

FCC Regulatory Initiatives May Spur Foreign Investment in Broadcast and Telecom Entities

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Recent Federal Communications Commission (FCC or Commission) and Obama administration initiatives may help to spur foreign investment in U.S. entities holding broadcast, telecommunications and other licenses issued by the Commission. In particular, the Commission has proposed streamlining the FCC's foreign ownership rules for broadcasters looking to exceed the 25 percent statutory benchmark for indirect foreign ownership of television and radio licensees. Under the proposed rules, certain foreign investments in broadcast licensees would be subject to a simplified FCC review process while other investments would be exempted from the review altogether.

The FCC and the Obama administration also recently signaled that they are reviewing potential reforms to the foreign investment review process undertaken by the so-called "Team Telecom" agencies (*i.e.*, the U.S. Departments of Defense, Homeland Security and Justice) in coordination with the FCC review of foreign investments in FCC-licensed entities. While large-scale reforms are unlikely in the absence of congressional action, the administration could adopt changes that streamline the review process and impose formal deadlines on the length of any such reviews.

Foreign Ownership of Broadcast Licensees

Background

The Communications Act of 1934, as amended (Act), establishes foreign ownership limits for U.S. entities holding broadcast and telecommunications spectrum licenses. Specifically, Section 310(b)(3) of the Act prohibits foreign individuals, governments and corporations from directly owning more than 20 percent of the capital stock of a broadcast or telecommunications spectrum licensee. Section 310(b)(4) of the Act establishes a separate 25 percent benchmark for indirect investment by foreign entities in a U.S. company that owns broadcast or telecommunications spectrum licensees. Prior to 2013, the Commission essentially had interpreted this benchmark as a strict 25 percent limit on foreign ownership of broadcast entities because of concerns regarding foreign influence over the content of broadcast television and radio transmissions.

In 2013, however, the Commission determined that the 25 percent limit on foreign ownership of broadcast licensees was not a hard cap, but rather a trigger for a detailed case-by-case public interest review by the Commission of any foreign ownership above the benchmark. This determination was consistent with previous FCC decisions that had permitted foreign investment above the benchmark in entities holding telecommunications spectrum licenses. In its 2013 decision, the Commission noted that it would coordinate its public interest review of foreign ownership in broadcast licensees with a parallel national security review undertaken by the Team Telecom agencies, discussed below.

Discussion

In its recent action, the FCC voted unanimously to commence a proceeding to simplify the foreign ownership approval process for broadcast licensees. This simplified review process would largely track the rules and procedures already in place for telecommunications wireless spectrum licensees. Under current FCC procedures, broadcast licensees request Commission approval for any significant changes to their controlling U.S. parents' foreign ownership by filing a petition for declaratory ruling with the FCC. For the Commission to make the public interest finding required by the Act, licensees must file the petition and obtain Commission approval before the foreign ownership of their U.S. parent company exceeds 25 percent. The Commission then assesses, on a case-by-case basis, whether the proposed foreign ownership is in the public interest.

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The regulations proposed by the FCC would allow entities holding broadcast television licenses to request approval for up to 100 percent aggregate foreign ownership (voting and/or equity) by unnamed and future foreign investors in their controlling parent, subject to an FCC public interest review. The proposed regulations also would permit any foreign investor that is approved to acquire a less than a 100 percent controlling interest in the parent of a broadcast licensee to subsequently increase that interest up to 100 percent without triggering another FCC public interest review. The proposals would further allow any identified, noncontrolling foreign investor to increase its voting and/or equity interest to 49.99 percent at some time in the future without further FCC approval. According to the Commission, these changes should facilitate investment from new sources of capital at a time of growing need for investment in the broadcast sector.

The FCC also tentatively concluded that broadcasters requesting approval for foreign investment would generally be subject to the same streamlined procedural and disclosure requirements already applicable to telecommunications wireless licensees. Under these procedures, broadcast licensees requesting foreign investment approval would need to obtain specific FCC approval for any foreign individual or group that holds or would hold, directly or indirectly, more than 5 percent of its U.S. controlling parent's total outstanding equity or voting interests. Licensees would need to file a new petition to obtain prior FCC approval before any foreign entity not previously approved by the Commission acquired more than a 5 percent equity or voting interest in its controlling parent entity. In addition, a broadcast licensee requesting foreign investment approval would need to identify any foreign investor that either holds or would hold a voting interest of more than 5 percent in its controlling U.S. parent. The Commission stated that adoption of standardized filing and review procedures for broadcast licensees' requests to exceed the statutory 25 percent foreign ownership benchmark would provide the broadcast sector with greater transparency and more predictability while reducing regulatory burdens and costs.

The Commission also proposed to clarify the methodology broadcast licenses should use to calculate their foreign equity and voting interests for purposes of the streamlined foreign ownership regulations. Under these proposals, certain ownership structures would be excluded from any foreign ownership calculation if they were insulated pursuant to the FCC's broadcast insulation criteria. Governing partnership and LLC interests, all general partners and noninsulated limited partnership and LLC interests would still be attributable to the licensee's ownership. However, those limited partners and LLC interest holders that meet the Commission's insulation criteria and certify that they are not materially involved in the management or operation of the licensee's media interests would be excluded.

Notwithstanding its tentative conclusion to streamline the foreign ownership review for broadcast licensees, the Commission questioned whether it should adopt service-specific rulings. For instance,

the Commission asked whether a foreign investor already approved to acquire a television station in one market should have to seek a new foreign ownership ruling allowing it to acquire an AM radio station in another market. Lastly, the Commission proposed to streamline the filing and processing of broadcast petitions and to simplify the procedures U.S. public companies can use to calculate their foreign ownership.

Reforms to Team Telecom Review

In addition to the FCC's public interest review, foreign investments in, or acquisitions of control of, U.S. telecommunications businesses are subject to a parallel national security review undertaken by a task force of representatives from the Team Telecom agencies. While Team Telecom review is not required by the Act, the FCC has for many years deferred any questions arising from a transaction regarding national security, trade policy and law enforcement issues to the Team Telecom agencies. These agencies will request that the FCC not make an ultimate decision on a proposed foreign investment until they have completed their national security review. Essentially, Team Telecom places a hold on a specific transaction, and the FCC will not approve the transaction until the agencies determine that it presents no unresolved national security concerns.

Unlike the FCC's review process, the Team Telecom review is not a formal U.S. government administrative proceeding subject to binding rules and regulations. The Team Telecom review is not a public proceeding, and all discussions and filings with the agencies remain confidential. Unlike other national security reviews, including that conducted by the Committee on Foreign Investment in the United States, completion of the Team Telecom review also is not required within a certain time frame. As a result, Team Telecom reviews often extend for many months, delaying FCC approval of the relevant transaction.

In the recent item proposing streamlined foreign investment reviews for broadcast licensees, the FCC questioned whether the Team Telecom review process should be reformed to more closely align it with the Commission's public interest review. For example, the Commission asked whether certain foreign ownership requests could be subject to a more streamlined national security review process given the simplified FCC approach being contemplated for broadcast licensees.

The FCC's inquiry into the Team Telecom review process follows earlier statements by FCC Chairman Tom Wheeler confirming that the Obama administration is conducting a review of Team Telecom's activities. While large-scale reforms are unlikely in the absence of congressional action, the administration could adopt procedural changes that impose more formal deadlines on Team Telecom reviews and narrow the scope of the types of transactions and licensees subject to the review requirement.