President Obama Heeds CFIUS and Blocks Chinese Takeover of German Semiconductor Company

On December 2, 2016, President Obama issued an executive order (the "Order") blocking the proposed acquisition of German semiconductor manufacturer Aixtron SE's ("Aixtron") U.S. business ("Aixtron U.S.") by a group of Chinese investors led by Fujian Grand Chip Investment Fund LP (the "Buyers"). This marks only the second time that a president has blocked a transaction since 2007, when CFIUS's authority was codified by the Foreign Investment and National Security Act of 2007 ("FINSA").[1]

"You can be certain that the new Congress in 2017 will work on legislation to further expand CFIUS oversight authority to reflect today's challenges[.]"
—Senator Chuck Schumer (D-NY)

In pertinent part, the Order declares that "*credible evidence exists*" that control of Aixtron U.S. by the Buyers would threaten to impair U.S. national security to an extent that cannot be sufficiently addressed by mitigation measures. Specifically, the Department of Treasury's press release describes the national security risk as arising from "*the military applications of the overall technical body of [Aixtron's] knowledge and experience . . . and the contribution of [Aixtron U.S.] to that body of knowledge and experience.*"[2] The press release further highlights that the transaction's funding sources included a Chinese state-sponsored investment fund.[3]

As a result of the President's decision, the Buyers and Aixtron must now "*take all steps necessary to fully and permanently abandon*" the transaction within 30 days or, with CFIUS's approval, within no more than 90 days. Until these steps have been completed, the Buyers and Aixtron are required to certify to CFIUS on a weekly basis the manner of their full compliance with the Order.

The President's decision to block the transaction provides further evidence of increasing U.S. government unease about certain foreign direct investment into the United States — especially when transactions have a Chinese government nexus either directly or indirectly, including as a financing source.

Just one day before the Order, Sen. Chuck Schumer (D-NY) released a letter to Secretary of the Treasury Jack Lew (Chair of CFIUS) criticizing the role of the Chinese government in recent transactions across diverse sectors, and stating that the incoming Congress would prioritize enhancements to CFIUS's authority to "*reflect today's challenges.*"[4] The President's decision also follows a succession of letters from Congress and U.S. industry stakeholders to Secretary Lew expressing bipartisan concerns that CFIUS is not equipped to address new, differentiated national security risks created by the rapid rise of Chinese investment into the United States. No-

Most transactions notified to CFIUS are ultimately approved.

tably, discomfort with Chinese foreign direct investment is emerging as a global trend: within the past eighteen months, roughly $40 billion of Chinese deals have been prohibited by European regulators.[5]

Here are five key takeaways from the President's decision and other recent CFIUS developments:

1. **Foreign buyers with a state-affiliation (directly or indirectly, through equity or debt), generally elevate CFIUS transaction risk.**
    - The Government Accountability Office is currently reviewing the CFIUS process to evaluate, among other topics, what enhancements to CFIUS's authority may be warranted in light of rising Chinese and other foreign state-controlled FDI into the United States.
    - In November, the bipartisan U.S.-China Economic Security Review Commission called for Congress to amend FINSA to bar Chinese state-owned companies from acquiring control of U.S. businesses.[6]
2. **Cross-border cooperation and information-sharing among national security regulators is increasing.**
    - In October, Germany's ministry of economics withdrew its initial approval of the Buyers' acquisition of Aixtron's German assets, reportedly after it was contacted by CFIUS to express concerns about the transaction.
3. **The U.S. is not alone in administering processes for national security reviews of foreign direct investment.**
    - Other countries (e.g., Germany) are implementing or enhancing processes for national security reviews of foreign direct investment, joining a growing list of countries where such regimes are already in place (e.g., the United States, Canada, France, Australia, China).
4. **CFIUS's interpretation of "control" is very broad.**
    - Under the CFIUS regulations, "control" is defined in functional terms, it need not be exercised, and it need not be exclusive. In practice, CFIUS interprets "control" very broadly.
    - Given Congress' growing scrutiny of the possibility of *de facto* "control" that could be exercised in practice by foreign buyers, indicia of control not explicitly addressed in the CFIUS regulations (e.g., commercial leverage) will continue to impact how CFIUS assesses whether a transaction falls within its jurisdiction (i.e., whether it is a "Covered Transaction").
5. **Most deals notified to CFIUS are ultimately approved.**
    - CFIUS approves most deals that it reviews and rarely refers deals to the

> President with a recommendation to block the transaction. Historically, approximately 60% of transactions notified to CFIUS received clearance in 30 days; most of the remainder of transactions reviewed by CFIUS clear within an additional 45-day investigation period.

In the current policy and political climate, careful planning for potential CFIUS review of a transaction is essential. Buyers and sellers alike should independently engage in a strategic CFIUS analysis well in advance of any potential transaction in order to minimize the risk that CFIUS concerns will adversely impact deal feasibility, difficulty and timing, as well as to mitigate a possible vector of reputational risk.

In November, the bipartisan U.S.-China Economic Security Review Commission recommended that Congress amend FINSA to bar Chinese state-owned buyers from acquiring control of U.S. businesses.

We will discuss these and other developments on our upcoming client call on Friday, December 9th, Assessing International Risk in the Age of President Trump.

* * *

The United States, the EU and other countries scrutinize or regulate international business activities to advance priority national security, foreign policy and other objectives. If not addressed effectively, such governmental scrutiny or regulation can adversely impact business strategy and investment decisions, lead to significant individual and corporate civil and criminal penalties, and may even result in imprisonment for responsible persons.

Anchored in Washington, D.C., Kirkland & Ellis's International Trade and National Security Practice, in coordination with the Firm's global offices and related practice areas, works closely with companies, investors and boards to mitigate and manage the legal and non-market risks associated with operating or investing across national borders.

If this publication was forwarded to you and you would like to receive similar future client alerts directly, please subscribe here.

---

1 50 U.S.C. App. § 2170 (2012). The previous blocked transaction was the attempted acquisition of certain wind farm project assets in Oregon by Chinese-owned Ralls Corporation, which was prohibited by President Obama on CFIUS' recommendation in July 2012. Generally, if CFIUS notifies the parties to a transaction that CFIUS intends to recommend to the President that a deal be blocked, the parties will withdraw the filing at such time.

2 *See* U.S. Dep't of the Treasury, Press Release, Statement on the President's Decision Regarding the U.S. Business of Aixtron SE (Dec. 2, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0679.aspx.

3 *See* U.S. Dep't of the Treasury, Press Release, Statement on the President's Decision Regarding the U.S. Business of Aixtron SE (Dec. 2, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0679.aspx.

4 Letter reprinted by Patrick Frater, *U.S. Senator Calls for Further Probe of China's Wanda*, Variety

(Dec. 1, 2016), http://variety.com/2016/biz/finance/u-s-senator-calls-for-probe-of-china-wanda-1201930826/.

[5] *See* Gordon G. Chang, *U.S., EU Say 'No' To China Buying The World*, Forbes (Oct. 30, 2016), http://www.forbes.com/sites/gordonchang/2016/10/30/u-s-eu-say-no-to-china-buying-the-world/#34f22b3522b8.

[6] U.S.-China Economic Security Review Commission, 114th Cong., 2016 Annual Report to Congress (Nov. 2016), http://origin.www.uscc.gov/sites/default/files/annual_reports/2016%20Annual%20Report%20to%20Congress.pdf.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Mario Mancuso, P.C.
Kirkland & Ellis LLP
655 Fifteenth Street
Washington, DC 20005
www.kirkland.com/mmancuso
+1 202 879 5070

Joanna Ritcey-Donohue
Kirkland & Ellis LLP
655 Fifteenth Street
Washington, DC 20005
www.kirkland.com/jritcey-donohue
+1 202 879 5980

Lucille Hague
Kirkland & Ellis LLP
655 Fifteenth Street
Washington, DC 20005
www.kirkland.com/lhague
+1 202 879 5195