

ANALYSIS: HOW TEAM TELECOM CAN CONDUCT FASTER REVIEWS IN NO-RISK CASES

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April 2023

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ANALYSIS: HOW TEAM TELECOM CAN CONDUCT FASTER REVIEWS IN NO-RISK CASES

A common concern of telecommunications companies, their investors, and their counsel is that the Team Telecom process is unduly long—especially compared with the analogous process for the Committee on Foreign Investment in the United States (CFIUS), which tends to be shorter.

This concern was often directed my way both during my time running the office at the US Department of Justice (DOJ) that handles both Team Telecom and CFIUS and during my past year in private practice when representing clients whose ability to get deals done has been hampered by the Team Telecom process.

In this report, I propose select targeted reforms to the Team Telecom process that, if adopted by the government, would streamline the procedure for transactions that are unlikely to pose a risk to national security and law enforcement interests while simultaneously preserving the government's ability to fully protect those interests.

The need to streamline the Team Telecom process is likely about to become even more urgent. On March 30, 2023, the Federal Communications Commission (FCC) issued a notice of proposed rulemaking (NPRM) that, among other things, seeks comments on potential new rules that would require all holders of international Communications Act Section 214 authorizations—regardless of whether such holders currently have foreign ownership—to undergo a periodic review and renewal process conducted by the FCC in close consultation with Team Telecom.

It seems likely the NPRM will receive support from the FCC commissioners, and such rules would presumably lead to a significant increase in Team Telecom reviews as well as increased deal risk as licensees and investors will face heightened regulatory uncertainty not just at the application stage, but also in perpetuity.

This would create additional burdens for both the government and industry. Therefore, the time is ripe to discuss whether these additional burdens could be offset, at least to some degree, by separate efforts to streamline the Team Telecom process where possible.

BACKGROUND ON TEAM TELECOM

The official name of Team Telecom, seldom used either in or outside of the government, is the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (CAFPUSTSS). Team Telecom's mission is to make recommendations to the FCC on the disposition of telecommunications licenses that involve foreign ownership above a certain threshold. The committee is chaired by the US attorney general with other executive branch agencies participating as committee members and advisers.

Team Telecom has existed for many years as an ad hoc group, but was formally established in law by Executive Order 13913 in April 2020. I was closely involved in the drafting and implementation of that executive order, and I modeled the executive order in large part on the CFIUS process due to both processes using a similar methodology to carry out a similar mission of evaluating and resolving national security risk posed by foreign investment in the United States.

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Prior to Executive Order 13913, there was no mandatory timeline for Team Telecom review, and some matters—most notably [the recommendation](#) that the FCC deny a license to China Mobile—took many years to process. Now, Team Telecom operates under a 120-day clock to review most matters, with an additional 90-day clock for cases that require further scrutiny. Although a significant improvement, this is still lengthier than the CFIUS process, which generally involves a 45-day review period, followed by a second 45-day investigation period when warranted.

COMPARING TEAM TELECOM TO CFIUS

When advising clients, my colleagues and I generally note that where a transaction requires both CFIUS and Team Telecom filings, the parties to the transaction should anticipate that CFIUS approval will likely issue before that of Team Telecom. Companies are often frustrated by the longer Team Telecom review process and its effect on deal timing but, in fairness to Team Telecom, evaluating its timelines through the lens of the CFIUS timelines is something of an apples-to-oranges comparison.

To start, the 90-day CFIUS clock is not necessarily a ceiling since CFIUS notices are frequently withdrawn and refiled in order to restart the clock, driven by the need of CFIUS and/or the parties for more time. In 2021, the most recent year for which metrics are publicly available, CFIUS utilized the withdraw-and-refile mechanism for 63 of the 272 joint voluntary notices (JVNs) filed—almost a quarter of cases.

When a CFIUS case is withdrawn and refiled, CFIUS might clear the transaction early in the refiling period, but it might also take the full 90 days, resulting in a 180-day review period. Moreover, CFIUS cases can be withdrawn and refiled more than once, leading to even longer review periods—as a recent example, the March 2023 CFIUS clearance of the acquisition of F-Star Therapeutics by Chinese acquirer Sino Pharmaceuticals was withdrawn and refiled not once, but twice.

A second reason the Team Telecom and CFIUS timelines are not entirely analogous is that Team Telecom very seldom uses its secondary review period, meaning most cases get processed on a 120-day clock rather than the 210-day clock available for especially complicated matters. By contrast, CFIUS cleared about half of its cases in 2021 in the 45-day review period, with the other half extending into the additional 45-day investigation period.

It should also be noted that CFIUS may add another 15 days to the clock in extraordinary circumstances, and the CFIUS statute separately provides for another 15-day period to be added to the clock when CFIUS refers a matter to the president for potential prohibition.

Another difference between Team Telecom and CFIUS that frustrates FCC applicants is that Team Telecom does not formally initiate the review and start the 120-day clock until it receives complete responses to the “triage questions” it sends applicants upon receiving an FCC referral, which means that, in practice, a 120-day review often takes closer to six to eight months. By contrast, under CFIUS’s regulations it must review a draft JVN and provide any comments within 10 days, and, once the final JVN is filed, CFIUS has a maximum of 10 days to accept the case for filing and start the clock.

Again, however, this reflects the inherent differences in how Team Telecom and CFIUS are situated. CFIUS can start the clock relatively quickly because most, if not all, of the information it requires from parties at the outset is contained in the JVN form, and when a draft JVN is submitted CFIUS typically does not request that significant additional information be included in the final filing.

The information required by Team Telecom, however, goes beyond what is filed with the FCC at the time of application, necessitating Team Telecom to essentially start at square one with applicants when their cases are referred to Team Telecom by the FCC.

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A pending FCC rulemaking process would address this issue, at least in part, by replacing the triage questions with standard questions that applicants would provide to the FCC at the time of the application, allowing for the information to be provided to Team Telecom concurrently with the FCC referral.

PROPOSALS FOR STREAMLINING TEAM TELECOM

Even when looked at in the proper context, the reality remains that Team Telecom is generally a much longer pole in the tent than CFIUS. While that may always to some extent be a reality that companies need to anticipate, there are two specific reforms that Team Telecom could make to its process to streamline the review for certain transactions that are unlikely to implicate national security or law enforcement issues. Moreover, both of these reforms draw on flexibilities found in the CFIUS process, so, in that respect, they are tried and tested methods that the government has already determined strike an appropriate balance between protecting national security and maintaining an open investment climate.

Reform #1: Create a New Team Telecom Declaration Process

The first potential reform would be Team Telecom creating a new mechanism for expedited review that would be similar to CFIUS's declaration process. Prior to 2018, all transactions with CFIUS were subject to the same timeline and format for review. The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), however, created a new streamlined process whereby parties could elect to file a short-form declaration rather than a full JVN. Whereas JVN are handled on the 90-day clock discussed above, declarations are processed on a 30-day clock. Additionally, although FIRRMA instituted new filing fees for JVN, there are no filing fees for declarations.

Of course, there is a catch: when parties file a JVN, unless the transaction gets blocked, CFIUS will clear the case and thereby provide a safe harbor that precludes any future CFIUS review of that transaction. When parties file a declaration, however, while CFIUS can—and does—provide the same sort of clearance and safe harbors in many instances, it also has other options. First, if CFIUS determines that a full JVN is warranted in light of a potential national security risk, CFIUS can request or require that the parties then file a full JVN—in which case the parties would wind up with an even longer timeline when the 30-day declaration process is added to the regular 90-day JVN process.

Second, CFIUS can simply conclude its review of a declaration with no action (sometimes referred to as the “CFIUS shrug”), meaning it neither asks for a full filing nor provides a safe harbor by clearing the transaction. In that event, the parties are in a gray area where they have some indication that CFIUS has not identified significant risk with the transaction but, because there is no safe harbor, legally CFIUS could still pull the transaction into review at any point in the future. In that scenario the parties will need to decide whether to eliminate any CFIUS risk by filing a JVN or forgo the JVN filing because they are comfortable going to closing without a CFIUS safe harbor, based on the CFIUS shrug.

CFIUS reviewed a total of 164 declarations in 2021. Of those, 120 received clearance, meaning almost 75% of the declarations received a safe harbor without the expense and time of filing a full JVN. For the remaining cases, there were 30 instances in which CFIUS requested a full JVN filing, 12 instances in which CFIUS provided an “unable to conclude action” determination, and two instances in which CFIUS rejected the filing.

When advising clients on CFIUS matters, if the transaction appears to not present significant national security issues, I always discuss a declaration as an option to consider. Because private parties do not have complete visibility into how the government will assess risk, whether to file a declaration or a JVN—or whether to not file anything at all, if a filing is not mandatory—is a fact-specific decision, and will also depend on the risk tolerance of the client.

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In the Team Telecom context, however, even if a deal similarly seems to present no significant national security or law enforcement issues, the parties have no choice but to go through the full 120-day Team Telecom review, which, as noted above, generally translates in reality to a review process spanning six to eight months.

For all of these reasons, Team Telecom could establish a similar declaration process, and likely would not even need FCC agreement to do so. Imagine a CFIUS-like process whereby parties can request accelerated review by Team Telecom—say, 30 days as with CFIUS—and at the end of that period Team Telecom does one of three things: (1) recommends that the FCC approve the license; (2) determines that it needs to conduct a full review and starts the 120-day clock at that point; or (3) concludes its review with no action. That third option—we can call it the “Team Telecom shrug”—leads in turn to my next proposal.

Reform #2: Make Some Team Telecom Reviews Voluntary

A “Team Telecom shrug” option only makes sense in a world where Team Telecom review is not mandatory. Right now, for the types of FCC applications that get referred to Team Telecom, the FCC simply will not act on the application until it receives a Team Telecom recommendation.

However, not all cases are created equal and, although applicants have fewer tools than the government to assess national security risk, there are certainly many applications that involve foreign ownership but do not actually present national security or law enforcement issues, in which case a review is not a good use of government resources that could be better spent focusing on higher-risk transactions.

Therefore, a second potential reform would be the FCC and Team Telecom moving to a system wherein some reviews are voluntary. Until 2018, CFIUS filing was a completely voluntary process. FIRRMA added a new mandatory filing requirement for a relatively narrow slice of deals—specifically, where the target US business is involved in critical technology, or where the foreign acquirer has substantial foreign government investment—but the majority of filings still remain voluntary. For example, of the 164 declarations filed with CFIUS in 2021, only 47—or a little under 30%—were the result of mandatory filing requirements.

By all means, the FCC and Team Telecom could—and probably should—identify types of cases for which Team Telecom review would remain mandatory. For example, transactions involving critical infrastructure (e.g., submarine cables or telecommunications networks serving military installations) and transactions with investors from certain high-threat countries could require mandatory Team Telecom review. However, for other transactions the parties could be given discretion on whether to seek Team Telecom review.

To understand how this would work in practice, it is important to note a significant difference between CFIUS and Team Telecom. As noted above, once a deal receives CFIUS clearance it has a safe harbor and cannot be re-reviewed, whereas if parties elect not to make a voluntary CFIUS filing they can be pulled into CFIUS at any time in the future—at which point CFIUS can implement remedies including mitigation measures and even potentially divestment.

With Team Telecom, however, there is no safe harbor. Under Section 6 of Executive Order 13913, Team Telecom can pull a license back into a new review, based on changed circumstances or other factors, even if Team Telecom has previously advised the FCC that the license did not present risk. For this reason, the new FCC effort to require periodic license reviews and renewals is arguably redundant with an ability the government already has by virtue of Section 6, at least with respect to licenses involving foreign ownership.

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Regardless of whether the government relies on Section 6 or on new FCC rules, an important question is what companies would stand to gain from a voluntary Team Telecom filing if they do not receive a safe harbor as a result. It seems fair to say that, even without a safe harbor, if a company voluntarily files and undergoes Team Telecom review, the chances of being pulled back into review postclosing are far lower than if Team Telecom never saw the transaction in the first place. Even if the new FCC NPRM eventually results in periodic reviews and renewals of licenses, companies that voluntarily undergo Team Telecom review could be given a longer period before their license is subject to re-review.

In addition, absent major changes in circumstances between the time of a voluntary Team Telecom review and time of a re-review, Team Telecom would presumably be unlikely to recommend radical changes with respect to a license, and as such a voluntary review would still provide increased business certainty preclosing.

For transactions not voluntarily filed with Team Telecom, the chances of getting pulled in for review postclosing would depend—as with CFIUS—on whether the parties and their counsel were accurate in predicting that Team Telecom would not identify national security or law enforcement issues associated with the transaction. In the CFIUS context, CFIUS uses its robust “non-notified” process to seek out deals that were not noticed to the committee and reach out to the parties postclosing if CFIUS assesses the potential for a national security risk.

While CFIUS conducted non-notified outreach with respect to 135 transactions in 2021, the vast majority of such transactions wound up being catch-and-release situations where, after gathering information from the parties, CFIUS did not require a filing. In only eight of those 135 transactions did CFIUS seek a filing, but it is also important to note that getting pulled in through the non-notified process does not necessarily mean that CFIUS will ultimately have a problem with the transaction. CFIUS could still clear the deal outright after its review or, if not, clear the deal contingent on mitigation measures. The worst-case scenario would be a divestment order, but those remain rare.

Similarly, Team Telecom could run its own non-notified program, which would be vastly easier than in CFIUS, because while CFIUS needs to use various investigative tools to search for transactions that are not notified, the list of FCC applications is readily available. If a licensee were to elect to not make a voluntary filing, but Team Telecom thought the transaction could pose risk, Team Telecom could engage with the licenseholder to gather more information and then, if warranted, use Section 6 to conduct a review postclosing.

But there would also likely be a class of no-risk transactions for which Team Telecom itself would see no value in conducting a review, and those are the transactions for which it could serve the interests of both the government and industry to not needlessly subject such transactions to a lengthy review process.

One complication with the notion of voluntary Team Telecom filings is that it presupposes that there is, in fact, a substantial universe of applications for which Team Telecom would be comfortable forgoing review, but the reality is that Team Telecom currently mitigates many cases that the industry might view as posing no national security or law enforcement issues.

Although Team Telecom often requires only what it calls “standard” mitigation measures, which are intended to be relatively light-touch, even the standard mitigation measures can impose significant compliance costs on companies subject to a mitigation agreement.

The fact that relatively few transactions get through Team Telecom without mitigation is in stark contrast to CFIUS, which in 2021 mitigated only 11% of cases for which JVN's were submitted. This disparity is in large part due to the fact that by law CFIUS can only mitigate risk arising from a transaction—i.e., risk caused by the new foreign ownership—whereas Team Telecom does not have that limitation and can therefore mitigate even preexisting risk.

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For that reason, many of Team Telecom’s standard mitigation measures have no clear nexus to the proposed foreign ownership—for instance, requiring vetting of non-US citizens with access to networks and data and barring certain Chinese equipment from a company’s network. Such mitigation measures may indeed promote national security and law enforcement interests, but in a generalized way that may have nothing to do with the foreign ownership.

For that reason, perhaps the proposal to make certain Team Telecom cases voluntary needs to be accompanied by a corollary proposal that Team Telecom mitigation be focused only on national security and law enforcement risk arising from the transaction itself—again taking a page from CFIUS—rather than attempting to mitigate preexisting risk that is not affected by the foreign investment.

For the same reason, companies will be wary of the significant mission creep contained in the new FCC NPRM, which for the first time would require Team Telecom to review international Section 214 licenses with no foreign investment at all. As Team Telecom’s formal name reflects, the Committee for the Assessment of *Foreign Participation* in the United States Telecommunications Services Sector was intended to focus—similar to CFIUS—on risk presented by *foreign participation*.

NEXT STEPS

Will DOJ and the other members of Team Telecom consider the ideas I have described above? Even if they do, regulatory change often comes slowly, if at all. It is notable, though, that Executive Order 13913 itself requires periodic reassessment of the Team Telecom process and how it is functioning.

Specifically, Section 11(d) states: “The Chair, in coordination with the Committee Members and the Committee Advisors, shall review the implementation of this order and provide a report to the President on an annual basis that identifies recommendations for relevant policy, administrative, or legislative proposals.”

There is no mechanism for the public to provide such recommendations, but there is also no requirement that the report to the president be a government echo chamber that does not take outside views into account. Indeed, in other contexts DOJ works with advisory committees to address policy issues.

As one recent and notable example, in September 2022 Deputy Attorney General (DAG) Lisa Monaco issued a memorandum on further revisions to corporate criminal enforcement policies following discussions with the DOJ’s Corporate Crime Advisory Group. In that memorandum, DAG Monaco highlighted the “helpful input from a broad cross-section of individuals and entities with relevant expertise and representing diverse perspectives.” Team Telecom could benefit from seeking similar outside input, and this may be another idea that DOJ and its interagency partners wish to consider.

Even absent that sort of formal advisory group, however, nothing prevents any interested party from sending a letter to DOJ with thoughtful and well-reasoned suggestions for further reform. At its discretion, DOJ and its interagency partners could choose to include such recommendations in its annual report to the president. If Team Telecom agreed that an outside recommendation had merit, it could endorse that recommendation despite it originating outside of government.

Frankly, even if Team Telecom disagreed with an outside recommendation, it might be a good-government measure to nonetheless include that recommendation in the report to the president, so long as the recommendation is not frivolous, and naturally Team Telecom could accompany that with an explanation of why it disagreed with the outside recommendation.

Another option is for the FCC—either on its own volition or as a result of comments filed in response to the March 30 NPRM—to use that rulemaking process to implement the reforms discussed herein. When

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the FCC conducts a cost-benefit analysis of new rules, the cost of subjecting existing licenses to periodic review and renewal could be at least partially offset if the FCC simultaneously reduces the burden on applicants by streamlining the Team Telecom process in other ways.

It is yet to be seen what will happen next. Executive Order 13913 is still fairly new, and Team Telecom as a formal interagency committee is still in its relative infancy compared to long-established committees such as CFIUS. CFIUS itself evolved over many years, and FIRRMA was only the most recent in a series of reforms.

As the government reflects on Team Telecom's continuing evolution, perhaps it will agree to take a page from the CFIUS playbook by tweaking the Team Telecom process to make filings voluntary in certain cases and providing a declaration-like process for streamlined review where appropriate. Such changes would be fully protective of national security, but would also avoid undue regulatory burdens for FCC license applicants whose transactions pose no risk.

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