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# Mitigating Risks in U.S. Transactions: CFIUS and Merger Review Tips for Japanese Companies

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# CFIUS Review

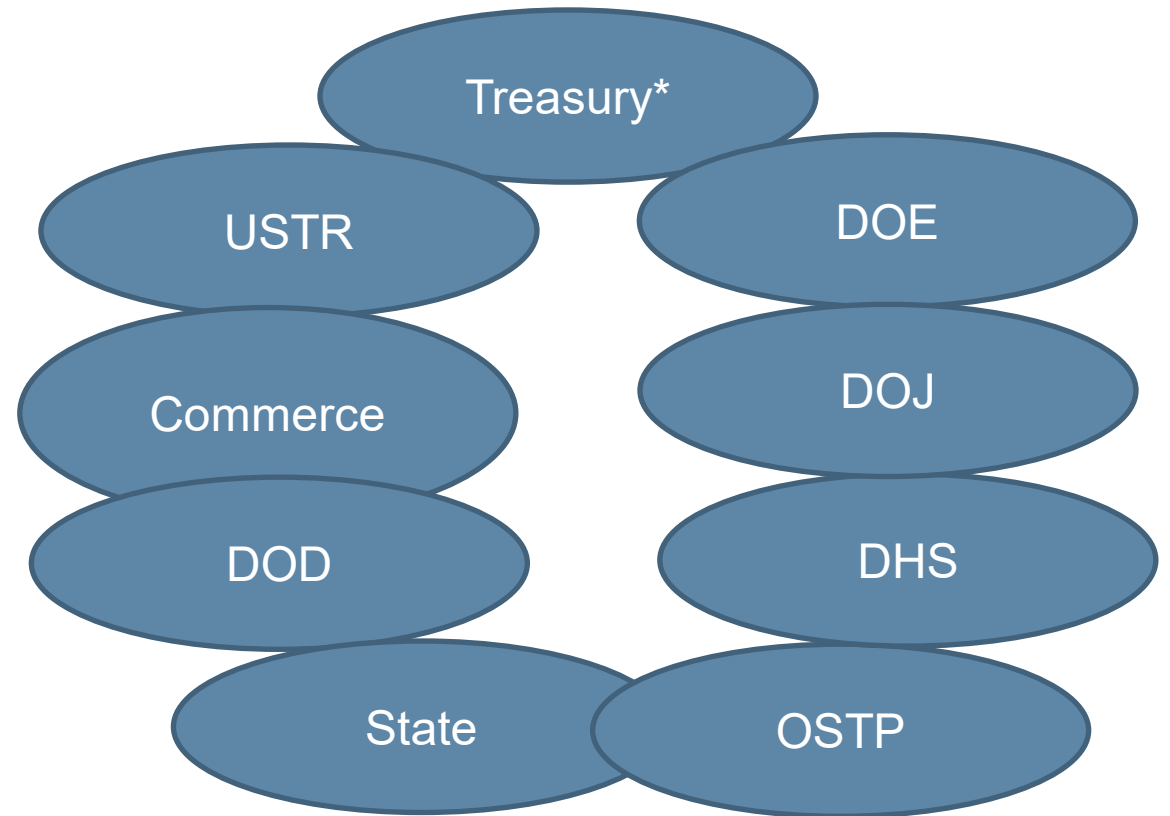


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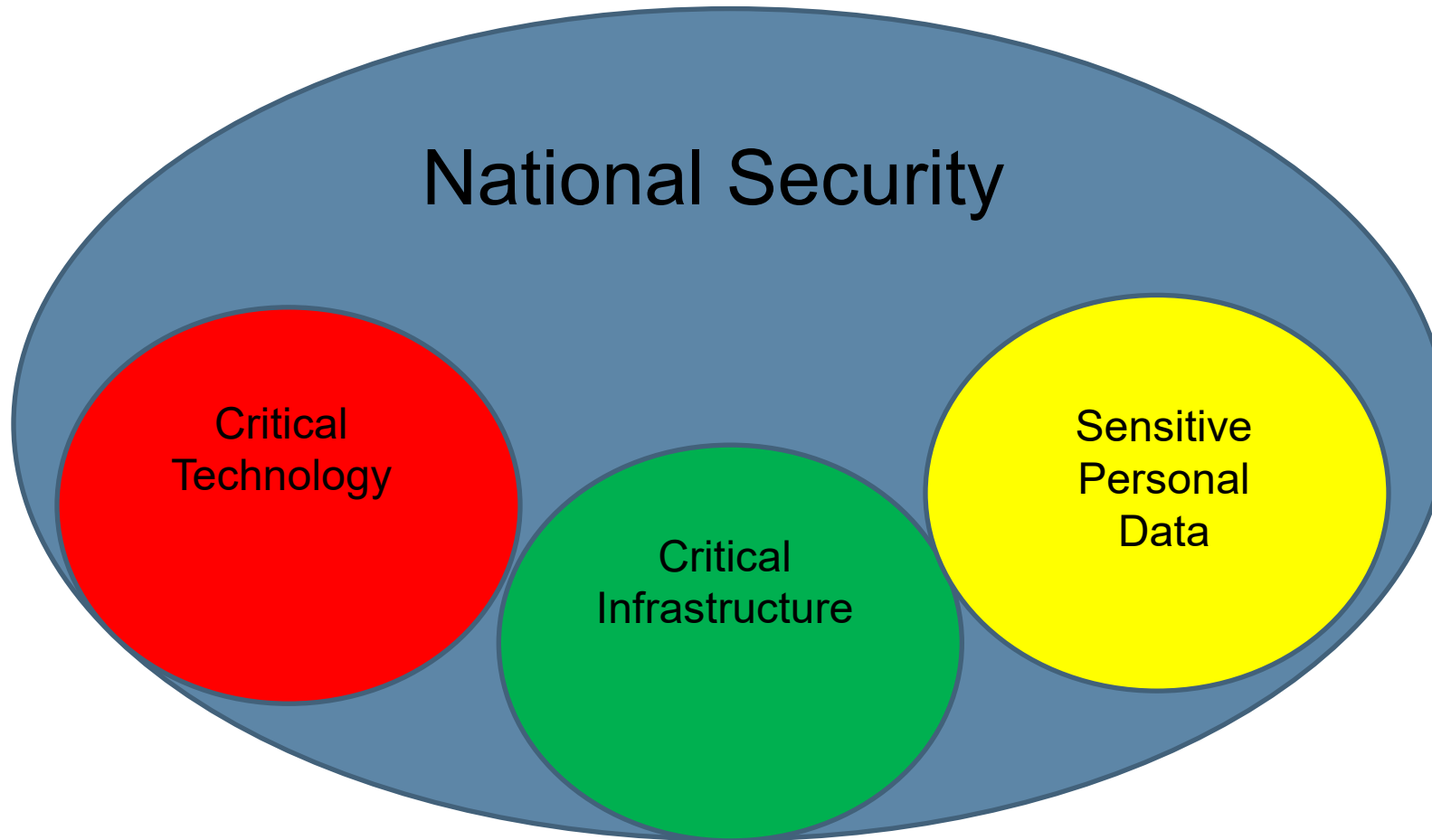
# CFIUS Basics

# Structure

- The Committee on Foreign Investment in the United States (CFIUS or the “Committee”)
- Nine voting members
- Treasury is the Chair
  - Manages the process
  - Communicates with transaction parties



# Focus



# Process

30 Days

No  
Deadline

45 Days

45 Days  
(plus 15 days in  
exceptional  
circumstances)

15 Days



# Jurisdiction

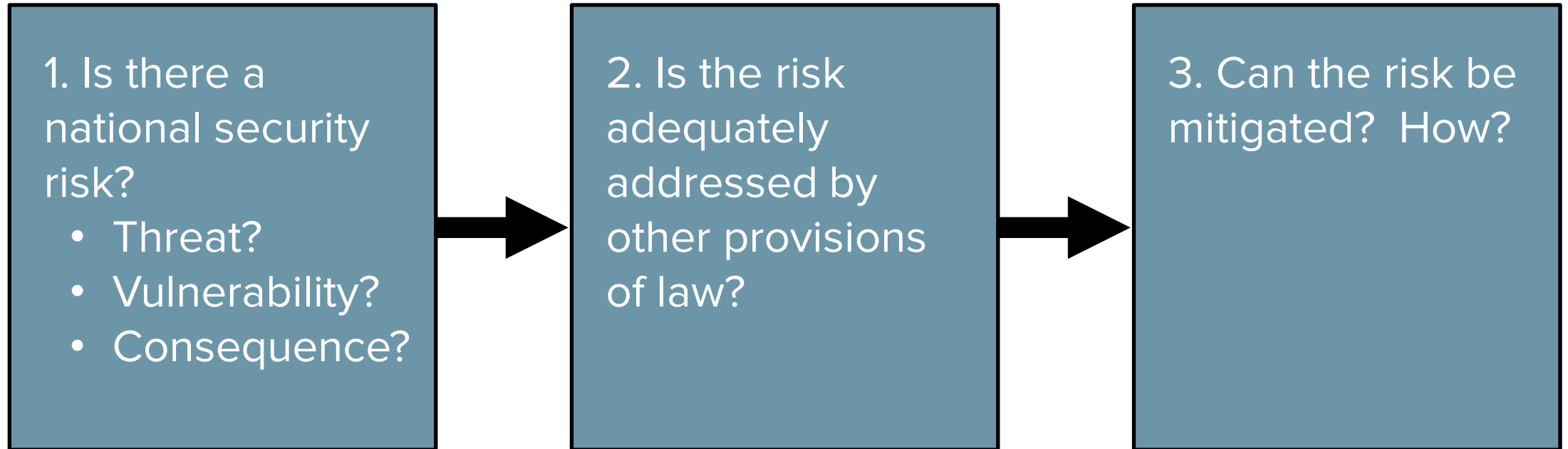
## VOLUNTARY FILINGS

Control Transaction	=	Foreign Person	+	Control	+	U.S. Business
Covered Investment	=	Foreign Person	+	Other Investment Rights	+	TID U.S. Business
Real Estate	=	Foreign Person	+	Purchase, Lease, Concession	+	Ports, Airports, and Proximity to USG

## MANDATORY FILINGS

FGC	=	FGC entity	+	25% or more	+	TID U.S. Business
Critical Technology	=	Foreign Person	+	Critical Technology Business	+	Export License

# National Security Risk Analysis





# Statistics on Case Disposition

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Total Number of Notices	93	111	114	97	147	143	172	237	229	231
Notices Withdrawn During Review	6	1	2	3	3	3	6	7	2	0
Cleared in Review	52	70	67	46	93	74	87	58	69	118
Number of Investigations	35	40	45	48	51	66	79	172	158	113
Notices Withdrawn After Commencement of Investigation	6	5	20	5	9	10	21	70	64	30
Cleared in Investigation w/o Mitigation	20	27	16	32	33	45	40	72	64	54
Cleared In Investigation w/ Mitigation	9	8	8	11	9	11	17	29	29	28
POTUS Blocks	0	0	1	0	0	0	1	1	1	1
Investigation Rate	40%	36%	40%	51%	35%	47%	48%	75%	70%	49%

# POTUS Blocks

<u>Year</u>	<u>Acquiring Company</u>	<u>U.S. Target</u>	<u>Business Activity of U.S. Target Company</u>	<u>POTUS</u>
1990	China National Aero-Technology Import & Export Corporation (CATIC)	Mamco Manufacturing Inc.	Aircraft Parts Manufacturer	Bush
2012	Ralls Corporation	Various	Wind Farm	Obama
2016	Fujian Grand Chip Investment Fund	Aixtron, Inc.	Semiconductors	Obama
2017	Canyon Bridge Capital Partners	Lattice Semiconductor	Semiconductors	Trump
2018	Broadcom	Qualcomm	Semiconductors	Trump
2019	Beijing Shiji Information Technology	StayNTouch	Hotel Software	Trump
2020	Bytedance	Musical.ly	Social Media App	Trump

# Practice Tips for Success

- Review filing requirements and collect all required information.
- Identify the immediate parent, ultimate parent, and every intermediate parent for the direct acquirer.
- Identify the U.S. business *and* any entity of which that U.S. business is a parent.
- Submit clear, well-organized, and complete pre- and post-transaction organizational charts.
- Have a good cyber security plan.
- Determine whether business rationale for transaction makes sense if CFIUS requires mitigation.
  - If so, think through how the company will implement a mitigation agreement.
  - Make sure that business side is involved in mitigation negotiations so that lawyers don't agree to provisions that are unworkable.
  - Assign responsibility for ensuring compliance with mitigation agreement to senior executives with sufficient authority to implement and enforce security policies and procedures across the business.

# CFIUS and Japan: Current Trends

# Covered Transactions by Acquirer Home Country or Geographic Economy, 2017-2019

Country/Economy	2017	2018	2019	Total
China	60	55	25	140
Japan	20	31	46	97
Canada	22	29	23	74
France	14	21	13	48
United Kingdom	18	5	13	36
Germany	7	12	13	32
Sweden	6	9	7	22
Singapore	6	5	10	21
Australia	5	4	11	20
South Korea	6	4	10	20

# Covered Transactions by Acquirer Home Country or Economy and Target Sector, 2017-2019

Country/Economy	Finance, Information, and Services	Manufacturing	Mining, Utilities, and Construction	Wholesale Trade, Retail Trade, and Transportation	Total
China	51	70	14	5	140
Japan	47	35	9	6	97
Canada	31	12	24	7	74
France	27	14	5	2	48
United Kingdom	21	10	1	4	36
Germany	8	20	3	1	32
Sweden	13	6	0	3	22
Singapore	10	7	2	2	21
Australia	12	2	3	3	20
South Korea	3	10	4	3	20

# Originating Countries for Acquisitions of U.S. Critical Technology Companies, 2017-2019

Country/Economy	2017	2018	2019	Total
Japan	10	9	20	39
China	21	8	3	32
Canada	7	9	7	23
France	9	7	7	23
United Kingdom	12	4	6	22
Germany	4	7	11	22
Sweden	3	5	2	10
Singapore	4	3	2	9
South Korea	2	1	4	7
Australia	1	1	1	3

# Pilot Program Declarations by Acquirer Home Country or Economy, 2018-2019

Country/Economy	2018	2019	Total
Japan	5	14	19
Canada	2	12	14
United Kingdom	1	11	12
South Korea	0	9	9
Germany	2	7	9
Cayman Islands	0	5	5
Switzerland	0	2	2
Ireland	0	4	4
Jersey	0	4	4
Luxembourg	0	4	4



# CFIUS and Japan: Future Developments

# Future Developments

- New Emerging and Foundational Technologies List
- Aggressive Non-notified Team
- Robust Monitoring & Enforcement
- Excepted Foreign State / Excepted Foreign Investor

# Antitrust Merger Review



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# U.S. Antitrust Laws Governing M&A



- **Section 7 of the Clayton Act**
  - Main substantive law
  - Prohibits mergers or acquisitions that “may be substantially to lessen competition, or tend to create a monopoly.”
- **Hart-Scott-Rodino (HSR) Act**
  - Main procedural law
  - Creates process whereby transactions of a certain size must be reported to the FTC and DOJ before they are completed.

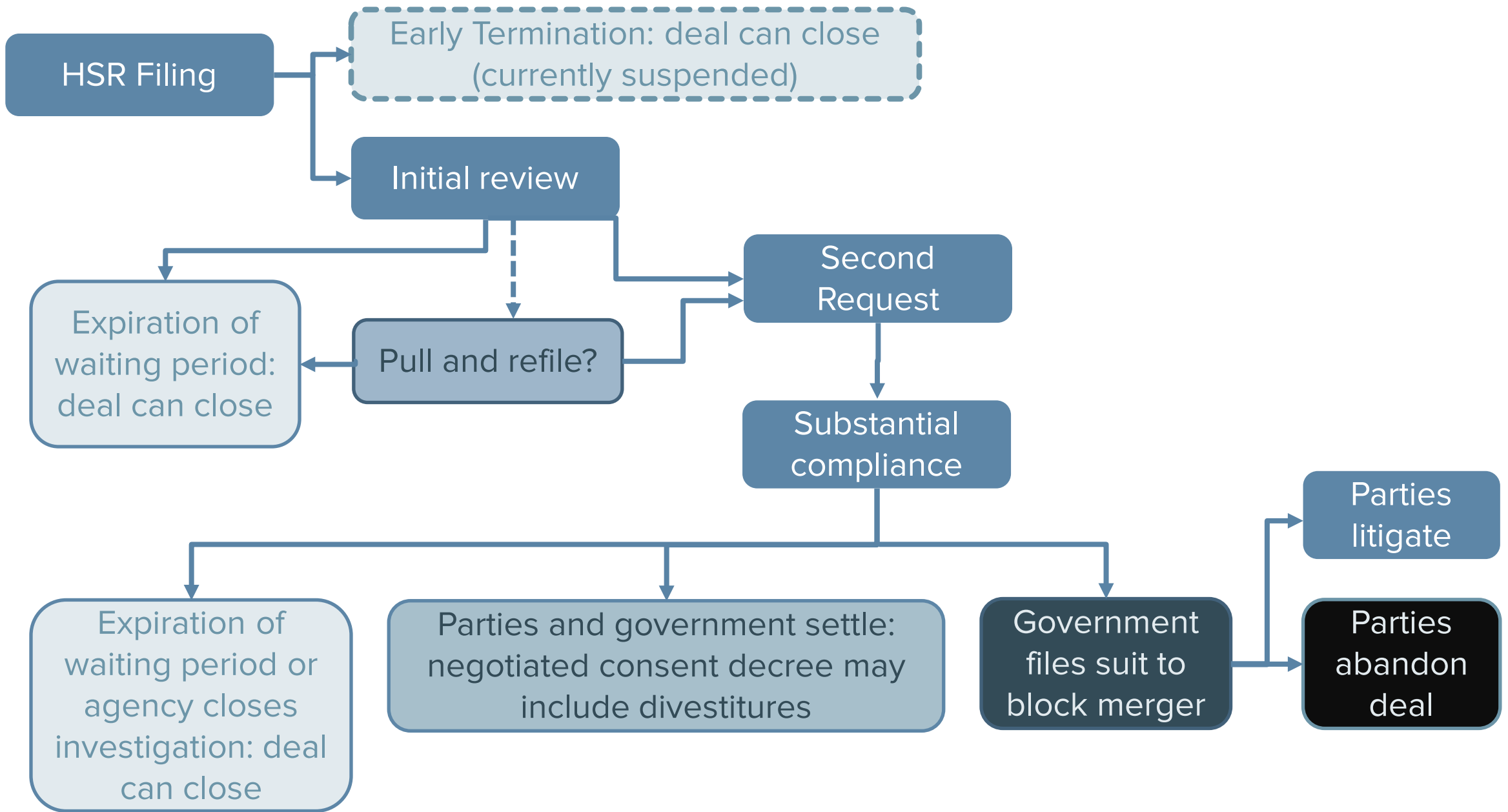
# Initial Steps in Merger Analysis

**Is transaction reportable under HSR Act?**

HSR filings mandatory if jurisdictional thresholds are met regardless of any substantive antitrust issues.

**Are there substantive antitrust concerns with the transaction?**

Is deal likely to harm consumers by reducing competition, such as by raising prices, reducing output, lowering quality of products or services, or reducing choice or innovation?



# HSR Act Does Not Create a Safe Harbor

- Even if a transaction is not reportable under the HSR Act, it can be challenged under Section 7 or other antitrust laws.
  - FTC and DOJ regularly monitor deal press to stay informed on non-reportable transactions, and field complaints from customers and other third parties.
- Even if a transaction is reported under HSR and is not challenged, it can later be challenged under Section 7 or other antitrust laws.
  - HSR clearance does not bar an investigation or challenge subsequent to obtaining clearance
  - Other laws under which a merger may be challenged include Sections 1 and 2 of the Sherman Act, Section 5 of the FTC Act, and state antitrust laws.



# Emerging Trends in Merger Enforcement



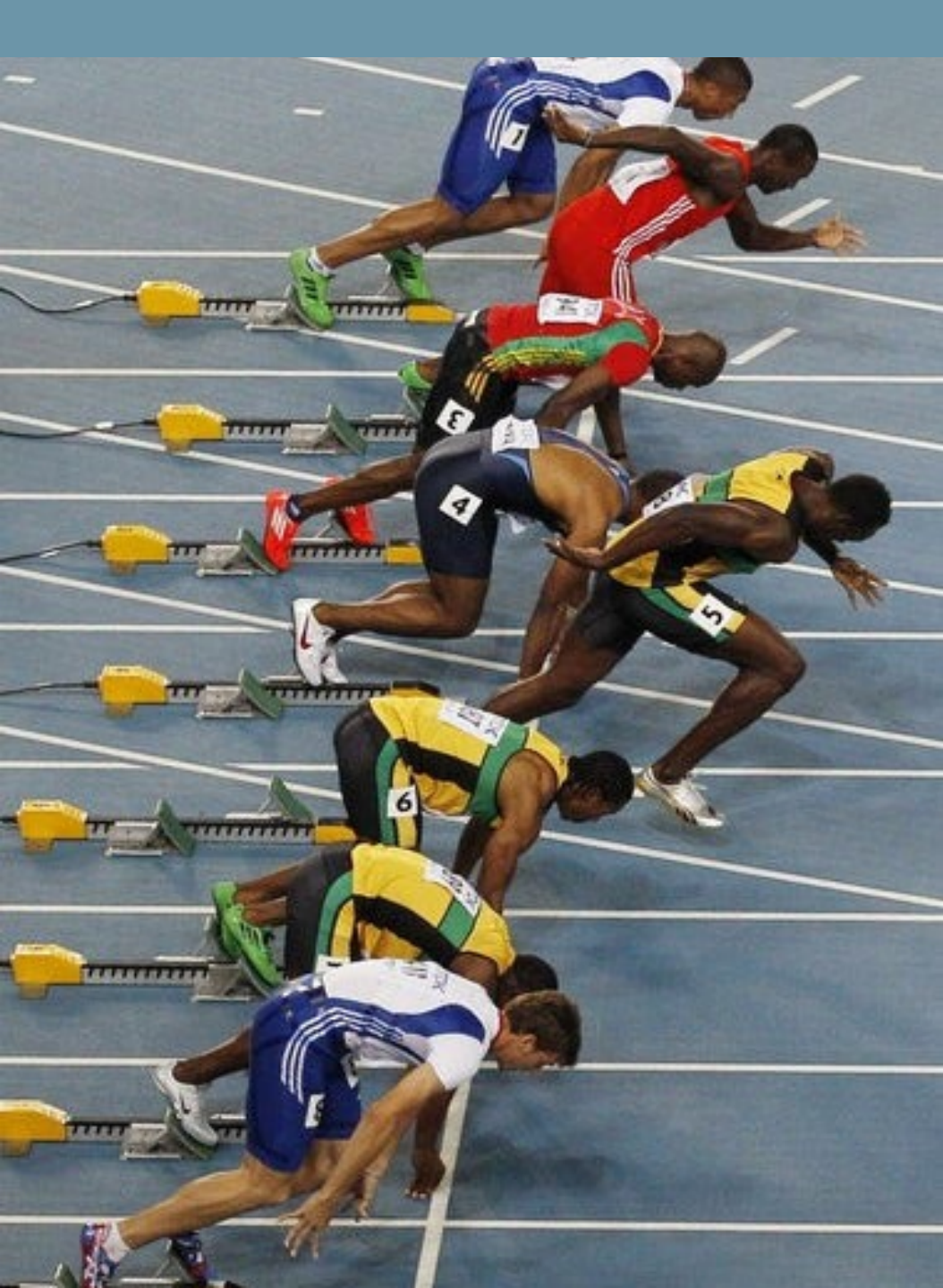
More challenges, including under novel theories of competitive harm

More vertical merger enforcement

Increased scrutiny of acquisitions of nascent competitors

Focus on key sectors, including tech and pharmaceuticals





# Beware of Gun Jumping

- Antitrust laws still apply in full even if the parties have agreed to merge, e.g., the parties cannot agree on prices, output, market allocations, etc.
- Buyer cannot effectively obtain control of the target before the transaction closes.

# Information Sharing Dos and Don'ts

## Non-competitively sensitive information that may be shared

- General financial information (income statements, balance sheets, etc.)
- General information about current products, product lines and general business activities
- General information regarding data processing or computer systems
- Safety reports and data
- Information regarding the organization of the parties' operations, management, and personnel
- Information that is regularly disclosed to 3<sup>rd</sup> parties (stock analysts)
- General information regarding relationships with third parties

## Competitively sensitive information that should not be shared, absent protections

- Negotiations, information regarding current product-specific or customer specific prices, costs, discounts or profits – although appropriately aggregated or historical information in these categories may be permissibly exchanged
- Research and development plans
- Strategic plans
- Marketing plans
- Individual customer lists
- Nonpublic contract terms
- Certain information about key suppliers/cost of specific inputs

# Best Practice Tips for Successful Deals

- Engage experienced antitrust counsel early to conduct an antitrust analysis.
- Be aware of any filing requirements and deadlines.
- Manage documents from the beginning of the process. Be mindful of documents created. Avoid inflammatory language or terms of art.
- Document the pro-competitive justifications for the transaction. Develop consistent messaging in support of the transaction
- Develop a customer strategy.
- If an efficiencies argument might be necessary, plan early. Don't wait to see if an investigation will ensue.
- Plan early for divestitures, if relevant.
- Work with counsel on diligence and integration planning to avoid gun jumping or violating antitrust laws while sharing information.

## CONTACTS

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