

The Impact on Acquisitions of the FCC's Proposed Order Reclassifying Broadband

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Last week, the FCC released a draft [Declaratory Ruling, Order, Report and Order, and Order on Reconsideration](#) (“Order”) that, if adopted at its open meeting on April 25, will reclassify Broadband Internet Access Service (“BIAS”)ⁱ as a telecommunications service. In many respects, the draft Order restores the framework that the FCC adopted in the 2015 *Open Internet Order*, but there are some critical differences, particularly where acquisitions of BIAS providers are concerned.

Section 214 Authority

The Notice of Proposed Rulemaking released in October 2023 sought comment on a number of questions arising from the FCC's proposed reclassification of BIAS, including questions suggesting that the FCC intended to require BIAS providers to seek approval of transfers of control—something it declined to do in 2015. But the draft Order walks back some of those proposals. While it does extend Section 214 authority to BIAS providers, it forbears from many of the most onerous obligations associated with Section 214 authority.

The draft Order sets out that BIAS providers will be granted blanket domestic Section 214 authority,ⁱⁱ which will include “authority for entry, acquisitions (including transfers of control and assignments), and temporary or emergency service and related requirements.”ⁱⁱⁱ The draft Order additionally waives certain Section 214 rules, including those that ordinarily require carriers to seek authority for discontinuance of service.^{iv} This grant of blanket authority is not extended to specified entities whose Section 214 authority was previously revoked or denied due to national security or law enforcement reasons.^v

Unfortunately, with respect to international Section 214 authority, further clarification is needed, as the FCC does not appear to have thought the issue through fully. The draft Order notes that “BIAS is subject to section 214 on the basis of it being both a domestic and an international telecommunications service,”^{vi} and undertakes a lengthy discussion of its decision to issue blanket Section 214 authorization in ways that seem to implicate both domestic and international services. But the FCC's current rules require prior consent of the FCC for international Section 214 authority, and there is no existing rule allowing for blanket international Section 214 authority. The draft Order, however, does not propose such a rule, so it is unclear how existing BIAS providers should proceed with respect to authorization for international operations. These providers may therefore need to seek special temporary authority (STA) in addition to new authorizations, and applications for regulatory approval will be required for transfers of control of those authorizations once obtained; moreover, some of these applications may be subject to Team Telecom review.

Foreign Ownership Restrictions for Common Carrier Wireless Licensees

The draft Order also addresses the impact of reclassification on common carrier wireless licensees providing BIAS, specifically with respect to foreign ownership. Section 310(b) of the Communication Act requires the Commission to review foreign investment in common carrier wireless licensees; over the years, the Commission has adopted a variety of rules clarifying and refining the scope of permissible foreign investment in companies holding common carrier wireless licenses, including an order adopted in 2013, under which common carrier wireless licensees are permitted have foreign ownership in excess of the statutory benchmark if that foreign ownership is held in the licensee through a U.S. entity that does not control the licensee.

The draft Order proposes to apply the same rules to wireless common carrier licensees offering only BIAS; as such, these providers will not be required to seek a declaratory ruling allowing foreign ownership in excess of the statutory benchmark. The draft Order notes, however, that this forbearance will be in place only until the FCC adopts specific rules for BIAS, which the Commission has indicated it intends to propose in the near term.

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For more information on the FCC's draft Order or our telecommunications practice, please contact Kristine Devine or the HWG attorney with whom you regularly work.

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ⁱ The Commission has retained its definition of BIAS as a "mass-market retail service," *Order* ¶ 125, and expressly notes in the draft Order that it will "continue to interpret mass market to exclude enterprise Internet access service offerings as well as other services, such as Business Data Services (BDS), that do not provide access to all, or substantially all, Internet endpoints." *Id.* ¶ 191. It does note, however, that the exclusion of enterprise services "should not be understood to mean that non-private carriage enterprise services cannot otherwise be subject to regulation as a telecommunications service. We believe it is likely that at least some such services are indeed offered as telecommunications services and note that would be consistent with previous Commission statements that non-private carriage enterprise services are telecommunications services." *Id.* n.785.

ⁱⁱ *Id.* ¶ 316.

ⁱⁱⁱ *Id.* n.1250

^{iv} *Id.* ¶ 337.

^v *Id.* ¶ 334.

^{vi} *Id.* ¶ 330.