

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Process Reform for Executive) IB Docket No. 16-155
Branch Review of Certain FCC)
Applications and Petitions)
Involving Foreign Ownership)

COMMENTS OF TMT FINANCIAL SPONSORS

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Executive Summary

Morgan, Lewis & Bockius LLP, on behalf of certain financial sponsors investing in telecommunications, media and technology companies (the “Financial Sponsors”), submits these comments in support of the Commission’s proposals in the Notice of Proposed Rulemaking issued in the above-referenced docket to reform the process by which the FCC and the Executive Branch agencies (commonly known as “Team Telecom”), review applications for new licenses or transfers of control of existing licensees from parties with more than for 10% direct or indirect foreign ownership or exceeding the foreign ownership limits for wireless and broadcast licensees. Given the significant obstacles that the Team Telecom process often puts in front of international investment, the Financial Sponsors applaud the FCC’s attention to this important issue, and urge the Commission to expeditiously establish rules to clarify and streamline the Team Telecom review process.

First, the Financial Sponsors respectfully assert that certain categories of applications currently subject to Team Telecom review should be removed entirely from this process, such as those where ultimate indirect ownership resides in the U.S.; those involving entities that only provide resold services; applications where the indirect owners have previously been vetted by Team Telecom; and transactions where applicants voluntarily subject themselves to review by the Committee on Foreign Investment in the United States.

Second, the Commission should not expand the scope of information and materials required for Team Telecom review beyond those that are relevant to law enforcement and national security. A secure online portal can be an efficient means to provide this information to Team Telecom, but very particular care must be given to the confidential nature of the information filed, and to minimize the potential for the disclosure of such information.

Likewise, the Financial Sponsors do not believe that using FCC staff as “gatekeepers” or first-line reviewers of this information would be necessary or helpful to the process, which the Executive Branch is very capable of undertaking. Adding another layer to the review process would unnecessarily burden FCC staff for work that would ultimately be duplicative, and would only serve to potentially increase delays in the review process.

The Financial Sponsors also support measures to streamline the review process, including having applicants certify voluntarily to certain mitigation measures as part of the application process, and measures to allow entities under common ownership to adopt recently established network security agreements that are already in place with an affiliate. They also strongly support establishing a 90-day timeline for Team Telecom review (with one possible 90-day extension with detailed justification). Having a clear timeframe for Team Telecom review and clearance is essential to improving the foreign ownership review process. Finally, the FCC’s framework should include a system to address situations where Team Telecom seeks to have the FCC deny an application, including transparency with respect to such a decision and the right to appeal it.

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COMMENTS OF TMT FINANCIAL SPONSORS

Morgan, Lewis & Bockius LLP (“Morgan Lewis”),¹ on behalf of certain telecommunications, media and technology (“TMT”) financial sponsor entities (the “Financial Sponsors”),² submits these comments in response to the Notice of Proposed Rulemaking issued in the above-referenced docket (“NPRM”). The NPRM seeks comment on a number of proposed changes to the FCC’s rules and procedures related to certain applications and petitions for declaratory ruling involving foreign ownership, arising out of a proposal submitted by the National Telecommunications and Information Administration , and the FCC’s comment cycle related to the NTIA Letter.³ The NPRM proposes a number of changes to the way the FCC and the Executive Branch agencies (commonly known as “Team Telecom”) process applications for

¹ Morgan Lewis is an international law firm that advises and assists financial sponsors and telecommunications service providers on the foreign ownership review processes involved in new authorizations and transfers of Section 214 licenses, submarine cable landing licenses, wireless licenses (including petitions for declaratory ruling under Section 310 of the Communications Act of 1934), media ownership review, and related matters. Morgan Lewis files these comments on behalf of a consortium of financial sponsor clients that invest in TMT companies regulated by the Commission, and subject to foreign ownership review processes at the FCC, the Executive Branch and the Committee of Foreign Investment in the United States (“CFIUS”).

² “Financial Sponsors” refers to U.S. and foreign-based entities that own or invest in TMT companies, such as, but not limited to, investment banks, mutual funds, trusts, pension funds, private equity funds, hedge funds, real estate investment trusts, etc.

³ See Letter from the Honorable Lawrence E. Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Marlene H. Dortch, Secretary, FCC (May 10, 2016); NTIA Letter Regarding Information and Certifications from Applicants and Petitioners for Certain International Authorizations, IB Docket No. 16-155, Public Notice, DA 16-531 (IB May 12, 2016) (“NTIA Letter”).

new licenses or transfers of control of existing licensees from parties with more than for 10% direct or indirect foreign ownership or exceeding the foreign ownership limits for wireless and broadcast licensees. The Financial Sponsors applaud the FCC's attention to these important issues, and strongly support the FCC's goals of improving the timeliness and transparency of the Executive Branch foreign ownership review process. The applicants urge the Commission to complete this proceeding expeditiously in order to create rules that clarify and streamline the Team Telecom review process, a labyrinthine and perplexing process for Financial Sponsors investing in FCC licensees.

I. Introduction

The Financial Sponsors represent a cross-section of Morgan Lewis clients that invest in companies in the telecommunications and/or media sectors in the United States. As investors in companies regulated by the FCC, the Financial Sponsors are often subject to, or are potentially subject to, to the Team Telecom foreign review process as disclosable interest holders in FCC-regulated companies.

Financial sponsor entities come in many varieties, and many involve different types of foreign ownership elements. For business purposes, some United States-based financial companies utilize foreign intermediary holding companies, but ultimate beneficial and/or voting ownership comes back fully to U.S. companies or citizens. Others utilize limited partnerships in various countries as funding vehicles for their investment portfolios to attract passive, non-controlling foreign investors. Often the complex tax and regulatory systems in the United States and other jurisdictions drive the decisions on how financial sponsor entities set up and fund their investment vehicles. In the world of international finance, there are a number of jurisdictions that sophisticated investors tend to use due to their favorable tax systems, legal protections, and corporate jurisprudence (*e.g.*, Cayman Islands, Bermuda, Ireland, Luxembourg, etc.). Many

sophisticated investors expect to see entities formed in these jurisdictions, and in many cases expect and demand it to provide them with certainty regarding the laws and taxes governing the investment vehicle.

Due to the complex nature of international capital-raising, the Financial Sponsors have, or can expect to have, some of their investment funds, owners and managers scrutinized through the Team Telecom foreign ownership review process when an FCC-regulated company that they invest in seeks to obtain a new license, transfers an existing license, or undertakes certain other corporate activities. The complexity and lack of transparency that currently surrounds this process hinders investment activity in the United States' telecommunications and media sectors. It also puts the United States at odds with other modern economies. Most of our trading partners have eliminated foreign ownership restrictions altogether, and few (if any) require detailed analysis of a 5% or 10% direct or indirect investor in a telecommunications or media company.

Over the past decade the Team Telecom process has morphed into a system allowing the Executive Branch virtually unfettered access to all manner of information on FCC licensees and their owners even when the licensee has only a very small amount of direct or indirect foreign ownership. While such reviews may be appropriate in cases of significant foreign controlling interests in a facilities-based carrier, or when a foreign telecommunications company seeks to enter the U.S. market for the first time; more and more this process has become a fishing expedition by often unnamed U.S. government agencies seeking to collect sensitive financial data, personal information, and other information in cases where there is only very minor foreign ownership with no logical connection to the licensee's actual operation of telecommunications services. It has also become a means by which certain agencies of the U.S. government can block foreign investment in the United States telecommunications and media sector under the

guise of national security, with scant accountability or transparency in the decision-making process. The process takes months at a minimum, and FCC records show that some applications have been placed on hold indefinitely (some tracing back to 2011). Applicants are often provided little or no information over the status of the review of their applications, and the Executive Branch agencies conducting the diligence process have little incentive to act upon them with any reasonable speed.

Given the obstacles that the Team Telecom process --a process with little transparency, certainty, oversight, accountability, or even a statutory or legal basis-- often puts in front of international investment, , the Financial Sponsors strongly applaud the FCC's proposals to rationalize, codify and streamline this process. Doing so is crucial to ensure that the United States telecommunications and media sectors continue to receive investment to allow it to grow and thrive in the future.

II. The Team Telecom Process Should Only Apply to Certain Types of Applications That Actually Raise Law Enforcement and/or National Security Concerns

The NPRM lists a number of types of applications (with reportable foreign ownership) that the Commission proposes to be subject to the Team Telecom process: international section 214 authorizations, applications to assign or transfer control of domestic or international section 214 authority, submarine cable landing licenses and applications to assign or transfer control of such licenses, and petitions for section 310(b) foreign ownership rulings (broadcast, common carrier wireless, and common carrier satellite earth stations).⁴ The Commission does not propose to expand the types of applications referred to the Executive Branch beyond those that it

⁴ See NPRM, ¶13.

currently refers.⁵ The FCC is, however, proposing to change its current practice of referring for Team Telecom review “domestic-only” Section 214 transfer applications.⁶

The Financial Sponsors agree with the Commission that the scope of the Team Telecom review process should not be extended to new categories of applications. In fact, the Financial Sponsors respectfully assert that certain categories of applications currently subject to review should be removed entirely from this process. For example, it may be reasonable to apply the Team Telecom process to applications directly involving foreign operating companies (*i.e.*, telecommunications carriers established in foreign jurisdictions), and licensees providing facilities-based services. However, it should not apply to applications where the licensee only offers resold telecommunications services.⁷ Applicants can simply certify as part of their FCC application that they do not provide or intend to provide facilities-based services in the United States or its territories. The limited resources of the Executive Branch should be aimed at law enforcement and national security review for entities that are, in fact, in a position to actually route telecommunications traffic over their networks, rather than those that simply resell the telecommunications services provided by other entities.

Likewise, the Team Telecom review should not apply to *pro forma* transactions where the ownership of a licensee may technically be changed through the insertion or removal of an upstream parent company or intermediary holding company, but where ultimate ownership remains unchanged. The FCC should clarify and codify this principle.

Additionally, applicants that only have passive, offshore intermediary holding companies, but where 100% of the ultimate control of the licensee comes back to the United States (either to

⁵ *Id.*

⁶ See NPRM, ¶14.

⁷ See NPRM, ¶47. See also TelePacific Comments, at 4.

a U.S. company or one or more U.S. citizens) should also be exempt from the Team Telecom process, as, by definition, all ultimate ownership and control of the licensee ultimately rests with U.S. citizens or U.S.-based companies.

The Financial Sponsors also believe that the FCC should establish rules to limit the processing of applications by Team Telecom to those applications that involve controlling foreign investors that have not already been previously vetted by Team Telecom in a defined recent timespan at the time of the application (for example, in the past five years). The Financial Sponsors assert that focusing review on “new” entities not previously vetted can ensure that Team Telecom resources are used in the most efficient manner possible and avoid repeated clearances for entities that make multiple investments in FCC licenses.

Finally, the Financial Sponsors believe that for acquisition and transfer of control transactions, in cases where parties have voluntarily subjected themselves to Executive Branch review through the CFIUS process, a simultaneous and parallel Team Telecom review is unnecessary, time consuming, and inefficient. The CFIUS review process involves national security and law enforcement review by the same agencies involved in the Team Telecom process, all of which are represented in CFIUS. Subjecting applications that are undergoing a CFIUS review to an additional Team Telecom review is therefore wasteful of both governmental and applicant resources. Thus, the Financial Sponsors respectfully request that the Commission’s rules exempt from Team Telecom review any application in which the parties make a voluntary filing with CFIUS.

III. The Scope of Team Telecom Review Should Be Reasonable and Focused on National Security and Law Enforcement Matters

Under the NPRM’s proposals, applicants would provide with their initial FCC applications the information that is today generally provided in response to a “triage”

questionnaire sent after Team Telecom review is initiated.⁸ As proposed, the rules would identify certain categories of information (such as: corporate structure and shareholder information; relationships with foreign entities; financial condition and circumstances; compliance with applicable laws and regulations; and operational information such as services or network infrastructure)⁹ and the applicants would access specific questions to be answered online.¹⁰

The Financial Sponsors urge the Commission not to expand the scope of information required for processing of applications by Team Telecom beyond those issues that are clearly applicable to national security and law enforcement issues. For example, financial information of FCC licensees and/or their owners is not an appropriate area of review for national security and law enforcement. It is not requested by the FCC for entities that are outside of the Team Telecom process, and should not apply to entities within the Team Telecom process either. Financial viability or lack thereof is not a reason why an applicant can or cannot be considered as a national security threat.

Likewise, with respect to questions concerning “relationships” with foreign entities in Exhibit D to the NPRM, the Financial Sponsors believe that what constitutes a “relationship” with a foreign entity is vague and should, at a minimum, be defined with specificity to those areas that are reasonable for Team Telecom to review, and with a minimum financial or monetary threshold of affiliation.

The Financial Sponsors support the establishment of a standardized list of information related to network management, security, operations, and similar measures in order to streamline

⁸ See NPRM, ¶¶16-29.

⁹ See NPRM, ¶18 and Appendix D.

¹⁰ See NPRM, ¶27.

Team Telecom review. Doing so is reasonable in the context of a national security and law enforcement review. However, expanding the list of required information beyond these topics will not further that process. The FCC and the U.S. government have not historically asserted jurisdiction over the financial transactions of telecommunications carrier licensees (*e.g.*, debt issuances, guarantees, pledges of assets, etc.), and the FCC does not require telecommunications carriers to provide financial statements in the context of its licensing authority—it should not start to do so now. U.S. policy concerning foreign policy, foreign investment in the U.S. market, and foreign trade are well within the jurisdiction and expertise of the United States Trade Representative and the Departments of Treasury, Commerce and State, and should be eliminated as an area of consideration by law enforcement and national security agencies as part of the Team Telecom process. Adding these additional areas to an already multifaceted and overly-burdensome review process will only introduce additional complexity and delay.

IV. The Means of Delivery of Information to Team Telecom Must Ensure Strict and Automatic Confidentiality

The NRPM asks for comment about the means of delivery of information responsive to Team Telecom.¹¹ The Financial Sponsors believe that the information provided in this process should continue to only be delivered to Team Telecom, and the FCC should not act as a gatekeeper. The FCC has no interest in the information provided to Team Telecom (otherwise it would already be asking for it as part of its general licensing rules), and inserting the FCC staff as another layer of review into the process would only create additional delays in the application review. Further, it would also increase the number of persons with access to information that is often considered highly sensitive and confidential, thereby increasing the possibility of accidental risk of disclosure of that information.

¹¹ See NPRM, ¶25.

The Financial Sponsors believe that the FCC should only play two roles in this process: 1) standardize the information required to be delivered to Team Telecom, and 2) provide a private, secure, and efficient conduit for the delivery of that information to Team Telecom. The national security agencies are perfectly capable of reviewing the information provided for completeness, and adding the FCC as a layer of review would only serve to delay the process. Team Telecom should be required to make a completeness determination within seven (7) calendar days of the receipt of the information package, at which time the 90-day clock should begin for Team Telecom's review. Applicants should be allowed to submit the information package to Team Telecom at any time after the filing of the application with the FCC (contemporaneously, or at a later date). But, by waiting to provide this information, the 7-day completeness determination (and thus the 90-day review clock) will toll. The use of a secure online portal should allow the FCC to know when the submission was made to Team Telecom.

The information provided to Team Telecom is by definition considered and handled as highly confidential information. The FCC's review framework should continue to treat all information provided through the portal to Team Telecom as automatically considered confidential and not subject to disclosure through the Freedom of Information Act or other means. Applicants should not be required to separately request confidential treatment for the information provided to Team Telecom, nor should they have to defend their determination that the information is confidential upon challenge by third parties (as may result from an application of the FCC's confidential treatment rules). If the Commission cannot legally provide the same measures of strict and automatic confidentiality that currently apply to data provided to Team Telecom, then it should not insert itself into the process by storing, processing, reviewing, or transferring this information to Team Telecom.

V. The Financial Sponsors Support Measures to Streamline the Team Telecom Process

The NPRM provides a number of appropriate ways that the Team Telecom process can be streamlined. First, the NPRM proposes to require all applicants to certify, at the outset of their application, that they will comply with certain mitigation measures.¹² Specifically, it proposes to require applicants to certify that (i) they will comply with the Communications Assistance for Law Enforcement Act (“CALEA”); (ii) they will make available communications for services covered by their application subject to lawful requests under U.S. law; and (iii) they will designate a U.S. citizen or permanent resident as a point of contact within the United States.¹³ The NPRM requests comment on whether all applicants should make these certifications rather than just applicants with reportable foreign ownership.¹⁴ By requiring certification as part of the initial application, the FCC intends to alleviate the portion of Team Telecom review that traditionally involves negotiating Letters of Assurance (“LOAs”).

While the Financial Sponsors believe that this could be an area that may reduce the timeframes associated with the Team Telecom review process, the Financial Sponsors nonetheless have concerns that some of the proposed certifications exceed the statutory authority of the Executive Branch agencies. The Financial Sponsors also question the need for certain certifications that are, in essence, requirements of U.S. law in the first place (*e.g.*, CALEA compliance). They also fear that, as drafted, some certifications could be used as a backdoor means to reduce the ability of certain FCC-regulated companies to use lawful encryption or other security technologies in their networks and services, or to impose other restrictions or additional requirements on licensees not established by law.

¹² See NPRM, ¶¶30-35.

¹³ See NPRM, ¶31.

¹⁴ See NPRM, ¶30

That said, CALEA compliance and similar commitments have long been imposed on numerous applicants over the past decade by Team Telecom. If the FCC intends to use the certifications as proposed by the NTIA, then the Financial Sponsors believe that applicants should at least be given the *option* of certifying to these commitments at the time of application filing (rather than it being a requirement to do so). Applicants that certify to these common requirements should then be able to forgo individual LOA negotiation. Applicants that do *not* or cannot make this certification at the outset would be subject to a negotiation process with Team Telecom as is currently undertaken (but still within the proposed 90-day review timeframe). The Financial Sponsors believe that providing applicants with an option to streamline the LOA process is a positive step as a means to streamline the review and approval process. The FCC, however, should clarify that any such commitments made in the certification would not be construed to limit the use of encryption or other lawful security technologies by the licensees or their owners.

The Financial Sponsors likewise believe that the FCC should establish rules allowing (as an option) entities under common ownership to adopt any Team Telecom network security agreements or LOAs already in place with their commonly-controlled affiliates that have been adopted in a defined recent timespan (for example, in the past three years). Doing so will allow applicants to streamline their Executive Branch compliance requirements across commonly-held affiliates, while at the same time giving Team Telecom assurances that companies under common ownership are treated equally. It would also provide another means to further streamline the review and negotiation process.

VI. The Financial Sponsors Support Subjecting the Team Telecom Process to Effective Timeframes

The NPRM proposes to adopt a “deadline” by which Team Telecom review must be completed. Specifically, the Commission proposes a 90-day period, with allowance for an additional, one-time 90-day extension.¹⁵ The extension would only be permitted given a sufficient showing of need by the Team Telecom agencies, and also requires status updates every 30 days.¹⁶

The Financial Sponsors strongly believe that having a clear timeframe for Team Telecom review and clearance is essential to improving the foreign ownership review process. An established “clock” for Team Telecom review would be consistent with other merger review undertaken by the FCC and other U.S. government bodies such as the Federal Trade Commission, the Antitrust Division of the Department of Justice and CFIUS, and would provide significant clarity as to the government’s review process. It would also ensure that those applications that have been pending for many months and years have a fair review and determination by the Executive Branch agencies.

The Financial Sponsors, however, strongly urge the Commission to heighten the showing of need sufficient to receive a 90-day extension. The government should be required to delineate specific reasons for its delay, with more specificity than the agencies simply “need more time for review.” Otherwise, the 90-day process will, in effect, turn into a *de facto* 180-day process for foreign ownership review. The FCC must also be willing and able to reject requests for an additional 90-day period when not adequately supported by Team Telecom. The standard should be similar to the standard used for granting extensions of other types of FCC filings.

¹⁵ See NPRM, ¶¶36-46.

¹⁶ See NPRM, ¶36.

Finally, the FCC's process should include a system to address situations where Team Telecom seeks to have the FCC deny an application. While the NPRM notes that Team Telecom has not yet requested the FCC to deny an application;¹⁷ in practice, Team Telecom and CFIUS have simply withheld their consideration from applications that they do not deem fit for approval. For example, a number of applications pending since 2011 and 2012 remain on the FCC's list of pending applications. In other cases, the Executive Branch agencies have otherwise convinced applicants to withdraw their applications rather than forcing the government to formally request denial. In both cases, applicants are left deadlocked by the Team Telecom review process. Thus, while formal denial requests have not been an issue for the FCC to date, they will likely become more of an issue in the future given the timeframes proposed in the NPRM, and the FCC's rules should provide applicants a means of transparency, hearing, and appeal in such cases.

VII. Other Considerations

The Commission concluded the NPRM with some additional proposed changes to further facilitate efficient review of applications, on which it also seeks comment. For example, the Commission proposes that for individuals or entities with 10% or greater foreign ownership in a license applicant, the applicant also include the voting interests of those entities. The Financial Sponsors believe that the FCC should require one means of ownership calculation or another, but not both. It is often very difficult for applicants to determine multiple types of ownership stakes when undertaking an ownership review process, especially when multiple, often passive and non-affiliated investors are present in the indirect ownership chain. The Financial Sponsors believe that voting ownership best considers the actual control of a licensee, and should be the

¹⁷ See NPRM, ¶8.

calculation used when determining licensee direct and indirect ownership. It is very burdensome for applicants to calculate multiple forms of ownership, especially to a 5% threshold, including as currently required in various types of FCC applications.

VIII. Conclusion

The Financial Sponsors strongly support the FCC's efforts to streamline and rationalize the Team Telecom process. With few minor suggested changes outlined herein, the Financial Sponsors support the FCC's proposals, and provide several additional proposals that the FCC may consider as it develops its foreign ownership regulations.

Respectfully submitted,

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