

# U.S. Regulatory Considerations for Transactions

*Hart-Scott-Rodino Premerger Filings  
and  
CFIUS Analysis and Filings*

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# Premerger Notifications Generally

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- Cross Border Transaction?
  - Minority holdings?
  - Revenues?
- Consider for timing and resources
- Critical to coordinate not delegate
- U.S.: HSR Act (size of the transaction)
- EU and it's member states
- Brazil
- China and India
- Over 170 jurisdictions (Cypress!)



# Hart-Scott-Rodino Act

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- Hart-Scott-Rodino Act of 1976, as amended and its rules and regulations (“HSR Act”)
- Purpose and Rationale
- Elements:
  - FTC and DOJ roles;
  - Thresholds and Exemptions;
  - Strategy and Timing;
  - Gun Jumping;
  - Filing information and fees;
  - Enforcement.

# Purpose and Rational of HSR Act

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- Gives Regulatory Agencies 30 days to review for anticompetitive effects prior to the consummation of acquisition or merger;
- Amendment to the Clayton Act in 1976
- Very difficult to enforce after a merger
- Power of Injunction to prevent merger
- Ability to reform the transaction to make it less anticompetitive



# HSR Agencies: DOJ and FTC

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- Roles of the Agencies involved with HSR
- Premerger Notification Office of the Federal Trade Commission
- Clearance Between Agencies for substantive review



# HSR Terms and Thresholds

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- Acquiring and Acquired Persons: Ultimate Parent Entities and Associates
- Concept of “control”
- Commerce Test
- Size of the Transaction Test
  - Asset v. Voting Securities
  - Non Corporate interests
  - Private Equity Funds and Master General Partnerships
- Size of the Parties Test



# HSR Exemptions

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- “Foreign Acquisition” of non US Assets
- Foreign Acquisition of voting securities of non-US issuer
- Undeveloped real estate;
- “Look through” exemption;
- Formation exemptions.



# HSR Strategy and Timing

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- HSR Waiting Period
- Early Termination
- Agency Review
- Informational Requests
- Pull and Refile
- Preemptive Review
- Second Requests

EARLY TERMINATION  
UPDATES ON [twitter](#)



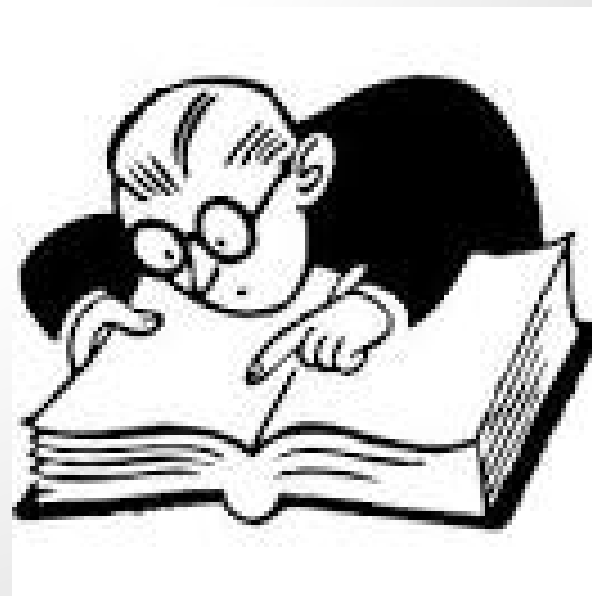


# Considerations before filing HSR

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- Substantive Antitrust Trust Review
  - Understand if there's a problem before you file
  - Strategy options
- Expert help?
- Timing Issues



# Gun Jumping and Spill Over Effects

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- Concept: no merging until after HSR period expires
- Provide guidelines to all principals working on the merger
- Due Diligence issues
- Integration issues



# HSR Filing and Fees

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- Preparation of the HSR Form
  - Documents required
  - CFO involvement
  - 2 weeks to 2 months
- HSR filing Fees
  - \$45,000 -- \$280,000
- All Parties File
- HSR Review Process

[HSR RESOURCES](#)

# HSR Enforcement

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- Failure to File (Bill Gates):  
\$16,000/day fine
- Failure to produce all relevant documents
- Gun Jumping
- Anticompetitive Transaction (Whole Foods example)
- Mergers remedies



# Exon-Florio Amendment

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- Purpose: to review transactions for issues of National security prior to consummation.
- History and background of enforcement
- Elements:
  - Transaction involving change of control
  - Implicating National Security
  - 30 day waiting period
  - Joint Filing
  - Strategy and considerations

# Composition of CFIUS

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- The members of CFIUS include the heads of the following departments and offices:
  1. Department of the Treasury (chair)
  2. Department of Justice
  3. Department of Homeland Security
  4. Department of Commerce
  5. Department of Defense
  6. Department of State
  7. Department of Energy
  8. Office of the U.S. Trade Representative
  9. Office of Science & Technology Policy
- The following offices also observe and, as appropriate, participate in CFIUS's activities:
  1. Office of Management & Budget
  2. Council of Economic Advisors
  3. National Security Council
  4. National Economic Council
  5. Homeland Security Council
  - The Director of National Intelligence and the Secretary of Labor are non-voting, *ex-officio* members of CFIUS with roles as defined by statute and regulation.

# Exon-Florio Amendment

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- Enacted in 1988 as an amendment to the Defense Production Act of 1950
- Authorize the president to investigate foreign acquisitions, mergers and takeovers of or investments in US Company from a national security perspective
- President may prohibit a transaction that appears to threaten national security
- President delegated authority to CFIUS

# When to Make CFIUS Filing

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- CFIUS Filing is “voluntary” – i.e., no penalty for failure to file.
- CFIUS can review at any time without filing and may delay transaction.
- If it is a “covered” transaction and
- May be subject to investigation.





# When to make CFIUS filing

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- **If there is “foreign control” of any person engaged in U.S. interstate commerce; and**
  - Concept of “control” is not fixed (can be as little as 10%);
  - Even if U.S. entity is already foreign owned.
  - Includes joint ventures and some investments.
- **If a foreign entity will control strategic resource or affect national security**
- Impairment of national security has changed since 1988 and is somewhat controversial

# Early Enforcement

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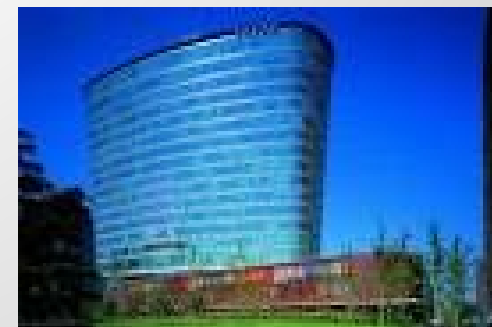
- 1990: Pres Bush blocked China National Aero-Technology Import & Export from acquiring Mamco Mfging;
- By 1991, only merger blocked out of 500.
- Amendments to strengthen did not pass.
- Post 9/11
  - Of six heightened review transaction between 2003 and 2005, two were Chinese



## ■ CNOOC's Proposed Acquisition of Unocal



- June 23, 2004, \$18.5 billion bid for Unocal
  - Bid over Chevron's \$16.4 bid
  - Filed a unilateral CFIUS filing but CFIUS never reviewed
  - National Security issue?
- No special technology
  - Political issues: no reciprocity (if a US company tried to buy a Chinese oil company)
  - Access to cheap capital (via Chinese gov't) so bid unfair
  - Republican protectionists/HR 344 passed
  - CNOOC withdrew its offer



# CFIUS Review of Dubai Ports World

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- DPW, owned by Dubai Gov't, purpose to acquire a British firm that held 6 US ports for \$6.8 billion in 2006;
- Filed for and received CFIUS approval;
- Then Congress learned of the transaction, was hostile in spite of safety mechanisms in place;
- DPW divested the six ports.



# Post Dubai Ports CFIUS

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- Weaken credibility of CFIUS
- Result is heightened review
- 2008 Guidelines (Exec. Order 13456) expanded CFIUS members
- 2008 requires second-stage investigation for foreign gov'ts or critical infrastructure.

# CFIUS Heightened Scrutiny

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- 2009: Chinese mining acquisition abandoned in Nevada;
- 2011 Huawei acquisition of 3Leaf Systems (No filing) and then abandoned;
- September 2012 blocks Ralls from acquiring Wind Farm Project
  - Retroactive review
  - Near Navy weapons systems training Boardman OR
- 2013: CFIUS cleared Wanxiang Group's acquisition of A123 Systems – battery maker)
  - Divested military and gov't assets
  - \$257 million acquisition price



# CFIUS Lessons

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- Increase in Filings (20% increase in 2011 over 2010)
- More heightened scrutiny (37%) in 2011;
- Compare to 4% in 2007;
- Don't avoid filing (Huawei);
- Have a plan in place to address concerns;
- Meet with CFIUS members;
- Distance from gov't entity.

