

KIRKLAND ALERT

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CFIUS Weighs in on Broadcom/ Qualcomm Fight

On March 4, 2018, in a historic intervention, the [Committee on Foreign Investment in the United States](#) (CFIUS) signed an interim [order](#) mandating that Qualcomm Inc., a leading U.S. chip maker, postpone its annual meeting of shareholders for 30 days in order to provide CFIUS with time to conduct an initial review of the hostile bid by Broadcom Ltd., a Singapore-based semiconductor company. At the shareholder meeting, which was scheduled to take place on March 6 — two days after the interim order was signed — Broadcom had planned to ask Qualcomm shareholders to install up to six new “independent” directors (a majority) on Qualcomm’s board in order to facilitate approval of its hostile bid.

CFIUS has forcefully asserted its jurisdiction under circumstances which raise a colorable argument that it has exceeded the scope of its authority under the CFIUS regulations.

Here are several noteworthy aspects of this situation:

- **Interim Order.** Interim orders are highly unusual. Typically, CFIUS has used interim orders in what it perceives are exigent circumstances, such as when it seeks to preserve the status quo in order to give it time to assess its policy posture.
- **Jurisdiction.** CFIUS has the authority to review “transactions” that could result in foreign control of a U.S. business. In this instance CFIUS issued an interim order in response to a proxy contest, prior to and in the absence of an agreed transaction. In doing so, CFIUS has forcefully asserted its jurisdiction under circumstances which raise a colorable argument that it has exceeded the scope of its authority under the CFIUS regulations.
- **Repatriation.** Broadcom is in the process of repatriating to the U.S. However, it is not entirely clear how establishing a U.S. domicile would affect CFIUS’s view of its jurisdiction over the proposed transaction. Notably, CFIUS’s determination as to whether an entity is considered “foreign” is nuanced and not prescriptive, and encompasses considerations that include a facts and circumstances assessment of ownership and formal and informal mechanisms of “control.”
- **A Consistent Policy Approach.** Although CFIUS’s tactical decision to order the delay of the shareholder vote is unprecedented, it is consistent with the Trump administration’s policy disposition to more forcefully address perceived national security risks in the commercial domain. This move comes on the heels of the administration’s announcement of forthcoming [steel and aluminum tariffs based on national security grounds](#).
- **Congressional Pressure.** CFIUS’s decision was precipitated, in part, by intense Congressional pressure. In recent weeks, multiple members of Congress have publicly called for CFIUS to intercede in the Broadcom/Qualcomm dispute. In a [letter](#) dated February 26, Sen. John Cornyn, a sponsor of pending CFIUS reform

legislation, asked Secretary of the Treasury Mnuchin to conduct a CFIUS review of Broadcom's proposed actions to ensure the United States retains its technological advantage over China in the development of 5G technologies. Likewise, Rep. Mike Gallagher, joined by other members of Congress, expressed concerns regarding Broadcom's attempted takeover in a March 1 [letter](#) to Secretary Mnuchin, specifically addressing the transaction's potential risks to 5G and other next-generation technologies. This Congressional concern regarding emerging technologies and U.S. technological advantage is not new and reflects concerns that Congress has previously expressed, including in its introduction of [bipartisan legislation to reform CFIUS](#) in November 2017.

- **China Nexus.** Once jurisdiction is established, CFIUS analyzes whether a proposed investor poses a “threat” to the national security of the U.S. While Broadcom is based in Singapore, a stalwart U.S. ally, it seems that the perceived [national security risk relates to Broadcom's links to China](#), specifically certain Broadcom [technology development agreements with Chinese parties](#) that are apparently unrelated to the contemplated Broadcom/Qualcomm transaction. This “indirect exposure to China” as a perceived national security risk has been an increasingly common theme for the last 18 months, including with respect to prospective buyers domiciled in Europe (i.e., NATO member nations).
- **National Security “Fitness.”** The non-U.S. business activities of prospective non-U.S. investors have increasingly factored into CFIUS's assessment of such investors. As noted above, Broadcom's business in China is seemingly unrelated to Broadcom's takeover bid for Qualcomm. This is a timely reminder that, in its evaluation of the intent and capability to exploit or cause harm to U.S. national security, CFIUS assesses the national security “fitness” of the non-U.S. investor. This is a broad assessment which encompasses, among other things, the investor's track record of engaging with foreign parties as to which the U.S. government has concerns, as well as the investor's economic sanctions and export controls compliance profile.

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If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Mario Mancuso, P.C.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/mmancuso
+1 202 879 5070

Sarkis Jebejian, P.C.
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/sjebejian
+1 212 446 5944

Joanna M. Ritcey-Donohue
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/jritcey-donohue
+1 202 879 5980

Sanjay J. Mullick
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/smullick
+1 202 879 5111

H. Boyd Greene IV
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/bgreene
+1 202 879 5209

Jennifer Fernandez
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/jfernandez
+1 202 879 5969

Luci Hague
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/lhague
+1 202 879 5195

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