

Record Fine Highlights Importance of Observing Antitrust Requirements Between Signing and Closing

US – January 2025

On January 7, 2025, the Federal Trade Commission (FTC) announced that three oil and gas companies will pay a record US\$5.6 million fine for engaging in improper premerger coordination – also known as “gun jumping” – prior to the closing of their proposed merger.

This development serves as a reminder that merging parties must be vigilant against potential gun-jumping activity while pending transactions are being reviewed by the antitrust agencies under the Hart-Scott-Rodino (HSR) Act.

Parties to an HSR-reportable transaction can violate the antitrust laws if they “jump the gun” by taking steps toward integration before the transaction has been cleared. This is because, prior to closing, the parties are considered to be independent competitors, and they must continue to operate in the ordinary course (i.e., continue to compete), particularly while any HSR review is pending. Gun-jumping issues can arise from certain exchanges of information, transfers of employees or assets, joint decision-making, or other forms of coordination between merging parties. As a general rule, prior to closing, parties are advised to plan for closing, but not implement those plans.

The FTC alleged that XCL Resources and Verdun Oil violated this principle when they assumed operational and decision-making control over EP Energy following the announcement that Verdun – which was under common management with XCL – would acquire EP Energy for US\$1.4 billion. The alleged illegal activities included (i) XCL and Verdun ordering a stoppage of EP’s planned drilling and development activities, (ii) XCL and EP coordinating to manage EP’s customer contracts, relationships and deliveries, and (iii) Verdun and EP coordinating on prices for EP’s customers.

The HSR waiting period for the transaction began on July 26, 2021, and the parties’ gun-jumping activities began on that date and lasted through October 27, 2021, when the parties executed an amendment to their merger agreement. The waiting period expired in March 2022 when the parties entered a consent decree and the FTC granted early termination of the waiting period.

Notably, the announcement of this fine comes nearly three years after the FTC granted early termination, indicating that the FTC’s involvement with this transaction continued for a significant period of time after it cleared the deal to close. Also notable is the fact that the FTC voted 4-0-1 to accept the settlement (with Commissioner Holyoak recused), which means that it had the support of both the sitting Democratic commissioners and sitting Republican Commissioner Andrew Ferguson, whom President-elect Trump has nominated to serve as FTC chair in the new administration.

Merging parties should thus expect that the FTC will continue to scrutinize potential gun jumping and to enforce its prohibition – at least on facts similar to those here – even following the anticipated changes to the FTC with the new administration. Companies should continue to ensure that their antitrust compliance programs address gun-jumping concerns and that, when a merger is contemplated or announced, all relevant business personnel are reminded of the potential consequences of a violation.

Contacts

Michael Wise

Washington DC
T +1 202 457 5239
E michael.wise@squirepb.com

Martin Mackowski

Washington DC
T +1 202 457 5287
E martin.mackowski@squirepb.com

Chris Gordon

Washington DC
T +1 202 626 6284
E christopher.gordon@squirepb.com