

- [Previous](#)
- [Next](#)

The Qualcomm defence: a possible new hostile takeover tactic

Author: John Crabb | Published: 2 May 2018

US companies in certain sectors that are being targeted by a hostile takeover could consider unilateral filing with the Committee on Foreign Investment in the United States (Cfius) as an extra line of defence. This is one potential lesson of the successful blocking of Singaporean company Broadcom's attempted acquisition of US semiconductor company Qualcomm earlier this year.

While it is unlikely to become commonplace, sources suggest that in the wake of the successful Broadcom/Qualcomm interception it will cause companies on both sides of the divide to reconsider their options.



Will firms add Cfius to their defensive toolkits?

of a hostile takeover operation going forward.

Brian Curran, partner at [Hogan Lovells](#) in Washington DC, said that when Qualcomm requested Cfius review the national security implications of the transaction the company was in effect asking the agency to potentially block it. The deal was unique in that respect though is likely to have an impact on how publicly-traded companies that are the target

“If I’m the target of a foreign hostile takeover bid, do I want to consider employing the Qualcomm defence – namely, do I want to try to see if Cfius might view the takeover as a national security threat and seek to block the transaction?” he said, outlining the possible decisions firms may have to make.

“This is not to say that this strategy will necessarily succeed, Cfius is not going to want to get into the business of randomly coming in

and blocking transactions just because a target doesn't want to be taken over by a foreign entity, but the intervention in the Qualcomm case is going to cause targets to at least think about it," he said.

KEY TAKEAWAYS

- **US companies facing hostile takeovers could consider unilateral filing with Cfius as an extra line of defence, suggest sources;**
 - **This follows the successful blockade of Broadcom's attempted hostile takeover of semiconductor company Qualcomm;**
 - **Whether it comes in the form of a filing or just effective lobbying, this kind of unilateral instigation in certain circumstances is likely to increase;**
 - **Boards applying the tactic will still need to consider the fiduciary obligations to their shareholders.**
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By default, on the other side of the ledger it will cause foreign companies engaged in hostile takeovers to consider if it is possible that the target will employ that strategy as a defence.

It is not that it is going to create a precedent in the sense that this is what companies will immediately opt for when put in this position, but more that any transactional lawyer will likely suggest that a publicly-traded company has an additional piece of kit in its toolbox for dealing with hostile takeovers, where perhaps before they may not have considered it.

"Targets actually employing this sort of Qualcomm defence is unlikely to be a frequent occurrence because Cfius will not necessarily be receptive in every case to a unilateral filing that indirectly asks for the same kind of action, namely to block the takeover bid," added Curran.

Nothing new

While it is an important question to raise, the concept of unilateral filing point isn't entirely new, it is just rarely used because hostile takeovers are not that common and hostile takeovers with a Cfius overlap are even less common.

Unilateral filings have always existed in certain appropriate circumstances. "I don't know if I would expect an increase in unilateral filings per se," said [Kirkland & Ellis](#) partner Mario Mancuso. "What I have seen however is something that is similar,

but not the same, which is where a third party - typically a competitor concerned about the proposed deal - will unilaterally poke Cfius to complicate the transaction.”

“That may or may not come in the form of a unilateral filing,” he added.

“But, whether it comes in the form of a written submission or just effective verbal advocacy, that kind of unilateral instigation at the margins of a formal Cfius review is likely going to increase.”

Fiduciary obligations

Mancuso added one nuance. In the sales context of a hostile takeover, US boards have certain fiduciary obligations to their shareholders to maximise value, and unlike other hostile defences, when the Cfius trigger is pulled, it can't be taken back.

“Often times this external prodding of Cfius will come from industry competitors of either target”

“A board thinking about using Cfius has to think about it in the context of its broader fiduciary duties and its tactical limitations- once you fire a Cfius round, you can't pull it back. In some cases it may very well be a legitimate tool, but I would not recommend that boards use it reflexively.”

It is the boards themselves who will have to think about the tools they have in their toolkit in light of all of their duties, and there are incentives to effectively self-police.

See also

[Firma: better faster stronger](#)

[Cfius historic intervention to block Qualcomm takeover](#)

[How Cfius is changing the definition of national security](#)

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