

FCC Moves Ahead with Modernizing Foreign Ownership Reviews by Team Telecom

September 11, 2020

At its September 30, 2020 Open Meeting, the Federal Communications Commission (FCC or Commission) will vote on an item to modernize the process by which Executive Branch Agencies, through a recently formalized Committee previously referred to as “Team Telecom,” consider the national security, law enforcement, diplomatic, and trade issues associated with transactions subject to the FCC’s foreign ownership review process. This long-awaited move addresses reforms that have been pending for years and have become more critical as the federal government increases its scrutiny of foreign investment and supply chain issues. Wiley’s National Security and TMT practices, which include a former Director at the U.S. Department of Justice who served as the Chair of Team Telecom for a decade, have been actively engaged in related proceedings and welcome additional clarity from the government.

According to the Commission, if adopted, the draft *Report and Order* “would improve the timeliness and transparency of the process by which it seeks the views of Executive Branch agencies on any national security, law enforcement, foreign policy, and trade policy concerns related to certain applications filed with the Commission.”

If approved, the *Report and Order* will be effective 30 days after publication in the *Federal Register*.

Background

This latest step by the FCC stems from a four year-long review of its process and, more recently, the President’s April 4, 2020 Executive Order on Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector.

Authors

Nova J. Daly
Senior Public Policy Advisor
202.719.3282
ndaly@wiley.law

Megan L. Brown
Partner
202.719.7579
mbrown@wiley.law

Daniel P. Brooks
Partner
202.719.4183
dbrooks@wiley.law

Practice Areas

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

The Executive Order (EO) formalized, through the establishment of a Committee, the *ad hoc* working group known as “Team Telecom,” which has reviewed certain telecommunications transactions that fall under the jurisdiction of the 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. The EO clarifies responsibilities and procedures for the review process and sets out timeframes for the Committee’s review of certain FCC applications and the types of recommendations the Committee can make to the Commission in response to referred applications.

FCC Chairman Pai had applauded “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.” Wiley lawyers discussed the EO in detail here.

On April 27, 2020, the International Bureau of the FCC released a Public Notice (PN) to refresh the record and seek comment in its 2016 proceeding to reform its approach to Team Telecom reviews. Details of the PN can be found here. Dozens of comments and reply comments were filed in the FCC’s docket urging the Commission to clarify and modernize the rules governing Executive Branch review of foreign investment in entities regulated by the FCC.

Key Takeaways of the *Report and Order*

The Commission’s *Report and Order* would adopt rules and procedures to improve the timeliness and transparency of the process by which the FCC coordinates its consideration of applications with Executive Branch agencies.

Key elements of the *Report and Order* include:

- **Established Timeframes.** The FCC proposes to adopt the timeframes set forth in the EO – a 120-day initial review period followed by a discretionary 90-day secondary assessment – if the Committee determines that the risk to national security or law enforcement interests cannot be mitigated with standard mitigation measures. (¶¶ 2, 20, 76-88)
- **Automatic Review of Some Applications.** The Committee will continue to review three types of applications where the applicants have reportable foreign ownership:
 - applications for international Section 214 authorizations or to assign or transfer control of these authorizations;
 - applications for a submarine cable landing license or to assign or transfer control of such a license; and
 - petitions seeking a foreign ownership ruling under Section 310(b) of the Communications Act of 1934, as amended, for broadcast, common carrier wireless, or common carrier earth station applicants and licensees. (¶¶ 18, 24-27)

- **Excluded Applications.** Over Executive Branch agency objections, the FCC proposes to generally exclude from referral certain applications that present a low or minimal risk to national security, law enforcement, foreign policy, and trade policy concerns. (¶¶ 30-35)
 - The following applications would generally be excluded from referral:
 - *pro forma* notifications and applications;
 - international section 214 applications, submarine cable applications, and section 310(b) petitions where the only reportable foreign ownership is through wholly owned intermediate holding companies and the ultimate ownership and control is held by U.S. citizens or entities;
 - international section 214 applications where the applicant has an existing mitigation agreement, there are no new reportable foreign owners of the applicant since the effective date of the mitigation agreement, and the applicant agrees to continue to comply with the terms of that mitigation agreement; and
 - international section 214 applications where the applicant was cleared by the Executive Branch within the past 18 months without mitigation and there are no new reportable foreign owners of the applicant since that review.
 - The FCC would nevertheless retain discretion to refer these applications to the Executive Branch if the particular circumstance warrants, such as a change in the relations between the United States and the applicant's home country.
 - The FCC declined to adopt other exclusions proposed by commenters, including applications that have undergone review by the Committee on Foreign Investment in the United States (CFIUS) because "Executive Branch review of an application referred by the Commission includes issues that are not addressed by CFIUS." (¶ 38)
 - We note that Team Telecom has recently reviewed certain applications *sua sponte* where the FCC did not specifically make a referral to Team Telecom. Thus, parties should assess the likelihood of Team Telecom self-initiating a review of an application that would otherwise be excluded under these provisions.
- **Standardized Questions for Applicants.** Applicants will be required to answer certain questions and make certifications designed to protect national security and law enforcement interests, which the FCC expects to "facilitate faster reviews, make mitigation unnecessary for a number of applications reviewed by the Committee, strengthen compliance, and assist the Commission in its ongoing regulatory obligations." (¶ 19)
 - The *Order* directs the FCC's International Bureau to draft and make available on a publicly available website a standardized set of national security and law enforcement questions (Standard Questions) and related certifications that elicit the information needed by the Committee for its review. Once the Standard Questions are available, the FCC will require applicants to file their responses with the Committee—prior to or at the same time they file their applications with the FCC—to expedite the review process. (¶¶ 40-41)

- The *Report and Order* proposes to adopt, and codify in FCC rules, five categories of information for which applicants must provide detailed and comprehensive answers in their applications. These include:
 - corporate structure and shareholder information;
 - relationships with foreign entities;
 - financial condition and circumstances;
 - compliance with applicable laws and regulations; and
 - business and operational information, including services to be provided and network infrastructure. (¶ 42)
- The FCC will also solicit comment on the Standard Questions or any future changes made to those questions in a future proceeding. (¶¶ 45-47)
- **Required Certifications.** Applicants, with the exception of certain broadcast petitioners, will also need to certify that they will:
 - comply with the Communications Assistance for Law Enforcement Act (CALEA) and related Commission rules and orders;
 - make communications to, from, or within the United States, as well as records thereof, available to U.S. law enforcement officials;
 - designate a U.S. citizen or permanent U.S. resident as a point of contact for the execution of lawful requests and designate an agent for legal service of process;
 - affirm that all information submitted to the Commission and the Committee as part of the application process is complete and accurate, and promptly notify them of any substantial and significant changes in such information; and
 - affirm their understanding that failure to fulfill any of the conditions of the grant of their applications can result in license revocation or termination and criminal and civil penalties. (¶¶ 54-57)
 - Broadcast petitioners seeking a section 310(b) foreign ownership ruling will only be required to certify to the certifications related to a point of contact, accuracy and completeness, and consequences. (¶ 75)
- **Treatment of Confidential Information.** The *Report and Order* would allow for the sharing of applicants' business confidential information with relevant agencies in reviews within the scope of the EO. (¶ 93)
- **Other Rules.** The Commission's item would also establish a set of rules governing referral of applications to the Executive Branch agencies. (¶ 21) Additional rules adopted in the *Report and Order* relate to:
 - Monitoring progress; (¶ 94)

- Including voting interests in applications; (¶ 95)
- Requiring ownership diagrams; (¶ 96) and
- Amending certain cable landing rules. (¶ 97)

Wiley's TMT, National Security, and International Trade practices have represented clients before Team Telecom and CFIUS for decades. We help global investors and FCC licensees navigate Team Telecom, CFIUS, and other critical national security reviews and processes. We have worked with Congress, the FCC, and other agencies on legal and policy issues affecting investors and companies across the private sector. Should you have any questions, please contact Rick Sofield, Nova Daly, Megan Brown, Wayne Johnsen, Eve Reed, Dan Brooks, or Mike Diakiwski.