

FTC ANNOUNCES RECORD “GUN-JUMPING” FINE FOR MERGING PARTIES

On January 7, 2025, the Federal Trade Commission (“FTC”) **announced** that several crude oil producers will pay a record \$5.6 million in civil penalties to settle allegations of premerger “gun-jumping” in violation of the Hart-Scott-Rodino (“HSR”) Act.

Parties to a merger violate the antitrust laws when a buyer takes operational control over the seller, or the parties inappropriately coordinate activities, prior to closing. In the present case, the FTC alleged that three oil companies, including XCL Resources, EP Energy and Verdun Oil, “jumped the gun” when they engaged in significant coordination and shifted substantial operational controls prior to the expiration of the HSR waiting period. Specifically, the buyer controlled the target’s expense approvals, changed the seller’s ordinary course of business operations and accessed competitively sensitive information. The FTC ultimately accepted the proposed settlement in a 4-0-1 vote, with one commissioner recusing.

This matter should serve as another reminder for health care entities engaging in transactions to proceed with caution during a transaction. Specifically, the health care industry is no stranger to gun-jumping concerns. In 2023, the FTC zeroed in on health care entities, concerned with their failure to adhere to the HSR notification requirements and corresponding waiting period (see *Louisiana Children’s Med. Ctr. v. Att’y Gen. of United States*). Similarly, though ultimately unsuccessful, during a merger in 2005, a large national pharmacy attempted to demonstrate two merging insurers participated in unlawful gun-jumping by exchanging confidential information (see *Omnicare, Inc. v. United Health Group, Inc.*).

It is essential for Hall Render clients and health care organizations to be aware of the FTC’s continued focus on gun-jumping, particularly given the heightened antitrust scrutiny applied to hospital transactions specifically and the health care industry generally. Regardless of how the landscape of antitrust enforcement shifts with the new administration, gun-jumping is sure to remain a relevant focus point for the FTC and Department of Justice.

PRACTICAL TAKEAWAYS

To avoid any potential concerns of gun-jumping and ensure continued compliance with antitrust law during transactions, companies should:

- Consult antitrust counsel early in a potential transaction;
- Utilize antitrust counsel to set up appropriate processes as you navigate the complexities of due diligence and integration planning, including utilizing clean rooms and clean teams;
- Consult antitrust counsel as questions arise about appropriate information sharing and interactions during due diligence and integration planning;
- Remember that in most instances you can make plans for post-closing, but should not implement those plans until closing occurs; and
- Make sure the parties continue to operate separately from each other and make independent business decisions until the deal is officially closed.

For more specifics on the withdrawal and the above-mentioned takeaways, please contact:

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