

# CLIENT ALERT

## No Longer Under The Radar

### FTC Antitrust Review of Small Transactions

June 22, 2010

On January 19, 2010, the Federal Trade Commission (FTC) announced that for the first time it was lowering the Hart-Scott-Rodino Act's (Hart-Scott) jurisdictional and filing-fee thresholds for transactions triggering mandatory antitrust review.<sup>1</sup> The 2010 revisions decreased the basic notification threshold for all transactions from \$65.2 million to \$63.4 million.

While Hart-Scott only requires federal notification for transactions exceeding \$63.4 million, over the past year the U.S. Department of Justice (DOJ) and FTC have significantly increased antitrust review of transactions falling below the Hart-Scott threshold as well.

For example, in January of 2010 the DOJ filed suit against Dean Foods Co., the country's largest processor and distributor of dairy products, for antitrust violations in its \$35 million acquisition of two Wisconsin dairy-processing plants from a local dairy cooperative. The DOJ alleged that the deal was likely to substantially lessen competition in milk sales to schools and convenience stores in Wisconsin, Illinois and Michigan.

The FTC and DOJ are keeping an especially close watch on mergers and acquisitions that result in one company gaining a substantial share of its relevant market. In March of 2010, the DOJ challenged a \$5 million merger between the country's two largest providers of voting machine equipment because the

deal gave one company control over more than 70% of the voting-machine market.<sup>2</sup>

Most recently, the FTC filed suit against Dun & Bradstreet Corp. because the database company's \$29 million acquisition of competitor Quality Education Data (QED) gave it more than 90% of the market for K-12 education data. "Despite its relatively low dollar value, this transaction dramatically decreased competition in the marketplace," said Richard Feinstein, Director of the FTC's Bureau of Competition. "When Dun & Bradstreet acquired QED, it bought its closest competitor and created a monopoly. That's going to get the FTC's attention every time."

Companies considering mergers, tender offers, acquisition transactions and joint ventures of any size should carefully examine any potential antitrust risks prior to closing the deal. Both the DOJ and FTC are increasing scrutiny of transactions that could potentially lessen competition or create a monopoly, even when those transactions do not warrant mandatory review under Hart-Scott. Identifying potential antitrust issues prior to closing a deal could save your company considerable effort and expense in litigating against a federal antitrust agency over a relatively modest transaction, or permit proactive planning to structure deals to avoid or minimize risk.

Please contact Glenn Davis, head of the Antitrust Practice Group at Gallop, Johnson & Neuman, L.C. or Amy K. Mistler at (314) 615-6000 with any questions or concerns regarding federal antitrust policy or review.



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<sup>1</sup> A complete list of the 2010 adjusted thresholds can be accessed through the FTC's website at <http://www.ftc.gov/os/fedreg/2010/january/1001218claytonact7a.pdf>.

<sup>2</sup> In September of 2009, Election Systems & Software Inc. agreed to purchase voting-machine manufacturer Premier Election Solutions Inc. (ES&S), a unit of Diebold Inc. After filing suit to challenge the merger, the DOJ reached a settlement agreement with ES&S in March of 2010. The DOJ's press release regarding settlement can be accessed at <http://www.justice.gov/opa/pr/2010/March/10-at-235.html>.