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FTC Focus: Avoiding 'Gun Jumping' Violations

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This article is part of a monthly column that considers the significance of recent Federal Trade Commission announcements about antitrust issues. In this installment, we discuss notable takeaways from the agency's recent enforcement action on "gun jumping."

On Jan. 7, the FTC brought an enforcement action against XCL Resources, EP Energy and Verdun Oil, under the Hart-Scott-Rodino Antitrust Improvements Act, for "gun jumping"

The U.S. v. XCL Resources case in the U.S. District Court for the District of Columbia resulted in a record $5.6 million penalty for unlawful coordination between the merger parties prior to HSR clearance.

The FTC alleged the conduct contributed to a crude oil supply shortage during the fall of 2021 and higher prices for consumers.

The case is noteworthy for several reasons.

First, the penalty is the highest ever imposed in connection with a gun-jumping action.

Second, the FTC's case relied on terms contained within the parties' purchase agreement, which the FTC characterized in its action as being a "paradigmatic case of beneficial ownership."

Finally, the conduct at issue lasted for no more than 94 days. Violations need not be long-lasting to be actionable. Below, we discuss the matter in some more detail and highlight some notes for practitioners going forward.

Gun Jumping Under the HSR Act

Gun jumping is shorthand for a company running afoul of the HSR Act's premerger requirements. For transactions subject to HSR reporting, there is an automatic 30-day waiting period under the HSR Act during which parties cannot transfer any assets or control of the business.

This prohibition continues during the pendency of the review. This ensures that the parties remain independent competitors until the transaction is closed and while the agencies assess the proposed transaction.

To avoid gun jumping, parties must avoid acquiring the equity or assets of the other, prematurely integrating operations and sharing competitively sensitive information.

Other conduct to be avoided during the review and preclosing period includes exercising control over the other party's assets or its routine business, management, or operations, or engaging in impermissible joint conduct, such as setting prices, terms and conditions.

The Case at a Glance

Under a July 2021 purchase agreement, Verdun agreed to acquire EP, which is active in crude oil production in Utah's Uinta Basin area and in Texas' Eagle Ford region.

Verdun and its sister company, XCL, also engaged in crude oil production in the same parts of the U.S. In connection with the agreement, EP transferred its assets to XCL in exchange for $1.445 billion. This price subjected the deal to HSR filing, triggering notification requirements. Both parties made premerger filings under the HSR Act.

After reviewing the transaction, the FTC entered into a consent decree with EP in May 2022, which required XCL to divest all of EP's operations in Utah, where XCL also had operations. Specifically, the consent agreement required the sale of EP's operations to third-party Crescent Energy in order to avoid the potential for reduced competition in the crude oil market in that region.

Then, almost two years later, the FTC brought its gun-jumping action. Central to the FTC's action were two provisions of the purchase agreement. These provisions were in place for about three months, from the date of execution to the date that the parties signed an amendment.

The first provision, the FTC said, allowed for XCL and Verdun to immediately exercise impermissible levels of control over EP, including EP's then-current and future crude oil production activities in the region. XCL and Verdun exercised this control to stop EP's new well-drilling plans from approximately July 26 to Aug. 16, 2021.

The second provision required EP to seek XCL's or Verdun's approval for all expenditures

above $250,000. These additional approval threshold requirements effectively transferred control over a large swath of EP's day-to-day operations.

The FTC alleged that EP also sought approval from XCL and Verdun for expenses well below the $250,000 limit, thus ceding additional control to its would-be acquirers.

According to the FTC, these provisions allowed XCL, Verdun and EP to coordinate their activities prior to being legally permitted to do so. The FTC alleged that the change in EP's crude oil development activities contributed to a shortage of U.S. crude oil in September and October 2021.

This was particularly impactful, given the nationwide shortage and high prices that the U.S. experienced during the period. The FTC alleged that these provisions also effectively required EP to turn over details on customer contracts, supply volumes and pricing terms, giving XCL and Verdun access to competitively sensitive business information.

Takeaways and Conclusions

The FTC's enforcement action against XCL, EP and Verdun sends a clear message: Violations of the HSR Act's premerger requirements, even for a brief period of time, can result in sizeable penalties.

The record $5.6 million fine in this case can be understood as reflecting the FTC's increased focus on deterring gun jumping and ensuring robust compliance with premerger requirements.

This case reminds practitioners what kind of conduct is violative of the HSR Act's premerger restrictions, and reflects the levels to which regulators are willing to look for potentially violative conduct.

The case also offers a window into the kinds of provisions in purchase agreements that the FTC considers to be a "paradigmatic" case of beneficial ownership, namely those that provide the purchaser control over the day-to-day operations of the target.

Ultimately, the record penalty and the FTC's allegations about the impact of the parties' coordination — contributing to crude oil shortages and higher prices for consumers — reinforce that these kinds of actions may be more common in certain industries, especially those receiving national media attention.

The case serves as an apt reminder of the importance of not just compliance with the HSR Act's premerger requirements, but also thoughtful structuring of transactions prior to closing.

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Provisions in purchase agreements or their equivalents that grant a party control over a target's operations, expenditures or strategic decisions before closing are red flags under the HSR Act.

Justify preclosing conduct and potentially precarious provisions.

If certain operational controls are necessary to preserve the target's value, document these justifications and ensure they are narrowly tailored.

Monitor compliance throughout the waiting period.

Even though the parties complied with the initial premerger requirements, this did not absolve them of postfiling conduct. Gun jumping has been a historical focus of enforcement and can be avoided through continued compliance with the HSR Act after filing.

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