

ISSUE BRIEF

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The CFIUS Must Review Any Broadcom–Qualcomm Deal

Riley Walters

Shareholders of U.S. technology company Qualcomm will vote on March 6 to replace six of its 11 board members. Whether or not Qualcomm shareholders elect a new board that favors a potential takeover by Singapore-based semiconductor company Broadcom, stakeholders should not discount the impact the Committee on Foreign Investment in the U.S. (CFIUS) will have on this deal.

The CFIUS does, however, owe potential investors an expeditious determination. Any approval, block, or mitigation agreement set by the CFIUS should be undertaken in a timely manner to reduce the cost of uncertainty for stakeholders. And, the CFIUS must remain committed to protecting U.S. national security interests. Whether or not Qualcomm agrees to do business with Broadcom, Congress must remain apolitical and accept the decision of the CFIUS and these companies' shareholders.

The Committee on Foreign Investment in the U.S.

The CFIUS has the authority to review for national security any transaction that involves a foreign entity and its investment in the U.S.¹ The CFIUS has traditionally focused on the transfer of control between entities, such as advanced U.S. technology

firms coming under control of a foreign government. Foreign entities are those where a foreign person, typically through share ownership, board membership, or senior employment, can exercise control. The CFIUS has the authority to approve transactions, block transactions, or propose mitigations, such as requiring that only certain individuals have access to parts of the company, or assuring continuity in the integrity and supply of goods sold to the U.S. government.

Last year, Broadcom went through the CFIUS process several times in order to secure its purchase of U.S. data network and storage company Brocade Communication Systems. On paper, a CFIUS oversight should take no longer than 75 days unless there are national security concerns. Companies may resubmit for CFIUS review if they feel they have appeased the committee's concerns.

Though the acquisition of Brocade took about a year, Broadcom was eventually able to address any national security concerns that the CFIUS had. But no two transactions are the same. And, given the importance of Qualcomm's technology to the U.S. defense and technology sectors, there is a basis for potential CFIUS concern. Qualcomm's technologies have dual use as it contributes to computer processing and data connectivity for both the Department of Defense and consumers. The CFIUS historically has given close scrutiny to transactions that involve technology, and in particular to those that affect our defense sector.²

Last September, President Donald Trump blocked the acquisition of Lattice Semiconductor Corporation by a subsidiary of Chinese state-owned China Venture Capital Fund Corporation Limited.³ The

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

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case was likely given extra scrutiny by the CFIUS due to both the great importance that semiconductors play in U.S. technology industries and the potential risks involved with Chinese government control of the company. On a November 2, 2017, visit to the White House, Broadcom president and CEO Hock Tan announced that Broadcom would be locating its legal headquarters back to the U.S., in part due to President Trump's commitments to reduce the U.S. corporate tax rate. The move to relocate from Singapore was also seen as a way to appease some of the CFIUS's concerns over Broadcom's purchase of Brocade, subsequently approved later around November 17.⁴

Singapore is a critical and highly valued U.S. security partner. Any foreign company would face scrutiny on such a purchase. Japan, Canada, and the United Kingdom made up over a third of transactions covered by the CFIUS between 2013 and 2015.⁵ However, the fact that Broadcom is in the process of moving its legal headquarters should not unduly influence the final decision of the CFIUS.

Several days after the White House visit, Broadcom made an offer to purchase Qualcomm for over \$100 billion. Statements from Qualcomm showed that it felt the bid was too low and that it worried about getting U.S. regulatory approval in a timely manner.⁶ Next week, Qualcomm shareholders will vote on whether to appoint to its board of directors six nominees offered by Broadcom.⁷ The new board members would likely approve a future merger between the two companies.

The timing of the CFIUS review is crucial to this potential deal. If Qualcomm shareholders vote in new board members next week, significant changes to Qualcomm's senior management could happen very quickly. But the CFIUS has the authority to announce its decision after any deal that has gone through. Meaning that if it takes the CFIUS several months to make a decision that could negatively affect the Broadcom–Qualcomm deal, the outcome could be just as harmful as any risks that may exist from a Broadcom takeover. Therefore, it is important that the CFIUS act quickly to remove any uncertainties for stakeholders.

Time for the CFIUS to Act

The CFIUS must:

- **Review any potential deal between Broadcom and Qualcomm.** The CFIUS must first establish whether Broadcom is controlled by a foreign entity. Simply moving its legal headquarters from Singapore to the U.S. should not be enough to appease the CFIUS. The CFIUS must weigh the potential national security risks associated with any sale of Qualcomm.
- **Complete the review quickly.** Qualcomm shareholders will vote within a week whether to accept a slate of six Broadcom nominees as members of Qualcomm's board of directors. A commitment to sell Qualcomm to Broadcom may be announced

1 The CFIUS is comprised of nine voting members, one each, from the Departments of Treasury, Justice, Homeland Security, Commerce, Defense, State, and Energy, the Office of the U.S. Trade Representative, and the Office of Science and Technology Policy. There are five observing members, one each, from the Office of Management and Budget, Council of Economic Advisors, National Security Council, National Economic Council, and Homeland Security Council. The Director of National Intelligence and Secretary of Labor are two non-voting, ex-officio members.

2 James Jackson, "The Committee on Foreign Investment in the United States," Congressional Research Service, January 16, 2018, <https://fas.org/sgp/crs/natsec/RL33388.pdf> (accessed February 28, 2018).

3 Riley Walters, "Trump Blocks His First Chinese Acquisition of an American Company," *The Diplomat*, September 21, 2017, <https://thediplomat.com/2017/09/trump-blocks-his-first-chinese-acquisition-of-an-american-company/> (accessed February 28, 2018).

4 "Broadcom Closes \$5.5 billion Brocade Deal," Reuters, November 17, 2018, <https://www.reuters.com/article/us-brocade-commns-m-a-broadcom/broadcom-closes-5-5-billion-brocade-deal-idUSKBN1DH1T9> (accessed February 28, 2018).

5 U.S. Department of the Treasury, "Committee on Foreign Investment in the United States Annual Report to Congress CY 2015," September, 2017, <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx> (accessed February 28, 2018).

6 Supantha Mukherjee and Greg Roumeliotis, "Broadcom Bids \$103 Billion for Qualcomm, Open to Going Hostile," Reuters, November 6, 2017, <https://www.reuters.com/article/us-qualcomm-m-a-broadcom/broadcom-bids-103-billion-for-qualcomm-open-to-going-hostile-idUSKBN1D61EO> (accessed February 28, 2018).

7 Diane Bartz, "Exclusive: Secretive U.S. Security Panel Discussing Broadcom's Qualcomm Bid—Sources," Reuters, February 26, 2018, <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-exclusive/exclusive-secretive-u-s-security-panel-discussing-broadcoms-qualcomm-bid-sources-idUSKCN1GB09V> (accessed February 28, 2018).

soon after, which could trigger senior management changes that would have immediate effects on Qualcomm's business. The CFIUS needs to act expeditiously to address national security concerns raised by the potential Broadcom acquisition before these changes are implemented.

Congress must:

- **Remain apolitical.** Shareholders have the right to appoint whomever they wish to their board of directors. If the CFIUS finds there is no reason to block the potential Broadcom acquisition, Congress must respect both the expertise of the com-

mittee and the wishes of Broadcom–Qualcomm stakeholders.

A timely review by the committee is needed in order to balance the protections of U.S. national security interests with the interest in maintaining the U.S. as a leading destination for foreign investment.

—Riley Walters is a Policy Analyst in the Asian Studies Center, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.