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FTC Secures Record Gun Jumping Penalty

The Federal Trade Commission's complaint and settlement with XCL, Verdun, and EP demonstrate that U.S. antitrust agencies remain committed to enforcing the HSR Act's prohibitions on gun jumping and the pre-closing exchange of competitively sensitive information.

On January 7, 2025, the U.S. FTC announced a settlement with three crude oil producers for violations of the gun jumping provisions of the HSR Act. XCL Resources Holdings, LLC (XCL), Verdun Oil Company II LLC (Verdun), and EP Energy LLC (EP) agreed to pay a record $5.6 million civil penalty to resolve claims that the oil producers engaged in illegal pre-merger coordination. The total $5.6 million penalty was shared by all parties. According to the proposed final order, XCL and Verdun were jointly and severally ordered to pay $2.8 million, and EP was ordered to pay an additional $2.8 million. The settlement comes just a few months after the U.S. Department of Justice settled gun jumping allegations against Legends Hospitality for $3.5 million.[1]

Background

The HSR Act requires companies undergoing certain mergers or acquisitions to file notifications with the FTC and the Department of Justice and observe a waiting period before closing the transaction.[2] During the waiting period, parties to a transaction must remain separate, independent entities, and may not integrate their business operations or otherwise exert control over one another. Moreover, prior to the closing of a transaction, parties are also prohibited by statute from exchanging competitively sensitive information.

According to the FTC's complaint, Verdun and XCL agreed to acquire EP in July 2021 for $1.4 billion. The transaction was subject to notification under the HSR Act, and the parties made the required filings. But according to the complaint the parties allegedly transferred significant operational control over EP's business operations to XCL and Verdun and shared competitive information before closing.

Evidence of Gun Jumping in the Parties' Purchase Agreement

The FTC's complaint points to provisions in the parties' purchase agreement that gave XCL and Verdun "immediate approval rights over EP's ordinary-course development activities."[3]

Specifically, the FTC highlighted provisions in the agreement that immediately forced EP to halt production of certain crude oil wells and other assets upon signing. The agreement provided that EP would "not conduct any operation in connection with" the development of certain oil wells "unless such operations [were] expressly permitted pursuant to" the purchase agreement or otherwise approved by Verdun and XCL.[4] According to the complaint, XCL's parent company insisted that these control rights were nonnegotiable. The purchase agreement similarly required EP to secure XCL's or Verdun's approval before making expenditures above $250,000, without an exception for ordinary course activities.

The parties allegedly recognized that halting EP's oil production could cause EP to breach contractual obligations with third parties. To compensate for this risk, Verdun and XCL further agreed to bear the financial risks associated with delaying production of EP's oil wells. The FTC cited these contractual provisions as a "paradigmatic case of gun jumping through transfer of beneficial ownership."[5]

Coordinated Conduct

The FTC also cited several examples of coordinated conduct during the HSR Act's waiting period.

- XCL employees began actively supervising EP's well design and planning activities and required EP to alter its site plans and vendor selection process.
- XCL coordinated with EP on customer contracts, customer relationships, and customer deliveries. Some customers even contacted XCL directly about EP contracts, projections, and delivery schedules.
- EP sought and received approval for several types of ordinary-course expenditures including approvals for purchasing equipment, hiring, and renewing contracts.
- Verdun and EP coordinated regarding prices for EP customers in certain geographies.
- The parties shared competitively sensitive information including details on EP's customer contracts, customer pricing, production volumes, customer dispatches, business plans, site designs, vendor relationships and contracts, permitting and surveying information, and other competitively sensitive, nonpublic information without taking adequate measures to limit access to and use of such competitively sensitive information by XCL's and Verdun's employees.[6]

Other Competitive Concerns

In addition to the gun jumping allegations, the FTC previously raised several competitive concerns about the transaction itself. According to a separate complaint filed in 2022, the transaction would have eliminated "substantial head-to-head competition between" two of the only four significant crude oil producers in Utah.[7] To resolve those concerns, the parties entered into a consent agreement requiring the divestiture of EP's entire business and assets in Utah.[8]

Key Takeaways

The FTC's complaint and settlement with XCL, Verdun, and EP demonstrate that U.S. antitrust agencies remain committed to enforcing the HSR Act's prohibitions on gun jumping and the pre-closing exchange of competitively sensitive information.

Many of the examples of coordinated conduct cited by the FTC (such as buyer approvals for material expenditures or for executing, amending, or terminating material contracts) are typical of interim period operating covenants in upstream oil and gas transactions. In light of the FTC's complaint, buyers of upstream oil and gas assets should consult with antitrust and oil and gas counsel to analyze whether interim period operating covenants infringe on the seller's ordinary course of business, structure such covenants to minimize gun jumping risks, and ensure that competitively sensitive information is shared with counterparties only under proper safeguards, such as "clean team" protocols.

Firms considering transactions should proactively consult with antitrust counsel to ensure that interim operating covenants are tailored to maintain the value of the business and do not result in de facto control. Manage integration planning with the assistance of counsel to ensure that a target can operate in the ordinary course of business between signing and closing. Gibson Dunn attorneys are available to discuss gun jumping and other pre-closing prohibitions as applied to your business or a specific transaction.

[1] *See* Proposed Final Judgment, *United States v. Legends Hospitality Parent Holdings, LLC*, No. 1:24-cv-05972 (S.D.N.Y. Aug. 5, 2024), https://www.justice.gov/atr/media/1362901/dl?inline.

[2] *See* 15 U.S.C. § 18a; 16 C.F.R. §§801–803.

[3] *See* Complaint at 8, *United States v. XCL Resources Holdings, LLC, et al.*, No. 1:25-cv-00041 (D.D.C. Jan. 7, 2025), here.

[4] *Id.* at 9.

[5] *Id.* at 10.

[6] *See id.* at 10–18.

[7] Complaint at 5, *In the Matter of EnCap Investments, L.P., et al.*, FTC Docket No. C-4760 (Mar. 25, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110158C4760EnCapEPEComplaint.pdf.

[8] Agreement Containing Consent Order, *In the Matter of EnCap Investments, L.P., et al.*, FTC Docket No. C-4760 (Mar. 25, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110158C4760EnCapEPEnergyACCO.pdf.

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