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FTC announces record gun-jumping fine

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On January 7, 2025, the Federal Trade Commission announced the imposition of a record $5.6 million "gun-jumping" fine in connection with a 2021/22 merger of oil producers XCL Resources Holdings, LLC, Verdun Oil Company II, LLC, and EP Energy LLC. Verdun and XCL were at the time under common management. "Gun-jumping" refers to impermissible pre-merger coordination among the parties to a M&A transaction before regulatory approval.

In July 2021, the parties executed a Purchase Agreement where Verdun Oil Company II, LLC (Verdun) would acquire EP Energy LLC (EP) for approximately $1.4 billion. The transaction was subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act)'s notification and waiting period requirements. Under the HSR Act, companies must file a premerger notification with the Federal Trade Commission (FTC) and the Department of Justice (together, the Agencies). The HSR Act requires that merging parties not consummate their planned transaction until the expiration of the statutory waiting period. The parties made the required notification with the Agencies, and the waiting period under the HSR Act went into effect on July 26, 2021 and expired on March 25, 2022.[1]

The FTC alleged that the parties violated the HSR Act because EP allowed Verdun and XCL Resources Holdings, LLC (XCL) to assume operational and decision-making control over significant aspects of EP's day-to-day business. This conduct allegedly lasted from July 26, 2021 through October 27, 2021 (94 days), when the parties amended the Purchase Agreement to allow EP to operate independently, without XCL's or Verdun's control over its day-to-day operations. The FTC alleged that "[parties'] conduct effectively allowed one competitor to acquire beneficial ownership, including control over key competitive decisions of the other, before the transaction closed, which is precisely what the HSR Act prohibits." The conduct at issue is described below.

Challenged conduct

Much of the challenged conduct stems from the exercise of approval and consent rights negotiated by the buyer as part of the interim operating covenants in the Purchase Agreement:

- **Buyer approval of seller expenditures above $250k.** The Purchase Agreement required EP (seller) to submit all expenditures above $250,000 (which the FTC described as "a relatively low threshold in the crude development and production business") for XCL or Verdun's (buyers') review and approval prior to closing. This requirement applied to many ordinary-course expenditures. Verdun and XCL received and approved expenditure requests from EP, including many falling well below the $250,000 threshold.
- **Buyer approval of seller oil well development activities.** The purchase agreement granted XCL and Verdun pre-closing approval rights over EP's ongoing and planned crude oil development and production activities. XCL immediately halted EP's new well-drilling activities so that XCL—not EP—could control the development and production plans for EP's drilling assets moving forward. The FTC alleged that XCL and Verdun allowed EP to resume its own well drilling activities only "after the [parties] realized that the FTC would investigate the transaction." XCL employees also actively supervised EP's well design and planning activities, including by requiring changes to EP's site design plans and vendor selection process.

Other challenged gun jumping conduct included improper coordination with EP and control over EP's operations prior to closing that does not appear to be directly linked to particular rights negotiated as part of the Purchase Agreement:

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- **Control over EP employees/contractors.** EP allegedly sought XCL's or Verdun's approval for hiring field-level employees and contractors necessary to conduct drilling and production operations in the ordinary course of business.
- **Coordinated efforts to supply EP customers.** XCL and EP (at the time, direct competitors in the market) allegedly "worked in concert" to supply EP's customers in satisfaction of EP's commitments. For example:
  - EP's employees effectively reported to XCL counterparts and provided XCL employees with detailed information regarding customers, supply volumes, and pricing terms.
  - XCL employees coordinated directly with EP's customers to discuss EP's supply shortage and to arrange for alternative delivery in satisfaction of EP's contractual commitments either from XCL's own supplies or from purchases XCL made on the spot market.
  - XCL allegedly held itself out to EP's customers "in words or substance" as coordinating EP's supply and delivery commitments.
  - EP's customers began contacting XCL directly (sometimes excluding EP altogether) to discuss EP supply and delivery commitments under their contracts with EP.
- **Coordination on pricing.** Verdun allegedly coordinated prices with EP during EP's contract negotiations with EP customers, specifically directing EP to raise its prices in the next contracting period with particular customers.
- **Exchange of competitively sensitive information.** In the months following signing, and prior to closing, EP allegedly gave XCL "almost-unfettered" access to EP's competitively sensitive business information, including EP's site design plans, customer contract and pricing information, daily supply and production reports, customer dispatches, business plans, vendor relationships and contracts, and other nonpublic information.
  - The FTC alleged that competitively sensitive business information provided by EP to XCL and Verdun through a virtual data room—set up ostensibly for the purpose of conducting due diligence on the proposed transaction—was exchanged among EP and Verdun personnel without appropriate safeguards to limit access and misuse. Specifically, confidential information from the virtual data room was allegedly used by Verdun's operations and sales employees to inform pricing and contract terms in the pre-merger period when Verdun and EP were still marketplace competitors. Additionally, a Verdun employee used information from the virtual data room to discuss EP's prices with a counterpart at EP.

Takeaways

The Commission vote to accept the settlement and refer the matter to the Department of Justice for filing suggests that gun-jumping enforcement will continue to be a priority in the incoming Trump Administration. The vote was 4-0-1, with Commissioner Melissa Holyoak (R) recused. The announced Trump Administration incoming chair of the FTC, Commissioner Andrew Ferguson (R), voted in favor. The $5.6 million fine is the largest dollar penalty ever for a gun-jumping enforcement action in U.S. history. It could have been even higher, however, as under the HSR Act parties can be fined in excess of $50,000 per day they were in violation of the Act. Gun-jumping is an area of close scrutiny in many ex-U.S. jurisdictions, including in the European Union where significant fines have been imposed.

The complaint does not break new ground in terms of the scope of gun-jumping prohibitions. Much of the conduct outlined in the complaint is the kind that parties typically avoid—and even more so in the context of a merger between direct competitors that was already being investigated on antitrust grounds. This settlement is a good reminder to seek the advice of antitrust counsel regarding the following:

- The appropriate scope of permissible **integration planning** in the pre-closing period. Buyers cannot exercise control over, direct, or influence the actions of sellers. Merging parties cannot conduct any joint meetings, bidding, or negotiations with customers (limited exceptions for joint meetings may be possible after consultation with the legal team) and cannot coordinate in any way their pricing, marketing, or other core business activities. Merging parties cannot transfer between them any operating business assets or make hiring or firing decisions concerning each other's personnel.
- **Interim operating covenants or "IOCs"** in merger agreements, especially buyer approval or veto rights. IOCs are common in merger agreements and generally do not raise antitrust concerns, so long as they attempt to preserve the value of the target business and ensure that the target operates in a manner consistent with its ordinary course of business. The U.S. antitrust agencies may, however, scrutinize whether an IOC goes "too far" and constitutes an illegal pre-closing ownership transfer under the HSR Act. Merging parties should be thoughtful about and should discuss with counsel the specific individuals at the buyer who will be involved with any approval processes. The

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purpose and specifics of interim operating covenants should be carefully reviewed.

- The **exchange of competitively sensitive information** (e.g., business information not typically shared with third parties) both pre- and post-signing. Safeguards, including clean teams and clean team agreements, should be considered to avoid impermissible information sharing between competitors. Competitively sensitive information can include detailed current pricing strategies and formulas, future pricing plans, future promotion and marketing terms, detailed sales and marketing strategies, details of agreements with particular customers or vendors, and customer-specific pricing information.

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[1] The FTC investigated the transaction and obtained a consent agreement addressing its concerns about the impact of the transaction on competition in crude oil in the Uinta Basin, Utah region. The consent agreement required EP to divest all of its Utah operations to a qualified third-party operator, Crescent Energy, which the FTC viewed as remedying the potential impact on competition in crude oil. The waiting period under the HSR Act expired on the date that the FTC accepted the consent agreement.

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