

ALERTS

Qualcomm: CFIUS Halts Board of Directors Proxy Fight, Blocks Foreign Company Effort to Acquire a US-Based Semiconductor Company

March 29, 2018

The President issued an executive order on March 12, 2018, blocking Singaporean company Broadcom Ltd. from pursuing its planned takeover of Qualcomm Inc., acting on a recommendation by the Committee on Foreign Investment in the United States (“CFIUS”), which reviews the national security implications of acquisitions of U.S. businesses by foreign investors. In what appears to be a first, CFIUS intervened just prior to the shareholder meeting of a public company based on a concern that, if elected, certain board candidates would vote to approve a merger with a foreign suitor.

Qualcomm management effectively used the CFIUS process as a winning defense, as the CFIUS decision decisively halts Broadcom’s five month, \$117-billion takeover attempt. At Qualcomm’s behest, CFIUS had earlier launched an investigation into the national security implications of the proposed acquisition, including concern that a foreign acquisition of Qualcomm would hamper U.S. efforts to develop 5G wireless networks and other emerging technologies.

CFIUS History of Blocking Foreign Acquisitions of US Semiconductor Companies

Contrary to some press accounts attributing the *Qualcomm* action to be part of a broader policy turn toward protectionism, the CFIUS decision is consistent with recent Trump and Obama administration enforcement policy that has treated semiconductor technology as critical infrastructure important to national security.

In the past few years, CFIUS has repeatedly blocked foreign acquisition of U.S. chipmakers. In February, Xcerra Corp., which makes equipment used to test chips during the manufacturing process, called off its acquisition by a Chinese entity amid CFIUS resistance. Last September, CFIUS blocked the sale of Lattice Semiconductor Corp. to a Chinese-backed investor. CFIUS also blocked German company Infineon AG's attempt to purchase U.S. chip maker Cree's Wolfspeed division in February 2017, and blocked Philips' 2016 attempt to sell an 80 percent stake in its California-based Lumileds lighting components division to a consortium that involved several Chinese firms. (The Cree and Philips transactions involved LED (light-emitting diode) technology, which is a type of semiconductor that can be used in defense applications.)

Qualcomm Management and CFIUS as a Successful Takeover Defense

Given a consistent track record by CFIUS in the semiconductor industry, the more remarkable aspect of the *Qualcomm* decision is its timing prior to a board of directors vote and how Qualcomm management used CFIUS as a weapon in thwarting Broadcom's takeover efforts.

CFIUS review ordinarily begins once the parties to a merger have signed an agreement to go forward with a transaction. It is highly unusual for CFIUS to intervene at an earlier stage in the process, such as a public company proxy contest. In this case, a contest in which a potential foreign acquirer, in coordination with supportive U.S. private equity investors, is attempting to replace a majority of a recalcitrant target's board.

In company statements, Broadcom alleged "that Qualcomm failed to disclose to its own stockholders and to Broadcom that it secretly filed a voluntary unilateral request for CFIUS review on January 29, 2018"[1] and characterized the action as "a blatant, desperate act by Qualcomm to entrench its incumbent board of directors and prevent its own stockholders from voting for Broadcom's independent director nominees." [2]

Prior to CFIUS action, Broadcom appeared to be on course to win all six of the seats it had sought on Qualcomm's board, giving it a majority. But on March 5, CFIUS ordered the planned March 6 Qualcomm board of directors election to be postponed, and on March 12, the President issued the order that finally killed Broadcom's acquisition hopes.

Implications for Potential Acquisitions of US Businesses by Foreign Purchasers

The *Qualcomm* action reaffirms the CFIUS view that advanced U.S. semiconductor technology R&D is critical U.S. infrastructure that should remain free of foreign ownership and control. It also highlights that CFIUS review can be a significant hurdle in takeover contests involving foreign buyers, and that even acquisitions by companies domiciled in friendly countries will be carefully reviewed for potential effects on future U.S. technological superiority.

Accordingly, foreign investors and funds that take positions in potential U.S. acquisition targets need to carefully evaluate the risk of CFIUS action, and may find it helpful to consult with CFIUS experts in formulating their investment strategies.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.[3]

[1] Press Release, Broadcom Reiterates Qualcomm Did Not Inform Its Own Stockholders or Broadcom of Its Secret, Voluntary Unilateral Request Filed on Jan. 29, 2018 (March 5, 2018), *available* here.

[2] Financial News Release, Broadcom Disappointed Will of Qualcomm Stockholders to be Deferred (March 5, 2018), *available* here.

[3] SRZ attorneys have represented U.S. Companies, Chinese and other foreign buyers and third parties in CFIUS investigations. In the interest of disclosure, one of the authors of this *Alert* represented a party before CFIUS that sought to block the Infineon/Cree acquisition.

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