

# How FTC Sent A \$5.6M Warning Against Jumping The Gun

By **Jason Leckerman and Habiba Cheema** (January 22, 2025)

On Jan. 7, the Federal Trade Commission announced that crude oil producers XCL Resources Holdings LLC, Verdun Oil Co. and EP Energy LLC would pay a record \$5.6 million civil penalty to settle allegations they engaged in unlawful "gun jumping" activities in violation of Section 7A of the Clayton Act, Title 15 of the U.S. Code, Section 18A, known as the Hart-Scott-Rodino Antitrust Improvements Act.

The size of the penalty caused many antitrust lawyers to take notice: It is the largest-ever penalty associated with unlawful gun jumping.

In 2021, pursuant to an agreement executed among the parties, Verdun agreed to acquire EP, a company engaged in crude oil production in the Uinta Basin region of Utah and in the Eagle Ford region of Texas. Verdun and XCL, sister companies under a common management, are also engaged in crude oil production.

As part of the transaction, EP's operations in the Uinta Basin region of Utah were to be transferred to XCL. XCL would pay the portion of the purchase price attributed to the Uinta Basin assets. The parties valued the transaction at approximately \$1.4 billion.

The proposed transaction triggered a filing obligation under the HSR Act. Passed in 1976, the HSR Act requires parties to mergers and acquisitions that meet certain size thresholds to submit premerger notification to the FTC and the U.S. Department of Justice.

Once a premerger notification is submitted, a waiting period commences, during which time the parties may not close the transaction.

The waiting period provides the enforcement agencies a period of time to investigate the proposed transaction. During that time, the agencies may ask for additional information and may issue a second request for information before the consummation of any merger.

Following the investigation, the agencies may decide either to close the matter or to pursue an enforcement action — by way of an agreed-to resolution or litigation.

Parties must remain as separate and independent entities during the period of the antitrust review. It is generally illegal to finalize an acquisition during this waiting period.

The parties to the Verdun-EP transaction filed the required premerger notification. The waiting period went into effect on July 26, 2021, the same date as the executed purchase agreement.

During the waiting period, the FTC began its investigation into the proposed transaction.

The FTC uncovered what it considered to be competitive concerns about the market for the development, production and sale of crude oil in the Uinta Basin.



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To address these concerns and avoid an enforcement action, the FTC and the parties entered into a consent agreement on March 25, 2022, requiring the companies to divest all of EP's Utah operations. The consent agreement terminated the waiting period.

A consent agreement, sometimes called a consent order, is a device the FTC often uses to resolve its concerns about conduct, or potential conduct, that it alleges violates the law. It allows the FTC to resolve the legal dispute without requiring the respondents to admit to liability or guilt.

When a company signs a consent agreement, it must agree to either stop the disputed practices or take certain steps to resolve the alleged anticompetitive aspects of its transaction.

The consent agreement here, however, did not resolve the FTC's concerns about the parties' conduct prior to termination of the waiting period.

The complaint in *U.S. v XCL Resources Holding LLC*, which the DOJ filed on the FTC's behalf in the U.S. District Court for the District of Columbia earlier this month, alleged that instead of observing the waiting period, EP allowed XCL and Verdun to assume operational and decision-making control over significant aspects of EP's day-to-day business operations. This type of conduct violates the HSR Act and is often referred to as gun jumping.

Gun jumping is illegal under Section 7A of the Clayton Act, which requires companies to maintain separate operations until the expiration of the waiting period following a premerger notification filing.

A gun jumping violation can be brought by the enforcement agencies under:

- Section 1 of the Sherman Act, which prohibits agreements in restraint of trade;
- The HSR Act, which requires parties to observe the necessary waiting period before closing their transaction; or
- Section 5 of the FTC Act, which prohibits unfair methods of competition in or affecting commerce.

Although gun jumping is more commonly investigated in connection with deals between competitors, parties that are not competitors can also be charged with a gun jumping violation.

Some of the unlawful gun jumping activities alleged in the complaint included activity in the following areas.

### **Stoppage**

XCL and Verdun ordered a stoppage to EP's planned well-drilling and development activities, allowing XCL to control the development activities moving forward. The stoppage lasted several weeks leading to a crude-oil supply shortage for EP.

According to the complaint, it wasn't until after the companies realized that the FTC would investigate the transaction that EP resumed its own well-drilling and planning activities.

## **Coordination**

XCL and EP coordinated the management of EP's customer contacts, relationships and deliveries in the Uinta Basin region of Utah. Specifically, EP employees began reporting to XCL and providing XCL employees with details on customer contracts, supply volumes and pricing terms.

XCL employees then began dealing directly with EP's customers to address EP's supply shortage and to offer alternative delivery to the customer.

XCL fulfilled EP's contractual commitments to the customers either through its own supplies or from purchases it made on the spot market. EP's customers in exchange began contracting with XCL directly, sometimes excluding EP altogether to discuss EP's supply and delivery commitments under the relevant contracts.

## **Prices**

Verdun and EP coordinated prices for EP's customers in the Eagle Ford region of Texas with Verdun directing EP to raise the price of certain contracts, which included below-market prices.

## **Control**

EP transferred control over key aspect of its business to XCL and Verdun, including granting XCL and Verdun approval rights over many of EP's ordinary course expenditures.

The purchase agreement required EP to submit all expenditures priced over \$250,000 for XCL's or Verdun's approval. In practice, XCL and Verdun reviewed and approved expenditure requests from EP that fell below the \$250,000 threshold as well.

## **Access**

EP provided access to competitively sensitive business information to XCL including its site design plans, customer contract and pricing information, and its daily supply and production reports.

## **A Look at the Findings**

According to the complaint, this premerger coordination "led to a crude oil-supply shortage for EP when the U.S. market was facing significant supply shortages and multi-year highs in oil prices, resulting in Americans paying skyrocketing prices at the pump."

The FTC found the companies were in violation of the HSR Act for 94 days and proposed a settlement agreement of a record \$5.6 million as a civil penalty. The settlement was approved by four of the FTC's five commissioners, with the fifth abstaining.

It now goes out for public comment. At the conclusion of the 60-day comment period, the district court may approve the proposed settlement upon finding that it is in the public interest.

Although the FTC and DOJ rarely make public any investigations into gun-jumping activity, the agreement here is consistent with positions the agencies have recently taken against parties involved in mergers and regarding competitors sharing competitively sensitive

information.

With the change in administration and the leadership of the antitrust enforcement agencies, many eyes will be on the new lead antitrust enforcers to see whether this enforcement trend continues.

Regardless, this recent enforcement action should provide sufficient incentive to parties to continue to operate independently during the HSR review period.

Some rules of thumb for parties to mergers and acquisitions to avoid a gun-jumping violation include:

- Continuing to exercise independent business judgment and to compete for opportunities;
- Avoiding involvement in each other's customer relationships;
- Avoiding one party taking possession of the other's assets;
- Maintaining separate access to the legacy computer systems; and
- Exercising caution when exchanging competitively sensitive information, especially information about pricing, customers, production innovation and strategic planning.

Parties should continue to use so-called clean teams — which consist of personnel not responsible for relevant competitive planning, pricing or strategy — during this period and adhere to antitrust protocols.

Parties should also consider using an independent third party to evaluate information necessary for integration planning or diligence to ensure competitively sensitive information is protected and only permissible information is exchanged.

At its root, the FTC's action in this case is a warning that the companies should ensure they continue to operate independently while their transactions are being reviewed.

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