

Practice Update

# FTC Imposes Record “Gun Jumping” Penalty for Illegal Pre-Merger Conduct

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## Key Takeaways

- The involved companies violated the HSR Act by assuming operational control prior to the expiration of the mandated 30-day waiting period.
- During the waiting period, the companies engaged in practices such as halting production, coordinating management decisions, and exchanging sensitive information.
- Companies should adhere strictly to antitrust regulations during mergers to avoid significant fines.

## Summary

The Federal Trade Commission (FTC) announced a historic settlement involving crude oil producers XCL Resources Holdings, LLC (XCL), Verdun Oil Company II LLC (Verdun), and EP Energy LLC (EP), who will collectively pay a record \$5.6 million for violating antitrust laws through illegal pre-merger coordination, commonly referred to as “gun jumping.” This penalty is the largest ever imposed for such violations under the Hart-Scott-Rodino Act (HSR Act), which mandates that merging companies must observe the regulatory waiting period (typically 30 days) prior to consummating their transaction and taking control of each other’s operations.

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The HSR Act requires that parties to certain mergers and acquisitions notify the U.S. Department of Justice and the FTC and observe a statutory waiting period, during which the parties are prohibited from consummating the proposed transaction or transferring beneficial ownership of the businesses or assets at issue. The HSR Act provides the antitrust agencies an opportunity to review notifiable transactions and to assess their potential competitive effects before the parties integrate the underlying businesses or assets. If the parties fail to file or observe the waiting period, both the acquiring and the acquired parties may be subject to penalties of up to \$51,744 per day (adjusted annually).

## Background of the Case

In July 2021, Verdun and XCL, which shared common management, agreed to acquire EP for \$1.4 billion. The transaction triggered an HSR filing obligation, requiring the companies to submit an HSR form and observe the 30-day waiting period prior to closing. However, the FTC's complaint revealed that the purchase agreement allowed XCL and Verdun to immediately assume operational control over significant aspects of EP's business prior to closing, breaching the HSR Act's waiting period requirements. When it became clear that the FTC intended to investigate the acquisition because of competition concerns, XCL, Verdun, and EP executed an amendment to the purchase agreement, which returned operational control to EP allowing it to operate independently without XCL's or Verdun's control over its day-to-day operations. As a result, the FTC alleges that XCL, Verdun, and EP were in violation of the HSR Act for 94 days between July 26, 2021, when the parties signed the purchase agreement, until October 27, 2021, when the parties signed the amendment.

## Details of the Violations

The FTC cited several concerning practices during the HSR Acts' waiting period, including:

- **Control Over Operations:** The purchase agreement stipulated that EP had to halt production on certain wells immediately after signing and could not engage in operations without approval from XCL or Verdun. This included requiring EP to seek approval for expenditures exceeding \$250,000, including ordinary course expenditures.
- **Coordinated Management Decisions:** During the waiting period, XCL halted EP's new well-drilling activities and coordinated with Verdun on pricing and customer contracts. Notably, EP employees began reporting directly to their counterparts at XCL, while customers started contacting XCL directly regarding their contracts with EP. These actions resulted in significant operational changes that disrupted supply chains and contributed to a crude oil supply shortage amid rising prices.
- **Exchange of Sensitive Information:** The companies also exchanged competitively sensitive information during the HSR waiting period without adequate safeguards. This included detailed data on customer contracts, pricing strategies, production volumes, and other nonpublic business information.

## Consequences and Settlement

The settlement reflects the FTC's commitment to enforcing antitrust laws rigorously. The civil penalty is divided equally among the three companies, with both XCL and Verdun jointly responsible for \$2.8 million and EP also contributing \$2.8 million. Previously, the parties had also agreed to divestitures of EP's operations in Utah to mitigate the competitive concerns stemming from the merger.

This case serves as a crucial reminder of the necessity for strict adherence to antitrust regulations during transactions. Companies considering transactions should proactively seek guidance from antitrust counsel to develop interim operating covenants that preserve business value while preventing unauthorized control transfers prior to

closing. Effective integration planning is also essential to ensure that target companies can maintain normal operations from agreement signing until closing.

At Akerman, our antitrust attorneys are prepared to assist you in navigating issues related to gun jumping and other pre-closing restrictions pertinent to your business or specific transactions.

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