

International Trade Group Of The Year: Covington

By **Kevin Penton**

Law360 (February 5, 2019, 5:39 PM EST) -- Covington & Burling LLP worked to secure a presidential order that effectively blocked Broadcom Ltd.'s \$117 billion takeover bid for California-based Qualcomm Inc. and knocked back a rare antitrust probe at the U.S. International Trade Commission, earning the firm a spot among Law360's International Trade Groups of the Year.

After Covington worked to anticipate how the Committee on Foreign Investment in the United States would analyze the deal and what the agency's concerns over the takeover might be, President Donald Trump found there was "credible evidence" that the Singapore-based Broadcom "might take action that threatens to impair the national security of the United States," according to the March order.

The firm correctly anticipated the concerns that CFIUS would have with the deal, as the agency probed whether the acquisition would harm national security by weakening U.S. influence over 5G standardization and by disrupting U.S. Department of Defense technology contracts, said David N. Fagan, co-chair of Covington's Committee on Foreign Investment in the United States practice and head of the firm's data privacy and cybersecurity practice.

Two days after Trump signed the order, Broadcom backed away from the deal, pulling back its offer for the California chipmaker and withdrawing a slate of independent candidates for Qualcomm's board of directors.

"We were grappling with literally a bet-the-company transaction in a forum and posture that was unprecedented, with national security interests that were also to a degree unprecedented, given the posture," Fagan said. "Because this was unprecedented, you couldn't say how this was handled in a prior case."

Covington in March beat back an attempt by United States Steel Corp. to use Section 337 of the Tariffs Act of 1930 — which is typically used to cover infringement allegations involving patents, copyrights or trademarks — as part of allegations that firm client Baosteel America Inc. and other Chinese companies were fixing prices.

A key prong of U.S. Steel's case under Section 337 accused Baosteel and the other Chinese companies of



conspiring to fix their prices in the U.S. market and hinder domestic production. U.S. Steel had argued it did not need to show an "antitrust injury," which deals with harm to consumers, to pursue its case, noting that Section 337 is designed to address harm to American companies and workers.

But the ITC was not convinced, saying in March that U.S. Steel could not wall off a key portion of U.S. antitrust law to make the company's case under the trade statute.

Rather than attempt to defeat U.S. Steel's relatively novel use of Section 337, which Covington said led the ITC to conduct its first price-fixing investigation in more than 40 years, the firm instead focused on the underlying merits of the antitrust claims raised by their opponent, said Peter Lichtenbaum, who co-chairs the firm's aerospace and defense industry group.

"We were able to show that on the facts of this case, the antitrust claims were not justified," Lichtenbaum said.

Covington in June secured CFIUS approval for the \$2.7 billion acquisition of client insurance company Genworth Financial by Chinese investment group China Oceanwide Holdings Group Co. Ltd., the largest acquisition of a U.S. company by a Chinese entity to receive a go-ahead from the Trump administration, said Fagan, one of Law360's 2018 International Trade MVPs.

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

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 announcement.

"The data security measures ... give the government the assurances that it rightly needed to protect what it deemed to be important national security issues and also provided the parties with the mechanisms to still be able to run a business," Fagan said. "It was a very successful outcome to address everybody's interests."

Covington has more than 150 attorneys and advisers who work in the area of international trade, Lichtenbaum said. In 2019, the firm expects to continue to focus on trade controls and disputes as well as transactions that may require CFIUS approval, he said.

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