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## Foreign Ownership Changes Could Lead to New Investment Opportunities



By Eve K. Reed and Kathleen Scott

Public comments on the FCC's proposed rulemaking to streamline broadcast foreign media ownership are due on December 21, and reply comments will be due on January 20, 2016 (to GN Docket No. 15-236.)

On October 22 the FCC issued a Notice of Proposed Rulemaking proposing to simplify the process for broadcast companies to obtain Commission consent to exceed the 25% benchmark set by Section 310(b)(4) of the Communications Act for foreign investment in their parent companies. The NPRM also seeks comment on the methodology that all companies subject to Section 310(b)(4) must use to determine their aggregate level of foreign ownership.

Here, Reed ([ereed@wileyrein.com](mailto:ereed@wileyrein.com)) and Scott ([KScott@wileyrein.com](mailto:KScott@wileyrein.com)) go over the key takeaways in the NPRM.

### **Extension of Foreign Ownership Streamlining Process to Broadcast Requests**

Under Section 310(b)(4), the prior express consent of the FCC must be obtained in order for the aggregate foreign ownership of a U.S. entity that controls a licensee in the broadcast, common carrier, or aeronautical radio services to exceed 25%. Procedurally, the Commission considers whether the public interest would be served by allowing foreign ownership in excess of this benchmark by ruling on petitions for declaratory ruling filed by licensees or their parent companies. Historically, the FCC has freely exercised its discretion to allow indirect foreign ownership in excess of 25% for common carriers, doing so over 150 times, and modifying the policies and procedures for streamlining that process in [2013](#). However, the Commission has, to date, been less willing to exercise its discretion in the broadcast context. In the wake of the recent [Pandora Declaratory Ruling](#), in which the FCC approved the request of a broadcast radio licensee to exceed the 25% indirect foreign ownership benchmark, this NPRM proposes to extend the streamlined foreign ownership rules and procedures that apply to common carriers to the broadcast context, with certain modifications. Through the proposed rules, the Commission aims to promote greater transparency and more predictability, and to reduce regulatory burdens and costs on the broadcast industry. The FCC also notes that the proposed rules will improve broadcasters' access to foreign capital.

Specifically, the Commission proposes to extend (with certain exceptions and modifications) the rules that currently apply to common carrier petitions for declaratory ruling under the foreign ownership rules to broadcasters. The NPRM proposes to allow broadcasters to request:

- “[A]pproval of up to 100% aggregate foreign ownership (voting and/or equity) by unnamed and future foreign investors in the controlling U.S. parent of a broadcast licensee, subject to certain conditions;”

- “[A]pproval for any named foreign investor that proposes to acquire a less than 100% controlling interest to increase the interest to 100% at some time in the future;” and
- “[A]pproval for any non-controlling named foreign investor to increase its voting and/or equity interest up to and including a non-controlling interest of 49.99% at some time in the future.” (§ 11)

The proposed rules would only require a broadcast licensee to “obtain specific approval of foreign investors (i.e., individuals, entities, or a ‘group’ of foreign individuals or entities) that hold or would hold, directly or indirectly, more than five percent, and in certain circumstances, more than ten percent of the U.S. parent’s equity and/or voting interests, or a controlling interest in the U.S. parent.” (§ 11) The NPRM makes clear that the Commission will continue to coordinate with the Executive Branch’s “Team Telecom” as necessary regarding foreign ownership petitions, just as it does in the common carrier context. (“Team Telecom” is a working group of officials from the Department of Defense, the Department of Homeland Security, and the Department of Justice that conducts national security reviews of transactions involving foreign ownership.)

The NPRM sets forth five major modifications of the current common carrier rules that would be specific to broadcast licensees seeking permission to exceed the 25% foreign ownership benchmark:

- **Disclosable Interest Holders:** Petitions for declaratory ruling must contain certain information about entities and individuals that hold interests in the parent company of a licensee that meet or exceed certain thresholds (these entities are called “disclosable interest holders”). Under the proposed rules, broadcasters would be required to disclose the name, address, citizenship, and principal business of any individual or entity that holds or would hold, after implementation of any planned ownership changes described in a petition for declaratory ruling, an “attributable interest” in the broadcast licensee under the broadcast attribution rules. In general, any entity or individual holding: (1) a 5% or greater voting stock interest in a corporation; (2) any general partnership, uninsured limited partnership, or uninsured limited liability company interest; or (3) more than 33% of a licensee’s “total asset value” (defined as all equity plus all debt), would be considered attributable and thus a disclosable interest holder. This proposal differs from the disclosable interest holder definition that applies to common carriers, which requires disclosure of any entity or individual that holds a 10% or greater equity or voting interest. (§ 14)
- **Specific Approval of Named Foreign Investors:** Petitions for declaratory ruling generally must identify and request specific approval for any foreign individual or entity, or “group” of foreign individuals or entities, that holds or would hold directly or indirectly more than 5% of the equity and/or voting stock of, or a controlling interest in, the U.S. parent of a licensee (the entities requiring specific approval are referred to as “named foreign investors”). Petitions must also include certain information about entities and individuals that hold interests in named foreign investors. Under the proposed rules, broadcasters would again use the broadcast attribution standards to determine which interests in named foreign investors must be disclosed. This proposal differs from the 10% voting or equity threshold that common carriers use to evaluate their disclosure obligations. (Note that, for purposes of determining *whether* a named foreign investor requires specific approval, the FCC proposes to require broadcasters to use the same standards that apply to common carriers.) (§15)
- **Insulation Criteria:** Under the current rules, the Commission details the methodology for calculating foreign ownership and voting interests in the controlling U.S. parent based, in part, on whether interests are “insulated” or not under criteria set forth in the foreign ownership rules. The FCC’s broadcast attribution rules also contain insulation criteria, although those criteria differ from those for common carriers. The NPRM proposes to rely on the broadcast insulation criteria when calculating foreign ownership and voting interests in controlling U.S. parents of broadcast licensees. Under those

rules, “all general partners and non-insulated limited partnership and LLC interests are attributable,” unless the organizational documents of the entity contain certain specific provisions and the licensee certifies that those holding insulated interests are not materially involved in the management or operations of the entity’s media-related activities. (¶ 18)

- **Service-Specific Rulings:** Under the current common carrier rules, a foreign ownership ruling applies to *all* types of common carrier wireless services (e.g., satellite, CMRS, microwave, AWS), and is *not* geographically specific. However, given the “heightened concern for foreign influence over or control over broadcast licensees which exercise editorial discretion over the content of their transmissions,” the Commission asks whether it should consider foreign investment in broadcast licensee parent companies on a service-specific and/or geographic basis. (¶ 21) For example, the Commission poses the following questions: “If a licensee has a ruling covering television licenses, would it need a new ruling if it later sought to acquire AM radio station licenses? Would a licensee with a ruling for an AM radio station in small market require a new ruling if it sought to acquire a national chain of radio stations or additional stations in that small market?” (¶ 22)

The Commission also seeks comment on how it should address situations in which a single entity may hold, or seek to hold, both common carrier and broadcast licenses, particularly given its proposal to require the submission of different information in common carrier and broadcast petitions for declaratory ruling. The Commission tentatively concludes that an entity should only have to disclose information for both common carrier and broadcast services if it proposes to provide both services. (¶ 23)

- **Filing and Processing of Petitions:** The NPRM proposes that broadcasters file petitions for declaratory ruling regarding the 25% foreign ownership benchmark through CDBS (rather than ECFS) as an attachment to the underlying applications for construction permit or assignment or transfer of control that broadcasters file. If there is no underlying broadcast application, then the NPRM proposes that petitioners file a non-docketed filing on ECFS. (¶¶ 24-25)

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