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Executive Order Establishes Committee to Assist FCC in Review of Foreign Participation in the Telecommunications Industry

On April 4, 2020, President Trump issued an Executive Order establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Sector (Committee). This Executive Order formalizes and modifies the review process that had been conducted by an intergovernmental group of Executive Branch agencies known as Team Telecom. In the past, applications for Federal Communications Commission (FCC) consent to the assignment or transfer of control of FCC licenses or other authorizations that involve foreign ownership have been subject to the Team Telecom review process. Team Telecom review has significantly prolonged the FCC approval process and delayed by months or even years companies' ability to consummate transactions involving broadcast stations and telecommunications service providers.

The Committee, comprised of representatives from several governmental agencies in the Executive Branch, will 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 sector" (Executive Order. § 3). This GT Alert explains the types of transactions subject to stringent review by the FCC and the Executive Branch and how the Executive Order formalizes the procedures governing that review.

FCC Review of Transactions

Pursuant to Section 310 of the Communications Act of 1934, as amended (47 U.S.C. § 310), FCC consent must be obtained prior to assigning a license or other authorization (also referenced herein as "license") to another party or transferring control of an entity holding a license. FCC licenses covered by Section 310 include international Section 214 authority, [1] domestic Section 214 authority,[2] submarine cable landing licenses, broadcast licenses, common carrier wireless licenses, and common carrier earth station licenses. With the exception of domestic Section 214 authority, FCC consent is required to obtain the foregoing types of licenses or authorizations.[3]

Section 310 also sets forth certain limits on foreign ownership of FCC licenses and entities holding FCC licenses.[4] First, no foreign government or representative of a foreign government may be an FCC licensee. Second, no broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by: (1) any alien or the representative of any alien; (2) any corporation organized under the laws of any foreign government; (3) any corporation of which more than 20% of its stock is owned or voted by aliens, a foreign government, or any corporation organized under the laws of a foreign country; (4) any corporation directly or indirectly controlled by any other corporation of which more than 25% of its stock is owned or voted by aliens, a foreign government, or representative thereof, or any corporation organized under the laws of a foreign country, if the FCC finds that the public interest will be served by the refusal or revocation of such license.[5] Thus, the FCC has authority to approve a transaction that exceeds the 25% foreign ownership/control limit if it concludes that such a transaction will benefit the public interest.

In accordance with Section 310(b), the FCC must conduct a public interest analysis of license applications and transactions that involve foreign ownership. In addition, when foreign ownership or control of an FCC license raises national security issues, the FCC has referred the relevant application to Team Telecom. Although there are no federal laws or statutes defining the percentage of foreign ownership that triggers Team Telecom review of a proposed transaction, in general, Team Telecom review occurs when 10% of more of the licensee is directly or indirectly owned by foreign individuals or entities. During the review, Team Telecom sends a series of questions to the parties requesting details about the deal and the companies involved, and may ask the party with foreign ownership to enter into a national security agreement with the Department of Justice in which it agrees to certain conditions.

In an effort to make the Team Telecom process more transparent and efficient, the FCC issued a notice of proposed rulemaking in 2016 "to identify ways in which both the Commission and the agencies might streamline and facilitate the process for obtaining information necessary for Executive Branch review and identify expected time frames, while ensuring that we continue to take Executive Branch concerns into consideration as part of our public interest review."[6] However, that proceeding remains pending. As explained below, the Executive Order provides the necessary impetus for the FCC to conclude its proceeding.

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[1] International Section 214 authority enables an entity to provide telecommunications services between the United States and foreign countries. *See* 47 U.S.C. § 214(a); 47 C.F.R. § 63.18.
[2] Telecommunications carriers have blanket authority to offer interstate telecommunications services pursuant to 47 U.S.C. § 214(a). *See also* 47 C.F.R. § 63.01.
[3] Although a telecommunications carrier does not need to file an application with the FCC prior to commencing domestic interstate telecommunications service under 47 U.S.C. § 214, it is required to obtain FCC consent prior to assigning that authorization or transferring control of an entity holding that authorization.
[4] 47 U.S.C. §310(a).
[5] 47 U.S.C. § 310(b).
[6] *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, 31 FCC Rcd 7456, ¶ 1 (2016).

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Committee's Responsibilities

The Committee is comprised of the Attorney General (who is the Chair of the Committee), Secretary of Defense, Secretary of Homeland Security, and the head of any other executive agency or Assistant to the President deemed appropriate by the President (Executive Order, § 3 (b), (c)). The Executive Order also establishes a group of federal officials as Advisors. The Advisors include the Secretaries of State, Treasury and Commerce, other officials that focus on national security, trade and technology issues, and any other Assistant to the President deemed appropriate (Executive Order, § 3(d)). The function of the Committee is to (a) review applications for new licenses and transactions involving transfers of licenses for risks to national security and enforcement interests and (b) respond to such risks by recommending a specific action to the FCC, such as denying an application or granting an application subject to compliance with mitigation measures (Executive Order, § 3(a), (b)). The Committee also has authority to review existing licenses to identify new or additional risks to national security or law enforcement issues[7] (Executive Order, § 6).

Review Process

The Committee's review process consists of an initial review of the application or license to evaluate whether it raises any national security or law enforcement issues. The Committee may require the applicant or licensee to respond to questions or information requests (Executive Order, § 8). Responses are generally not disclosed beyond the Committee or Advisors unless required by law. However, responses may be disclosed to the Committee on Foreign Investment in the United States and other governmental agencies (Executive Order, § 8). The Director of National Intelligence is responsible for producing a written assessment of any threat to national security within the earlier of 30 days from the date the Chair determines that the applicant's or licensee's responses to any Committee questions are complete or 30 days from the date the Chair requests a written analysis (Executive Order, § 7(a), (b)).

If the Committee determines that granting the application does not raise any risks or that standard mitigation measures[8] would mitigate any risks, then it will advise the FCC of its recommendation (Executive Order, §§ 5, 9, 10). The Committee's initial review must be completed within 120 days of the date the Chair determines that the applicant's responses to questions from the Committee are complete (Executive Order, § 5(b)). If the Committee determines the risks associated with the application cannot be addressed with standard mitigation measures, then a secondary assessment of the application will be conducted. This secondary assessment must be completed no later than 90 days after the Committee determines that further evaluation is necessary (Executive Order, § 5(c)).

Advisors' Review of Recommendations and Notice to President

After the Committee completes its review of an application to transfer ownership or control of a license to a foreign owned or controlled entity, it may take one of the following actions: (1) advise the FCC that it has no objection to grant of the application; (2) recommend denial of the application; or (3) recommend grant of the application contingent on the applicant's compliance with mitigation measures. If the Committee

[7] The Executive Order defines "license" to include any license or authorization issued by the FCC and "application" to include an application for a license or for transfer of a license referred by the FCC to the Committee (Executive Order, § 2(a), (b)).

[8] The Executive Order vaguely defines "standard mitigation measures" as measures that are agreed upon by the Committee and Advisors. (Executive Order, § 2(e)). Standard mitigation measures recommended by Team Telecom have included certifications by the foreign owned or controlled party that it will comply with the Communications Assistance for Law Enforcement Act, make communications and records available in a form and location that permits them to be subject to legal process under Unites States law, and designating a United States citizen located in the United States as a point of contact.

reviews an existing license, then it may recommend to the FCC that the FCC modify the license to include mitigation measures, revoke the license, or take no action. All recommendations by the Committee that advise the FCC to deny an application or grant an application subject to conditions must be based on a written risk-based analysis supported by credible evidence. If the Committee's recommendation is to deny an application, revoke a license, or impose non-standard mitigation measures, then the Committee must present the issue to the Advisors to ensure that the Advisors do not oppose the recommendation. Finally, the Chair must notify the President within seven days of any recommendation or opposition by the Advisors to a recommendation that involves denial of an application, revocation of a license, or the imposition of non-standard mitigation measures. The FCC will receive notice of the recommendation no earlier than 15 days after the date the President is notified of the recommendation (Executive Order, § 9).

Monitoring Compliance

The Executive Order requires the Committee to monitor mitigation measures imposed by the FCC, and members of the Committee are responsible for reporting any material noncompliance with mitigation measures. When noncompliance is discovered, the Committee may recommend that the relevant licenses be revoked or modified in accordance with the process set forth the Executive Order (Executive Order, § 10).

Implementation

Executive agencies are directed to take all appropriate measures to implement the Executive Order. In addition, within 90 days from the date of the Executive Order, the Committee must enter into a Memorandum of Understanding with the Director of National Intelligence describing their implementation plan (Executive Order, § 11). In response to the Executive Order, the FCC Chairman Pai stated that "the FCC will move forward to conclude our own pending rulemaking on reform of the foreign ownership review process."[9]

The Executive Order provides clarity regarding Executive Branch review of foreign ownership of FCC licenses used to provide telecommunications and broadcast services in the United States. Importantly, the Executive Order establishes a structure and timeline for the review so that licensees seeking FCC approval for transactions will know when to expect the FCC's decision regarding the consent necessary for parties to close their transactions.

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[9] Statement of Chairman Pai on 'Team Telecom' Executive Order, April 6, 2020.