

Executive Order Establishes New Committee to Review Foreign Investment in Communications Companies

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TAKEAWAYS

- ⌚ Establishes Deadlines for Committee to Respond to FCC Referrals
- ⌚ Invites Committee Review of Existing License Holders
- ⌚ Resolution of Long Pending FCC Proposed Rulemaking Expected

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On April 4, 2020, the White House issued an Executive Order creating the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (the “Committee”). The Committee, chaired by the Attorney General, includes the Secretaries of Homeland Security and Defense, and any other executive department head so designated by the President, is seen as an attempt to formalize the long-standing “Team Telecom” review process that began in the 1990s. The Committee’s stated goal is similar to Team Telecom’s, i.e., to assist the Federal Communications Commission (“FCC”) in its public interest review of national security and law enforcement concerns that may be triggered by foreign investment in the US telecommunications sector. But there may be some notable differences.

Background on FCC Reviews

The FCC began opening US telecommunications markets for foreign investment in the 1990s. In a series of orders, the FCC established a structure by which it would review the national security, law enforcement, foreign policy, and trade policy concerns arising from foreign investment in satellite and telecommunications carriers seeking international Section 214 authorizations and submarine cable landing licenses to provide service to the US public. Later, the FCC modified its rules to permit foreign investment in broadcast and wireless companies, requiring applicants to seek FCC approval prior to exceeding certain foreign investment thresholds.

While the FCC made clear that it would make an independent decision on whether to grant any particular application, it acknowledged that other Executive Branch agencies had both expertise and possible interest in reviewing

applications involving foreign investment. The FCC therefore developed a practice of referring certain applications involving a reportable level of foreign ownership in the applicant to Team Telecom, an informal body which is comprised of representatives of the Justice Department (including the FBI), the Departments of Homeland Security, Defense and State, along with several other executive departments and agencies.

In recent times, nearly 20 percent of FCC applications involving foreign investment were referred to Team Telecom for review. This review was conducted separately from the FCC's determination of whether approval of a proposed transaction was in the public interest, convenience and necessity under the Communications Act. Often times, this dual-track review delayed transactions for months beyond the FCC's normal processing times, with interested parties being asked to respond to multiple rounds of requests for information from Team Telecom. Team Telecom was not bound by any statutory or other obligations to complete its review within a prescribed time period, or even to provide applicants (or the FCC) with any justifications for its determinations, leading Commissioner O'Rielly to refer to the process in 2015 as an "inextricable black hole" that "leaves applicants subject to the whim of the individual members of Team Telecom at that exact moment in time."

In 2016, Team Telecom, through the National Telecommunications and Information Administration ("NTIA"), requested that the FCC modify its applications and procedures to gather more information from applicants. There was mixed response to this request, both from the FCC and the companies with experience in dealing directly with Team Telecom. The FCC sought comment on the NTIA proposal, and then issued a notice of proposed rulemaking, seeking additional comment on how the FCC could expedite the Team Telecom review process and increase transparency. To date, this proceeding remains open.

The Committee for the Assessment of Foreign Participation in the United States Telecommunications Service Sector

The Executive Order ("EO") establishing the Committee appears to be a step toward resolving some of the timing and transparency issues that have plagued the existing process. For example, the Committee is obligated to complete an initial review within 120 days after the Chairman of the Committee has determined that an applicant's responses to information requests from the Committee are complete. If at the end of that 120-day period the Committee determines additional information is necessary, the Committee must act within 90 days after such determination. Pursuant to the EO, the Committee is required to keep the FCC informed as to when it has completed its initial review, whether a secondary assessment is warranted, and whether the Committee has granted any extensions of the initial review or secondary assessment periods. Upon conclusion of its review process, the Committee may recommend to the FCC that it (i) grant the application without any conditions; (ii) deny the application due to national security or law enforcement risks; or (iii) condition grant of the application upon compliance with mitigation measures that would resolve the Committee's concerns.

Unresolved in the EO is how long the Committee may take before determining it has received the necessary information to start the 120-day clock or embarking on a second assessment. The EO also appears to give the Committee discretion to extend either the initial review or secondary assessment period. Depending on the transaction, it remains likely that companies proposing a transaction involving foreign ownership before the FCC will continue to see substantial delays in the processing of their FCC application as a result of the additional review by the Committee. It is also unclear whether, or to what extent, any of the Committee's written risk-based analyses or determinations will be shared with the FCC or applicants.

Perhaps one of the most surprising aspects of the EO is the Committee's new authority to review "existing licenses to identify any additional or new risks to national security or law enforcement interests of the United States." This suggests that the Committee may take steps to investigate past foreign investment transactions or authorizations that have already been issued.

In fact, Commissioner Carr has already called for the FCC to refer to the Committee the previously-granted Section 214 authorizations issued to two Chinese companies – China Unicom and China Telecom. The Committee's authority may even extend to the issuance of certain equipment authorizations obtained by foreign companies to market and

sell their products in the United States. These equipment authorization certifications issued by the Office of Engineering and Technology include a wide swath of the telecommunications service industry, including network equipment, Internet of Things devices and consumer products.

Both Chairman Pai and Commissioner O’Rielly stated that they intend to finalize the 2016 rulemaking in light of the issuance of the EO. The FCC may seek to refresh the record, or the EO may energize it to finally adopt a Report and Order. In any respect, it is likely that existing and proposed foreign involvement in the US telecommunications and broadcast industries will face heightened review by the Administration and the FCC in the foreseeable future.

Interplay with Other Foreign Transaction Reviews

The EO does not explicitly address how the Committee will function alongside the review process conducted by the Committee on Foreign Investment in the United States (“CFIUS”). CFIUS is the US inter-agency committee responsible for reviewing foreign acquisitions and investments for their potential impact on national security. CFIUS and Team Telecom have historically reviewed transactions in parallel when the FCC has referred investments to Team Telecom for review.

Notably, Section 721 of the Defense Production Act, which establishes CFIUS’ authority to suspend or prohibit covered transactions that impair national security, permits the President to invoke such authority only if no other US laws are adequate or appropriate to address the national security concerns. This suggests that CFIUS may defer to the Committee in cases where their jurisdiction overlaps.

Separate from these review procedures for foreign investment, there is also a new proposed review process to be led by the US Commerce Department that would apply to transactions involving the acquisition of telecommunications-related equipment. On November 27, 2019, the US Commerce Department published a proposed rule implementing Executive Order 13783 on Securing the Information and Communications Technology and Services Supply Chain (the “ICTS Proposed Rule”). The ICTS Proposed Rule adopts an open-ended, case-by-case review framework providing the Commerce Department with the authority to evaluate and prohibit any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service if it:

- involves property in which a foreign country or national has an interest;
- includes information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and
- poses certain undue risks to critical infrastructure or the digital economy in the US or certain unacceptable risks to US national security or US persons.

The ICTS Proposed Rule would give the Commerce Department broad discretion to initiate an evaluation of a particular transaction. It could do so in one of three ways: (1) at its own discretion; (2) upon request of certain US Government agencies; or (3) based on information submitted by private parties determined to be credible. Parties would not have any mandated reporting or compliance requirement and would not necessarily even know if the transaction was being evaluated unless they receive a notice from the Commerce Department.

Unlike the new Committee, which addresses investment transactions that require FCC licensing, or CFIUS, which examines more broadly the potential national security implications of a proposed investment, the ICTS Proposed Rule focuses more narrowly on the acquisition of equipment from a foreign adversary, but also unlike these other reviews the ICTS Proposed Rule provides no notice to the parties before prohibiting the use of such equipment in the US telecommunications infrastructure and potentially requiring parties to rip out and replace equipment that has already been installed.