

ALERT

FCC Issues Draft NPRM Proposing Targeted Changes to Foreign Ownership Rules and Processes

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On April 7, the Federal Communications Commission (FCC) released a draft Notice of Proposed Rulemaking (NPRM) that proposes to codify a number of definitions and concepts underlying the foreign ownership rules and process in an effort to “assist petitioners in providing the relevant information in their initial filings, minimize the need for supplemental filings, and promote efficient and shorter processing times of Section 310(b) petitions.”

Below is a brief summary of the draft NPRM, which will be considered at the agency’s April 28 Open Meeting. Parties will have the opportunity to meet with the FCC to seek changes to the draft item before Monday, April 21, which is when the FCC’s “Sunshine” period will commence.

Proposed Changes Impacting Only Broadcast Applications

Controlling U.S. Parent. The draft NPRM proposes to define the “controlling U.S. parent” as “the first controlling entity organized in the United States that is above the licensee(s) in the vertical chain of control and does not itself hold a license subject to [S]ection 310 (b).” ¶ 17.

Deemed Voting and Advance Approval. For Section 310(b) petitions involving limited partners and LLC members that have deemed voting interests, the draft NPRM proposes to explicitly state that “a finding of deemed voting interest of 50 percent or more is not a finding of control in and of itself.” ¶ 18. The draft NPRM also proposes to amend the advance approval rule to state that “a foreign individual

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or entity that has a deemed voting interest of 50 percent or greater voting interest in the controlling U.S. parent, but that does not have de jure or de facto control of the controlling U.S. parent, may request advance approval for the foreign individual or entity to increase its interests, at some future time, up to any non-controlling amount not to exceed 49.99 percent equity and/or voting interest.” ¶ 18.

Trust and Trustee Requirements. The draft NPRM also proposes to amend the FCC’s foreign ownership rules to specify the information that petitioners must submit in Section 310(b) petitions concerning trusts and trustees. The draft NPRM proposes to amend the FCC’s rules to conform with the “policy and practice” that trustees must be disclosed under the Commission’s rules governing attributable interests and specific approval. ¶ 29. Moreover, “[t]o reduce the costs and burdens associated with additional requests when the petitioner fails to provide trustee information in an initial petition,” the draft NPRM proposes to codify that a petitioner must disclose both a trust and its trustees under the FCC’s attribution rules.

Extending the Methodology and Remedial Process to Privately Held Entities. The draft NPRM seeks comment on revisiting whether the FCC should extend its “methodology for determining foreign ownership and the remedial process for inadvertent non-compliance with the foreign ownership benchmarks to privately held entities for all services subject to Section 310(b)(4).” ¶ 30. The FCC currently allows private companies to use the revised calculation methodology applicable to publicly traded companies on a case-by-case basis. ¶ 31. The draft NPRM also seeks comment on extending its remedial process to private companies, stating that it expects that this process “would conserve public and private resources by minimizing the need for enforcement action.” ¶ 34.

Contents of Remedial Petitions. The draft NPRM proposes to amend the FCC’s rules “to state what information petitioners must include in a remedial petition for declaratory ruling . . . when seeking to remedy non-compliance with the existing requirements for foreign ownership benchmarks with respect to any service subject to Section 310(b).” ¶ 35. Specifically, the draft NPRM proposes to require that remedial petitions “contain all of the information required for an initial petition for declaratory ruling and not just the information related to the newly discovered non-compliant interest(s).” ¶ 35. The draft NPRM observes that although most petitions proceed this way already, “there have been instances where petitioners, despite the existing Commission rules on foreign ownership, have initially provided only the information related to the non-compliant interest(s), resulting in multiple submissions by the petitioners.” ¶ 36.

Amendments as a Complete Restatement for a Petition. The draft NPRM seeks comment “on codifying a requirement that any amendments to a pending petition for declaratory ruling must be filed as a complete restatement of the initial petition.” ¶ 39. The draft NPRM notes that it has been the practice of the Office of International Affairs and the Media Bureau that substantial changes to a petition for declaratory ruling warrant a complete restatement as opposed to an amendment or a supplement. ¶ 39.

U.S. Residency Requirements. The draft NPRM proposes to clarify that there is “no Commission requirement that a foreign investor must reside within the United States. Specifically, a foreign investor’s lack of a U.S. residence is not a factor in the Commission’s assessment of whether a petition for declaratory ruling is in the public interest.” ¶ 40.

Proposed Changes Broadcast Applications Only

Processing Broadcast License Applications During Remedial Process. The draft NPRM tentatively concludes that processing guidelines “will best inform the broadcast industry on how the Commission will process broadcast applications while a remedial petition is subject to review and we seek comment on that position.” ¶ 42. Under the current remedial process, the Commission has stated that it does not expect to take enforcement action against petitioners who file a remedial petition or redeem the foreign interests that rendered the licensee non-compliant with Section 310(b)(4). ¶¶ 43-44. However, the FCC may determine that the licensee was not entitled to the remedial process, or the agency may reject the foreign ownership.

The draft NPRM notes that “a licensee with a pending remedial petition for declaratory ruling has a foreign ownership interest that is inconsistent with the Commission’s rules and that has not yet been approved.” ¶ 45. As such, the draft NPRM seeks comment on “whether the Commission should grant the licensee new authorizations or allow a licensee to dispose of certain authorizations while the petition for declaratory ruling is pending.” ¶ 45. The draft NPRM further seeks comment on “whether adopting rules concerning the processing of broadcast applications while a foreign ownership petition is pending would offer greater benefits or fewer burdens than issuing guidance.” ¶ 47.

NCE/LPFM Station Ownership and Application Processing Issues. The draft NPRM seeks comment on how to incorporate the ownership structures of non-commercial educational (NCE) stations and low power FM (LPFM) stations seeking foreign ownership approval into the FCC’s rules. ¶ 48. The draft NPRM also seeks comment on “whether and how to clarify the Commission’s rules and procedures regarding the application of Section 310(b) in the context of filing windows for construction permits for noncommercial authorizations.” ¶ 53.

Other Opportunities to Reduce Regulatory Burdens

The draft NPRM seeks comment on other opportunities to approve the FCC’s foreign ownership rules or streamline Section 310(b). ¶ 56. The draft NPRM also seeks comment on “whether there are any other processes or policies that may need to be codified” in the FCC’s rules to assist petitioners and expedite petition processing. Finally, the draft NPRM asks whether, consistent with the *Delete, Delete, Delete* proceeding, there are “opportunities to alleviate unnecessary regulatory burdens” in the FCC’s foreign ownership rules. ¶ 56.

Wiley’s Telecom, Media & Technology and National Security practices have been deeply engaged in the efforts to reform the Team Telecom review process, as well as reforms to CFIUS, and have significant experience assisting parties in preparing FCC applications and navigating Team Telecom reviews. If you have questions about the draft NPRM, please contact one of the authors of this alert.