

# President Trump Signs Executive Order Formalizing “Team Telecom”

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CFIUS; Communications and Media

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On Saturday, April 4, 2020, the White House released the [long-awaited Executive Order \(“EO”\)](#) formalizing the “Team Telecom” Process, titled the “Executive Order on Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector” (“the Committee”). This EO provides, for the first time, formal structure and process to the informal Team Telecom interagency working group for reviewing foreign investment in certain regulated telecommunications and broadcast companies.

While the EO does not appear to significantly alter Team Telecom’s day-to-day workings in most ways, it should provide welcome transparency on the group’s internal processes, as well as certain features that may improve the timeliness of Team Telecom’s reviews. These issues have been a significant cause of public criticism of Team Telecom, including by [Commissioner Mike O’Rielly](#) of the Federal Communications Commission (“FCC”). Commissioner O’Rielly also has voiced [significant support](#) for this EO, as have [FCC Chairman Ajit Pai](#) and [Commissioner Brendan Carr](#). FCC Chairman Pai also has announced that the FCC will update its own rules to reflect the process and timeline outlined in the EO.

We offer below some questions and responses on the new EO.

## 1. What is Team Telecom?

“Team Telecom” is the informal name for an interagency working group composed of representatives from the Departments of Defense (“DOD”), Homeland Security (“DHS”), and Justice (“DOJ”), including the Federal Bureau of Investigation (“FBI”), whose primary mission has been to assess and address national security and law enforcement issues associated with foreign applicants of certain categories of applications to the FCC.

The FCC has long recognized that foreign involvement in the U.S. telecommunications market could implicate significant national security, law enforcement, foreign policy, and foreign trade issues uniquely within the expertise of certain executive branch agencies. Therefore, it has referred certain types of applications—specifically those related to (a) international telecommunications services under Section 214 of the Communications Act of 1934 (“the Communications Act”); (b) broadcast, common carrier, or aeronautical radio station licenses under Section 310 of the Communications Act; and (c) those under the Cable Landing License Act of 1921—to various executive branch agencies (including but not limited to the Team Telecom agencies) and solicited those agencies’ feedback to incorporate into the FCC’s public interest analysis.

Team Telecom was born over two decades ago out of a desire by DOJ and DOD—and then, when it was formed in the early 2000’s, DHS—to more closely coordinate their respective FCC application reviews, akin to the coordination that happens for foreign investment reviews under the Committee on Foreign Investment in the United States (“CFIUS”), and to speak with a single voice in discussions with other executive branch agencies and the FCC on these matters.

The new EO does not refer to “Team Telecom” by name. It is unclear whether the new Committee will continue to go by this informal appellation or adopt a more formal name or acronym. We will refer to it as the Committee throughout this alert.

## **2. Does the EO change the membership of Team Telecom?**

Not fundamentally, but it does empower DOJ. Like Team Telecom, the Committee is comprised of DOJ, DHS, and DOD, with the cabinet secretaries of each agency serving as “Committee Members,” much like with CFIUS. Other U.S. government entities would serve as “Committee Advisors”, including the Secretaries of the Treasury, State, and Commerce; the Administrator of General Services; the Director of National Intelligence (“DNI”); and various White House positions, including the Director of the Office of Management and Budget; the United States Trade Representative (“USTR”); 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; and the Chair of the Council of Economic Advisers. Many of these are entities that also receive FCC referrals, and all are entities with whom the Team Telecom agencies have consulted in the past on various Team Telecom-related matters.

## **3. What is DOJ’s role in the Committee?**

The EO also recognizes the Attorney General as the formal chair of the Committee. While this is consistent with Team Telecom practice—where DOJ has served as informal chair since Team Telecom was founded—the EO also formally enhances DOJ’s role by granting it, for the first time, specific authorities. In addition to basic ministerial and coordinating duties, the EO formally enables DOJ to:

- Designate lead agencies for specific matters;
- Act on behalf of the Committee, unless delegated, including as to communications with the FCC and applicants/licenseses; and
- Break ties on Committee votes (discussed more below).

## **4. Does the EO change the scope of the matters the Committee will review, relative to what has historically been reviewed by Team Telecom?**

Not necessarily. The EO defines the licenses and applications within the Committee’s purview as those referred to the Committee or executive branch agencies by the FCC. Therefore, unless the FCC itself changes the scope of referred matters or pushes back on guidance it receives on non-referred matters, the Committee will likely be primarily reviewing the same types of matters that Team Telecom has reviewed historically. With that said, the EO does clarify that the Committee has authority to recommend that the FCC “revoke a license,” and it also states that the Committee “may review existing licenses to identify any additional or new risks to national security or law enforcement interests.” In combination, these terms seem to make clear that the Committee can revisit prior license authorizations if new facts emerge that implicate national

security or law enforcement interests, and even petition the FCC to revoke the licenses in extreme circumstances.

## **5. How does the EO change the Team Telecom review process?**

The EO provides transparent structure and process for the Committee that has not previously existed for Team Telecom, since it has been an informal working group without an explicit statutory or regulatory charter. While much of the process laid out in the EO instantiates Team Telecom's general internal practices, including that its decisions and recommendations need to be based on a risk-based analysis, there are a few key changes that should help provide more discipline on timelines and more transparency around the process, which have been longtime criticisms of Team Telecom's operations. These changes include explicit deadlines for various parts of the process, as well as formal support from the U.S. Intelligence Community ("IC") through the DNI.

Much as Team Telecom does today with its "triage questions," the EO allows the Committee to ask applicants, licensees, and other related entities questions to inform its risk analysis and to recommend to the FCC that the application be dismissed without prejudice if an applicant is not responsive to the Committee's requests for information.

The process laid out in the EO also contemplates a potential two-phase review for referred matters. The EO indicates the first phase will be completed within 120 days of DOJ, as Committee chair, determining that the applicant's responses to the Committee's questions and information requests are complete. At the completion of this first phase, the Committee can conclude that:

1. the application poses no current risk to U.S. national security or law enforcement interests;
2. the application does pose a risk, but one that can be addressed by "standard mitigation measures," (to be discussed further below); or
3. a further, "secondary assessment" is warranted because the identified risks cannot be addressed by the "standard mitigation measures." This secondary assessment must conclude within 90 days of the Committee determining it is required.

These deadlines are different from—and appear to be more flexible than—CFIUS's timelines, which are prescribed by statute. It appears that the Committee only needs to complete its assessment within these timeframes and not, for example, complete mitigation negotiations or final Committee action, as is the case with CFIUS's statutory deadlines. Similarly, it is unclear how these deadlines would be policed and enforced, except by potential appeal to the White House.

At the conclusion of a review, whether at the end of the primary or secondary phases, the Committee can:

1. Advise the FCC that it has no objection to the FCC granting the license or transfer of a license;
2. Recommend that the FCC deny the application; or

3. Recommend that the FCC condition the grant or transfer of the license on compliance with risk mitigation measures.

As noted above, one of the other major changes, aside from the timelines, is the requirement for threat analysis support from the IC. As with CFIUS, the EO tasks the DNI with producing an IC-coordinated threat assessment for each application or license under review. This assessment is due 30 days after the applicant's responses are deemed complete or 30 days from the date on which DOJ requests such an assessment. Previously, we understand Team Telecom relied on ad hoc support from indigenous intelligence assets at its member agencies, which given competing priorities and the lack of mandate for support, were inconsistent in the timing and level of support they could provide, which inevitably impacted the timing of Team Telecom's reviews. Consistent, high-level support from the DNI should remove one of the major sources of delays in the Team Telecom review process.

#### **6. How does the EO change Team Telecom decision-making processes?**

Historically, Team Telecom has operated on a loose consensus model; if an agency was to take an action on behalf of Team Telecom, all of the agencies would typically have to agree, or at least not object, to the action being taken. Additionally, where a matter implicated broader national security and telecommunications policy issues, the agencies generally sought to reach consensus among the wider executive branch interagency before acting, for fear of potentially giving the FCC a divided recommendation on a matter.

By comparison, while the EO indicates that consensus decision making is the goal, it explicitly contemplates a majority vote by the Committee Members where consensus cannot be reached, including with respect to both whether to review an existing license and the actual recommendation to be made to the FCC on any given review.

In addition, in order for the Committee to recommend denial or revocation of a license, or the conditioning of a new or existing license on "non-standard mitigation," the Committee Advisors must also be consulted and heard. Again, while the goal is consensus, and the EO lays out a process for trying to reach consensus, the ultimate decision on these actions still lies with a majority vote of the Committee Members.

#### **7. How will risk mitigation measures differ under the regime laid out in the EO versus historical Team Telecom practice?**

The risk mitigation approach taken by the Committee likely will not differ in substance from Team Telecom's practices, but the EO does provide some further definition around types of mitigation. Specifically, the EO identifies two categories of mitigation: "standard mitigation" and "non-standard mitigation," although it does not define either term. The Committee Member agencies may pursue "standard mitigation" without consulting with the Committee Advisors; as noted above, such consultations are required if "non-standard mitigation" is being sought.

While we expect what constitutes each type of mitigation to be laid out in a required Memorandum of Understanding among the Committee Members (and the DNI), it is possible that the definitions of those categories will not be made public. Nevertheless, based on the practice of Team Telecom over the last several years, we believe that "standard mitigation" will likely include terms that have been used previously in a Team Telecom mitigation agreement. "Non-standard mitigation," in turn, will likely mean any new term that has not been used

previously. Moreover, because Team Telecom agreements are part of the public FCC proceedings, it should be possible for applicants to discern standard mitigation from non-standard mitigation terms. As a general matter, these will include, for example, requirements for a law enforcement point of contact, to keep infrastructure that handles U.S. domestic communications in the United States, not to route U.S. domestic communications outside the United States except as necessary for least-cost routing practices, and the provision of lists of principal equipment in the applicant's/licensee's infrastructure.

**8. How will the authorities under the EO interact with other related national security regulatory regimes, like the Information and Communications Technology and Services (“ICTS”) Supply Chain Executive Order?**

While this EO and the ICTS Supply Chain EO (for more information on that EO and its implementing regulations, please see our previous analysis [here](#) and [here](#)) emerged from the same initiative to update and expand the executive branch's ability to address telecommunications-related national security risks, they address different dimensions of the risk and are different in scope.

Fundamentally, the ICTS Supply Chain EO is directed at addressing risks that arise from procurement and trade in goods and services, whereas the Team Telecom process is focused around investment activity that triggers requirements for FCC authorizations or changes in FCC licenses. The two share a common history insofar as the issues identified in the ICTS Supply Chain EO emerged from perceived gaps in Team Telecom's authority, and eventually expanded in scope beyond just telecommunications equipment. Specifically, through the Team Telecom process, the agencies have been able to address certain supply chain risks, e.g., by requiring parties to get agency approval for certain principal equipment acquisitions, but because of the FCC referral process on which Team Telecom is based, they can only do so for the foreign parties that come before it. Recognizing that they could not readily review or regulate the acquisition of potentially problematic telecommunications equipment by U.S. telecommunications service providers, several years ago the Team Telecom agencies initiated an interagency process to address supply chain risks more broadly in the telecommunications sector. That process ultimately expanded to include risks to infrastructure arising from information and communications technologies and services, resulting in last year's ICTS Supply Chain EO.

At the same time that they commenced the interagency discussion on supply chain, the Team Telecom agencies also commenced a process to try to formalize the Team Telecom authorities, leading to the most recent EO. In theory, both orders ultimately will serve the objective of addressing supply chain risks, and to the extent that a party is subject to supply chain requirements through one, it may help address risks and concerns of the other, but it is too early to say exactly how they will line up.

**9. How does this Committee relate to CFIUS? Is it no longer necessary to file telecom transactions with CFIUS?**

For the near term, at least, we do not believe the formalization of the Team Telecom process through the Committee will alter the dynamic for telecommunications transactions that also are subject to the authorities of CFIUS. CFIUS should continue to be the U.S. government's broadest authority to review foreign investments to determine their impact on national security, and to mitigate any transaction that threatens to impair national security—including law

enforcement interests. Moreover, the respective staff working on CFIUS and Team Telecom matters at DOJ, DHS, and DOD have significant overlap. By formalizing the DNI input to the Team Telecom process—which is already a requirement for CFIUS—and by installing timelines in the Team Telecom process, the EO may help provide greater alignment between the two review processes, even though the timelines are not precisely the same. Equally, the EO would still allow for slight divergences in outcomes between the two processes: it has long been the case that if a specific transaction does not threaten to impair national security—and, therefore, is approved by CFIUS without conditions—but the Team Telecom agencies nevertheless believe it implicates national security and law enforcement interests, the Team Telecom agencies could seek mitigation commitments outside of CFIUS’s authorities. Thus, there are a number of transactions that are not subject to CFIUS mitigation, but are subject to Team Telecom mitigation. The EO would seem to allow this practice to continue.

The longer-term questions are really whether the formalization of a Committee for reviewing telecommunications outside of the CFIUS structure and with DOJ as chair will (i) alter the dynamic within CFIUS by effectively lessening the authority of the Department of the Treasury, as chair of CFIUS, when a transaction involves the parallel authorities of the Committee; (ii) drive towards more conservative outcomes in telecommunications transactions by requiring that only a majority control the Committee, rather than the historical consensus of Team Telecom and the required consensus of CFIUS; and (iii) in extraordinary cases, result in any competing recommendations to the President from different committees under the guiding hand of different chairs.

We expect that the agencies themselves would suggest that the EO is not intended to have these effects; nevertheless, by formalizing Team Telecom under the Committee structure, it seems possible, if not likely, to us that over time CFIUS’s hand—and the voice of agencies such as the Departments of Treasury, Commerce, and State and USTR—may be weakened in the review of telecommunications transactions.

#### **10. Will there be any changes to the FCC’s own processes as a result of the EO?**

FCC Chairman Pai, and his fellow Republican Commissioners, welcomed the EO, with Chairman Pai publicly stating that he “applaud[s] the President for 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.” Chairman Pai also suggested that the FCC would make updates to its own rules to reflect the process outlined in the EO, and in general, it appears that the FCC expects the new EO to improve communication and coordination between it and the national security agencies. The EO’s release comes at a time when the FCC generally has been more inclined to involve itself directly in national security matters affecting the telecommunications industry, as Chairman Pai and Commissioner Carr also pointed out in their statements supporting the release of the EO.

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