

FTC Imposes Record \$5.6 Million Civil Penalty to Settle Gun-Jumping Charges

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On January 7, 2025, the Federal Trade Commission (FTC) imposed a record \$5.6 million civil penalty on crude-oil producers XCL Resources Holdings, LLC, Verdun Oil Company II LLC, and EP Energy LLC for alleged “gun-jumping” violations of the Hart–Scott–Rodino (HSR) Act. “Gun jumping” is the unlawful pre-closing coordination between a buyer and seller, including when the buyer exerts operational control over the business being acquired or when the parties agree to align competitive activities before the transaction is completed. This FTC action underscores the importance of continuing to operate independently after a deal is signed until closing.

On July 26, 2021, Verdun, which was under common management with XCL, agreed to acquire EP Energy in a \$1.4 billion transaction. The parties submitted their HSR notification, and the waiting period expired on March 25, 2022, when the FTC accepted a consent agreement and granted termination of the HSR waiting period. The FTC alleged that, during the waiting period, XCL, Verdun, and EP Energy engaged in “gun-jumping activities” when XCL and Verdun assumed operational and decision-making control over significant aspects of EP’s day-to-day business operations prior to the transaction closing, in violation of the HSR Act.

Specifically, the FTC alleged XCL, Verdun, and EP Energy of gun jumping by:

1. The Purchase Agreement immediately providing XCL and Verdun approval rights over EP’s crude oil development and production activities and exercising those rights to instruct EP to halt its planned well-drilling and development operations;
2. XCL and EP managing EP’s customer contracts, relationships, and deliveries in the Uinta Basin region of Utah;
3. Verdun and EP coordinating pricing strategies for EP’s customers in the Eagle Ford region of Texas, including Verdun instructing EP to raise prices to customers;
4. Including in the Purchase Agreement a requirement that EP submit all expenditures above \$250,000 for XCL’s or Verdun’s review and approval, which included many of EP’s ordinary-course expenditures, as well as obtaining approval for ordinary course expenditures below \$250,000; and
5. Providing XCL “unfettered” access to EP’s competitively sensitive information.

The FTC, in conjunction with the Department of Justice’s Antitrust Division, entered into a proposed settlement under which XCL, EP Energy, and Verdun agreed to pay a \$5.6 million penalty to resolve the alleged HSR Act violations.

TAKEAWAYS

This settlement highlights the importance of avoiding premature coordination, such as exerting operational control or aligning competitive activities. Parties should carefully draft purchase agreements with the HSR Act’s waiting period in mind. It is important for counsel to be involved early in the merger process to ensure compliance with antitrust laws. Parties should consider certain best practices to ensure antitrust compliance and prevent regulatory gun jumping allegations, including:

- Providing deal personnel **gun jumping guidelines** to avoid either party controlling the other party before closing;
- Implementing **“clean teams”** during due diligence to facilitate necessary exchanges with competitors and other strategic purchasers of competitively sensitive information such as pricing information and new product pipelines;
- Avoiding **pre-closing covenants** that require one party to seek approval from the other for ordinary-course business decisions; and
- Maintaining **clear records** of meetings and communications between the parties made during the pre-closing period to document compliance in case of regulatory scrutiny.

Winston regularly advises clients on gun-jumping, HSR, and antitrust issues. Reach out to the authors of this post or [contact](#) Winston contacts with any questions.

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