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ALERTS

Foreign Investment In The U.S.: President Blocks Broadcom-Qualcomm Under CFIUS, Citing National Security Concerns

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Acting on a recommendation by the Committee on Foreign Investment in the U.S. (CFIUS), President Donald Trump has blocked Singapore-based Broadcom Ltd.'s proposed $117 billion hostile takeover bid of U.S.-based semiconductor and telecommunications company Qualcomm, Inc. (the Broadcom-Qualcomm transaction). It is the second time President Trump has blocked transactions under CFIUS authority, with Broadcom-Qualcomm being only the fifth time a U.S. president has intervened since the creation of CFIUS over four decades ago.

The March 12, 2018, executive order should be significant news for anyone involved in the foreign ownership, investment or control of a U.S. business or technology, for several reasons:

1. **National Security as a Continuing (And Broadening) Theme.** Following on campaign promises, President Trump continues to make national security an over-arching theme, thus significantly altering the landscape of cross-border transactions and trade. Just over one week ago, President Trump imposed new tariffs on imported steel and aluminum, citing national security reasons under section 232 of the Trade Expansion Act of 1962, as amended. In its Broadcom-Qualcomm recommendation, CFIUS also cited national security concerns due to Qualcomm's critical role in developing the next generation of communications (5G) and the possible risk of foreign control and influence posed by Broadcom's bid. Because U.S. law gives substantial deference to the president on issues concerning national security, and decisions under CFIUS are generally not subject to judicial review, CFIUS and President Trump continue to re-define which transactions trigger national security concerns. As demonstrated by the Broadcom-Qualcomm case, these concerns are not limited to traditional defense-related industries.

2. **Is China Still the Primary Focus of CFIUS?** Unlike the attempted bid for control by Broadcom, a Singapore-based company, the four prior instances in which a U.S. president used CFIUS to block or unwind an acquisition all involved a Chinese investment or purchase: President Trump in 2017; President Barack Obama in 2012 and 2016; and President George H.W. Bush in 1990. Broadcom-Qualcomm is an important reminder that the CFIUS analysis should not be limited to potential Chinese ownership or control. According to the most recent CFIUS annual report (covering 2015), China was involved in 29 of the 143 covered

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transactions subject to CFIUS review (CFIUS defines a “covered transaction” as any transaction by or with any foreign person, which could result in control of a U.S. business by a foreign person). While China remains the main concern of CFIUS, the majority of covered transactions in 2015 involved other countries, such as Canada, the U.K. and Japan. Additionally, of those 143 transactions that proceeded to a 45-day investigation, more than half involved countries other than China. Interestingly, however, China did play an indirect role in Broadcom-Qualcomm due to CFIUS’s concern that the U.S. could lose competitive ground to China in developing 5G technology if Qualcomm were taken over by a foreign company.

3. **CFIUS’s Expanding Role and Reach.** The number of covered transactions reviewed by CFIUS has been trending upward for the last few years. While there is no public data yet available for 2017, unofficial estimates are that it was a record year with the number likely to exceed 200 covered transactions reviewed. And, early expectations are that the 2018 number will break the 2017 mark. Importantly, there is also proposed legislation on the horizon related to the proposed Foreign Investment Risk Review Modernization Act (FIRRMA). Among several significant changes, FIRRMA will broaden the definition of what constitutes a “covered transaction.” The White House has already released a statement supporting the passage of this bill in its current form. President Trump’s current authority to review covered transactions is based in Section 721 of the Defense Production Act of 1950 (as amended by the Foreign Investment and National Security Act of 2007 - FINSA), which authorizes the president to take any action necessary to suspend, prohibit or even require divestiture (including retroactively) in any transaction that results in control of a U.S. business by a foreign entity, upon a determination that the transaction potentially threatens U.S. national security.

4. **Possible Model for Defeating Hostile Takeovers by Foreign Entities.** Broadcom-Qualcomm was notable also because Qualcomm unilaterally requested CFIUS review. In virtually all other cases, the two parties (buyer and seller) jointly submit a voluntary notice to CFIUS. Qualcomm’s action may inspire other U.S. businesses facing hostile takeovers by foreign entities to request unilaterally a CFIUS review.

There is no one clear factor for the increasing role and reach of CFIUS, but one thing is clear: Assessment of the CFIUS risk needs to be given proper attention by any parties, foreign or domestic, involved in a covered transaction. The CFIUS risk should be addressed early in the process (ideally, before due diligence begins), as CFIUS issues could affect valuation of a deal (e.g., where a CFIUS mitigation agreement is a possibility). Do not underestimate the importance of considering whether to include CFIUS language, such as a “CFIUS condition,” in purchase agreements. In addition, there is an increasing market and role for insurance policies as a way to manage the CFIUS risk.

Although covered transactions are not limited to defense, companies engaged in manufacture or sale of defense articles regulated under the International Traffic in Arms Regulations (ITAR) have an additional consideration in a potential foreign acquisition or investment. Specifically, such companies must notify the State Department of the prospective transaction at least 60 days prior to closing, and the company must advise State as to whether the company plans to file with CFIUS.

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