

President Creates Regime for Federal Review of Foreign Telecom Transactions

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On April 4, 2020, President Trump issued the Executive Order on Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector. The Executive Order (EO) formalizes, through the establishment of a Committee, the *ad hoc* working group known as “Team Telecom” which has been reviewing certain telecommunications transactions that fall under the jurisdiction of the Federal Communications Commission (FCC). For years, the FCC has referred transactions to Team Telecom, to consider national security and law enforcement issues that may be raised by applications for FCC licenses and other grants of authority involving foreign ownership. This long-expected EO formalizes responsibilities and process for that review. FCC Chairman Pai issued a statement applauding “the President for formalizing Team Telecom review,” “welcom[ing] beneficial investment in our networks,” and noting that the FCC would “move forward to conclude our own pending rulemaking on reform of the foreign ownership review process.”

Several things are notable about the EO. Of particular importance, it creates a shot clock for the Committee/Team Telecom to complete its review; permits scrutiny of previously granted FCC licenses (as has been called for by some FCC leadership due to concerns regarding Chinese telecom investments and suppliers); and formalizes Team Telecom’s authority to request information from applicants and enter into mitigation agreements to address national security or law enforcement risks.

The EO adds to the complex regulatory environment for transactions involving foreign ownership, which includes reform to the Committee on Foreign Investment in the United States (CFIUS), new government

Authors

Megan L. Brown
Partner
202.719.7579
mbrown@wiley.law
Daniel P. Brooks
Partner
202.719.4183
dbrooks@wiley.law
Nova J. Daly
Senior Public Policy Advisor
202.719.3282
ndaly@wiley.law
Amb. David A. Gross
Senior Counsel
202.719.7414
dgross@wiley.law
Wayne D. Johnsen
Partner
202.719.7303
wjohnsen@wiley.law
Eve Klindera Reed
Partner
202.719.7404
ereed@wiley.law

Practice Areas

Committee on Foreign Investment in the United States (CFIUS)
Corporate
International Trade
National Security
Team Telecom
Telecom, Media & Technology

regulation of the information and communications technology (ICT) sector, FCC limits on federal funding to certain Chinese companies, new legislation on supply chain security, evolving export control regulations, and procurement limitations, as in the National Defense Authorization Act for the Department of Defense (DoD).

The EO and its Provisions

The EO states that “[t]he security, integrity, and availability of United States telecommunications networks are vital to United States national security and law enforcement interests.” The EO formally establishes an inter-agency Committee “to assist the FCC in its public interest review of national security and law enforcement concerns that may be raised by foreign participation in the United States telecommunications services sector.” The EO formalizes Team Telecom’s review process “to determine whether granting a license or the transfer of a license poses a risk to national security or law enforcement interests of the United States” and whether existing licenses also pose such risks.

The EO Adopts a Shot Clock

An FCC referral generates an initial review by the Committee under a 120-day shot clock that starts once the applicant has provided the Committee with complete responses to any questions and information requests. Thus, the EO encourages applicants to be cooperative with the Committee. If the Committee determines that a secondary assessment is warranted “because risk to national security or law enforcement interests cannot be mitigated by standard mitigation measures,” the Chair shall notify the FCC and the secondary assessment “shall be completed no more than 90 days after the Committee’s determination that a secondary assessment is warranted.” This shot clock may be tolled if an applicant fails to respond to requests for additional information.

The creation of the shot clock is responsive to concerns about the timing of Team Telecom review. FCC Commissioner O’Rielly in 2018 told Congress that Team Telecom’s multiple requests for information and review “delays applications substantially” and that “a more effective structure and process will help generate enhanced attention and facilitate improved responses from the requisite agencies.” Importantly, the 90-day secondary assessment period may also involve the participation of a broader set of Executive Branch agencies, known as “Committee Advisors.” The potential involvement by more stakeholders should encourage the Committee to complete its review within the initial 120 days.

The EO Codifies Committee Roles for the Departments of Justice, Homeland Security, and Defense, and Advisory Roles for the Director of National Intelligence and Others

The Committee will be chaired by the Attorney General and will have as additional voting members the Secretary of Defense, the Secretary of Homeland Security and, as determined by the President, the head of any other executive department or agency or any Assistant to the President.

The EO also creates Committee Advisors to include the Secretary of State, the Secretary of the Treasury, the Secretary of Commerce, the Director of the Office of Management and Budget, the United States Trade Representative, the Director of National Intelligence (DNI), the Administrator of General Services, the Assistant

to the President for National Security Affairs, the Assistant to the President for Economic Policy, the Director of the Office of Science and Technology Policy, the Chair of the Council of Economic Advisers; and any other Assistant to the President, as the President determines appropriate.

The EO codifies a key role for the DNI. Section 7 directs the DNI to “produce a written assessment of any threat to national security interests of the United States posed by granting the application or maintaining the license” and to draw on the intelligence community in making this assessment. The EO sets timeframes for the DNI to provide this assessment, empowers the Chair to request supplemental intelligence information and directs the DNI to oversee continual analysis by the intelligence community. The DNI has other roles under the EO, including to advise, monitor, and provide input.

The EO Allows Review of Previously Granted Applications

Section 6 creates a process to review “existing licenses to identify any additional or new risks to national security or law enforcement interests of the United States” which may be initiated by a majority vote of Committee members. This review mechanism will be important for existing FCC licensees having foreign owners or investors and is responsive to calls to review existing approvals, such as from Commissioner Brendan Carr, who has remarked that “it’s time for the U.S. to take additional action” and that “national security agencies should examine whether the FCC should revoke … existing Section 214 authorizations.”

The EO Formalizes the Power to Collect and Share Information

A key part of the traditional Team Telecom process (like CFIUS) involves information collection by the government. Commissioner O’Rielly has said that “applications referred to Team Telecom enter a procedural black hole that has been known to take years to complete.” As a result of criticism, the EO codifies and imposes some limits. The EO (Section 4) empowers the Committee to ask applicants and licensees questions, seek information, and conduct assessments to identify risks to national security or law enforcement interests of the United States.

The EO envisions robust information-collection authorities. Section 8 authorizes the collection of information from “applicants, licensees, and any other entity as needed.” The EO contemplates that responsive information will be shared with “Committee Member entities and Committee Advisor entities.” It also contemplates the sharing of information beyond those entities at the discretion of the Chair, with other agencies subject to the assurance that they “will not further disclose shared information,” and with CFIUS subject to that organization’s statutory limits on disclosure.

The Committee Can Propose Substantive Mitigation Measures and Monitor Compliance

After reviewing whether “granting a license or the transfer of a license poses a risk to national security or law enforcement interests of the United States,” the Committee may recommend that an FCC application grant be conditioned on “mitigation measures” to address risks, with the Committee monitoring compliance with any mitigation measures imposed.

On the merits, the Committee is expected to make recommendations to the FCC about the disposition of applications for licenses and transfers. For previously-granted licenses, the Committee can recommend modifications to a license or a revocation of a license.

The EO Sets Expectations for Recommendations to the President and to the FCC, through NTIA

Section 9 addresses recommendations by the Committee.

- For new applications reviewed under Section 5 (as opposed to Section 6 reviews of existing licenses), the Committee can advise that it has no recommendation, that the FCC should deny the application, or that the FCC should grant the license or transfer subject to conditions.
- Section 9(b) addresses licenses already granted. Upon completion of a review, the Committee may take no action, recommend that the FCC make changes to existing licenses, or recommend that the FCC revoke the license.

Any recommendation under these sections proposing denial, mitigation measures, modification, revocation, or no action “shall be based on a written risk-based analysis,” and “credible evidence.” In most instances, a recommendation is to be communicated to the FCC through the Administrator of the National Telecommunications and Information Administration (NTIA).

Under Section 9(g), the Chair is to notify the President of any intended recommendation, and any opposition by a Committee Member or Committee Advisor, within seven days of a majority or tie vote if the recommendation or any opposition by a Committee Member or Committee Advisor “involves the denial of an application, granting an application contingent on non-standard mitigation measures, modifying a license to condition it upon compliance with non-standard mitigation measures, or revoking a license.”

The EO directs that the FCC will receive notice of such recommendation not earlier than 15 days after the date on which the President is notified of the intended action.

The EO Contemplates Diverse Risk-Based Mitigation Measures to be Negotiated, Communicated and Monitored by the Committee

Under Section 10, the Committee is empowered to recommend to the FCC that it condition the grant of a license or transfer of a license on compliance with any mitigation measures to mitigate a national security or law enforcement risk. The Committee also may recommend to the FCC that it modify a license to condition it upon compliance with any mitigation measures.

Any negotiated mitigation measures are to be based on a written risk-based analysis, and the Committee is to communicate any proposed mitigation measures to the applicant or licensee.

Notably, the Committee is tasked with monitoring mitigation measures imposed by the FCC as a condition on a license or consent to a transaction and Committee Members are to report on any material noncompliance with mitigation measures.

Action Should Commence Within 90 Days

The EO states that within 90 days Committee Members are to enter into a "Memorandum of Understanding (MOU) among themselves and with the DNI (or the Director's designee) describing their plan to implement and execute this order."

The MOU will identify "questions and requests for applicants and licensees that may be needed to acquire information necessary to conduct the reviews and assessments described in sections 5 and 6" and define the "standard mitigation measures," among other matters.

This MOU and its products will be a notable development for companies to watch. It likely will build on existing Team Telecom "Triage" questionnaires and traditional CFIUS information requests, and it may provide important clues for investors about what the government will focus on in reviews.

These actions are part of numerous fast-moving supply chain and national security activities across the government. Many of these efforts are focused on Chinese companies but these regulatory moves promise to have lasting impacts and should be considered whenever a company is dealing with foreign investments, business partners, suppliers, and operations.

Wiley's TMT, National Security, International Trade, and Corporate practices have represented clients before Team Telecom and CFIUS for decades. We have worked with Congress, the FCC, and other agencies on legal and policy issues affecting investors and companies across the private sector. We are helping implement recent statutory and regulatory changes to CFIUS, new obligations from Section 889 of the 2019 National Defense Authorization Act, and the Department of Commerce's rule implementing the President's May 2019 Executive Order on Securing the Information and Communications Technology and Services Supply Chain, among others.

We invite you to reach out to any of our professionals for additional information or guidance, and to sign up to receive emails with updates, webinars, and podcasts. We are in the midst of a National Security webinar series and just released a 5G Regulatory Roadmap and accompanying podcast series, which is archived here.