

FCC Adopts Process Reforms for Foreign Ownership Reviews

The new rules offer greater regulatory certainty and improve transparency in the Team Telecom review process.

On September 30, 2020, the Federal Communications Commission (the FCC) adopted a Report and Order (the [Order](#)) that formalizes and streamlines the process by which it coordinates with Executive Branch agencies to review applications for national security, law enforcement, foreign policy, and trade policy issues.¹ The new rules also reflect the timelines for Executive Branch agency reviews consistent with President Trump's April 4, 2020, Executive Order establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (the Committee).²

The new rules have important implications for investors, lenders, and other companies involved in FCC-regulated businesses, as they offer greater regulatory certainty and improve transparency in the Team Telecom review process. This process often is a significant aspect of obtaining regulatory approval for proposed transactions involving foreign ownership of FCC licensees and authorization holders.

Background

The FCC considers national security, law enforcement, foreign policy, and trade policy concerns as part of its review of applications involving the transfer of control or assignment of FCC licenses or authorizations. Historically, for such applications involving direct or indirect foreign ownership or investment, the FCC has coordinated its review with an ad hoc group of national security and law enforcement agencies, including the Department of Defense, the Department of Homeland Security, and the Department of Justice, in consultation with other Executive Branch agencies, informally referred to as "Team Telecom." The FCC retains discretion to determine which applications it will refer to Team Telecom for review.

Team Telecom initiates its reviews by intervening in the FCC's application proceeding and issuing a set of questions seeking further information about the proposed foreign interests, as well as the target company's networks and operations. Based on its assessment, Team Telecom may require the applicants to agree to measures required to mitigate any potential national security and law enforcement concerns. Upon completion of its review, Team Telecom advises the FCC of its recommendation to proceed with processing the application, and if applicable, issue a grant subject to a condition that the applicant adhere to the commitments and undertakings in a mitigation agreement.

On April 4, 2020, the President signed Executive Order 13913 establishing the Committee, which is chaired by the Attorney General and includes the heads of many of the same Executive Branch agencies that compose Team Telecom. The Executive Order formalizes the Team Telecom review process and establishes timeframes for the Committee's review of FCC applications.

The Order

The FCC's September 30 Order sets forth formal rules governing the process for Executive Branch agency reviews of FCC applications, and incorporates the timeframes for Committee review set forth in the Executive Order, in an effort to facilitate expeditious, transparent, and efficient reviews of transactions involving reportable foreign ownership.

Specifically, the FCC has adopted rules to:

- Clarify the types of FCC applications referred to the Executive Branch agencies
- Identify the categories of information that applicants must provide to the Executive Branch agencies
- Establish timelines for Executive Branch review
- Require applicants to make certain certifications in their applications
- Revise the informational requirements relating to certain FCC applications and licenses

Types of Applications Referred for Executive Branch Review

Under the adopted rules, the FCC will continue to refer the following applications to the Executive Branch agencies for review when the applicant has reportable foreign ownership of 10% or greater:

- Applications for international section 214 authorizations and submarine cable landing licenses, including applications to assign, transfer control of, or modify those authorizations and licenses
- Petitions for foreign ownership rulings for broadcast, common carrier wireless, and common carrier satellite earth station applicants and licensees under section 310(b) of the Communications Act, as amended (the Act)
- All applications associated with the requests and applications identified above, at the FCC's discretion

The Order clarifies that the FCC will not routinely refer the following types of applications to the Executive Branch agencies:

- Transfer of control applications of stand-alone domestic section 214 authority (i.e., transactions that do not involve international section 214 authority or otherwise meet the criteria above)
- Satellite earth station applications that are not associated with a petition for a foreign ownership ruling under section 310(b) of the Act
- Notifications and applications for *pro forma* (i.e., non-substantive) assignments or transfers of control
- Applications involving transactions in which the only reportable foreign ownership is through wholly owned intermediate holding companies and the ultimate ownership and control is held by US citizens or entities
- International section 214 applications in which the applicant has an existing mitigation agreement and there are no new reportable foreign owners since the effective date of the agreement
- International section 214 applications in which 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

An applicant must make a specific showing that it qualifies for one of the above exclusions from Executive Branch referral.

Categories of Information and Standard Questions

For the types of applications that will be referred for Executive Branch review, the Order codifies in the FCC's rules the categories of information that applicants must submit to the Committee at the same time they file their applications at the FCC. These categories include:

- 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

The Order does not adopt specific questions, and instead directs the FCC's International Bureau, within 90 days, to develop, solicit comment on, and make available on a public website a standardized set of national security and law enforcement questions that are consistent with the Order and that will elicit the information needed for the Committee's review.

Committee Review of Standard Question Responses

Once the Committee receives the applicant's responses to the standard questions and determines that the responses are complete, the 120-day review period established by the Executive Order commences. The Committee may seek responses to additional questions tailored to the transaction or the parties before it starts the 120-day clock. As provided in the Executive Order, the Committee has an additional 90-day period for a secondary assessment of the application if it determines that the risk to national security cannot be addressed through standard mitigation measures. After the Committee issues its final recommendation, the FCC must be notified of that recommendation within seven days.

Applicant Certifications

The Order establishes new certification requirements for all international section 214 and submarine cable applicants (including applicants requesting to assign, transfer control, or modify such authorizations and licenses). Specifically, such applicants must certify that they:

- (i) Comply with the Communications Assistance for Law Enforcement Act (CALEA)³
- (ii) Make communications to, from, or within the United States, as well as records thereof, available to US law enforcement officials
- (iii) Designate a US citizen or permanent US resident as a point of contact for the execution of lawful requests and as an agent for legal service of process
- (iv) 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 changes
- (v) 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

Broadcast petitioners seeking a section 310(b) foreign ownership ruling will be required to make the certifications in (iii)-(v) above.

Other Changes to FCC Application Processes

The Order implements additional informational requirements for certain FCC licensees and applications:

- The new rules require domestic and international section 214 applicants, and applicants for submarine cable licenses, to include the voting interests — in addition to equity interests — of any entities or individuals with a 10% or greater direct or indirect ownership in the applicant. (The FCC currently requires applicants in certain other contexts to provide both equity and voting interests.) This rule change is intended to conform the informational requirements across different types of license applications.
- The Order codifies the FCC's current practice of requesting that applicants provide an ownership structure diagram illustrating the 10% and greater direct and indirect interests in the applicant.
- The FCC has amended its cable landing license rules to impose reporting requirements on licensees affiliated with a carrier with market power in a cable's destination market for all countries, regardless of whether or not the country is a member of the World Trade Organization.

Next Steps

The Order will become effective 30 days after publication in the Federal Register. Provisions containing new information collection requirements require additional approvals by the Office of Management and Budget, and will become effective upon a subsequent Federal Register notice. In the meantime, however, the rules and procedures described in the Order will still likely be instructive for parties to transactions under FCC and Committee review.

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Endnotes

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- ¹ 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 (rel. Oct. 1, 2020).
 - ² Executive Order No. 13913, Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector, 85 Fed Reg 19643 (Apr. 8, 2020).
 - ³ 47 C.F.R. § 1.20000 et seq.