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Determining Whether You've Hit the 25% Foreign Ownership Benchmark



By Eve K. Reed and Kathleen Scott

In a Notice of Proposed Rulemaking, the FCC proposes to simplify the process for broadcast owners to obtain commission consent to exceed the 25% benchmark. The agency is asking for public input on how to accomplish this goal.

Here, Wiley Rein attorneys Reed (ereed@wileyrein.com) and Scott (KScott@wileyrein.com) go over key points.

In the NPRM, the Commission also seeks comment on the methodology for assessing compliance with Section 310(b)(4)'s foreign ownership threshold. Even though these issues were largely brought to the Commission's attention in the broadcast context during the proceeding involving Pandora through comments from the National Association of Broadcasters ("NAB") and the Multicultural Media and Telecommunications Council ("MMTC"), the NPRM seeks to address the practices used to measure compliance by *all* licensees subject to Section 310(b)(4). (The FCC also asks whether any changes that it makes to the requirements for evaluating compliance with Section 310(b)(4) should also apply to Section 310(b)(3), which imposes a 20% limit on direct foreign investment in broadcast, common carrier, or aeronautical radio licensees.)

For purposes of tracking foreign ownership to ensure compliance with the 25% benchmark, the Commission proposes to distinguish between privately-held and publicly-traded entities. As to privately-held entities, the FCC contemplates that such entities should have knowledge of and be able to easily track their owners. (¶ 30)

For publicly-traded companies, however, the Commission acknowledges that demonstrating compliance is more complicated, in part because most shares are held in "street name" (meaning the broker holds legal title on behalf of the beneficial shareholder), and surveys may not be able to ascertain beneficial shareholders' citizenship. Despite these recognized complications, the FCC states that a publicly traded company should know information about certain shareholders, namely, shareholders that are required to disclose ownership pursuant to SEC rules (generally, shareholders with greater than 5% ownership and institutional investors with greater than 10% ownership), shareholders whose shares are registered with the company, and shareholders who are officers and directors. (¶ 31)

The Commission asks whether it has authority to allow a licensee with a U.S.-organized public company in its ownership chain to rely solely on ownership information that is known or reasonably should be known to the public company. It also seeks comment on the amount and type of data licensees should be required to access and review in order to satisfy a requirement to use "best efforts" to comply with Section 310(b)(4).

The FCC asks, further, if there are policy or legal reasons to limit the availability of such a method to U.S.-organized public companies and/or companies with a certain percentage of U.S. citizens as officers and directors. The agency also inquires as to whether it should apply the same standards for equity and voting ownership or whether there should be a greater obligation to know whether entities holding voting interests are foreign.

Additionally, the Commission seeks comment on whether it should accept shareholder street addresses alone as a proxy for citizenship (as it currently does outside of the broadcast context), whether there are circumstances under which street addresses alone should not be acceptable, and how frequently it should require a company to assess the extent of its foreign ownership. (¶ 32)

The FCC also requests comments regarding alternative approaches to assessing foreign ownership. Specifically, the Commission references certain of the methods outlined in the Pandora Declaratory Ruling, including the possibility of allowing reliance on street addresses coupled with participation in the Depository Trust Corporation's "SEG-100" program — which allows for the deposit of foreign-owned shares into a segregated account for monitoring — for purposes of measuring foreign ownership. (¶ 34)

In addition, the FCC seeks comment on the NAB's suggestion that it eliminate the presumption that unidentified shareholders should be counted as foreign shareholders. In this regard, the Commission asks whether, if it eliminates that presumption, applicants should be allowed to extrapolate foreign ownership percentages based on known shareholders, whether it should use a multiple, and whether there should be an upper limit on the relative number of shareholders that can be estimated. (¶ 35)

The NPRM also suggests that the Commission might permit small foreign equity and/or voting interests in U.S. public entities without individual review and approval by the FCC. Here, it asks whether there is a legal and policy basis to permit equity and voting interests that need not be reported under Exchange Act Rule 13d-1 without Commission approval, even though a U.S. public company could have aggregate foreign ownership exceeding 25%.

The FCC asks, further, if there is a basis for allowing a U.S. public company to have up to an aggregate of less than 50% (or some higher level) non-controlling foreign investment, even if it has investments that may have to be reported under Exchange Act Rule 13d-1, without individual review and approval. (¶ 36)

The Commission proposes that the new streamlined rules for broadcast petitions would be applied prospectively. Relatedly, it seeks comment on how to treat requests that are currently pending. (¶ 42)

Finally, the FCC uses the NPRM to seek comment on certain corrections and clarifications to its existing foreign ownership rules, including whether it should:

- Clarify that certain foreign interests of 5% or less may require specific approval in circumstances where there is direct or indirect foreign ownership in the U.S. parent in the form of uninsulated partnership interests or uninsulated interests held by members of an LLC; (¶ 39)
- Consider whether Commission precedent supports the inclusion of (1) additional permissible voting or consent rights in the list of investor protections that may be held by an insulated limited partner or LLC member, and (2) additional minority shareholder protections that may be held by a 5% or greater voting or equity interest holder without triggering the requirement to obtain specific approval of a named foreign investor (these expansions would apparently not apply in the broadcast context); (¶ 40) and
- Make explicit the requirement that parties filing petitions of declaratory ruling include a certification required by Section 1.16 of the Commission's rules. (¶ 38)

The proposed streamlining of the broadcast foreign ownership review process certainly represents a welcome change from the FCC’s historical treatment of broadcaster requests to exceed the Section 310(b)(4) benchmark. All five Commissioners endorsed the NPRM, with Chairman Wheeler recognizing the need to inject “greater transparency” into the broadcast foreign ownership review process and the appropriateness of modernizing the FCC’s procedures to account for changes in securities laws and regulations for publicly traded companies. Commissioner O’Rielly — who has long pressed for reforming broadcast foreign ownership review — commented that the item represented a “positive, although incremental, step” toward “multiply[ing] potential funding options available to broadcasters.”

Commissioner Clyburn similarly acknowledged the benefits of increasing broadcasters’ access to foreign capital so as to fuel their efforts to serve the local information needs of communities, increase diversity, and lower barriers to entry to for small businesses. Likewise, Commissioner Rosenworcel agreed that the time has come to eliminate the special funding constraints that broadcasters have faced with respect to raising capital from overseas sources as a result of the Commission’s uneven treatment of broadcaster requests to exceed Section 310(b)(4)’s benchmark. Commissioner Pai also praised the FCC’s efforts, urging the agency to focus on “level[ing] the playing field” to “enable greater foreign investment in the broadcast industry” and “creat[ing] a more rational process for determining compliance with foreign ownership requirements.”

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