

President Trump halts Broadcom takeover of Qualcomm

19 March 2018

On 12 March 2018, President Trump issued an [order](#) blocking the proposed hostile takeover of Qualcomm Incorporated, a semiconductor and telecommunications equipment company headquartered in California, by Broadcom Limited, a semiconductor device supplier organized in Singapore with operational headquarters in California. The president's order cites national security concerns as the basis for blocking a transaction valued at approximately US\$117 billion.

President Trump's order:

The president's order followed the review of the Committee on Foreign Investment in the United States (CFIUS), a U.S. government interagency committee that evaluates the national security implications of foreign investments into the United States. According to a [5 March 2018 Treasury Department letter](#), CFIUS's review was initiated by a 29 January 2018 unilateral notice filed by Qualcomm with CFIUS seeking review of Broadcom's solicitation of proxies in connection with the election of Qualcomm's board of directors at its upcoming annual stockholders meeting. CFIUS's review identified certain national security risks associated with Broadcom's proposed takeover of Qualcomm, including:

- A potential weakening of Qualcomm's technological leadership, particularly in 5G technology development and standard-setting, due to insufficient investment by Broadcom in continuing research and development (R&D) within Qualcomm; and
- A potential adverse impact on the security and integrity of equipment and services that Qualcomm supplies to the U.S. government under classified and unclassified contracts, including ones related to addressing 5G cybersecurity issues.

Specifically, the Treasury Department letter cites CFIUS's concerns that Broadcom's "private equity"-style approach to the Qualcomm acquisition might favor short-term profitability over sustained R&D investment, thereby creating a void in the 5G standard-setting process that Chinese companies would compete aggressively to fill, with "substantial negative national security consequences for the United States."

In response, Broadcom [announced](#) that it would "focus R&D spend to those critical technologies that are essential to the U.S." and "create a new US\$1.5 billion fund with a focus on innovation to train and educate the next generation of engineers in the U.S." Broadcom also [emphasized](#) that its acquisition of Qualcomm remained premised on its plan, announced in November 2017, to

redomicile to the United States, a condition of CFIUS's earlier clearance of Broadcom's 2017 acquisition of Brocade Communications Systems, Inc.

Nonetheless, President Trump blocked Broadcom's bid to acquire Qualcomm, marking only the fifth time a U.S. president formally has blocked an acquisition or ordered a divestiture on national security grounds since CFIUS's establishment, and the first time the acquirer was neither a Chinese nor a Chinese-owned entity. In 2017, President Trump [blocked](#) the proposed acquisition of a U.S. semiconductor company by a Chinese venture fund. In 2016, President Obama [blocked](#) a Chinese-owned German company from acquiring the U.S. semiconductor business of a German company. In 2012, President Obama [ordered](#) a Chinese-owned U.S. company to sell its interest in U.S. wind farm projects located near a U.S. Navy training facility in Oregon. In 1990, President George H.W. Bush ordered a Chinese government-owned firm to divest itself of a Seattle-based aerospace company.

Implications for cross-border M&A:

Beyond the commercial ramifications, President Trump's order to block Broadcom's takeover of Qualcomm is noteworthy not only because presidents so rarely take such action but also because of the circumstances that gave rise to the order. In our view, some of the implications of President Trump's order on cross-border M&A transactions include:

- **The order serves as a reminder that parties should assess CFIUS risks early.** CFIUS cases typically involve a buyer and a seller filing a joint voluntary notice with CFIUS after the parties have signed a binding purchase agreement. Here, however, Qualcomm filed a unilateral notice with CFIUS in the midst of a proxy contest that preceded the execution of any binding purchase agreement, initially presenting the transaction to CFIUS from Qualcomm's perspective, rather than the joint perspective of Broadcom and Qualcomm. Although interventions by CFIUS before the parties have signed an agreement are likely to arise only in rare circumstances, parties to cross-border deals – especially unsolicited cross-border deals – will be well-advised to assess and, where appropriate, address the potential CFIUS risks of their transactions as early as possible.
- **The use of the CFIUS process as a takeover defense strategy.** By unilaterally requesting that CFIUS review the national security implications of Broadcom's hostile bid, Qualcomm sought to use the CFIUS process as a takeover defense. Qualcomm understood that, if CFIUS agreed that it had jurisdiction to review Broadcom's takeover bid, CFIUS had a statutory obligation to fully assess the national security risks posed by the transaction. While U.S. companies facing unsolicited acquisition proposals are used to considering every defense available in their arsenal, U.S. companies may now be more likely to consider a unilateral CFIUS filing as a means of fending off foreign hostile takeover bids. Foreign acquirers are also more likely to consider whether the targets of their hostile takeover bids might be considering such a strategy. Nonetheless, foreign investors and U.S. companies should understand that CFIUS is likely to intervene at this early stage of a foreign hostile takeover bid only in rare circumstances that raise, from the U.S. government's perspective, the most significant national security issues.
- **CFIUS's national security concerns are not limited to Chinese buyers.** The precedent of presidential action being limited to impeding investments into the United States by Chinese or Chinese-owned investors no longer holds. Broadcom is a Singaporean company with its operational headquarters in California. Moreover, Broadcom intended to redomicile to the

United States prior to closing the acquisition of Qualcomm. Nonetheless, President Trump decided to act promptly to prevent Broadcom from taking over Qualcomm.

- **But CFIUS also considers national security threats posed by Chinese and other foreign third parties.** The Treasury Department's 5 March 2018 letter highlighted CFIUS's national security concerns about Broadcom's relationships with "third party foreign entities," probably at least some of which were Chinese entities. CFIUS also feared that Chinese companies might fill a void left by a post-acquisition "weakening of Qualcomm's position in maintaining long-term technological competitiveness." These concerns are consistent with an ongoing trend that we have observed – CFIUS is examining the potential national security threats posed by Chinese and other foreign parties, even in transactions with that do not involve investments by those parties. Namely, CFIUS increasingly is assessing whether the parties' Chinese or other foreign suppliers, service providers, customers, joint venture partners, IP licensees, or competitors might be able to exploit a transaction in ways that are detrimental to U.S. national security.

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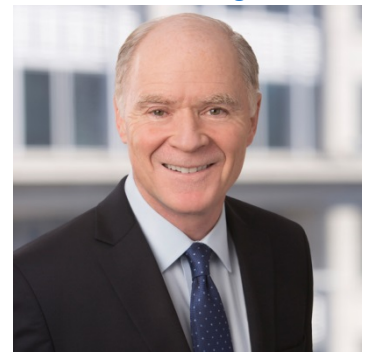


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