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Foreign Investment Alert¹

Negotiable Hostilities - Part II: Telecom Deals with Foreign Investors in the Current Administration - Upcoming Webinar

June 15, 2020

I. INTRODUCTION

In a prior alert² and accompanying webinar,³ we discussed whether Russian investment in U.S. wireless and other telecom markets in the current geopolitical hostile climate is doable.

The answer is yes – but it just became harder: and not just for Russia.⁴

Previously, we discussed the respective sanction and counter-sanction regimes imposed by U.S. and other western nations on Russia (and by Russia on those nations in response) as a result of hostilities among Russia, the Crimea, and the Ukraine. We also discussed the escalating U.S. legislative and regulatory barriers on foreign investment, including the Foreign Investment Risk Review Modernization Act of 2018.⁵

The escalation continues, having expanded to a series of executive orders by the U.S. administration, specifically focused on securing the domestic telecommunications and wireless infrastructure and supply chain, recently broadened to include foreign investors generally – with

¹ While accurate to the best of our knowledge, this discussion is for tutorial purposes only, is neither a legal opinion nor legal advice. Please contact us if you have any questions regarding this disclaimer.

² Sapronov & Associates, P.C. Client Alert, “*Negotiable Hostilities: Doing Business with Russia in the Sanctions Era*,” available at wstelecomlaw.com.

³ The webinar was sponsored by Thomson Reuters and moderated by Walt Sapronov, Esq. and Paul Kouroupas (Sapronov & Associates, P.C.). Speakers include Daniel B. Pickard, Esq. (Wiley Rein, LLP), James Kevin Wholey, Esq. (Phillips Lytle, LLP), Alla Naglis, Esq. (King & Spalding), and Maxim Khlopotin, Esq. (Sapronov & Associates, P.C.). A video broadcast of the webinar is available for purchase at http://westlegaledcenter.com/program_guide/course_detail.jsf?videoCourseId=100267557&ADMIN_PREVIEW=true.

⁴ <https://www.rferl.org/a/russia-sanctions-timeline/29477179.html>.

⁵ This legislation (“FIRMA”) has expanded the scope and jurisdiction of the Committee on Foreign Investment in the U.S. (CFIUS) in review of foreign investment transactions raising national security concerns.

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particular emphasis on China. The heightened regulation of foreign entry and investment in U.S. telecom and wireless markets is the topic of this alert. It will also be the focus of our upcoming webinar. Hosted by Thomson Reuters, the panel will consist of highly experienced regulatory and transactional attorneys (including the former General Counsel for the U.S. National Security Agency as well as our Moscow-based Counsel representing foreign investors). A brief introduction to the topic and additional webinar details are set forth below.

II. PROTECTING THE U.S. DIGITAL INFRASTRUCTURE: A NEW REGULATORY FRAMEWORK

Compared to previous administrations, there is considerably more governmental scrutiny today of foreign investment in U.S. telecom markets. Federal regulatory review is now triggered at a low threshold of would-be foreign control or ownership and undertaken from the standpoint of national security. The new framework is the recent expansion of “Team Telecom” – an informal multi-agency review team historically brought in under the auspices of the FCC in the exercise of its statutory licensing authority over telecommunications carriers and wireless spectrum - to a new Committee for the Assessment of Foreign Participation in the U.S. Telecommunications Services Sector - one including the U.S. Attorney General, the Secretaries of Defense and Homeland Security and other senior officials.⁶ Others include the Commerce Department’s recently proposed rule for national review of foreign acquisition of telecommunications and other technology supply chain components, as well as new regulations expanding the scope of The Committee on Foreign Investment in the United States (“CFIUS”) review.

These expanded regulations dovetail with a longstanding suspicion held by U.S. lawmakers of Huawei Communications, a Chinese company and one of the world’s largest wireless equipment and handset manufacturers, widely viewed to be under control of the People’s Republic of China and thus a national security threat.⁷

Finally, there is a confluence of these heightened security concerns and the anticipated arrival of the wireless technology known as “5-G,”⁸ expected to generate some \$325 Billion in worldwide revenues. At least some of the U.S. buildout of 5-G will be financed by the Universal Service Fund (“USF”) (a/k/a the “Connect America Fund” or “CAF”). The fund is comprised of revenue “contributions” made by carriers and other providers of telecommunications and is disbursed to those carriers “eligible” to receive them to help cover their network buildout costs (e.g., in rural areas). The FCC has expressly banned the use of USF funds by eligible telecommunications carriers for equipment furnished by Huawei (and ZTE) on the grounds that those entities pose national security concerns. Huawei, to repeat, is one of the largest suppliers

⁶ A brief overview of this Committee (“Foreign Assessment Committee”) may be found at Attachment “A” to this alert.

⁷ Huawei forcefully denies these allegations and has responded with legal action against the U.S., arguing that the regulatory scrutiny is an unconstitutional Bill of Attainder. See, <https://www.wsj.com/articles/huawei-founder-ren-zhengfei-takes-off-the-gloves-in-fight-against-u-s-11591416028>. See our Firm publication, *Investment in Wireless Infrastructure*, available upon request.

⁸ Weiss, David interview (May 22, 2020), “What is 5G? Understanding the Growth and Complexity of the New Era w/ Walt Saponov, Esq.,” available at <https://www.youtube.com/watch?v=WBamix6mM9Q&t=58s>.

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of 5-G infrastructure, and much of its equipment is embedded in U.S. networks (especially rural ones).

Against this backdrop, what opportunities – if any – are there for foreign investors in the U.S. telecom sector in the 5-G era? What are some of the key regulatory issues for those investors bold enough to enter it? And how does one craft deal protection measures, especially given the possibilities of retroactive license revocation and other changes of law that national security concerns might portend for the telecommunications sector?

III. FOREIGN TELECOM INVESTMENT WEBINAR

This will be part of the discussion of our upcoming webinar. Hosted by Thomson Reuters, the speakers will address the above-summarized, expanded regulation of foreign entry into U.S. telecommunications markets with emphasis on national security and protection of the U.S. digital supply chain. Topics will include the practical implications (including telecom investment transaction delays and retroactive foreign license revocation) of the expansion of Team Telecom to the Foreign Assessment Committee. The panel will also discuss the implications of the Commerce Department's proposed ICTS Supply Chain regulation, the recently codified Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) regulations (expanding CFIUS review) and other governmental entry barriers into U.S. telecommunications and digital infrastructure.

In particular, the program will address how the new Committee, as well as other expanded foreign entry regulations, could (or perhaps already have) affect the foreign investment climate and how U.S. policy has shifted from that of a “free market” to one viewing foreign investment as a potential national security threat - especially as it concerns China and other adversarial sovereign entities. Some specific topics will include:

1. Overview of the current political landscape for, and national security concerns regarding, foreign investment in technology. Review of the US government's actions on Huawei, the approach of allies and how the highly partisan environment makes compromise difficult. Explaining how the renewed interest in a national industrial policy for domestic production of electronic chips is reflective of an increased willingness to decouple the US from overseas supplies in the tech area. Understanding how Silicon Valley and Big Tech are perceived in Washington and how that has consequences for foreign investment in the sector.
2. How will the overlapping reviews of foreign telecom investment by the Foreign Assessment Committee (telecom and wireline licensing), the Commerce Department (ICTS regulations) and CFIUS (FIRRMA regulations) intersect?
3. What are the new waiting periods? What percentage of foreign ownership and control will trigger review? What “mitigation” measures are to be expected under a Foreign Assessment Committee review?

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4. “What is permitted; what is not;” navigating foreign ownership restrictions on U.S. telecom asset purchases, security interests, investment protection, and deal structures – including the importance of securing “no action” confirmation from U.S. regulators.
 5. What other foreign investors (other than Huawei and others from China) may expect stricter scrutiny?
 6. Round-table discussion on investment opportunities, geopolitical considerations, and takeaways for investors and their counsel (both in the U.S. and abroad).
 7. What might (or might not) change as a result of the upcoming U.S. elections in November?
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Please join us on July 1 at 10 a.m. ET for a detailed discussion of these topics (additional details available at <https://westlegaledcenter.com/home/homepage.jsf>). The webinar will be moderated by Walt Saprnov of our firm and Jim Wholey, Phillips Lytle, LLP. Speakers include Glenn Gerstell, former General Counsel for U.S. National Security Agency, Richard C. Sofield, Wiley Rein LLP, and Maxim Khlopov, Of Counsel, Saprnov & Associates, P.C.

Meanwhile, we also take this opportunity to wish everyone safety in light of the pandemic and other developments, both here and abroad. Please do not hesitate to contact us if you have questions or wish additional details. Best wishes (*Всего хорошего*) and we hope you enjoy the webinar.

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Attachment “A”

Summary of Executive Order 13913, 85 Fed. Reg. 19643 (April 8, 2020) Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector

On April 4, 2020 an executive order (“Order”) was issued that created the Committee for the Assessment of Foreign Participation in the U.S. Telecommunications Services Sector (“Committee”). This Committee replaces the long standing “Team Telecom,” an informal interagency group that assists the FCC in reviewing licensing and entry certification applications involving foreign ownership or control in an effort to mitigate national security and law enforcement risks. A brief summary of the Order follows.

Purpose

To assist the FCC in its public interest review of national security and law enforcement concerns that may be raised by foreign participation in the United States telecommunications services sector.

Duties

- Review applications and licenses for national security/law enforcement risks
- Respond to any risks and making recommendations to the FCC (dismissal/denial/conditions/modification) of an application or license, if appropriate

Members

The Committee will include the following members:

- the Secretary of Defense
- the Attorney General
- the Secretary of Homeland Security
- the head of any other executive department or agency, or any Assistant to the President, as the President determines appropriate

The U.S. Attorney General shall serve as Chair, with the exclusive authority to act, or to authorize other Committee Members to act, on behalf of the Committee, including communicating with the FCC and with applicants or licensees on behalf of the Committee. The Chair shall keep the Committee fully informed of all activities and shall consult with the Committee before taking any material actions under this Order.

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Advisors

Advisors shall include:

- the Secretary of State
- the Secretary of the Treasury
- the Secretary of Commerce
- 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
- any other Assistant to the President, as the President determines appropriate

Committee Members and Advisory may designate a senior executive from within their agency to perform functions on their behalf. The Chair shall designate Members to serve as a Leads for the execution of any function of the Committee. Said functions include:

- Submitting questions/requests to applicants/licensees to assist with fact gathering in order to further review applications
- Identifying risks to national security or law enforcement raised by an application/license
- Coordinate with other Committee Members on the reviews
- Processing and communicating to applicants/licensees any mitigation measures necessary to address risks
- Monitoring compliance imposed by the FCC as a condition of a license
- Any related responsibilities as specified by the Chair

Committee Application Review Process

The Committee shall review and assess applications referred by the FCC to determine whether granting a license or the transfer of a license poses a risk to national security or law enforcement interests. During the initial review, the following may be determined:

- That no risk exists
- Risks identified may be addressed through standard mitigation measures
- That a secondary assessment is warranted because risks cannot be mitigated through standard measures

Initial reviews are to be completed within 120 days beginning on the date the Chair determines the applicant's responses to information requests are complete.

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Any secondary assessment is to be completed no more than 90 days after the Committee's determination that a secondary assessment is warranted.

During an initial or secondary assessment, if an applicant fails to respond to any requests, the Chair may either extend the review/assessment or recommend that the application be dismissed without prejudice.

The Committee is to keep the FCC fully informed throughout these processes.

Committee License Review Process

The Committee may review existing licenses for any new risks upon majority vote of the Committee Members. Committee Advisors are to be promptly notified if it is determined such a review is warranted.

Threat Analysis by Director of National Intelligence

For each license or application reviewed by the Committee, the Director of National Intelligence shall produce a written assessment of any threat to national security interests posed by granting the application or maintaining the license. The Director of National Intelligence shall solicit and incorporate the views of the Intelligence Community, as appropriate. This analysis shall be provided to the Committee within 30 days of receipt of applicant/licensee's responses to any inquiries.

Requests for Information

The Committee may seek information from applicants, licensees, and any other entity as needed. Information will remain confidential, and will only be disclosed to other agencies as appropriate/required by law, and consistent with procedures governing the handling of classified/privileged/protected information.

Recommendations by the Committee Pursuant to Review Process

When reviewing applications, the Committee shall advise the FCC:

- That it has no recommendation/objection to the license being granted
- Recommend the application be denied due to risks
- Recommend contingencies for granting the application
- Recommend modifications to the license to include mitigation conditions
- Recommend revocation of the license due to risks

Recommendations shall be based on a written risk-based analysis and must contain credible evidence of risk(s).

The Committee shall attempt to reach consensus on all recommendations. If consensus cannot be reached, the issue shall be presented to the Committee by the Chair and a majority vote

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will determine the recommendation. In the event of a tie, the Chair shall determine the recommendation.

If anything other than approval is recommended, the Chair shall notify all Advisors and provide them with all assessments and evaluations which led to the decision. Advisors have 21 days to advise the Chair whether they oppose the recommendation. If any Advisors oppose the recommendation, designated executives shall promptly confer in an effort to reach consensus. If consensus is not reached, the Chair shall present the issue to Members and Advisors and attempt to resolve the issue(s). Resolution shall be attempted within 30 days if the recommendation is to deny or grant on contingency with non-standard mitigation and within 60 days if the recommendation is to modify or revoke a license. If consensus is still not reached, a majority vote will determine the recommendation. The Chair will make the recommendation in the event of a tie.

The Chair shall notify the President of any intended recommendation, and any opposition thereto by a Committee Member or Committee Advisor, within 7 days of a majority or tie, if either the recommendation or any opposition thereto involves the denial of an application, granting an application contingent on non-standard mitigation measures, modifying a license to condition it upon compliance with non-standard mitigation measures, or revoking a license. The FCC will receive notice of the recommendation not earlier than 15 days after the date on which the President is notified of the intended action.

The Chair shall notify the FCC through the Administrator of the National Telecommunications and Information Administration (NTIA) of a final recommendation. The Administrator of NTIA shall notify the FCC of the recommendation within 7 days of the notification from the Chair.

Mitigation of Risk & Monitoring

The Committee may recommend to the FCC conditions to the granting/transferring of a license, such as compliance with mitigation measures. Modification of a license to comply with mitigation measures may also be recommended. Mitigation measures negotiated shall be based on a written risk analysis and shall be monitored by appointed Committee Members. Methods of monitoring shall be developed by the Committee in conjunction with the FCC. Noncompliance with mitigation measures shall be reported to the Committee. The Committee shall recommend actions for uncured violations to mitigation measures.

This Order does not constrain the relevant authority not described in this order of executive departments or agencies from conducting inquiries re: applications/licenses, communicating with applicants or licensees or negotiating, entering into, imposing or enforcing contractual provisions with an applicant or licensee.

Implementation

Executive departments and agencies shall take all appropriate measures within their authority to implement the provisions of the Order. DOJ shall provide funding and

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administrative support for the Committee. Heads of executive departments shall provide, to the extent permitted by law, resources, information and assistance as needed. An Intelligence Community liaison designated by the Director of National Intelligence shall support the Committee, consistent with applicable law.

Within 90 days from the date of the Order (by July 7, 2020), the Committee Members must enter into a Memorandum of Understanding among themselves and with the Director of National Intelligence describing their plan to implement and execute this Order. The Memorandum is to come up with questions/requests for applicants/licensees that may be needed to acquire the information necessary to conduct the reviews/assessments described in the Order, define mitigation measures standards and outline the process for designating a Lead Committee Member. The U.S. Attorney General will be tasked with review of the Order's implementation along with an annual report to the President with recommendations for relevant policy, administrative, or legislative proposals.