

Telecoms and Media

Contributing editors

Alexander Brown and Peter Broadhurst



2018

GETTING THE
DEAL THROUGH 

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Alexander Brown and Peter Broadhurst
Simmons & Simmons LLP

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Preface

Telecoms and Media 2018

Nineteenth edition

Getting the Deal Through is delighted to publish the nineteenth edition of *Telecoms and Media*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Cyprus, Kenya and Serbia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Alexander Brown and Peter Broadhurst of Simmons & Simmons LLP, for their assistance with this volume.

GETTING THE
DEAL THROUGH 

London
May 2018

United States

Kent Bressie, Paul Margie, Julie A Veach, Michael Nilsson and Kristine Devine

Harris, Wiltshire & Grannis LLP

Communications policy

1 Regulatory and institutional structure

Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

In the United States, regulatory requirements, and even the regulators with jurisdiction, vary by technology. Multiple national, state and local government agencies can be involved for a particular service or transaction. The Communications Act of 1934 (the Communications Act) establishes the basic sector-specific framework.

Telecoms and RF regulation

State and territorial public utilities commissions (PUCs) regulate intrastate telecommunications services (ie, where the endpoints of a communication fall within the borders of a single state or territory), but PUCs generally do not regulate mobile services, nomadic voice over internet protocol (VoIP) or, in a majority of states, any other VoIP. The national regulator, the Federal Communications Commission (FCC), regulates interstate and international telecommunications (including, to some extent, VoIP), mobile services, non-US governmental uses of radio frequency (RF) spectrum, over-the-air broadcast television and radio, and certain aspects of cable television content. In the past, the FCC generally has not regulated internet access services, backbone networks or peering arrangements. In its 2015 Order 'Protecting and Promoting the Open Internet' (2015 Order), the FCC imposed open internet rules for both fixed and mobile broadband internet access services (BIAS) and asserted jurisdiction over the exchange of traffic between providers and 'connecting networks', such as content delivery networks. Reversing course under the new Republican Chairman and majority, in December 2017, the Commission adopted an order 'Restoring Internet Freedom' (2017 Order) that reversed – in nearly all respects – the 2015 Order. In particular, the 2017 Order retained a modified version of the requirement that BIAS providers disclose certain information about their service, but otherwise eliminated the 2015 net neutrality rules and disclaimed any statutory authority for oversight over interconnection practices. The 2017 Order is expected to become effective in 2018.

The United States has not amended its telecommunications statutes specifically to take account of convergence. The Communications Act is divided into separate titles for common-carrier services, RF spectrum regulation and licensing (including over-the-air broadcast television and radio), and cable television regulation. As noted above, when the FCC imposed open internet rules on BIAS in 2015, it also classified that service as a 'telecommunications service', exposing BIAS providers to certain heightened FCC regulations as common-carriers under Title II of the Communications Act. In the 2017 Order, however, the FCC reclassified BIAS as an 'information service' under Title I of the Communications Act – returning to a classification the FCC had applied from 2005 to 2015. Under the statute, an information service cannot be treated as a common-carrier service – in other words, the FCC has limited authority to impose regulatory obligations on BIAS.

The FCC has not decided whether VoIP is regulated as a common-carrier service; nevertheless, it has imposed a number of common-carrier-like non-economic regulatory obligations on VoIP providers. Specifically, VoIP services, including one-way or non-interconnected

VoIP services, must be accessible to individuals with disabilities, as must email and other text-based communications services. Some states have asserted regulatory authority over fixed line VoIP.

With respect to media, regulation of over-the-air broadcast services remains tied to the FCC's authority to grant licences for use of the RF spectrum, and is stricter than the regulation of cable television. The FCC has not asserted complete jurisdiction over 'over-the-top' (OTT) internet-based media services. Although it has begun to apply accessibility rules to some such services, efforts to apply additional rules to such services appear stalled in light of the change in administration.

Congress continues to consider an overhaul of federal telecommunications laws, but any sort of action would likely take several years and does not appear to be imminent.

Marketing regulation

The FCC sets rules under the Telephone Consumer Protection Act (TCPA) regarding companies' telemarketing activities that involve the use of 'autodialer' technology, telemarketing that involves an artificial or pre-recorded voice, and the sending of 'junk' faxes. The FCC's telemarketing regulations are detailed and nuanced, and so companies should consult these regulations before engaging in telemarketing in the United States. However, at a high level, companies need 'prior express written consent' (a term of art with very specific requirements) before placing an autodialed call or text message involving marketing, a pre-recorded call involving marketing, or a call that uses an artificial voice to a cell phone that involves marketing. Companies also need prior express written consent to place a prerecorded call or a call involving an artificial voice to a land line if it involves marketing. Companies must honor all consumer requests to no longer receive autodialed or pre-recorded calls, as long as the consumer makes the request through a reasonable means. The FCC and state attorneys general can bring enforcement actions for violations of the TCPA, and these actions can result in large fines. The TCPA also gives call recipients the right to bring private lawsuits seeking damages of US\$500 to US\$1,500 per call that violates the TCPA. TCPA lawsuits are often brought as large class actions.

The state of TCPA law is currently in flux. In the high-profile case of *ACA International v FCC*, the US Court of Appeals for the District of Columbia overturned FCC rules regarding what type of technology qualifies as an 'autodialer.' The ACA decision also struck down the FCC's rule that companies were liable for making more than one call to the wrong person, owing to the number in question being reassigned from one subscriber to another, when the caller had no actual knowledge of the reassignment. The FCC chairman and two Republican commissioners have praised the DC Circuit's decision, which overturned rules that the FCC adopted under democratic control. As of the date of writing, the precise next steps that the FCC will take to clarify what qualifies as an autodialer have yet to become public. In the reassigned number context, the FCC is exploring creating a nationwide database of reassigned numbers, and offering companies who 'scrub' their calling lists using this database protection from liability.

The Federal Trade Commission (FTC) also has rules that it applies to a wide variety of industries, including the communications industry. (Indeed, recent litigation in the US Court of Appeals for the Ninth Circuit has reaffirmed the FTC's power to oversee certain practices of communications companies, even those that the FCC heavily regulates as common carriers.) For example, the FTC's Telemarketing Sales

Rule, in broad strokes, requires companies to check the National Do Not Call registry before engaging in most telemarketing campaigns, requires companies to honour consumer requests to no longer receive telemarketing calls from the company, restricts telemarketing calls during certain times of day, restricts call abandonment, prohibits abusive callers, and requires the transmission of non-misleading caller ID information. The FTC's CAN-SPAM rules, among other things, require that senders of commercial email identify emails as an advertisement, provide information about the identity and location of the sender, and provide a functional opt-out mechanism. The FTC also requires disclosures regarding paid endorsements. Violations of these rules can result in costly monetary penalties. The FTC also has relatively broad power to enjoin and seek consumer redress for unfair or deceptive marketing practices, even if such a practice does not violate a specific FTC rule.

Many states also set limits on when and how companies can engage in telemarketing, with many requiring state registration before beginning to telemarket state residents, further limiting the times when telemarketing may occur, and requiring specific disclosures at the beginning of a call.

State and local rights-of-way and siting

State and local government franchising authorities regulate cable operators and some telecommunications services. Local governments regulate zoning, rights of way and wireless tower siting. In recent years, many states have adopted legislation limiting the authority of local and municipal governments over permitting and regulation of wireless facilities, with a particular focus on limiting the amount of fees that can be charged for placement of small wireless facilities in public rights-of-way.

The FCC has established pre-construction environmental and historic preservation review requirements for wireless antennas. The FCC works in conjunction with the Federal Aviation Administration to regulate antenna and tower heights and associated lighting and marking requirements. In March 2018, the FCC adopted new rules streamlining the processes for local and tribal wireless tower approvals, including excluding 'small wireless facilities' on non-tribal lands from environmental and historic preservation review. 'Small wireless facilities' encompasses structures that are either less than 50 feet in height or no more than 10 per cent taller than other nearby structures, and that support small antennas and related equipment.

National security and competition

'Team Telecom' – an informal grouping of the Departments of Defence, Homeland Security and Justice, and the Federal Bureau of Investigation – regulates national security issues with telecommunications service providers and network owners, while the Committee on Foreign Investment in the United States (CFIUS), a national inter-agency committee administered by the US Department of the Treasury, reviews transactions involving acquisitions of existing US businesses engaged in interstate commerce. The FTC and the US Department of Justice (DOJ) jointly regulate competition and merger control under US antitrust laws, as do state attorneys general, under state antitrust laws.

Policy changes

Federal, state or local authorities can initiate policy changes. When the FCC sets rules, it overrides any conflicting state or local laws or requirements. The FCC sets rules through a notice-and-comment process. All final FCC rules are subject to review in federal courts of appeal. State PUCs have similar processes for adopting rules, with the jurisdictional limits and processes varying from state to state. Judicial review is generally available in the state courts, although issues of federal law can also be reviewed by federal courts in many cases. The FTC can implement policy changes through rules as well as by prosecuting civil suits against unfair trade practices either before the FTC or in the federal courts. State attorneys general similarly can bring civil actions that may, in some instances, be creating new policies.

2 Authorisation/licensing regime

Describe the authorisation or licensing regime.

Fixed providers of common-carrier services other than VoIP

Fixed providers of common-carrier services other than VoIP must register with the FCC and are authorised by a blanket FCC authorisation to provide interstate domestic services (ie, no prior authorisation

is required) but must obtain affirmative prior authorisation from the FCC pursuant to section 214 of the Communications Act (international section 214 authorisation) to provide services between US and foreign points – whether facilities-based or resale, or whether using undersea cables, domestic or foreign satellites, or cross-border terrestrial facilities – regardless of whether the traffic originates or terminates in the United States or both. For intrastate services, a fixed provider must generally be licensed by the relevant state PUC. PUC processes and requirements vary, with procedures less strict for long-distance services and more rigorous for local services. The FCC does not limit the number of licences for telecommunications service providers. Some state PUCs may refuse to grant operating authority to multiple intrastate local telecommunications providers in rural areas. A fixed provider of common-carrier services must obtain FCC consent prior to discontinuing interstate and international services and generally state PUC consent prior to discontinuing intrastate services.

Public mobile service providers

Public mobile service providers (commercial mobile radio service (CMRS)), including resellers, must register with the FCC but are not required to obtain prior authorisation for domestic service; however, they must obtain international section 214 authorisations to provide services between US and foreign points even by resale, and appropriate spectrum use authorisation. As discussed below, the FCC must grant terrestrial RF licences by auction if there are two or more competing, mutually exclusive applications. FCC rules do not require CMRS operators to deploy particular air interface technologies (eg, LTE). Accordingly, and unlike many other jurisdictions, the US authorisation and licensing regime does not distinguish among 'generations' of licensed wireless technologies (eg, 2/3/4G) used by operators. States cannot regulate the rates or entry of CMRS providers, but can regulate other terms and conditions. Facilities-based mobile service operators must obtain licences or leases to use RF spectrum, except where the FCC rules permit licence-exempt (ie, unlicensed) operation. Public mobile service providers are not required to obtain FCC consent to discontinue domestic services.

Public Wi-Fi

In the United States, Wi-Fi operates on an 'unlicensed' basis under the Commission's Part 15 rules. These rules set power levels, out-of-band emission limits and other technical limits. The FCC designates certain frequency bands where unlicensed devices may operate at higher power levels. The most important of these bands are the 900MHz, 2.4GHz and 5GHz bands. The rules for each of these bands, and sometimes their sub-bands, differ in terms of power and emission mask, and sometimes include special requirements. Special requirements include, but are not limited to, the use of dynamic frequency selection in the U-NII-2a and U-NII-2c sub-bands of the 5GHz band, and the availability of higher power with the use of a down-pointing antenna design in the U-NII-1 sub-band of the 5GHz band. But, importantly, as long as a Wi-Fi and other unlicensed device complies with these rules and operates within these designated bands, it does not require a licence to operate. Note that the FCC allows lower-power unlicensed operations on a co-channel 'underlay' basis in many other bands, but these low power levels make the bands inappropriate for Wi-Fi.

Wi-Fi continues to grow in importance in the United States. The FCC has stated that consumers receive more data over Wi-Fi than over licensed cellular networks, and soon Wi-Fi will deliver more data to consumers than even wired networks. Consequently, the FCC has undertaken to make additional spectrum bands available for Wi-Fi. For example, the FCC:

- opened the 'white spaces' between television broadcast channels for unlicensed operation, and is currently considering how and where such unlicensed devices would operate after the recent broadcast incentive auction in the 600MHz band;
- designated additional spectrum in millimetre wave bands for unlicensed use;
- adopted more liberal unlicensed rules in the U-NII-1 sub-band of the 5GHz band, thereby allowing traditional Wi-Fi services in these frequencies; and
- is considering opening the U-NII-4 sub-band of the 5GHz band for Wi-Fi through a proceeding exploring how unlicensed services can share the band with incumbent Intelligent Transportation Services.

Notably, in 2016 the FCC decided not to open the U-NII-2b sub-band of the 5GHz band to Wi-Fi after analysing the potential of sharing with incumbent government operations. The FCC also recently opened the 3.5GHz band for a mix of light-licensed and 'licensed-by-rule' operations. While the licensed-by-rule operations are not unlicensed or governed by Part 15 rules, they are likely to share many characteristics with Wi-Fi deployments. Finally, the FCC has issued a notice of inquiry seeking input on potential uses of 'mid band' spectrum (ie, spectrum above 3.7GHz but below millimetre wave) for wireless broadband, potentially including unlicensed operations in the 6GHz band.

Interconnected VoIP

Interconnected VoIP (VoIP services that can place calls to and receive calls from the traditional telephone network as part of a single service) are not subject to prior authorisation. Some states have asserted the ability to require prior approval for fixed interconnected VoIP services, which is currently being challenged in the courts. Interconnected VoIP providers must seek prior authorisation from the FCC, however, before discontinuing service.

Non-interconnected VoIP

Non-interconnected VoIP (VoIP services that can only send or receive calls (but not both) from the traditional telephone network) are not subject to prior authorisation or discontinuance requirements.

Satellite service providers

Satellite service providers must obtain licences to use RF spectrum and must ensure that their handsets or antennae meet FCC interference requirements. If providing common-carrier services between US and foreign points, satellite service providers must also obtain international section 214 authorisations. They are not subject to state rate or market-entry regulation or to FCC price regulation.

Satellite space stations

Satellite space stations notified to the International Telecommunication Union by the United States or using US orbital slots, as well as transmit-receive earth stations, must be licensed by the FCC prior to launch or services commencement, respectively. Receive-only earth stations communicating with US-licensed space stations require only FCC registration. Earth stations in certain frequency bands are covered by blanket authorisations (ie, the FCC does not require individual licensing or registration). Foreign-licensed satellites may serve US earth stations on a streamlined basis if they appear on the FCC's Permitted Space Station List, but may also make an individualised market access showing in connection with transmissions to and from a specific earth station.

Undersea cable infrastructure

Before installing or operating undersea cable infrastructure in the United States or its territories, an operator must first receive a cable landing licence from the FCC, coordinated with the US Department of State, pursuant to the Cable Landing Licence Act of 1921. For an undersea cable to be operated on a common-carrier basis, the operator must also apply for and receive an international section 214 authorisation from the FCC, as described above.

Internet services other than VoIP

The FCC does not require prior authorisations to provide service or to discontinue service for BIAS. The FCC does not regulate internet services other than VoIP and BIAS.

Foreign ownership restrictions – international wireline

The FCC applies a public interest analysis in determining whether to allow a foreign investor to enter the US telecommunications market. For international telecoms service authorisations (international section 214 authorisations), the FCC presumes that the public interest is served by direct and indirect foreign ownership (up to 100 per cent) in facilities-based and resale providers of interstate and international telecommunications services, where the investor's home country is a World Trade Organization (WTO) member, and in undersea cables landing in WTO member countries. For investors from non-WTO member countries – and undersea cables landing in non-WTO member countries – the FCC does not presume that the public interest is served by direct and indirect foreign ownership (up to 100 per cent). Instead, it will require

such investors from non-WTO member countries to make a showing whether they have market power in non-WTO member markets and evaluate whether US carriers or submarine cable operators are experiencing problems in entering such non-WTO member markets. The FCC determines an investor's home market and consequent WTO status by applying a principal place-of-business test.

Foreign ownership restrictions – RF licences

The United States imposes limitations on both direct and indirect foreign ownership. US WTO commitments reflect these statutory restrictions on foreign ownership. Regardless of WTO status, section 310 of the Communications Act prohibits a foreign government, corporation organised under foreign law, non-US citizen or representative of a foreign government, or non-US citizen from directly holding a common-carrier RF (for terrestrial wireless/microwave, mobile or satellite service) or aeronautical licence. Section 310 does, however, permit direct and indirect foreign ownership in such licensees, subject to a number of additional requirements:

- Common-carrier RF licence not controlled by a foreign investor: for non-controlling investments that result in aggregate direct and indirect foreign ownership of 20 per cent or less, the FCC does not require prior approval. For non-controlling investments that result in aggregate direct and indirect foreign ownership in a licensee in excess of 20 per cent, the FCC requires that the licensee first obtain a declaratory ruling finding that such foreign ownership would serve the public interest.
- Common-carrier RF licence controlled by a foreign investor: section 310(b)(3) prohibits direct, controlling ownership in the licensee in excess of 20 per cent. For controlling investments that result in aggregate direct and indirect foreign ownership in a licensee in excess of 25 per cent, the FCC requires that the licensee first obtain a declaratory ruling finding that such foreign ownership would serve the public interest.

Regardless of whether the foreign investor would control or not control the common-carrier RF licence, the FCC presumes that aggregate foreign ownership of up to 100 per cent serves the public interest, a presumption that applied only to investors from WTO member countries prior to August 2013.

Interplay with national security and trade concerns

The FCC may nonetheless deny approval if the Executive Branch raises serious concerns regarding national security, law enforcement, foreign policy or trade issues, or if the entry of the foreign investor (or cable landing) into the US market presents a risk to competition. In practice, applications for carrier licences for facilities-based and resale international telecommunications services, common-carrier RF licences, and non-common-carrier licences used for mobile or wireless networking services are typically subject to national security reviews by the Team Telecom agencies (see question 1). These agencies (which also review mergers and acquisitions – see questions 28 and 30) often require negotiation of security agreements or assurances letters prior to licensing or transaction consummation.

Authorisation timescale

Although the FCC has adopted detailed licensing timelines (for example, a 14-day streamlined review for most international section 214 applications, a 45-day streamlined review for most cable landing licence applications, and a statutory 30-day review for applications involving common-carrier wireless, mobile and transmit-receive satellite earth station applications), these are typically suspended in cases involving aggregate foreign ownership exceeding 10 per cent, as Team Telecom (see question 1) generally asks the FCC to defer action on such applications pending sometimes lengthy national security reviews. See question 28 for a description of the timing of consents for mergers, stock and asset-based acquisitions, and joint ventures (JVs) for the telecommunications and broadcasting sectors.

Licence duration

Licence durations vary by service and infrastructure type. International section 214 authorisations have no set term or expiry date. Cable landing licences have a 25-year term. Commercial wireless licences, private microwave and industrial wireless licences, and transmit-receive

satellite earth station authorisations generally have 10-year terms. Space stations are generally authorised for 15-year terms, but direct broadcast satellite authorisations are authorised only for 10 years. These licences are generally eligible for extension as long as the licensee has complied with the relevant FCC service rules. Cable systems are generally authorised by local franchising authorities for a set term, subject to renewal.

Fees

The FCC assesses application processing fees for new and modified licence applications involving telecommunications and broadcasting services and infrastructure, and for applications seeking consent for transactions involving transfers or assignments of FCC licences. The FCC also assesses annual regulatory fees for the providers it regulates. All of these fees vary by licence and service type; the FCC revises application processing fees periodically and regulatory fees annually. The FCC also assesses fees for a variety of federal programmes involving providers of interstate telecommunications and interconnected VoIP, including: federal universal service (as discussed in question 6); relay services for the hearing-impaired; numbering administration; and number portability. Non-interconnected VoIP providers are required to pay fees to support relay services for the hearing-impaired. State and territorial fees and contributions vary by jurisdiction.

Modification or assignment of licences (including transfers of common-carrier authorisation or assets)

FCC procedures and requirements for licence modifications vary significantly by licence type and service, and, in some cases, by whether the modification is 'major' or 'minor'. The FCC permits assignments of many types of licences, including common-carrier authorisations, though it distinguishes between a pro forma assignment of a licence or transfer of control of a licensee (where ultimate control of the licence does not change, such as with an internal corporate reorganisation), and a substantial assignment or transfer of control to an unrelated third party. Substantial assignments and transfers of control generally require prior FCC consent, as do any transfers of non-mobile common-carrier assets. Pro forma transfers of common-carrier authorisations and common-carrier RF licences do not require prior FCC consent, but the FCC must be notified within 30 days of consummation. Pro forma transfers of non-common-carrier RF licences require prior FCC consent. In general, prior FCC approval is required either when the licence or authorisation itself is transferred to another entity, or when control of the entity holding the licence of authorisation is changing (even if the licence or authorisation is staying within the same entity).

FCC licences and financial security interests

FCC licences may not be pledged as security for financing purposes. Nevertheless, a lender may take a security interest in the proceeds of the sale of an FCC licensee. Lenders are also permitted to take a pledge of the shares of a company holding an FCC licence, though FCC consent must be obtained prior to a lender consummating any post-default transfer of control of an FCC licensee or assignment of an FCC licence. In structuring arrangements for protection in the event of a borrower default or insolvency, lenders, security-interest holders, and FCC licensees need to be mindful of the FCC's rules on security interests and requirements for approval of transfers of control and assignments, whether voluntary or involuntary.

3 Flexibility in spectrum use

Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

In addition to any required telecoms services authorisations, facilities-based wireless service providers must have an RF licence, unless they operate exclusively in licence-exempt (ie, unlicensed) bands. In most circumstances, the FCC must grant terrestrial RF licences by auction if there are two or more competing, mutually exclusive applications. Before holding an auction, FCC rulemakings establish spectrum blocks to be auctioned, geographic areas covered, licence terms, service rules including technical and interference-related rules, and network build-out rules. In some cases, the FCC limits the entities eligible to participate in the auction. Some satellite services do not require an auction. In bands designated for licence-exempt use, users can operate under

specific technical rules without an individual FCC licence. The FCC has also allotted some frequency bands for 'licensed-light' services, where entities can obtain permission to use set frequencies through less onerous processes, such as by registration with the FCC.

The FCC has the authority to reallocate (change the permitted use or permitted class of user) or reassign (change the entity authorised to use particular frequencies in a particular geography) RF spectrum. The FCC is more likely to consider such changes when changes in technology or the marketplace render its rules obsolete. The FCC may also revoke a licence for failure to meet licensee qualification or fitness requirements, or for violations of FCC build-out rules. FCC rules specify the permitted use of some licensed spectrum. However, over the past two decades, the FCC has made spectrum available without detailed use restrictions in most cases, instead setting technical rules, but permitting flexible use of the spectrum. This allows licensees to change the services they provide without seeking prior authorisation from the FCC in most cases. Similarly, FCC rules do not specifically limit the services provided over most unlicensed bands by an individual user as long as they are consistent with the technical operating rules and do not wilfully or maliciously interfere with other users. While individual users of an unlicensed band must accept harmful interference, the FCC has used its equipment authorisation and enforcement processes to investigate and address unlicensed technologies that it believes might undermine an unlicensed band as a whole. The core unlicensed bands are located within the 2.4GHz and 5GHz bands. In 2014, the FCC changed its rules to permit outdoor operations and operations with increased power in the 'U-NII-1' sub-band of the 5GHz band. In addition, the FCC recently permitted unlicensed operations in the television 'white spaces,' that is, the vacant frequencies between occupied over-the-air broadcast television channels, as well as in portions of the new 600MHz band that will be created as a result of the television broadcast incentive auction (see question 16). FCC rules require these white space devices to operate subject to a database that determines where and when they can transmit so as to protect licensed operations, including television broadcasters and certain wireless microphones. The FCC is currently considering designating additional frequencies for unlicensed use, including in portions of the 5GHz band on a shared basis with incumbents (see question 2 'Public Wi-Fi'). The FCC has also recently permitted new commercial uses of the 3.5GHz band on a shared basis with incumbents - including 'licensed-by-rule' uses that are functionally similar to unlicensed uses - using a spectrum database approach. In addition, the FCC has recently made additional frequencies available for licensed and unlicensed use in the 'millimetre wave' bands above 24GHz. Finally, the FCC has started a new proceeding to develop rules for spectrum above 95GHz, and has issued a notice of inquiry seeking input on potential uses of 'mid band' spectrum for licensed and unlicensed wireless broadband deployments.

The FCC permits spectrum licences to be transferred or assigned, subject to FCC consent (see question 2) as long as speculation is not the principal purpose of the transaction. In approving any transfer or assignment of spectrum, the FCC considers competition, spectrum aggregation, and prior compliance issues. The FCC permits partitioning (assignments of the licence in part of the licensed areas) and disaggregation (assignments of some, but not all, frequencies in the licensed area) subject to FCC consent. The FCC also permits leasing of RF spectrum, with the nature of the FCC review depending on the nature and duration of the lease.

4 Ex-ante regulatory obligations

Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

With respect to ex-ante economic and competition regulation, although the FCC requires all interstate and international common carriers to offer just and reasonable rates, terms and conditions, and prohibits unreasonable discrimination, in practice these are not significant constraints except for incumbent local exchange carriers. The FCC also has the authority to eliminate, or 'forbear' from, any statutory common-carrier requirements that it finds unnecessary.

Incumbent local exchange carriers

Incumbent local exchange carriers (ILECs) generally remain subject to both state and federal tariffing, cost accounting, accounting

separation, discounted mandatory resale, and unbundling requirements, although unbundling is primarily limited to copper networks. They generally face price controls on retail and wholesale rates, although the FCC has substantially deregulated rates, terms and conditions for non-switched 'special access' services in many areas and particularly for packet services such as Ethernet. Specifically, in 2017, the FCC adopted an order deregulating most business data services (BDS), also known as special access, that provide dedicated point-to-point connectivity at guaranteed levels of service. The order determined that all packet-based (typically Ethernet) BDS services are competitive, at low and high capacity levels, everywhere in the country. Based on this finding, the FCC declined to establish new rate regulations for Ethernet BDS. The order then broadly deregulated BDS provided over legacy, circuit-based time-division multiplexing (TDM) networks, which previously were subject to rate regulation in many parts of the country. With respect to middle-mile TDM 'transport' services, the order determined that the market is generally competitive, and eliminated all existing price regulation nationwide. The order took the same approach to high-bandwidth (above 45Mbps) TDM 'channel termination' services (ie, the last-mile connections between the provider's network and the customer location). For lower-bandwidth (below 45Mbps) TDM channel terminations – commonly referred to as DS1 and DS3 services – the order adopted a new two-pronged 'competitive market test' to determine which US counties are sufficiently competitive to warrant deregulation. This test deems counties competitive if:

- 50 per cent of buildings or cell towers with BDS demand are located within a half a mile of a building or cell tower served by a competitive provider; or
- 75 per cent of the census blocks within the county are reported to have broadband availability (including for residential 'best-efforts' broadband service) from a cable operator.

The test produces positive findings of competition for more than 90 per cent of counties with BDS demand, resulting in wide-scale deregulation of DS1s and DS3s. Competitive carriers and other purchasers of BDS have challenged the order in federal court.

The FCC has also initiated a phased elimination of all inter-carrier compensation for call termination (excluding leases of fixed facilities to an interconnection point), and has announced, but not implemented, an intent to eliminate inter-carrier compensation for call origination. In addition to economic regulation, ILECs are also subject to a variety of security and consumer protection requirements, including those for law enforcement access, emergency calling, universal service funding, disability access, funding of telecommunications services for the deaf, customer privacy, number portability service, discontinuance, anti-blocking, rural call completion, outage reporting and some other reporting requirements.

Non-incumbent local exchange carriers

Non-incumbent (called competitive) local exchange carriers (CLECs) are not required to file FCC tariffs, although most choose to do so, and generally are required to file state tariffs. The FCC limits the amounts that CLECs can charge for inter-carrier compensation on call origination and termination. They are not subject to cost accounting, separation, discounted mandatory resale or unbundling requirements. They are, however, subject to a variety of security and consumer protection requirements, including those for law enforcement access, emergency calling, universal service funding, disability access, funding of telecommunications services for the deaf, customer privacy, number portability service, discontinuance, anti-blocking, rural call completion, outage reporting, and some other reporting requirements.

Interconnected VoIP providers

Like non-incumbent local exchange carriers, interconnected VoIP providers are not subject to economic regulations; however, they must comply with significant regulatory requirements, including those for law enforcement access, emergency calling, universal service funding, disability access, funding of telecommunications services for the deaf, customer privacy, number portability service, discontinuance, anti-blocking, rural call completion, outage reporting, and some other reporting requirements. The FCC, however, pre-empted state PUC regulation of nomadic interconnected VoIP services (those that can be

used at more than one site). Some PUCs assert authority to regulate fixed interconnected VoIP services, but a majority of states do not.

Non-interconnected VoIP providers

Non-interconnected VoIP providers must comply with anti-blocking, rural call completion, and disability access requirements and pay FCC-assessed fees to support telecommunications services for the deaf, but are not yet subject to the other regulatory requirements for interconnected VoIP or common carriers. The FCC is considering whether to extend additional regulatory obligations to non-interconnected VoIP, including the obligation to contribute to the support of universal service programmes and for automatic routing and location identification for emergency access (ie, 911) calls.

Broadband internet access service rules

In its 2015 Order, the FCC forbore from exercising its full authority to impose ex-ante rate regulation on providers of broadband internet access services. However, the FCC imposed three bright-line rules on BIAS providers as common carriers, prohibiting them from placing burdens or restrictions on subscriber access to lawful internet content. First, BIAS providers may not block subscribers from lawful internet content, applications, services, or non-harmful devices; second, BIAS providers may also not impair or degrade subscribers' internet access to lawful content, applications, services, or use of non-harmful devices; and finally, BIAS providers may not engage in 'paid prioritisation' – that is, they may not accept payment of any kind in exchange for 'fast lane' access to specified internet content, applications, services or devices. The agency has also imposed a prophylactic catch-all standard preventing broadband providers from 'unreasonably interfering' with subscriber access to lawful internet content in ways unforeseen by the Order's bright-line rules. The 2015 Order also affirmed and expanded on the transparency requirements the FCC originally imposed on providers in 2010.

As noted above, however, in December 2017, the Commission adopted the 2017 Order, which modified the transparency requirements, but otherwise eliminated the three bright-line rules against blocking, throttling, and paid prioritisation, as well as the catch-all standard preventing unreasonable interference. While these changes were adopted by the FCC in 2017, they are not yet in effect at the time of writing. Per the FCC, the 2017 Order will become effective once the Office of Management and Budget approves the changes to the transparency rule, which is expected to occur later in 2018.

The FCC adopted privacy regulations for BIAS in the autumn of 2016. However, in April 2017, President Trump signed a Joint Resolution passed by Congress to rescind those rules. As a result, until the 2017 Order is effective, BIAS providers are currently subject only to a statutory provision that requires them to protect customers' proprietary network information. Once the 2017 Order is effective later in 2018, BIAS providers will be subject to FTC privacy oversight, rather than that statutory provision.

BIAS providers have obligations to prepare their networks for lawful intercept requests under the Communications Assistance for Law Enforcement Act, described below in response to question 12.

Wireline long distance

For wireline long-distance service providers, the FCC generally prohibits filing of tariffs for almost all retail domestic interstate and international telecommunications services, except for certain specialised situations, and for providers of international telecommunications services regulated as dominant (ie, having market power) on particular routes to particular foreign countries. Long-distance service providers remain subject to customer protection requirements similar to those applicable to competitive local exchange carriers. State PUCs typically require tariffing of intrastate long-distance services. The US Congress recently passed the Improving Rural Call Quality and Reliability Act of 2017 to address the persistent problems associated with terminating long-distance calls to rural areas. The Act requires the FCC to develop a registry of 'intermediate providers,' or carriers to which long-distance calls are passed for termination, and to develop service quality standards for intermediate providers. The FCC is beginning a rulemaking process to implement the Act.

Public mobile services

Public mobile service providers (ie, CMRS) are not subject to ex-ante economic regulation by either the FCC or state PUCs. They are not subject to price controls, tariffing, cost accounting, separations, resale, or domestic discontinuance requirements. Voice roaming rates and conditions must be just, reasonable, and non-discriminatory, and CMRS providers must negotiate commercially reasonable data roaming agreements with other carriers, subject to certain limitations regarding technical compatibility and feasibility. Mobile service providers must also ensure that their handsets and base stations meet FCC rules on topics such as maximum power, interference/spectral masks, antenna design/directionality, human radiation exposure, and disabilities access, including technical hearing aid compatibility requirements. FCC rules require testing and certification of RF equipment. Moreover, as discussed above with regard to broadband internet access services, in December 2017, the Commission revised, but did not eliminate, BIAS transparency obligations. These revised rules will apply to mobile as well as fixed BIAS.

5 Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

No, the United States does not require carriers to maintain separate wholesale network and retail-service subsidiaries. In some cases the FCC or state PUCs require separation among service activities (eg, a US carrier affiliated with a carrier with market power in a foreign market must provide US-originating or terminating services to that foreign market through a subsidiary separate from the foreign carrier).

6 Universal service obligations and financing

Outline any universal service obligations. How is provision of these services financed?

Incumbent local exchange carriers generally have state-imposed universal service obligations to meet all reasonable requests for service within their service area (called 'carrier of last resort' obligations). Some cable companies also have requirements in franchise agreements with local or state governments to build out their network.

The federal Universal Service Fund (USF) supports the provision of telecommunications services in high-cost areas, to low-income consumers, to rural healthcare providers, and to schools and libraries. The FCC sets voice and broadband performance and service requirements for carriers that choose to receive explicit universal service funding for high-cost areas. The FCC is beginning to use reverse auctions to distribute universal service support to eligible carriers; it is currently processing initial applications to participate in a reverse auction to bring fixed voice and broadband services to areas that lack broadband of at least 10Mbps/1Mbps, and it is in the process of confirming which areas will be available for a reverse auction to provide mobile broadband services to underserved areas. Carriers that are eligible to receive high-cost universal service support must also provide services to low-income consumers, although some carriers receive subsidies only for serving low-income consumers.

The federal USF is financed by an assessment on all end-user interstate and international telecommunications revenues earned by telecommunications carriers and interconnected VoIP providers. The FCC recalculates the assessment rate quarterly; for the second quarter of 2018 the assessment rate is 18.4 per cent of interstate and international telecommunications revenues. From 2015 to the present, the rate has fluctuated from a low of 16.7 per cent for the fourth quarter of 2015 and the first quarter of 2017 to an all-time high of 19.5 per cent for the first quarter of 2018. Internet access revenues currently are not subject to USF assessments. Determining which services are required to contribute directly and when is extremely complex.

Many states also require providers of intrastate telecommunications to contribute to state universal service programmes, and some states require interconnected VoIP providers to contribute. Nearly all states assess contribution requirements based on provider revenue, but a few states have recently adopted connection-based revenue requirements. These new rules are being challenged in court.

7 Number allocation and portability

Describe the number allocation scheme and number portability regime in your jurisdiction.

The United States is one of 20 countries that participate in the North American Numbering Plan, which uses the +1 country code. Within the United States, the FCC has exclusive authority over numbers; it has delegated certain management functions to the states. The FCC contracts out the day-to-day management of the US portion of the North American Numbering Plan; Neustar, Inc currently serves as the North American Numbering Plan administrator. Providers of local telecommunications services, including mobile wireless providers, that are authorised to provide service in a particular geographic area apply to the Administrator for numbers associated with that area, typically in contiguous blocks of 1,000 (eg, NPA-NXX-3000 through NPA-NXX-3999). Providers of interconnected VoIP service may also apply for numbers after obtaining authorisation from the FCC. Fixed and mobile common carriers and interconnected VoIP providers pay fees to support numbering administration.

Numbers for toll-free calling are managed separately by Somos, Inc, a private company, on designation by the FCC.

The FCC requires fixed and mobile common carriers and interconnected VoIP providers to permit number porting within the same geographic area. All providers of telecommunications services and interconnected VoIP must pay fees to support number portability administration. These fees vary by region. The US number portability system does not currently permit nationwide number portability, although a provider that operates in all seven number portability regions can effectively create the ability for its customers to port numbers anywhere in the US.

8 Customer terms and conditions

Are customer terms and conditions in the communications sector subject to specific rules?

States regulate customer terms and conditions for intrastate, including local, services, frequently with advance filing or approval requirements through tariffs. The FCC does not require advance filing of customer terms and conditions for any interstate services, other than for local services provided by incumbent local exchange carriers. All wireline local carriers can advance file, through tariffs, customer terms and conditions for interstate services, although CLECs are not required to do so. Long-distance carriers are not permitted to tariff customer terms and conditions. Both the FCC and state PUCs generally require terms and conditions that are reasonable and non-misleading.

For non-common-carrier services and prepaid phone cards, sold and distributed by non-carriers, the FTC has taken the position that it has jurisdiction to regulate misleading or unfair terms and conditions. The states' attorneys general also police false, misleading or unfair terms and conditions. Neither the FTC nor state attorneys general require advance filing or approval.

9 Net neutrality

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

In 2010, the FCC imposed three net neutrality obligations on mass-market broadband ISPs: transparency; a prohibition on blocking; and a prohibition on unreasonable discrimination. A reviewing court vacated the prohibitions on blocking and unreasonable discrimination in January 2014. However, in 2015, the FCC reinstated and expanded on the vacated rules, which it accomplished by classifying broadband internet access carriers as 'telecommunications providers'. The 2015 Order established prohibitions on blocking, throttling, and paid prioritisation, as detailed above; enhanced carriers' existing transparency obligations; and made all rules governing the openness of the internet apply uniformly to both fixed and mobile broadband internet access devices. The rules were challenged in court and upheld in their entirety by the DC Circuit in June 2016.

As mentioned above, however, in December 2017, the Commission adopted a new order reversing—in nearly all respects—the 2015 Order.

In particular, the FCC reclassified broadband ISPs as 'information service' providers rather than 'telecommunications providers' and eliminated the net neutrality rules against blocking, throttling, paid prioritisation and unreasonable interference. Once the 2017 Order is effective later this year, therefore, BIAS providers will be subject only to a modified version of the FCC's transparency rule. Under that rule, broadband ISPs must publicly disclose accurate information regarding network management practices, including whether they are engaging in blocking, throttling, or paid prioritisation practices. They must also disclose certain network performance and commercial terms governing their broadband internet access services. Beyond that, broadband provider ISP will be governed by existing general antitrust and consumer protection law.

In the 2017 Order, the FCC stated that it was preempting any state or local measures inconsistent with its net neutrality approach (ie, precluding states or localities from adopting net neutrality rules). Notwithstanding that language, in the wake of the 2017 Order's adoption, several states have sought to put state net neutrality regulations in place. At the time of writing, the governors of five states – Montana, Hawaii, New Jersey, New York and Vermont – have signed executive orders stating that a broadband provider that has a government contract with the state must not block, throttle, or degrade internet content and must not engage in paid prioritisation, including in some cases a prohibition on requiring consumers to pay different rates to access specific kinds of content or applications online. In addition, 25 states have introduced legislation to support some form of net neutrality protection for consumers in their state. On 7 March 2018, Washington state enacted the first of these bills into law, providing that broadband providers that block content, impair or degrade traffic, or engage in paid prioritisation violate the state's law against unfair or deception acts in trade or commerce or unfair methods of competition. The Oregon legislature has also passed a bill that requires the state to contract only with broadband providers that comply with net neutrality protections. Other state bills remain pending.

As noted above, the 2017 Order will become effective once the Office of Management and Budget approves changes to the transparency rule, likely later this year. Meanwhile, over 20 state attorneys general offices, several online companies, and a number of public interest groups have challenged the 2017 Order in court. Those lawsuits remain pending at the time of writing.

10 Platform regulation

Is there specific legislation or regulation in place, and have there been any enforcement initiatives, relating to digital platforms?

The FCC does not regulate internet-based services such as search, social media and news services. Those services may be subject to other generally applicable laws, such as laws against unfair or deceptive marketing.

11 Next-Generation-Access (NGA) networks

Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

Pursuant to its 2015 Order, the FCC treated BIAS, including traffic exchange arrangements, as 'telecommunications service' subject to its regulatory authority over common carriers. The FCC did not impose specific rules governing internet backbone or traffic exchange, but asserted authority to hear complaints of unjust, unreasonable or unreasonably discriminatory traffic exchange practices by BIAS providers. As mentioned above, however, in December 2017, it reversed itself and the FCC adopted the 2017 Order, which among other things, disclaimed FCC jurisdiction over internet traffic exchange practices. The FCC also requires internet access networks to comply with surveillance and law-enforcement assistance requirements, as described in question 12.

The FCC has adopted some measures to address the transition from copper-based phone networks to fibre, intended to encourage incumbent carriers in upgrading their networks. For example, the FCC eliminated prohibitions that previously prohibited incumbent carriers from disclosing planned network changes to their affiliates before informing the public. The FCC also eased requirements on incumbent carriers to provide prior notice before retiring copper facilities.

The FCC has also modernised all of its universal service support programmes to support broadband services (the high-cost support programme, the schools and libraries programme, the rural healthcare programme, and the low-income programme). Its programmes in total disburse approximately US\$9 billion annually.

12 Data protection

Is there a specific data protection regime applicable to the communications sector?

Limits on communications companies' use and disclosure of personally identifiable information to non-law-enforcement entities

Under the Electronic Communications Privacy Act (ECPA) and the Communications Assistance for Law Enforcement Act (CALEA), communications companies cannot as a general rule disclose the contents of communications to anyone other than a party to the communication and are limited in their ability to regularly monitor the contents of communications occurring on the carrier's network. Third parties who are not law enforcement or vendors working for the carrier typically cannot be given access to communications contents.

The FCC requires companies offering telephone or interconnected VoIP services to offer special protections to a category of customer data known as customer proprietary network information (CPNI). CPNI includes information about a customer's use of telecommunications services, such as the numbers the customer called, how long each conversation lasted and certain billing information. A customer's name, address, social security number, birth date and many other types of personal information are not CPNI.

Providers must take all reasonable measures to discover and protect against attempts to gain unauthorised access to CPNI and properly authenticate a customer's identity before complying with a request that would give the customer access to his or her own CPNI. Telecommunications carriers must also provide customers with notice related to the company's CPNI practices, seek customer consent before using CPNI to engage in certain activities, retain records related to CPNI access and report certain information related to CPNI to the FCC.

Federal oversight of phone and iVoIP companies' treatment of personally identifiable information that does not qualify as CPNI is unclear. Under the prior administration, the FCC took the position (announced in October 2014) that a telecommunications provider's failure to protect data falling outside the definition of CPNI can violate the Communications Act. Specifically, the FCC stated that a customer's name, address, social security number, date of birth and other types of personally identifiable information that a carrier collects when providing service qualify as customer proprietary information (CPI). The FCC stated that it expects telecommunications carriers to employ adequate data security to protect CPI, avoid implicit and explicit misrepresentations regarding the level of data security provided, and notify customers potentially affected by a data security breach. Whether the FCC intends to take the same approach under its new leadership – and whether it has the continued power to do so after Congressional action overturning an FCC order that touched on the FCC's treatment of CPI – remains unclear at the time of writing.

The FTC oversees the treatment of personally identifiable information by companies, except in their provision of common carrier services. For example, in the wake of the reclassification of broadband internet access service as an information service, the FTC oversees companies' data protection practices with regard to data collected from providing broadband, whereas the FCC continues to oversee companies' data protection practices with regard to data collected from providing telephone service (pursuant to the CPNI and possibly CPI rules discussed above). The FTC does not have set rules regarding data protection. Instead, it takes a case-by-case approach, evaluating whether a company's treatment or protection of personally identifiable information is unfair (eg, if the company retroactively applies new data protection practices to data the company previously collected, without obtaining opt-in customer consent) or deceptive (eg, if it materially conflicts with implicit or explicit statements the company made about its data protection practices).

A small number of states and municipalities have laws that specifically address the data protection practices of communications providers. After Congress's rescission of the FCC's broadband privacy rules,

many state legislatures have considered legislation requiring broadband providers to obtain customer consent to use or disclose personally identifiable information to third parties for non-service-related purposes. States and municipalities also have generally applicable data protection rules that may apply to communications providers. In particular, California has extensive regulations dealing with privacy notices for online services and the ability for California residents to obtain information about whether their information is provided to third parties for direct marketing purposes.

Law enforcement access to data

The United States has specific data protection regulations dealing with the content of communications, including emails, text messages and calls. Under ECPA and CALEA, communications companies cannot turn over the content of communications to a law enforcement entity without a valid court order, absent an emergency or other special circumstance. The type of court order necessary depends on a number of different factors, including whether the communications will be intercepted in real-time or whether law enforcement will access the contents of a previously stored communication. Statutes differ on whether consumers must be notified and given an opportunity to challenge the disclosure. ECPA gives law enforcement the ability to require communications providers to retain communications in their possession pending a court order. The Cybersecurity Information Sharing Act (CISA) also allows companies to voluntarily share certain information with the government regarding cybersecurity threats.

Federal regulations require each telecommunications common carrier that offers or bills toll telephone service to retain billing-record data for a period of 18 months.

Although the circumstances in which disclosure is allowed are somewhat limited, CALEA requires telecommunications providers (including interconnected VoIP providers), fixed broadband service providers, manufacturers of telecommunications transmission and switching equipment, and providers of support services (ie, products, software, or services used by a telecommunications carrier for the internal signalling or switching functions of its telecommunications network) to provide the capacity to allow properly authorised law enforcement officials to intercept communications and obtain call-identifying information from their customers, as well as the capacity to meet the surveillance needs of properly authorised law enforcement officials. Pursuant to a court order or other lawful authorisation, carriers must be able to:

- expeditiously isolate all wire and electronic communications of a target transmitted by the carrier within its service area;
- expeditiously isolate call-identifying information of a target;
- provide intercepted communications and call-identifying information to law enforcement; and
- carry out intercepts unobtrusively, so targets are not made aware of the electronic surveillance, and in a manner that does not compromise the privacy and security of other communications.

CALEA does not require telecommunications providers to decrypt communications, unless the carrier provided the encryption and has the information necessary to perform the decryption.

Failure to comply with CALEA obligations can result in civil penalties. The attorney general may enforce these obligations by seeking an order from a federal district court. Violations of ECPA can result in criminal penalties.

13 Cybersecurity

Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

In February 2014, the National Telecommunications and Information Administration (NTIA) and the National Institute of Standards and Technology (NIST) released their Framework for Improving Critical Infrastructure Cybersecurity, a set of industry best practices to reduce cyber risks to critical infrastructure, including telecommunications services; as of this writing, NTIA and NIST are engaging with key stakeholders to update the Framework. The FCC-convened Communications Security, Reliability, and Interoperability Council (CISRC) provides guidance on how the NIST framework applies in the telecommunications context and offers recommendations. Compliance with the Framework and CISRC best practices is voluntary.

Under CALEA, telecommunications providers (including interconnected VoIP providers) must maintain and file with the FCC System Security and Integrity plans, detailing how the provider ensures proper government access to communications content and call identifying information, and protects such information from unauthorised disclosure. Neither CALEA nor the FCC mandate the use of any particular technical standard to ensure law enforcement access or communications security.

CISA limits liability of companies for sharing information with other private entities and with government related to cybersecurity threats. CISA does not impose a sharing mandate and instead establishes a voluntary sharing framework; in addition, it explicitly authorises private entities to monitor their networks for cybersecurity threats, to operate defensive measures to protect their networks from cybersecurity threats, and to share and receive cybersecurity threat information.

The Team Telecom agencies also often impose cybersecurity-related conditions in security agreements and assurances letters as conditions for the grant of FCC licences or consents for mergers and acquisitions.

14 Big data

Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

In the United States, the Fair Credit Reporting Act (FCRA) is the main law dealing specifically with amassing and using high-volume datasets of personally identifiable information (PII), but the law has limited reach. The FCRA only applies to 'consumer reporting agencies' (CRAs) and entities that obtain information from or furnish information to CRAs. Credit reporting bureaux, such as Transunion, Equifax and Experian, and employment and tenant background screening companies are the main CRAs. However, a 2016 report from the FTC and a number of commentators have suggested that the definition of a CRA is sufficiently broad to cover data brokers who: compile PII that bears 'on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living'; and provide these compilations (known as consumer reports) to buyers who use them (or can be expected to use them) in making credit determinations or for employment, insurance, licensing and other business purposes. Importantly, the FCRA does not generally apply to reports that are used or can be expected to be used only for marketing and general risk management purposes. As of this writing, President Trump's nominees to the Federal Trade Commission have not publicly expressed a position on their view of FCRA's scope in the big data context.

There have been few big data-related cases alleging violations of the FCRA, so the precise reach of the FCRA in this context remains unknown. Litigation related to the Equifax data breach may shed light on this issue in the near future. In one high-profile case, LexisNexis settled a class action FCRA lawsuit – which alleged that identity reports it sold for locating people and assets, authenticating identities and verifying credentials in the debt collection context were subject to the FCRA – for US\$13.5 million in damages, US\$5.5 million in fees and an agreement to restructure the identity report programme at issue so that it would comply with the FCRA. And in a January 2016 staff report on big data, the FTC took the position that data brokers who advertise their services 'for eligibility purposes' and companies that use non-traditional predictors (such as a consumer's zip code, social media usage or shopping history) to create reports of consumers' creditworthiness are particularly likely to fall under the FCRA (as are companies that use such reports).

When a company involved in big data qualifies as a CRA, it must:

- only include accurate, current and complete data in consumer reports, including in most cases deleting information on account data after seven years and bankruptcies after 10 years;
- provide consumers with access to and the opportunity to dispute or correct any errors in a consumer report, as well as general consumer assistance in accordance with FTC rules;
- provide consumer reports only to entities that have a permissible purpose under the FCRA, including for the extension of credit applied for by a consumer, the review or collection of a consumer's account, insurance underwriting, employment purposes where consumer permission is obtained pursuant to stringent rules, where there is a legitimate business need in connection with a business

transaction initiated by the consumer, and in certain legal actions; and

- keep records regarding the release of consumer reports.

Users of consumer reports must:

- provide notice to consumers when most types of third-party data are used to make adverse decisions about them;
- only use consumer reports for a permissible purpose and so certify; and
- provide certain consumer disclosures and keep records related to making offers to a list of pre-screened consumers obtained from a CRA.

Companies that provide information to CRAs for use in consumer reports must take certain steps to ensure the information provided is accurate and complete.

Additionally, some companies have faced questions about whether their use of data has a discriminatory impact on protected classes of people. Under Title VII of the Civil Rights Act of 1965 and other statutes, companies could face a civil action when their facially neutral policies or practices have a disproportionate adverse effect on a protected class. The Equal Credit Opportunity Act (ECOA) bans companies that regularly extend credit from using information about consumers' race, colour, religion, national origin, sex, marital status, age or receipt of public assistance when making credit decisions. The 2016 FTC big data report indicated that targeting credit advertisements in a way that had an 'unjustified' disparate impact on a protected class could potentially violate the ECOA. Whether courts would take a similar view of the ECOA's application to big data remains to be seen. The 2016 FTC big data report also indicated that selling analytics products knowing that they would be used for a fraudulent or discriminatory purpose may also constitute a violation of the FTC Act. In May 2016, the Obama Administration issued 'Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights', which noted some concerns with the use of big data. Some of the companies faced with allegations of discrimination have voluntarily addressed these issues in a way that has helped them avoid litigation.

Generally applicable privacy and data security rules will also apply to most companies involved in big data. The FTC Act bans unfair or deceptive acts in interstate commerce by non-common carriers, including misrepresenting how PII will be collected and used, misrepresenting how PII will be protected, and failing to maintain reasonable security over PII. A number of states have additional requirements regarding privacy disclosures, cybersecurity, and notification to consumers in the event of a data breach. Companies must comply with myriad requirements under the Children's Online Privacy Protection Act before knowingly collecting personally identifiable information from children under 13 via an online service or collecting personally identifiable information from an online service targeted at children under 13. The United States also has a number of sector-specific privacy laws that can impact companies compiling information from certain healthcare-related companies, financial institutions and communications companies.

US law does not require online companies to honour consumers' 'do not track' settings. However, California law typically requires entities operating online to state how the entity treats 'do not track' requests.

15 Data localisation

Are there any laws or regulations that require data to be stored locally in the jurisdiction?

The United States has not adopted laws or regulations requiring that data be stored locally in the United States. Nevertheless, in some cases, Team Telecom imposes data localisation requirements in security agreements and assurances letters as a condition for the grant of a licence or consent for a merger or acquisition. In such cases, Team Telecom may require that such data be stored only in the United States, or that copies of such data be made available in the United States. Such requirements are controversial, as they extend extraterritorially the reach of US law enforcement jurisdiction.

The United States' lack of data localisation requirements has driven US law enforcement to take an aggressive approach to their ability to access data that allegedly relates to unlawful activity occurring in the United States but is stored in a different country. The Supreme Court

heard an argument earlier this year from Microsoft, challenging the federal government's position on the extraterritorial reach of US warrants. That case was dismissed as moot following passage of the Clarifying Lawful Overseas Use of Data (CLOUD) Act. The CLOUD Act amends the Stored Communications Act of 1986 to allow US law enforcement to compel (via warrant or subpoena) US-based technology companies to provide data stored on servers regardless of whether the data are stored in the US or on foreign soil.

16 Key trends and expected changes

Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

IP transition/convergence

Both Congress and the FCC continue to tackle how best to update US telecommunications laws in light of the technological changes and service convergence brought about by digitisation and IP networks. As described above, the FCC has modernised all of its universal service support programmes to support broadband services (the high-cost support programme, the schools and libraries programme, the rural health-care programme and the low-income programme). The Republican-led Congress continues to consider a fundamental update of underlying telecommunications laws. At the time of writing, there has been little movement on such an update.

Spectrum/wireless

The FCC and US government continue to attempt to find spectrum to make available for both licensed and licence-exempt services, particularly mobile broadband. There are several important ongoing proceedings on this topic.

The FCC recently concluded an incentive auction that allowed television broadcasters to relinquish spectrum rights in the 600MHz band in exchange for auction revenues (the reverse auction), and assign the returned spectrum for flexible use (the forward auction) by licensed and unlicensed networks. Because there is little other opportunity for commercial access to spectrum below 1GHz, the FCC has also adopted spectrum-aggregation rules to address the amount of such spectrum that any single provider can hold. This auction produced 84MHz of spectrum for licensed mobile broadband services. The process of 'repacking' the remaining broadcasters and opening this band for auction winners will be a major endeavour of the FCC over the next several years.

The FCC recently allowed commercial users to share the 3.5GHz band with government and non-government incumbents, on a secondary basis. The FCC adopted an innovative three-tier approach that would make incumbents primary, a set of licensees that acquire licences secondary exclusive and a tertiary tier of licensed-by-rule users (similar to traditional unlicensed operations). Under its new leadership, the FCC is considering revisiting elements of these rules, however, with nationwide carriers seeking longer licence terms and larger licence areas. FCC proceedings are also under way to put in place a database system to govern use and interference.

The FCC is considering permitting unlicensed devices to operate in the UNII-4 sub-band of the 5GHz band, where Intelligent Transportation Services is the incumbent licensee.

The FCC recently permitted additional terrestrial licensed and unlicensed wireless operation in the 'millimetre wave' bands above 24GHz. It will soon put auction rules in place for the licensed bands, and auction of the 28GHz band could take place as early as November 2018, followed by auction of the 24GHz band. Standardisation of the new unlicensed millimetre wave band is already well under way.

Furthermore, the FCC has started a new proceeding to develop rules for spectrum above 95GHz, and has issued a notice of inquiry seeking input on potential uses of 'mid band' spectrum for licensed and unlicensed wireless broadband deployments.

Finally, the US Congress recently passed legislation requiring the FCC and the National Telecommunications and Information Administration to identify 255MHz of additional spectrum for mobile and fixed wireless broadband use, including not less than 100MHz of spectrum below 6GHz for exclusively licensed commercial mobile use (subject to potential continued use by federal entities), and not less than 100MHz of spectrum below 8GHz for unlicensed operations.

Public mobile service competition

When the US DOJ challenged the *AT&T/T-Mobile* merger, it strongly suggested that it was necessary to maintain at least four national public mobile service providers. Whether this is true, and, if so, what regulatory steps are necessary to secure it, will remain issues, before both the FCC and the DOJ antitrust division. The FCC, however, has taken steps to strengthen its rules limiting data roaming rates, and has conditionally reserved some spectrum below 1GHz for providers other than the two largest nationwide mobile wireless carriers.

Delayed market entry owing to national security reviews; prospect of reform

In 2016, the FCC initiated a proceeding to reform the Team Telecom review process to provide greater transparency and timing certainty for national security reviews of foreign ownership for new FCC licences and mergers and acquisitions involving FCC licensees. That proceeding remains pending, having been suspended by the FCC at the end of 2016 owing to concerns about the propriety of a lame-duck FCC initiating major reforms in advance of the presidential transition. The US national security reviews by Team Telecom and CFIUS have long generated considerable anxiety among foreign investors and equipment and software suppliers considering US entry. Continuing disclosures about US government spying have exacerbated concerns both about the purpose of those reviews and about delays in future reviews as the agencies adjust. Notwithstanding US WTO commitments to make publicly available the licensing criteria and ‘the period of time normally required to reach a decision concerning an application for a license’, there remains little predictability in the process or timing for obtaining a new licence or transaction approval involving foreign investment in a telecommunications provider. Reviews and conditions can affect corporate governance, personnel and other operational matters, with investments from particular countries (eg, China and the Gulf states) and by sovereign wealth funds subject to considerable scrutiny. Although the supply arrangements do not require direct US government approval, the US government can nevertheless foreclose supply opportunities indirectly by imposing market-entry conditions on investors. In rare circumstances, the US government has sought to pressure US carriers in procurements unrelated to foreign-investment transactions, particularly where US government agencies are customers of the carriers. In 2017, the US Congress is expected to consider CFIUS reform legislation that would require greater CFIUS scrutiny of Chinese investments in US technology companies.

Disabilities access

Following a major expansion in 2010 of disabilities access requirements to non-interconnected as well as interconnected VoIP, electronic messaging and interactive video conferencing, and software and equipment (including internet browsers) used to access such services, the FCC has begun to receive, investigate and adjudicate complaints. In December 2016, the FCC approved rules to enable carriers and device manufacturers to satisfy certain disabilities access requirements through the use of IP-based real-time text technology rather than traditional teletypewriter equipment. Companies have also faced growing pressure, including consumer lawsuits brought under the Americans with Disabilities Act, to make their websites and mobile applications compatible with screen reader technology and meet other accessibility-related requirements. Courts have taken differing views on the application of the Americans with Disabilities Act to websites and apps.

Initiatives to prevent illegal calls

In the past two years, the FCC has focused heavily on the prevention of illegal calls, such as calls that are abusive or fraudulent, autodialled or pre-recorded calls made without the necessary level of consent and calls made to consumers who are on a legally mandated ‘do not call’ list. The FCC has adopted limited changes to its rules about call blocking to encourage providers to block presumptively illegal calls, to share information necessary to identify illegal calls and to take other measures to prevent illegal calls from reaching consumers. More expansive changes, including the creation of a nationwide database to identify numbers that have been reassigned from one subscriber to another, are currently under consideration. Success of this initiative will likely require extensive industry-wide coordination.

Media

17 Regulatory and institutional structure

Summarise the regulatory framework for the media sector in your jurisdiction.

The United States regulates the delivery of television and audio radio signals differently depending on how those signals reach the end user. Broadcast television in the United States refers only to the delivery of signals over the air directly to a television. Cable television refers to the delivery of signals to a television through a terrestrial ‘cable system’ with distinct rules from those governing over-the-air television. Direct-to-home satellite refers to the delivery of signals to a television through the use of a satellite antenna and is subject to yet another set of rules. The FCC also classifies cable, satellite and similar providers as ‘multi-channel video programming distributors’ (MVPDs), and subjects them as such to additional rules. OTT delivery refers to the delivery of video programming over the internet. On the audio side, broadcast radio refers to the delivery of audio signals over the air, while satellite digital audio radio service refers to the delivery of audio signals over satellite. Please note that our responses to questions about ‘broadcasting’ in this chapter refer to all of these types of delivery.

Television stations now transmit in a digital format called ATSC 1.0. The FCC recently granted them authority to transmit in a new digital format, ATSC 3.0, which will permit them much greater flexibility in the content and services they provide. Television stations will thus have considerable leeway to offer additional services subject to little or no regulation.

OTT video and audio delivery has not been definitively addressed by the FCC, and efforts for it to do so appear stalled. The FCC previously proposed to classify such providers as MVPDs, subjecting them to some (but not all) rules that now apply to cable and satellite providers. Action on this item, however, is unlikely, leaving OTT services largely unregulated for the time being. OTT delivery is also subject to copyright rules, with disputes pending or recently resolved before several courts.

The FCC does not regulate the delivery of audio or video services to mobile devices as broadcasting, although US copyright laws apply. As such delivery becomes more common, however, the FCC is likely to increase its regulation of such services. For example, the FCC now requires programming delivered to most mobile devices to be captioned, and has begun to require such devices to decode and render such captioning.

18 Ownership restrictions

Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Media ownership is subject to restrictions on:

- ownership of multiple broadcast television stations in a single market;
- ownership of broadcast television stations reaching a certain percentage of the population;
- ownership of broadcast radio stations within a local market;
- service to a certain percentage of the population by a single cable operator;
- ownership by a cable operator of a certain percentage of the channels it carries; and
- ownership of two or more of the ‘top four’ television networks (ABC, CBS, FOX and NBC).

In November 2017, the FCC eliminated several ownership rules, including one that had prohibited cross-ownership of broadcast and radio stations within a local market and another that had prohibited cross-ownership of television and radio stations in the same geographic area. It also substantially relaxed the limitation on ownership of multiple television stations in a single market – in some cases, permitting applicants to request such combinations on a case-by-case basis.

Neither the FCC nor state or local franchising authorities impose foreign-ownership or other ownership restrictions on cable networks, though the transfer and assignment of cable franchises almost always

requires prior consent of the franchising authority (but not the FCC). The FCC restricts acquisition of local exchange carriers by cable operators in the same area, and vice versa.

US WTO commitments in basic telecommunications reflect US statutory restrictions on foreign ownership of broadcast licensees. In its commitments, the United States also took article II (most-favoured nation) exemptions for one-way satellite transmissions of direct-to-home and direct-broadcast satellite services and digital audio radio services. Regardless of WTO status, section 310 of the Communications Act prohibits a foreign government, corporation organised under foreign law, non-US citizen or representative of a foreign government or non-US citizen from directly holding a broadcast licence. Section 310(b)(3) limits direct foreign ownership in a US corporation holding a broadcast licence to 20 per cent, a limitation the Communications Act does not permit the FCC to waive. Section 310(b)(4) prohibits indirect foreign ownership in a broadcast or aeronautical licensee in excess of 25 per cent, unless the FCC finds that greater foreign ownership would serve the public interest. Historically, the FCC did not knowingly authorise indirect foreign ownership of a broadcast licensee in excess of 25 per cent. In November 2013, however, the FCC announced that it will review applications for approval of foreign investment in the parent company of a US broadcast licensee above the statutory 25 per cent benchmark on a 'fact-specific, individual case-by-case' basis. In May 2015, the FCC granted an application involving Pandora Radio for greater than 25 per cent indirect foreign ownership of a radio station. In September 2016, the FCC amended its foreign ownership rules for broadcast licensees, including changes to: permit indirect foreign ownership up to 100 per cent upon a public interest finding; permit a previously authorised non-controlling foreign investor to increase its interest to 49.9 per cent without additional approval; and permit a previously authorised controlling foreign investor to increase its interest to 100 per cent without additional approval.

In enforcing all of these ownership rules, the FCC applies a complicated set of 'attribution' rules that include a broad range of financial or other interests denoting ownership, control and influence.

19 Licensing requirements

What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Television and radio stations are licensed individually. Cable systems are not 'licensed' by the FCC, but instead are 'franchised' by state and local governments. Cable systems, however, often use satellite or wireless infrastructure licensed by the FCC. Direct-to-home satellites and certain satellite earth stations are licensed by the FCC. Licence applicants must pay an application fee that depends on the asset to be licensed. OTT internet video services are not licensed by any federal or state regulator.

As new licenses are often unavailable or difficult to obtain, entities typically obtain broadcast and satellite assets through an assignment of the licence or a transfer of control of the entity controlling the RF licence, subject to the consent requirements described in questions 1 and 3. Assignment or transfer of control of cable franchises are usually subject to franchising authority consent.

OTT services are not licensed, and will not be licensed even if the FCC classifies them as MVPDs.

20 Foreign programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The United States does not regulate the carriage of foreign-produced programmes or impose local content requirements (except for low-power over-the-air television broadcasters). Cable operators must often carry public, educational and governmental programming chosen by the local franchising authority. Satellite carriers are subject to a similar public interest allocation. Over-the-air television broadcasters must air certain amounts of children's programming. Over-the-air television and radio broadcasters (but not cable and satellite carriers) are also subject to certain restrictions on indecent programming.

21 Advertising

How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The FTC (among other entities) prohibits all entities from engaging in false and misleading advertising, regardless of the medium used. Advertisements covering topics that are heavily regulated may be subject to additional regulations, regardless of whether the ads appear on television, online or elsewhere. For example, advertisements for political candidates must include disclosures required by the Federal Election Commission and, in some instances, state law; advertisements for pharmaceuticals must meet stringent Food and Drug Administration requirements related to drug advertising.

Over-the-air television, cable and satellite providers are subject to FCC restrictions on advertising in children's programming and advertising of tobacco products. Over-the-air and cable television providers are further subject to FCC restrictions on the advertising of lotteries and certain games of chance, although this rule does not apply to truthful advertisements regarding casinos where casinos are legal. These restrictions do not currently apply to streaming online video. In 2013, the FCC adopted rules implementing the CALM Act, prohibiting commercial advertisements from being louder than the programming that surrounds them. These rules apply to broadcast television stations, pay-television programmers, and cable and satellite carriers, but not (yet) to internet video services. The FCC also requires broadcast stations to make public certain information about spots they sell for political advertisements.

Online advertisements are subject to a few additional restrictions beyond those that apply to advertisements generally. Under the Children's Online Privacy Protection Act (COPPA) and the FTC's COPPA rules, advertisers cannot use online ads to knowingly gather personally identifiable information from children under 13, to gather personal information through an online ad directed toward children, or to gather personal information through an online ad placed on a site directed toward children. Additionally, for advertising via email, the FTC's CAN-SPAM rules require that senders of commercial email identify emails as an advertisement, provide information about the identity and location of the sender, and provide a functional opt-out mechanism, among other requirements.

22 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Cable operators and direct-to-home satellite providers are subject to must-carry obligations with respect to the signals of over-the-air television broadcasters in their operating area. OTT internet providers are not, although the FCC's classification of OTT providers as MVPDs could result in them having comparable obligations.

Full-power, commercial broadcast television stations must submit an election to each cable or satellite carrier serving the station's 'local market' every three years. Those that elect 'must-carry' receive automatic carriage (with some exceptions), but cannot demand compensation. Those that elect 'retransmission consent' have no right to carriage, but also cannot be carried by distributors in the absence of a written agreement. In many cases distributors must pay such carriage rights, particularly for popular network affiliates. Neither the must-carry nor the retransmission consent regimes cover copyright issues, which are handled under separate, highly complex statutory licences. The FCC's recent order permitting television stations to transmit in ATSC 3.0 specified that cable and satellite operators need not carry signals in these new formats.

23 Regulation of new media content

Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content is very lightly regulated compared to content delivered by over-the-air broadcasting, cable and satellite. That said, as new media delivery begins to compete with and replace more traditional modes of delivery, the government will likely increasingly apply

regulations. For example, disabilities access rules now require full-length video programming delivered using internet protocol (IP) to be closed-captioned if that programming is also delivered with captions via over-the-air broadcasting, cable or satellite. These rules also require a wide range of devices that are capable of playing video delivered over IP networks to display closed captions. In addition, new rules covering the accessibility of user interfaces for devices used to access video programming, which will take effect in less than two years, impose similar obligations on devices that receive content via IP networks and devices that receive content via more traditional delivery modes. FCC classification of OTT providers as MVPDs would add to this regulation by applying retransmission consent, programme access and other rules to such entities.

In addition, in 2014, the US Supreme Court determined that an entity that picks up free, over-the-air broadcast signals cannot send those signals to its customers over the internet without receiving copyright authorisation. Subsequent decisions have clarified that such entities cannot employ the statutory copyright licence reserved for cable systems.

24 Digital switchover

When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The switchover for most broadcast television stations occurred in 2009. The FCC reallocated that spectrum to commercial mobile services, some of which will be auctioned and some of which has been allocated to a nationwide public safety network. The switchover for low-power stations, however, remains ongoing, and some such stations still transmit in analogue. Television stations have sought authority to 'voluntarily' transmit in a new format, ATSC 3.0. Any such transmissions will involve issues similar to those raised by the switchover of analogue to digital. Low-power stations must complete the transition to digital broadcasting 12 months after the completion of the post-incentive auction transition described in question 16.

25 Digital formats

Does regulation restrict how broadcasters can use their spectrum?

No, but broadcasters must retain at least one channel of free, over-the-air broadcast programming, and remit 5 per cent of any income derived from ancillary services. As a practical matter, broadcasters transmitting in the current format, ATSC 1.0, have found it difficult to offer non-broadcast services. The new proposed format, ATSC 3.0, promises to give broadcasters more flexibility to offer such services.

26 Media plurality

Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The United States does not expressly regulate media plurality, viewpoint diversity, or similar concepts. As discussed in question 18, US ownership restrictions (eg, cross-ownership prohibitions) for particular media sectors serve to protect viewpoint diversity indirectly.

27 Key trends and expected changes

Provide a summary of key emerging trends and hot topics in media regulation in your country.

Ownership

The FCC recently relaxed or eliminated certain ownership restrictions, as described in question 18. It intends to consider further relaxation in the coming year.

Mergers and acquisitions

Two large television broadcast ownership groups, anticipating relaxation of the FCC's ownership rules, have sought permission to combine. We expect many additional such requests in the coming months.

Regulatory agencies and competition law

28 Regulatory agencies

Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

General

The DOJ and the FTC regulate vertical and horizontal anticompetitive effects in the telecoms, broadcasting, and new media sectors pursuant to general US antitrust laws, particularly the Sherman and Clayton Acts. The FTC also regulates unfair and deceptive trade practices in these and other sectors pursuant to the Federal Trade Commission Act. The FCC regulates competition-related issues in the telecommunications and broadcasting sectors under the Communications Act's public interest standard. State attorneys general enforce state-level competition and consumer protection laws, and private litigants enforce federal and state competition laws through damages claims. While there is no single mechanism to ensure the consistent treatment of competition-related issues, the DOJ, the FTC and the FCC regularly coordinate their reviews in an attempt to avoid conflicting results and undue delay. Anticompetitive practices are controlled both through ex-ante and ex-post, sector-specific regulation and by general competition law. Jurisdiction among all regulators is concurrent. State and local authorities generally operate independently of the DOJ, the FTC and the FCC.

Merger control – antitrust agencies

All mergers, acquisitions and joint ventures that involve the transfer or assignment of FCC licences (including service under the blanket domestic common-carrier authorisation) require prior approval under the Communications Act, regardless of whether such transactions involve the telecoms, broadcasting or new media sectors. While the antitrust laws generally do not have a minimum jurisdictional threshold, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) requires that the DOJ and the FTC receive pre-merger notification if the transaction meets the 'size of transaction' or 'size of persons' thresholds. Effective from 26 January 2018, a transaction must be notified if: the voting securities and assets of the acquired person are valued at more than US\$84.4 million and if one of the parties has sales or assets of at least US\$168.8 million and the other party has sales or assets of at least US\$16.9 million; or if the voting securities and assets of the acquired person are valued at more than US\$337.6 million. DOJ and FTC reviews are generally subject to a minimum 30-day initial review period. In transactions subject to a 'second request' of the parties, the review can take significantly longer. Pursuant to the HSR Act, the DOJ and the FTC share jurisdiction for reviewing all mergers, acquisitions and JVs involving providers of telecommunications, broadcasting and new media, with the lead reviewing agency determined by sector or by transaction.

Merger control – FCC and state and local authorities

The FCC, PUCs and state or local franchising authorities also review mergers, acquisitions (including asset sales and licence transfers) and JVs that involve authorisations or franchises that they issue. Each of these processes is separate. For 'major transactions' involving significant competition or public-interest issues, the FCC reviews transactions pursuant to a suggested 180-day time frame, though it often stops and later restarts the clock, resulting in a lengthier review. For routine transactions, the specific procedures and timescales for approving licence transfers and assignments vary by licence type and by FCC bureau. The procedures and associated timescales for state and local reviews of transactions involving intrastate telecommunications providers and cable operators vary greatly from jurisdiction to jurisdiction; these state or local reviews, however, can take longer than the FCC's review.

Team Telecom

The Team Telecom agencies (see question 2) conduct national-security reviews of mergers and acquisitions in the telecoms and broadcasting sectors (and the new media sector, if there are FCC licences to be transferred or assigned in the transaction) and often require negotiation of

security agreements or assurances letters prior to consummation. There are no formal procedures or established timescales for Team Telecom reviews, which can last from a few weeks to 18 months. The Team Telecom agencies do not act pursuant to any particular law. As noted in question 16, the FCC is driving reform of Team Telecom reviews.

CFIUS

Pursuant to section 721 of the Defence Production Act of 1950, the CFIUS reviews acquisitions of control (including mergers, acquisitions of stock or assets and JVs) by foreign persons of existing US businesses engaged in interstate commerce in any economic sector (known as 'covered transactions'). The CFIUS does not review 'greenfield' investments, whereby a foreign investor creates a new US business. The CFIUS scrutinises the impact of a transaction on national security and gives particular attention to foreign (and foreign-government) ownership of the acquirer and the US business's contracts benefiting US government agencies. CFIUS reviews are initiated by parties to a transaction or the CFIUS itself. Failure to obtain CFIUS clearance for a covered transaction gives the President the power to unwind the transaction at any point in the future. Unlike the FCC, which defines 'control' as majority equity ownership, voting control or management control, the CFIUS may consider as 'control' any prospective investment other than the acquisition of an outstanding voting interest of 10 per cent or less acquired solely for the purpose of passive investment. For a transaction involving CFIUS or Team Telecom review, the FCC will generally not grant consent without prior clearance by Team Telecom and the CFIUS. The CFIUS conducts an initial 30-day review of a covered transaction. It may subsequently conduct a 45-day investigation for a transaction involving more significant national security issues (and must do so for transactions that would result in foreign government control of a US business), with a further 15 days for presidential action to block a transaction. In total, the CFIUS process should not last more than 90 days, although parties sometimes withdraw and refile transactions in order to provide the CFIUS with additional time for review.

The US Congress is currently considering legislation, the Foreign Investment Risk Review Modernization Act (FIRRMA), that would make significant changes to the US foreign investment review process conducted by CFIUS. FIRRMA is driven largely by concerns about China's strategic objectives with investments and critical technology acquisition, increasing complexity of transactions, globalised supply chains, US military dependence on commercial technology developments, new (particularly cyber- and data-related) national security vulnerabilities, and the inadequacy of other authorities (such as export controls) to mitigate national security risks. Among other things, FIRRMA would:

- provide for CFIUS review of minority, non-controlling investments in US critical technology and critical infrastructure businesses;
- provide for additional scrutiny of investment activity involving 'countries of special concern' while also providing for potential exemption of review for investments from identified countries whose foreign investment and national security interests and policies are aligned with those of the United States;

- create a two-track system of filings – the current option of notices plus a new, more abbreviated system of declarations, with the CFIUS to respond to a declaration by:
 - clearing the transaction;
 - notifying the parties that it is unable to clear the transaction (giving the parties the option to file a notice to obtain such clearance);
 - inviting the parties to file a full-blown notice; or
 - self-initiating a review;
- require the filing of declarations for transactions involving:
 - direct or indirect foreign government ownership of 25 per cent or more at least 45 days prior to consummation; or
 - other circumstances to be defined by the CFIUS, and impose penalties for non-compliance with the mandatory filing requirement; and
- extend the current timeline for reviewing notices, with the initial review extended from 30 to 45 days and with a one-time option for the CFIUS to extend the 45-day investigation for an additional 30 days, for a total timeline (absent withdrawals and refilings) of 135 days instead of the current 90 days.

Prospects and timing for FIRRMA passage remain uncertain, but the current political climate and bipartisan support for FIRRMA suggest that the US Congress will alter the CFIUS review process in the very near future.

29 Appeal procedure

How can decisions of the regulators be challenged and on what bases?

Final FCC decisions (including new or revised FCC rules) are subject to judicial review. In reviewing licensing and rule-making decisions, courts evaluate whether the FCC acted arbitrarily, capriciously or otherwise not in accordance with the law. Courts defer to the FCC's reasonable interpretation of ambiguous statutory provisions. Decisions by FCC bureaux are subject to review by the FCC's commissioners; such review must be completed prior to any judicial review. Enforcement actions are subject to de novo review in federal trial courts, unless the FCC held an evidentiary hearing.

The DOJ antitrust division is a prosecutorial agency that must prove a case in federal district court, subject to appellate review. The FTC can either bring cases in the federal district court or adjudicate them before the full FTC, subject to judicial review.

State PUC decisions are subject to judicial review under state or federal law, depending on the subject matter.

In 2014, the US Court of Appeals for the District of Columbia ruled in *Ralls v Obama* that a presidential decision to suspend or block a transaction under section 721 of the Defence Production Act following CFIUS review must comply with constitutional due-process protections and provide an investor with access to non-classified evidence used in making a determination about whether to block a particular

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investment. The question of whether Team Telecom action or inaction is subject to judicial review has never been tested.

30 Competition law developments

Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The Department of Justice recently sued to enjoin AT&T's proposed takeover of Time Warner. AT&T (including its DIRECTV satellite television subsidiary) is the country's largest distributor of television programming. Time Warner is one of the most important content providers. The DOJ claims that, post merger, AT&T will be able to charge its rivals higher prices for Time Warner programming. The DOJ also claims that AT&T will be able to use Time Warner programming to harm emerging online-only distribution rivals, such as DISH's 'Sling' product. In a departure from past practice, the DOJ states that behavioral remedies (such as conditions) will not suffice to address these harms, and that the court must reject the proposed transaction altogether. AT&T responds, among other things, that it will lack the incentive and ability to engage in the conduct described by the DOJ, that the state of the current media market makes its proposed purchase both desirable and necessary, and that the consumer benefits of the transaction greatly outweigh what it describes as 'speculative' harms. The trial was ongoing at the time of writing, and its outcome remains in doubt. If AT&T prevails, however, many more such combinations can be expected.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
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Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
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Equity Derivatives
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Foreign Investment Review
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Licensing
Life Sciences
Loans & Secured Financing
Mediation
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Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
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