

# Memorandum

## Takeaways from DOJ's Record \$5.7 Million Gun-Jumping Settlement

January 22, 2025

On January 7, 2025, XCL Resources Holdings, LLC (“XCL”), XCL subsidiary Verdun Oil Company II, LLC (“Verdun”), and EP Energy LLC (“EP,” and with XCL and Verdun, the “Defendants”) agreed to a record-setting civil penalty of \$5,684,377 (and related behavioral commitments) for engaging in unlawful “gun-jumping” in violation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”).<sup>1</sup> The penalty stems from Verdun’s 2021 agreement to acquire EP, which closed in 2022 (the “Transaction”). In connection with the FTC’s review of that transaction, Verdun was required to divest the entirety of EP’s business in Utah.<sup>2</sup>

Here, DOJ alleges that the buyers “substituted their business interests and judgment for those of EP and exercised operation control over key aspects of EP’s business before expiration of the waiting period,” including directing EP’s ordinary course business activities and customer negotiations, all before receiving the requisite merger clearance under the HSR Act.<sup>3</sup> Compl. ¶ 71. DOJ characterized the contractual provisions that “allowed one competitor to control the other’s ordinary-course business activities” as “a paradigmatic case” of gun-jumping in violation of the HSR Act. Compl. ¶ 32.

The case serves as a good reminder to merging parties to work closely with antitrust counsel regarding integration planning activities and other pre-closing activities to ensure compliance with the HSR Act rules concerning gun-jumping.

### Gun-Jumping and the HSR Act Waiting Period

The HSR Act requires transactions exceeding certain thresholds to be notified to the DOJ and FTC, and for the parties to those transactions to observe a waiting period (typically 30 calendar days) before consummating the transaction.<sup>4</sup> Gun-jumping occurs when the acquirer assumes “beneficial ownership” over the target prior to the

<sup>1</sup> [Stipulation and Order](#), ECF No. 4, *United States v. XCL Res. Holdings, LLC, et al.*, No. 1:25-cv-00041 (D.D.C. Jan. 7, 2025). In addition to the civil penalty, the consent order requires that XCL, Verdun, and EP abide by the HSR Act’s pre-consummation waiting periods for any future reportable transactions, as well as prohibits the parties from requiring that any other party to such a transaction (i) obtain approval for ordinary course business activities, (ii) delay or suspend ordinary course business efforts, or (iii) share confidential business information. *Id.* ¶ V.A.

<sup>2</sup> The FTC investigated the Transaction in 2021, clearing it on the merits (subject to the divestiture) in 2022. Decision and Order, *In the Matter of EnCap Invs., L.P., et al.*, No. C-5760 (FTC Mar. 25, 2022).

<sup>3</sup> [Complaint](#), ECF No. 1, *United States v. XCL Res. Holdings, LLC, et al.*, No. 1:25-cv-00041 (D.D.C. Jan. 7, 2025). While gun-jumping violations, particularly those involving competitors, may also be pursued as coordinated conduct in violation of Section 1, as well as Section 5 of the FTC Act, the Complaint in this case does not do so.

<sup>4</sup> 15 U.S.C. §18a(a), (b).

expiration of the HSR waiting period.<sup>5</sup> The existence of “beneficial ownership” is determined by reference to certain key “indicia,” which include “the right to obtain the benefit of any increase in value or dividends, the risk of loss of value, the right to vote the stock or to determine who may vote the stock, [and] the investment discretion (including the power to dispose of the stock).”<sup>6</sup> In its Complaint, DOJ elaborates that the practical indicia of beneficial ownership include, for example, “controlling ordinary-course business decisions, assuming or rejecting contractual obligations, obtaining competitively sensitive information, and partaking in financial gains and losses.” Compl. ¶ 23.

In practice, applying these indicia to discern the boundary between lawful transaction covenants designed to protect the value of a buyer’s contemplated investment and an illegal exercise of beneficial ownership is fact specific. While it is possible that a single interim operating covenant reaches the threshold of beneficial ownership, it is more often the case that concerns arise when considering the aggregate transfer of beneficial ownership resulting from the interim operating covenants in their totality, particularly where (as in this matter) the covenants were allegedly invoked to restrict the target’s ordinary course business operations. Prior gun-jumping challenges by DOJ and the FTC have, indeed, generally involved similar wide-ranging and expansive conduct.

### The DOJ Complaint

DOJ alleges that, although Defendants made the required pre-merger notification filings, EP allowed Verdun and XCL to assume operational and decision-making control over significant aspects of EP’s day-to-day business operations as soon as the Transaction was executed and before HSR clearance was received, “in direct violation of the HSR Act’s waiting period requirements.” Compl. ¶ 35, 71.

The Complaint alleges the gun-jumping violation occurred during the period between the execution of the initial purchase agreement and its later amendment (which DOJ alleged occurs only after Defendants “realized that the FTC would investigate the transaction,” Compl. ¶ 7).

Per the Complaint, from the date the purchase agreement was signed on July 26, 2021, through its amendment on October 27, 2021, the parties engaged in the following prohibited conduct (Compl. ¶¶ 43-68):

- **Coordinated Customer Activity.** Immediately after the purchase agreement was signed, EP employees began reporting to their XCL counterparts and providing them with details on customer contracts, supply volumes, and pricing terms. XCL employees also coordinated directly with EP’s customers to discuss EP’s supply shortages and arrange for alternative deliveries.

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<sup>5</sup> See 16 C.F.R. 801.1(c).

<sup>6</sup> [43 Fed. Reg. 33,449](#) at 33,458 (July 31, 1978). These indicia of pecuniary interest and control refer specifically to acquisitions of voting securities, but the same principle applies with respect to other covered acquisitions (*e.g.*, asset acquisitions).

- **Operational Control Over Day-To-Day Business.** XCL and Verdun required EP to make operational changes, including halting EP's new well drilling activities immediately after the purchase agreement was signed. The prohibition was lifted only after XCL and Verdun realized that the FTC would investigate the transaction.
- **Pricing Coordination.** Verdun and EP coordinated regarding prices for EP's customers in the Eagle Ford region of Texas, and Verdun directed EP to raise prices during EP's next customer contracting period.
- **Sharing Competitively Sensitive Information.** EP provided XCL and Verdun with almost-unfettered access to its competitively sensitive business information, including site design plans, customer contract and pricing information, and daily supply and production reports. Standard protections, such as a "clean team" arrangement, were not observed.
- **Prior Approval Requirements.** The Purchase Agreement granted XCL and Verdun approval rights over EP's activities taking place before the transaction closed. This included EP's ongoing and planned crude oil development and production activities, as well EP's ordinary-course expenditures over \$250,000 (an amount that was deemed to be too low because it interfered with EP's ordinary course business operations and thus interfered with EP's independent operation).

In sum, "XCL and Verdun substituted their business interests and judgment for those of EP and exercised operational control over key aspects of EP's business before expiration of the waiting period in violation of Section 7A." Compl. ¶ 71.

## Key Takeaways

Although the *XCL* example illustrates particularly concerning alleged behavior on behalf of the merging competitors, it nonetheless serves as a stark reminder that, until regulatory clearances are received, parties to a transaction remain separate and independent and should continue to operate their businesses as they have done in the past (*i.e.*, "in the ordinary course"). While parties may engage in due diligence and integration planning before receiving regulatory clearances, they cannot integrate or transfer any business control from target to buyer. To that end, parties should pay close attention to agreed-upon interim operating covenants, which themselves should be narrowly tailored to include only obligations necessary to preserve the value of the target business and should not interfere with the target's ordinary course operations or general exercise of its business judgment. Determining the proper bounds of such covenants is fact-specific and should include input from antitrust counsel.

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