

Client Update

President Trump Bars Broadcom's Proposed Takeover of Qualcomm

President Trump on Monday issued an executive order permanently barring Broadcom's proposed takeover of Qualcomm. In sweeping terms, the order prohibits Broadcom from pursuing the Qualcomm acquisition or any "substantially equivalent merger, acquisition, or takeover, whether effected directly or indirectly." The President's decision arose out of a review by the interagency Committee on Foreign Investment in the United States (CFIUS), which is empowered to review any foreign person's acquisition of control of a U.S. business that may raise national security concerns.

In the face of Broadcom's hostile takeover attempt, Qualcomm filed a notice with CFIUS seeking such a review. Last week, CFIUS issued an interim order requiring Qualcomm to adjourn its stockholder meeting at which Broadcom sought to elect a slate of directors in furtherance of its takeover attempt in order to afford the Committee time to review the proposed transaction.

CFIUS has statutory jurisdiction over the transaction because Broadcom is incorporated in Singapore. Notably, Broadcom started life as a Hewlett-Packard division, is listed on a U.S. stock exchange, has a widely dispersed, primarily institutional stockholder base, and is seeking stockholder approval to re-domesticate to Delaware.

Once a notice is filed with CFIUS, the Committee and the President may take a non-exhaustive list of factors into account in determining whether national security concerns are raised. These include the potential effect of the transaction on the ability to meet national defense requirements and on critical technologies as well as any other factors the Committee and the President deem appropriate.

In considering those factors, CFIUS noted the \$106 billion of debt Broadcom would take on to effect the transaction and expressed concern that Broadcom was "looking to take a 'private equity'-style direction ... which means reducing long-term investment" in favor of short-term profitability. CFIUS believed that Broadcom might cause Qualcomm to reduce research and development spending, potentially opening the door for China to take the lead in 5G technology.

It was also concerned that the deal might interrupt Department of Defense access to Qualcomm products used in U.S. government cybersecurity programs. The order did not discuss Broadcom's proposal to re-domesticate to Delaware and will continue to bar it from acquiring control of Qualcomm following any such re-domestication.

The order raises a number of considerations for transactions involving foreign acquisitions of control:

- Non-U.S. buyers from jurisdictions long active in the U.S. M&A market—such as the United Kingdom or Canada—have, where appropriate, typically filed notices with CFIUS to trigger its review. Depending on the nature of the target, however, might a buyer's stated plans to cut costs at a U.S. business jeopardize the likelihood of CFIUS approval?
- Financial buyers often invest in U.S. businesses through offshore fund vehicles. In cases where the vehicle is ultimately controlled by U.S. persons, CFIUS review is typically not sought. Will that now change, given the focus in the Broadcom matter on Broadcom's "private equity"-style direction? Note that CFIUS or the President can suspend or prohibit a transaction that is not yet closed, as well as require the buyer to divest itself of the business once acquired, even if the transaction is not notified to the Committee.
- Sellers of U.S. businesses consider deal certainty when comparing U.S. and foreign buyers. Given the more aggressive use of CFIUS authority by the Trump administration, might foreign buyers now face higher hurdles in proposing to acquire businesses operating in areas that might trigger national security concerns?
- Particularly given the recent changes to the U.S. corporate tax regime, should publicly traded foreign buyers—particularly those that are largely managed in the United States—consider reincorporating in the United States prior to commencing an acquisition of a U.S. company that could implicate national security considerations?

Together with the proposed acquisitions of Moneygram by Ant Financial and of Lattice Semiconductor by a Chinese-backed investment fund, Broadcom's proposed acquisition of Qualcomm is the third large transaction that CFIUS or the President has blocked in the past six months. That is the same number of transactions formally blocked, or where divestment was ordered, by all other administrations in the past 30 years, although that number does not take account of transactions withdrawn, delayed or restructured as a result of CFIUS review. Both the greater willingness of the Trump administration to block transactions and the broad grounds invoked by the President and CFIUS in blocking Broadcom's bid for Qualcomm can be expected to heighten the sensitivity of foreign bidders, U.S. targets and their respective advisors to the challenges of CFIUS review.

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Please do not hesitate to contact us with any questions.

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