

FCC To Propose Sweeping Changes to Regulation of International Telecommunications Service

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On March 30, 2023, the Federal Communication Commission (FCC or Commission) released a draft Order and Notice of Proposed Rulemaking on international section 214 authorizations (the Draft Order and Draft NPRM), which governs international telecommunications service. This is the latest effort in the agency's evolving role in national security issues. The Draft NPRM proposes "comprehensive changes" to the FCC's rules, which it describes as "another important step to protect the nation's telecommunications infrastructure from threats in an evolving national security and law enforcement landscape." Because the FCC's proposals would affect any company offering international services originating or terminating in the United States, a broad range of entities could be impacted. This includes any telecommunications provider, such as satellite and wireless providers, as well as private equity firms and others investing capital in such entities.

The Draft NPRM is extremely comprehensive and proposes new rules that could lead to sweeping changes to the FCC's current international section 214 framework. Among other things, the Draft NPRM would do the following:

- *International Section 214 Renewals* – propose to require carriers to renew, every 10 years, their international section 214 authority, or in the alternative, require all international section 214 authorization holders to periodically update information enabling the FCC to review the public interest and national security implications of those authorizations based on that updated information;

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Practice Areas

International Trade
National Security
Team Telecom
Telecom, Media & Technology

- *Five Percent Threshold for Reportable Ownership Interests* – seek comment on whether the FCC should adopt a new ownership reporting threshold that would require disclosure of 5% or greater direct and indirect equity and/or voting interests;
- *Services and Geographic Markets* – adopt rules requiring applicants to provide information about their current and/or expected future services and geographic markets;
- *Foreign-Owned Managed Network Service Providers (MNSPs)* – seek comment on whether the FCC should require certain applicants, without reportable ownership, to provide information on foreign-owned MNSPs;
- *Facilities Cybersecurity Certification* – propose to require applicants to certify in their application that they will undertake to implement and adhere to baseline cybersecurity standards based on universally recognized standards; and
- *Facilities “Covered List” Certification* – propose to require applicants to certify in their application whether or not they use equipment or services identified in the FCC’s “Covered List” of equipment and services.

The Draft Order would adopt a one-time collection of foreign ownership information from international section 214 authorization holders. The Draft Order and Draft NPRM will be voted on at the FCC’s April 20 Open Meeting, and interested parties will have until April 6 to seek changes to the item. If adopted, comments and reply comments will be due 30 and 60 days, respectively, from the date of publication in the Federal Register. Below is a high-level summary of the current international section 214 authorization framework, and a summary of both items.

The Current International Section 214 Authorization Framework

Under current rules, the FCC reviews applications for new or modified international section 214 authorizations, for the transfer of control of an authorization holder, and for the assignment of an authorization (as well as notifications regarding *pro forma* transfers of control and assignments). As part of the review process, applicants must, among other things, provide the name, address, citizenship and principal businesses of any person or entity that directly or indirectly owns at least 10 percent of the equity of the applicant. Although the current rule references only the disclosure of equity interests, FCC staff routinely asks for information regarding holders of 10% or greater voting interests, and a new rule adopted by the Commission will formalize the requirement to provide information regarding both equity and voting holders. The Commission will refer applications with “reportable” or “disclosable” foreign ownership to the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector, which is commonly referred to as Team Telecom (the “Committee” or “Team Telecom”), to assess national security and law enforcement risks associated with the proposed services. Team Telecom will undertake its own analysis of the applicant and provide the FCC with a recommendation whether to grant, condition or deny the application. As part of its review process, Team Telecom will often require the parties to enter into a “mitigation agreement” to address perceived national security concerns, and will recommend that the Commission grant the application as long as the grant is conditioned on the applicant’s compliance with the mitigation agreement.

Significantly, once granted, international section 214 authorizations do not currently expire, and applicants have no obligation to provide any additional ownership information to the FCC unless there is an event that requires the filing of a modification, assignment or transfer of control application, or a notification regarding a *pro forma* event. Thus, an authorization holder that did not have any reportable foreign ownership at the time of the grant of its initial application would not be required to report the addition of any 10% or greater foreign holders, unless that (or a subsequent event) triggered an ownership change that would require the filing of a transfer of control application. Thus, it is possible that the foreign owner would never be reviewed by Team Telecom. Team Telecom, in its mitigation agreements, however, often requires that the parties provide it with information regarding ownership changes.

The Draft Order Would Adopt a One-Time Information Collection

If adopted, the Draft Order would establish a one-time information collection obligation for all international section 214 authorization holders. Each section 214 authorization holder would be required to identify its 10% or greater direct or indirect foreign interest holders (reportable foreign ownership) as of thirty (30) days prior to the filing deadline and require each holder to certify as to the accuracy of the information provided. International section 214 authorization holders would also be required to submit information based on three categories of ownership: 1) foreign adversaries; 2) no foreign adversaries; and 3) no foreign ownership. Notably, the Draft NPRM proposes to cancel the authorizations of carriers that fail to respond to the FCC's information collection and proposes to impose forfeitures or other measures where a carrier fails to respond in a timely or complete manner.

Draft NPRM Proposes Comprehensive Changes to the Section 214 Authorization Framework

If adopted, the Draft NPRM would propose comprehensive changes to the FCC's existing section 214 authorization framework across six areas. These proposed changes are summarized below and could lay the groundwork for sweeping changes to the FCC's existing section 214 authorization framework.

Proposed Cancellation of Section 214 Authorizations for Failure to Timely Respond to One-Time Information Collection

If an international section 214 authorization holder fails to timely respond to the information collection required in the Draft Order, the FCC proposes to cancel its authorization based on the "presumptive evidence that the authorization holder is no longer in operation." The FCC would publish a list of non-responsive authorization holders in the Federal Register and provide an additional 30 days from that publication for those authorization holders to respond to the information collection requirement or surrender the authorization.

The Draft NPRM also proposes rules that would permit any authorization holder whose authorization is cancelled for failure to timely respond to the information collection to file a petition for reinstatement *nunc pro tunc* of the authorization. Any such petition for reinstatement would be considered only if the petition: (1) is filed within six months after publication of the Federal Register notice; (2) demonstrates that the authorization holder is currently in operation and has customers; and (3) demonstrates good cause for the failure to timely respond.

Establishment of International Section 214 Renewal or Periodic Review Requirements

The Draft NPRM proposes a 10-year renewal requirement for all international section 214 authorization holders, whereby those authorization holders would be required to periodically demonstrate that their authorization continues to serve the public interest, and such authorization would expire following appropriate proceedings if the holder fails to meet that burden. In the alternative, the Draft NPRM would seek comment on adopting a periodic review process whereby international section 214 authorization holders would be required to periodically submit similar information demonstrating that their authorization continues to serve the public interest, and the FCC could institute a revocation proceeding if the holder fails to meet that burden. The Draft NPRM tentatively concludes that the FCC has direct and ancillary authority under sections 4(i), 201(b), and 214 of the Communications Act of 1934, as amended (the Act)—individually and collectively—to adopt terms and conditions of service for international section 214 authorizations.

The Draft NPRM proposes for the framework to apply to all international section 214 authorization holders, regardless of whether they have any foreign ownership. As such, all authorization holders would be subject to a renewal requirement, including authorization holders that have been granted international section 214 authority prior to the effective date of the renewal rules and authorization holders that are granted international section 214 authority after the effective date of the rules. The FCC would structure its periodic reassessment by prioritizing review of authorization holders with reportable foreign ownership, consistent with the FCC's long-held view that foreign ownership in the U.S. telecommunications sector "implicates national security, law enforcement, and other considerations."

Renewal Process and Implementation

The Draft NPRM proposes to adopt a renewal schedule that prioritizes the filing and review of renewal applications based on whether the carrier currently has reportable foreign ownership, the length of time since the FCC's most recent review of the authorization, and whether the authorization is subject to a mitigation agreement. Based on these priorities, the Draft NPRM proposes five distinct prioritized groups:

- **Group 1:** All Authorization Holders with Reportable Foreign Ownership From Foreign Adversary Country/No Mitigation Agreement/Authorization Granted over 10 Years Ago or Raises Other National Security, Law Enforcement, or Other Concerns.
- **Group 2:** All Authorization Holders with Reportable Foreign Ownership/Mitigation Agreement/Authorization Granted over 10 Years Ago.
- **Group 3:** All Authorization Holders with Reportable Foreign Ownership/No Mitigation Agreement/Authorization Granted less than 10 Years Ago.
- **Group 4:** All Authorization Holders with Reportable Foreign Ownership/ Mitigation Agreement/Authorization Granted less than 10 Years Ago.
- **Group 5:** No Reportable Foreign Ownership/No Other National Security or Law Enforcement Concerns.

The Draft NPRM also seeks comment on a proposal to routinely refer to the Executive Branch and Team Telecom those applications where an applicant discloses that it: 1) uses and/or will use a foreign-owned MNSP; 2) has cross-border facilities; and/or 3) uses equipment or services identified on the FCC's "Covered List" of equipment and services pursuant to the Secure and Trusted Communications Networks Act. For these referrals, the Draft NPRM proposes to apply the same timeframes associated with Team Telecom reviews, consisting of a 120-day initial review period followed by a discretionary 90-day secondary assessment.

Draft NPRM Proposes Robust Requirements for Section 214 Renewal Applications

The Draft NPRM proposes to apply the requirements applicable to initial applications for international section 214 authority to the proposed rules for renewal applications. In the context of a periodic review framework, the Draft NPRM would require authorization holders to submit the same information as that required for a renewal application. Among other things, those requirements would include basic information about the applicant and contact information, the type of international section 214 authority, interlocking directorates, and foreign carrier affiliations.

The Draft NPRM also proposes to apply the application requirements that were adopted in the Executive Branch Process Reform Order, with regard to international section 214 authorizations, to renewal applications. Among other things, these criteria include the calculation of equity and voting interests held indirectly in a carrier, an ownership diagram reflecting both the pre-transaction and post-transaction ownership of the authorization holder, and associated certifications.

New Application Requirements for All International Section 214 Applicants and Authorization Holders

The Draft NPRM also proposes a host of new application requirements for all international section 214 applicants and authorization holders. Among other things, the Draft NPRM seeks comment on whether to adopt a new ownership reporting threshold that would require disclosure of 5% or greater direct and indirect equity and/or voting interests with respect to applications for international section 214 authority and modifications, assignments, transfers of control, and renewals of international section 214 authority. The Draft NPRM asserts that the current 10% reporting threshold may not "capture all foreign interests that may present national security, law enforcement, foreign policy, and trade policy concerns."

The Draft NPRM also proposes to adopt rules requiring applicants to include in all initial applications for international section 214 authority and applications for modification, assignment, transfer of control, and renewal of international section 214 authority information about their current and/or expected future services and the geographic markets where the authorization holder offers service in the U.S. under its international section 214 authority. Among other things, the Draft NPRM proposes to require applicants to: (1) identify and describe the specific services they provide and/or will provide; (2) the types of customers that are and/or will be served; and (3) identify where they currently and/or in the future expect to market, offer, and/or provide services, such as a U.S. state or territory and/or U.S.-international route or globally.

The Draft NPRM also seeks comment on whether the FCC should require all applicants, including those *without* foreign ownership, to identify in their application whether or not they use and/or will use foreign-owned MNSPs. It also seeks comment on whether an MNSP should be considered “foreign-owned” only if it is majority-owned and/or controlled by one or more non-U.S. individual(s) or entity(ies), and whether the FCC should evaluate the character qualifications of foreign-owned MNSPs.

The Draft NPRM also proposes to collect from current international section 214 authorization holders detailed information on critical infrastructure that is used to provide service crossing the U.S.-Mexico and U.S.-Canada borders, including the location, ownership, and type of facilities, and to require authorization holders to continue to update this information as part of a proposed ongoing three-year reporting requirement. The Draft NPRM also proposes to share this information with relevant Executive Branch agencies, including Team Telecom.

The Draft NPRM would seek comment on whether the FCC should require international section 214 applicants to certify in the application as to whether or not they use equipment or services identified on the Commission’s “Covered List” of equipment and services. It would also seek comment on whether the FCC should require applicants to certify that they will not purchase and/or use equipment made by entities (and their subsidiaries and affiliates) on the “Covered List” as a condition of the potential grant of the application. The Draft NPRM would also propose to routinely refer to Executive Branch agencies and Team Telecom applications for new international section 214 authorizations as well as applications to modify, assign, transfer control of, or renew those authorizations where an applicant certifies that they use equipment or services identified on the Commission’s “Covered List” of equipment.

The Draft NPRM would also propose that all applicants seeking international section 214 authority or modification, assignment, transfer of control, or renewal of international section 214 authority to certify in the application whether or not they are in compliance with the FCC’s rules and regulations, the Act, and other laws. The Draft NPRM would propose that each applicant certify in its application whether or not the applicant has violated the Act, FCC rules, or U.S. antitrust or other competition laws, has engaged in fraudulent conduct before another government agency, has been convicted of a felony, or has engaged in other non-FCC misconduct. The Draft NPRM would also seek comment on whether the FCC should require applicants to disclose any pending FCC investigations, including any pending Notice of Apparent Liability, and any adjudicated findings of non-FCC misconduct.

Additional Changes to Part 63 Rules, Including Reporting of Data Storage Information

Finally, the Draft NPRM would propose substantial changes to the FCC’s existing Part 63 rules governing international section 214 authorizations. Among other things, the Draft NPRM would propose to adopt a rule that would allow an authorization holder to hold only one international section 214 authorization except in certain limited circumstances. It would also propose to adopt a rule requiring an international section 214 authorization holder to commence service under its international section 214 authority within one year following the grant. The Draft NPRM would also propose to amend the FCC’s rules to require authorization holders that permanently discontinue service under their international section 214 authority to file a

notification of the discontinuance with the FCC and surrender the authorization.

The Draft NPRM would also propose that the FCC require authorization holders to provide updated ownership information and other information every three years following the grant of a renewal application filed with the agency until the next grant of a renewal application. The reporting proposal is extremely broad and, among other things, would require section 214 authorization holders to provide updated information concerning those who hold 5% or greater direct and indirect equity and/or voting interests, or a controlling interest, in the authorization holder, updated information on their cross-border facilities, and a certification as to whether or not they are in compliance with the FCC's rules and regulations, the Act, and other laws.

Finally, the Draft NPRM would seek comment on whether, as part of their three-year reporting requirement, authorization holders should report the current location(s) of their data storage facilities; the foreign countries where they currently store U.S. records; the foreign countries from which their infrastructure in the United States is currently and/or can be accessed, controlled, and/or owned; and the countries in which their employees, subsidiaries, and/or offices are currently located. The item would also seek comment on whether authorization holders should disclose the equipment such as the hardware and software that they currently use to store U.S. records for services provided pursuant to their international section 214 authority.

Conclusion

The Draft Order and Draft NPRM are sweeping in nature and, if adopted, would significantly expand obligations for carriers under the Commission's international section 214 authorization framework. Wiley's Telecom, Media & Technology, National Security, Cybersecurity, and Government Contracts practitioners can help navigate these evolving issues.