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Report from Washington

FCC Announces Proposed Rules to Streamline Review of Foreign Investments in the Telecommunications Industry

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On June 24, 2016, the Federal Communications Commission ("FCC") voted unanimously to release a Notice of Public Rulemaking ("NPRM") in an effort to clarify and streamline the review process for foreign investment in U.S. telecommunications businesses. Presently, when foreign investors seek authorization for such investments, the FCC refrains from making a decision until an ad hoc group of Executive Branch agencies—known colloquially as "Team Telecom"—determines if the proposed investment poses national security, law enforcement, foreign policy, or trade policy concerns. In contrast to other U.S. national security reviews, Team Telecom screening is not a formal administrative process governed by binding rules and regulations. This often makes it difficult to predict what information the different Team Telecom agencies will ask parties to provide or how long any particular Team Telecom review will take. By identifying the information that applicants must provide at the outset, and by setting timelines for the agencies to adhere to, the FCC's proposed changes may lead to more transparent and faster Team Telecom reviews, helping to bring the FCC's approval process in line with the other U.S. national security review processes, such as reviews conducted by the Committee on Foreign Investment in the United States ("CFIUS").

Current State of Team Telecom Review

The Communications Act of 1934, as amended, tasks the FCC with determining whether investments in, or control over, U.S. telecommunications businesses would be in the "public interest." To determine if transactions involving foreign investors would be in the public interest, the FCC seeks the view of a number of different Executive Branch agencies as to whether the proposed deal would create concerns regarding national security, law enforcement, foreign policy, or trade policy. This means that FCC applications involving foreign investors are often subject to a long and opaque review process involving any of the Federal Bureau of Investigation, the United States Trade Representative, the Office of Science and Technology Policy, and the Departments of Defense, Homeland Security, Commerce, State, and Justice. FCC Chairman Tom Wheeler recently stated that the average Team Telecom review takes 250 days—far longer than the 75-day review and investigation period by CFIUS—and applicants are often unsure when decisions will be made.

Key Proposals in the New Rules

The NPRM marks the latest development in a two-year long effort to improve Team Telecom reviews, and it builds off proposals submitted to the FCC by the National Telecommunications and Information Administration ("NTIA") in May 2015. At a high level, the NPRM proposes three major reforms:

- Threshold Review. *Before* referring applications to Team Telecom, the NPRM contemplates that FCC staff will perform a threshold review based on answers to standardized questions regarding ownership, network operations, and other related matters, although substantive review will remain with Team Telecom.
- Certifications. *Before* referring applications to Team Telecom, the NPRM contemplates that applicants will agree to certain mitigation provisions at the outset of the review process, such as a commitment to "make communications to, from, or within the United States, as well as records thereof, available in a form and location that permits them to be subject to lawful request or valid legal process under U.S. law, for services covered under the requested Commission license or authorization."
- 90-Day Timeline. The NPRM further proposes a 90-day timeline for Team Telecom's review, with an additional 90-day extension available in "rare circumstances" where the reviewing agencies commit to providing status updates every 30 days and demonstrate that issues are sufficiently complex as to warrant an extension.

Implications for Foreign Investment

Each of the three major reforms in the NPRM has the potential to increase certainty and hasten the review process. Adopting a threshold review based on responses to standardized questions would add transparency and could significantly reduce the review timetable, but requiring investors to provide the FCC with detailed and sensitive information at the outset raises confidentiality concerns. Under the current review process, applicants provide information directly to Team Telecom as requested in the context of the particular transaction. By standardizing initial disclosures and conducting threshold review at the FCC, the FCC's proposal may require some applicants to provide more information than under the existing process, which may raise confidentiality concerns. As noted by the FCC in the NPRM:

> We recognize that the responses to some of these threshold questions may contain confidential commercial information. The Commission's rules provide a mechanism for requesting confidential treatment of such information. Under these rules, such information will be accorded confidential treatment until the Commission acts on the confidentiality request and all subsequent agency review and judicial stay proceedings have been exhausted. To the extent the information qualifies as trade secrets or confidential commercial or financial information that is exempt from disclosure under the Freedom of Information Act, our rules require a 'persuasive showing' for public release of the information, showing among other factors that the information is relevant to a public interest issue before the Commission.

Without a mechanism *automatically* affording confidential treatment to information provided in response to the standardized questions, applicants may be wary of turning over sensitive corporate or personal information. By contrast, information submitted to CFIUS is automatically accorded confidential treatment.

Likewise, the FCC's certification proposals should also help to add certainty and reduce the timeline for Team Telecom reviews. Indeed, according to the FCC, the certification proposal would have eliminated the need for more than half of the mitigation agreements that were negotiated last year as part of the approval process. This could significantly reduce application costs and burdens. However, as Commissioner Pai notes in his statement accompanying the NPRM, the FCC's certification proposals as presently drafted could extend federal jurisdiction to communications that are not normally subject to U.S. government process. In addition, requiring *all* applicants to make the certification as a condition of approval may sweep too broadly, imposing new obligations on applicants that are not presently subject to Team Telecom review.

Lastly, requiring Team Telecom to finish their reviews within a 90-day time frame would be a huge improvement over the 250 days that it takes for the average review today, even accounting for an additional 90-day extension. Consistent with the FCC's goals, requiring Team Telecom to support any request for an extension by showing that the underlying issues are unusually complex, and then requiring Team Telecom to provide status updates every 30 days, should help ensure that such extensions are restricted to "rare circumstances."

To learn more about the FCC's foreign investment review process and how to navigate it effectively, including in connection with CFIUS reviews, please contact any of the following:

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