

FTC Secures Record Gun-Jumping Settlement in Energy Transaction

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The Federal Trade Commission (FTC) and the Department of Justice, Antitrust Division (DOJ) announced a record-setting \$5.6 million gun-jumping fine related to Verdun Oil Company II LLC's acquisition of EP Energy LLC. Although the parties agreed to divest certain operations pursuant to a 2022 consent decree to address competition issues, the current action did not allege new concerns about the post-closing effects of the transaction on competition. Instead, the sole issue raised in the DOJ's complaint is the manner in which the parties operated during the Hart-Scott-Rodino (HSR) waiting period and the interim period, between execution of the purchase agreement and closing.

The HSR Act requires that parties to transactions of a certain size submit notification and information to the FTC and the DOJ and observe an initial 30-day waiting period while the agencies review the transaction. Before the termination or expiration of the HSR waiting period, the parties are forbidden to shift beneficial ownership, control, risks, or benefits of the to-be-acquired business or assets to the acquirer.

The FTC alleged that, for a three-week period before the end of the HSR waiting period, EP allowed Verdun and an affiliate to assume operational and decision-making control over significant aspects of EP's day-to-day business operations. Further, the buyer received regular operational reports and had access to EP's competitively sensitive information (CSI) for approximately three months. The FTC pointed to, for example, contractual provisions that gave Verdun approval rights over EP's ongoing and planned crude oil development production activities and EP's ordinary-course expenditures exceeding \$250,000.

Similar provisions are often included among interim covenants to protect the buyer's anticipated investment and to ensure the buyer's valuation remains valid through closing. According to the enforcement agencies, the buyer exercised control by forcing the target to change its business plans before the end of the HSR waiting period. The complaint quotes an email from the target to the buyer as evidence of the buyer's control over the target's operations: "Please confirm that you approve the ... [s]hut down all currently planned fracs until after the close. [S]hutting down these fracs we have sold more oil than we will be able to deliver and [you] accept[] the contractual and reputational ramifications of not delivering these barrels." The agencies allege that the buyer "began actively supervising the target's well-design and planning activities," and even changed the target's site design plans and vendor-selection process. The parties' employees allegedly coordinated on pricing for certain customers, and neither party allegedly attempted to restrict access to CSI.

The crux of the agencies' concern is that the parties allegedly disregarded their strategic and operational separateness. This action serves as a reminder that the HSR waiting period is mandatory, the parties must limit

disclosure of CSI to only what is essential for valuation, due diligence, and integration planning. Most importantly, the buyer may not control the operations of the target, particularly when the target is an actual or potential competitor.

The Troutman Pepper Locke antitrust team closely monitors developments at the federal and state antitrust enforcement agencies and provides the legal guidance necessary to identify potential risks and efficiently realize the benefits of transactions.

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