

On November 18, 2016, [Aixtron SE](#), a German-based global provider of equipment to the semiconductor industry, announced that the investigation period for the Committee on Foreign Investment in the United States (CFIUS) to review the tender offer by Grand Chip Investment GmbH (GCI) lapsed on November 17, 2016, and the matter has now been passed along to the US President Obama for decision in line with CFIUS statutes. (See Aixtron [Form 6-K, Ex-99.1](#), Nov. 18, 2016, SEC Filing; Aixtron [Press Release](#), Nov. 18, 2016.) The President now has less than a week to make a decision (no later than December 2, 2016 at midnight New York City time). This development is significant because it could be the first time that a 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 foreign investors that acquisitions of non-US targets can still fall within CFIUS's jurisdiction if the target has operations in the United States.

CFIUS Procedure and Prior Presidential Actions

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 United States, but only to the extent of its activities in interstate commerce." (See [31 C.F.R. § 800.226](#).) CFIUS can retroactively review any transaction that falls within its authority. Alternatively, parties have the option of voluntarily seeking a CFIUS review and obtain a safe-harbor from future CFIUS action upon a successful review. Once a complete formal filing is submitted to and accepted by the Treasury Department, CFIUS is required to then complete an initial review within 30 days, or commence a 45-day "investigation" if CFIUS deems the transaction could have a possible adverse impact on US national security interests. Following the 45-day investigation, CFIUS will clear the transaction or make a recommendation to the President to block the transaction (or unwind the transaction if it is already concluded at that point).

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 been reported to result in a Presidential action since the CFIUS process was enacted in 1988, and both involved Chinese investors.

In 1990, President George H. W. Bush executed an order requiring China National Aero-Technology Import and Export Corporation, a Chinese company, to divest all interest in MAMCO Manufacturing, Incorporated, a Seattle-based aerospace products supplier. (See [Presidential Order](#), 55 Fed. Reg. 3935, Feb. 1, 1990.)

The next did not occur until 2012, when President Obama signed an Order requiring that Ralls Corporation, owned in part by the Sany Group and other Chinese nationals, divest all interest in US wind farms because of proximity to military facilities. (See [Presidential Order](#), Sept. 28, 2012; [77 Fed. Reg. 60281](#), Oct. 3, 2012; see also [Squire Patton Boggs Client Alert, Ralls v. CFIUS](#), July 16, 2014.)

Aixtron and Fujian Grand Chip Investment Fund

The Parties

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.) "Most of the world's leading electronic device manufacturers produce in Asia and consequently, the majority of Aixtron sales continue to be delivered into this region." (*Id.*) In addition, in April of 2015, Aixtron acquired PlasmaSi Inc., a California-based company with technology that "enables the encapsulation of organic thin-films by depositing ultra-thin, light weight and flexible barrier films through its proprietary technology which is particularly well suited to Organic Light Emitting Diodes (OLED) displays." (*Id.*)

GCI is wholly owned by Fujian Grand Chip Investment Fund LP, which is 51% held by a Chinese national Zhendong Liu and 49% by a Chinese entity, Xiamen Bohao Investment Ltd. (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. (厦门友宏贸易有限公司) and Xiamen Golden Circle Real Estate Development Co., Ltd. (厦门金圆产业发展有限公司), the latter of which is owned by Xiamen Golden Circle Investment Group Co., Ltd. (FIG) (厦门金圆投资集团有限公司), which is in turn owned by the Xiamen Finance Bureau (厦门市财政局). [PRC Enterprise Credit Information Database](#), is a government maintained database for basic information about companies registered in China. (see also Statements by Martin Goetzler, President & CEO, Aixtron SE, [Analyst Earnings Conference Call, Second Quarter 2016](#), August 2016 – indicating Chinese funding but no government involvement in the deal.)

CFIUS Review of the Transaction

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 accepted 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 that the parties had presented or other mitigation measures CFIUS had considered.” (See [Grandchip-Aixtron joint announcement](#), Nov. 21, 2016.) In addition, “CFIUS informed the [Fujian Grand Chip] and AIXTRON that, if the parties did not withdraw their CFIUS notice and abandon the transaction, the matter would be referred to the President of the United States, who has the power to prohibit the transaction.” (*Id.*)

Although CFIUS’s concerns have not been stated, *The New York Times* reported that “[o]ne possibility is Aixtron’s leading position making technology that creates chips based on an advanced semiconductor material called gallium nitride.” (See *The New York Times*, “[Showdown Looms as U.S. Questions Chinese Deal for Aixtron](#),” Nov. 19, 2016.) Semiconductor companies that develop products using gallium nitride 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 gallium nitride (GaN) to develop diodes, and GaN is used in a growing number of a new generation sensitive microchips. (See *The New York Times*, “[Concern Grows in U.S. Over China’s Drive to Make Chips](#),” Feb. 4, 2016.)

Aixtron Presidential Review, Key Takeaways

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

The Presidential review of Aixtron’s acquisition is unprecedented because the target’s operations are predominately outside the United States. Both of the earlier CFIUS cases that resulted in Presidential actions concerned US businesses based in the United States. 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 *The New York Times*, “[China Ends Silence on Deal U.S. 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.)

The US operations of Aixtron is 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.) This statement by CFIUS raises questions because it would likely exceed the authority of the government to issue an order blocking wholly foreign components of a transaction.

CFIUS Will Move to Block Acquisitions That Have Not Closed

The review here is also unprecedented because the Aixtron offer has not yet closed and the completion of the CFIUS process is a condition to closing. (See Offer Document at Aixtron [SC TO-T/A, Ex-99.\(A\)\(1\)\(A\)](#), Aug. 2, 2016.) Both of the earlier CFIUS cases that resulted in Presidential actions concerned the already consummated acquisitions of US businesses, which is why those Orders mandated divestments. It was the only remedy available because the transaction had completed. 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 to spin 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 United States.

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