

# President Formalizes Executive Agency Review of FCC Applications and Licenses; Quick Action on FCC License Revocation

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For years, there have been critiques about the lack of procedures surrounding the review, by a group of Executive Branch agencies commonly referred to as “Team Telecom”, of applications before the Federal Communications Commission (“FCC” or “Commission”) for licenses and transaction approvals involving foreign ownership, including the absence of timeframes for completing reviews. The FCC tried to implement limited changes within its jurisdiction by launching a [rulemaking](#), but that never progressed to a conclusion. Now, by [Executive Order](#) (“EO”) on April 4, 2020, President Trump established a framework to govern such reviews and clearly include reviews of existing licenses and authorizations even where there are no current mitigations. There are still a lot of unknowns regarding the new “Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector” (the “Committee”). It is too soon to know whether the Committee will bring a welcome measure of regularity to a previously unshackled process or will prove to be an even greater bane to applicants and licensees than the Team Telecom process its work will replace.

Review of applications, referred by the FCC to Team Telecom, with certain national security and law enforcement concerns has long been part of the landscape, but, because the Team Telecom review process had had no statutory or regulatory framework, the communications industry had little insight into the review process or the Executive Branch’s related activities. This is not to say that the new Committee will be transparent, and one should not expect that, but the EO better defines the process and the potential scope of the review activities.

## *Committee Responsibilities*

The Committee is tasked to review, for national security and law enforcement concerns raised by foreign participation in the United States telecommunications services sector, those applications before the FCC “for a license or authorization, or the transfer of a license or authorization” which the agency refers to the Committee (“Referred Application”). The EO does not purport to dictate when the FCC, an independent agency, refers applications to the Committee, but the track record of referrals to Team Telecom probably provides a guide of what will be referred. And nothing prevents the Committee, or an executive agency, from asking the Commission to refer an application (which has been the case prior to the EO). Moreover, the interrelationship between the Committee’s activities and those of the Committee on Foreign Investment in the United States (“CFIUS”), whose

authority pursuant to statute concerns review of certain covered transactions involving foreign investment in U.S. businesses in the telecom sector and beyond, remains to be seen. Historically the link between Team Telecom review and CFIUS activities has not been susceptible to clear explanation. Indeed, there is only one mention of CFIUS in the EO, in the context of information that the Committee can share with the CFIUS when it is undertaking a review of transactions.

By all appearances, the Committee will replace the functions of Team Telecom which currently conducts such national security reviews but is not governed by any established procedures. The new EO also contemplates review, on the Committee's own motion, of existing FCC licenses and authorizations to identify "any new or additional risks" to law enforcement and national security. These reviews may result in a recommendation to the FCC to modify or revoke licenses and authorizations even where Team Telecom or the Committee has not imposed mitigation measures earlier. While the EO provides some long-sought clarity and structure to the review process, some uncertainties remain as to how this Committee will operate and use its authority to seek conditions on or denial of FCC licenses, given the White House's initiative to establish the Committee. However, judging by an executive agency recommendation – a mere five days after the EO was issued – that the FCC revoke China Telecom's FCC license, albeit not under the guise of the new Committee, and the Commission's show cause orders issued to four Chinese government owned FCC licensees, the U.S. telecommunications industry should expect to see close review of new applications and potentially renewed scrutiny of previously-granted FCC licenses.

Responding to the release of the EO, [FCC Chairman Pai welcomed](#) the EO's "formalizing Team Telecom review and establishing a process that will allow the Executive Branch to provide its expert input to the FCC in a timely manner." [FCC Commissioner O'Reilly](#), long an ardent proponent for revising the review process and a champion of the Commission's rulemaking seeking changes associated with Team Telecom review, similarly lauded the EO for "establishing a formal structure . . . and including deadlines for the relevant agencies to render decisions" and noted that fixing the "incoherent and indefensibly unpredictable review process" had been his priority over the last several years. In its rulemaking proceeding in 2016 the FCC proposed definitive timeframes and a clear review process but, despite receiving industry support, that proceeding stalled.

#### *Committee Structure and Implementation*

Comprising, at its core, the same three agencies as Team Telecom, the Committee, chaired by the Attorney General, the head of the Department of Justice, will include the Secretary of Defense, Secretary of Homeland Security, and to the extent the President deems appropriate, the heads of any other executive agencies or Assistants to the President. Officials of other agencies – such as the Director of National Intelligence, the Secretary of Commerce, and the Secretary of State – will have limited roles in certain circumstances.

The EO sets a ninety (90) day timeline, or until June 2, 2020, for the Committee members to enter into a Memorandum of Understanding (that may or may not become public) that, among other requirements, establishes the information to be collected from applicants, defines standard mitigation measures, and identifies the plan for implementing the EO. However, the EO does not set an actual deadline by which the Committee will begin reviewing Referred Applications, but does provide that the purview includes applications "referred by the FCC before the date of [the EO] to the group of executive departments and agencies involved in the review process that was previously in place," i.e., to Team Telecom. This should provide for something of a seamless transition from the current framework to the new Committee.

### *The EO Brings Some Insights into the Review Process*

While the Committee's responsibilities generally would be familiar to Team Telecom observers, at least two aspects are worth specific mention.

First, the EO establishes some semblance of definitive timeframes and processes for the Committee's review of Referred Applications, albeit triggered by a somewhat uncertain date when applicants' responses to the Committee's questions and information requests are "complete." Telecommunications providers and legal practitioners that have been through a Team Telecom review know that the process often was lengthy, with reviews not uncommonly taking nine months and even much longer. Moreover, neither the applicants nor the FCC had any insight into the mechanics of the review process or whether the review was continuing in the background during the often long stretches of time with no communication, from the Executive Branch after responses to the Team Telecom questions and information requests (commonly referred to as "triage" questions) were provided, at least until the end of the review process.

Under the EO, the Committee is to finish its initial review within 120 days of when an applicant's responses are complete, although the Committee may conclude that a "secondary assessment" is warranted." Any secondary review must be completed within ninety days of the start of the secondary assessment. So, reviews could take seven months after the triage questions have been completely addressed and still be within the time frames contemplated by the EO. Experience often showed, under the Team Telecom process, that completing triage could take several months itself.

The EO also provides a look "behind the curtain" of the Committee, from a procedural perspective, as it delineates the actions, such as the Director of National Intelligence's review and written national security threat assessment, that the various Committee components will take during the review process. While knowledge that a process actually exists will be of interest to applicants, the substance of the internal communications will likely not be shared until such time as Committee recommendations are made known in terms of proposed mitigation measures or the lack of objections to a Referred Application.

Second, the EO makes clear that the Committee may take a fresh look at existing licensees for national security and law enforcement risks although the procedures surrounding such license reviews are not as fully flushed out in the EO as are those surrounding examination of Referred Applications. This authority may lead to the Committee seeking license revocation through the FCC or requiring the licensee enter into a mitigation agreement to avoid, presumably, an effort to revoke the license. While Team Telecom has sought license [revocations](#) over the past few years where mitigation agreements are already in place and there are issues of compliance, see also [here](#) and [here](#), we are unaware of existing licensees being required to enter into new or revised mitigation agreements absent new applications, for example for assignments or transfers of control, being filed with the FCC.

Nevertheless, this explicit authority for the Committee to revisit and possibly modify or require new mitigation agreements is not entirely surprising. As [we have reported previously](#), increased concerns regarding the security of telecommunications equipment from certain foreign-owned equipment manufacturers, such as Huawei and ZTE, recently have led the FCC to restrict and, in some cases, ban the use of such manufacturers' equipment. The Executive Branch and other agencies similarly have identified numerous national security threats, with cybersecurity as a top concern, arising in the many years since some FCC licenses have been granted. Consequently, the Committee is unlikely to be shy about revisiting existing licensees where there now are perceived law enforcement

or national security concerns that the Committee believes need to be addressed by mitigation measures. Of course, having a licensee's existing mitigation agreement revisited, typically in the form of a generally more robust National Security Agreement ("NSA") or a frequently "lighter touch" Letter of Assurances ("LOA"), or a licensee being required to enter into such a mitigation agreement for the first time, may have serious implications for the licensee depending on its business and operations models.

The EO explains that, while it does establish certain procedures and timeframes, it does not create any rights or benefits, substantive or procedural, that applicants or licensees can enforce at law or in equity against the government or any other person. Moreover, the EO does not supersede the existing rights or discretion of any Federal agency, outside the activities of the Committee, to conduct inquiries with respect to an FCC application or license or to negotiate, enter into, impose, or enforce contractual provisions" with such applicant or licensee, which would include existing mitigation arrangements with one or more executive branch agency.

#### *The EO Also Creates Some Uncertainty*

While the EO provides some transparency in, and certainty to, the Referred Application review process, many questions remain. To mention a few of those questions:

- *What information will Referred Application applicants have to provide?* Traditionally, applicants undergoing a Team Telecom review have faced fairly consistent sets of triage questions that vary by the type of application, with additional questions typically customized based on the applicant. The EO directs the Committee to develop the information requests that will be required from Referred Application applicants but it is unknown if those questions will be similar in scope and content to the triage questions or if the Committee will develop different and possibly more burdensome triage questionnaires given the elevated concerns within the government regarding the security of U.S. telecommunications and networks.
- *What compliance obligations will be included in mitigation agreements?* Under the current Team Telecom review process, applicants can expect to enter into a comprehensive NSA or an often narrower and lighter LOA. These arrangements are publicly available and provided FCC license applicants with a general sense of the scope of compliance obligations. In more recent years, we have observed a convergence toward more common terms, albeit with some ability to negotiate certain aspects of the mitigation. The EO retains the use of mitigation agreements but refers to "standard" and "non-standard" mitigation agreements. It is unclear if the "standard" vs "non-standard" mitigation dichotomy refers to the difference between LOAs and NSAs or contemplates other compliance frameworks. It is possible that LOAs and NSAs will be considered standard mitigation and non-standard mitigation measures will contain even more stringent or targeted compliance obligations. Alternatively, the Committee may revise the entire mitigation measure regime, and the degree of "negotiation" the government is willing to engage in may be adjusted materially, and not necessarily for the better.
- *Exactly when will the Committee and its new measures replace the current Executive Branch review regime?* The EO sets a 90 day deadline for the Committee to develop an implementation plan. It is possible that the Committee may be able to meet this deadline since the three primary member agencies already will be familiar with the review process based on their experience with the Executive Branch reviews. However, the EO does not identify a deadline for when the Committee will begin reviewing Referred Applications (or existing licenses) per the EO framework. The EO suggests that pending reviews may become subject to the EO timelines. If

that's true, will the timelines apply in full? Where the review is well under way? Will already pending reviews be placed on hold until the Committee is up and running? Similarly, will applications referred after the EO was released remain in pending status until the Committee gets things up and running?

### *Swift Movement to Revoke Licenses*

Although not even a month has passed since the EO was released, action already is being taken to revoke the FCC license of China Telecom, and to require four other Chinese government-affiliated licensees to show cause why their FCC licenses should not be revoked. In what clearly was an already pending initiative, within five days of the EO's release, Team Telecom [recommended the FCC revoke China Telecom's license](#). The recommendation, exceeding fifty pages and containing hundreds of pages of, often redacted, exhibits, details numerous concerns regarding China Telecom's operations, which were subject to a 2007 LOA. The concerns range from the company's failure to comply with its mitigation agreement to making inaccurate statements regarding its cybersecurity practices to providing opportunities for the Chinese government to engage in economic espionage and misroute or disrupt U.S. communications. Although China Telecom currently has only an LOA as its mitigation agreement, and presumably could be required to enter into a more comprehensive NSA, the Executive Branch explicitly rejected the transition to an NSA based on China Telecom being deemed "an untrustworthy and unwilling partner" in its current LOA. Unlike other Executive Branch license revocation recommendations which typically cited to general mitigation agreement noncompliance and, more often, apparent cessation of operations, the China Telecom revocation recommendation identifies numerous and detailed concerns and relies, in part, on information obtained under the Foreign Intelligence Surveillance Act. Similarly, on Friday the Commission issued show cause orders to [China Telecom Americas](#), [China Unicom Americas](#), [Pacific Networks](#), and [ComNet](#) giving them thirty days to show cause why their FCC licenses should not be revoked. The show cause orders cite to Team Telecom's China Telecom revocation recommendation when noting that, as entities ultimately owned or controlled by the Chinese government-owned entities, the four FCC licensees would be vulnerab[le] . . . to the exploitation, influence, and control of the Chinese government." Although the show cause orders were issued on the Commission's own motion, the FCC's action undoubtedly is related to the EO's review of existing licensees for national security and law enforcement concerns. In light of the national security concerns the Executive Branch outlined in the China Telecom recommendation, the FCC's show cause orders to China Telecom Americas, China Unicom Americas, Pacific Networks, and ComNet, and the similar concerns regarding Huawei and ZTE equipment, we anticipate the Committee similarly will be proactive in revisiting any licensees that may raise national security concerns.

### *Key Takeaways*

The EO provides some clarity regarding the Referred Application review process and timeframe but many uncertainties remain, including just how long the process will begin after the application is referred.

Applicants contemplating transactions or new FCC licensing that will involve a Referred Application will benefit from a clearly defined review timeframe, once triage is "complete," but also may face different, and potentially more stringent, mitigation obligations.

Current FCC licensees, whether parties to mitigation agreements or not bound by such agreements, may have their communications operations reviewed for national security concerns and the licensee could be subjected to new or revised mitigation requirements.

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The full impact of the EO will only become known over time. Kelley Drye continues to monitor the issues, so check back for future updates.