

## **Alert | Technology, Media & Telecommunications**



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### **FCC Reforms Process for Coordinating with Executive Branch to Review Transactions and License Applications Involving Foreign Ownership**

The Federal Communications Commission (FCC) has adopted rules to reform its process for referring applications that involve foreign ownership to the executive branch to review those applications for national security, law enforcement, foreign policy, or trade policy issues. The FCC's new rules clarify the information applicants are required to submit and establish clear timelines for the executive branch to complete its evaluation.<sup>1</sup> Importantly, the FCC's rules are consistent with an April 4, 2020, Executive Order (EO) establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Sector (Committee).<sup>2</sup> This GT Alert focuses on: (1) the types of applications that the FCC will refer to the executive branch; (2) information applicants must include in their applications; (3) information applicants must provide to the executive branch in response to standard questions; and (4) timeframes governing the executive branch's review of applications.

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<sup>1</sup> *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, IB Docket No. 16-155, Report and Order, FCC 20-133 (released Oct. 1, 2020) (Referral Order).

<sup>2</sup> EO No. 13913, Establishing the Committee for the Assessment of Foreign Participation in the United States Service Sector, 85 FR 19643 (April 8, 2020). A detailed discussion of the executive order is contained in GT Alert, "[Executive Order Establishes Committee to Assist FCC in Review of Foreign Participation in the Telecommunications Industry](#)."

## Background

In accordance with Section 310 of the Communications Act of 1934, as amended<sup>3</sup> (Communications Act), the FCC conducts a public interest analysis of certain license applications and transactions that involve foreign ownership.<sup>4</sup> In addition, the FCC has had a longstanding practice of referring any application that, if granted, would result in 10% or more of a licensee being directly or indirectly owned by a foreign individuals or entities to a group of executive branch agencies (previously known as Team Telecom) for review of national security and related issues. The members of Team Telecom included the Department of Justice, Department of Defense, and Department of Homeland Security. In 2016, the FCC released a notice of proposed rulemaking in an effort to make the executive branch review process more transparent and efficient. The EO issued earlier in 2020 prompted the FCC to conclude its rulemaking proceeding and issue rules governing the process for handling applications that involve foreign ownership.

## FCC Applications Subject to Executive Branch Review

The FCC will refer the following types of applications to the executive branch (referenced as the Committee in the Executive Order):<sup>5</sup>

- Applications for international Section 214 authorizations (which authorize international telecommunications services) and submarine cable landing licenses and applications that seek to assign, transfer control of or modify such authorizations or licenses when the relevant party has 10% or greater foreign ownership.
- Petitions for foreign ownership rulings for broadcast, common carrier wireless and common carrier satellite earth station license applicants and current licensees that seek to exceed the foreign ownership limitations set forth in Section 310 of the Communications Act. Such rulings are required prior to obtaining a license or completing a transaction that would result in a licensee exceeding the foreign ownership limitations.

The EO also provides that the Committee may “review existing licenses to identify any additional or new risks to national security or law enforcement interests of the United States.”<sup>6</sup> The FCC stressed in its Referral Order that, consistent with its current practice, licensees have an opportunity to respond to any Committee recommendations concerning modifying or terminating an authorization or license.

The FCC will generally not refer the following types of applications to the executive branch (but retains discretion to make a referral if required by the circumstances of the application):

- *Pro forma* applications related to international section 214 authorizations and cable landing licenses (because there is no change in the ultimate control of the licensee).

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<sup>3</sup> 47 U.S.C. § 310.

<sup>4</sup> Section 310 of the Communications Act prohibits aliens, foreign governments, and corporations organized under the laws of a foreign country (i.e., foreign corporations) from holding a broadcast, common carrier, or aeronautical en route or fixed radio station license. Section 310 also establishes the following foreign ownership limits on broadcast, common carrier, and aeronautical licensees: (1) such licensees shall not be a corporation with more than 20% of its stock owned or voted by aliens, a foreign government or a foreign corporation and (2) such licensees shall not be directly or indirectly controlled by any other corporation with more than 25% of its stock owned or voted by aliens, a foreign government, or a foreign corporation, unless the FCC finds that exceeding the 25% limit serves the public interest.

<sup>5</sup> The Committee’s members are the Secretary of Defense, Attorney General (Committee Chair), Secretary of Homeland Security and the head of any other executive department or agency, or any Assistant to the President, as the President determines appropriate. The E O also establishes a group of federal officials as Advisors. The advisors include the Secretaries of State, Treasury and Commerce, other officials who focus on national security, trade and technology issues, and any other Assistant to the President deemed appropriate.

<sup>6</sup> See Executive Order, § 6.

- Applications and petitions for foreign ownership rulings where foreign ownership interests are held by an intermediate holding company, but United States citizens or entities have ultimate control and ownership.
- Applications related to international section 214 authorizations where: (1) the applicant has an existing mitigation agreement with the executive branch with which it agrees to comply, and there has been no change in the applicant's foreign ownership since the effective date of the agreement or (2) within the last 18 months the applicant was found by the executive branch to not require a mitigation agreement, and there has been no change in the applicant's foreign ownership.

### **Additional Content Required in FCC Applications**

Applications related to international section 214 authorizations and submarine cable landing licenses (even if there are no foreign ownership issues) and petitions for foreign ownership rulings related to common carrier wireless and common carrier satellite earth station licenses (but not those related to broadcast licenses) must include certifications that the applicants will: (1) comply with the Communications Assistance for Law Enforcement Act (CALEA) (which requires telecommunications carriers to use equipment and provide services that have surveillance capabilities necessary to comply with legal requests for information); (2) make communications and records available to law enforcement; (3) designate a point of contact for lawful requests and an agent for legal service of process; (4) affirm that information submitted to the FCC and the executive branch is complete and accurate and that the Commission and executive branch will be advised of changes to that information; and (5) affirm that any failure to comply with conditions for grant of an application can result in license revocation and civil penalties. Broadcast licensees that file petitions for foreign ownership rulings are only required to provide certifications (3) through (5).

The FCC also amended its rules governing applications for approval of domestic section 214 transactions and applications related to international section 214 authorizations and submarine cable landing licenses to identify voting interests and equity interests of individuals and entities with 10% or greater direct or indirect ownership of the applicant and to provide a diagram depicting the applicant's ownership structure.

### **Standard Questions**

Applicants that plan to submit the types of applications that are subject to referral to the executive branch, as described above, will need to provide responses to a standard set of questions (Standard Questions) to the Committee either prior to or at the same time they file applications with the FCC. The FCC directed its International Bureau to develop Standard Questions that cover the following categories of information: (1) corporate structure and shareholder information; (2) relationships with foreign entities; (3) financial condition; (4) legal compliance; and (5) business and operational information, including information about the applicant's service and network infrastructure.

### **Schedule for Executive Branch Review of Applications**

Consistent with the time periods for review set forth in the EO, the FCC adopted a 120-day initial review period for all applications referred to the Committee. The 120-day period will usually commence 30 days after the date the FCC refers the application to the Committee. During that 30-day period, the Committee will have an opportunity to send tailored questions to the applicant, if it requires information beyond that provided in response to the Standard Questions. If the Committee decides not to send any additional questions to the applicant, the 120-day initial review period will start on the date the Committee notifies

the FCC of that decision. The Committee may also take advantage of an additional 90-day extension to review the application, if further review is needed. In addition, the Committee may extend the 120-day initial review period and 90-day secondary review period in accordance with the EO. To track the Committee's progress in reviewing the application, the FCC rules require the Committee to file several notices with the FCC regarding numerous milestones, such as a notification that the Committee will be reviewing an application, a notification regarding the extension of the 120-day or 90-day review periods, and a notification that a final recommendation has been reached.

## Conclusion

The FCC's Referral Order provides clarity and transparency regarding the applicable process when the FCC refers applications to the Committee to review national security, law enforcement, and foreign and trade policy issues regarding foreign ownership. By requiring applicants to provide responses to Standard Questions prior to or at the time of filing an application that involves foreign ownership, the FCC's action may increase the efficiency of the review process, which had previously consisted of the executive branch issuing questions to the applicant after the FCC referred an application. Furthermore, by describing a clear timeline for the Committee's review and requiring the Committee to file notifications regarding the progress of the review, the FCC's amended rules will enable applicants seeking prior FCC approval for transactions to track the status of their applications and know when to expect a final decision from the FCC.

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