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A national 501c(3) nonpartisan nonprofit

SYNOPSIS

Black Box Voting has filed a formal letter of complaint and request for investigation with the United States Dept. of Justice Office of Antitrust and with the Federal Trade Commission.

CONTENTS:

1. THE COMPANIES
 2. MONOPOLY MAP
 3. HORIZONTAL MONOPOLY: HERFINDAHL INDEX
 4. VERTICAL MONOPOLY:
 - a. MONOPOLIZATION AND CONCEALMENT OF ESSENTIAL PROCESSES FROM END TO END
 - b. VERTICAL MONOPOLIZATION THROUGH LOCK-INS FOR SERVICES AND PRODUCTS
 5. OUR RESEARCH SHOWS A PAST HISTORY OF ANTICOMPETITIVE BEHAVIOR
 6. REGULATORY AND COST OF CERTIFICATION STRUCTURE AFFECTS ANTICOMPETITIVE ENVIRONMENT
 7. THE ELECTION ASSISTANCE COMMISSION, THE TECHNICAL GUIDELINES DEVELOPMENT COMMITTEE, AND PROPOSED FEDERAL LEGISLATION
 8. REVOLVING DOOR BETWEEN REGULATORS, PUBLIC OFFICIALS AND VENDOR PERSONNEL
 9. ACTUAL OWNERSHIP NEEDS TO BE INVESTIGATED AND DISCLOSED
 10. HISTORY OF ANTI-COMPETITIVE PRACTICES: EXAMPLES
 12. HISTORY OF THE EFFECT OF LACK OF COMPETITION:
LOW QUALITY, SLOWDOWNS, POTENTIAL SHUTDOWN OF ELECTIONS
 13. COMPLAINT THAT THIS ACQUISITION IS A MONOPOLY, SHOULD BE PROHIBITED UNDER THE CLAYTON ACT, TITLE 15 U.S.C. § 1-27 et. al.
- APPENDIX A: PARTIAL UNRAVELING OF OWNERSHIP TRAIL ON ES&S

This research is the culmination of seven years of work by Bev Harris and the Black Box Voting team. We also collaborated with Florida Fair Elections Coalition, a former DoJ investigator, voting rights scholar Paul Lehto, the Election Defense Alliance and others in preparing the evidence.



The Honorable Eric Holder
Attorney General
United States Department of Justice
950 Pennsylvania Avenue
Washington D.C. 20530

Letter of Complaint - Request for Investigation

Re: Federal antitrust concerns

Asserted under the Clayton Act, Title 15 U.S.C. § 18 et. al.

Dear Attorney General Holder,

Sept. 25, 2009

Black Box Voting is writing to express our objection to, and to request your investigation of, the proposed acquisition of Diebold's Premier Election Solutions by Election Systems & Software, Inc. (ES&S).

This acquisition is the latest action in a series of events which have created a concentration in the electronic voting industry. This acquisition will exacerbate and burden an already non-competitive and restrictive situation for our public elections, which under the Constitution are an essential part of our democratic system of government. This acquisition, in addition to overconcentrating the industry, will put a single company in a position to shut down federal elections at will. Thus, this overconcentration also creates a potential national security problem.

This letter of complaint regards the acquisition of Premier Election Solutions, Inc., a subsidiary of Diebold, Inc., by Election Systems & Software (ES&S). Both companies transact business throughout the United States.

We are asking that the office of Antitrust investigate this acquisition carefully keeping adverse and anticompetitive impacts in mind for the following:

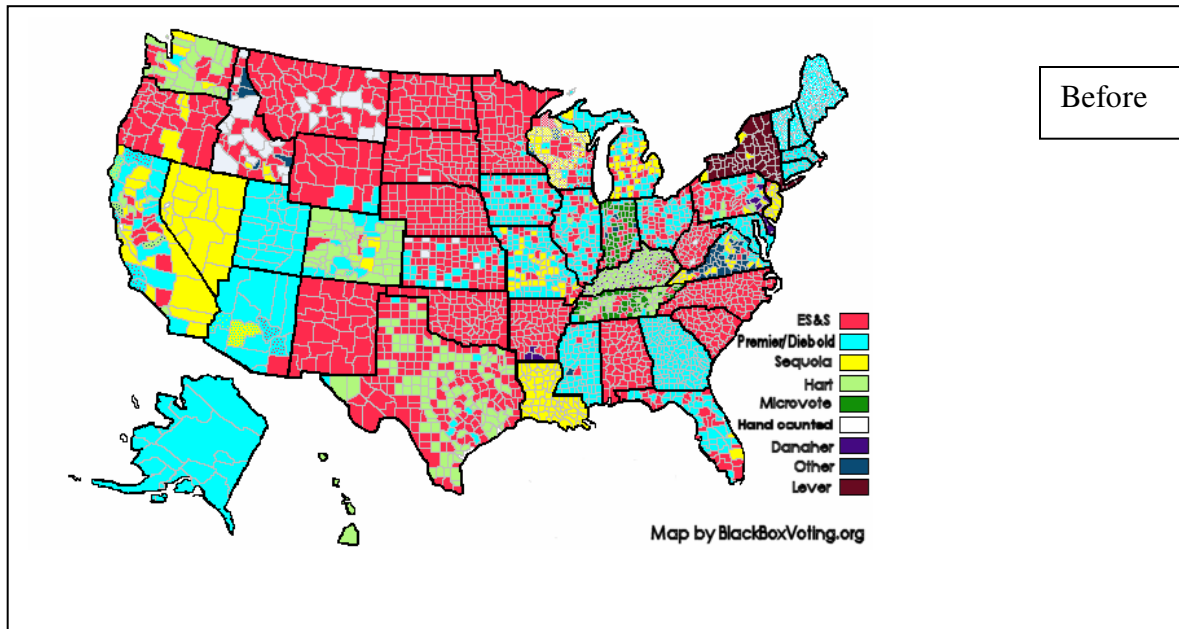
- (1) Voters and Taxpayers
- (2) Election officials
- (3) Counties, municipalities and state governments
- (4) Other private companies who may wish to compete

THE COMPANIES

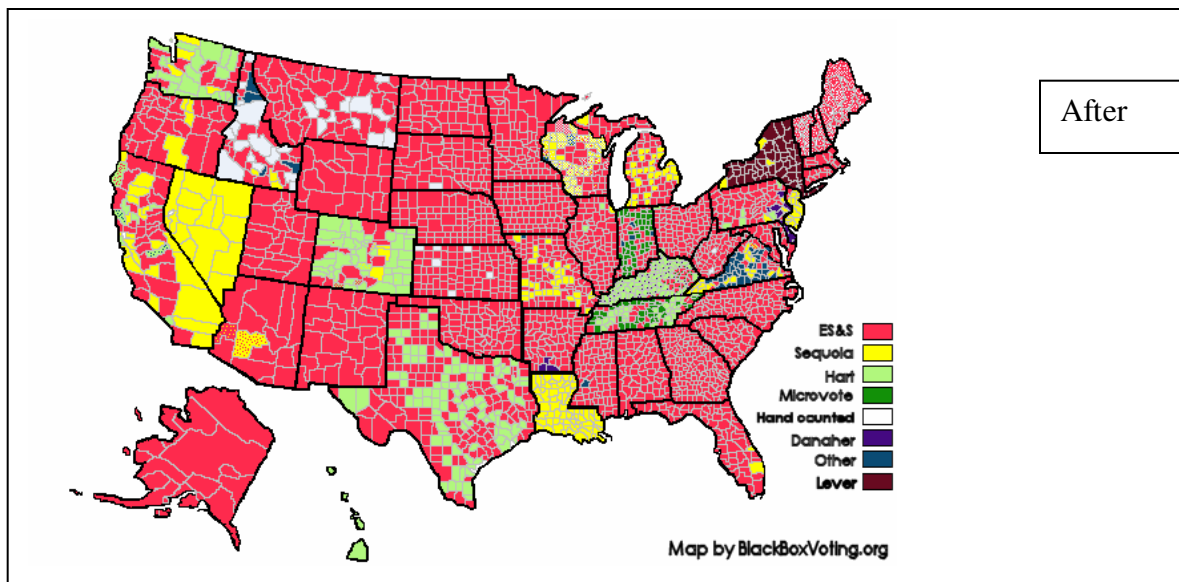
Diebold, Inc. is a publicly held company that is the ultimate parent of Premier Election Solutions. Diebold's principal place of business is at 5995 Mayfair Road, North Canton, Ohio 44720. Diebold is a diversified manufacturing company specializing in ATMs, vaults, and security products. Diebold's Premier Election Solutions division currently serves 27%⁽¹⁾ of the voting machine purchasing jurisdictions in the United States.

⁽¹⁾ **Secretaries of State and Boards of Elections**, supplemented with information by VerifiedVoting.org, compiled and tabulated by Black Box Voting, Inc.; *Sourced US Voting Systems by jurisdiction*

ES&S's principal place of business is at 11208 John Galt Blvd., Omaha, Nebraska 68137. ES&S, aka American Information Systems, Inc., in 1997 acquired the election systems division of a Texas Company called Business Records Corporation. In Sept. 2009, ES&S announced the acquisition of Diebold's Premier Election Solutions division.



Before



After

Prior to the acquisition, ES&S has served 47.7% of the purchasing jurisdictions in the United States. If the acquisition is allowed to stand, ES&S will hold 74.7%⁽²⁾ of the U.S. electronic/computerized supply of voting devices as market share.

<http://www.blackboxvoting.org/Sourced-US-Voting-Systems-by-jurisdiction-2009.xls> ; links to documents for each state contained within spreadsheet document.

⁽²⁾ Method of calculation: See footnote 1 *Sourced US Voting Systems by jurisdiction*; Market share by jurisdiction for ES&S and Premier Election Solutions added together to total 74.7%

New product sales in this market are currently handled by four, some say five companies.

- ES&S, the largest, handles 47.7% of the purchasing jurisdictions.
- Diebold's Premier Election Solutions handles 27%.
- Sequoia Voting Systems handles 9.5% (Sequoia is a foreign-owned supplier: Venezuela/Antilles)
- Hart Intercivic handles 10.4%.
- Some include Dominion Voting Systems, Inc. ⁽³⁾ This firm may end up servicing many locations in New York State, but with the exception of three New York counties, its machines have not yet been put into use. (Dominion is a foreign-owned supplier: Toronto Canada)
- A remaining amount of less than 5% is shared by six companies, most of which have gone out of business, no longer sell to new markets, or no longer develop new products to comply with state or federal voting system certification standards.

HORIZONTAL MONOPOLY: HERFINDAHL INDEX

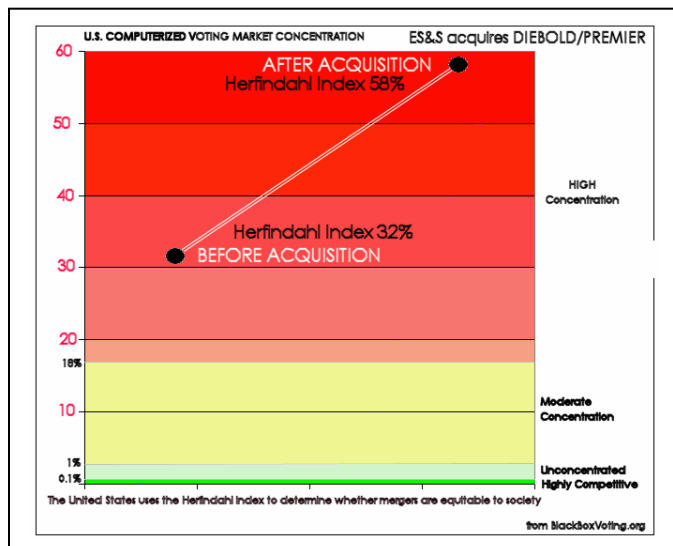
The Herfindahl index is used to determine whether acquisitions are equitable to society. Herfindahl indices higher than 0.18 are considered "concentrated." As market concentration increases, competition and efficiency decrease and opportunity for collusion and monopoly increase.

Herfindahl Index for voting industry before acquisition: **.32**

Herfindahl Index for voting industry after acquisition: **.58**

Change: **+.26**

The Herfindahl Index showed how overconcentrated the industry was -- even before the acquisition -- with a score of .32 (and .18 representing overconcentration). After the acquisition, the Herfindahl Index rises to .58.



VERTICAL MONOPOLY

MONOPOLIZATION AND CONCEALMENT OF ESSENTIAL PROCESSES FROM END TO END: An even bigger issue is the vertical top to bottom monopoly that every vendor has in their respective districts regarding concealed vote counts. This is similar to the vertical monopoly where, for example, an agricultural company might control the process from farm all the way up to making baking mixes and marketing them.

⁽³⁾ Reference to Dominion Voting Systems: Hart Intercivic, Inc. vs. Diebold, Inc. and Election Systems & Software, Inc. antitrust complaint: http://www.blackboxvoting.org/hart-v-diebold_ess.pdf

Electronic voting companies create the software, firmware and hardware which controls:

- (1) **Who is eligible to vote** (ES&S and Diebold's Premier sell voter registration systems and electronic poll books; they keep lists of who can vote, and instruct poll workers as to which voters to accept)
- (2) **Which absentee ballots to accept** (VoteRemote, made by Diebold/Premier, which performs signature comparison and other functions, and determines which ballots will be accepted and which will be rejected)
- (3) **How the votes are counted**, a process concealed from the public on computerized machines, performed by polling place or absentee ballot counting machines. This is controlled by firmware within the polling place or central count machine, combined with programs and functions on memory cards and cartridges, both of which are created by the vendor.
- (4) **How the votes are aggregated**. The aggregation is done by software also manufactured by the vendor. This is done on a separate computer, also supplied by the vendor, and the software adds up the total from each polling place voting machine.
- (5) **How the ballot coding is performed**. In general, the same set of software that aggregates concealed vote counts is previously used to create ballot printing files for the printer. Each of these printing files contains a code, implanted by the vendor, which tells the first counting machine how to interpret the votes.
- (6) **The calibration process**: Both optical scan machines and DRE machines determine whether votes will be counted based on calibration. DRE machines can be miscalibrated to shift votes to a different candidate; optical scan machine calibration can be set to over or under-report votes.

VERTICAL MONOPOLIZATION THROUGH LOCK-INS FOR SERVICES AND PRODUCTS: Purchasing jurisdictions are locked into the vendor for the following:

1. Ancillary products like memory cards, cartridges, activation cards
2. In the case of ES&S, public officials and printing companies are required to purchase paper for ballots from ES&S; in addition, approved ballot printing companies are specified by ES&S.
3. Software: Purchasers must pay ongoing fees for use of the software; only the software made by the vendor is permitted on the system
4. Parts: Purchasers are locked into using only the vendor or its approved local service vendor for maintenance.
5. In general, it is impossible for the purchaser to obtain aftermarket services, software upgrades (which may be required by regulatory agencies), or parts from any other vendor.
6. Purchases of these systems are prohibited by contract from examining the software themselves, and if they do their own testing on functionality and security, vendors have voided warranties and demanded the resignations of publicly elected officials.

OUR RESEARCH SHOWS A PAST HISTORY OF ANTICOMPETITIVE BEHAVIOR

The two companies involved in this acquisition have a history of anticompetitive actions to control the marketplace. Both companies have engaged in the sale of uncertified products in violation of some state law. (See sections "**HISTORY OF ANTI-COMPETITIVE PRACTICES** and **HISTORY OF THE EFFECT OF LACK OF COMPETITION**, beginning on pg. 10 of this letter.)

ES&S has a history of antitrust denial by the USDOJ, and was aware of this at the time it negotiated and finalized a purchase on Sept. 2, 2009. In 1997, American Information Systems (now going by the name ES&S) purchased Business Records Corporation (BRC); the Department of Justice intervened on antitrust grounds and forced ES&S to share the BRC optical scan voting equipment business with another company, Sequoia Voting Systems.⁽⁴⁾

REGULATORY AND COST OF CERTIFICATION STRUCTURE AFFECTS ANTICOMPETITIVE ENVIRONMENT

BACKGROUND -- INDUSTRY STRUCTURE: The cost and certification process at federal and state levels further restricts competition. The elections industry restricts trade through an approval process which steers purchasing to a small set of companies.

THE ELECTION CENTER, NASED, AND VOTING DEVICE TESTING: During the 1990s, a private entity called The Election Center was established, supported in part by fees from ES&S and other voting device vendors. The Election Center is run by R. Doug Lewis.⁽⁵⁾ Lewis claims to have created the National Association of State Elections Directors (NASED), and IACREOT,⁽⁶⁾ both election industry groups also supported in part by fees from voting device vendors.

During the 1990s, NASED created a "voluntary" system of guidelines, or product specifications, on purchasing jurisdictions. Involved in the technical committee which developed these NASED purchase specs was then-Secretary of State Ralph Munro (WA) and then-Secretary of State Donetta Davidson (CO).

These "voluntary" guidelines became mandatory in many states; particular vendors (and specific products) were restricted by state legislation requiring that vendors adhere to NASED specifications. The number of approved vendors was limited to only those with products "certified" by NASED.

⁽⁴⁾ Omaha World-Herald, Nov. 20, 1997: *Election Firms' Deal Approved--* "An Omaha ballot-counting company agreed Thursday to acquire a Dallas-based business under U.S. Justice Department conditions that will set up a competing company. American Information Systems Inc. of Omaha, which offers electronic ballot-scanning equipment and services to election districts, will pay \$47.3 million for the election business of BRC Holdings Inc. of Dallas. BRC said it would receive \$33.2 million in cash and a \$14.1 million note. **The transaction, announced about a year ago, was delayed by a Justice Department antitrust review.** The government ended its review Wednesday after the two companies agreed to sell BRC's optical scanning technology to Sequoia Pacific Systems.

^{(5) (6)} See R Doug Lewis bio and NASED incorporation papers, next page.



The Report | The Symposium | Resources | Contact

The Report

- [Contents](#)
- [Introduction](#)
- [Executive Summary](#)
- [Nominating Process](#)
- [Voting Process](#)
- [Electoral College](#)
- [Civics Education](#)

The Symposium

- [About](#)
- [Schedule & Panelists](#)
- [Video Archives](#)
- [Transcripts](#)
- [Photos](#)

Resources

- [Government links](#)
- [Election reports](#)
- [Legislation](#)

Contact

- [Comments & Suggestions](#)

[Home](#)

The National Symposium : Schedule & Panelists : **Doug Lewis**

Doug Lewis

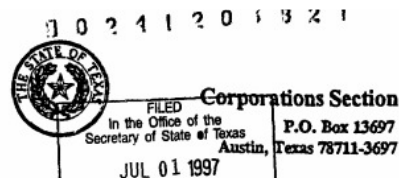
Doug Lewis serves as executive director of The Election Center, a national nonprofit organization serving the elections and voter registration profession, a position he has held since 1994. He developed and authored the Professional Education Program for elections/registration officials - named as the best continuing education program in the nation by the National University Continuing Education Association. From 1966 to 1980, he managed campaigns for Congress, U.S. Senate, governor, and the U.S. presidency, served as Executive Director of the Democratic party in Kansas and Texas, worked as Regional Political Director in the DNC, and served as Assistant to the President at the White House, and managed the political affairs for former Texas Governor John Connally.

Lewis also has more than 15 years of business experience in fields such as management consulting for the petrochemical, refining, and chemical processing industry; and computer software and hardware.

Among his other accomplishments are the development of the first Code of Ethics for voter registrars and elections administrators, the establishment of the Joint Elections Officials Liaison committee (JEOLC), the National Association of State Election Directors (NASED), the National Association of County Recorders, elections officials, and Clerks (NACRC), the International Association of Clerks, Recorders, Election Officials, and Treasurers (IACREOT), and the International Institute of Municipal Clerks (IIMC). Lewis also established the National Postal Task Force, the National Task Force on Voting Accessibility, and the National Elections Reform Task Force to study and propose solutions to the problems of the 2000 Presidential election.

Lewis serves as the director of the Voting Systems Program for NASED, where he is responsible for managing the qualifications, testing, and approval of voting equipment in America through independent test authorities, and sits as member of the national Voting Systems Board to develop and update the Federal Voting Systems Standards, and serves as a member of California's Internet Voting Advisory Committee.

(c) 2001, University of Virginia Center for Governmental Studies



Office of the Secretary of State

Corporations Section

P.O. Box 13697 Austin, Texas 78711-3697

STATEMENT APPOINTING AN AGENT BY AN UNINCORPORATED NONPROFIT ASSOCIATION

The named nonprofit association hereby appoints an agent authorized to receive service of process pursuant to section 12(a) of the Texas Uniform Unincorporated Nonprofit Association Act.

- The name of the nonprofit association is National Association of State Election Directors (NASED)
- A. The federal tax identification number of the association is _____
B. The nonprofit association does not have a federal tax identification number at this time. (Check 2B if applicable.)
- The address of the nonprofit association in Texas, or if the association has no address in this state, its address out-of-state, is _____
NASED, c/o Election Center, 12543 Westella, Ste 100 Houston TX 77077-3929
- The name of the person authorized to receive service of process on behalf of the nonprofit association is Mr. Tom Harrison and the person's street address in Texas is 201 E. 14th, 10th Floor, Austin, TX 78701.
- As evidenced by the signature below, the person appointed as agent to receive service of process accepts the appointment made by the nonprofit association.

National Association of State Election Directors

Name of the nonprofit association

By: [Signature]
Signature of Authorized Officer

Christopher M. Thomas
Typed or Printed Name

President
Title

Appointment as Agent Accepted

By: [Signature]
Agent for Service of Process

The Election Center under R. Doug Lewis then selected an individual, Shawn Southworth, to test voting devices.

Various employers of Shawn Southworth were paid by voting device vendors for Southworth's testing. The company employing Southworth changed several times, from PSI to Metamor, from Metamor to Ciber, but each time the same individual, Shawn Southworth, was selected to test voting devices for ES&S, Diebold, and Sequoia. In a videotaped interview with Black Box Voting, Southworth stated to Black Box Voting that the vendors did not want him to put anything negative in his reports.⁽⁷⁾

All voting device defects detailed in the examples that follow in this letter, and many more, passed Southworth's examinations and thereby achieved certification by NASED. The list of certified voting systems was distributed by The Election Center, which also recruited elections officials and provides training and recommendations for elections officials.

THE ELECTION ASSISTANCE COMMISSION, THE TECHNICAL GUIDELINES DEVELOPMENT COMMITTEE, AND PROPOSED FEDERAL LEGISLATION:

Currently the Election Assistance Commission (EAC), a federal agency directed and run by commissioners appointed by the Executive Office, develops purchase specifications and approves testing firms for voting devices. The EAC was established in 2002 to distribute funds associated with the Help America Vote Act. It has expanded its role to one of *de facto* control over vendors and the products that may/must be purchased.

The EAC formed a "Technical Guidelines Development Committee" (TGDC), to create design specifications for new computerized voting systems. These specifications are then used to propose new laws⁽⁸⁾ mandating purchase and repurchases, effectively steering procurement to one or a small number of vendors, and also forcing taxpayers to purchase new systems every 2-4 years.

In order for any other company to enter into competitive bidding, a new firm must first go through a federal testing and certification process which historically takes several years. Because the TGDC alters its design specifications every 2-4 years, by the time new companies have gone through testing and certification their products can be obsolete; the constant new design specs also require taxpayers to underwrite a steady flow of new systems, in effect strong-arming purchase of approximately 1 million new voting computers every few years, at taxpayer expense. By contrast, less expensive older voting systems typically have remained functional for 20 to 100 years, or longer.

⁽⁷⁾ Video footage of the interview with Shawn Southworth is contained in the HBO documentary "Hacking Democracy"

⁽⁸⁾ Proposed federal legislation such as the "Holt Bill" (HR 2894), seeks to mandate purchase of new systems into every precinct in America. It is estimated that the purchase requirements in HR 2894 will produce at least \$3 billion in mandated purchases to match new TGDC design specifications. The TGDC puts out new design specs every three to four years. Currently only ES&S claims to meet the specifications which would be required for purchase in the Holt Bill, HR 2894. Holt's office identified the TGDC specifications as its reference for proposing a required new voting device.

Exceptional selling advantage goes to dominant companies who become "close" with the EAC and its TGDC.⁽⁹⁾

—Original Message—

From: Groh, John
Sent: Monday, September 18, 2006 9:23 AM
To: Tesi, Aldo; Carbullido, Ken; Crump, Gary; Anderson, Eric; O'Brien, Tom; Nelson, Matt; Duncan, Guy
Cc: Schiefert, Karen; Buchanan, Janet; Benek, Allan; Pearson, Steve; Palmer, Rob; Jill Friedman-Wilson (friedmj@fleishman.com)
Subject: FW: Member Alert: New EAC Commissioner HEADS UP- replacing Chairman Paul DeGregorio- John Groh comments below

All:

Last week I had calls that current Chair of EAC, Commissioner Paul DeGregorio was up for renewal of his spot on the commission. The Whitehouse did not resubmit or approve his nomination.

Over weekend several e-mails have confirmed new appointment to EAC. See below information.

I do not know this individual from any dealings I have had in DC or Florida. Will get more and share. I will be at EAC Public Hearing Thursday September 21st in St Louis, so I am sure to get full dose of what and why changes being made. Paul's term was long expired, so this is no way is removal of him from office. But clearly also not a vote of confidence.

The Commission is made up of:

Donneta Davidson (Rep)- former Colorado county clerk & Colorado Secretary of State

- she has election running experience
- also is the lead for EAC with NIST on next round of standards
- **ES&S knows her very well**

Gracia Hillman (DEM) - former league of Women President

- Ms Hillman was Chairman, taking on role when first Chair DeForrest Soares resigned
- Civil rights, and voting right advocate/activist
- very little election knowledge
- has not been the most engaging commissioner
- ES&S has good relationship with her

EAC losing two Commissioners

Chair Paul DeGregorio (Rep) by large amount had more election knowledge than all the other commissioners. **Losing Paul will be blow to technology side** and person of reason, understanding voting is process with many moving parts.

Vice-Chair Ray Martinez (Dem) was the most engaged Commissioner. He attended every NIST meeting and wanted to learn all he could. Announced his resignation back in March, but remained until August. Ray is returning to Austin

Texas. He is originally from Texas, has large family there, and wants to get back into a private law practice.

ES&S knows both of these individuals very well. I know they will remain involved in election reform and will surface somewhere involved.

1.) I do not know this newly appointed individual Caroline C. Hunter, of Florida.

- will dig for more on her background
- will ask SoS FL Cobb and others if they know her
- Linda Bennett, does this name ring any bells with you

2.) No one has been appointed for replacing Ray Martinez.

- since this is DEM appointment may take some time

Note: these changes are dramatic and will affect the capability and capacity of the EAC to be effective in short term. Also points out that **ES&S needs to be in DC at EAC and other key influencer groups.** Knowing the EAC is important to **ES&S.**

Please if you get anything from your sources, share.

John S. Groh
Election Systems and Software International
11208 John Galt Blvd.
Omaha, Nebraska 68137 USA
office 402-593-0101
office 402-537-1111 direct line
home 402-652-3433
cell 402-660-5292
<http://www.esvote.com>

The permitted sale of Premier Election Solutions to ES&S will consolidate this not-very-competitive process for years to come based on the historical process timeline.

In addition, certain states have added their own purchasing restrictions. The states of Texas and Ohio, for example, do not permit Sequoia Voting Systems to sell systems to their counties. The state of Florida does not permit Hart Intercivic to sell voting systems in Florida. And the state of New Hampshire has established an unusual ballot design requirement which precludes all vendors except Diebold/Premier. Some states, like Georgia, Maryland, New Mexico, Arkansas, West Virginia and Utah require all local counties to purchase a system from a single vendor selected by state officials.

⁽⁹⁾ See e-mail documents from ES&S employee John Groh, above.

REVOLVING DOOR BETWEEN REGULATORS, PUBLIC OFFICIALS AND VENDOR PERSONNEL

Furthering the affect of regulatory and certification influence on an already anticompetitive environment is the crossover of personnel from regulatory agencies to vendors.

- For example, former Washington State Secretary of State Ralph Munro, formerly head of the NASED technical committee influencing which voting machines and vendors would be certified, took a position with a voting device vendor (VoteHere) just 10 days after leaving office. Washington state law requires public officials to wait one to three years before taking a position with a vendor over which their office made purchasing decisions. The VoteHere company, at the time Munro took over, was selling voting devices. Munro's VoteHere company then sold a ballot tracking device that placed unique identifiers on each ballot, tied to the voter, another violation of Washington state law. Recently, Munro has joined a group to make recommendations on "voter registration modernization", steering election practices towards additional purchases of new "to be built" products.
- A state of California public official, Lou Didier, recommended voting systems for state approval. Didier then took a paid position with ES&S.
- Former California Secretary of State Bill Jones advocated voting system purchase, then took a paid position with Sequoia Voting Systems.
- Deborah Seiler worked with the California Secretary of State's office during a time period when it was expanding the purchase of electronic and computerized voting systems in the state; she went from that position to a paid sales position with Diebold Election Systems, and then to a position in Solano County California as elections chief.
- Clark County Nevada, under the guidance of Kathryn Ferguson, purchased Sequoia voting machines. Ferguson then went to take a public position in Santa Clara County, California, where she again took charge of purchasing voting machines and again procured Sequoia voting machines. Then Ferguson took a paid position with Sequoia Voting Systems.
- DuPage County Illinois elections chief Robert Saar, without disclosing it and while he was a public official for DuPage County, was marketing and taking money for selling another computerized elections product, the Robis "AskEd" polling place device. Saar then took a position as the head of IACREOT -- like NASED, a industry group founded by The Election Center. Both IACREOT and The Election Center provide ongoing training and networking for elections officials and both receive some funding from a small number of elections industry vendors which benefit from the recommendations provided by these groups.

ACTUAL OWNERSHIP NEEDS TO BE INVESTIGATED AND DISCLOSED

In an extraordinary situation for public elections, electronic and computerized voting systems in effect conceal the counting process from the public (a process deemed unconstitutional by Germany's high court). Such concealed counting mechanisms are under ultimate control of the vendor's programmers and suppliers, and those who service the machines and program the cartridges and memory cards on which votes are stored.

It is unlikely that concealing the counting processes can meet the definition of "public" for our public elections. But in addition to concealing the counting process, the names of those who own and manage the voting machine companies are also concealed (except for Diebold's Premier Election Solutions; Diebold is a publicly held company). ES&S, Sequoia, and Hart Intercivic are privately held.

A full examination of the owners of these companies would be prudent and necessary before this acquisition can be allowed to go through. Without that, there is no way to ascertain whether the owners overlap. In other words, while we know that ES&S purchasing Diebold's Premier Election Solutions would produce a 74.7% market share, we do not yet know if any of the ES&S investors are also invested in Hart Intercivic, or Sequoia Voting Systems.

Without knowing who owns ES&S and the other companies, we have no way to know whether regulatory agencies, testing laboratories, or the private (but pseudo-public) agencies like IACREOT, which influence election administrations, cross over into ownership with products they benefit.

Please see Appendix A for a partial unraveling of the real ownership behind ES&S.

HISTORY OF ANTI-COMPETITIVE PRACTICES: EXAMPLES

1. The Leon County, Florida Anti-trust investigation: Florida Attorney General Charlie Crist opened an investigation into Diebold, ES&S and Sequoia for antitrust violations after the only three vendors authorized to do business in Florida refused to sell to Leon County, a discriminatory practice which violates the Clayton Act. The state of Florida began to investigate collusion among vendors, but the investigation was tabled when vendors changed their mind to offer their products for sale to Leon County. Identical documents were served on all three voting system vendors.⁽¹⁰⁾

⁽¹⁰⁾ STATE OF FLORIDA, Department of Legal Affairs, OFFICE OF THE ATTORNEY GENERAL: ANTITRUST CIVIL INVESTIGATIVE DEMAND No. 06-040: "This antitrust civil investigative demand is issued pursuant to the Florida Antitrust Act of 1980, Section 542.28, Florida Statutes, in the course of an official investigation to determine whether there is, has been or may be a violation of Sections 542.18 or 542.19, Florida Statutes (parts of the Florida Antitrust Act of 1980); or sections 1 or 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2), by conduct, activities or proposed action of the following nature: possible contracts, combinations or conspiracies in restraint of trade or commerce relating to the sale of voting machines and peripheral equipment in the State of Florida...."

[http://myfloridalegal.com/webfiles.nsf/WF/MRAY-NCL8G/\\$file/Diebold_subpoena.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-NCL8G/$file/Diebold_subpoena.pdf)

[http://myfloridalegal.com/webfiles.nsf/WF/MRAY-NCL9U/\\$file/Election_Systems_subpoena.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-NCL9U/$file/Election_Systems_subpoena.pdf)

[http://myfloridalegal.com/webfiles.nsf/WF/MRAY-NCLAG/\\$file/Sequoia_subpoena.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-NCLAG/$file/Sequoia_subpoena.pdf)

2. The State of California false claims lawsuit: State of California: In 2004, Attorney General Lockyear announced a \$2.6 million settlement with Diebold to resolve false claims allegations. The lawsuit was filed by Black Box Voting founder Bev Harris, and Black Box Voting Board Member Jim March. After conducting an investigation into Harris and March's false claims allegations, the state of California joined the suit, accusing Diebold of making false claims about the security, and certification, of its voting devices.⁽¹¹⁾

3. The State of Arkansas bribery scandal: Arkansas Secretary of State Bill McCuen pleaded guilty to felony charges that he took bribes, evaded taxes and accepted kickbacks in connection with voting device purchase from Business Records Corp, which by the time of the conviction had been acquired by ES&S. A top executive at ES&S and former Business Records Corp employee, Tom Eschberger, received immunity for his part in the scheme, for testifying against McCuen.⁽¹²⁾

⁽¹¹⁾ *Settlement Would Resolve False Claims Allegations, Strengthen Security of Equipment*

(OAKLAND) - Attorney General Bill Lockyer today announced a proposed \$2.6 million settlement with Diebold Election Systems, Inc. (Diebold) to resolve a lawsuit that alleged the Texas-based firm provided false information to obtain payments from the state and counties for its electronic voting equipment. ... "In making false claims about its equipment, Diebold treated that right, and the taxpayers who bought its machines, cavalierly. This settlement holds Diebold accountable and helps ensure the future quality and security of its voting systems." The complaint is an amended version of a false claims lawsuit originally filed November 21, 2003 by James March and Bev Harris. Lockyer and the local prosecutors, after conducting their own investigation, intervened on September 7, 2004 and took over the case. ... Diebold made false claims about the security, and state and federal certification, of its touchscreen machines and vote tabulation system. As a result of those false claims, the complaint alleges, Alameda and other counties spent taxpayer money to buy the equipment. The state then reimbursed six counties for a portion of their payments with funds provided under the Voting Modernization Bond Act of 2002 (VMBA), according to the complaint. Those counties included Alameda, Kern, Lassen, Plumas, Santa Barbara and Siskiyou." Nov. 10, 2004, available at <http://ag.ca.gov/newsalerts/release.php?id=843>

⁽¹²⁾ *Voting-machine sales can be dirty business:* The Baton Rouge Advocate, 5 February 2002; Bill McCuen, guilty plea to felony charges of bribery, tax evasion and accepting kickbacks. In Arkansas, Secretary of State Bill McCuen pleaded guilty to felony charges that he took bribes, evaded taxes and accepted kickbacks. Part of the case involved Business Records Corp., a Dallas company that sold Arkansas computerized systems for recording corporate and voter registration records. Arkansas officials said the scheme involved McCuen and then-BRC employee Tom Eschberger selling used voting machines that BRC received as trade-ins. The two formed a side company, and McCuen was among those who benefited from the machine sales. Eschberger got immunity from prosecution for his cooperation. Today, he's a top executive of ES&S. In Louisiana, former Elections Commissioner Jerry Fowler is serving a five-year term in federal prison for taking hundreds of thousands of dollars in kickbacks in another voting-machine scandal.

4. **The State of California lawsuit against ES&S for deceptive practices:** Secretary of State Debra Bowen announced in March 2009 that the state would receive \$3.25 million from ES&S in connection with a lawsuit the state filed against ES&S for selling unauthorized voting systems to five counties.⁽¹³⁾

5. **The Angelina County, Texas threat letter:** Angelina County was forced by judicial order to re-run an election due to problems with results when an ES&S technician tallied the votes incorrectly. When Thelma "Midget" Sherman, elections chief for Angelina County, expressed concern about paying the \$3,900 for the inept ES&S technician, ES&S responded with a threat letter, strong-arming her into signing a new contract or ES&S would refuse to run the November 2008 general election.⁽¹⁴⁾

⁽¹³⁾ **Bowen settles voting machine lawsuit:** The Sacramento Bee - March 19, 2009

<http://www.sacbee.com/static/weblogs/capitolalertlatest/020851.html>

Secretary of State Debra Bowen said today the state will get \$3.25 million after she **settled her department's lawsuit against Election Systems & Software Inc.**, the electronic voting machine manufacturer. ...Bowen filed a lawsuit against the voting machine manufacturer in November 2007, amid allegations that the company had sold 972 AutoMARK Model A200 ballot-marking machines to several counties that contained hardware changes that had were not authorized by the Secretary of State, as required by law.

Related item: Colusa County, Calif: *Unapproved vote machines purchased by Colusa County:* Appeal-Democrat - Oct. 9, 2007

http://www.appeal-democrat.com/news/whether_55099__article.html/state_voting.html

Some Colusa County residents voting in the February primaries may hit a roadblock on their way to the polls – **an investigation into whether 20 of its electronic voting machines lacked the state's approval.** The office of Secretary of State Debra Bowen is looking into whether **Election Systems & Software sold the machines to Colusa and four other counties without state-required certification.** A hearing on the controversy is set for Monday in Sacramento, and the voting equipment firm faces possible fines or a suspension from the California market. **“This isn't the counties' fault; it's the company's fault,”** Nicole Winger, Bowen's assistant secretary of communications, said Tuesday. ... **unknown to county election officials, the state says, ES&S did not sell counties the original version of the machine but an updated one with plugs and other controls moved around** – changes that requires a new round of testing and certification, according to state officials.

⁽¹⁴⁾ According to public records obtained by Black Box Voting posted here:

<http://www.bbvdocs.org/TX/angelina/2008-Jun-TX-Angelina-PRRresp.pdf>

In March 2008 ES&S charged Angelina County \$3900 for a technician who tallied the votes incorrectly. County election administrator Thelma "Midget" Sherman spotted this. A judge ordered a recount and County Democratic Chairman Jim Wark filed a complaint with the state requesting an investigation into assignment of unqualified technicians. ES&S responded by threatening to withdraw support services -- crippling the ability of Angelina County to run elections at all -- and ultimately strong-arming the county into signing a new contract on ES&S terms. Angelina County, like other Texas counties using the ES&S iVotronic paperless touch-screen voting machines, is wholly dependent on ES&S to conduct elections. Records obtained by Black Box Voting reveal:

- April 28, 2008: ES&S denied, without explanation, on-site support for the November 2008 general election.

- May 15, 2008: the ES&S Chief Operating Officer told Angelina County that they would "be allowed" site support for the court-ordered recount, but only if she immediately signed a letter containing new terms of agreement.

- There is no indication that ES&S offered to reimburse the county for either the \$3,900 or for the recount caused by their technician's error.

6. The Wisconsin threat to add extra charges to warranties: Election Systems & Software, citing needs to alter hardware on all computerized voting systems (M100 scanners, AutoMARK, Unity servers, iVotronics), failed to gain federal approval for the changes, and therefore failed to gain state approval, so it threatened to refuse to service its Wisconsin maintenance contracts without extra fees. Below is a public record obtained by Wisconsin computer testing professional John Washburn, showing the dilemma Wisconsin election officials faced:

Dear Election Official,

As we prepare for your upcoming elections I wanted to make you aware of a potential issue your county may face.

In the manufacturing industry it is very common for suppliers to discontinue the manufacture of certain parts and replace them with parts of the same basic function but made of slightly different materials. When this happens, ES&S notifies the appropriate state officials across our entire customer base in the United States. In most cases, those state officials rapidly approve these small changes and, thus, ES&S is able to use those new parts to replace worn or broken parts on machines during preventative maintenance or repair events.

The State of Wisconsin has not yet approved some of the parts that have been replaced by our suppliers. What does this mean for your jurisdiction?

It means that if ES&S needs to replace a part on one of your machines, either during a preventative maintenance event or in an emergency repair situation, and that old part has been discontinued by our supplier and replaced with a new part that State officials have not yet approved, then ES&S will be unable to perform the repair.

Unfortunately, this also means that if ES&S needs to return at a later date to perform the necessary repairs, additional service charges will apply.

We are working diligently to receive state approval for replacement parts and share your goal of conducting smooth, successful elections. We will continue to do everything we can to provide quality service and support to your jurisdiction. Please do not hesitate to contact me if you have questions or concerns.

Best Regards.

Ryan M. Mack
Sr. Manager, Customer Service
Election Svstems & Software

7. The Marion County, Indiana lying incident: County Clerk Doris Anne Sadler accused ES&S of willfully and purposely deceiving her office and the Marion County Election Board. An ES&S employee, Wendy Orange, blew the whistle on ES&S for installing unauthorized software and trying to cover it up.⁽¹⁵⁾

8. The New Mexico emergency loan for ES&S maintenance costs: Counties complained to the state about high prices for maintenance charged by the sole vendor of their voting devices, ES&S. The secretary of state asked for and received a \$153,000 emergency loan to help counties cover costs.⁽¹⁶⁾

⁽¹⁵⁾ *Marion County Clerk Accuses ES&S of Lying:* WISH-TV - April 20, 2008

<http://www.wishtv.com/Global/story.asp?S=1799902>

"The company with which the Marion County election board has contracted to provide its voting machines and software, has willfully and purposely deceived me and the Marion County election board," said County Clerk Doris Anne Sadler. **Sadler accused the company that supplies the county's voting equipment, Election Systems and Software (ES&S) of lying and a cover-up.** ES&S' on-site project manager, Wendy Orange, blew the whistle on her employer. Orange informed Sadler last Friday that **ES&S installed illegal software for the November election, and recently replaced it with legal software.**

"... **The real problem of course is ES&S' knowingly unlawful installation of that software last year and then their attempt to cover it up,**" said Sadler. The Marion County clerk, a Republican, didn't mince words. Neither did Marion County Democratic party chair Ed Treacy, who believes there is criminal activity on the part of ES&S. "Criminal activity of the worst level: an absolute, total attempt to deceive," said Treacy. ES&S is the same company that got yelled at by state election commissioners for installing illegal software in machines used by three counties last November. "We're all lined up to get sued, all because you derelicts couldn't get your act together," Brian Burdick, Indiana election commissioner, told ES&S at a March meeting. **The software was illegal because it had not been certified by the state.** This time around, ES&S installed illegal software in the computer program used to compile and tabulate votes in five counties. "Executive management staff at ES&S has made no attempt to inform me of this fact," said Sadler.

"... with complete disregard for business ethics and with intent to deceive, deliberately worked to keep their actions from the Marion County election board and its employees," said Sadler. ..**"Throughout the process, there have been missteps and outright fabrications and mistruths given to us by the vendor implementing the election process,"** said Steve Eichholtz, Marion County election board vice chair. "Right now my trust is not very great," said Sadler.

The president of the Marion County election board has called an emergency meeting for Thursday. Members plan to review the voting machine company's contract so they can determine whether or not to seek a payment and performance bond to cover the May primary, to sue the company for breach of contract or to terminate the contract.

⁽¹⁶⁾ *Loan provided to maintain software of NM voting equipment:* Associated Press - May 21, 2008

http://www.lcsun-news.com/cj_9328111

SANTA FE — The secretary of state has received a \$153,000 emergency loan to help pay for maintenance of the paper ballot voting systems used for elections in New Mexico. The loan is to address complaints from counties about high prices for maintenance charged by the sole vendor of the voting equipment, Nebraska-based Election Systems & Software, known as ES&S.

...Maintenance costs have been the subject of complaints from counties since an initial one-year warranty expired last fall on the paper ballot voting equipment the state purchased in 2006 from ES&S. ..."The counties don't have the money to pay for this. **The maintenance is exorbitant. It's beyond our capacity as a county to pay for this maintenance.**" At issue are agreements that serve almost like an insurance policy for costs of maintaining or upgrading the voting system software, such as that used to accumulate and report election results or to program the voting machine used by people with disabilities.

HISTORY OF THE EFFECT OF LACK OF COMPETITION: LOW QUALITY, SLOWDOWNS, POTENTIAL SHUTDOWN OF ELECTIONS

1. **Ohio report finds poor and unsafe programming practices:** Researchers hired by the state of Ohio found the following when studying the ES&S system: "Failure to follow standard software and security engineering practices – A root cause of the security and reliability issues present in the system is the visible lack of sound software and security engineering practices. Examples of poor or unsafe coding practices, unclear or undefined security goals, technology misuse, and poor maintenance are pervasive. This general lack of quality leads to a buggy, unstable, and exploitable system."⁽¹⁷⁾

2. **The national warning on voting machine oversight failure:** After years of denial, Diebold came clean, admitting that its voting devices dropped ballots totals, and that testing failed to detect an array of flaws for equipment sold nationwide since 2003.⁽¹⁸⁾

⁽¹⁷⁾ EVEREST: Evaluation and Validation of Election-Related Equipment, Standards and Testing <http://www.sos.state.oh.us/SOS/upload/everest/14-AcademicFinalEVERESTReport.pdf>
Begins on Page 29: ... "The ES&S Unity EMS, iVotronic DRE and M100 optical scan systems lack the fundamental technical controls necessary to guarantee a trustworthy election under operational conditions. Exploitable vulnerabilities allow even persons with limited access – voters and precinct poll workers – to compromise voting machines and precinct results, and, in some cases, to inject and spread software viruses into the central election management system. Such compromises render the election result subject to subtle manipulations – potentially across election cycles. These vulnerabilities arise from several pervasive, critical failures of the ES&S system:
... Failure to follow standard software and security engineering practices – A root cause of the security and reliability issues present in the system is the visible lack of sound software and security engineering practices. Examples of poor or unsafe coding practices, unclear or undefined security goals, technology misuse, and poor maintenance are pervasive. This general lack of quality leads to a buggy, unstable, and exploitable system.
... "We found fundamental security deficiencies throughout the ES&S Unity EMS, iVotronic DRE and M100 optical scanner software and hardware. Virtually every mechanism for assuring the integrity of precinct results and for protecting the back-end tallying system can be circumvented."

⁽¹⁸⁾ *Diebold comes clean, admits flaws:* McClatchy News Service - Aug. 25, 2008
<http://www.mcclatchydc.com/homepage/story/50485.html>
WASHINGTON — Disclosure of an election computer glitch that could drop ballot totals for entire precincts is stirring new worries that an unofficial **laboratory testing system failed for years to detect an array of flaws in \$1.5 billion worth of voting equipment sold nationwide since 2003.** Texas-based Premier Elections Solutions last week alerted at least 1,750 jurisdictions across the country that special precautions are needed to address the problem in tabulation software affecting all 19 of its models dating back a decade. ... **Like nearly all of the nation's modern voting equipment, Premier's products were declared "qualified"** under a voluntary testing process overseen from the mid 1990s until 2005 by the National Association of State Election Directors... **The vendors secretly negotiated payments with the labs, helped design the tests, got to see the results first and only shared the codes driving their software with three NASED technical experts who signed non-disclosure agreements.** ... Questions about NASED's testing grew in intensity over the last couple of years, after independent tests for the states of California, New York, Ohio, Florida and Connecticut found performance defects and security gaps in both systems that will serve most voters this fall: touch-screens and optical scanners. ... John Washburn, a software tester in the Milwaukee suburb of Germantown, predicts that nearly all of the machines bought in recent years will have to be replaced in a process he likened to the early 20th Century Teapot Dome scandal.

3. **The backlog problem for correcting voting device defects:** The 2008 general election was conducted on voting devices with known defects, forcing voters to use machines of doubtful reliability. This backlog also worsens the noncompetitive environment. The EAC admits that it was not able to certify repairs for flawed machines in time for the 2008 federal election.⁽¹⁹⁾

4. **The EAC notice to ES&S of non-compliance:** Investigative reporter Dan Rather found quality defects and shoddy testing procedures with ES&S voting devices (for example, shaking a voting device, if nothing falls out, it passes the test). After he filmed a report showing factories in the Philippines manufacturing defective touchscreens, the EAC issued a notice of noncompliance to ES&S for violating rules on disclosure.⁽²⁰⁾

5. **The New Mexico memory card problem:** Doug Shaw, chief deputy clerk in Chaves County, reported numerous complaints from county clerks that ES&S memory cards were failing. Even after a recall, card failures continued.⁽²¹⁾

⁽¹⁹⁾ **Flaws in voting machines used by millions of people will not be fixed in time:** *New York Times*, Aug. 16, 2008 http://www.nytimes.com/2008/08/16/us/politics/16vote.html?_r=1&ref=us&oref=slogin
Flaws in voting machines used by millions of people will not be fixed in time for the presidential election because of a government backlog in testing the machines' hardware and software, officials say. **The flaws, which have cast doubt on the ability of some machines to provide a consistent and reliable vote count**, were supposed to be addressed by the Election Assistance Commission, the federal agency that oversees voting. But commission officials say they will not be able to certify that flawed machines are repaired by the November election, or provide software fixes or upgrades, because of a backlog at the testing laboratories the commission uses. ... machine manufacturers and state election officials say **states and local jurisdictions are forgoing important software modifications meant to address security and performance concerns**. In some cases, **election officials in need of new equipment have no choice but to buy machines that lack the current innovations and upgrades**. ...In Ohio, for example, which requires federal certification, election officials found that in this year's presidential primary the touch-screen machines used in 43 counties, or by more than three million voters, dropped at least 1,000 votes as memory cards sent data to the central server in each county. The discrepancy was caught and corrected before final tallies were calculated, but election officials say the risk is too high. The newer software being provided by manufacturers fixes the problem, but it has not been certified, and so the state cannot use it. ...In June, the Election Technology Council, the trade association that represents most major voting machine makers, issued a report highly critical of the commission that said the **certification delays were squelching innovation and raising the industry's costs**.

⁽²⁰⁾ EAC notice of non-compliance: <http://www.bbvdocs.org/ESS/2007-Notice-of-Non-Compliance.pdf>
"It has come to our attention that Election Systems & Software, Inc (ES&S) may be using a facility in Manila, Philippines to assemble some of its voting systems. As you know, it is a requirement for participants in the Election Assistance Commission's Voting System Testing and Certification Program to disclose the locations of all manufacturing and assembly facilities. **Information about the Manila facility was not included in the list of facilities ES&S provided to EAC.**

⁽²¹⁾ **Memory Cards Will Be Tested:** *The Associated Press* - Mar. 20, 2008; SANTA FE-- **Problem-prone memory cards used in voting machines across New Mexico are being recalled** ...The cards hold ballot information and are necessary for vote tabulators to operate. **However, a number of county clerks have reported card failures** and they have been forced to use backup cards to keep voting machines in service during elections. ... **A Nebraska-based company -- Election Systems & Software, which is known as ES&S -- is New Mexico's sole supplier of the voting machines and their memory cards.** ...The Secretary of State's Office said it was working with ES&S to try to obtain a better price for counties wishing to buy extra cards. A card costs about \$90.

6. **The Kanawha County West Virginia programming error by ES&S:** A mistake made by ES&S risked incorrect results, forces retesting the day before election. In addition, public officials cite repeated problems with ES&S missing deadlines and making mistakes on voting materials.⁽²²⁾

7. **The Webb County, Texas programming errors by ES&S:** Voting devices improperly programmed by ES&S were blamed for malfunctioning vote counts in Webb County. In the same election, Bexar County Texas also reported programming errors on its ES&S system.⁽²³⁾

8. **The Benton County, Arkansas election puzzle:** Large mid-election leaps in turnout, including impossible turnouts reported by the ES&S system, like a Rogers precinct with more than 100% turnout, caused alarm. The changing results altered outcomes in eight contests, and ES&S could not be reached.⁽²⁴⁾

⁽²²⁾ *Programming glitch affects ballots statewide; Mistake made by vendor, commissioner says:* Charleston Gazette - Oct. 14, 2008 - <http://wvgazette.com/News/200810140330>
CHARLESTON, W.Va. -- **A programming glitch is forcing election officials in Kanawha and 18 other counties to retest their optical scanning voting machines on the eve of the general election...** a programming error in the state's automated voting machines could have resulted in incorrect results for at least one state race. According to McCormick, voters who voted a straight Republican ticket but then decided to vote for only one Democrat in the state Supreme Court race would have had their votes incorrectly counted...State election officials contacted the vendor who did the programming for the voting machines to correct the mistake...Carper said **the mistake was made by the vendor, Election Systems & Software** in Nebraska. **State and county election officials have repeatedly had problems with ES&S missing deadlines and making mistakes on voting materials.** Kanawha County received new memory cards for only 16 voting machines that will be used for early voting. ES&S is supposed to supply new cards for the county's other 164 voting machines before Election Day...**Carper is unhappy with the voting glitch. "The problem is this is the day before the election starts,"** he said.

⁽²³⁾ *E-voting continues to present problems:* March 9, 2006 - San Antonio Express-News:
"A technical malfunction in the counting of electronic votes in Webb County Tuesday night threw into question the results of the Congressional District 28 race. It seems **the county's voting machines were improperly programmed,** prompting officials to count the votes by a different, slower method. The glitch affected the early vote and Tuesday's vote...the glitch and others like it remain a glaring question mark, not as evidence of voter fraud, but as a warning that electronic voting systems aren't infallible. **Bexar County also had a computer programming error Tuesday night,** forcing judges to manually collect the vote data...**Webb County uses the same voting system as Bexar County: Election Systems & Software of Omaha, Neb. ES&S is one of the three mega-firms that produce most of the electronic voting systems in the country."**

⁽²⁴⁾ *Election Results Continue To Puzzle:* The Morning News - Nov. 10, 2006
<http://www.nwaonline.com/articles/2006/11/11/news/111106bzelectioncontinued.txt>
Unprecedented voter turnout in Benton County **again called into question the results of Tuesday's general election.** After the Election Commission reviewed the votes Wednesday, the turnout jumped from 49 percent to 83 percent. ...Some, such as **a Rogers precinct with more than 100 percent voter turnout,** alarmed both of them. He then gathered the voting system's computer disks and flash drives and told her he was headed to the Election Systems & Software office in Little Rock, she said. **Election Systems & Software has a statewide contract to provide voting machines.** Calls to Jim McCarthy's cell phone went straight to voicemail, which was full. An employee who answered the telephone at the Election Systems & Software office in Little Rock said he could not speak to the media. Election Systems & Software media representatives in Omaha, Neb., where the company is based, said they were not aware of the situation.

9. The Arkansas ES&S "monopoly" advises election officials to break the law:

Crucial ES&S voting device cartridges didn't arrive on time, and when they finally did arrive they were unusable. "Telling us to 'violate the law' by printing up unofficial ballots to use, and ignore multiple provisions of the state election laws doesn't give us much confidence that this whole process is under control," said White County Election Commissioner Norm Southerland. .. "ES&S has now proven in four states that they are unable to meet deadlines for the delivery of programming, regardless of the time period they have to do the work," ...Janet Harris from the secretary of state's office responded by saying the same issue has arisen across the state. "ES&S even had the gall to show up Friday and tell me they had already done all the testing on my PEB's 'to save me time,'" Nunnally wrote. "That's a violation of the law, and besides that, on what grounds would I trust their testing?"⁽²⁵⁾

⁽²⁵⁾ *Election 2006: 'a royal mess' - White County Election Commissioner claims state advised to break the law:* The Daily Citizen; http://www.thedailycitizen.com/articles/2006/06/06/news/top_stories/top01.txt

White County election officials are trying to untangle red tape, work around ineptitude by a private contractor and follow the advice of a seemingly helpless state office as they attempt to continue the election of 2006. Last month's primary election was conducted in the county with a few minor problems, but early voting began with homemade paper ballots being used instead of the new iVotronic electronic voting machines supplied by Election Systems and Software (ES&S). Personal Electronic Ballots (PEBs) due to be delivered to the White County Election Commission before last Tuesday never arrived, and the paper ballots were printed by the commission as a stop-gap measure. When the PEBs finally arrived Friday, they were not useable.

"The situation has been a royal mess," Tanya Burleson, White County Clerk, said. "Our PEB's that were received were wrong. We have no absentee ballots. We can send ballots like we are using for early voting, but ES&S was supposed to have paper ballots to us by Friday and no ballots have been received. It is definitely a mess." White County Election Commissioner Norm Southerland sent an e-mail to Charlie Daniels, Arkansas secretary of state, sharing his analysis of the current state of affairs.

"Just a note to make sure you understand that the election business with ES&S has been, and is still a mess," Southerland wrote. "The counties managed to pull off the primary election by doing things they shouldn't have to do, but now we're doing it again for the runoff. Here we are, a week into early voting, and still no paper ballots or correct PEBs from the contractor. The time schedules set forth in the state law are not new. They haven't changed since the contract process started, or the award of the contract to ES&S."

..." The support from the contractor and the management by your office appears to be a large part of the problem. At least that is how it appears out here where the elections take place. Telling us to 'violate the law' by printing up unofficial ballots to use, and ignore multiple provisions of the state election laws doesn't give us much confidence that this whole process is under control." Southerland is the Republican representative on the county election commission and forecasted more problems with the system in the future. "If this is the best we can do now, we're in big trouble this fall," Southerland

wrote. White County Election Commissioner John Nunnally has exchanged e-mails with Janet Harris in the Secretary of State's office. "ES&S has now proven in four states that they are unable to meet deadlines for the delivery of programming, regardless of the time period they have to do the work," Nunnally wrote.

Saying he has not received anything from ES&S that was correct on the first try, Nunnally said PEBs were arriving so late that officials had no opportunity to test and perhaps correct them, making it difficult to notify the press and candidates of official meetings or activities. Harris responded by saying the same issue has arisen across the state. "ES&S even had the gall to show up Friday and tell me they had already done all the testing on my PEB's 'to save me time,'" Nunnally wrote. "That's a violation of the law, and besides that, on what grounds would I trust their testing?" **Because ES&S is the only supplier of machines and support services, they have a monopoly on the election. "ES&S is set up to box us into using their proprietary services for election preparation,"** Nunnally wrote.

10. **Kanawha County wants ES&S machines replaced:** "The technicians provided on Nov. 4, 2008 had little, if any, knowledge of how to service the M650s and no more than 30 days' experience working with ES&S," wrote the president of the Kanawha County Commission Secretary of State Betty Ireland approved ES&S as the exclusive provider of all voting machines for the entire state.⁽²⁶⁾

11. **The ES&S voting devices counting backwards problem:** Officials in Florida (and Oklahoma, and North Carolina, were frustrated when ES&S failed repeatedly to resolve a problem that caused its voting machines to count backwards when the counter hit just over 32,000 votes. See Florida e-mail below:

Matthews, Marla I.

From: Craft, Paul
Sent: Friday, December 10, 2004 11:49 AM
To: Drury, David R.
Cc: 'Lonn@ocfelections.com'; Mann, Dave; Roberts, Dawn K.; 'Herb Deutsch (hdeutsch@essvote.com)'
Subject: RE: Update on AutoMark Certification

David, (Drury)

During your visit with the ES&S engineering group next week, please add the 32,676 limit to things which need to be resolved in the system. Upon your return I would like an inventory of every system marketed or supported by ES&S that has this limitation and proposed system changes to keep this from interfering with elections. If the variable cannot be redefined so as not to have a limitation then the logic and error messaging of the system must be set to provide users with an appropriate error message when the condition occurs. To have users notified of this condition only by not having as many votes cast as ballots is not an appropriate error detection routine.

Thanks
Paul

-----Original Message-----
From: Lonn Fluke [mailto:Lonn@ocfelections.com]
Sent: Friday, December 10, 2004 10:09 AM
To: 'Paul Craft'
Subject: FW: Update on AutoMark Certification

FYI - the version 2.43 still does not correct the 32,676 limit and from the Conference they would not say when it ever will be corrected. It caused this office severe problems as to reporting that in my 23 years I never had to experience. I had to enter into Spreadsheet manually and could not trust any of the reports. We separated the Absentees even on its own database from the rest of the 'precincts' and still had reporting problems. I would like to have the State De-certify ES&S so I can go to Sequoia. Maybe that is too simple of an idea, I am now off Automark and would just do DRE and integrate our Epoll Book directly with Sequoia's OPEN system (rather than ES&S proprietary DRE pem).

Just letting off steam....

⁽²⁶⁾ **Kanawha County, West Virginia: Carper wants vote machines replaced over Election Day jams:**

The Charleston Gazette - Nov. 11, 2008 <http://sundaygazette.com/News/200811100665>
CHARLESTON, W.Va. - The president of the Kanawha County Commission wants Electronic Equipment & Software to replace two **ballot-counting machines that consistently jammed when tabulating ballots on Election Day.** "We have had serious problems with the M650s [vote-counting machines] since the first time they were placed in service," Kent Carper wrote in a letter sent on Monday to Also Tesi, president and CEO of ES&S, based in Omaha, Neb.. Kanawha County paid ES&S \$2.7 million for its optical-scan voting machines, including \$118,214 for the two ballot-counting machines at the county clerk's office. Carper repeated a concern he has raised during the past three years, since Secretary of State Betty Ireland approved ES&S as the exclusive provider of all voting machines for the entire state...
...ES&S is one of four companies that make electronic voting machines used in many states. The others are: Sequoia Voting Systems, Hart InterCivic and Diebold, now called Premier Election Systems.
..In his letter to Tesi, Carper also questioned the qualifications of the technicians ES&S sent to monitor the machines on Election Day. "The technicians provided on November 4, 2008, had little, if any, knowledge of how to service the M650s and no more than 30 days' experience working with ES&S.

COMPLAINT THAT THIS ACQUISITION IS A MONOPOLY, SHOULD BE PROHIBITED UNDER THE CLAYTON ACT, TITLE 15 U.S.C. § 1-27 et. al.

It is in the public interest that monopolistic and anticompetitive processes be eliminated from elections. Title 15, Chapter 1, § 18 Acquisition by one corporation of stock of another, states that:

"No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Concealing essential election processes from the public, in public elections, makes the elections no longer public and in fact, executes a subtle change in our originally designed democratic form of government. Consolidating and centralizing these concealed processes transfers power from the public to a concentrated group of unnamed insiders. Concealed, consolidated election processes produce a high likelihood for fraud.

Consolidation of the industry that executes the mechanics of elections puts the public and public officials in an untenable position: Because the public must have public elections in order to consummate its right to ownership over its own government, and public officials must hold public elections in order to achieve this, if ES&S is permitted to take control of 75% of elections jurisdictions, the people will be confined to a position to rely on its continued management in perpetuity as well as the unregulated good will of the company due to concentration within the industry.

ES&S will have achieved a transfer of power from the industry to itself, and from the public to itself, and will also put itself in a position to shut down or delay time-sensitive federal elections.

My organization and many other citizens will be happy to provide more information upon request. I look forward to an energetic examination of this matter.

Bev Harris



Founder: Black Box Voting: A national nonpartisan nonprofit elections watchdog organization

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Government is the servant of the people, and not the master of them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. We insist on remaining informed so that we may retain control over the instruments of government we have created.

APPENDIX A: PARTIAL UNRAVELING OF OWNERSHIP TRAIL ON ES&S

ES&S is privately owned; the names of its current owners have not been publicly released, but articles in the Omaha World Herald indicate that:

- ES&S is or has recently been owned by The McCarthy Group and the Omaha World Herald and/or The World Companies (also affiliated with the Omaha World Herald Companies). The Omaha World Herald is a media conglomerate; this ownership links control of media outlets with control of programming for devices that elect federal candidates.
- The McCarthy Group, in turn, is or was partially owned itself by the Omaha World Herald and/or the World Companies.

The Omaha World Herald and the World Companies have been owned by the Peter Kiewit family, owners of privately held Peter Kiewit & Sons, a privately held diversified multinational company handling road construction, communications, and the building of defense installations. The Omaha World Herald became an employee owned company shortly after Peter Kiewit's death, but with restrictions on employee stockholder voting rights. According to the Omaha World Herald, the Peter Kiewit Foundation holds the largest shares in and the most voting rights for the Omaha World Herald Companies.

Mike McCarthy, who runs The McCarthy Group, handled the sale of Peter Kiewit's ranch when Peter Kiewit died; just after Peter Kiewit's death, McCarthy capitalized and launched The McCarthy Group. Mike McCarthy is a board member for Peter Kiewit & Sons; Mike McCarthy's family relationship within the Kiewit family, if any, has not been publicly disclosed. In examining the impact of this acquisition, the relationship of ES&S owners to members of the Kiewit family or to the Kiewit organization or companies should be more fully explored, because Kiewit companies and key personnel were repeatedly convicted of unfair trade practices and bid-rigging several times in the 1980s, and of various unfair trade practices in the 1990s. The Kiewit company paid several fines for setting up companies posing as unrelated to Kiewit, which were in fact owned by and/or controlled by Kiewit personnel, and some key executives were sentenced to prison.

ES&S reported on public bid forms submitted to Santa Clara County, Calif. in 2003 that another group of investors called "Normal Investments LLC" owns part of ES&S. The names of the investors in "Normal Investments LLC" has not been publicly disclosed.

An Omaha World Herald article also indicated that a group of investors composed private investors associated with the original Business Records Corporation entity owns part of ES&S. Their names, and what percentage they own, has not been publicly disclosed.

Without knowing the names of investors in ES&S, it will not be possible to examine this acquisition for past history of unfair competitive practices by its owners. An organizational review needs to be part of investigation into this acquisition. It should be noted that majority ownership does not settle the finite question control of all or part of the company. For example, not only may minority shareholders negotiate or retain special rights upon sale of a majority share of stock, but even an employment contract could reserve powerful rights to some person or persons to access or control software.