

Communications and Information Technology Alert

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FCC Adopts New Rules Regarding Executive Branch Review of Certain Applications and Petitions Involving Foreign Ownership

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On September 30, 2020, the Federal Communications Commission (“FCC”) adopted an **order** establishing new rules with respect to Executive Branch review of certain types of FCC applications and petitions that reveal foreign ownership in the applicants or petitioners—informally known as the “Team Telecom” review process. Consistent with the April 4, 2020 **Executive Order** creating the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (the “Committee”), the new rules formalize the review process and establish time frames for the Committee to complete its assessment of any national security, law enforcement, foreign policy or trade policy issues regarding certain applications filed with the FCC.

As described more fully below, the order, among other things:

- Codifies the FCC’s existing practice of referring for Executive Branch review applications to obtain, modify, assign or transfer control of international Section 214 authorizations and submarine cable licenses, as well as petitions for declaratory ruling to exceed the foreign ownership limits for broadcast, common carrier wireless and common carrier satellite earth station licensees;
- Exempts from routine referral to the Committee certain categories of applications, including, but not limited to standalone domestic Section 214 transfer applications, satellite earth station applications that do not implicate foreign ownership limits, and *pro forma* notifications and applications;
- Establishes a 120-day initial period for Committee review, commencing upon the Attorney General’s determination that the information provided to the Committee is complete, and allows for a 90-day extension for a secondary assessment where the Executive Branch’s concerns cannot be addressed through standard mitigation;
- Adopts procedures to allow the Committee to review existing licenses and affirms that affected licensees will be provided notice and an opportunity to respond to such recommendations before the FCC takes any action;

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Requires applicants to provide additional ownership information to enable the FCC to better understand applicants' ownership structures.

Applications to Be Referred to the Committee. With respect to the types of applications to be referred to the Committee, the new rules principally codify the FCC's existing informal consultation process with Team Telecom. Specifically, the rules provide that the FCC will refer to the Committee: (1) applications to obtain, modify, assign or transfer control of the holder of an international Section 214 or a submarine cable landing license where such applications report 10 percent or greater direct or indirect foreign ownership; and (2) petitions for declaratory ruling to exceed the 20 percent direct or 25 percent indirect foreign ownership limits in a broadcast, common carrier wireless or common carrier satellite earth station licensee, as set forth in Section 310(b) of the Communications Act of 1934, as amended.

While the FCC will retain the discretion to refer other types of applications, the order also identifies certain categories of applications that generally will not be referred to the Committee:

- Standalone applications to transfer control of domestic Section 214 authority;
- Satellite earth station applications that are not associated with a Section 310(b) petition for declaratory ruling regarding foreign ownership;
- *Pro forma* notifications and applications;
- International Section 214 applications, submarine cable applications and Section 310(b) petitions where the only reportable foreign ownership is through wholly owned intermediate holding companies and the ultimate ownership and control is held by U.S. citizens or entities;
- International Section 214 applications where the applicant has an existing mitigation agreement to address Executive Branch concerns regarding foreign ownership, there are no new reportable foreign owners of the applicant since the effective date of the mitigation agreement and the applicant agrees to continue to comply with the terms of that mitigation agreement;
- International Section 214 applications where the applicant was cleared by the Executive Branch within the past 18 months without mitigation and there are no new reportable foreign owners of the applicant since that review.

Information Required to Be Submitted to the Committee. In addition, in an effort to expedite the Committee's review by providing relevant information on referred applications from the outset, the new rules require international Section 214 authorization and submarine cable landing license applicants with reportable foreign ownership, and petitioners for a foreign ownership ruling under Section 310(b) whose applications are not excluded from routine referral, to provide responses to a standard set of questions ("Standard Questions") designed to elicit information in the following categories when filing their applications:

- Corporate structure and shareholder information;
- Relationships with foreign entities;
- Financial condition and circumstances;
- Compliance with applicable laws and regulations;

- Business and operational information, including services to be provided and network infrastructure.

An applicant's responses to the Standard Questions are to be submitted directly to the Committee and not to the FCC. The FCC has not yet developed the list of Standard Questions, but instead has directed its International Bureau to develop, solicit comment on, and make publicly available on a website the Standard Questions within 90 days of the order. To the extent the Committee requires additional information upon reviewing an applicant's responses to the Standard Questions, it may send to the applicant one or more inquiries requesting the necessary supplemental information ("Tailored Questions").

Required Certifications. Regardless of foreign ownership, the new rules also require all international Section 214 and submarine cable applicants, as well as all non-broadcast petitioners for a Section 310(b) foreign ownership ruling, to make certain certifications as part of their applications to expedite Committee review of any applications that may be referred by the FCC. These certifications include assurances that have heretofore been routinely included in security agreements to mitigate Executive Branch concerns, but have had to be individually negotiated and drafted, thus extending the timeline of Executive Branch review under the existing Team Telecom procedures. By requiring these certifications from the outset, the FCC hopes that many applicants that previously would have been required to negotiate routine mitigation measures will no longer have to do so. Applicants and petitioners subject to the certification requirements must certify that they will:

- Comply with the Communications Assistance for Law Enforcement Act ("CALEA") and related FCC rules and orders to the extent applicable;
- Make communications to, from or within the U.S., as well as records of such communications, available to U.S. law enforcement officials;
- Designate a U.S. citizen or permanent resident as a point of contact for the execution of lawful requests and as an agent for service of process;
- Affirm that all information submitted to the FCC and the Committee as part of the application process is complete and accurate, and promptly inform the FCC and the Committee of any substantial and significant changes in such information while the application is pending, as well as any changes in applicant or contact information after the application is no longer pending;
- Affirm their understanding that failure to fulfill any of the conditions of the grant of their applications can result in license revocation or termination and criminal and civil penalties.

Because the certifications concerning the provision of telecommunication services related to compliance with CALEA and making communications to, from or within the U.S. available to law enforcement do not apply to broadcast service, broadcast petitioners for Section 310(b) foreign ownership rulings will not be required to make these two certifications, but must still make the remaining three certifications as part of their petitions.

Timeframe for Committee Review of Referred Applications. Significantly, and consistent with the Executive Order, the new rules establish for the first time a timeframe for Executive Branch review of referred FCC applications. The legacy

Team Telecom process could be lengthy, as there was no prescribed timeframe during which Team Telecom was required to act. As a result, the Team Telecom review process has long been criticized as lengthy, opaque, unpredictable and a deterrent to foreign investment. To provide increased transparency and certainty to applicants, the FCC's new rules allow for a 120-day initial review period for applications with reportable foreign ownership that the FCC refers to the Committee, with a possible 90-day extension for a secondary assessment in those instances where "national security or law enforcement interests cannot be mitigated by standard mitigation measures." Notably, the 120-day initial review period does not commence until the Attorney General, as Chair of the Committee, determines that an applicant's responses to any questions and information requests from the Committee are complete, including responses to Tailored Questions where applicable. Because the Committee's review timeframe is not tied to an objective measure (e.g., the date on which an application is submitted), but rather depends on the Attorney General's determination of a given application's completeness, it is not clear whether the time for Committee review will be significantly less than the amount of time required for Team Telecom review.

FCC Processes Related to Committee Review of Existing Licenses. Among the more significant provisions of the Executive Order is Section 6, which provides that the Committee may at any time "review existing licenses to identify any additional or new risks to national security or law enforcement interests of the United States." Of note, the Executive Order defines "license" to mean an authorization granted by the FCC "after referral" of the application for Executive Branch review. As a result, the Committee's authority to review existing licenses extends only to those authorizations where the FCC had referred the application to the Executive Branch agencies, including the Committee, both prior to and after the Executive Order.

Upon such review, the Committee will either: (1) recommend that the FCC modify an existing license to include new mitigation conditions; (2) recommend that the FCC revoke the license; or (3) decide to make no recommendation to the FCC as to the existing license. However, the Executive Order does not contain any provision requiring the Committee to notify the FCC or the licensee that the Committee is reviewing an existing license, such that it is possible that the FCC and the licensee would not be notified of such review until the Committee communicates its recommendation to modify or revoke the license.

To address this possibility, the order states that the FCC, consistent with due process, will provide any affected licensee an opportunity to respond to the Committee's recommendation prior to any action by the FCC. Specifically, if the Committee recommends that the FCC revoke an existing license, the FCC will provide the licensee "such notice and an opportunity to respond as is required by due process and applicable law, and appropriate in light of the facts and circumstances, including any opportunity for the Committee to reply." If the Committee files a petition recommending that the FCC modify an existing license, the licensee would have the opportunity to file comments in response to the petition.

Other Changes to the Application Process. Finally, the FCC adopted certain other changes to its application processes with which prospective applicants should familiarize themselves.

Historically, applicants for domestic Section 214 transactions, international Section 214 authorizations and submarine cable licenses have been required to identify

individuals or entities holding 10 percent or more direct or indirect equity interests in the applicant. Under the new rules, however, the application must disclose all individuals and entities holding 10 percent or greater equity and voting interests in the applicant, whether such interest is held directly or indirectly.

Additionally, such applicants must now also include with their applications a diagram of the applicant's ownership, showing the 10 percent or greater direct or indirect ownership interests in the applicant.

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