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Ant Financial/MoneyGram: Buyer's Chinese Government Ties, Money Transfer Issues Raise Potential CFIUS Concerns; Issues May be Resolvable Through Mitigation

CFIUS Update

On January 26, Ant Financial, the financial services arm of Alibaba, announced an agreement to acquire U.S. money transfer company MoneyGram in a deal valued at about $880 million. U.S. payments company Euronet Worldwide, however, made a competing, $1 billion acquisition offer for MoneyGram on March 14, in what may be the initial move of a bidding war for the company. In addition to the heightened deal price, Euronet is emphasizing the fact that, unlike the Ant Financial deal, its proposal would not require CFIUS clearance.

Ant Financial has ties to the Chinese government, and given that MoneyGram's money transfer business may implicate certain anti-money laundering (AML) and national security concerns, the proposed acquisition carries some CFIUS risk. According to interviewed CFIUS experts, however, AML and counter-terrorism concerns related to MoneyGram's business may be potentially resolvable through mitigation.

That said, the new administration does add an element of uncertainty to currently ongoing CFIUS reviews, as the White House has telegraphed a more aggressive stance towards Chinese inbound investment. Although sources view CFIUS as likely to, at least in the near-term, continue to review deals based on a strict national security focus, consistent with previous administrations, given the sensitive nature of MoneyGram's business, and the politically-charged atmosphere around Chinese inbound acquisitions, such an outcome is by no means certain.

For this article, we spoke to CFIUS experts, including several former CFIUS staff representatives from various member agencies, plus experts on U.S.-China relations, anti-money laundering and financial crimes, and international money transfer and payment systems.

In Depth Look at Remittances and MoneyGram's Vulnerability as a Target

Vulnerability and risk inherent in sale of MoneyGram, as a financial services business, is tied to money laundering concerns. The deals most likely to trigger in-depth CFIUS reviews typically involve critical technology (e.g., recent semiconductor deals). With a company like MoneyGram, however, CFIUS is unlikely to have concerns about the technology involved.

"MoneyGram, Western Union, and other traditional money transfer operators (MTOs) transmit money through technology that is relatively older," says Juan Llanos, an advisor to MTOs and high-tech payment firms. "Payment orders are transmitted across telephone lines or the Internet, while funds [connected to those orders] move via traditional, centrally-controlled networks like SWIFT [a system used to identify banks and financial institutions]." The technology has been around for decades, and has no connection to potential defense or military uses.

With MoneyGram, there is a more indirect connection to U.S. national security. "In this particular case, you have a foreign firm that is trying a buy a U.S. company that is involved in financial transactions in the U.S.," notes Michael Casey, Counsel at Ropes & Gray, who represents clients in the CFIUS review process. "Now, MoneyGram has had significant AML issues in the U.S.— and then you have the prospect of a Chinese company coming in. So the national security concerns here are tied to the U.S. financial system, and tied to money laundering concerns."

MoneyGram's recent AML issues involve a 2012 DOJ enforcement action, as a result of which MoneyGram entered into a Deferred Prosecution Agreement (DPA) with a forfeiture of $100 million for aiding and abetting wire fraud and failing to meet its AML obligations. As part of the DPA, MoneyGram agreed to enhanced compliance obligations and structural changes, including retaining an independent corporate monitor who reports regularly to DOJ, as well as adopting a worldwide AML and anti-fraud standard.

The key element of AML concerns is that MoneyGram, in the course of its business, collects data that U.S. law enforcement accesses through reporting and recordkeeping requirements of the Bank Secrecy Act (BSA). This data is, of course, valuable in that it may be used to detect and deter money laundering and terrorist financing. MoneyGram, as a money transmitter subject to the BSA, is required to collect and retain records of customer transactions, verify customers' identities, maintain AML programs, and report suspicious transactions. To that end, money transmitters are required to register with the Financial Crimes Enforcement Network (FinCEN), the bureau within the Treasury Department responsible for administering the BSA, and to provide information on structure and ownership. FinCEN combines this information with other intelligence to provide analytical support to other enforcement agencies and regulators.

Dennis Lormel, an expert on AML and Combating the Financing of Terrorism (CFT) issues, explains that these concerns are inherent to MoneyGram's business, and would be a concern in allowing the sale of MoneyGram to any foreign firm. "By nature of MoneyGram's business, and the fact that they've had their own issues and have their own court appointed monitor—they are in an inherently high risk business," says Lormel. "Not that they're necessarily doing anything to support that kind of activity— but money transfer is simply susceptible to being used to support illegal activity. And that's a concern to national security, from an AML standpoint."

MoneyGram will continue to be subject to U.S. AML/CFT regulations and recordkeeping requirements post merger. While the high-risk nature of MoneyGram's business poses a certain national security-related concern, the nature of the business also means that MoneyGram will continue to be subject to a high level of U.S.-based oversight — even under Ant Financial's ownership.

"The money remittance industry is highly regulated in the U.S. for a range of reasons, including AML, data protection, information security, and consumer privacy concerns," notes Will M. Leahy, an attorney with Harris, Wiltshire & Grannis whose practice focuses on international trade and investment. "MoneyGram will continue to be headquartered in the U.S. and run by its U.S.-based management team after the deal closes. Therefore, the U.S. government would retain regulatory jurisdiction over the company."

To that point, Casey adds, "As long as MoneyGram continues to operate in the U.S., it will be subject to the Bank Secrecy Act, and will have to comply with affirmative anti-money laundering obligations mandated by that law. MoneyGram would still be required to abide by those requirements if a Chinese company acquires it."

According to another CFIUS attorney, this is where FinCEN will come into the picture, as FinCEN plays a role in certain CFIUS reviews, and would almost certainly weigh in on CFIUS review of an entity subject to the BSA. "FinCEN, as part of the intelligence community, can participate in particular cases where the acquisition involves a financial institution and could implicate access to data," explains the source. "In those cases, CFIUS then acts to preserve U.S. government access to data."

AML/CFT concerns may be addressable through mitigation. Given extensive federal and state oversight, and AML recordkeeping and reporting requirements, the U.S. government will retain a number of levers through which to ensure continued access to MoneyGram's data post-acquisition. However, if the Committee retains concerns about the U.S. and state governments' ability to monitor MoneyGram's business post merger, these additional concerns may be resolvable through mitigation.

Once CFIUS has reviewed the deal, with FinCEN's input, the Committee will determine what mitigation measures it needs to impose, if any, in order to address any lingering AML/CFT concerns. "If data and access to data is a concern, then CFIUS could adapt to ensure that that access is preserved," says the CFIUS attorney. "CFIUS could require, as a condition of clearing the deal, the company to take steps to preserve the U.S. government's ability to obtain its financial data." Such measures could include more demanding examinations and reviews, or requiring a higher standard of AML compliance policies, procedures, and internal controls.

Ant Financial is likely to agree to such measures in order to get its deal through CFIUS review, since hindering the U.S. government's access to financial data is not an important deal objective. Furthermore, not only would MoneyGram (and by extension, Ant Financial) have had to comply with AML requirements and FinCEN oversight regardless, but MoneyGram's current management already has significant experience dealing with heightened oversight under its court-appointed monitorship.

According to Leahy, Ant Financial will need to demonstrate its commitment to CFIUS on the AML compliance front. "The key will be for MoneyGram to show that it has comprehensive internal policies and procedures in place for compliance with U.S. AML, data protection, consumer privacy, and sanctions obligations, among other areas," says Leahy. "Moreover, Ant Financial will have to make clear its commitment to retaining, if not bolstering, these policies and procedures."

In Depth Look at Ant Financial as Acquirer

Ant Financial has ambitions be the world's dominant mobile wallet, financial technology and services provider. Ant Financial dominates the e-commerce space in China, as a leader in financial technology and mobile payments processing. It has also begun to aggressively pursue channels and capabilities beyond online payments, now offering services like Sesame Credit (a credit scoring system that uses data from Alibaba's services), MYbank (a private bank that provides microloans to businesses and consumers), and Yue'Bao (a money-market manager).

The company has also recently revealed its global ambitions, with acquisitions and investments in India, Thailand, South Korea, and the EU, among other efforts. Its pending acquisition of MoneyGram signals its first major foray into the U.S. financial services and online payments market. Eventually, Ant Financial is looking to cover financial products and services for users around the world, leveraging key technologies such as cloud, data analytics, and advanced algorithms that will allow for international payments.

CFIUS is familiar with Ant Financial and its ownership structure. The risk assessment for Ant Financial's acquisition of MoneyGram will certainly be deal specific, given that MoneyGram is a financial services company with its own set of assets and vulnerabilities. However, to the extent that CFIUS staff and personnel have stayed in place since September 2016, when Ant Financial received approval to acquire U.S. technology firm EyeVerify, the review of the MoneyGram deal could be somewhat expedited given the Committee's familiarity with Ant Financial.

In the Committee's review of the EyeVerify deal, it will have examined Ant Financial's business and, more importantly, its ownership structure. This also means that Ant Financial is familiar with the CFIUS review process, albeit in the context of a less sensitive acquisition.

Ant Financial is backed by at least two Chinese sovereign wealth funds, China Investment Corporation and National Social Security Fund (NSSF). In reviewing this deal, CFIUS will consider the threat posed by Ant Financial, particularly as a government-backed actor. According to a source who served as an advisor on CFIUS to DOJ leadership, "CFIUS staff will be looking at all the information they have available, some highly classified, and will also get a report from the intelligence community that rates the threat [from the buyer] as low, medium, or high."

One point of significant concern in any CFIUS review is whether the proposed deal could put the target within control of a foreign government, including sovereign wealth funds (SWFs). In Ant Financial's case, investors include two prominent Chinese SWFs, China Investment Corporation and National Social Security Fund (NSSF). Additional investors with strong ties to China include state-owned Shanghai Financial Development Investment Fund and national postal service China Post Group.

This point is noted in a Wall Street Journal op-ed penned by Congressmen Robert Pittenger (R-NC) and Chris Smith (R-NJ), which cautions that Chinese acquisitions of U.S. financial service firms and financial infrastructure may undermine America's core strategic interests. "The Chinese government is a significant shareholder of Ant Financial, with an approximate 15% stake," the op-ed reads. "Should this transaction be approved, the Chinese government would gain significant access to, and information on, financial markets and specific international consumer money flows."

Sources note that this is unlikely to be enough of a threat to obstruct the deal. A problem would arise only if there were some indication that the government backing means a connection to Chinese intelligence. "I doubt this is going to be the case, but CFIUS could interfere if the acquiring firm has known links to Chinese intelligence," says Derek Scissors, a resident scholar at the American Enterprise Institute who is an expert on Chinese outbound investment and U.S.-China economic relations. "This traces back to Alibaba — you look at Alibaba and its subsidiaries, and whether, as a result of the deal, there are going to be a bunch of Chinese operatives wandering around the U.S. financial system. I don't anticipate anything like that, but that would be a reason for CFIUS to interfere."

MoneyGram's posturing that proposed deal has potential for U.S. job opportunities could curry favor with Trump administration. In response to Congressmen Pittenger and Smith, Ant Financial's President, Douglas Feagin states (also in a WSJ op-ed): "[Ant Financial and MoneyGram] believe that the proposed combination would create the potential for a large number of U.S.-based job opportunities." Similarly, in MoneyGram's press release announcing the deal, Ant Financial CEO Eric Jing states that Ant Financial is "committed to continuing to invest in MoneyGram's workforce and growing jobs in the United States."

To the extent that Ant Financial can sell this angle to the Trump administration, job and investment commitments could help seal the government's approval. It may also help that Jack Ma, who controls Ant Financial and Alibaba, and President Trump are on friendly terms. The two met in January to discuss the prospect of one million new U.S. jobs, with Trump stating after the meeting, "Jack and I are going to do some great things."

In Depth Look at Potential Changes to CFIUS Review

CFIUS reviews unlikely to stray too far from past practice for the time being. Leaving aside the underlying CFIUS merits of the Ant Financial/MoneyGram transaction, the CFIUS review of the matter will take place in a transitional environment. And although the White House (and certain members of Congress) have telegraphed a more aggressive stance towards Chinese inbound investment, the transition's relatively slow place, coupled with lack of high-level White House guidance, may lead to CFIUS reviews, at least in the near-term, being conducted relatively consistently with past practice.

Until some policy direction filters down from the top, either from the White House or from department heads, CFIUS review is likely to roll along much as it has, with a strict focus on national security concerns. "There's no one who's in the middle levels right now, so as for now, I don't think policy is going to change particularly," notes a source who served on CFIUS staff at the Department of Treasury. "There may be someone acting in those positions, but those people may not be all that comfortable forwarding policy anyway—so I have a feeling that there's somewhat of a policy void right now."

Scissors agrees that CFIUS review is unlikely to change significantly in the near term. In fact, he considers it premature to draw any conclusions on whether CFIUS reviews are poised to get tougher under Trump. "People are conflating things within the administration," Scissors explains. "There is hawkishness on the econ side when it comes to American money going to China, because it takes away from job creation here—but that doesn't mean they're against Chinese money coming here. … So far, we don't have any evidence that people on the security side are hawkish on Chinese investment. That could ultimately turn out to be the case — but so far… I'm not aware of anyone on the security side who is arguing for less Chinese investment."

However, that could all change, depending on China's action in the near term. "I have yet to see any kind of definitive position on Chinese investment by Trump's team—but any kind of change, if there is one, could always be initiated by the Chinese," says Scissors. "You could see a situation where the Chinese try to pull or hide an acquisition, which would then get a lot of attention; and then maybe the U.S. would be prompted to take a more aggressive stance. But I don't think the change will be initiated on the U.S. side."

CFIUS reviews will become much more unpredictable if Trump decides to use the Committee as a mechanism for driving policy objectives. According to Dan G. Blair, former CEO of the National Academy of Public Administration (which worked with the Trump transition team both before and after the election), staffing of political appointees is very much an ongoing process, during which time day-to-day operations generally roll along thanks to the senior career staff. "Most of these interagency organizations are staffed below the presidentially-appointed levels, so most of the day to day operations of the Committee should be ongoing," notes Blair.

Blair explains that the switch off was facilitated by the "beachhead teams" coming in to start implementing Trump's policies following the inauguration. "The Trump team initially named landing teams to go into the agencies and departments following the election. 'Beachhead teams' then followed suit in the post-inaugural environment," explains Blair, referring to temporary appointees who were put in place to guide agencies towards Trump's agenda until he's able to get more permanent appointees in place. "So with interagency organizations [like CFIUS], the agencies should have identified concerns to the landing teams during their briefings, and the beachhead teams—who have the authority to actually direct action—should also have been made aware of any potential issues."

In all, according to Blair, there are between 3,000 to 4,000 political appointee spots to fill, including appointees that require senate confirmation. In the meantime, appointees awaiting confirmation act as advisers, advising both political and career senior staff. Between the beachhead teams and appointee-advisers, the mechanism is certainly in place for Trump to implement a top-town policy approach to CFIUS, should he decide to do so. The question is whether Trump and his team will get around to doing so, particularly given their difficulty in getting cabinet picks confirmed, and other more pressing issues.

If Trump does decide to shift CFIUS policy towards a more aggressive stance, this policy guidance will be reflected in the discretion CFIUS uses to review and to investigate deals. Experts note that this is why the CFIUS community is watching this deal closely. "For CFIUS purposes, national security is really in the eye of the beholder," says Casey. "So people are interested to see whether the Trump administration will define national security broadly in order to use CFIUS as a mechanism to drive his administration's foreign policy objectives."