



President Blocks Acquisition of Semiconductor Business Under CFIUS

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On December 2, 2016, President Obama ordered that the acquisition of the U.S. assets of Aixtron SE by Chinese investors be "prohibited" under CFIUS.[1] This reinforces the importance of reviewing CFIUS issues in any acquisitions of U.S. businesses by foreign purchasers.

Under CFIUS, the President is authorized to suspend, prohibit and/or rescind acquisitions of U.S. companies by foreign parties that threaten to impair the national security of the U.S.[2] Factors considered in such assessments extend beyond just the impact of transactions on national defense but also on U.S. "critical infrastructure," "major energy assets," "critical U.S. technologies," and other factors.[3] In one CFIUS case, the President ordered that the purchase of a U.S. business involved in the development of wind farms in Oregon by two Chinese nationals be rescinded on the grounds that the facilities of the target company were located too close to a U.S. military facility[4] Parties to the transactions can mitigate this risk by filing Voluntary Notices with the CFIUS staff and obtaining CFIUS clearance of their transactions prior to closing.

In the Aixtron case, Aixtron SE, a German semiconductor company, was being acquired by Grand Chip Investment GmbH, which was owned by Chinese shareholders. Aixtron SE owned certain assets in the U.S. (the "U.S. Assets"). In the President's action, the President ordered that the acquisition of the U.S. Assets by the Chinese investors be "prohibited" and ordered that the parties take all steps necessary to abandon the transaction. The order ("Order") was based on the finding that the transaction threatens U.S. national security:

There is credible evidence that leads me to believe that: (1) Grand Chip Investment GmbH, a limited liability company organized under the laws of the Federal Republic of Germany (Grand Chip); (2) Grand Chip's parent companies Grand Chip Investment S.a.r.l., a company organized under the laws of the Grand Duchy of Luxembourg (GC Investment), and Fujian Grand Chip Investment Fund LP, a limited

partnership organized under the laws of the People's Republic of China (Fujian Grand); and (3) Fujian Grand's partners, Mr. Zhendong Liu, a citizen of the People's Republic of China (Mr. Liu), and Xiamen Bohao Investment Co. Ltd., a company organized under the laws of the People's Republic of China (Xiamen Bohao and, together with Grand Chip, GC Investment, Fujian Grand, and Mr. Liu, the Purchasers), through exercising control of the U.S. business of AIXTRON SE, a company organized under the laws of the Federal Republic of Germany (Aixtron), might take action that threatens to impair the national security of the United States.[5]

It is interesting to note the basis of jurisdiction of the Order. The Presidential action was focused on the U.S. assets of Aixtron ? these included AIXTRON, Inc., a California corporation and subsidiary of Aixtron SE, the equity interests of AIXTRON, Inc., and any asset of Aixtron or AIXTRON, Inc. ?used in, or owned for the use in or benefit of, the activities in interstate commerce in the United States of AIXTRON, Inc., including without limitation any interest in any patents issued by, and any interest in any patent applications pending with, the United States Patent and Trademark Office.? As such, the order covered not just assets situated in the United States but also those that are located elsewhere in the world that are used in connection with activities here. Thus the U.S. is regulating foreign acquisition transactions, at least as they impact the U.S. This is consistent with recent actions of other U.S. agencies, such as the Office of Foreign Assets Control (?OFAC?), which exercises extraterritorial jurisdiction over foreign parties based on narrow jurisdictional contacts with the U.S.

CFIUS issues can affect many companies in many industries. This case is a reminder that U.S. parties entering acquisitions with foreign purchasers should use care to put CFIUS on their list of issues to review in their transactions and if risks arise to take appropriate actions.

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[1] Committee On Foreign Investment In the United States. See § 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (collectively the ?Act?).

[2] Under § 721(d)(3) of the Act, to enforce such actions the President may direct the U.S. Attorney General to ?seek appropriate relief, including divestment relief, in the district courts of the United States, in order to implement and enforce this subsection.? The details of such authority are set forth in the Act, regulations

promulgated by the Department of the Treasury (?Treasury?) at 31 CFR Part 800 (the ?Regulations?) and Executive Order 11858.

[3] See § 721(f) of the Act.

[4] The facts of this case are discussed in the court?s opinion in Ralls Corporation v. Committee on Foreign Investment In the United States, 758 F.3d 296 (D.C. Cir. 2014).

[5] See Presidential Order Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GMBH, The White House, December 2, 2016, Section 1(a).

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