

ALERT

The FCC Releases International Section 214 Order and NPRM, Proposing Major Changes to the Regulation of International Telecommunications Service

April 27, 2023

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On April 25, 2023, the Federal Communications Commission (FCC or Commission) released an Order and Notice of Proposed Rulemaking on international Section 214 authorizations (the Order and NPRM), which authorize the provision of international telecommunications service. The item was unanimously adopted at the Commission's April 20 Open Meeting. Although the Commission's released Order and NPRM is substantially the same as the circulated draft item, which we previously analyzed, the Commission made several changes.

The Order and NPRM present yet another step in the Commission's ongoing efforts to evolve—and significantly expand—its role in addressing national security issues. Because the Commission's proposals would affect any company offering international telecommunications services originating or terminating in the United States, a large swath of entities will be impacted, including telecommunications providers, such as satellite and wireless providers, as well as private equity firms and others investing capital in such entities.

Adoption of the NPRM's proposals would subject companies and their owners to significantly expanded disclosure obligations, ongoing reporting requirements, and increased scrutiny by the Committee for the Assessment of Foreign Participation in the United States

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Telecommunications Services Sector (commonly referred to as “Team Telecom”). Comments and reply comments will be due 30 and 60 days, respectively, from date of publication in the *Federal Register*.

Our more detailed summary is below, and we note differences between the final item and the draft item.

The Order adopts a one-time collection of foreign ownership information from international Section 214 authorization holders. International Section 214 authorization holders will be required to identify their 10% or greater direct or indirect foreign interest holders and will also be required to submit information based on the extent of their foreign ownership, including that held by foreign adversaries. The FCC proposes to cancel the authorizations of any holders that do not respond to the information collection obligation and may also take enforcement action against them.

The NPRM is extremely comprehensive and proposes new rules that would lead to sweeping changes to the FCC’s decades-old international Section 214 framework. Among other things, the Draft NPRM would do the following:

- **Mandate International Section 214 Renewals** – require carriers to renew their international Section 214 authority every 10 years or, alternatively, require all international Section 214 authorization holders to periodically update information to allow the FCC to reassess the public interest and national security implications of those authorizations, and the Commission would refer all applications for renewal involving reportable foreign ownership to Team Telecom for review;
- **Establish a Reduced 5% Threshold for Reportable Ownership Interests** – establish a new, lower ownership reporting threshold that would require disclosure of 5% or greater direct and indirect equity and/or voting interests, a move that many argue could chill investment in the U.S. telecommunications sector;
- **Mandate Disclosure of Information on Services and Geographic Markets** – require international Section 214 applicants to provide information about their current and/or expected future services and geographic markets;
- **Mandate Disclosure of Foreign-Owned Managed Network Service Providers (MNSPs)** – require all international Section 214 applicants, even those *without* reportable foreign ownership, to provide information on foreign-owned MNSPs, and make a referral to Team Telecom if an international Section 214 applicant reports use of foreign-owned MNSPs;
- **Establish a Facilities Cybersecurity Certification** – require international Section 214 applicants to certify that they will take action to implement and adhere to baseline cybersecurity standards based on universally recognized standards, such as those provided by the Department of Homeland Security’s Cybersecurity & Infrastructure Security Agency (CISA) or the Department of Commerce’s National Institute of Standards and Technology (NIST);
- **Establish a Facilities “Covered List” Certification** – require applicants to certify whether or not they use equipment or services identified on the FCC’s “Covered List” of equipment and services; and

- **Establish Ongoing Reporting Requirements, Including Data Storage Information** – require authorization holders to provide updated ownership information and other information –including data storage information – every three years following a renewal application grant.

SUMMARY

The Order

The Commission’s adopted Order will require all international Section 214 authorization holders to respond to a one-time information collection. Authorization holders will be required to identify their 10% or greater direct or indirect foreign interest holders as of 30 days prior to the filing deadline. The filing deadline will be no fewer than 30 days following the effective date of the Order, as to be determined by the Office of Management and Budget (OMB). Authorization holders must submit information based on the following categories:

- **Reportable Foreign Ownership – Foreign Adversary – China (including Hong Kong), Cuba, Iran, North Korea, Russia, Maduro Regime.** Where there are interest holders that are entities and individuals that are government organizations or citizens of “foreign adversary” countries (listed above), an authorization holder must identify its 10% or greater direct or indirect foreign interest holders, as well as any additional 10% or greater direct or indirect foreign interest holders, aside from the foreign adversaries.
- **Reportable Foreign Ownership – No Foreign Adversary.** Where there are no interest holders that are foreign adversaries or citizens of any foreign adversary country, an authorization holder must identify its 10% or greater direct or indirect foreign interest holders.
- **No Reportable Foreign Ownership.** An authorization holder that has no reportable foreign ownership must certify the truth and accuracy of this information.

Authorization holders must also certify that the information provided is accurate.

The NPRM

Procedures 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 Order, the NPRM proposes to cancel its authorization. The NPRM proposes to publish a list of non-responsive authorization holders in the *Federal Register* and provide an additional 30 days from that publication date for those authorization holders to respond to the information collection requirement or surrender the authorization. The NPRM builds upon the draft item, explaining that authorization holders will be subject to forfeiture in addition to authorization cancellation.

The NPRM also proposes to 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. Such petitions 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.

Renewal Requirement Applicable to All International Section 214 Authorization Holders

Currently, once issued, international Section 214 authorizations do not expire. The NPRM proposes to impose a new requirement to renew international Section 214 authorizations every 10 years. The NPRM seeks comment on this timeframe and on possible alternatives. Additionally, the NPRM asks a new question that was not in the draft item, *i.e.*, “whether the 10-year period should reset if an international Section 214 authorization holder undergoes a complete review, such as during the review of a substantive assignment or transfer of control application.” The Commission also states that, regardless of the renewal timeframe, the Commission should retain its existing authority to conduct *ad hoc* review of authorizations and revoke those authorizations if necessary.

As an alternative to a 10-year renewal cycle, the Commission seeks comment on establishing a three-year periodic review scheme that would enable the FCC to review the public interest and national security implications of those authorizations. Under this alternative, the Commission would “systematically and continually review” all authorization holders at regular intervals. The NPRM explains that “[t]o the extent circumstances in any particular situation raised . . . concerns, the Commission could initiate a revocation proceeding.”

The Commission also seeks comment on a bifurcated process where the Commission adopts the 10-year renewal framework for authorization holders whose international Section 214 application is granted *after* the effective date of new rules. For authorization holders whose applications were granted *before* the effective date of the new rules, the Commission seeks comment on adopting a three-year formalized periodic review process.

With respect to its legal authority to adopt a renewal requirement, the FCC tentatively concludes that it has direct and ancillary authority under Sections 4(i), 201(b), and 214 of the Communications Act to impose renewal requirements, even though Section 214 does not expressly require the renewal of authorizations granted thereunder. The FCC seeks comment on this tentative conclusion and whether there are other statutory provisions that provide the agency with the power to adopt a renewal or periodic review process.

Renewal Process and Implementation

Priority Categories

The Commission proposes to prioritize renewal applications or any periodic review filings and deadlines based on: (1) reportable foreign ownership, including any reportable foreign interest holder that is a citizen of a foreign adversary country, (2) the year of the oldest to most recent Commission action, divided in fixed intervals, and (3) whether the authorizations are conditioned on an existing mitigation agreement with Team Telecom. The Commission also proposes to prioritize any filings that raise other national security, law enforcement, or other concerns. The Commission proposes five categories for renewal prioritization:

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

Although the draft NPRM proposed to include all authorization holders with reportable foreign ownership from foreign adversary countries in Group 1, the adopted NPRM departs from this approach and includes such holders in Groups 1-4 based on how long ago their authorizations were granted and whether they have a mitigation agreement. The Commission proposes that the Office of International Affairs establish filing deadlines for Groups 1 to 5 that require the first submissions of renewal applications by authorization holders within six months of OMB approval. The Commission proposes to apply these same principles if it establishes a periodic review framework rather than a renewal framework.

Streamlined Renewal Processing Procedures

The Commission proposes to create a streamlined review process for Group 5. Authorization holders in Group 5 would be placed on a streamlined Accepted for Filing public notice. The application would be granted 14 days after the public notice if: "(1) the Commission does not refer the application to the Executive Branch agencies because the applicant does not have reportable foreign ownership and the application does not raise other national security, law enforcement, or other considerations; (2) the application does not raise other public interest considerations, including regulatory compliance; (3) the Executive Branch agencies do not separately request during the comment period that the Commission defer action and remove the application from streamlined processing; and (4) no objections to the application are timely raised by an opposing party." The Commission seeks comment on this proposal.

Referral of Applications with Reportable Foreign Ownership to the Executive Branch Agencies

The Commission will refer applications for renewal where the applicant has reportable foreign ownership to relevant Executive Branch agencies and Team Telecom. The Commission proposes to apply the same time frames that were adopted in the *Executive Branch Process Reform Order*[1] for the referrals: a 120-day initial review period followed by a discretionary 90-day secondary assessment.

Referral of Certain Applications Without Reportable Foreign Ownership to the Executive Branch Agencies

The NPRM also seeks comment on a proposal to routinely refer to the Executive Branch and Team Telecom those applications that do not include any reportable foreign ownership but do include a disclosure that the applicant: (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. These referrals would also be subject to an initial 120-day review period followed by a discretionary 90-day secondary review.

Non-Referral of Certain Applications

The NPRM contains a new section, not included in the draft item, seeking comment on whether there are categories of renewal applications with respect to which the Commission can leverage prior national security determinations to "minimize burdens" on the Executive Branch agencies and Team Telecom. The Commission seeks comment on whether there are categories of renewal applications that should not be referred to the Executive Branch agencies, including whether there are applications the Commission could act on without referral.

Renewal Application Requirements

The NPRM proposes to require renewal applicants to submit the same application information and certifications required for initial applications that are set out in Section 63.18 of the Commission's rules. Such information, which would similarly be required if the Commission were to adopt a periodic review framework, would include the following:

- **Applicant Information.** Basic information about the applicant and contact information.
- **Type of International Section 214 Authority.** Information pertaining to an applicant's previous receipt of international Section 214 authority and the specific authority, either facilities-based and/or resale-based and/or other authorization sought in the application. Applicants would also be required to provide certifications that they will comply with certain terms in conditions in the Commission's rules. These applicants would include those applying for:
 - Global facilities-based authority,
 - Global resale authority, and

- Authority to acquire facilities or to provide services not covered by the above.
- **Ownership and Interlocking Directorates.** Ownership information and identification of any interlocking directorates with foreign carriers.
- **Foreign Carrier Affiliation.** Information and certifications relating to whether an applicant is, or is affiliated with, a foreign carrier. Specifically:
 - Whether the applicant is or is affiliated with a foreign carrier and identification of each foreign country in which the applicant is or is affiliated with a foreign carrier;
 - Whether the applicant seeks to provide international telecommunications services to any destination country where the applicant is or controls a foreign carrier in that country; or any entity that owns more than 25% of the applicant, or that controls the applicant, controls a foreign carrier in that country; or two or more foreign carriers (or parties that control foreign carriers) own, in the aggregate, more than 25% of the applicant and are parties to, or the beneficiaries of, a contractual relation affecting the provision or marketing of international basic telecommunications services in the United States;
 - If any country identified by the applicant in the certification is not a member of the World Trade Organization (WTO), the applicant must demonstrate whether the foreign carrier has market power or lacks market power; and
 - Any applicant that is or is affiliated with a foreign carrier in a country identified in the certification, and which seeks to be regulated as non-dominant for the provision of particular international telecommunications services to such country, should demonstrate that it qualifies for non-dominant classification.
- **No Special Concessions.** An applicant must certify that it has not agreed to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses market power on the foreign end of the route and will not enter into such agreements in the future.
- **Not Subject to Denial of Federal Benefits.** An applicant must certify that no party to the application is subject to a denial of Federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988.
- **Other Requirements.** Any other information that may be necessary to enable the Commission to act on the application.

The NPRM also proposes to apply application requirements adopted in the *Executive Branch Process Reform Order* to its proposed international Section 214 authorization renewal process. These include:

- **Calculation of *Equity* Interests Held Indirectly in the Carrier.** Pursuant to rules adopted in the *Executive Process Branch Reform Order*, equity interests held indirectly in a carrier would be calculated by multiplying the equity percentages for each link in the vertical ownership chain. This calculation would apply to all equity interests, regardless of whether any link in the chain holds a controlling interest in the entity in the next lower tier.

- **Calculation of Voting Interests Held Indirectly in the Carrier.** Pursuant to rules adopted in the *Executive Branch Process Reform Order*, voting interests held indirectly in a carrier would be calculated by multiplying the voting percentages for each link in the vertical ownership chain. Where a voting interest in any link of the chain equals or exceeds 50% or represents actual control, however, it would be treated as if it were a 100% voting interest.
- **Ownership Diagram.** Applicants would be required to provide an ownership diagram illustrating the applicant's vertical ownership structure.
- **Responses to Standard Questions.** Each applicant for which an individual or entity that is not a U.S. citizen holds a 10% or greater interest or a controlling interest would be required to submit responses to the FCC's Standard Questions.
- Applicants would be required to make several certifications, including that they will comply with all applicable Communications Assistance for Law Enforcement Act (CALEA) requirements and regulations.

The Commission also proposes to adopt an application fee of \$875.

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

While the previous proposed requirements would apply to the Commission's proposed renewal process, the NPRM also proposes to adopt new requirements for *all* international Section 214 applicants and authorization holders. These requirements would apply to both substantive and *pro forma* applications. Specifically, the Commission proposes:

- **Five (5) Percent Threshold for Reportable Interests.** The Commission's rules currently require a 10% reporting threshold for ownership interests. The NPRM proposes reducing this to a 5% reporting threshold for direct and indirect voting and/or equity interests. This disclosure requirement would apply to applications for new international Section 214 authority as well as modifications, assignments, transfers of control, and renewals of existing international Section 214 authority. The Commission seeks comment on this approach, asking whether a 5% reporting threshold would capture the extent of influence that foreign investors or foreign governments may have on the applicant.
 - The NPRM also includes changes from the original draft item in this regard. Specifically, the Commission asks for comment on an alternative proposal pursuant to which it would "only require disclosure of foreign ownership at the 5% level by citizens, entities, and government organizations from foreign adversary countries, as defined in the Department of Commerce's [ICTS Supply Chain] rule, 15 CFR § 7.4." In addition, the Commission asks whether it should require reporting only where the 5% or greater interest is "not passive or otherwise insulated." The Commission notes that there is a similar system in place for foreign ownership rulings under 47 U.S.C. § 310(b) but questions whether it would be appropriate for international Section 214 applicants because national security and law enforcement issues may be implicated even if interests are passive or insulated. Lastly, the Commission asks whether it should treat disclosure of 5% and up to less than 10% interests as presumptively confidential.

- At the same time, the Commission proposes *not* to change the Commission's cable landing license rules and would instead retain the current 10% reporting threshold for submarine cable landing license applications.
- **Services and Geographic Markets.** The Commission proposes to require applicants to submit information about their current and/or expected future services and geographic markets where the authorization holder offers services in the United States under its authority.
- **Foreign-owned MNSPs.** The Commission seeks comment on whether it should require all applicants – including those *without* foreign ownership – to identify in their applications whether they use and/or will use foreign-owned MNSPs. The NPRM proposes that applicants who answer in the affirmative would have their applications “routinely referred to the Executive Branch agencies, including [Team Telecom].” Additionally, the Commission seeks comment on whether it should conduct a one-time collection on the use of foreign-owned MNSPs.
- **Cross Border Facilities Information.** The Commission proposes to collect detailed information regarding critical infrastructure used by authorization holders to provide service crossing the U.S.-Mexico and U.S.-Canada borders. The NPRM also differs from the draft item by proposing to conduct a one-time collection concerning cross-border facilities and proposing to require updates in ongoing reports.
- **Facilities-Based Equipment, Resellers, and Service Certification.**
 - *Cybersecurity Certification.* The Commission proposes requiring applicants to certify that they will undertake to implement and adhere to baseline cybersecurity standards based on standards such as CISA's Cybersecurity Performance Goals or NIST's Cybersecurity Framework.
 - *Facilities “Covered List” Certification.* The Commission proposes requiring applicants to certify in their applications whether they use equipment or services identified on the Commission's “Covered List.”
- **Regulatory Compliance Certification.** The Commission proposes requiring applicants to certify whether they comply with the Commission's rules and regulations, as well as the Communications Act.

Changes to Part 63 Rules

In addition to the authorization renewal and application rule changes, the Commission proposes the following changes to the international Section 214 authorization rules in Part 63.

- **Permissible Number of Authorizations.** The Commission proposes to adopt a rule that would allow authorization holders to hold only one international Section 214 authorization, “except in certain limited circumstances.”
- **Commence Service Within One Year.** The Commission proposes requiring an international Section 214 authorization holder to begin providing service under its authority within one year of the grant, or have its authorization canceled.

- **Changes to the Discontinuance Rule.** Among other proposed discontinuation requirements, the Commission proposes to require authorization holders that permanently discontinue service under their international Section 214 authority to file a notification to the Commission and surrender their authorizations. Additionally, the NPRM proposes to modify the rules to require authorization holders to provide notices to affected customers of planned discontinuance, reduction, or impairment of service.
- **Ongoing Reporting Requirements, Including Data Storage Information.** The Commission proposes to require authorization holders to provide updated ownership information and other information every three years following a renewal application grant. Specifically, the updated information required to be reported would include the new information the Commission proposes to require for all applications, as described above. This would include proposing that *authorization holders be required 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. However, the NPRM makes a change from the original draft item in that it asks whether to require ongoing reporting at **10%** or greater threshold if the Commission does not adopt a reporting requirement at a 5% threshold. Additionally, the Commission seeks comment on requiring information about **data storage practices** for services provided pursuant to international Section 214 authority.
- **International Signaling Point Codes (ISPCs).** The Commission proposes to adopt a rule requiring applicants seeking to assign or transfer control of their authorization to identify in their application any ISPCs that they hold and whether the ISPC will be subject to the assignment or transfer of control.
- **Enforcement of International Section 214 Authorization Rules.** The Commission proposes adjusting its rules to allow for the cancellation of an authorization if the Commission determines that the authorization holder has permanently discontinued service. Additionally, the Commission proposes cancelling authorizations if authorization holders fail to comply with other reporting requirements.

CONCLUSION

The Commission's Order and NPRM envision sweeping changes to the international Section 214 regime that, if adopted, would significantly expand obligations for carriers. Wiley's Telecom, Media & Technology, National Security, Cybersecurity, and Government Contracts practitioners can help navigate these evolving issues.

[1] *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, IB Docket No. 16-155, Report and Order, 35 FCC Rcd 10927 (2020) ("Executive Branch Process Reform Order").