Communications, Internet & Technology

Federal Communications Commission Unanimously Streamlines Foreign Ownership Requirements for Broadcasters and Common Carriers

On September 30, 2016, the Federal Communications Commission unanimously granted broadcast licensees the same streamlined foreign ownership procedures—with a few modifications—that common carrier licensees now enjoy. The Commission also eliminated the onerous requirements to conduct shareholder surveys and samplings to determine foreign ownership—instead allowing companies to rely on information that is "known or reasonably should be known" to the public company in the ordinary course of business. Together, these changes are designed to decrease burdens for both broadcasters and investors and enhance licensee access to global capital.

Background

The FCC places limits on foreign investments in common carrier, aeronautical, and broadcast licensees and reviews any investments that may exceed those limits. Foreign investors—be they individuals, companies, or governments—may not own more than 20 percent of the capital stock of such a licensee.[1] Nor may foreign investors own, directly or indirectly, 25 percent of the capital stock of any U.S.-organized parent that controls such a licensee.[2] In both cases, the FCC has interpreted the term "capital stock" to include virtually any form of equity or voting interest held in the licensee or U.S. parent, not just corporate equity interests. Foreign investors can exceed the 25 percent threshold as long as the FCC finds that the public interest does not require otherwise, typically through a declaratory ruling requested by the licensee.

In 2013, the FCC simplified its policies and procedures for foreign investment in *common carrier* and *aeronautical* licensees by creating a streamlined process for those licensees to petition to exceed the 25 percent foreign ownership benchmark.[3] The same rules also clarified how to calculate aggregate foreign ownership, how to identify which investors must be disclosed in the petition and which investors require specific approval, and how investors may be insulated for foreign ownership purposes. Those changes provided common carrier and aeronautical licensees with a more straightforward and predictable process, but left *broadcast* licensees in a comparative regulatory limbo that discouraged foreign investment.

Extending Streamlined Foreign Ownership Rules to Broadcasters

In the rapidly changing broadcast world, holders of U.S. broadcast licenses and their would-be investors were disadvantaged in the race for global capital by unclear rules forged in an earlier era. The new Order simplifies foreign investment by extending the streamlined 2013 rules to broadcast licensees. Broadcasters seeking to exceed foreign ownership benchmarks will now enjoy a defined structure and review process to facilitate their petitions for declaratory ruling. In particular, those petitioners will be able to request approval for:

- up to 100 percent aggregate foreign ownership (voting and/or equity) by unnamed and future foreign investors in their controlling U.S. parent, subject to certain conditions;
- any named foreign investor that plans to acquire a less than 100 percent controlling interest to increase the interest to 100 percent at some future time; and

- any non-controlling named foreign investor to increase its voting and/or equity interest up to a non-controlling interest of 49.99 percent in the future.[4]

The Commission also made specific modifications to the new requirements to increase synergy with broadcasters' existing ownership obligations. Broadcasters may now:

- rely on the existing broadcast attribution criteria to determine whether a particular investor requires disclosure;[5]
- seek specific approval for foreign investors with a greater than 5 percent interest—or, in some cases, 10 percent—in the U.S. parent;[6]
- rely on existing broadcast insulation criteria, which will also apply to cross-ownership,[7] to determine whether a foreign investor requires specific approval and or is considered insulated;[8] and
- apply declaratory rulings to after-acquired broadcast licenses, regardless of broadcast service or geographic area.[9]

New Methodology for Common Carriers and Broadcasters to Determine Foreign Ownership

In addition, the Order streamlines the process for determining foreign ownership levels. A broadcaster or common carrier controlled by a U.S. public company may now determine its aggregate foreign ownership by relying on information that is "known or reasonably should be known" to the public company in the ordinary course of business.[10] This new method allows public companies to identify interest-holders using information such as the beneficial ownership information reported in SEC forms, shares registered with the company and held by directors and employees, and other information known in the ordinary course.[11] This eliminates the need for burdensome surveys and also, in practice, eliminates the Commission's previous presumption that unknown shareholders were foreign.[12]

The Order also provides new guidance on how to determine whether an identified interest-holder is "foreign." For directors, officers, and employees, the public company should rely on internal surveys; for other registered interest-holders it should generally rely on publicly available information or try to make direct inquiries of any "known or reasonably should be known" interest-holders whose information is not already available.[13] The Order provides additional detail on the application of these and other requirements.

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[1] 47 U.S.C. § 310(b)(3).

[2] 47 U.S.C. § 310(b)(4).

[3] See Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees, Second Report and Order, 28 FCC Rcd 5741 (2013).

[4] Order at ¶ 15.

[5] Order at ¶¶ 18-21; see 47 C.F.R. § 73.3555.

[6] Order at ¶¶ 22-24.

[7] See 47 C.F.R. § 73.3555 n. 2(f).

[8] Order at ¶¶ 24, 28.

[9] Order at ¶¶ 31-32.

[10] Order at ¶ 44.

[11] Order at ¶¶ 46-52.

[12] Order at ¶ 88. The Order allows that a privately held entity may rely on the new methodology if, in a particular case, there are significant impediments that prevent the privately held entity from conducting an up-the-chain analysis to ascertain all of its indirect ownership interests, including non-voting equity interests held by remote insulated investors.

[13] Order at ¶¶ 58-59.

CONTACT US

John L. Flynn, Partner, Jenner & Block

Phone: 202 639-6007 Email: jflynn@jenner.com Download V-Card

David Didion, Associate, Jenner & Block

Phone: 202 639 6082 Email: ddidion@jenner.com Download V-Card