

Executive Order Formalizes Telecom Foreign Investment Review

April 8, 2020

On April 4, the White House released an Executive Order establishing the *Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector* (the “Committee”) to assess foreign ownership and national security issues in the telecommunications sector. The Committee will be led by the Attorney General and comprised of the Secretaries of the Department of Defense and the Department of Homeland Security and other executive agency heads, or assistants to the President, as determined by the President. Advisors to the Committee include the heads of several Executive Branch agencies.

The Executive Order formalizes the existing “Team Telecom” review process pursuant to which Team Telecom (an interagency group of several Executive Branch agencies, including the Department of Homeland Security, the Department of Justice, the Department of Defense, the Federal Bureau of Investigation and the United States Trade Representative) reviews certain applications referred to it by the Federal Communications Commission (FCC). Chairman Pai and Commissioner O’Reilly have praised the Executive Order for providing predictability to the “Team Telecom” review process.

Team Telecom Review Process. Under current procedures, Team Telecom reviews applications referred to it by the FCC for any national security, law enforcement, foreign policy and trade policy concerns that may arise from the foreign ownership interests held in the applicants and petitioners. Specifically, the FCC refers to Team Telecom (1) applications to obtain, assign, or transfer control of the holder of, an international Section 214 or a submarine cable landing license where such applications report 10 percent or greater direct or indirect foreign ownership and (2) petitions for declaratory ruling to exceed the 20 percent direct or 25 percent indirect foreign ownership limits in a broadcast or common carrier wireless licensee, as set forth in Section 310(b) of the Communications Act of 1934, as amended.

The Team Telecom process can be lengthy, as there is no prescribed timeframe during which Team Telecom is required to act, nor are there publicly available rules and procedures governing Team Telecom review. As a result, the Team Telecom review process has long been criticized as lengthy, opaque, unpredictable and a deterrent to foreign investment. In 2016, the FCC initiated a rulemaking procedure to

Contact Information

If you have any questions concerning this alert, please contact:

Jennifer L. Richter

Partner
jrichter@akingump.com
Washington, D.C.
+1 202.887.4524

Tom W. Davidson

Partner
tdavidson@akingump.com
Washington, D.C.
+1 202.887.4011

Christian C. Davis

Partner
chdavis@akingump.com
Washington, D.C.
+1 202.887.4529

Clete R. Willems

Partner
cwillems@akingump.com
Washington, D.C.
+1 202.887.4125

Kevin J. Wolf

Partner
kwolf@akingump.com
Washington, D.C.
+1 202.887.4051

Karen L. Milne

Senior Counsel
kmilne@akingump.com
Washington, D.C.
+1 202.416.5024

Lyndsey M. Grunewald

Counsel
lgrunewald@akingump.com
Washington, D.C.
+1 202.887.4413

streamline the Team Telecom review process to address some of these concerns, but this effort has not progressed in recent years. On April 6, following the issuance of the Executive Order, Chairman Pai stated that the FCC will move forward the rulemaking, but did not indicate when it would do so, nor did he provide guidance as to the specific action the FCC will take in this regard.

Committee Review Process. Under the Executive Order, the Committee is required to review an application referred to it by the FCC to determine whether the application poses any national security or law enforcement concerns. The U.S. government stakeholders involved include the State Department, Treasury, Commerce, the Office of Management and Budget, the U.S. Trade Representative, the Director of National Intelligence, the General Services Administration, the assistants to the President for National Security Affairs and Economic Policy, the Office of Science and Technology Policy, and the Council of Economic Advisors.

The Committee must complete its initial review of any FCC-referred application within 120 days of the date on which the Committee Chair (i.e., the Attorney General) determines that the applicant has provided complete responses to the Committee's questions and information requests. If the Committee determines that a secondary assessment is necessary, it must complete such assessment within 90 days after making such determination. Upon completion of its review of an application referred to it by the FCC, the Committee will either advise the FCC that it has no objection to grant of the application or recommend that the FCC address national security and law enforcement concerns by conditioning its approval of the subject application on the applicants' compliance with mitigation measures or by denying the application.

In addition to reviewing applications referred to it by the FCC, the Committee also has discretion under the Executive Order to review existing FCC licenses previously reviewed by Team Telecom or the Committee to evaluate any new or additional national security or law enforcement risks. The Committee may only review these existing licenses if a majority of the Committee elects to do so. If, after such review, the Committee concludes that national security or law enforcement issues are present, it can recommend that the Commission modify the license to require compliance with mitigation measures or revoke the license on the basis of national security concerns.

The Executive Order instructs the Committee to attempt to reach consensus on its recommendations regarding licenses and applications. If the Committee cannot reach a consensus, the recommendation will be determined by a majority vote of the Committee Members, with the Committee Chair casting the tie-breaking vote. The Committee must provide the President notice of any recommendation resulting from a non-unanimous Committee vote at least 15 days before providing its recommendation to the FCC.

The Executive Order directs the Committee to enter into a Memorandum of Understanding (MOU) with Director of National Intelligence by July 3, 2020 to, among other things, delineate questions and requests for applicants and licensees that may be needed to acquire information necessary to conduct the Committee's reviews and assessments, define the standard mitigation measures to address national security issues and certain delegation procedures.

Discussion. While the Executive Order does provide some transparency and time restraints on the Committee review process (as compared to the current Team

Katherine P. Padgett
Counsel
kpadgett@akingump.com
Washington, D.C.
+1 202.887.4079

C. Shea Boyd
Associate
email@akingump.com
Washington, D.C.
+1 202.887.4421

Telecom process), it is not clear whether it will produce any practical benefit for FCC applicants. For example, the Executive Order does not expressly mandate that the MOU be made publicly available (thereby providing transparency as to the Committee's procedures), nor does it provide any express guidance regarding the type of information the Committee will request from applicants. The Executive Order also does not establish the criteria to be used by the Committee to determine whether mitigation measures are warranted, such that it appears that this will be a matter of discretion, as is presently the case with Team Telecom.

As noted above, the Executive Order prescribes specific timelines for Committee action. However, the timing is not tied to an objective measure (e.g., the date an application is submitted) but rather depends upon when the Committee makes certain decisions (e.g., the timeline for the initial review process does not commence until the Attorney General determines the applicant's responses to the Committee's questions and information requests are complete). As a result, it is not clear whether the time for Committee review will be significantly less than the amount of time required for Team Telecom review.

Notably, the Executive Order expands the scope of the Executive Branch review process by allowing the Committee, upon majority vote, to review existing FCC licenses and authorizations reviewed under the Executive Order processes or the prior Team Telecom framework to "identify any additional or new risks to national security or law enforcement interests of the United States." If the Committee exercises such discretion, it is authorized to take one of several actions, including requesting that the FCC modify the license to require the licensee to comply with mitigation measures or recommending revocation of the license.

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