

TELECOMMUNICATIONS + NATIONAL SECURITY ADVISORY

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President Trump Formalizes Team Telecom Process for Reviewing Foreign Investments in U.S. Telecommunications Market

Action Brings Greater Justice Department Control, Timeframes with Significant Loopholes, and Increased Risks of License Blocking and Retroactive Revocation

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On April 4, 2020, President Donald Trump signed Executive Order 13913 formalizing and modifying the Team Telecom process through which the Executive Branch reviews national security and law enforcement issues arising from applications filed with the Federal Communications Commission (“FCC”) for new licenses and authorizations, transaction consents, and new foreign ownership in certain wireless licensees. With the new Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (“Committee”), Executive Order 13913 codifies many aspects of the existing Team Telecom process, including a continuing focus on foreign investment. It concentrates authority in the hands of the U.S. Department of Justice (“DOJ”) as Committee Chair and marginalizes the role of the economic agencies, meaning that reviews will likely favor operating restrictions and enforcement over infrastructure development and innovation. It includes majority-vote decisionmaking rules that will reduce the risk of stalemated reviews but also increase the risk of recommendations to block the grant of new FCC licenses and to revoke existing ones. Although Executive Order 13913 provides for 120-day initial reviews and 90-day secondary assessments, those timeframes include significant discretion and loopholes that could limit their effectiveness in producing timely outcomes.

DOJ as Chair and “Super-Member”. Executive Order 13913 appoints DOJ as Chair of the Committee—a role that it had long claimed within Team Telecom—and directs it to fund and administer the Committee. It also grants to the Chair the exclusive authority to act, or authorize Committee Members to act, on behalf of the Committee and to designate a Committee Member as a Lead Member for purposes of a particular review and/or mitigation oversight. As noted below, DOJ holds tie-breaking authority in the case of tie votes by Committee Members. The selection of DOJ to chair the Committee will formalize DOJ’s increasing domination of the Team Telecom process and continue what is increasingly an adversarial process.

Timeframes and Deadlines with Little Practical Effect. Executive Order 13913 provides that the Committee must make an initial determination within 120 days after the Chair determines that the applicant's responses to any questions and information requests from the Committee are complete. At the end of the initial review period, the Committee may elect to conduct a secondary assessment, which it must complete within 90 days. Although seemingly helpful, these deadlines could prove meaningless in practice, as Executive Order 13913 grants the Committee significant authority to draw out reviews. First, Executive Order 13913 establishes no cut-off date or time limit for questions and information requests issued by the Committee, meaning that the Committee could continue to issue questions and information requests for months or years before the 120-day period would start to run. Second, it grants the Chair the discretion to determine what constitutes "complete." Third, it authorizes the Committee to extend each time period if it finds responses incomplete. Moreover, additional process steps for Presidential notification and notification to the FCC will likely add additional time to the overall review timeframes.

Clarification of Authority for Retroactive Review of Existing Authorizations. Under existing Team Telecom practice, the Executive Branch has sought to revoke existing authorizations only on grounds of non-compliance with existing Team Telecom mitigation instruments. Executive Order 13913, however, directs the Committee to review existing authorizations "to identify any additional or new risks to national security or law enforcement interests of the United States"—regardless of any preexisting mitigation. Executive Order 13913 provides that a decision to review an existing authorization is to be made by majority vote of the Committee Members. At the conclusion of a review, the Committee may decide to (i) take no action, (ii) recommend that the FCC condition the authorization upon compliance with mitigation conditions, or (iii) recommend that the FCC revoke the license. In the event of a revocation recommendation, the FCC would need to seek public comment and a response from the authorization holder prior to acting on the recommendation.

Limited Improvements in Transparency. Executive Order 13913 requires that the Committee (i) delineate questions and information requests needed to conduct prospective and retroactive reviews, (ii) define standard mitigation measures, and (iii) outline the process for designating a Lead Member in reviews. Its preservation of Committee discretion, however, means that the Committee need not be limited to such standard questions and information requests or standard mitigation measures. It remains to be seen whether the FCC would seek to codify questions, information requests, and standard mitigation in its own rules (as proposed in a long-moribund but never-terminated FCC rulemaking).

Committee Membership. Executive Order 13913 provides that the heads of the three historical Team Telecom member agencies—DOJ and the U.S. Departments of Homeland Security (“DHS”) and Defense (“DOD”)—will be Committee Members, along with any department or agency head or assistant to the President so designated by the President. It also provides that the heads of a host of other Executive Branch agencies (the U.S. Departments of State, the Treasury, and Commerce) and White House advisers (the Director of the Office of Management and Budget, the United States Trade Representative, the Director of National Intelligence, 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) will serve as Committee Advisors. Executive Order 13913 permits the Committee Members and Committee Advisors to act through designated senior executives.

Process and Deadline for Threat Assessment by the Director of National Intelligence (“DNI”). Executive Order 13913 addresses a defect in the existing Team Telecom process by requiring the DNI to provide a timely written assessment of any threat to U.S. national security interests posed by granting the application or maintaining an existing license (soliciting and incorporating the views of the Intelligence Community, as appropriate). The DNI must provide this analysis within the earlier of (i) 30 days from the date on which the Chair deems an applicant’s or licensee’s responses to any questions and requests for information from the Committee as complete or (ii) 30 days from the date on which the Chair requests such an analysis.

Decision Rules. Historically, a disagreement among the Team Telecom agencies or—in the case of a denial or revocation recommendation—the broader group of Team Telecom agencies and economic agencies (the National Telecommunications and Information Administration (“NTIA”), the Office of the U.S. Trade Representative, and the U.S. Department of State) resulted in a stalemate, with some reviews lasting for years—most notoriously, an eight-year review in the case of a carrier license application by China Mobile International (USA) Inc. Executive Order 13913’s new decision rules give the economic agencies and other Committee Advisors a consultative role but vest the Committee Members with ultimate decisionmaking authority. While this arrangement may produce quicker resolutions in contested cases, it also privileges the views of the security agencies in a manner absent in the Team Telecom process.

- **Generally.** Executive Order 13913 directs the Committee to seek consensus on any recommendation authorized by Executive Order 13913 (including a recommendation to take no action on an application, to impose mitigation, to deny an application, or to modify or revoke an authorization). If Committee Members’ designated senior executives cannot reach consensus on a recommendation, the Chair must present the issue to the

Committee Members, who must determine the Committee recommendation by majority vote. If the vote results in a tie, the Chair (i.e., the Attorney General) determines the recommendation.

- **Cases Involving Committee Recommendation for Denial, Non-Standard Mitigation, or Revocation.** Where the Committee recommends denial of an application, conditioning of an authorization on compliance with non-standard mitigation measures, or revocation of an authorization, the Chair must notify the Committee Advisors and provide them with the relevant assessments. Within 21 days of such notification, the Committee Advisors must advise the Chair whether they oppose the recommendation. If any Committee Advisor opposes the recommendation, the senior executives designated by the Committee Members and Committee Advisors must promptly confer to seek a consensus on a recommendation. If they cannot reach consensus, the Chair must present the issue to the Committee Members and the Committee Advisors to resolve any objections (i) within 30 days of the notification by the Chair of a recommendation to deny or to grant an application contingent on compliance with non-standard mitigation, or (ii) within 60 days in the case of a recommendation to modify a license to condition it upon compliance with non-standard mitigation measures or to revoke a license. If the Committee Members and Committee Advisors are unable to reach consensus through the foregoing process, the Committee Members must make a recommendation by majority vote. In the event of a tie, the Chair determines the recommendation.
- **Presidential Notification.** The Chair must notify the President of any recommendation to (i) deny an application, (ii) grant an application contingent on non-standard mitigation measures, (iii) modify a license to condition it upon compliance with non-standard mitigation measures, or (iv) revoke a license that is not reached by consensus. The Chair must make the recommendation within 7 days of the relevant majority vote (whether by the Committee Members or the Committee Members and Committee Advisors). Executive Order 13913 does not specify a process for Presidential ratification, veto, or inaction in response to such a notification. It implies, however, that the President could direct the Executive Branch agencies to act in a particular manner, whether or not consistent with the recommendation.
- **Notification via NTIA.** Except for a no-action recommendation, the Committee Chair must notify the FCC of a recommendation via the NTIA, and NTIA must notify the FCC of the recommendation within 7 days of the notification from the Chair. In cases involving Presidential notification, NTIA must notify the FCC no earlier than 15 days after the date on which the President is notified of the intended action. This additional process for NTIA notifications, which differs from the current Team Telecom practice of direct notification to the FCC of recommendations other than application denial, is merely a formality to recognize NTIA's statutory position as the President's adviser on telecommunications policy. As a Committee Advisor, NTIA in fact has little influence over the Committee's process.

FCC Implementation. Executive Order 13913 does not specify or codify the basis for an FCC referral of a pending application to the Committee—nor could it, given that the FCC is an independent regulatory agency that answers to the U.S. Congress rather than to the President. Historically, the FCC has referred to Team Telecom any application with a new 10-percent-or-greater direct or indirect foreign owner, and we expect that practice to continue. Once the Committee adopts standard questions and information requests and standard mitigation measures, we expect the FCC to revive its 2016 Team Telecom reform rulemaking to consider and potentially codify such provisions in its own rules.

Interplay with CFIUS. Executive Order 13913 does not clarify the relationship between the Committee and the Committee on Foreign Investment in the United States (“CFIUS”), which reviews potential acquisitions of control of, and certain minority investments in, existing U.S. businesses by foreign investors (as well as certain real estate acquisitions by foreign investors). Team Telecom and CFIUS have long conducted concurrent reviews of transactions involving new foreign investment in FCC licensees, a situation that has created needless duplication (as DOJ, DHS, and DOD are both Team Telecom and CFIUS members) and timing problems (as Team Telecom reviews typically last longer than CFIUS reviews). DOJ in particular has followed a policy of refusing to clear a CFIUS review absent completion of any related Team Telecom review. Executive Order 13913 mentions CFIUS only to authorize the sharing with CFIUS of information submitted by applicants and licensees to the Committee.

Absence of Clear Transition Provisions. Executive Order 13913 lacks clear transition provisions and deadlines. It requires that by July 3, 2020, the Committee Members enter into a memorandum of understanding among themselves and with the Director of National Intelligence describing their plan to implement and execute Executive Order 13913, including: (i) delineation of questions and information requests needed to conduct prospective and retroactive reviews, (ii) definition of standard mitigation measures, and (iii) outlining of the process for designating a Lead Member in reviews. It does not specify a date by which those plans must be implemented and executed. It also does not address the treatment of any Team Telecom reviews within the new Committee process or potential changes to existing Team Telecom mitigation instruments.

No Independent Legal Authority. Executive Order 13913 does not establish any independent legal basis for the Committee’s work. Nevertheless, it “does not constrain the discretion of executive departments or agencies, pursuant to any relevant authority not described in this order, to: (i) conduct inquiries with respect to an application or license; (ii) communicate with any applicant, licensee, or other necessary party; or (iii) negotiate, enter into, impose, or enforce contractual provisions with an applicant or licensee.” Of course, neither Team Telecom

nor the Committee has any independent statutory authority to conduct national security and law enforcement reviews of FCC applications, relying instead on leverage over the FCC's processes under the Communications Act of 1934, the Cable Landing License Act of 1921, and Executive Order 10530 and the FCC's historic deference to the Executive Branch on questions of national security, law enforcement, foreign policy, and trade issue.

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For more information on Executive Order 13913 or HWG's national security, foreign investment, and international telecommunications practices, please contact Kent Bressie at +1 202 730 1337 or kbressie@hwglaw.com, or contact the HWG lawyer with whom you regularly work.

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