

MVP: Covington's David Fagan

Law360 (December 4, 2018, 10:19 AM EST) -- David Fagan of Covington & Burling LLP has notched U.S. government approval on major transactions for both foreign and domestic companies, including one of the largest Chinese investments under the Trump administration, earning him a spot as one of Law360's 2018 International Trade MVPs.

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

In a situation he described as "unprecedented," Fagan saved his client Qualcomm Inc. from a hostile takeover at the hands of semiconductor company Broadcom Inc., successfully securing a presidential executive order in March blocking the attempted acquisition.

Broadcom, domiciled at the time in Singapore, had launched a proxy war to take over the board for the California telecom giant, which is a U.S. producer of critical technologies, or defense parts covered by the U.S. munitions list.

Fagan told Law360 that not only would it have been the largest takeover in the semiconductor industry, but there was also "no prior history" for such a takeover — especially one involving critical technologies — being conducted by a foreign company through a proxy fight through the board.

"The fact that it was a foreign person doing it was completely unprecedented, totally unprecedented. Nobody had seen it before," Fagan said. "I don't think there's going to be another one like that in anyone's career."

Fagan added that the situation was "very combustible from a political standpoint too," noting that it involved technology affecting U.S. national security, such as 5G.



David Fagan
Covington

Fagan led the Covington team in filing voluntarily for review at the Committee on Foreign Investment in the United States, also known as CFIUS, which asserted jurisdiction over the proxy fight on March 4. In an overnight order ahead of the proxy vote scheduled for March 6, the committee halted the vote with an interim protection order. President Donald Trump handed down a presidential order a week later blocking the takeover.

HIS BIGGEST CHALLENGE THIS YEAR:

Fagan, who co-chairs his firm's CFIUS practice, said one of his biggest challenges this year has been adapting to the changing rules governing CFIUS reviews, brought by the advent of a new presidential administration as well as by major legislative reform passed by Congress earlier this year.

In August, President Trump signed into law the National Defense Authorization Act for 2019, which included the Foreign Investment Risk Review Modernization Act. That act, known as FIRRMA, aims to bring about sweeping changes to CFIUS' scope and to the committee's review process.

In November, the U.S. Department of the Treasury rolled out a set of new temporary regulations, effective Nov. 10, to widen CFIUS' authority, including by expanding the types of foreign transactions that must be filed with the committee.

"It has been a far more challenging time, just generally, on how to plan for and prepare for CFIUS," Fagan said, particularly in what he called a "transition environment."

Fagan added that he has also seen a "reset of how the U.S. government is evaluating relationships between the U.S. and China," a change that he said began under the Obama administration but was "sped up and accentuated" under the Trump administration.

"All of that has been, I think, the most challenging thing for everybody who's been involved in M&A," he said.

HIS OTHER SIGNIFICANT DEALS:

In another major transaction this year, Fagan successfully secured CFIUS approval for the \$2.7 billion acquisition of his client insurance company Genworth Financial by Chinese investment group China Oceanwide Holdings Group Co. Ltd.

"It is the largest and arguably most consequential acquisition of a U.S. company by a Chinese business approved in this administration," Fagan said.

The deal had prompted concerns from the U.S. government over national security issues, specifically how to protect the personal data of individual insurance policy holders.

"In the CFIUS context, the protection of personally identifying information has been an emerging and very important issue," Fagan said.

But the Covington team managed to structure an agreement that worked from a "commercial standpoint" while also providing assurances to the U.S. government that personal data would be protected. As part of that mitigation agreement, Genworth will be required to use a U.S.-based third-party services provider to handle the personal data of the insurance company's American policyholders, according to a Genworth press release. The deal cleared CFIUS in June.

Fagan's other notable achievements this year include securing CFIUS approvals on the \$1.6 billion sale of certain assets from Takata Corp. to Key Safety Systems, a subsidiary of a Chinese automotive electronics supplier Ningbo Joyson Electronic Corp., and on Israeli defense company Elbit Systems Ltd.'s \$117.5 million acquisition of Arizona aircraft equipment company Universal Avionics Systems Corp.

WHAT HE'S MOST PROUD OF:

Fagan said his proudest moments have not been specific cases or deals, or the "corporate" successes, but instead center on the "human successes," or the times he has watched other attorneys at Covington rise in the ranks and notch their own individual achievements.

"It's a reflection of the strength of the practice that we've built," he said, adding that he is also proud of the firm's pro bono successes. "I think that's as rewarding as any individual success."

— *As told to Suzanne Monyak*

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