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**Alert | Antitrust Litigation & Competition Regulation**

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# FTC Secures $5.68M HSR Gun-Jumping Penalty From 2021 Deal

**Go-To Guide**

- FTC announced a $5.68 million penalty against Verdun Oil Company II LLC, XCL Resources Holdings, LLC, and EP Energy LLC for premature control of EP Energy during their 2021 transaction.
- FTC took issue with the exercise of certain consent rights and coordination of sales and strategic planning with EP Energy before the deal closed.
- The settlement also requires that for the next decade, the companies appoint an antitrust compliance officer, conduct annual antitrust training, and use a "clean team" agreement in future transactions.
- The case highlights that maintaining independent operations pre-close is critical, regardless of the merits review of a transaction by the antitrust authorities.

On Jan. 7, 2025, the Federal Trade Commission, in conjunction with the Department of Justice Antitrust Division (DOJ), settled allegations that sister companies Verdun Oil Company II LLC (Verdun) and XCL Resources Holdings, LLC (XCL) exercised unlawful, premature control of EP Energy LLC (EP) while acquiring EP in 2021. This alleged "gun-jumping" HSR Act violation involved Verdun and XCL exercising

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various consent rights under the merger agreement and coordinating sales and strategic planning with EP during the interim period before closing.

In settling, the parties agreed to pay a total civil penalty of $5.68 million, appoint or retain an antitrust compliance officer, provide annual antitrust trainings, use a "clean team" agreement in future transactions involving a competing product, and be subject to compliance reporting for a decade.

## Background

Under the HSR Act,[1] an acquiror cannot take beneficial ownership of a target prior to observing a waiting-period, which allows the DOJ and FTC to investigate the transaction's potential impact on competition in advance of any integration. During the pre-close period, parties to a proposed transaction must remain separate, independent entities and act accordingly. Penalties for HSR Act violations are assessed daily, currently at a rate of $51,744 for each day a party is in violation (amount adjusted annually for inflation).

In July 2021, Verdun and XCL agreed to acquire EP's oil production operations in Utah and Texas for $1.4 billion. The transaction was subject to the HSR Act's notification and waiting-period requirements. The transaction closed in March 2022 after an FTC investigation, with a consent decree settlement that required divesting EP's entire Utah operation (an area where XCL also operated as an oil producer).

The FTC's current complaint asserts that immediately after signing, Verdun and XCL unlawfully began to assume operational control over significant aspects of EP's day-to-day business during the HSR Act review period. The complaint alleged Verdun and XCL

- required EP to delay certain production activities in return for an early deposit of a portion of the purchase price;
- exercised consent rights to discontinue new wells EP was developing;
- agreed to assume financial risk of production shortfalls arising from EP's commitments to customers, and then began coordinating sales and production activity with EP, which included receiving detailed information on EP's pricing, volume forecasts, and daily operational activity;
- required changes to EP's site design plans and vendor selection;
- exercised consent rights for expenditures above $250,000, which the complaint alleged inhibited EP's ability to conduct ordinary course activities, such as purchasing drilling supplies or extending contracts for drilling rigs; and
- exercised consent rights for lower-level hiring decisions, such as for field-level employees and contractors for drilling and production operations.

The complaint also criticized EP for taking "no meaningful steps to resist" XCL and Verdun's requests for competitively sensitive information and "making no effort" to limit XCL and Verdun employees' access or use of information, including data room information.

The alleged gun-jumping conduct occurred for 94 days, from July to October 2021, when an amendment to the agreement allowed EP to resume independent operations.

[1] 15 U.S.C. § 18a.

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## Takeaways

- **Gun-Jumping Enforcement is a Bright-Line Issue**. The FTC's action against Verdun, XCL, and EP is consistent with the conduct and "bright-line" enforcement approach in past gun-jumping cases—meaning the agencies will bring an action regardless of the magnitude of the impact on commerce. For example, in 2024, the DOJ brought an action against a buyer involving pre-closing bid coordination;[2] in 2015, the DOJ brought an action involving the closing of a target's mill and transferring customers to the buyer pre-close;[3] and in 2010, the DOJ brought an action involving the exercise of merger agreement consent rights with respect to three ordinary course input contracts, one of which represented less than 1% of capacity.[4]
- **Significant Penalties May Ensue Regardless of Closing**. Even though the parties resolved substantive concerns about the merger with a divestiture, they will have to pay a significant penalty for the gun-jumping violation. Though parties settled for an estimated 40% discount off the statutory maximum penalty, the FTC assessed the penalty to both the buy-side and the sell-side, which, since the deal has closed, leaves the buyer with the full obligation. In the past, both sides have also been assessed in abandoned deals and the authorities also have sought disgorgement when there are financial gains because of the violation.[5]
- **Consider Covenants that Allow for Ordinary Course Activities.** Sellers should ensure they retain the freedom to operate in the ordinary course of business in purchase agreement interim covenants, which in turn maintains the competitive status quo remains while the deal is pending. As illustrated by this case, parties should be concerned with both the conduct that is allowed—e.g., entering into ordinary contracts, maintaining relationships with customers, or making regular hiring or investment decisions—and the dollar thresholds for any consent rights (ensuring they are sufficiently high).
- **Clean Team Process Needed Pre- and Post-Signing with Overlap**. The FTC criticized EP as the seller for failing to impose restraints on the information it provided for diligence and post-close integration planning. The consent decree settlement obligates the parties to use a "clean team" process for future transactions with product or service overlap that antitrust counsel supervises. It also specifies that information shared must be "necessary" for diligence or integration planning, and where competitively sensitive, not be accessible by those with "direct[] responsibil[ity] for the marketing, pricing, or sales" of the competitive product.
- **Consult Antitrust Counsel Before Exercising Consent Rights**. Even where the parties have agreed to certain interim covenants to protect the acquired assets' value, the facts and circumstances at the time of exercise should be carefully considered for their impact on the seller's competitive activities. Accordingly, parties are best served to seek the advice of antitrust counsel prior to either seeking consent or responding to a request for consent. A proactive approach may help avoid delays to closing and penalties.

[2] *U.S. v. Legends Hospitality Parent Holdings, LLC*.
[3] *U.S. v. Flakeboard America Limited, et al*.
[4] *U.S. v. Smithfield Foods, Inc. and Premium Standard Farms, LLC*.
[5] See *U.S. v. Flakeboard America Limited, et al.*

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