

## Presidential Review of Aixtron Acquisition: Implications for Chinese Out-bound Investors

美国外国投资委员会（“下称CFIUS”）近期对中国福建宏芯投资基金通过德国子公司Grand Chip Investment GmbH（“GCI”）对一家德国全球半导体设备供应商进行的自愿收购案作出的否决，进一步证明中国投资者正面临日趋严格的投资环境。在CFIUS截至11月17日的调查期届满后，总统将会在15天内——最晚不迟于纽约时间2016年12月2日晚12时——做出允许、推迟或禁止交易的最终决定（参见 Aixtron Form [6-K, Ex-99.1](#), 2016年11月18日, 美国证监会备案以及 [Aixtron 相关新闻稿](#), 2016年11月18日）。由于此项决定可能是总统首次依照《国防生产法案》（正是该法案规定了CFIUS的相关程序）第721条的规定阻止的一项收购，因而相关进展情况引起各方关注。同时，它还给中国投资者发出了一个明确的警示——即使收购的目标公司非美国企业，如果该企业在美国有经营行为，仍然会受到CFIUS的管辖。

In what has become an increasingly difficult environment for Chinese investors, the Committee on Foreign Investment in the United States (CFIUS) is opposing the voluntary takeover of a German-based global provider of semiconductor equipment by Grand Chip Investment GmbH (GCI), the German unit of China's Fujian Grand Chip Investment Fund LP. Following the lapse of the CFIUS investigation period on November 17, the President now has 15 days to decide whether to allow, suspend or prohibit the transaction (no later than December 2, 2016 at midnight New York City time). (See Aixtron [Form 6-K, Ex-99.1](#), Nov. 18, 2016, SEC Filing; Aixtron [Press Release](#), Nov. 18, 2016.) This development is significant because it could be the first time that the President has acted to block an acquisition under Section 721 of the Defense Production Act (the statute creating the CFIUS process). It also serves as a stark reminder to Chinese investors that acquisitions of non-US targets can still fall within CFIUS's jurisdiction if the target has operations in the US.

### CFIUS程序及先于总统的行动

#### CFIUS Procedure and Prior Presidential Actions

CFIUS有权对最终导致由非美国一方拥有或控制美国企业或资产的交易进行有关美国国家安全方面的审查。“美国公司”这一概念的范围十分宽泛，其中就包括了那些外国公司“在美国从事州际贸易，但仅限于州际贸易内的商业活动（参见[31 C.F.R. § 800.226](#)）”的美国运营实体。国防生产法721款下的总统行为一般很少发生，多数交易主体会选择通过放缓或放弃交易来解除CFIUS的顾虑而非继续启动总统审查程序，因为后者的最终决定仍然会参考CFIUS的意见。自1988年CFIUS审核流程出台至今，只有两起交易最终启动了总统审查程序，而两起交易都涉及中国投资者。

CFIUS has the authority to review the US national security implications of transactions that result in ownership or control of a US business or assets by a non-US party. The concept of “US business” is broad and includes the US operations of foreign companies that are “engaged in interstate commerce in the US, but only to the extent of its activities in interstate commerce.” (See [31 C.F.R. § 800.226](#).) A presidential action under Section 721 of the Defense Production Act is extremely rare. Most parties either resolve CFIUS concerns through some form of mitigation or abandon the transaction altogether instead of proceeding to the President, who is thought to follow CFIUS's recommendations. Only two cases have resulted in a presidential action since the CFIUS process was enacted in 1988, and each involved Chinese investors.

### 爱思强股份公司和福建宏芯投资基金

#### Aixtron and Fujian Grand Chip Investment Fund

##### 交易双方

##### The Parties

爱思强是半导体设备行业领先的供应商，其业务领域是用化合物、硅、或有机半导体材料制造高级电子光电应用材料（参见 [Aixtron Form 20-F](#), 2016年2月23日, 美国证监会备案）。爱思强企业在全美范围内运营，但业务重点位于其分别坐落于黑尔措根拉特（德国）、剑桥（英国）和森尼维尔市（美国）的三家主要技术中心（见 [Grand Chip - Aixtron SE Transaction Fact Sheet](#)）。根据爱思强的年度报告，截至2015年12月31日，其营业收入中的60%来自亚洲，18%来自欧洲，22%来自美国（见 [Aixtron Form 20-F](#), 2016年2月23日, 美国证监会备案）。

Aixtron “is a leading provider of deposition equipment to the semiconductor industry ... [that is used] to build advanced components for electronic and optoelectronic applications based on compound, silicon, or organic semiconductor materials.” (See [Aixtron Form 20-F](#), Feb. 23, 2016, SEC Filing.) Aixtron has global operations, but is currently based around three leading technology hubs in Herzogenrath (Germany), Cambridge (UK) and Sunnyvale (US). (See [Grand Chip – Aixtron SE Transaction Fact Sheet](#).) According to Aixtron's annual report, its year ending December 31, 2015, revenues were derived 60% in Asia, 18% in Europe and 22% in the US. (See [Aixtron Form 20-F](#), Feb. 23, 2016, SEC Filing.)

GCI公司由福建宏芯投资基金（“FGC”）独资控股。福建宏芯基金由刘振东持股51%，由厦门博灏投资有限公司（市政府出资的公司）持股49%（见 [Aixtron 相关新闻稿](#)，2016年5月23日）。据 [全国企业信用信息公示系统](#) 的数据，厦门博灏投资有限公司由厦门友宏贸易有限公司和厦门金圆产业发展有限公司持股。后者由厦门金圆投资集团有限公司所有。厦门金圆投资集团有限公司由厦门市财政局所有（见爱思强公司总裁及董事长Martin Goetzeler在2016年8月召开的 [第二季度利润分析会议上的陈述](#)（表明该交易是中国基金但无政府参与））。

GCI is wholly owned by Fujian Grand Chip Investment Fund LP (FGC), which is 51% held by a Chinese national Zhendong Liu and 49% by a Chinese entity, Xiamen Bohao Investment Co., Ltd. (Bohao), which is a company financed by the municipal government. (See [Aixtron Press Release](#), May 23, 2016.) According to the [PRC Enterprise Credit Information Database](#), Xiamen Bohao is owned by Xiamen Youhong Trade Co., Ltd. and Xiamen Golden Circle Real Estate Development Co., Ltd. The latter of which is owned by Xiamen Golden Circle Investment Group Co., Ltd. (FIG) which is in turn owned by the Xiamen Finance Bureau. (See Statements by Martin Goetzeler, President and CEO, Aixtron SE, [Analyst Earnings Conference Call, Second Quarter 2016, August 2016](#) (indicating Chinese funding but no government involvement in the deal)).

## CFIUS对交易的审查过程

### CFIUS Review of the Transaction

2016年5月23日，GCI对爱思强公司发出价值6.7亿欧元的要约收购报价（见 Aixtron [Form 6-k, Ex-99.1](#)，2016年5月23日，美国证监会备案）。根据要约文件，交易的成交以得到CFIUS的批准为前提（见Aixtron 交易文件的 [SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#)，2016年8月2日）。2016年7月1日，GCI和爱思强公司联合向CFIUS发布了自愿声明，并于13日和14日作出补充声明，CFIUS于2016年7月19日接受了审查申请（见Aixtron交易文件的 [SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#)，2016年8月2日，美国证监会备案）。交易双方于2016年8月17日，也就是30天初审期的最后一天提出拟采取的风险防范措施，但CFIUS随后告知双方，委员会成员“并不认为通过双方提出的措施，或是委员会可能想到的其他措施可以解决国家安全问题。”（见 [宏芯投资基金与爱思强的联合公告](#)，2016年11月21日）。

GCI made a tender offer to acquire Aixtron on May 23, 2016, for a total value of €670 million. (See Aixtron [Form 6-k, Ex-99.1](#), May 23, 2016, SEC Filing.) According to the Offer Document, CFIUS Approval is a condition of the deal. (See Offer Document at Aixtron [SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#), Aug. 2, 2016.) GCI and Aixtron filed a joint voluntary notice with CFIUS on July 1, 2016, which was supplemented on the 13th and 14th and accepted by CFIUS for review on July 19, 2016. (See Offer Document at Aixtron [SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#), Aug. 2, 2016, SEC Filing.) The final day of the initial 30-day review period was on August 17, 2016. (See *id.*) The parties proposed mitigation options, but CFIUS told the parties that it “does not believe that those national security concerns can be resolved by mitigation proposals.” (See [Grandchip-Aixtron joint announcement](#), Nov. 21, 2016.)

尽管CFIUS并未说明其担忧为何，但根据纽约时报报道，有一种可能就是爱思强在运用一种叫氮化镓的高半导体器件来制造芯片方面的领先地位（参照纽约时报，[Showdown Looms as U.S. Questions Chinese Deal for Aixtron](#)，2016年11月19日）。用氮化镓生产产品的半导体公司曾接受过CFIUS的审查。2016年1月，CFIUS拒绝了金沙江创投中国联盟对皇家飞利浦公司的并购，使得双方在提起总统审查程序前就放弃了该项交易（请参见 [Philips 相关新闻稿](#)，2016年1月）。据报道，CFIUS的担忧之一就是飞利浦公司用氮化镓技术来生产二极管，并且越来越多的氮化镓被用于生产新一代敏感芯片（请参见纽约时报文章 [Concern Grows in U.S. Over China's Drive to Make Chips](#)，2016年2月4日）。

Although the specific national security concerns have not been stated, “one possibility is Aixtron’s leading position making technology that creates chips based on an advanced semiconductor material called gallium nitride.” (See *New York Times*, [Showdown Looms as US Questions Chinese Deal for Aixtron](#), Nov. 19, 2016.) Semiconductor companies that develop products using gallium nitride (GaN) have been scrutinized in the past by CFIUS. In January 2016, CFIUS’s opposition to the acquisition of the Royal Philips NV’s LED business, Lumileds, by a Chinese consortium led by GO Scale Capital, caused the parties to abandon the transaction instead of proceeding with a presidential review. (See [Philips Press Release](#), Jan. 2016.) It was reported that one of the concerns that CFIUS had was that Lumileds had technology that used GaN to develop diodes, and GaN is used in a growing number of a new generation sensitive microchips. (See *New York Times*, [Concern Grows in US Over China's Drive to Make Chips](#), Feb. 4, 2016.)

## 重点提示

### Key Takeaways

**CFIUS将会倾向于阻止对在美国运营的非美国企业的并购**

### CFIUS Will Move to Block Acquisitions of Non-US Companies with US Operations

爱思强并购案中对总统审查程序的启动可谓史无前例，因为目标公司的业务主要是在美国境外，而之前的两个引发总统审查程序的CFIUS案例针对的都是美国本土企业。MAMCO制造有限公司是在西雅图成立的，为波音公司等美国公司提供航空航天产品的供应商。据新闻报道，MAMCO并没有将其产品对外出口（参见纽约时报文章 [China Ends Silence on Deal U.S. Rescinded](#)，1990年2月20日）。同样地，罗尔斯公司案中的风力发电公司也是一家美国企业。与这些不同的是，因为爱思强股份有限公司在美国加利福尼亚州的森尼维尔市只有一家子公司，且其收入只占总收入的五分之一（参见爱思强提供的文件，[SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#)，2016年8月2日；[Aixtron Form 20-F](#)，2016年2月23日，证券委员会 备案），因而爱思强并购案只是部分涉及了其在美国的业务。

The presidential review of Aixtron's acquisition is unprecedented because the target's operations are predominately outside the US. Both of the earlier CFIUS cases that resulted in presidential actions concerned US businesses based in the US. MAMCO Manufacturing, Incorporated was a Seattle-based aerospace products supplier to US companies like Boeing. According to news reports at the time, MAMCO Manufacturing did not export outside the US. (See *New York Times*, [China Ends Silence on Deal US Rescinded](#), Feb. 20, 1990.) Similarly, the wind farms at issue in the Ralls case were also entirely US based. Unlike these earlier cases, the acquisition at issue with Aixtron only partially involves a US business. Aixtron has only one US subsidiary, Aixtron, Inc., in Sunnyvale, California, and derives only one-fifth of its revenue in the US. (See Offer Document at Aixtron [SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#), Aug. 2, 2016; [Aixtron Form 20-F](#), Feb. 23, 2016, SEC Filing.)

由于爱思强符合“在美国从事州际贸易”的经营性质（[31 C.F.R. § 800.226](#)），因而其在美国的运营属于CFIUS规定中所定义的“美国商业”范畴。需要特别注意的是，在该定义下，即使爱思强未曾拥有在美国法律管辖下设立的企业法人实体，CFIUS仍有权介入该交易。同时CFIUS也只能对该德国公司涉及“在美国州际间的贸易部分”的并购进行审查。然而，与这种局限于在美国业务范围内的审查大相径庭的是，交易方称，CFIUS要求他们“放弃交易”，否则将会“启动总统审查程序”（参见[宏芯投资基金与爱思强的联合公告](#)，2016年11月21日）。

The US operations of Aixtron are considered a “US business” under the CFIUS regulations because Aixtron is “engaged in interstate commerce in the United States.” ([31 C.F.R. § 800.226](#)) Keep in mind that under the regulations, CFIUS might have stepped in even if Aixtron owned no legal entities established under US law. At the same time, CFIUS can only review the acquisition of the German company “to the extent of its activities in interstate commerce.” (*Id.*) Contrary to this limited review of the US operations, the parties reported that CFIUS asked them to “abandon the transaction” or it would refer the matter “to the President of the United States, who has the power to prohibit the transaction.” (See [Grandchip-Aixtron joint announcement](#), Nov. 21, 2016.)

## CFIUS将阻止尚未结束的并购进程

### CFIUS Will Move to Block Acquisitions That Have Not Closed

这次审查结果同样说明了制定一个好的CFIUS审查管理方案对交易双方的重要性。早期两宗引发总统审查的案件都是发生在对美国业务的并购完成之后，因而撤资就成了在交易已经完成的情况下的唯一补救方法。相反，爱思强的要约是基于CFIUS程序以及BMW（在德国的同类机构）程序顺利通过的前提之下（见Aixtron交易文件[SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#)，2016年8月2日）。

但本案中，交易尚未完成，且总统也可能作出其他选择来降低对国家安全的忧虑。考虑到总统审查前交易尚未完成的情况，总统可能会根据CFIUS的建议提出“终止交易”的最终裁决，但如果这样做的话就产生了另一个问题，即美国政府出面阻止一宗外国企业之间的交易是否涉及到越权行为。或许总统还会寻求通过其他途径，包括采取类似于交易双方提出的防范风险措施，或以对美国业务进行剥离为条件等方法以求审查得到通过。考虑到在阻止整个交易上的管辖权限制，和爱思强约80%的收入均来自国外这一现实，后一种选择貌似更符合逻辑。

The review also illustrates the importance for the parties of good CFIUS process management. Both of the earlier CFIUS cases that resulted in presidential actions involved consummated acquisitions of US businesses, which is why those orders mandated divestments. It was the only remedy available because the transaction had closed. By contrast, the Aixtron offer was conditioned on the prior successful completion of the CFIUS process and the BMWi (the German counterpart to CFIUS) process. (See Offer Document at Aixtron [SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#), Aug. 2, 2016.) Here, however, the transaction has not closed and the President has – potentially – other options that could mitigate the national security concerns. Given the pre-closing status of this presidential review, the President may follow CFIUS's recommendations to “prohibit the transaction;” however, that again raises questions because it would likely exceed the authority of the government to issue an order blocking wholly foreign components. Alternatively, the President could take any number of other actions, including something similar to what the parties proposed as mitigation, or order that the US business be spun-off as a condition to approval. This latter option seems more plausible given the jurisdictional limitations in blocking the entire transaction and that almost 80% of the Aixtron revenues are outside the US.

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