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FTC Imposes Record Gun-Jumping Fine of \$5.6M

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On Jan. 7, the Federal Trade Commission announced the imposition of a \$5.6 million fine for a gun-jumping violation under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). Gun-jumping violations occur when parties to a potential transaction inappropriately begin to integrate their operations or otherwise prematurely implement the transaction prior to receiving regulatory antitrust clearance.¹ The fine is the result of a settlement with crude oil producers XCL Resources Holdings, LLC, Verdun Oil Company II LLC, and EP Energy LLC. The \$5.6 million penalty is the largest ever imposed for a gun-jumping violation in the United States, and serves as a reminder of the critical importance of refraining from premature coordination during the HSR Act waiting period.

According to the complaint,² the parties violated the HSR Act in connection with the \$1.45 billion acquisition of EP, a crude oil producer operating in Utah and Texas, by its competitors, XCL and Verdun. The FTC alleged that through a combination of improper terms in the purchase agreement and misconduct after execution of the agreement but prior to obtaining antitrust clearance, XCL and Verdun prematurely exercised operational and decision-making control over EP's operations. Most notably:

- The purchase agreement, once executed, provided XCL and Verdun immediate approval rights over EP's development of new oil wells. Shortly after signing, XCL and Verdun enforced those rights by requiring EP to halt all new development.
- XCL and Verdun agreed to bear all costs associated with the supply shortages that would result from EP halting oil well development, and coordinated directly with EP's customers to fulfill the resulting shortfall.
- XCL and Verdun coordinated with EP regarding crude oil prices for EP's customers, and exchanged competitively sensitive information with EP regarding its production volumes and forecasts, business operations, and customer lists.

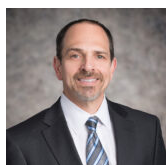
While gun-jumping violations tend to be highly fact-specific, the alleged misconduct was described in the complaint as a "paradigmatic case of gun jumping," and is instructive as to the pitfalls parties should be wary of prior to receiving HSR Act clearance. A few guiding principles can help parties avoid gun-jumping violations as they navigate potential transactions:

- The parties are expected to continue to operate independently until closing and to make their own separate and unilateral business decisions.
- Acquirers should avoid exercising any control over the target's ordinary-course business operations. Any pre-closing covenants or approval requirements must be narrow and include ordinary-course exceptions. Ideally, such terms should be reviewed and cleared by antitrust counsel prior to signing.
- At all stages of the transaction, parties should avoid exchanging competitively sensitive information except to the extent legitimately necessary to facilitate the transaction. When competitively sensitive information must be exchanged for due diligence or integration planning purposes, it should be shared subject to appropriate safeguards such as clean rooms and clean teams developed in consultation with antitrust counsel.
- Until closing, each party should avoid treating the other's customers as its own or suggesting to customers/suppliers that the parties are operating as a unified entity.

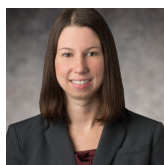
Because gun-jumping analysis is heavily fact-dependent and context-specific, parties should not hesitate to consult antitrust counsel for guidance on potential gun-jumping concerns as the transaction progresses. Antitrust counsel can advise as to whether a particular course of conduct presents gun-jumping risks, and often can help the parties craft safeguards and solutions that will allow them to achieve their legitimate deal-related goals while avoiding the severe penalties that can arise from a gun-jumping violation, such as the currently maximum statutory fine of \$51,744 per day that the parties are in violation of the HSR Act.

1. As with most gun-jumping enforcement actions in the United States, the penalty discussed in this advisory was imposed for violations of the HSR Act based on misconduct that occurred before the transaction received antitrust clearance. However, parties to potential transactions must also be cognizant of the fact that gun-jumping violations can also occur (1) after the expiration of the HSR Act waiting period but before closing or (2) at any time prior to closing in transactions that do not require HSR Act clearance. In those cases, inappropriate sharing of competitively sensitive information or pre-closing integration does not violate the HSR Act but can violate the Sherman Act, which prohibits anticompetitive agreements between separate firms. ↩
2. The complaint is available at https://www.ftc.gov/system/files/ftc_gov/pdf/complaintforcivilpenaltiesandequitable relief for violations of the hartscottro and the Proposed Final Judgment is available at https://www.ftc.gov/system/files/ftc_gov/pdf/proposedfinaljudgment.pdf. ↩

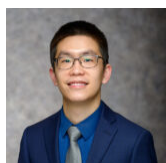
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