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Client Alert

International Trade & Litigation Practice Group

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U.S. Blocks Alibaba Affiliate Ant Financial's Acquisition of MoneyGram

De-facto blocking evidences continuing scrutiny of Chinese investments in U.S. companies in the strategic technology and financial industries.

On January 2, 2018, MoneyGram International, Inc. (NYSE:MGI) ("MoneyGram") and affiliates of Ant Financial ("Ant Financial") terminated their previously-announced proposed merger.[1] The termination follows almost a year spent by the parties in trying to secure approval of the transaction by the Committee on Foreign Investment in the United States ("CFIUS").

Transaction Background

In January of 2017, Ant Financial announced the entry into a definitive agreement to acquire MoneyGram for approximately $1.2 billion. Ant Financial is best known for Alipay, an online payments service similar to PayPal, that had been part of Alibaba (NYSE:BABA), until spun-off in connection with Alibaba's IPO in 2014. Alibaba founder Jack Ma continues to have a significant stake in Ant Financial.

The companies decided to terminate their deal after CFIUS rejected their third proposal to mitigate concerns over the safety of personally identifiable information held by MoneyGram. In connection with the termination, Ant Financial paid a termination fee of $30 million to MoneyGram.[2]

CFIUS Process

The proposed acquisition caught the eye of U.S. lawmakers soon after announcement, with Congressman Robert Pittenger (R-NC 9th District) and Congressman Chris Smith (R-NJ 4th District) publishing an op-ed in the Wall Street Journal specifically calling out the proposed acquisition as problematic.[3] Congressmen Pittenger and Smith raised concerns regarding "strategic, well-coordinated and state-sponsored Chinese investments in American financial institutions" that "[are] often driven by the priorities and objectives of the Chinese government."[4] Specifically with respect to the MoneyGram acquisition, the Congressmen were apprehensive about a 15% shareholding stake in Ant Financial held by the Chinese government. Citing expert testimony by the Rhodium Group, the Congressmen focused on the

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fact that "China's state-dominated financial system and the lack of rule of law means that state involvement can be pervasive, even if a firm is privately owned."[5] The Congressmen went on to state that should the Ant Financial/MoneyGram transaction be approved, "the Chinese government would gain significant access to, and information on, financial markets and specific international consumer money flows" that could be used to target "political, religious and human rights activists."[6]

Douglas Feagin, the President of Ant Financial, responded in a letter to the editor in the Wall Street Journal to clarify that "Ant Financial is a private sector company and while a handful of Chinese state-owned or –affiliated funds own non-controlling minority stakes, they do not participate in company management … [n]or do they have board representation or any special rights."[7] Around the same time, Mr. Feagin also told the Wall Street Journal that Ant Financial was "very happy to go through [the CFIUS] process" and that Ant Financial had a "good dialogue with U.S. regulators."[8]

Following an extended campaign by Ant Financial and MoneyGram to satisfy CFIUS's national security concerns, including three separate mitigation proposals, the parties opted to terminate the transaction prior to the official CFIUS recommendation. MoneyGram Chief Executive Officer, Alex Homes, noted in a press release at the time of termination that it had "become clear that CFIUS will not approve this merger."[9]

Chinese Foreign Direct Investment & CFIUS

In 2017, several companies walked away from transactions as a result of challenges related to the CFIUS process, indicating that CFIUS may be viewing what constitutes a U.S. national security threat using a new lens, particularly with respect to inbound investment from China. As we have previously reported,[10] various sources within the U.S. government, including a Department of Defense commissioned report and Members of Congress, have called for a more robust review of Chinese investment into the United States.

Even as CFIUS is exercising its discretion under existing law to take what appears to be a more expansive view of threats to national security, Congress has introduced legislation to reform the CFIUS review process by providing the Committee with even more authority and additional resources. In particular, in November 2017, Senator John Cornyn introduced a bill called the Foreign Investment Risk Review Modernization Act ("FIRRMA"), which could reform the CFIUS process in several ways, including by broadening the types of transactions CFIUS may review. In particular, the bill would expand the definition of a "covered transaction" reviewable by CFIUS to include:

- the purchase or lease by a foreign person of private or public real estate that is located in the United States and is in close proximity to a United States military installation or to another facility or property of the United States Government that is sensitive for reasons relating to national security and meets such other criteria as the Committee prescribes by regulation;

- non-passive investments by a foreign person in any United States critical technology company or United States critical infrastructure company, subject to certain prescribed regulations;

- any change in the rights that a foreign person has with respect to a United States business in which the foreign person has an investment, if that change could result in foreign control of the United States business or a non-passive investment described above;

- the contribution (other than through an ordinary customer relationship) by a United State critical technology company of both intellectual property and associated support to a foreign person through any type of arrangement (*e.g.*, a Joint Venture); and

- any other transaction, transfer, agreement, or arrangement which is designed or intended to evade or circumvent CFIUS review.

Notably, the bill would also make filing a CFIUS notice mandatory for certain transactions (*i.e.*, transactions involving certain state-owned foreign investors), extend CFIUS' current review period, and institute a filing fee capped at the lesser of $300,000 or 1% of the transaction's value.

Given these potential changes, if this version of the bill were to become law, it would significantly alter the CFIUS process. While many of Congress' legislative initiatives continue to be quagmired in partisan gridlock, signs suggest the bill could be moved through the legislative process given its strong bipartisan support. Senator Cornyn secured several high ranking Democrats and Republicans as co-sponsors to the bill, including Senators Dianne Feinstein (D-CA), Richard Burr (R-NC), Gary C. Peters (D-MI), and Marco Rubio (R-FL). In addition, the House of Representatives introduced an identical bill that also has several Democratic and Republican co-sponsors and, as we have reported before, various parts of the United States government have become increasingly supportive of providing CFIUS with broader capabilities to review U.S. inbound investment.

Takeaways

The de-facto blocking of Ant Financial's acquisition of MoneyGram signals continuing willingness by the current Administration to use all avenues available to it to accomplish its trade and foreign policy goals in its relationship with China. It is also significant in that it shows a willingness to block transactions involving privately-owned Chinese buyers in addition to those involving state-backed buyers (i.e., the Canyon Bridge/Lattice Semiconductor transaction). As noted by Mr. Holmes at the time of termination, "[t]he geopolitical environment has changed considerably since we first announced the proposed transaction with Ant Financial nearly a year ago."[11]

This transaction also shows that CFIUS is continuing to expand how it views threats to U.S. national security to include access to the U.S. financial system and data security issues. This further emphasizes the need for U.S. strategic technology and financial companies to fully understand potential CFIUS or other regulatory risks in deals involving foreign investors, especially in China.

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[1] Press Release, MoneyGram International, Inc., *MoneyGram and Ant Financial Announce Termination of Amended Merger Agreement* (Jan. 2, 2018).
[2] *Id*.
[3] Robert Pittenger and Chris Smith, Op-Ed, *Check China's Financial Investments in the U.S.*, WALL ST. J., Feb. 21, 2017.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] Douglas Feagin, Letter to the Editor, *Ant Financial's MoneyGram Deal Is Clean*, WALL ST. J., Feb. 28, 2017.
[8] Telis Demos and Rick Carew, *China's Ant Financial, Owned by Trump Ally Jack Ma, Makes U.S. Play*, WALL ST. J., Jan. 26, 2017.
[9] Press Release, *supra* note 1.
[10] Baltz, Raymond E., Hill, Eleanor, Savage, Christine E., Stockdale, Spencer A., Gizaw, Betre M., "President Trump Blocks Acquisition of US Chipmaker by Chinese-Backed Private Equity Fund Amid CFIUS Concerns." KING & SPALDING CLIENT ALERT, SEPTEMBER 15, 2017.
[11] Id.