HSR BONANZA: FTC ANNOUNCES RECORD "GUN-JUMPING" FINE; DOJ SUES FOR SERIAL VIOLATIONS

The antitrust agencies have been active this month, bringing compliance with the Hart-Scott-Rodino ("HSR") Act to the forefront. The HSR Act requires companies to file premerger notifications with the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") for certain transactions.

FTC FINES GUN-JUMPERS

On January 7, 2025, the 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 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.

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.***).

DOJ BRINGS SUIT FOR HSR VIOLATIONS

Just a week later, on January 14, 2025, the DOJ Antitrust Division filed a **civil lawsuit** against KKR & Co. Inc. and many of its investment advisors and funds (collectively, "KKR"), alleging KKR withheld or altered documents in violation of the HSR Act during premerger reviews for at least 16 unique transactions. The government's complaint lists multiple violations of the HSR Act, including alteration of documents in HSR filings for some transactions, omission of required documents in HSR filings and, on two occasions, the failure to make an HSR filing. The HSR Act authorizes penalties on a per day, per violation basis, at a rate of $50,000. The complaint, filed in the Southern District of New York, seeks a maximum of $650 million in civil penalties for these violations.

In response, KKR filed its own **complaint** in the District of Columbia, seeking declaratory judgment that they did not violate the HSR Act, but that the HSR Act and regulations are vague and confusing, and any errors were unintentional and trivial. Hall Render will continue to monitor both countersuits as they develop.

PRACTICAL TAKEAWAYS

These matters should serve as reminders for health care entities engaging in transactions to proceed with caution during a transaction. Specifically, it is essential for Hall Render clients and health care organizations to be aware of the antitrust agencies' continued focus on HSR compliance, 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, enforcement of HSR requirements will remain a key focus point for the FTC and DOJ.

To ensure continued compliance with antitrust laws during transactions and avoid any potential concerns of gun-jumping or other HSR violations, companies should:

- Consult antitrust counsel early in a potential transaction;
- Utilize antitrust counsel to set up appropriate processes when navigating the complexities of due diligence and integration planning,

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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
- Ensure the parties continue operating 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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