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The Dog that Didn't Bark: CFIUS Clears Wanxiang's Acquisition of Battery Manufacturer A123

Review by the Committee on Foreign Investment in the United States (“CFIUS”) often raises fears among outside observers that political and protectionist considerations, rather than true national security concerns, will play an undue role in the review of transactions. However, CFIUS’s recent uneventful clearance of the acquisition of bankrupt battery manufacturer A123 Systems, Inc. (“A123”) by a large Chinese automotive components manufacturer, the Wanxiang Group, is evidence that even when politics, protectionism, and xenophobia all appear to be significant obstacles, CFIUS will not raise objections if it believes no security issues exist. With proper planning and transparency, even politically controversial transactions can successfully negotiate the CFIUS process.¹

The Chinese acquiror, Wanxiang America (“Wanxiang”), the U.S. subsidiary of a large non-state-owned automotive components manufacturer, the Wanxiang Group, won a bankruptcy auction for the U.S. company, A123, in early December 2012. When Wanxiang emerged as the winner of the bankruptcy auction, the acquisition quickly drew political scrutiny and criticism. The political profile of the transaction was heightened because A123 had been the recipient of nearly US\$250 million in assistance from the U.S. Department of Energy’s (“DoE”) clean energy program, the same program that had provided loan guarantees in excess of US\$500 million to the now bankrupt solar panel manufacturer, Solyndra. Literally dozens of U.S. lawmakers, including the congressional delegation from the state of Michigan (where an A123 factory was to be built using the DoE funds) as well

¹ The Exon-Florio amendments to the Defense Production Act of 1950 (50 U.S.C. App. § 2170) and their implementing regulations (31 C.F.R. part 800) (together, “Exon-Florio”) authorize the President to suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses that threaten to impair the national security of the United States. CFIUS, which conducts reviews under Exon-Florio, is a committee of representatives from various government agencies and offices, including the Departments of Defense, Justice, State, Commerce, Energy, and Homeland Security, and is chaired by Treasury Department. Parties to an acquisition that could raise national security issues can file a voluntary notification of the transaction to CFIUS, thereby triggering a national security review. However, if no notification is made, CFIUS retains the right to review the acquisition in the future, before or after it closes. Following a national security review the Committee may approve the acquisition, require adherence to a security mitigation agreement, or recommend that the President block or unwind the acquisition.

To learn more about CFIUS, see our prior alert memorandum, *Recent Revisions to Exon-Florio “National Security” Reviews of Foreign Investment in the United States* (Dec. 22, 2008), <http://www.cgsh.com/recent-revisions-to-exon-florio-national-security-reviews-foreign-investment-in-the-us/>.

as Republican Senators Chuck Grassley of Iowa and John Thune of South Dakota, raised concerns including the potential acquisition of U.S. taxpayer-funded technology by a Chinese purchaser, fairness of competition between U.S. and Chinese alternative energy companies, and A123's military contracts. Press reports also indicated that the unsuccessful U.S. bidder, Johnson Controls, hired a team of Washington lobbyists to rally political opposition to Wanxiang's bid.

Despite the political and protectionist opposition to the transaction, and the heightened domestic political scrutiny being applied to the DoE loan guarantee program in which A123 participated following the Solyndra matter, CFIUS cleared the transaction with little apparent difficulty.² While as part of the bankruptcy auction, A123's government business was sold separately to Illinois-based Navitas Systems LLC for approximately \$2.25 million, most likely in order to facilitate CFIUS approval (although it is unclear whether this was a pre-emptive move by the parties or reflected prior guidance from CFIUS or its member agencies), this was a minor divestiture accounting for less than 1% of the aggregate purchase price. The domestic opponents of the Wanxiang acquisition were not successful in inducing CFIUS to block the transaction altogether in favor of the American acquiror.

This transaction provides strong evidence that fears that CFIUS acts as a purely political or protectionist barrier to foreign acquisitions are overblown. The Wanxiang bid presented something of a "perfect storm" of such considerations – a Chinese acquiror, a jilted American bidder mounting a vigorous public relations campaign, widespread congressional expressions of concern, a U.S. industry claiming unfair competition from China, and a target that had benefitted from a politically sensitive program of financial support from the U.S. government. Nevertheless, CFIUS cleared the transaction without incident.

It of course remains true that CFIUS's conception of national security is quite broad, and the CFIUS process will continue to present challenges arising from the secrecy surrounding its analyses and from the procedural difficulty of coordinating a multiagency process. Moreover, we would not go so far as to say that politics have no role to play or that broad consultations are not important. However, neither is CFIUS review a mere smokescreen for political or economic considerations having nothing to do with national security, and with the proper planning, advice, and disclosure, the process can be navigated successfully even when the transaction would appear to present all of the hallmarks of a politically difficult review.

² The length of CFIUS's review is not entirely clear from publicly available information. Wanxiang won the bankruptcy auction on December 11, 2012, and, according to press reports, received CFIUS clearance on January 28, 2013. However, Wanxiang reportedly sought a controlling stake in A123 in August 2012, prior to its bankruptcy filing, and the extent of Wanxiang's previous interactions with CFIUS is not clear.

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Please contact Paul Marquardt or Rick Bidstrup of our Washington office, or any of your other regular contacts at the firm, for further information about the matters discussed above or CFIUS reviews more generally.

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