agency, the Election Assistance Commission (EAC), in order to ensure the accuracy, security and reliability of the voting process. *Id.* The EAC issued standards for voting equipment systems in 2002 and 2005, and those standards are continually evolving. HAVA also required that the voting equipment systems provide disabled voters the opportunity to cast a private and independent ballot. 42 U.S.C. § 15481(a)(3)(A)-(B) (2002).

A voting equipment system consists of the integrated collection of customized hardware, software, firmware and associated services used to electronically record, tabulate, transmit and report votes in an election. Hardware components may include recording devices such as precinct or central count Optical Scan ("OS") machines; Direct Recording Electronic ("DRE") machines; and Ballot Marking Devices ("BMD"). Recording devices may be used not only to cast votes, but also to create a paper record of each vote, to allow independent voting by disabled

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[1] Because the purchase price for this transaction fell below the reporting thresholds of the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976, ES&S was not required to report the acquisition to the Department of Justice or the Federal Trade Commission before consummation. *See* 15 U.S.C. § 18a(a)(2)(B)(i) (2000); 75 Fed. Reg. 3468 (Jan. 21, 2010).

voters, and to read votes cast by absentee or vote-by-mail voters. Depending on the needs of the jurisdiction, a voting equipment system may include only one type of device, or several different types of devices used in concert. Each type of recording device feeds votes into a tabulator, which counts each vote and prepares a report. All devices are bound together by a collection of proprietary election management software and firmware, which enables their operation and the communication and reporting of election results.

The number, variety, and operation of electronic components within a voting equipment system vary depending on the needs of the jurisdiction responsible for administering elections, which may be the state, county or local government, depending on state law. Voting equipment systems typically are sold to state, county and municipal jurisdictions, pursuant to request for proposals. The jurisdictions typically evaluate competing bids using a public procurement process and select a winning bid based on its compliance with state law, technical standards, certification standards, experience in other jurisdictions and commercial terms, such as price, delivery schedule and other conditions of sale. The combined technical and commercial needs vary among customers. Most successful bids also include multi-year service agreements.

A voting equipment system differs from the mechanical lever and punch card voting devices used in the past in conjunction with manual tabulation methods. Mechanical systems cannot accommodate speedy tabulation across a large number of voters; do not allow disabled voters the opportunity to cast an independent, private ballot; and are considered less accurate and reliable than voting equipment systems.

A small but significant increase in the price that vendors bid to provide voting equipment systems to customers would not cause customers to substitute away from electronic voting

equipment systems so as to make such a price increase unprofitable. Accordingly, the Plaintiffs allege that voting equipment systems are a relevant product market within the meaning of Section 7 of the Clayton Act.

In the United States, customers of voting equipment systems prefer suppliers with a substantial physical presence in the United States, including a network of sales, technical and support personnel and parts distribution. Customers prefer such vendors because, during the design, bid, and implementation phases of installing a new voting equipment system, customers interact with vendors to test system functionality, adjust technical specifications, correct design flaws, track progress and ensure successful implementation. A significant local service presence also is required to assist annually in the preparation for Election Day, and to address immediately system problems arising on Election Day.

A small but significant increase in the price of voting equipment systems in the United States would not cause a sufficient number of U.S. customers to turn to suppliers of voting equipment systems that do not have a substantial physical presence in the United States so as to make such a price increase unprofitable. Accordingly, the Plaintiffs allege that the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

2. Anticompetitive Effects

ES&S's acquisition of Premier combined two firms that many customers considered the two closest competitors in the provision of voting equipment systems, and the two largest providers of U.S. voting equipment systems, substantially reducing competition for the provision of voting equipment systems in the United States. As a result of ES&S's acquisition of its

closest competitor, ES&S has a reduced incentive both to compete as aggressively for bids and to invest in new products, thereby increasing the price and reducing the quality of the voting equipment systems available to most jurisdictions.

Prior to the acquisition, ES&S and Premier were considered the closest competitors by many customers because the two companies offered voting equipment systems certified in the greatest number of jurisdictions; offered a complete suite of voting equipment system products; had a reputation for reliable equipment; and enjoyed an incumbent vendor's expertise on election administration in several jurisdictions. ES&S and Premier were certified in more states by far than any other vendor, and were the only two active vendors with EAC certification at the time of the acquisition. Prior to the acquisition, ES&S and Premier also offered two of the most complete suites of voting equipment choices, an important factor for many jurisdictions because proprietary election management software prevents customers from selecting the best in breed of each type of device. Further, ES&S and Premier voting equipment systems had the broadest installed bases prior to the acquisition, which helped assure customers that the systems were proven by experience in the field. A proven voting equipment system is an important consideration for many customers because, although certification testing is designed to screen out technical problems, even certified machines have demonstrated security and accuracy problems when deployed in an actual election, which can undermine the integrity of the democratic process. In addition to supplying customers with proven equipment, ES&S and Premier employees provided a variety of valuable services to their customers, which gave the companies greater familiarity with the needs of each customer, and a resulting advantage in competing to sell each customer a new installation in the future.

A number of recent bid events substantiate the close competition between ES&S and Premier prior to the acquisition, and demonstrate that ES&S has responded to Premier's competition by reducing its own prices and offering other favorable terms. ES&S's acquisition of Premier eliminated ES&S's strongest competitor and, as a result, has given ES&S both the incentive and ability to profitably raise its bid prices significantly above the level they would be absent the acquisition. The remaining three competitors, limited by the lack of a full product line, inadequate certification, a limited record of proven equipment and, in at least one case, lack of financing, cannot fully constrain a unilateral exercise of market power by ES&S.

The acquisition of Premier also reduces ES&S's incentive to develop new, more accurate, and more secure voting equipment system products. In the past, ES&S has responded to Premier's efforts to meet new standards by following Premier's lead in the development of new products. The acquisition removes the firms' competitive pressure on each other to innovate, and is likely to reduce the quality and variety of new products brought to the market, reducing the choices offered to customers. Since its acquisition of Premier, ES&S has already withdrawn Premier products from certification testing in two states. In the absence of competitive pressure from Premier, ES&S is unlikely to have the same incentive to develop new products in the future.

Finally, entry or expansion by any other firm into the U.S. market for the provision of voting equipment systems is unlikely to prevent the substantial lessening of competition resulting from ES&S's acquisition of Premier. Firms attempting to enter into the development, production, and sale of voting equipment systems in the United States face several barriers that make successful entry challenging, time-consuming, and costly. Entry requires not only the

design and development of hardware, software and firmware products, but also obtaining multiple levels of certification, establishing a reputation for reliable equipment performance, and the financial wherewithal sufficient to assure a buyer of long-term service capabilities. The design and development of technology requires a considerable, risky capital investment over a period of several years. Most jurisdictions also require that vendors obtain federal and/or state certification, which can cost millions and take multiple years to complete. In addition, firms must establish a reputation for reliable system performance. As most voting equipment systems are used only once or twice every two years, establishing a reputation for reliable system operation takes several years of successful performance. Finally, providers of voting equipment systems must demonstrate both that they are financially sound and that they will respond quickly and effectively to requests for service or parts for many years after a new voting equipment system has been installed.

Therefore, ES&S's completed acquisition of Premier likely will substantially lessen competition in the United States market for voting equipment systems, which likely will lead to higher prices, lower quality and less innovation in violation of Section 7 of the Clayton Act.

III. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendant. The United States could have continued the litigation and sought a permanent injunction requiring that ES&S divest the Premier assets and voting securities. However, the acquisition of Premier by ES&S was consummated before the United States learned of the transaction and could commence an investigation. Given the diminution of

the Premier assets since ES&S acquired the company, relief that replicates the condition of Premier prior to the acquisition is not available. Premier operated as an independent subsidiary of Diebold prior to the acquisition. After ES&S acquired the company, it dismantled the business units necessary for independent operation, subsuming Premier operations into the ES&S corporate structure. Less than a month after the acquisition, the Premier business units responsible for sales, product design and development, and voting equipment system certification all were dismantled, and most employees of these business units were terminated. While ES&S continues to serve current Premier customers, it does so with the assistance of ES&S resources, staffing and operations. Consequently, unwinding the transaction to require a divestiture of only Premier voting securities and remaining assets would not be sufficient to restore the Premier entity that existed prior to ES&S's acquisition of the company.

Further, the litigation process would likely take considerable time. The Premier assets likely would diminish substantially during the pendency of litigation, particularly as preliminary relief is not available to compel ES&S to invest in ongoing research, development and certification of future Premier voting equipment systems. Even if a court ultimately ordered a divestiture, the delay would diminish, if not forestall, the competitive value of the Premier assets in the hands of a divestiture buyer because the standards for voting equipment systems would have evolved away from Premier's current line of products. The United States is satisfied that the proposed Final Judgment has allowed the government to secure relief more quickly than if the matter had gone to litigation, and that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the provision of voting equipment systems in the United States. Thus, the proposed Final Judgment will achieve all or substantially all of the

relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

IV. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects that would otherwise likely result from ES&S's acquisition of Premier. The divestiture will restore competition by making available to an independent competitor the Premier assets necessary to equip an economically viable competitor to ES&S in the provision of voting equipment systems in the United States.

The proposed Final Judgment requires ES&S to take certain actions, including divesting, within sixty (60) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, the following assets: (1) all of the intangible assets related to past and present Premier voting equipment system products, as well as those that were in development at the time of the acquisition; (2) tangible assets including all tooling and fixed assets related to the production, assembly and repair of those products; and (3) inventory and parts sufficient to meet the needs of the Acquirer.

In addition to these divestitures, the proposed Final Judgment also requires ES&S to grant a fully paid-up, non-exclusive, irrevocable license to ES&S's AutoMARK products. The AutoMARK products are Ballot Marking Devices ("BMD"), used in some jurisdictions to allow some disabled voters the opportunity to cast a private and independent ballot. Prior to the acquisition, Premier used a limited, non-exclusive license from ES&S to offer AutoMARK products as part of its EAC-certified Assure 1.2 system. To allow customers the greatest number of choices of systems that include an EAC-certified BMD, ES&S must provide the Acquirer with

a license to use, service, repair, modify and improve the AutoMARK products.

In order to facilitate the Acquirer's ability to provide services related to voting equipment systems to existing Premier customers, the proposed Final Judgement also requires that ES&S waive all non-competition and non-disclosure agreements for all current and former Premier employees. Access to Premier employees will allow the Acquirer to recruit employees with experience serving current customers, and expertise related to the development, sale, repair or service of Premier voting equipment system products. Allowing such recruitment will enable the Acquirer to re-establish the experience and expertise of Premier before its acquisition by ES&S, and so will facilitate its ability to restore competition in the sale of voting equipment systems. In addition to waiving all non-competition and non-disclosure agreements, ES&S is prohibited from interfering with the Acquirer's efforts to recruit Premier employees. The waiver is limited to six months, in order to encourage the Acquirer to solicit staff expeditiously, and minimize the disruption to upcoming elections that otherwise might result from significant staff turnover.

Under the terms of the proposed Final Judgment, only the Acquirer will be permitted to offer Premier voting equipment systems to existing customers for new installations. New installations of voting equipment systems are defined broadly to capture any procurement let under a Request for Proposal or Request for Quote, as well as any procurement that calls for replacement of 50 percent or more of a customer's installed equipment. By providing the Acquirer with the exclusive right to offer the Premier voting equipment systems to customers for new installations, the remedy replicates the incentive that Premier would have had, giving the Acquirer the greatest incentive to invest in the development of new Premier products.

The proposed Final Judgment also provides for the creation of new competition in the

provision of services related to voting equipment systems, in order to permit the Acquirer to replace the competition in the sale of voting equipment systems that was lost as a result of ES&S's acquisition of Premier. Currently, only one vendor typically is able to provide certain services to a voting equipment system customer, as these services are linked to the proprietary election management software that a particular vendor provides. The proposed Final Judgment, however, will allow both the Acquirer and ES&S to compete to provide all services related to Premier voting equipment systems, giving customers the option to switch to the Acquirer or to remain with ES&S for service of their existing Premier voting equipment systems. ES&S is required to waive any contractual provisions that otherwise would prevent or hinder the Acquirer from competing to provide services to current Premier customers. The potential to serve current customers enhances competition in the sale of voting equipment systems by enabling the Acquirer to develop expertise about a customer's election administration needs and practices. These provisions further enhance the divestiture's efficacy by ensuring that ES&S does not retain sole control over the quality and extent of service on the installed base of Premier equipment, and would not be able to use its provision of service to undermine the competitive goals of the divestiture. Leaving the ultimate choice of service providers to customers accommodates customer concerns that an outright divestiture of customer service contracts would disrupt the administration of upcoming primaries and elections.

In addition, the proposed Final Judgment requires that ES&S provide a transition services agreement and a transitional supply agreement for parts and inventory. The transition services agreement must be sufficient to meet the Acquirer's needs for assistance in matters relating to the utilization of the divestiture assets for a period of up to six months. ES&S also must agree to

supply parts and inventory to the Acquirer at commercially reasonable terms for up to two years, in order to allow the Acquirer access to parts and inventory while it arranges for independent manufacturing. ES&S also must not interfere with the Acquirer's efforts to contract with third party manufacturers, on whom vendors typically rely for the manufacture of parts and assembly of finished devices.

The divestiture must be accomplished in such a way as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that these assets can and will be operated by the Acquirer as a viable, ongoing business that will compete effectively in the development, production, sale, repair, and service of voting equipment systems in the United States. ES&S must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that ES&S does not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that ES&S will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price and terms obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture and other provisions of the proposed Final Judgment will eliminate the anticompetitive effects that likely would result from ES&S's acquisition of Premier.

V. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendant.

VI. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will

be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the *Federal Register*. Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination in accordance with the statute, the court is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").

As the United States Court of Appeals for the District of Columbia has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S.

Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must

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[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). Therefore, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[3] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4]

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[3] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: March 8, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on March 8, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon Defendant Election Systems and Software, Inc. and the Plaintiff States by mailing the documents electronically to their duly authorized legal representatives as follows:

FOR DEFENDANT, ELECTION SYSTEMS & SOFTWARE, INC.
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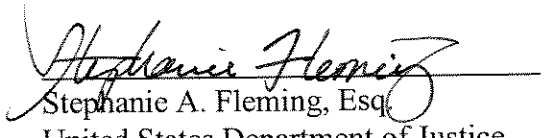

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