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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the matter of)
)
Implementation of Sections 11 and 13)
of the Cable Television Consumer)
Protection and Competition Act of 1992)
)
Horizontal and Vertical Ownership)
Limits, Cross-Ownership Limitations)
and Anti-Trafficking Provisions)

MM Docket No. 92-264 ✓

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: June 24, 1993

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By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. In this Report and Order and Further Notice of Proposed Rule Making ("Report and Order/Further Notice"), the Commission adopts regulations interpreting and implementing the anti-trafficking and cross-ownership provisions of the Cable Television Consumer Protection and Competition Act of 1992.¹ The Commission also solicits further comment on its proposals regarding the establishment of subscriber limits and channel occupancy limits required by the 1992 Act. The Commission issued a Notice of Proposed Rule Making and Notice of Inquiry² ("Notice"), in this proceeding, which sought comment on the intended objectives and scope of the Section 11(a) cross-ownership restrictions and the Section 13 anti-trafficking provision of the 1992 Cable Act.³ The Notice also sought comment on issues pertaining to the

¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act of 1992" or "1992 Cable Act").

² Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rod 210 (1992) ("Notice").

³ A list of commenters responding to the issues raised in the Notice, and the references to specific commenters used herein, are listed on Appendix A.

adoption of limits on the number of subscribers any one entity can reach through cable systems owned by such entity; limits on the number of cable channels that can be occupied by vertically integrated programmers ("channel occupancy limits"); and on the appropriateness of imposing limits on the degree to which multichannel video program distributors ("Multichannel Distributors") may engage in the creation and production of video programming, as prescribed by Section 11(c) (2) of the 1992 Act.⁴

2. Section 13 of the 1992 Cable Act adds a new Section 617 to the Communications Act of 1934, as amended⁵, establishing a three-year holding requirement for cable systems. This cable anti-trafficking rule, with certain exceptions, prohibits cable operators from selling or otherwise transferring ownership in a cable system within three years following the acquisition or initial construction of such system by such operator. Section 11(a) of the 1992 Cable Act modifies Section 613(a) of the Communications Act to prohibit the common ownership of a cable system and a multichannel multipoint distribution service ("MMDS") licensee or a cable system and a satellite master antenna television service ("SMATV"), separate and apart from any franchised cable service, within any portion of the franchise area served by that cable operator's system.⁶ The anti-trafficking and cross-ownership provisions of the 1992 Cable Act contain no specific effective date and thus, pursuant to Section 28 of the 1992 Act, became effective on December 4, 1992.⁷

3. In summary, this Report and Order/Further Notice contains the following determinations. The Commission concludes that the Section 617

⁴ Most commenters addressing the issue of establishing limits on Multichannel Distributor participation in the creation and production of video programming opposed establishing such limits at this time. Most commenters agreed with the Commission's tentative conclusion in the Notice that the objectives of any such restrictions are fully addressed by other provisions of the Act. See NCTA Comments at 36-37; Viacom Comments at 19-21; Time Warner Comments at 60-62; TCI Comments at 58; Liberty Media Comments at 9-11. The National Private Cable Association, INTV and Liberty Cable indicated that some limits may be necessary. These commenters, however, did not indicate the rationale for such additional restrictions. The Commission will address this issue, along with the other provisions of Section 11, in a Second Report Order.

⁵ 47 U.S.C. § 537.

⁶ 47 U.S.C. 533(a) (2).

⁷ Section 617(e) imposes a 120-day limitation on franchise authority consideration of transfer requests for cable systems owned for three years or more. 47 U.S.C. § 537(e). The 120-day period commences upon the submission of all information required by Commission regulations and by the franchise authority. The Commission adopts such regulations herein and thus, the 120-day limitation will not become effective until the effective date of this Report and Order/Further Notice.

anti-trafficking restriction applies only to assignments and transfers of control of cable systems. Such transactions will be defined generally, by reference to the Commission's broadcast assignment and transfer of control standards used to implement Section 310(d) of the Communications Act. The Commission will rely on local franchise authorities to monitor and exercise primary enforcement responsibility under the anti-trafficking rule. Cable operators seeking to assign or transfer control of a cable system are required to certify compliance with the anti-trafficking rule to the local franchise authority at the time such cable operators seek local transfer approval. Disputes regarding the validity of such anti-trafficking certifications, the applicability of the anti-trafficking rule to a particular transaction, or eligibility for one of the rule's exemptions will be handled by the Commission pursuant to the Section 76.7 special relief procedures.⁸ The Commission further determines that the statute provides the Commission with authority to waive the three-year holding period in the public interest and directs the Commission to grant such waivers in cases of default, foreclosure and financial distress. In addition, the Commission adopts a blanket anti-trafficking waiver for small systems, serving 1000 subscribers or less.

4. In connection with transfer requests for systems owned for three years or more, the Commission establishes a standardized transfer approval form, which a cable operator must submit to the franchise authority in connection with such transfer requests. The Commission's transfer approval form solicits information necessary to establish the technical, legal and financial qualifications of the proposed transferee and any information required by the franchise agreement or applicable state or local law. Upon the submission of a completed FCC assignment or transfer approval form and the necessary exhibits, the franchise authority will have 120 days in which to consider such transfer request. Local authorities may request additional information reasonably necessary to determine the qualifications of the proposed assignee or transferee. Such requests, however, generally will not toll the running of the statutory 120-day limitation on franchise authority consideration unless the franchise authority and the cable operator otherwise agree to an extension of time.

5. With respect to the Section 613 cable/MDS cross-ownership restriction, we modify Section 21.912 of our Rules to implement the statutory restriction. We amend Section 21.912 to prohibit cable/MDS cross-ownership only where a cable operator's actual service area and the MDS protected service area overlap. In assessing cross-ownership, we will consider a cable operator to have an attributable interest in an MDS licensee if such cable operator holds five percent or more of the stock of such licensee, whether voting or non-voting. We do not adopt a single majority shareholder exception, and all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater, regardless of insulation. We retain the local programming exception under Section 21.912 as it applies to leased channels, but eliminate the overbuild and rural exceptions.

⁸ 47 C.F.R. § 76.7.

6. We adopt a separate rule to implement the Section 613 cable/SMATV cross-ownership restriction. The Commission concludes that Congress intended a narrower restriction with respect to cable/SMATV cross-ownership. The rules we adopt prohibit cable operators from acquiring an attributable ownership interest in a separate SMATV service within the cable operator's actual service area. Cable operators are permitted, however, to construct a stand-alone or integrated SMATV system in their actual service area, provided such SMATV service is offered in accordance with the terms and conditions of the cable franchise agreement. The attribution rules we adopt for this purpose are the same as those established for the cable/MDS cross-ownership restriction. We acknowledge that the statutory cross-ownership restriction prohibits cable/SMATV cross-ownership only in a cable operator's actual service area. Therefore, in the unserved portions of the franchise area, a cable operator is permitted to build or acquire a stand-alone SMATV system, provided such cable-owned SMATV systems are operated in accordance with the terms and conditions of the cable franchise agreement.

7. With respect to establishing subscriber limits as required by Section 613, we seek further comment on our proposal to adopt a national subscriber limit of 25% of homes passed and to attribute cable system ownership based on the same criteria that is used in the broadcast context. However, we continue to seek comment on establishing subscriber limits in the range of 20% to 35% of homes passed nationwide. In addition, we propose to permit ownership of additional cable systems, beyond the 25% limit, if such systems are minority-controlled.

8. We also seek comment on our proposal to adopt a 40% limit on the number of channels that can be occupied on a cable system by programming in which the particular cable operator has an attributable interest. We propose to define vertical attribution for this purpose by reference to the broadcast attribution criteria. In addition, we propose to allow carriage of additional vertically integrated video programming services provided such video programming services are minority-controlled or are targeted to a minority audience.

II. ANTI-TRAFFICKING RESTRICTION

A. Background

9. In this proceeding, we sought to interpret the various provisions of the anti-trafficking rule and to establish an appropriate system of implementation. As indicated above, the new Section 617 of the Communications Act provides, with certain exceptions, that "no cable operator may sell or otherwise transfer ownership in a cable system within a 36-month period following either the acquisition or initial construction of such system by such operator."⁹ Where a transaction involving a multiple

⁹ 47 U.S.C. 537(a).

system transfer provides as part of that transaction for the subsequent transfer of one or more such acquired systems to a third party¹⁰, the subsequent transfer will be considered part of the original transaction for purposes of determining compliance with the three-year holding period.

10. Section 617(c) creates several exceptions under the anti-trafficking rule, including: (1) transfers which are not subject to Federal income tax liability; (2) sales required by operation of law or any act of any federal agency, any State or political subdivision thereof, or any franchising authority; and (3) any sale, assignment or transfer to one or more purchasers, assignees or transferees controlled by, controlling, or under common control with the seller, assignor or transferor.¹¹ Moreover, the Commission is given broad authority to grant waivers under the anti-trafficking rule, consistent with the public interest.¹² However, where local transfer approval is required, the Commission may not waive the three-year holding requirement unless the franchise authority has approved such transfer. Section 617(d) directs the Commission to grant anti-trafficking waivers to permit appropriate transfers in cases of default, foreclosure, or other financial distress.

11. The relevant legislative history to the 1992 Cable Act suggests only that the anti-trafficking provision was intended to restrict profiteering transactions and other transfers that are likely to adversely affect cable rates or service in the franchise area. The House Report also indicates that the anti-trafficking rule was not meant to prevent lenders from obtaining a security interest in connection with providing financing for cable system acquisitions.¹³

B. Transfer of Ownership.

12. Notice. In the Notice, we stated that the 1992 Cable Act does not specify what shall constitute a "transfer of ownership in a cable system" subject to the anti-trafficking rule. We sought comment on the appropriate interpretation of transfers of ownership for purposes of applying the three-year holding period. Commenting parties were asked to consider whether "transfer of ownership in a cable system" should be defined by reference to the Commission's broadcast transfer of control standards implemented pursuant to Section 310(d) of the Communications Act.¹⁴ We tentatively concluded that the broadcast transfer of control standards would be appropriate, and sought

¹⁰ 47 U.S.C. § 537(b).

¹¹ 47 U.S.C. § 537(c).

¹² 47 U.S.C. § 537(d).

¹³ House Committee on Energy and Commerce, H.R. Rep. No. 102-628 ("House Report") at 120, 102d Cong., 2d Sess. (1992).

¹⁴ 47 U.S.C. § 310(d).

comment regarding this tentative conclusion.¹⁵

13. Alternatively, we questioned whether application of a fixed ownership standard may be preferable for purposes of applying the anti-trafficking rule. In this regard, we asked whether application of the anti-trafficking rule should be limited to transfers of 50% or more of the outstanding equity in a cable system. Finally, we asked commenters to indicate whether the attribution criteria contained in Section 73.3555 (Notes) of our Rules would be preferable for defining ownership interests subject to the anti-trafficking rule.

14. Comments. Most cable commenters agree that the standard employed by the Commission under Sections 310(d) and 309(c)(2)(B) of the Communications Act are appropriate for determining transfers of control subject to the anti-trafficking rule. According to these commenters, a change in control occurs when a new party is able to determine policy and control managerial and operating decisions of a cable system, which generally only occurs if there is a change in actual voting control. Cable commenters assert that transfers that do not result in such substantial changes of control were not meant to be subject to the anti-trafficking restriction. Some cable commenters indicate, however, that the FCC should clarify that pro forma transfers and transfers of minority and non-controlling interests will not be subject to the anti-trafficking rule.

15. One cable commenter contends that transfers of minority interests and purely management interests should not be considered for purposes of Section 617.¹⁶ This commenter concludes that the broadcast transfer of control standards are inappropriate for purposes of implementing the anti-trafficking rule since they were developed to address concerns irrelevant to the prevention of profiteering. Moreover, this commenter indicates that the case-by-case approach required under the transfer of control standards lacks the clarity and simplicity needed to implement Section 617.

16. Other cable commenters prefer a fixed ownership standard. Several commenters indicate that only transfers involving more than 50% of a cable system's equity should be subject to the anti-trafficking rule. These parties assert that Congress did not intend the phrase "transfer of ownership" merely to refer to changes in control of a cable system, but to changes in control that could adversely affect cable television rates or service. On the other hand, the National Association of Telecommunications Officers and Advisors et al. ("NATOA") proposes an ownership standard in which transfers of 5% or more of the stock of a cable system would create a rebuttable presumption that an actual transfer of control had taken place.¹⁷

17. Some franchise authorities submit that all transfers of ownership

¹⁵ Notice, 8 FCC Rod at 212.

¹⁶ TCI Comments at 48.

¹⁷ NATOA Comments at 10.

in a cable system should be subject to the anti-trafficking rule.¹⁸ These local authorities assert that the most inclusive interpretation is necessary to effect Congress' intent to prevent profiteering and other transfers that could affect cable rates and service. Franchise authorities advocating this approach argue that any change in ownership that would cause a change in the identity of the cable operator should be subject to regulation by local authorities.

18. On the other hand, another commenter advocates use of the broadcast attribution standards in all provisions of this proceeding, provided the Commission also uses these same attribution criteria in the Video Dialtone Proceeding (CC Docket No. 87-266). This commenter notes that in this dynamic period of convergence of communications technologies, it is particularly important to have a single uniform set of attribution standards.¹⁹

19. Discussion. As we indicated in the Notice, the 1992 Act does not specify what shall constitute a transfer of ownership in a cable system subject to the anti-trafficking rule. By its terms, Section 617(a) applies only to a "cable operator," which is defined under Section 602(5) of the Communications Act as any entity that provides cable service over a cable system and who directly, or through one or more affiliates, owns a "significant interest in" such cable system, or who "otherwise controls or is responsible for" the management and operation of the cable system.²⁰ A "significant interest" in a cable system has been interpreted for this purpose to mean a cognizable interest in a cable system under the Commission's broadcast attribution rules.²¹ Pursuant to the anti-trafficking rule, once an entity becomes a cable operator such entity cannot sell or otherwise transfer "ownership in" a cable system for a period of three years. Entities that have an ownership interest in a cable system, but which are not "cable operators" as defined under the statute may sell such ownership interests at any time.

20. It is not clear from the statutory language whether the anti-trafficking provision applies to all transfers of ownership in a cable system which effect changes in the identity of the cable operator (i.e., transfers of a significant ownership interest such that the cable operator is no longer a cable operator under the statutory definition), or whether the rule applies to only those transfers of ownership of a cable system by a cable operator which constitute transfers of control of a cable system. The statutory provision uses the terms "ownership in" and "ownership of" a cable

18 New Jersey Cable Board Comments at 2; Joint Florida Cities Comments at 2.

19 BellSouth Comments at 2.

20 47 U.S.C. § 522(5).

21 See Cable Franchise Policy and Communications Act of 1984, H.R. Rep. No. 934, 98th Cong., 2d Sess at 41 (1984); Cable Communications Act Rules, 58 RR 2d 1, 5 (1985).

system interchangeably.²² The House Report also uses the terms "ownership in" and "ownership of" a cable system interchangeably. Nonetheless, the House Report provides some interpretative guidance with respect to the types of transfers of ownership that were meant to be prohibited by the rule. The House Report indicates that the anti-trafficking rule was meant to prevent profiteering and other transactions that could affect cable rates and service.²³

21. Given the uncertainty regarding the intended application of the anti-trafficking rule, we seek to adopt an ownership standard that will accomplish the objective stated in the House Report of preventing profiteering transactions and other transfers that may affect cable rates or service, without inhibiting investment in the cable industry or disrupting legitimate cable transactions. Based on the statutory language and the objectives articulated in the House Report, we believe that this provision was aimed at deterring the acquisition of cable systems by individuals interested only in speculating or exploiting ownership in cable systems for short term gain through quick resale. Therefore, by addressing the rule to transfers of ownership we do not believe that Congress meant to prohibit all transactions in which a cable system is sold at a profit. Rather, we believe that it was Congress' intent that the rule apply to transfers of control of a cable system for the purpose of quick resale at an inflated per subscriber value, enabling the cable operator to realize a substantial profit as a result of the cable system's market power. Accordingly, we limit application of our rules to situations involving transfers of control of cable systems.

22. We determine that our broadcast assignment and transfer of control standards developed to implement Section 310(d) of the Communications Act are appropriate to accomplish these objectives. The broadcast transfer of control standards were used previously to implement the broadcast anti-trafficking rule,²⁴ and the Commission uses them currently to implement the one-year holding period applicable to broadcast licenses and construction permits.²⁵ These standards are also applicable to transfers of licenses for

²² See Section 617 (a) "ownership in a cable system" and "acquisition or initial construction . . . of such system"; Section 617 (b) "transfer ownership of one or more such systems;" Section 617(e) "transfer ownership of any cable system."

²³ House Report at 119.

²⁴ The Commission previously required applications requesting approval to assign or transfer a broadcast license prior to the completion of a three-year holding period to be designated for hearing to determine whether such transfers raised trafficking concerns. The Commission eliminated the three year holding requirement for broadcast licenses in 1982. See Report and Order, 52 RR 2d 1081 (1982).

²⁵ 47 C.F.R. § 73.3597(a).

cable television relay services ("CARS").²⁶ Consequently, we believe that these well developed standards will be effective in implementing the cable anti-trafficking restriction.

23. Involuntary and pro forma transfers of control are exempt from the cable anti-trafficking rule under the statutory exceptions provided in Section 617(c) of the Communications Act. Transfers of purely management interests will also be exempt from the cable anti-trafficking rule, since the statutory language addresses only transfers of "ownership" interests in a cable system. Consequently, the Commission will apply the three-year holding period only to assignments and transfers involving substantial changes in ownership that constitute transfers of control. The procedures that currently govern the need for Commission approval in connection with assignments and transfers of control of CARS licenses can be used as a reference for determining when the anti-trafficking rule will be applicable to a particular transfer. In the context of CARS licenses, Commission approval is required only where there is a change in the identity of the licensee or a change in the holder of a controlling interest in the licensee.²⁷ Similarly, if a transfer of ownership in a cable system does not result in a change in the identity of the franchisee, or in the holder of a controlling interest in the cable operator, the transfer will not be subject to the three-year holding requirement. For this purpose, an assignment occurs when a franchise is transferred from one entity to another. A transfer of control occurs when the franchisee remains the same, but the owner or holder of a controlling interest in the franchise changes. Assignments are generally associated with asset sales, and transfers of control are generally associated with stock sales. There are no significant differences between assignments and transfers of control for purposes of the Commission's Rules.

24. We will briefly describe how the Commission determines the types of transfers of ownership interests that constitute transfers of control requiring Commission approval under our broadcast rules. These same issues and determinations will apply to determinations of transfers of control of cable systems subject to the anti-trafficking rule. Transfers of control are easily identifiable in the vast majority of cases. Typically, the buyer will acquire de jure control or "legal control," by acquiring a majority (51% or more) of the licensee's voting stock, or partnership interests, or effect a change in the general partner.²⁸ Such transfers would be considered transfers of control under our broadcast rules and thus, in the cable context would be subject to the anti-trafficking rule, provided they are substantial and voluntary and do not qualify for any of the statutory exceptions.

26 47 C.F.R. § 78.35(c).

27 Id.

28 Sewell S., Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act, 43 Fed. Comm. Law Journal 277, 295 (July 1991) ("Assignments and Transfers of Control").

25. The more difficult questions regarding determinations of transfers of control involve transfers of de facto or "actual control." De facto control exists when a holder of a minority interest in a corporation is in actual control. Thus, some transfers of a minority interest in a cable system may constitute a transfer of control subject to the anti-trafficking rule. In the broadcast context, we have said that determinations of de facto control are governed by the demonstration of power to dominate management of corporate affairs.²⁹ In this context we have defined transfers of control in broad terms as "any act which vests in a new entity or individual the right to determine the manner or means of operating the license and determining the policy that licensee will pursue."³⁰ This definition encompasses every form of control, actual or legal, direct or indirect, negative or positive.

26. Since the size of a person's equity ownership interest is relevant but not determinative to issues of control, we ascertain issues of de facto control on a case-by-cases basis by looking at all relevant factors. Generally, we look at such factors as the ability to nominate the board of directors of a corporate licensee as an important factor.³¹ Commission decisions have generally focused on the ability of a person or entity to control a licensee's finances, personnel practices, and programming decisions.³² Transfers of de facto control have been established where non-controlling stockholders exercise substantial management or financial control over a licensee.³³

27. We note, however, that sales of minority interests in corporate licensees occur routinely, particularly in publicly traded companies. Such sales, unless they result in the acquisition or loss of control, do not require Commission approval. Thus, for example absent de facto control, if a seven percent shareholder sells all of its stock in a licensee to an existing stockholder already owning a ten percent interest, no transfer of control has taken place.³⁴ However, a transfer of a minority interest, which results in new entity obtaining a controlling interest would constitute a transfer of

29 Benjamin L. Dubb, 16 FCC 274, 289 (1951).

30 Powell Crosley, Jr., 11 FCC 3, 20 (1945).

31 Metromedia, Inc., 98 FCC 2d 300, recon. denied, 56 R.R. 2d 1198 (1984), appeal dismissed sub nom. California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir 1985).

32 See Stereo Broadcasters, Inc., 87 FCC 2d 87 (1981); WWIZ, Inc., 36 FCC 561, reconsideration denied, 37 FCC 2d 685 (1964), aff'd sub nom Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965). cert. denied, 383 U.S. 967 (1966).

33 See e.g., Metromedia, 98 FCC 2d 300, 303 (1984).

34 Sewell S., Assignments and Transfers of Control, 43 Fed. Comm. Law Journal at 311.

control. For instance, where a shareholder owning one-third of the stock in a licensee acquires an additional one-third interest, a transfer of control has taken place.

28. As we indicated above, in all but a few cases transfers of control will be clearly established by transfers of a majority or controlling ownership interest. Where transfers of ownership do not affect the entity holding a controlling interest in the franchisee, the three-year holding period is inapplicable. In unusual cases, where doubt exists, cable operators seeking to transfer an ownership interest in a cable system should consult with their local franchise authority regarding the application of the anti-trafficking rule to a particular transfer. Reference should also be made to whether or not the cable operator is required to file an application for Commission approval to transfer a CARS license in connection with such transfer. Where Commission approval is required to transfer a CARS license, the transfer will also be subject to the three-year holding requirement. If franchise authorities and cable operators are unable to determine the applicability of the anti-trafficking rule to a particular transfer, either party may request a declaratory ruling from the Commission.

C. Procedures for Monitoring Compliance

29. Notice. In the Notice, we observed that the 1992 Act does not indicate who should have primary responsibility for enforcement of the anti-trafficking rule. Since local franchising authorities are responsible for awarding cable franchises and for approving sales and transfers of such franchises, we tentatively concluded that local franchise authorities would be best able to monitor and enforce compliance with the anti-trafficking restriction. We proposed requiring a cable operator seeking to transfer ownership in a cable system to certify compliance with the anti-trafficking rule to the local franchise authority. We suggested that such certifications would create a presumption of compliance, unless the local franchise authority found to the contrary. Commenters were asked to address whether these procedures were suitable for enforcing the anti-trafficking rule.

30. We also requested comment regarding what, if any, procedures the Commission should establish for resolution of complaints arising from determinations under this provision. We indicated, that our tentative view was that such complaints should be resolved at the local level, either according to relevant procedures contained in the franchise agreement or by commencement of an action in the state or federal courts. Alternatively, we asked commenters to indicate whether the provisions of Section 76.7 of the Commission's rules, or some modified form of these procedures, would be appropriate. We further asked commenters to address what, if any, sanctions should be applicable to willful violations of the anti-trafficking rule.

31. Comments. Cable operators and the National Cable Television Association ("NCTA") argue that the FCC should retain primary responsibility for monitoring and enforcing the anti-trafficking rule. NCTA suggests that Federal enforcement is essential to ensure that the restriction is applied in a uniform and consistent manner. NCTA also notes that MSO transfers would be impaired by local enforcement mechanisms, which would require franchise

authority approval in multiple jurisdictions. According to cable commenters, the 1992 Act does not provide local governments with any authority to enforce the anti-trafficking restriction. Commenters advocating Federal enforcement, also indicate that local enforcement would create substantial delays and result in conflicting and inconsistent applications of the anti-trafficking rule.

32. Cable operators generally support the certification procedures proposed in the Notice, provided such certification is made to the FCC or, if it is made to the local franchise authorities, that challenges to such certifications are decided by the FCC. Most cable operators further propose that the FCC should be the exclusive arbiter of disputes arising under the anti-trafficking rule, and advocate the use of the special relief procedures contained in Section 76.7. Cable operators argue that resolution at the local level would lead to unpredictable and inconsistent rulings. Cable operators further indicate that a certificate filed with a franchising authority should carry a presumption that the cable operator is in compliance with the statute. Some commenters oppose a certification procedure and propose instead that the Commission should rely on the due diligence of the parties.³⁵

33. Cable operators contend that in cases of good faith violations of the three-year holding period, no sanctions should be imposed and under no circumstances should transfers be rescinded. According to cable operators, reversal of transfers would serve no useful purpose and would put a cable system back in the hands of an entity with no interest in its operation. Some commenters submit that the FCC's general forfeiture procedures under Section 503 of the Communications Act provide satisfactory remedies for willful anti-trafficking violations.

34. Franchise authorities agree with the Commission's proposal to rely on local authorities to exercise primary anti-trafficking enforcement responsibility. Franchise authorities indicate that since most franchise agreements require local approval prior to a system assignment or transfer, local authorities can monitor compliance most efficiently and determine the effects of a proposed transfer on cable rates and service. Franchise authorities also favor the certification procedure proposed in the Notice, provided that cable operators are required to submit sufficient evidence to reasonably verify such compliance. Franchise authorities suggest that the FCC rules should clarify that local authorities have broad discretion to request any additional information they deem relevant to determining whether a proposed transfer satisfies the rule or qualifies for an exception.

35. Local authorities also maintain that disputes arising under the anti-trafficking rule should be resolved locally, using dispute resolution procedures under the franchise agreement or applicable local law. If such complaints cannot be resolved accordingly, local authorities recommend resolution in the state or federal courts. NATOA believes that local dispute resolution is both efficient and consistent with local jurisdiction over

³⁵ Cole Raywid & Braverman ("CR&B") Comments at 20.

cable system transfers.

36. **Discussion.** The anti-trafficking regulations we adopt herein are designed to address Congress' concerns in preventing profiteering by cable operators that could affect cable rates and service, without unnecessarily delaying cable transactions. We conclude that these objectives can best be served by relying on local authorities to monitor compliance with the anti-trafficking rule. We believe that local enforcement will be more efficient and effective than Commission oversight, since local transfer approval is already required under most franchise agreements or state laws. In addition, local authorities are most familiar with individual cable operators and franchise agreements and are better positioned to evaluate the effects of a proposed transfer on cable rates and service. Moreover, we do not believe that local anti-trafficking enforcement will delay or add significantly to the administrative burden associated with most cable system transfers.

37. Pursuant to the regulations we adopt herein, cable operators seeking to assign or transfer ownership in a cable system will be required to certify to the local franchise authority that the subject transfer complies with the anti-trafficking rule, that the transferor is seeking or has obtained a waiver from the Commission, or that the transfer is otherwise exempt from the anti-trafficking rule.³⁶ The Commission requires that such certification be submitted to the local franchise authority at the time a cable operator submits a request for transfer approval. If local transfer approval is not otherwise required by the franchise agreement, the anti-trafficking certification must be submitted to the local franchise authority no later than 30 days in advance of the closing date of the proposed transaction. All such certifications must contain a complete description of the transaction and the nature of the interest being transferred, the date on which such interest was acquired, and the effective date of the proposed transfer. Certifications claiming exemption from the anti-trafficking rule should also describe the nature of the transaction and identify the applicable exemption accompanied by a statement of the facts giving rise to the claimed exemption. Receipt by the local franchise authority of the appropriate certification will create a presumption of compliance with the anti-trafficking provision. Franchise authorities may request additional information reasonably necessary to determine the validity of a certification in cases where the franchise authority has reason to doubt the accuracy of a certification.

38. Franchise authorities questioning the accuracy of an anti-trafficking certification must notify the cable operator within 30 days of the filing of such certification, or such certification shall be deemed

³⁶ We decline to grandfather cable transactions predating the 1992 Act, as requested by some commenters. Section 617 of the Communication Act does not establish any grandfathering provisions for cable system transfers, nor does it authorize the Commission to do so. To the extent that parties to a particular transaction believe that the anti-trafficking rule should not apply to their transaction, the Commission will consider appropriate waiver requests filed in accordance with Section 76.7 of the Commission's Rules.

accepted.³⁷ The 30-day review period for anti-trafficking certifications will not be tolled by requests for additional information by the franchise authority unless the cable operator fails to provide complete and accurate responses to such requests within 10 days of the date of such request. The 30 day limitation on franchise authority consideration of an anti-trafficking certification in no way affects the time allowed for franchise authority consideration of the transfer request itself.

39. For systems held for three years or more the anti-trafficking certification is incorporated into the FCC standardized transfer approval Form discussed *infra* in paragraph 85. For such systems, the 30-day period for consideration of the anti-trafficking certification will in no way affect the running of the 120-day statutory period for consideration of such transfer requests. Local decisions regarding the accuracy of a certification, eligibility for one of the exemptions, and questions regarding whether a particular transaction is subject to the three-year holding requirement are reviewable by the FCC pursuant to the special relief procedures set forth in Section 76.7 of the Commission's Rules.³⁸ Although the *Notice*, proposed to rely on local dispute resolution mechanisms, we are persuaded by commenters who argue that Commission resolution of anti-trafficking disputes is essential to ensure prompt and consistent determinations regarding the application of the three-year holding period.

40. If the facts ultimately reveal a willful violation of the anti-trafficking rule, local franchise authorities shall notify the Commission of such violation. The Commission will then determine the application of appropriate sanctions according to the procedures set forth in Section 76.9 of Commission Rules. Pursuant to Section 76.9, the Commission may issue cease and desist orders, orders to show cause, or compel forfeitures in appropriate cases. Determinations by the Commission regarding appropriate remedies will not limit, in any respect, the remedies available to local franchise authorities under the terms of the franchise agreement or local law.

41. Our regulations are designed to simplify application of the anti-trafficking rule. We have attempted, to the maximum extent possible, to provide guidance to local franchise authorities and cable operators regarding the application and enforcement of the three-year holding period. We believe that our regulations will enable franchise authorities in the vast

³⁷ However, if such certification is later found to be defective, the cable operator may still be subject to appropriate sanctions.

³⁸ 47 C.F.R. § 76.7. Section 617 does not require the Commission to adopt substantive standards governing the approval of transfers. It should be emphasized, however, that in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters. For example, a franchising authority may not delay a transfer or impose conditions on a transfer authorization that would impinge upon the Commission's statutory authority.

majority of cases to quickly determine compliance issues. In difficult cases, we have provided for Commission determinations regarding the application of the three-year holding period. Accordingly, we consider commenters' concerns regarding local enforcement of the anti-trafficking rule to be largely unwarranted. To the extent that local approval is already required for most cable system transfers, we do not believe that the additional responsibility of monitoring compliance with the three-year holding period will significantly alter the nature of the relationship between cable operators and franchise authorities. We are convinced that the procedures we have adopted will simplify anti-trafficking enforcement and minimize the administrative burden on cable operators.

D. Calculation of Three-Year Holding Period

42. Notice. In the Notice we asked commenters to address the appropriate dates to be used in calculating the three-year holding period, both for initially constructed systems and for acquired systems. For initially constructed systems, we questioned whether the three-year holding period should be measured from the date of activation or the date of the award of the cable franchise. Similarly, for acquired systems, we asked commenters to indicate whether the effective date of the transfer, or the date of the application for transfer approval would be more appropriate.

43. We also sought comment regarding the appropriate treatment of MSO transfers under this provision. We indicated that the anti-trafficking restriction was apparently not meant to forestall MSO transfers, and questioned whether the statute required that the three-year holding period be satisfied for each system transferred by an MSO. Commenters were asked to indicate whether we should establish separate procedures for application of the anti-trafficking provision to MSO transfers. In addition, we questioned how stepped or installment transactions should be handled for purposes of the three-year holding period.

44. Comments. Most commenters suggest that we define initial construction according to the date when cable service is activated to the first customer in the franchise community, rather than the date of award of the franchise. Commenters indicate that such a definition will prevent local disputes, since not all franchise agreements provide consistent concepts of initial construction. In contrast, NATOA proposes that for initially constructed systems, the holding period should not commence until the date of completion of construction -- when service is actually available throughout the service area.³⁹

45. For acquired cable systems, most commenters suggest using the effective date of the closing of the transaction in which the cable system is transferred. For gradual transfers, TCI suggests that the date of acquisition should be defined as "the date of closing of a transaction involving 50% or more of the equity in a system," without regard to the

³⁹ NATOA Comments at 9.

dates set forth in installment or stepped transactions.⁴⁰ Alternatively, NATOA suggests that the holding period for acquired systems should begin on the effective date of the local ordinance approving the sale or transfer of the cable system.⁴¹ NCTA proposes that where a transfer involves a single integrated system serving multiple franchise areas, the holding period should be calculated from the date of initial construction or acquisition of the first franchise in the system.⁴²

46. Discussion. We agree with commenters suggesting that for initially constructed systems, the holding period should be measured from the date on which service is activated to the system's first subscriber.⁴³ The date of activation of service effectively establishes when the initial phase of system construction is complete. The date of activation also provides a specific date for commencement of the holding period which does not depend on factors that may vary from one jurisdiction to the next. We decline to use the date when service is available throughout the service area, as NATOA suggests, because in many instances cable service may not be extended throughout the service area for many years, if at all, either because of economic feasibility, or because alternative multichannel providers already serve some portions of the franchise area.

47. For acquired systems, the holding period will commence on the effective date of the closing of the transaction in which the system was acquired. In the case of sales in stages or installment transactions, the holding period will commence on the effective date of the transaction in which the transferee or assignee acquired control of the cable system. We determine that the proposed effective date of closing is appropriate because it represents the date on which control of the system was actually transferred to a new cable operator. We decline to follow NATOA's proposal that we use the effective date of the local ordinance approving a transfer, because in our view, this date is too indirectly related to the date when control of a system actually passes to a new owner.

48. The three-year holding period will be measured from the date of acquisition or initial construction through the proposed effective date of the closing of the transaction transferring control of the cable system. While a transfer or sale agreement may be executed prior to the completion of the three-year holding period, consummation of the transfer may not take place until after the expiration of the requisite holding period.

40 TCI Comments at 49.

41 NATOA Comments at 8.

42 NCTA Comments at 43.

43 "System" is defined for this purpose in Section 76.5 of the Commission's Rules. 47 C.F.R. § 76.5 (a).

1. MSO Transfers.

49. Comments. Most commenters advocate a separate procedure for implementation of the anti-trafficking rule for MSO transfers. Cable commenters propose a materiality test that would allow MSO transfers where 50% of the actual subscribers are served by systems owned for three years or more. Time Warner notes that a similar approach is used in the context of trafficking in cellular licenses, where a sale that might raise trafficking concerns taken by itself is permitted if the transfer is incidental to a sale of other facilities.

50. In contrast, local franchise authorities argue that no exception should be made for MSO transfers. Franchise authorities indicate that MSO transfers are no different than any other system transfer from the perspective of the cable subscriber. These commenters assert that the only issue of concern to cable subscribers is the effect that a proposed transfer will have on cable rates and service. In addition, local authorities indicate that there is no statutory authority for treating MSO transfers differently from other cable system transfers. On the other hand, the New York Cable Commission proposes that MSO transfers should be deemed to comply with the anti-trafficking rule provided 80% of the MSO's subscribers are served by systems held for three years or more.

51. Discussion. Nothing in the legislative history indicates that Congress intended for the anti-trafficking rule to impede MSO transactions. Moreover, we believe that uniform application of a separate holding requirement to each MSO-owned system could sacrifice some of the benefits afforded by multiple system ownership. Cable operators frequently build or acquire nearby cable systems. Such common ownership of cable systems may create operating efficiencies and allow cable operators to expand service to previously unserved areas. Common ownership of cable systems may also result in economies of scale that could benefit cable subscribers. Therefore, we conclude that application of a separate holding requirement to each MSO-owned system may be inappropriate in some circumstances. Nonetheless, we believe that in order to preserve the objectives underlying the anti-trafficking rule, a substantial number of the MSO's subscribers must have been served by cable systems owned by the MSO for at least three years.

52. In this regard, the Commission will entertain requests to waive the anti-trafficking restriction in cases involving MSO transfers. The Commission will look favorably upon such waiver applications where two-thirds or more of the MSO's subscribers are served by systems owned for three years or more. Where an MSO transfers several systems in a single transaction, the Commission will look favorably upon waiver requests if two-thirds of the subscribers of the systems being transferred are served by systems owned for three years or more. We regard the consideration of such waiver requests as essential to ensure that the anti-trafficking rule does not unnecessarily deter MSO transfers.

2. Subsequent Transfers Required by the Terms of the Sale.

53. Comments. Most commenters agree that in the case of "spin-offs" from an original transfer, the FCC should clarify that the statute does not require application of a new three-year holding period, even if the subsequent transfer is not specifically identified in the original transfer agreement. Several commenters suggest that if the subsequent transfer is necessitated by the original transaction and is completed within a reasonable period of time following the original transaction it should be considered part of the original transaction for purposes of applying the three-year holding requirement.

54. Time Warner in particular, urges that this provision be read broadly so that any transaction that is a consequence of such initial transaction and, which existed on the date of the closing of the original transaction, would be considered part of the initial sale. For example, Time Warner argues that in the absence of specific language in the sale agreement, if there is any legal requirement or necessity at the time of the initial sale compelling the resale of one or more systems, such resale should be deemed part of the original transaction.⁴⁴

55. Discussion. Section 617(b) of the Communications Act provides that in the case of multiple system transfers, "if the terms of the sale require the buyer subsequently to transfer ownership of one or more of the systems to one or more third parties, such transfers shall be considered part of the original transaction."⁴⁵ Under this provision, a subsequent transfer that is considered part of the original transaction will not require application of a separate three-year holding requirement. In our view, this provision does not require that a subsequent transfer be explicitly mentioned in the original transfer or sale agreement. We believe that it is sufficient for purposes of this provision if the buyer had a legal obligation to subsequently transfer one or more of the systems originally acquired at the time of the original transaction. Accordingly, we interpret the "terms of the sale" requirement to include all agreements in connection with the original sale or transfer including the sale or transfer agreement, letters of intent, financing agreements, security agreements or other contemporaneous arrangements or agreements in connection with the original transfer.

56. Nevertheless, in order to implement Congress' intent underlying this provision we will require that such subsequent transfers be effected within a reasonable period of time following the completion of the original transaction in order to qualify for special treatment under Section 617(b). Therefore, pursuant to this provision, the Commission will require that a transfer request for the subsequent transfer be filed within 90 days from the

⁴⁴ Time Warner Comments at 18-19.

⁴⁵ 47 U.S.C. § 537(b).

effective date of the closing of the original transaction.⁴⁶ In addition, the closing of the subsequent transaction must take place no more than 90 days after such local transfer approval is granted. In cases where no local transfer approval is required, the Commission will require that the subsequent transfer be completed within 180 days from the closing of the original transaction.

E. Exceptions

57. Notice. In the Notice, we sought to clarify interpretation of the three statutory exceptions to the anti-trafficking rule contained in Section 617(c). We asked commenters to indicate the types of transactions that were contemplated by each exception. We noted that the first exception, excluding transfers which are not subject to Federal income tax liability, seemed to address transactions involving tax certificates issued by the Commission pursuant to Section 1071 of the Internal Revenue Code ("Code"). We also indicated that this exception may be applicable to so-called "tax free" exchanges of assets under Section 1031 of the Code and to "tax free" reorganizations under Section 368 of the Code. Commenters were asked to address these tentative conclusions and to identify any other transactions that may qualify for this exception.

58. We tentatively concluded that the second exception, excluding sales required by operation of law, or by act of any Federal, state or local agency, was intended to include involuntary transfers in the context of bankruptcy proceedings or other types of receivership. We also questioned whether this exception should be interpreted to include sales of municipally-operated cable systems. We sought comment on these interpretations and on any other types of transactions that may have been contemplated by this exception.

59. The third exception, exempting sales, assignments and transfers to affiliated entities, we indicated may be interpreted to apply to pro forma transfers as defined in Section 73.3540(f) of our Rules. We also observed that the legislative history suggests that this provision was meant to exempt transfers between affiliated entities, including entities related by virtue of stock, or other equity ownership, debt ownership, or management control. We asked commenters to indicate what other intra-company transfers should be included within this exception. Commenters were also asked to indicate what types of information should be required in order to establish eligibility under each of these exceptions.

⁴⁶ In some instances, local transfer approval for a subsequent transfer may be obtained at the same time as transfer approval is obtained for the initial transaction. In such cases, we would consider the request for approval of the subsequent transfer to be evidence of an intent that such subsequent transfer was part of the original transaction for purposes of determining compliance with the three-year holding period.

1. "Tax Free" Transfers.

60. Comments. Most commenters argue that the FCC should exempt all transactions which are non-taxable under the Internal Revenue Code ("Code") rather than attempt to list all "tax free" transactions. NCTA proposes a general exemption for all transfers which are not subject to Federal income tax liability.⁴⁷ This interpretation would include transactions involving tax certificates issued by the FCC pursuant to Section 1071 of the Code, transactions deemed to be "tax free" exchanges of assets under section 1031 of the Code, and "tax free" reorganizations under Section 368 of the Code.

61. Regarding the payment of cash or other taxable consideration in like system exchanges, TCI strongly urges that the FCC exemption mirror the IRS Code so that if a transaction is "tax free" for federal tax purposes, it should be exempt under this provision. Such factors should not defeat the exempt status of a transaction if they do not defeat the "tax free" nature of the exchange, according to TCI.⁴⁸ Alternatively, Time Warner proposes that we should not disqualify "tax free" exchanges of assets that include taxable consideration that comprise less than 50% of the total property exchanged. According to Time Warner, such taxable consideration is frequently included in system exchanges to equalize the value of the assets.⁴⁹

62. CR&B comments that, at a minimum, this exception should apply to sales in which there is no gain or there is a loss, as well as to transactions involving a tax certificate and other transactions commonly referred to as "tax free" under the Code. According to CR&B, the addition of taxable consideration should not effect eligibility for this exception, so long as the transaction qualifies for preferential treatment by the IRS. CR&B also asserts that cable operators should not be required to provide franchise authorities with proof that a particular transfer qualifies for an exception. CR&B maintains that such supplemental documentation should be required only when requested to substantiate the applicability of one of the exceptions.⁵⁰

63. Discussion. Section 617(c)(1) exempts from the three-year holding requirement all transfers of ownership in a cable system which are not subject to Federal income tax liability. Congress did not impose any limitations on the types of tax exempt transactions it included under Section 617(c)(1). Accordingly, we determine that consistent with the underlying purpose of the anti-trafficking rule, Congress sought to exempt all transactions which qualify as "tax exempt" under the Federal Income Tax Code ("Code"). For this purpose, we interpret "tax exempt" transactions to

⁴⁷ NCTA Comments at 46.

⁴⁸ TCI Comments at 53.

⁴⁹ Time Warner Comments at 22.

⁵⁰ CR&B Comments at 14.

include all transactions in which there is no cognizable gain or there is a loss under the Code.⁵¹ We believe that such an interpretation is consistent with the statutory language and congressional intent in enacting this exemption since transactions which do not result in a gain or which result in a loss are unlikely to constitute profiteering transactions.

64. Anti-trafficking certifications which claim any of the exemptions provided in Section 617(c), accompanied by an explanation of the basis for the claimed exemption, shall be considered sufficient to establish a presumption of compliance. Nevertheless, local franchise authorities may request additional information reasonably necessary to establish eligibility under the claimed exemption, such as copies of applicable laws, court orders, tax rulings, etc.

2. Transfers required by operation of law, act of a Federal or State agency, or by a local franchise authority.

65. Comments. Commenters indicate that in addition to covering transfers mandated by franchise authorities, this exception was intended to encompass any involuntary transfer required by a court order or other government act or decree. One commenter suggests that this exemption also includes transfers elected in order to comply with applicable laws or regulations.⁵² According to most commenters, this exception should be read to include transfers pursuant to bankruptcy proceedings, including transfers required by trustees and receivers; transfers ordered in the context of divorce proceedings to facilitate court-ordered property settlements; transfers in connection with probate proceedings, to facilitate the division of an estate or to accommodate the laws of succession; and transfers implemented to comply with statutes, laws or regulations of government entities including the ownership restrictions promulgated as a result of the 1992 Act.

66. NCTA and Time Warner argue that municipally-owned cable systems should not be exempt by reason of their municipal ownership. These commenters assert that transfers of such systems should be exempt only if ordered by a court or other government authority, other than the franchise authority. Time Warner believes that exempting voluntary transfers of municipally-owned cable systems would create an unlevel playing field and would encourage "sweetheart deals" for municipal overbuilds. In contrast, NATOA maintains that sales of municipally-owned systems should be exempt under this provision since there has been no history of trafficking by municipal cable operators. Moreover, NATOA argues that municipally-owned cable systems are not obtained for purposes of profiteering. According to NATOA, such systems are typically acquired in order to provide quality cable

⁵¹ Similarly, we determine that this provision exempts transactions in which recognition of a taxable gain is deferred, as is the case with minority tax certificates issued by the Commission pursuant to Section 1071 of the Code.

⁵² Time Warner Comments at 24.

service at reasonable rates where such service is not otherwise available.

67. Discussion. Section 617(c)(2) exempts from the three-year holding requirement, any sale required by operation of law or any act of a Federal agency, State or political subdivision thereof, or any franchise authority. In our view, this provision would exempt from the three-year holding requirement involuntary transfers required by any law, order, act or decree of any federal, state or local authority, including franchise authorities, executors, receivers, guardians and trustees. We conclude that such involuntary transfers to effect bankruptcy, divorce or probate proceedings are encompassed by the statutory language and are therefore, appropriately exempted under this provision. Moreover, such involuntary transfers are generally necessitated by changed or unforeseen circumstances unrelated to profiteering objectives, and are thus unlikely to implicate the trafficking concerns that underlie the three-year holding requirement.

68. In addition, we believe that this exception was meant to include transfers involving municipally-owned cable systems. Section 7 of the 1992 Cable Act amends Section 621 of the Communications Act to allow municipalities to provide cable service without requiring such municipalities to obtain a franchise.⁵³ This provision was added in order to facilitate the provision of cable service by franchise authorities and other municipal entities and evidences Congress' intent to afford municipalities flexibility in the provision of cable service. Accordingly, we believe it is consistent with congressional treatment of municipal systems to exempt transfers to or from municipalities from the three-year holding requirement.

3. Sales, assignments, and transfers to affiliates.

69. Comments. Most commenters agree that this provision was meant to exempt all pro forma transfers. Commenters note that this exception should be broadly construed because profiteering is not an issue in transfers between affiliated entities. Commenters add that the legislative history suggests that this provision was also meant to exempt transfers of systems commonly controlled through management control. According to commenters, this provision mandates that no new three-year holding period is required following intra-company transfers. In such cases, commenters assert that measurement of the holding period should commence with the date of entrance into the corporate family and end on the date of transfer to an entity outside the corporate family (to a buyer not under common control with the seller).

70. In contrast, the New York Cable Commission argues that some pro forma transfers will modify existing security interests or otherwise increase the financial burden on the cable system, which could adversely impact rates. Therefore, the New York Cable Commission urges the Commission to adopt safeguards which allow franchise authorities to review such

⁵³ 47 U.S.C. § 541(f).

transfers to ensure that they are consistent with congressional intent.⁵⁴

71. Discussion. Section 617(c)(3) exempts all sales, assignments and transfers to purchasers, assignees or transferees controlled by, controlling, or under common control with the seller, assignor or transferor. As discussed in the Notice, we conclude that this provision was intended to exempt the type of pro forma transfers defined in Section 73.3540(f) of the Commission's Rules.⁵⁵ Thus, for example, a transfer from a shareholder to a corporation owned or controlled by such shareholder, an assignment from a corporation to its individual shareholders, and a transfer between a parent corporation and its wholly-owned subsidiary would all be exempt under Section 617(c)(3).

72. Furthermore, the legislative history of the 1992 Act indicates that "common control" as used in Section 617(c) was meant to include transfers between affiliated entities, regardless of whether such affiliation is by virtue of common "stock ownership, other equity or debt ownership, or management control."⁵⁶ The House Report stated that transfers of this nature have traditionally occurred without abuse, and most commonly occur in connection with short term financing transactions or in situations involving corporate or partnership reorganizations.⁵⁷ Thus, we conclude that transfers between subsidiaries owned or controlled by the same parent corporation will be exempt from the anti-trafficking rule. Similarly, transfers between limited partners and 50% joint venturers would also be exempt under this provision. In addition, debt for equity exchanges between affiliated entities, in connection with refinancings and reorganizations, will generally be exempt from the three-year holding requirement.

73. With respect to the objections raised by the New York Cable Commission that transfers between affiliated entities may substantially alter debt and financing responsibilities, which could effect rates and service, we believe that such concerns are fully addressed by the legislative history underlying this provision. The House Report specifically concludes that affiliate transfers do not raise trafficking concerns. Moreover, the House Report finds that "these types of transfers are not profiteering transactions of the kind sought to be limited by the three-year holding period and would not appear to adversely affect cable rates and service in the community served by the transferred system."⁵⁸

54 New York Cable Commission Comments at 6.

55 Section 73.3540(f) of the Commission's rules establishes "short form" approval for pro forma transfers only if such transfers do not result in any substantial change in ownership or control between affiliated entities. 47 C.F.R. § 73.3540(f).

56 House Report at 119.

57 Id.

58 Id.

F. Waivers

74. Notice. We sought comment in the Notice regarding the extent of the Commission's public interest waiver authority under Section 617(d), and asked whether we should establish specific waiver criteria in connection with such waiver requests. We asked commenters to address the appropriate definition of "financial distress" sufficient to warrant a presumption in favor of a waiver grant pursuant to Section 617(d). We also noted that the 1992 Cable Act prevents the Commission from granting waivers unless the franchise authority has approved a proposed transfer, if local transfer approval is required. We asked commenters to indicate whether the Commission could nonetheless grant waivers prior to franchise authority consideration, provided such waivers were contingent upon ultimate approval by the local franchise authority.

75. Comments. Cable commenters maintain that Section 617 affords the Commission general waiver authority consistent with the public interest. These commenters indicate that such authority to grant waivers in the public interest is in addition to the instruction that the Commission shall grant waivers in cases of default, foreclosure and financial distress. These commenters argue that public interest waivers should be considered on a case-by-case basis. Cable commenters also maintain that the statute allows the Commission to grant waivers prior to local franchise authority approval, provided such waivers are conditioned upon approval by the franchise authority where such approval is required. These commenters state that such contingent waivers will enhance the speed and efficiency of the waiver process without undermining local franchise authority power.

76. Most franchise authorities argue that the FCC should not grant conditional waivers prior to local transfer approval. Franchise authorities maintain that the statute does not authorize conditional waivers, and expressly limits the Commission's ability to grant waivers prior to local transfer approval. The New York Cable Commission, however, does not object to conditional waiver grants, provided the Commission clarifies that such contingent waivers in no way affect the discretion or jurisdiction of the local franchise authority.

77. With respect to waivers involving default, foreclosure or financial distress, cable commenters suggest that the Commission should identify factors which constitute factual showings establishing a prima facie showing of financial distress. According to some cable commenters, the "financial distress" criteria should include financial conditions less severe than bankruptcy or receivership which are otherwise exempted under the 1992 Act. In particular, commenters assert that the Commission should consider the unavailability of capital sufficient to maintain an adequate level of cable television service to be good cause for a waiver, if accompanied by the demonstrated ability of the transferee to invest in the cable plant. Several commenters also assert that a waiver applicant who demonstrates that the transfer of a system will not lead to increased prices or a diminution in service warrants a waiver grant.