Foreign Investment in US Telecommunications Industry

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Key Factors That Might Indicate A Foreign Ownership Issue

- Investment Target Provides FCC Regulated Services
- Investment Target owns Communications Infrastructure Such as Towers, Fiber, Carrier Hotels
- Investment Target holds FCC licenses
- Acquiring entity, investor, or potential licensee, is foreign entity or has greater than 10% foreign ownership, including:
  - Indirect foreign ownership anywhere in the ownership chain above the licensee
  - Aggregation of interests of foreign individuals or entities investing in funds that hold interests in licensee or upstream parent

Demystifying the FCC Foreign Ownership Review Process

- Foreign ownership one of many public interest factors reviewed
- International Bureau responsible for review of foreign ownership in all FCC applications
- International Section 214 applications analyzed under World Trade Organization (WTO) framework and Foreign Participation Order (Effective Competitive Opportunities “ECO” analysis)
- FCC defers to Executive Branch on issues of national security, law enforcement, foreign policy and trade policy concerns

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Determining Level and Type of Foreign Ownership

- General Principles
  - Upstream equity and voting interests count, though may be diluted using “multiplier rule”
  - Options, warrants or other future ownership interests do not count until exercised
  - Debentures and other debt instruments do not count until converted to equity
    - Exception: If terms of repayment of debt or debt/equity ratio is such that debt appears more like equity than debt. This is reviewed on a case-by-case basis.
  - Certain investment vehicles may allow for some insulation of foreign ownership

Committee on Foreign Investment in the United States (CFIUS)

- CFIUS is an inter-agency Executive Branch group
  - Chaired by Treasury
  - Security agencies dominant players since 2001
  - Focus on communications and critical infrastructure (radio towers, fiber, carrier hotels), technology, energy, transport, and defense-related industries, companies holding government contracts
  - Broad power to condition or block deals or to require divestitures of subsidiaries/lines of businesses
    - Can review closed deals if prior approval not obtained
- Review initiated by filing of notice with CFIUS
  - 30 days to terminate review or announce an "investigation"
  - 45 days to investigate and give recommendations
  - 15 days for President to act
    - President may approve, block, or approve with conditions

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Network Security Agreements

- NSA is the typical mitigation agreement for facilities-based telecommunications carriers
- Reliance-YIPES NSA is typical
  - Domestic communications infrastructure must be located in US and under control of US-based personnel
  - Transactional data, subscriber information, billing records, etc. must be stored in US
  - Restricted access to domestic network and data by foreign persons and prohibition on disclosure of domestic communications and data to foreign persons
  - Appointment of US-citizen Security Officer and implementation of personnel screening procedures
  - Configuration of network to enable interception by USG
- Annual reporting and USG inspection and audit rights

Strategies for Dealing with CFIUS

- Diligence and Structure
  - Understand what network and contract issues may present biggest hurdles
  - USG contracting/defense work a big issue
    - At minimum, structural separation will be required
  - Limit involvement of SWFs
    - Limit to minority, passive investment
    - SWF from "friendly" WTO country highly preferable
- Engage Team Telecom/CFIUS Early
  - Be prepared to offer substantial and meaningful concessions
  - Anticipate and promptly address agency concerns