

Getting the Deal Done!
Anatomy of a Cross-Border Deal
Global Law and Business Seminar

COLUMBIA LAW SCHOOL

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THREE TOPICS AND AN INTERVIEW:

1. INTRODUCTION AND M&A OVERVIEW
2. IMPACT OF POLITICAL AND ECONOMIC CONSIDERATIONS ON M&A DEALS
3. A ROADMAP TO CLOSING: A CHEAT SHEET
4. INTERVIEW: BRETT BARRAGATE (JONES DAY)





Course Overview

GETTING THE DEAL DONE!

COURSE OVERVIEW

Course Description:

This course is meant for business executives. It offers a practical introduction to key legal issues that come into play in cross-border deals under NY law, and/or involving U.S. parties

My *immediate goal* is to make you aware of the main themes that drive or significantly impact deal-making in the U.S. so that you hit the road running when you find yourself working on a cross-border M&A deal with U.S. parties. My *overall goal* is to have you think about the type of leader you want to be

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COURSE OVERVIEW

Course Structure:

- Seminar: Interactive; your goals are mine
- 4 classes: from specific to general:
 - In our first class, we will address regulatory and political risks in cross-border M&A transactions and map out a roadmap to getting a deal closed;
 - We will follow with a negotiation workshop; and
 - End with two classes on ESG and how it is shaping the business world, in and outside the U.S.
- Guest speakers: top professionals with first-hand experience on the topics we have been discussing in class

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COURSE OVERVIEW

- Why me?
- From an M&A perspective, what is the main difference between a U.S. trained executive and a non-U.S. trained executive?





What is M&A?

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THE LIFECYCLE OF A DEAL

What is M&A?:

- A general term that describes the consolidation of businesses or assets through various types of financial transactions such as mergers, acquisitions or sales
- At its core, M&A consists of advising clients in forming a business, selling a business, or buying a business

GETTING THE DEAL DONE! THE LIFECYCLE OF A DEAL

Why is U.S. M&A important to you?:

- In 2022, the U.S. M&A market represented approximately 30% of global M&A volume and approximately 50% of global value
 - Approximately one out of three M&A deals over US\$100M has a U.S. component
- Aggregate deal value climbed to US\$4.3 trillion, 46% higher than in 2020 and 67% higher than in 2019

M&A PRACTICE

COURSE OVERVIEW

10 BIGGEST M&A Deals of 2022 (*DealRoom*):

1. US\$68.7 billion – Microsoft acquisition of Activision Blizzard (largest video game maker). Industry: Gaming
2. US\$61 billion – Broadcom acquisition of VMWare (cloud tech company). Industry: Information Technology
3. US\$28.3 billion – Oracle acquisition of Cerner (health information technology). Industry: Health Technology
4. US\$28.3 billion – ADM acquisition of Xilinx. Industry: Microprocessors
5. US\$26 billion – Prologis (world's top industrial real estate company) merger with Duke Realty (real estate investment trust). Industry: Real Estate
6. US\$21.3 billion – Orange merger with Grupo MasMovil. Creates new leader in Spain's cellular telephone market. Industry: Telecommunications [Spanish law]
7. US\$20 billion – Adobe acquisition of Figma (design platform). Industry: Technology (digital)
8. US\$21 billion – Dutch Chemical Company Royal DSM acquisition of Firmenich (Swiss flavors company). Industry: Food and beverage [Non-US deal]
9. US\$19.7 billion – Microsoft acquisition of Nuance (AI). Industry: Technology
10. US\$16.5 billion – Vista Equity Partners acquisition of Citrix. Industry: Information Technology.

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The Top 10 Largest PE Firms in the World in 2022* ([U.S. News](#)):

*based on money raised over the past five years (Private Equity International)

TOP PE GLOBAL FUNDS	
1. KKR	6. Carlyle Group
2. Blackstone	7. General Atlantic Service
3. EQT (Sweden)	8. Clearlake Capital Group
4. CVC Partners [Citi]	9. Hellman & Friedman
5. Thoma Bravo	10. Insight Partners

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CONCLUSION:

IF YOU ARE GOING TO WORK ON CROSS-BORDER M&A, IT IS VERY LIKELY THAT YOU WILL BE WORKING ON TRANSACTIONS UNDER NY LAW AND WITH U.S. EXECUTIVES

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In U.S. led cross-border M&A transactions, most transactions will be under NY law:

- U.S. parties are partial to NY law BUT
- NY Law is also the “Gold Standard Choice” for global business contracts

WHY?



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THE LIFECYCLE OF A DEAL

Why New York Law?

- One of the most **sophisticated, developed and predictable** bodies of commercial and business law available
- Guided by the **intent of the parties** as expressed in the words they chose in the contract, making the results predictable and certain (159 *MO Corp, v Redbrige Bedford*, 33 N.Y.3d 353 (2019))
- NY imposes a **high standard of conduct** on contracting parties. It incorporates the implied covenant of good faith and fair dealing into all contracts

GETTING THE DEAL DONE! THE LIFECYCLE OF A DEAL

Why New York Law?

- If the agreement involves at least **\$250K**, NY law may be chosen, whether or not the agreement has anything to do with NY. A NY state court forum may be chosen for any commercial dispute where the contracts is expressly governed by NY law and involves not less than **\$1 million**
- Excellent resources for the resolution of **conflict disputes**: the Commercial Division of the NY State Supreme Court is staffed by judges whose sole responsibility is the resolution of commercial disputes. NY also offers excellent choices for arbitration, with many of the leading arbitral institutions having offices in NY

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What about Delaware law?

- Not as popular as NY law for governing commercial transactions. However, Delaware is extremely popular for incorporating businesses, including for the following reasons:
 - Flexible and advanced business formation statutes. Shareholders, officers and directors are not required to live in DE
 - The registration process is straightforward and done online
 - Business owners are not required to list their names when filing business formation papers
 - Does not impose state income tax on businesses that do not operate within the state
 - The Delaware Court of Chancery is a unique 220 year-old business court that has written most of the modern U.S. corporation U.S. case law



TOPIC TWO: IMPACT OF POLITICAL AND ECONOMIC CONSIDERATIONS ON M&A DEALS

1. Overview: Impact on M&A Deals
2. Going in, how do you protect your investment on a long-term basis?
 1. BIT Approach
 2. Political Insurance
 3. Business Strategy
3. Country Risk and Corruption
 1. FCPA Overview
5. CFIUS Overview (U.S. inbound investments)
5. Impact on Deal Documents



HOW TO PROTECT YOUR INVESTMENT L/T

GETTING THE DEAL DONE!

POLITICAL/REGULATORY CONSIDERATIONS

How do you protect your investment long-term?



GETTING THE DEAL DONE! POLITICAL/REGULATORY RISK

How do you to protect your investment on a long-term basis? [Resource Nationalism Index, “creeping expropriation” – Bolsonaro (BR/Lula), Lopez-Obrador (Mex), Castillo (Peru/ Dina Boluarte), Boric (Chile) and Petro (Colombia)]

1. Treaty planning: Bilateral Investment Treaty (BIT) investing

- Ensures investment treaty protection: Top 20 FDI recipients are signatories to over 950 BITs [Spain has 99 treaties in force – ETVE regime]
- What is protected?: “Investment” (shares, assets, bonds, enterprise)
- Who is protected?: The “investor” making the investment – natural persons and corporations

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POLITICAL/REGULATORY RISK

- What protections do IBTs offer?
 - Most common:
 - No Expropriation Without Fair Compensation / “Creeping” Expropriation [Mexico]
 - Fair & Equitable Treatment/Denial of Justice
 - Most Favored Nation Treatment/ National Treatment
 - Full Protection and Security
 - Other protections: protection for civil strife or armed conflict, enforcement of agreements with the host state or free transfer of covered investments
- How much and for how long?: Generally unlimited
- Cost: Implementation and maintenance. Forum Shopping. [Bottler experience]
- Arbitration: By investor against host country directly. Approximately 40% of the IBT arbitrations are settled or discontinued

GETTING THE DEAL DONE! POLITICAL/REGULATORY RISK

2. Political insurance: May be the answer against expropriation, political violence, currency inconvertibility (the inability to convert local currency and repatriate it), sovereign debt default, and even acts of terrorism and war
- Not always available
 - It is expensive (investor pays for insurance with a premium), limited (maximum insurance periods are 15-20 years) and insurance recovery amounts are subject to applicable policy limits
 - Insurance protection may also require disclosure, which is not the case if relying on IBT protection
 - Has been in the rise and is arguably speedier and more certain than under treaties
 -

See JD article [here](#)

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POLITICAL/REGULATORY RISK

3. L/T Business Strategy:

- Develop an international legal/business strategy (e.g., create internal monitoring systems (lobby before *unwanted* changes take place) and build and strengthen relationships with local communities)
- Companies in mining, energy and heavily regulated industries consistently follow this approach



Political and Regulatory Considerations CORRUPTION

GETTING THE DEAL DONE! COUNTRY RISK AND CORRUPTION

- FCPA Overview: targets corporate bribery of non-US government officials. Two basic provisions:
 - *Anti-bribery provisions*: (i) prohibit making, promising or offering payments or providing other things of value to (ii) foreign government officials (iii) for the purpose of obtaining or retaining business
 - This prohibition extends to “issuers,” “domestic concerns” and those acting on their behalf – e.g., under the company’s control or at the company’s direction
 - “Control”: For example, in Bell South, the SEC asserted that where the parent company (U.S.) held 49 percent of the equity of [affiliate] (Nicaragua) with the right to acquire an additional 40 percent interest, the parent company had “operational control” and “the ability to cause [the subsidiary’s] compliance with the FCPA”
 - *Books and Records provisions*: issuers are required to (i) maintain books, records and accounts that accurately and fairly reflect the issuer’s transactions, and (ii) devise a system of internal accounting controls sufficient to confirm (i)

GETTING THE DEAL DONE! COUNTRY RISK AND CORRUPTION

- Under the FCPA, **once a deal has closed**, an acquirer may become liable for the seller's past violations, which can damage reputations and lead to significant financial penalties and loss of value. The FCPA provides for “**successful liability**” if the acquiring company is found liable of “willful blindness” regarding the corrupt practices of target
- For a U.S. executive doing an M&A deal in Brazil corruption may be top of mind:
 - In 2023, under the Transparency International Corruption Perception Index, Brazil's level of corruption perception is 38 against a global average of 44.5 (0-100 where 0 is absolute corruption)
 - Brazil' reputation was tarnished by “Operation Car Wash”, largest ever anti-corruption case (2014)
 - *However*, Brazil has a strong FCPA-style legislation that is effectively enforced

GETTING THE DEAL DONE! COUNTRY RISK AND CORRUPTION

- First effort of the Buyer will be on identifying corruption-related red flags: Two prongs (legal and financial)
 - Questionnaire
 - Interviews with Officers
 - Review of Target's compliance programs (existence *and* effectiveness)

GETTING THE DEAL DONE! COUNTRY RISK AND CORRUPTION

Identifying Red Flags:



COMPLIANCE DD AND RISK ASSESSMENT – INITIAL QUESTIONNAIRE

- High-Risk Jurisdictions:** Does the target have sales or operations in any high-risk jurisdictions? Who oversees sales and operations in high-risk jurisdictions? What (if any) gifts, hospitality, entertainment, travel, corporate sponsorships or charitable donations occur in high-risk jurisdictions? **[Where does target do business?]**
- Government and Regulatory Touchpoints:** What licenses, permits or regulatory approvals does the target need to conduct its business? Who obtained these approvals? Who is responsible for government relations? Are there any lobbying efforts, political contributions, or political engagement — either directly or through a trade association? **[How does target do business?]**
- High-Risk Third Parties:** Do the target's third parties engage them to interact with governmental entities, state-owned enterprises or government officials? Does the target rely on sales channel partners, such as wholesalers, distributors, resellers, joint venture partners, locally sourced content providers, customs clearing agents or freight forwarders? Who are the target's key suppliers, and where are they located? What are the targets processes for diligencing and contracting with high-risk third parties? **[With whom does target do business?]**
- High-Risk Customers:** To whom is the target selling its products or services? Are there any governmental or state-owned enterprise customers? If so, how is that business typically awarded? Who is responsible for maintaining relationships with customers? What (if any) gifts, hospitality, entertainment, travel, corporate sponsorships or charitable donations are connected to sales efforts? **[With whom does target do business?]**
- Compliance and Control Infrastructure:** Are the target's policies and procedures adequately designed? Are employees and high-risk third parties appropriately trained? How are the control functions (legal, compliance and audit) resourced? Has the company conducted a risk assessment? Has an external or internal audit recently tested any of the key compliance controls?
- Corporate Governance and ESG:** Who is on the board? What issues are escalated to the board? Have there been any allegations of wrongdoing or breaches of the target's internal policies? Does the target have any material outstanding litigation or investigations? [Is the target's supply chain free from child and slave labor?](#) How does the target's operations impact the environment? Is there any adverse media coverage related to the target?

GETTING THE DEAL DONE! COUNTRY RISK AND CORRUPTION

What steps should a Buyer subject to the FCPA take when considering a merger or acquisition?:

1. Conduct thorough risk-based FCPA and anti-corruption due diligence on Target;
2. Ensure that Buyer's code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to Target;
3. Train the directors, officers and employees of Target and, when appropriate, train agents and business partners on the FCPA and other relevant anti-corruption laws and Target's code of conduct and compliance policies and procedures;
4. Conduct an FCPA-specific audit of Target as quickly as practicable; and
5. Disclose any corrupt payments discovered as part of its due diligence of Target.

The DOJ and SEC will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, the DOJ and SEC may consequently decline to bring enforcement actions (FCPA Guidance (the "Resource Guide"))

GETTING THE DEAL DONE! COUNTRY RISK AND CORRUPTION

Ten Biggest FCPA Cases (2008 - 2021):

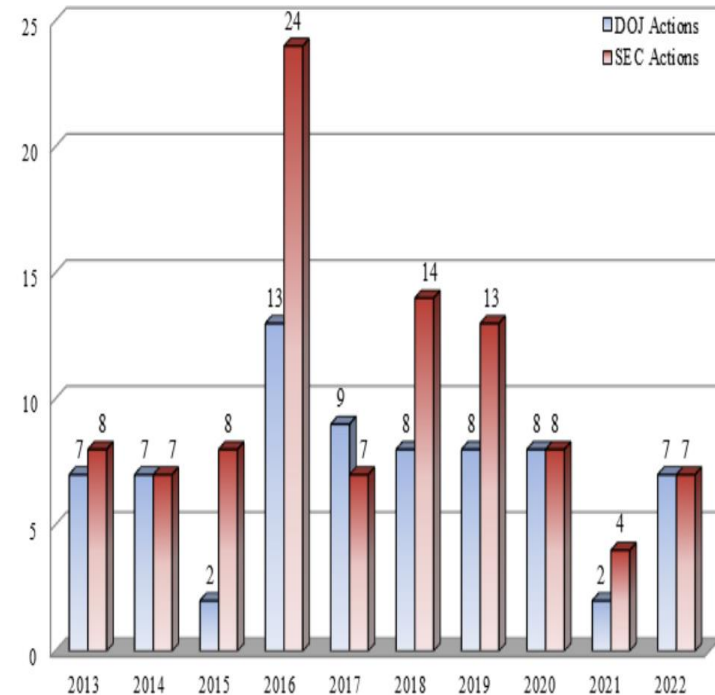
1. Goldman Sachs Group (US): 3.3 billion in 2020
2. Airbus SE (Netherlands/France): \$2.09 billion in 2020
3. Petroleo Brasileiro S.A. (Petrobras, Brazil): \$1.78 billion in 2018
4. Telefonaktiebolaget LM Ericsson (Sweden): \$1.06 billion in 2019
5. Telia Company (Sweden): \$1.01 billion in 2017
6. MTS (Russia): \$850 million in 2019
7. Siemens (Germany): \$800 million in 2008
8. VimpelCom (Netherlands): \$795 million in 2016
9. Almston (France): \$772 million in 2014
10. Societe Generale S.A. (France): \$585 million in 2018

* [FCPA Blog](#) (May 26, 2021)

2022 was a year of robust enforcement of the FCPA in the U.S. and globally

- In September 2022, the DOJ implemented additional guidance requiring prosecutors to **analyze warranted criminal charges against individuals** as part of every corporate charging memorandum -- novel statement that companies should shift the burden of financial penalties from shareholders to executives via compensation clawbacks
- 2023 – Criminal Division Enforcement & Voluntary Self-Disclosure Policy substantially **increases the discounts available to companies for voluntary disclosure, cooperation and remediation**. Before, the maximum credit a company could get where the company disclosed misconduct before the DOJ was aware of it, then fully cooperated and remediated, was a 50% discount below the Guidelines range, and in non-voluntary cases the maximum was 25%. Now, if the relevant requirements are met the discounts climb up to 75% and 50% respectively

Corporate FCPA Enforcement Actions (2013–2022)





OVERVIEW OF CFIUS

WHAT IS CFIUS?

- The Committee on Foreign Investment in the United States (“**CFIUS**”) is an inter-agency panel authorized to conduct national security reviews of any “covered transactions,” which includes (1) transactions that could result in foreign **control** of a U.S. business, (2) non-controlling investments that afford a foreign investor **certain substantive rights** in a U.S. business involved with **critical technologies**, **critical infrastructure**, or **sensitive personal data** of U.S. persons (collectively referred to as “**TID U.S. businesses**”), and (3) certain investments involving **U.S. real estate**
- CFIUS evaluates whether such transactions will threaten the **national security** of the United States



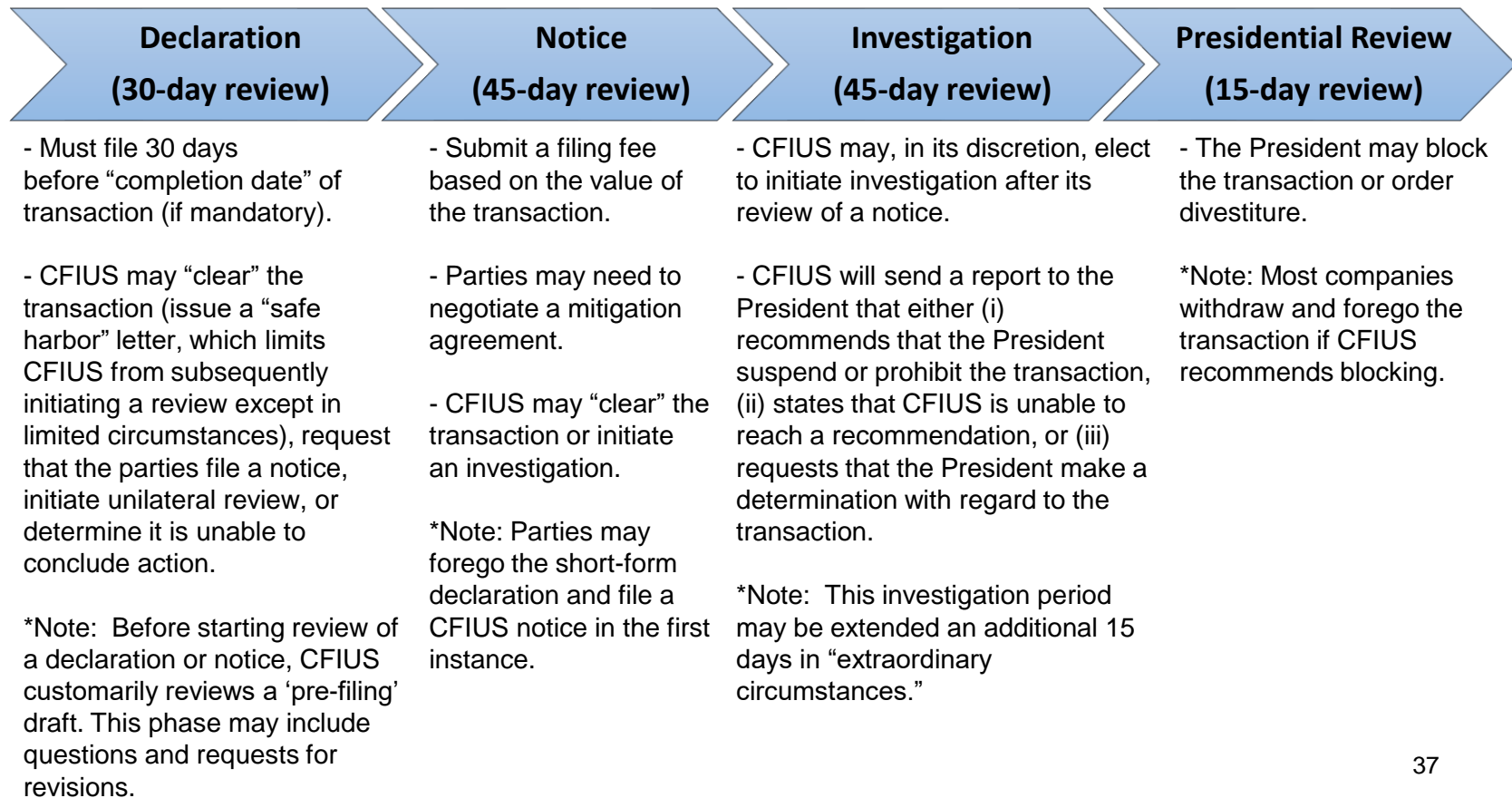
WHAT DOES CFIUS DO?

- CFIEW reviews certain foreign investment transactions within its jurisdiction (i.e., “covered transactions”) and advises the President on matters of national security arising from foreign investments
- Power to impose penalties, block, modify, or unwind transactions
- Three categories of acts or omissions that may constitute a Violation:
 - Failure to timely submit a declaration or notice, as applicable
 - Non-compliance with CFIUS Mitigation
 - Material misstatement, omission or false certification in information files with CFIUS

OVERVIEW OF CFIUS PROCESS: COMPLEX AND OFTEN UNPREDICTABLE

- CFIUS review process:
 - Voluntary filings – prescribed by regulations and include a description of the transaction, the parties involved, and additional background regarding their respective business activities
 - Mandatory filings – prescribed by regulations (e.g., Foreign investor that would “control” a U.S. business that produces “critical technology” that would require a license to export, reexport, transfer (in-country) or retransfer the critical technology to the foreign investor)
 - Absent a voluntary filing, CFIUS may unilaterally initiate a review of a covered transaction at any time, including after the transaction has closed
 - There is a team within CFIUS dedicated to identifying and investigating non-notified transactions. If CFIUS believes that it has jurisdiction, CFIUS typically will reach out to the US target business with questions that may be followed with a request that the parties submit a notice. Mitigation measures may include routine or periodic use of a third-party monitor, compliance auditor, or cybersecurity auditor who are required to report directly to CFIUS, or implementation of measures to protect sensitive personal information or technology. CFIUS also has the right to unwind the transaction (e.g., in early 2020, CFIUS forced the unwinding of a JV involving Ekso Bionics Holdings, Inc., a US manufacturer of robotic mechanical suits, and multiple Chinese venture capital firms)

CFIUS: TIMELINE AND PROCEDURES



MAGNACHIP DEAL (DECEMBER 2021) – PARTIES TERMINATED DEAL AS THEY WERE UNABLE TO OBTAIN CFIUS APPROVAL

KEY TAKE-AWAYS:

- Magnachip Semiconductor Corporation, a NYSE-listed Delaware corporation, and
- Wise Road Capital LTD, a Chinese PE

1. The threshold for CFIUS jurisdiction is low – CFIUS concerns may arise from non-US activities. All operations and employees of the target were in South Korea
2. Pre-transactions re-structuring to address CFIUS jurisdiction carries risk
3. Narrow basis for jurisdiction
4. China and semiconductors remain subject to heavy scrutiny
5. It's hard to fly under the CFIUS radar



IMPACT ON M&A DEAL DOCUMENTS

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POLITICAL/REGULATORY RISK

Country Risk and Impact on Deal Documents

- Purchase Agreement – If representing the Buyer:
 - **R&W:** No violation of corruption related laws, no false entries in books and records, no convictions of employees/directors on corruption related charges, and financial statements compliance rep
 - **Interim Covenants:** Prohibit specific actions/omissions + Audit rights
 - **Conditions to Closing:**
 - Bring-down of compliance reps without materiality qualifiers
 - File [at least a declaration] with CFIUS
 - No MAE (MAE definition would not carve-out changes of law, political or social unrest)

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DUE DILIGENCE AND RISK ASSESSMENT

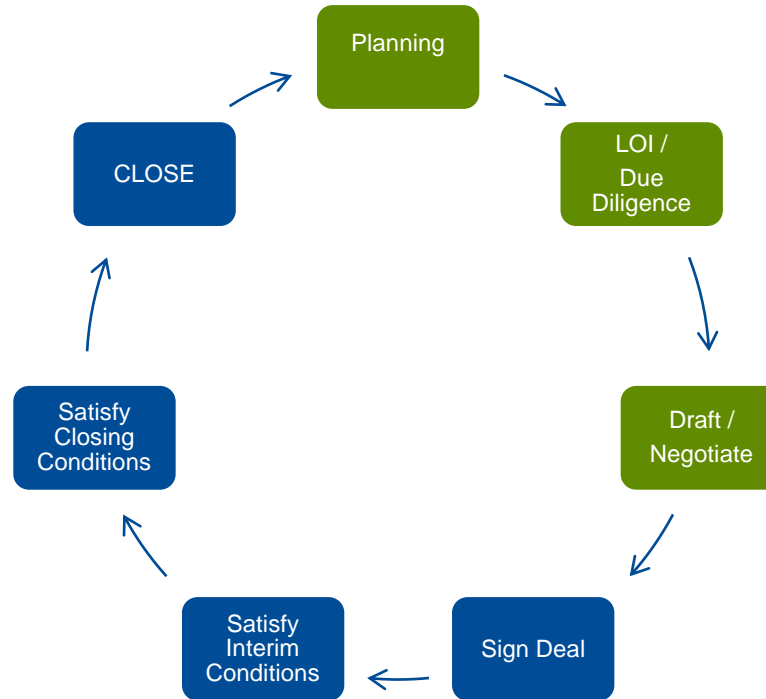
TIPS ON DUE DILIGENCE AND OUTSIDE COUNSEL:

1. Lawyer intensive process:
 1. Limit time and cost
 2. Control Work Product: executive summary and risk table; require standardized contract review
 - *Forensic due diligence*: Interviews with top management, background checks, transaction testing around high-risk transactions, reviewing correspondence with regulators, litigation history and whistleblower complaints
 3. Coordinate use of specialists ([investigative firms](#) - transparency)/ Tax due diligence
 4. Tight Coordination: Weekly calls to review DD progress (separate DD team)



A Roadmap to Closing an M&A Private Deal!

THE LIFECYCLE OF A DEAL



TRANSACTION AGREEMENT WALK-THROUGH

Table of Contents

1. Definitions and terms / Recitals
2. Purchase and Sale
3. Consideration
4. Closing
5. Representations and warranties of the Seller
6. Representations and warranties of the Buyer
7. Covenants
8. Conditions to Closing
9. Termination
10. Survival: Indemnification
11. Miscellaneous

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A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOCUMENT	KEY WORDS	COMMENTS
PLANNING	Confidential Information Memorandum (CIM)	Forward-looking statements; market share related statements	Tailoring: scope, term, covenants
	Term Sheet	Exclusivity	Do you need a lawyer?
	Confidentiality Agreement	Binding/Non-binding	
DUE DILIGENCE	Due Diligence Report:	Material risks	Balance Cost/Expectations
	1. Executive Summary	Mitigation strategies	Coordination: key team members
	2. Risk Table	Valuation	Opportunity to develop a relationship (juniors)

GETTING THE DEAL DONE!

A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOCUMENT	KEY WORDS	COMMENTS
SIGNING	PURCHASE AGREEMENT (one step v two steps)	Purchase Price: 1. Purchase Price Adjustments (WC) 2. Earnouts 3. Holdbacks (buyer)/Escrows [Market Studies: ABA Deal Points Study, PP Allocation Study]	PP Adj.: run them by accountant Earnouts: valuation gap; fair 🌶️ Escrows: unilateral release; no tailoring; time
		R&W: statements of fact; true, complete and correct	Party giving rep must indemnify the other party if “breached” 🌶️
		Disclosure Schedules: carve-outs to indemnity obligations	Update Disclosure Schedules: impact on indemnity (TIP: Seller: right & no indemnity unless MAE// Buyer: obligation & indemnity in all cases)
		“Bring-down” (exceptions)	
		Qualifiers: Materiality, Efforts, Knowledge	Knowledge of the Seller: whose knowledge?; constructive vs. actual

APA WORKSHOP

REPRESENTATIONS AND WARRANTIES (PRO SELLER)

Section 5.8(b). Product Registrations.

(b) Except as set forth in Schedule 5.8(b), to the Knowledge of Seller, all Products sold under the Product Registrations are manufactured and marketed in accordance with the specifications and standards contained in such Product Registrations, except where the failure to comply therewith would not have a Material Adverse Effect.

“Material Adverse Effect” means a material adverse effect on the Purchased Assets, taken as a whole, or on the ability of Seller or its Affiliates, as the case may be, to perform their respective obligations under, or consummate, the transactions contemplated by this Agreement; [provided, however, that none of the following events [change of law, civil unrest]

“Knowledge of Seller” means the current actual (but not constructive or imputed) knowledge, without inquiry or investigation, of any of the individuals listed on Schedule 1.1(a) hereto.

GETTING THE DEAL DONE!

A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOC	KEY WORDS	COMMENTS
INTERIM PERIOD	PSA	<p>Covenants: agreements to take action in the future:</p> <ol style="list-style-type: none"> 1. Pre-closing covenants [third party consents; regulatory approvals]: outline degree of efforts necessary to close – Interim covenants 2. Post-closing: non-compete, indemnification, tax <p>Buyer wants to limit exposure (more covenants)/Seller wants certainty of Closing and independence</p>	<p>Interim pre-closing covenants: govern the operation of the business between signing and closing.</p> <p>Issues: what is “ordinary course of business” [TIP: Covid – if S, include ability to act in a pandemic or other health crisis (AB Stable Decision 2020)], and you also want to carve-out pandemics and other health crisis from the MAE definition 🌶️</p> <p>Gun-jumping</p>
		<p>Closing Conditions:</p> <ol style="list-style-type: none"> 1. Mutual (No Proceeding, No Law or Order, Waiting Period/Regulatory Approvals Obtained) 2. Bring-down of R&W 3. Closing deliveries 4. No MAE (benefit of Buyer) 	<p>Reduce deal certainty 🌶️</p> <p>Seller: limited bring-down (not all and R&W qualified by updates to Disclosure Schedules, VDR, and/or MAE)</p>


GETTING THE DEAL DONE!

A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOC	KEY WORDS	COMMENTS
INTERIM PERIOD	PSA	<p>Termination:</p> <ol style="list-style-type: none"> 1. Mutual termination 2. By either party if: <ol style="list-style-type: none"> 1. Closing has not occurred by Drop-dead Date 2. Non-appealable Order 3. Breach and failure to cure and/or condition impossible to fulfill 3. By Buyer if MAE has occurred or reasonably expected to occur 	<p>MAE is a very high standard. Until 2018, no Delaware court had ever found an MAE to exist such that buyer could walk out of the deal 🌶️</p> <p>Requires that (1) a sustained and severe business decline, not attributable to general economic or industry factors, has occurred of a temporary long duration (not a blip); (2) highly significant (86% decline on EBITDA or approximately 20% of a company's total equity value in terms of remediation and other costs could be a relevant threshold – <i>Akorn</i> case), and (3) unexpected (perhaps)</p> <p>While the investigation of a potential MAE unfolds, Buyer is advised to (<i>Channel</i> case):</p> <ul style="list-style-type: none"> • Continue to perform contractual obligations • Communicate clearly the message of continued commitment to close within organization and to the Seller • Create a different team to investigate the potential MAE so as not to taint the deal team's efforts to close

GETTING THE DEAL DONE!

A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOC	KEY WORDS	COMMENTS
POST-CLOSING	PSA	<p>Indemnification: remedy for losses incurred under the PSA</p> <ul style="list-style-type: none"> • Loss (scope) • Indemnifying Party • Indemnified Party (includes affiliates, directors, officers and agents) • What is indemnified? Breaches of R&W, Covenants <p>Survival; Limitations on Indemnification</p> <p>Indemnification Procedures</p> <ul style="list-style-type: none"> • Materiality Scrape: permits Buyer to claim indemnification for any breach or inaccuracy of the R&W, regardless of how material or significant it is. 	<p>Indemnification Limitations: typically apply only to breaches of reps (other than fundamental reps)</p> <ul style="list-style-type: none"> ▶ De Minimis amount (threshold)  ▶ Deductible Basket: Indemnifying Party is only liable in excess of [Deductible Amount] ▶ Tipping Basket: Once the Deductible Amount is reached, Indemnifying Party is liable from Dollar one ▶ Cap <p>You may want to check what's market in the U.S. as a reference (click for example here)</p> <p>Include Pro-sandbagging provision so that Buyer can get indemnified from breaches of R&W it knew or could have been aware of in spite of knowledge it obtained or could have obtained from the data room</p> <p>Include Materiality Scrape for purposes of determining whether there is a breach and the amount of the Loss. Standard tool to eliminate “double materiality” when you already have indemnification limitations</p>

ROADMAP DETOUR

R&W INSURANCE

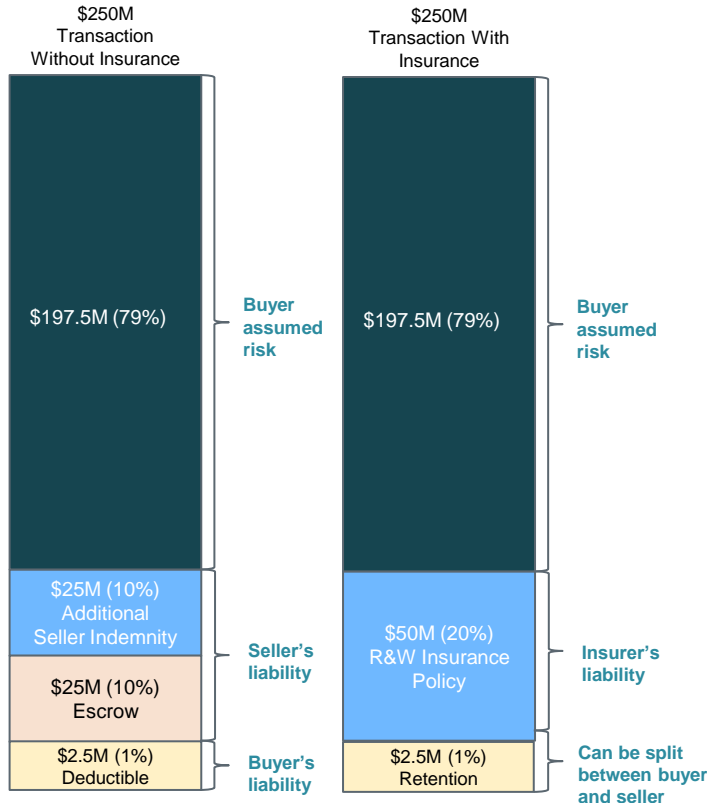
The Basics:

- Traditional indemnification structure: Seller deposits a portion of the Consideration (typically 10-15%) in an escrow account for one or two years to cover breaches of R&W
- RWI:
 - covers financial losses resulting from unknown breaches of R&W made by the Seller and Target, including as a result of fraud
 - covers pre-Closing tax indemnity, third party claims, defense/prosecution costs
 - Types:
 - *Sell-Side RWI*: Covers Seller for losses resulting from claims by Buyer alleging Seller has breached R&W
 - *Buy-Side RWI*: Covers Buyer for losses resulting from Seller's breaches of R&W
 - Note: Most RWI policies issued in the U.S. are Buy-Side

ROADMAP DETOUR R&W INSURANCE

Advantages – Sellers	Advantages - Buyers
<ul style="list-style-type: none"> • Expedite sale process 	<p>Purchase agreements is easier to negotiate with Seller</p>
<ul style="list-style-type: none"> • Reduce contingent liabilities 	<p>Broader reps, longer survival periods, expansive definition of losses</p>
<ul style="list-style-type: none"> • Protect passive Seller 	<p>Reduces the need to deal with the Seller (only with respect to exclusions – interim breaches, WC Adjustments)</p>
<ul style="list-style-type: none"> • Reduce or eliminate post-Closing indemnity obligations 	<p>Insurance companies have a duty of good faith and fair dealing, in contrast, such obligations may not be as well defined in the typical business contract</p>
<ul style="list-style-type: none"> • Exit deal with increased funds 	<p>Ease collection concerns associated with Seller's credit worthiness or other issues (e.g., cross-border deals)</p>
<ul style="list-style-type: none"> • Attract better offers 	<p>Generally well-received by Seller</p>

M&A PRACTICE R&W INSURANCE



Background

- Transaction value: \$250 million
- 20% indemnity cap on R&W and 1% deductible
- Buyer wants to differentiate its bid in a highly contested auction
- Seller wants to maximize closing date proceeds

M&A PRACTICE R&W INSURANCE

R&W Insurance Structure:

Retention (aka Deductible) in the aggregate:

- 0.75% to 1.0% transaction value, with 0.5% possible for largest deals
- Initial retention is decreased at 12 or 18 months after closing; this “drop down” is timed to coincide with the release of the seller escrow (if any)

Total Costs = Premium, Underwriting Fee, Broker Commission, Taxes/Fees

- 3% to 4% of policy limits, generally
- 2% to 3% of policy limits, if total policy limits are \$50M+
- 4% to 5% (or more) of policy limits, if total policy limits are \$5M or less

✓ **Parties may agree to split Retention and Total Costs**

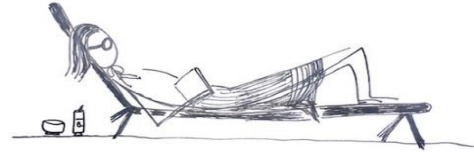
A 3D rectangular sign with a red face and a dark red border. The words "ON AIR" are written in large, white, sans-serif capital letters on the red face. The sign has a slight shadow on the surface below it.

ON AIR

30 MINUTES WITH BRETT BARRAGATE
(Jones Day)

GETTING THE DEAL DONE!

READING MATERIALS FOR JUNE 27



Reading:

- [Bio](#) of Amy Becker (Head of Growth Strategy, Waterlogic)
- [Negotiation Skills and Strategies: Winning Over Reluctant Counterparts](#) , by Katie Shonk, Harvard Law School (Program on Negotiation) (6/13/2022)
- [Three Negotiation Mistakes That Are Hurting Your Deals](#), by Chris Voss (11/25/2021)
- [Your Behavior is the Key to Winning the Deal According to Joe Valley](#) – Podcast hosted by Mark Raffan, Negotiations Ninja Podcast (2022)

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