

FCC Media Bureau Approves Pandora's Plan for Compliance with Waiver of 25% Foreign Ownership Limit

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Just over a month after the Federal Communications Commission (FCC or Commission) adopted its Declaratory Ruling (Pandora Ruling) allowing Internet streaming music provider Pandora to exceed the Communications Act's 25% benchmark for foreign investment in broadcast licensee parent companies, the FCC's Media Bureau (Bureau) granted Pandora's application to acquire South Dakota radio station KXMZ. The Bureau took this action over the objection of the American Society of Composers, Authors, and Publishers (ASCAP), one of the major music performance royalty organizations, which had taken issue with Pandora's certification of compliance with the foreign ownership limits and its motivations for acquiring the radio station.

In the Pandora Ruling, the FCC authorized foreign investors to hold up to an aggregate 49.99% voting and/or equity interest in Pandora Media, the parent company of Pandora Radio, without additional Commission approval, provided that a majority of its Board of Directors remain United States citizens and subject to certain conditions. However, the FCC ordered Pandora to take certain steps to ensure that foreign shareholders do not obtain significant influence over Pandora without prior Commission approval and without giving Pandora the opportunity to take preventative or remedial actions. The FCC also ordered Pandora to submit a compliance plan in connection with its application to acquire KXMZ, outlining the steps it has taken and intends to take to comply with the Pandora Ruling.

As required, Pandora submitted a compliance plan to the FCC, which it later revised. In its revised compliance plan, Pandora committed to engage in the following steps to monitor its foreign ownership levels:

Authors

Gregory L. Masters
Partner
202.719.7370
gmasters@wiley.law
Eve Klindera Reed
Partner
202.719.7404
ereed@wiley.law

Practice Areas

Media
Telecom, Media & Technology

- Enter into the Depository Trust Corporation (DTC) SEG-100 or program, which allows for the deposit of foreign-owned shares into a segregated account for monitoring of shares;
- Monitor shares held by current or former officers and directors;
- Monitor relevant SEC filings, such as Form 13F, Schedule 13D, Schedule 13G, and Form ADV, and any plan or proposal to influence the management or operation of the company; and
- Request lists of non-objecting beneficial owners (NOBOs) (i.e., a list of beneficial owners that own shares through a broker or bank intermediary and that do not object to having their identifying information reported to the issuer), and requesting all shareholders on the NOBO list to complete citizenship questionnaires in connection with its annual meeting proxy notices.

In addition, Pandora committed to use these monitoring steps to certify compliance with the Pandora Ruling in its FCC Biennial Ownership Report beginning in 2017.

The revised compliance plan did not address additional, non-discretionary, conditions imposed by the Pandora Ruling, which remain in effect and require Pandora to:

- Amend its organizational documents to allow its Board of Directors to (i) restrict the transfer of shares to aliens; (ii) require disclosure when an alien acquires beneficial ownership of, or voting interest in, shares; and (iii) compel the redemption of shares held by aliens;
- Notify the FCC in the event of non-compliance; and
- Obtain prior Commission approval for (i) a single foreign investor to acquire a greater than 5% interest in Pandora's outstanding shares, or (ii) transactions that would result in foreign investors in the aggregate acquiring a greater than 49.99% voting and/or equity interest in Pandora.

ASCAP objected to the compliance plan, identifying a number of alleged deficiencies. ASCAP also continued to press arguments that Pandora sought not to serve the listeners of KXMZ, but to inappropriately secure for itself lower copyright performance royalties in connection with its webcasting service by acquiring a terrestrial radio station.

The Bureau found that ASCAP lacked standing to file a formal "petition to deny" under the Communications Act for two reasons. First, the Bureau faulted ASCAP for failing to identify a member who was a *regular* listener of KXMZ, as opposed to an occasional or transient listener. Second, the Bureau found that ASCAP's arguments concerning the potential impact of a ruling in Pandora's favor on litigation between ASCAP and Pandora were speculative. As it often does, however, the Bureau considered ASCAP's arguments and rejected them. It approved Pandora's compliance plan, incorporated the Pandora Ruling to address the foreign ownership allegations, and refused to examine Pandora's motivations for acquiring the station. The Bureau thus approved the assignment of KXMZ to Pandora, conditioned on compliance with the Pandora Ruling and the commitments made in Pandora's revised compliance plan.

As we noted before, the extent to which the Pandora Ruling and/or the Bureau's decision will serve as a blueprint for other broadcasters seeking to exceed the 25% foreign ownership benchmark is unclear. The Pandora Ruling was limited to the facts presented by the particular transaction at issue, and the FCC stated at the time that it "intend[s] to examine in the near future whether it would be appropriate for the Commission to revise its methodology for assessing compliance with Section 310(b)(4) in the broadcast context." Pending that proceeding or subsequent case-by-case declaratory rulings, the Pandora Ruling and Bureau order approving the KXMZ assignment provide some guidance regarding measures that broadcasters may be able to employ—including the steps outlined above to which Pandora committed—to demonstrate compliance with the foreign ownership benchmark.