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STRUCTURING FOREIGN INVESTMENTS IN FCC LICENSEES UNDER SECTION 310(B) OF THE COMMUNICATIONS ACT*

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INTRODUCTION

Worldwide barriers of distance, culture, and politics are rapidly giving way largely as a result of technological developments in the communications industry. Because communications plays a vital role in economic growth, this process threatens to leave behind the economies of countries not willing or able to keep pace with changes in the communications industry. The United States economy is no exception.

The explosive growth and globalization of the communications industry¹ has sparked a need for increased investment capital among American communications companies which cannot be met solely by domestic capital markets.² For example, only one of the world's largest thirty-five commercial banks is based in the United States.³

In addition, the global marketplace has made it essentially impossible for expanding companies to ignore the potential benefits of establishing operations in a number of countries. International carriers or providers of communications services which offer their services or products worldwide through integrated and

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1. See, e.g., National Telecommunications and Information Administration, *Comprehensive Study on the Globalization of Mass Media Firms*, No. 900241-0041, 55 Fed. Reg. 5792 (Feb. 16, 1990) ("Many providers of news and entertainment television programming, films, print media, and other mass communications compete in several countries and indeed on several continents."); National Telecommunications Information Administration, *U.S. Telecommunications in a Global Economy: Competitiveness at a Cross Roads* (Aug. 16, 1990).

2. See, e.g., Orion Satellite Corporation, Memorandum Opinion, Order and Authorization, F.C.C. 90-241, at 13 (released Aug. 6, 1990) (FCC recognized potential public interest benefits from allowing foreign investment in satellite system).

3. *Ranking the World's Largest Banks*, INSTITUTIONAL INVESTOR 217 (June 1989).

interconnected operations are rapidly emerging.⁴ These companies are inevitably seeking more and more equity in United States properties in order to offer services on a worldwide basis.

While the recent policy of the United States government has been to liberalize trade with major trading partners through, for example, free trade agreements and elimination of trade restrictions,⁵ its long-standing policy under the Communications Act of 1934,⁶ as amended, to retain control over many domestic communications companies by curbing foreign participation remains largely intact.

Section 310(b) of the Communications Act restricts alien investment in a wide range of licenses granted by the Federal Communications Commission ("FCC" or "Commission").⁷ However, the alien ownership restrictions of Section 310(b) need not unduly limit meaningful foreign investment in communications companies holding or having an interest in such licenses. By carefully structuring the investment, a foreign investor may comfortably take a significant position in a company holding licenses subject to Section 310(b), while a Section 310(b) company may also gain a substantial infusion of funds from foreign sources, without running afoul of the alien ownership rules.

In structuring any such foreign investment, it is critical to understand thoroughly, and respect completely, the restrictions in Section 310(b). Failure to comply with the provisions of Section 310(b) would likely result in the forfeiture of the relevant FCC license—generally considered the most valuable asset of any communications company.

This Article discusses the FCC's treatment of foreign investment in companies subject to Section 310(b) and provides guidance and suggestions for such

4. Such firms include, among others, American Telephone and Telegraph Company, Bertelsmann AG, Cable & Wireless, Ltd., FTC Communications, Inc., British Telecom, Hachette, S.A., News Corp., Sony, and Time-Warner, Inc.

5. See, e.g., United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449, 102 Stat. 1857 (1988); Schenker, *CoCom Eases Export Rules*, COMMUNICATIONS WEEK 41 (June 18, 1990). See also *United States v. Western Electric Co.*, No. 82-0192, 1990-2 Trade Cas. (CCH) ¶ 69,139 (D.D.C. 1990) (waiver granted of long distance line of business restriction imposed by the AT&T Modification of Final Judgment Consent Decree thus allowing two Bell regional holding companies "to export American telecommunications expertise and technology" by acquiring New Zealand's state-owned telephone system).

6. 47 U.S.C. § 310(b) (1982).

7. Certain restrictions on foreign ownership interests apply to radio licenses for broadcast, common carrier, and aeronautical stations. See *id.* The discussion in this Article is essentially confined to limitations on broadcast and common carrier radio station licenses. Broadcast radio licenses include AM and FM radio and VHF and UHF television licenses. Common carrier licenses include cellular radio, mobile radio, paging networks, satellite, and microwave licenses. In 1974, Section 310(b) was amended to exempt safety, special, and experimental radio services from restrictions on alien licensing. Communications Act, 88 Stat. 853 (1979) (codified at 47 U.S.C. § 310(b)). The purpose of the exemption was to allow greater flexibility to persons who used radio services as an ancillary part of their business. However, the exemption also allowed aliens to hold microwave radio station licenses for Cable Television Relay Service ("CARS"). For a full discussion of the legislative history of Section 310(b), see Watkins, *Alien Ownership and the Communications Act*, 33 FED. COMM. L.J. 1-12 (1981).

investments in light of the FCC's past decisions.⁸ Section I explains the restrictions contained in Section 310(b), focusing primarily on Sections 310(b)(3) and (b)(4), the key subsections containing the limitations on "capital stock" investments. Section II discusses various types of equity and debt financing in light of FCC decisions interpreting the Section 310(b)(3) and 310(b)(4) limitations on "capital stock" investment. Finally, Section III explores alternative financial and corporate arrangements designed to maximize an alien's ownership interest in companies subject to Section 310(b) or to maximize the infusion of capital into a Section 310(b) company from alien sources.

I. APPLYING SECTIONS 310(b)(3) AND 310(b)(4) ALIEN INVESTMENT LIMITATIONS

Section 310(b) of the Communications Act provides that:

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

- (1) any alien or the representative of any alien;
- (2) any corporation organized under the laws of any foreign government;
- (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
- (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.⁹

8. This Article presumes that the objective of the arrangement is to maximize permissible foreign investment in the licensee. However, it is also possible to utilize the Section 310(b) restrictions as a defensive mechanism to limit foreign investment. For example, holding an FCC license directly, and thus being subject to Section 310(b)(3) restrictions, effectively precludes foreign participation on the licensee's board of directors as well as limits foreign ownership to 20%. In addition, in the case of an attempted hostile tender offer of a company subject to Section 310(b)(3), an acquirer with alien ownership in excess of 20% would probably not be able to avail itself of the FCC's voting trust mechanism to hold the license during the tender offer. This would greatly diminish the likelihood of success of such a tender offer. *See infra* notes 158-76 and accompanying text for a discussion of the use of voting trusts under Section 310(b).

9. 47 U.S.C. § 310(b).

In sum, Section 310(b) restricts both direct and indirect alien ownership in certain FCC radio station licenses.

The ownership limitations imposed by Section 310(b) generally become more onerous as the relationship between the alien and the licensee becomes closer. Nonetheless, it is possible to structure alien investments around these restrictions to allow aliens to take significant ownership and management positions in companies subject to Section 310(b). For example, while an alien is not allowed to hold a restricted license in his or her own name pursuant to Section 310(b)(1), the same alien without special FCC approval could hold: (1) a 20% interest in a licensee under Section 310(b)(3); (2) an ownership interest of up to 25% in a company controlling the licensee; and (3) at least one of four director positions of such a holding company under Section 310(b)(4). In addition, it appears that an alien would be able to hold certain types of conditional interests in the licensee or holding company along with his or her vested ownership interests.¹⁰

Sections 310(b)(3) and (b)(4) differ in a number of respects. Section 310(b)(3) restricts direct ownership interests in the licensee, whereas Section 310(b)(4) restricts ownership in companies directly or indirectly controlling the licensee. Section 310(b)(4) also has a higher investment benchmark (25%) than Section 310(b)(3) (20%) and permits a limited number (25%) of alien directors. Most important, Section 310(b)(4) allows the FCC to decide whether the public interest would be served by waiving the restrictions of Section 310(b)(4), whereas the FCC has no such discretion under Section 310(b)(3).

The first step in analyzing a proposed transaction in light of Section 310(b) requires determining whether Section 310(b)(3) or (b)(4) governs the relevant ownership interests in a licensee. This analysis turns on whether the equity or voting interest held by the alien investor is in a holding company controlling the licensee, in the licensee directly, or through an intervening corporation holding only a non-controlling interest in the licensee.

For Section 310(b)(4) purposes, the FCC views a "controlling" interest as a majority interest (50% or more) in the licensee.¹¹ If the interest held by the alien is in a holding company holding a 50% or greater interest in the licensee, Section 310(b)(4) is applied, and the interest in the licensee held by the controlling holding company is not considered for Section 310(b)(3) purposes.

10. See Section II, *infra*, for a discussion of permissible types of conditional interests and Section III, *infra*, for a complete discussion of strategies for structuring alien investments in accordance with Section 310(b).

11. For transfer of control purposes under Section 310(d) of the Act, the FCC routinely considers whether entities holding a less than 50% interest in a licensee actually control the licensee. See William S. Paley, 1 F.C.C. Rcd. 1025, 1026 (1986), *recon. denied*, 2 F.C.C. Rcd. 2274 (1987), *aff'd sub nom.* Fairness in Media, 851 F.2d 1500 (D.C. Cir. 1988); James F. Rill, Trustee for Comet, Inc. and Pacific Telesis Group, 60 Rad. Reg. (P&F) 583 (1986). The Commission appears to take a narrower view of "control" for Section 310(b)(4) purposes and only applies the section which is applicable to corporations "directly or indirectly controlled by any other corporation," to those entities holding de jure control, or 50% or more ownership or voting interest in a licensee. Questions of de facto control are addressed, however, in a later stage in the analysis. See *infra* notes 68-83 and accompanying text.

Section 310(b)(3) is applied if the interest held is a non-controlling (less than 50%) interest held directly in a restricted licensee or in an intervening company holding a non-controlling interest in the licensee.¹²

A. Applying Section 310(b)(3) to Alien Investments

Section 310(b)(3) permits non-citizens to own or vote¹³ up to 20% of the capital stock of a licensee corporation.¹⁴ It also prohibits a licensee from having any alien officers or directors. To determine whether foreign ownership is within the 20% ownership limitation, all direct and indirect non-controlling interests in the licensee held by aliens are aggregated.¹⁵ Indirect interests in the licensee held by aliens through non-controlling intervening corporations are accounted for by the use of a "multiplier," as discussed below. The fact that these alien interests may be widely dispersed among multiple aliens from the same or different countries is irrelevant.

1. *Use of the Multiplier.* Because Section 310(b) requires the calculation of the total alien investment, direct or through an intervening corporation or holding company, the FCC has established a multiplier to take into account the diminution of influence over the licensee caused by successive layers of minority ownership in a vertical ownership situation.¹⁶ According to the FCC, "the degree of influence over the licensee conveyed indirectly through minority stock ownership or voting rights in a company which, in turn, holds stock in a licensee is not as great as that conferred by the possession of the same amount of stock directly in the licensee."¹⁷

The multiplier focuses on the product of each level of foreign interest. For example, assume that an alien investor ("AI") owns a 15% interest in Company X, which holds a 40% interest in Licensee. The Commission would find that the AI has a 6% ownership interest in Licensee under Section 310(b)(3), which is permissible.¹⁸ The Section 310(b)(3) benchmark of 20% is the relevant standard in this situation because Company X does not "control" the Licensee.

12. 47 U.S.C. § 310(b)(3).

13. For further discussion of what constitutes "owning or voting" stock of a licensee, see notes 86-97 and accompanying text, *infra*.

14. Although Section 310(b)(3) addresses only the "capital stock" of a "corporation," the Commission has interpreted the provision to apply equally to any other means by which equity or voting interests may be held (e.g., a limited or general partnership interest). See Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, 103 F.C.C.2d 511, 514 (1985) ("*Wilner & Scheiner*" *recon. in part* 1 F.C.C. Rcd. 12 (1986) ("*Wilner & Scheiner Recon.*"). For a further discussion of the definition of "capital stock," see Section II, *infra*.

15. See *Wilner & Scheiner*, 103 F.C.C.2d at 521 ("Any ownership or voting interest held by an individual other than a United States citizen or by an entity organized under the laws of a foreign government is counted in the application of the statutory benchmarks.").

16. *Id.*

17. *Id.*

18. The appropriate calculation is as follows: $.15 \times .40 = .06$ or 6%.

Company X merely holds a minority (less than 50%) stake in the Licensee.

The FCC does not apply the multiplier where the ownership interest held by an alien in an intervening corporation is greater than 50% (except in the case of insulated limited partnerships and non-voting stock),¹⁹ reasoning that such a shareholder has actual control of the entity "which is unlikely to be significantly attenuated through intervening companies."²⁰ When the multiplier is not applied, the intervening corporation does not dilute the foreign ownership or voting interest for purposes of a Section 310(b)(3) analysis.²¹

2. *Commission Discretion.* The FCC's decision to apply a multiplier to some alien investments demonstrates that it does have some discretion regarding the manner in which it calculates alien ownership under Section 310(b)(3). However, Section 310(b)(3) does not expressly provide the Commission with discretion in applying the result of its calculations. Unlike Section 310(b)(4), the Commission has no authority under Section 310(b)(3) to waive the 20% ownership limitation or to allow any alien officers or directors of a licensee.

The Commission has repeatedly stated that it strictly applies the Section 310(b)(3) statutory restrictions because it lacks such express discretion.²² However, in *Spanish International Communication Corporation*,²³ the Commission found enough "discretion" under Section 310(b)(3) to renew a license held by a party found to have committed technical violations of Section 310(b)(3). Spanish International Communication Corporation ("SICC") was the licensee of several broadcast stations. Despite a finding by an administrative law judge that SICC's ownership and operating structure violated Section 310(b)(3) because SICC was essentially acting as a "representative of an alien," the Commission nonetheless granted conditional renewal to the licensee provided that it promptly sell the licensed television stations to unrelated, qualified buyers with no alien owners.²⁴ Thus, the Commission has exercised a certain degree of discretion in applying Section 310(b)(3) under certain circumstances.

19. See *infra* notes 103-04, 154-56 and accompanying text.

20. *Wilner & Scheiner*, 103 F.C.C.2d at 522. The FCC relies upon a similar approach in applying its multiple ownership rules for broadcast, cable, and newspaper entities. See Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 F.C.C.2d 997, 1018 (1984) ("*Attribution Order*"), reconsideration granted *in part*, 58 Rad. Reg. 2d (P&F) 604 (1985) ("*Attribution Recon.*"), further recon. 1 F.C.C. Rcd. 802 (1986).

21. If, as discussed above, the intervening corporation controls the licensee, the interest in the intervening corporation is not considered under Section 310(b)(3), but under Section 310(b)(4). See *supra* notes 11-12 and accompanying text.

22. *Wilner & Scheiner*, 103 F.C.C.2d at 518; PrimeMedia Broadcasting, Inc., 3 F.C.C. Rcd. 4293, 4295 (1988) ("*PrimeMedia*").

23. Spanish Int'l Communication Corp., 2 F.C.C. Rcd. 3336 (1987), remanded on other grounds, 893 F.2d 1349 (D.C. Cir. 1990) (per curiam) ("*Spanish International*").

24. *Id.* at 3339-40.

B. Application of Section 310(b)(4) to Alien Investment

Where an entity controls a licensee (i.e., ownership of 50% or more of the equity or voting stock of the entity), Section 310(b)(4) is used to measure alien ownership interests. Section 310(b)(4) allows foreign investors to own up to 25% of a parent or holding company of a licensee. This section also allows up to one-fourth of the board of directors to be aliens, but does not allow any alien officers. However, as noted above, Section 310(b)(4) provides the Commission with the discretion to waive certain restrictions.

Because Section 310(b)(4) imposes less onerous restrictions on alien ownership interests held in a licensee than Section 310(b)(3), it is generally more desirable for aliens to hold ownership interest through a holding company structure.²⁵ Not only can the alien hold 25% of the controlling holding company, as opposed to just 20% in the licensee directly, but Section 310(b)(4) also allows a limited number of alien directors and provides for the possibility of a waiver of the section's restrictions altogether.

1. *Public Interest Finding.* Under Section 310(b)(4), the Commission may grant a license to an entity directly or indirectly controlled by any other entity of which more than 25% of the ownership or voting interest is held by an alien, or of which any officer is or more than 25% of the directors are aliens, if the Commission finds that the public interest will be served by such a grant.²⁶ As the Commission has stated:

[T]he restrictions on foreign participation in companies that own or control a Commission licensee are not absolute. . . . [T]he Commission has the statutory authority [under Section 310(b)(4)] to evaluate whether or not, in a particular situation, it is in the public interest to permit a person to obtain or to hold a station license notwithstanding the fact that the alien interests in that station exceed the statutory benchmarks.²⁷

Thus, Section 310(b)(4) requires an FCC finding that refusal of a license for a domestic corporation subject to vertical alien ownership in excess of the 25% benchmark serves the public interest. This public interest analysis is undertaken by the FCC on a case-by-case basis and may involve the consideration of several

25. In addition, it is important to note that ownership by an alien investor of 25% of a holding company under Section 310(b)(4) does not preclude an additional ownership of 20% by aliens in the licensee directly. See *infra* notes 62-67 and accompanying text.

26. See, e.g., *Comsat General Corp.*, 3 F.C.C. Rcd. 4216, 4218 (1988) ("*Comsat General*"); *LCI Communications, Inc.*, Mimeo No. 3491 ¶ 3 (released Mar. 31, 1986) ("*LCI Communications*").

27. *Millicom Incorporated*, 4 F.C.C. Rcd. 4846, 4847 (1989) (citing *Wilner & Scheiner*, 103 F.C.C.2d 511 (1985)) ("*Millicom*"). See also *LCI Communications*, Mimeo No. 3491 ¶ 3; *GRC Cablevision, Inc.*, 47 F.C.C.2d 467 (1974) ("*GRC Cablevision*").

different factors.²⁸

2. *Approval of Alien Ownership in Excess of 25% of Company Controlling Licensee.* In a handful of situations, the FCC has allowed alien ownership in excess of the 25% benchmark. In *GRC Cablevision*,²⁹ the FCC granted a cable television relay license to a corporation under the de jure control of aliens (i.e., 60% owned by a corporation whose majority shareholders were Canadian citizens). The FCC determined that, despite the actual alien control of voting power (over 50%), the grant of the license to GRC was in the public interest because: (1) the holding company was a United States corporation with a majority of United States citizens as directors; (2) Canada was a country with which the United States enjoyed friendly and close relations; (3) the licensed facility was passive in nature because the licensee did not initiate or control the content of the broadcasts but merely relayed signals from other broadcast facilities; and (4) the applicant was otherwise qualified.³⁰

This case appears to represent the largest alien ownership interest percentage approved by the FCC under Section 310(b)(4) to date. The FCC firmly stated, however, that it was not "establishing a rule of general applicability" with regard to foreign participation in CARS licenses, and that its traditional policies regarding alien investments in broadcast licenses remained intact.³¹ Alien ownership issues were to continue to be examined on a case-by-case basis.

Four other Section 310(b)(4) cases provide additional insight into the public interest standard. In *LCI Communications, Inc.*,³² LCI, the corporate parent of Litel, requested a declaratory ruling to the effect that ownership of more than 25% of its capital stock (approximately 28%) by foreign corporations and the presence of two foreign nationals on its six-member board of directors did not require refusal or revocation of Litel's microwave authorizations.³³ The Commission found that: (1) since less than 50% of LCI's stock was held by a foreign corporation, majority control remained with U.S. stockholders; (2) the majority of LCI's directors were U.S. citizens; and (3) the facilities involved were "passive because the licensee does not initiate or control the content of the transmission."³⁴

In *Banque de Paris et des Pays Bas*,³⁵ a French bank held 20% of the stock of Columbia Pictures Corporation ("Columbia"), a parent company owning many FCC licensee subsidiaries. Another branch of the French bank sought FCC

28. See Section I.B.4, *infra*.

29. *GRC Cablevision*, 47 F.C.C.2d 467. At this time, the FCC was applying the alien ownership restrictions to CARS licenses. However, the Commission has since determined that this type of license is not subject to the Section 310(b) limitations. See *supra* note 7.

30. *Id.* at 467-68.

31. *Id.* at 468.

32. *LCI Communications*, Mimeo No. 3491.

33. *Id.* ¶ 1.

34. *Id.*

35. *Banque de Paris et des Pays Bas*, 6 F.C.C.2d 418 (1966) ("*Banque de Paris*").

approval to have an additional 18% of Columbia stock placed into a trust, with a United States trustee, for the benefit of the bank. The Commission approved the trust arrangement upon four conditions:

- (1) the bank shall not acquire additional shares of Columbia stock, to be held by it or by any other party on its behalf, which would increase the percentage of shares beyond that held by it or on its behalf on [the date of the decision].
- (2) the bank shall not enter into any agreement or understanding with any other stockholder, or person holding voting rights to Columbia stock, concerning the manner in which the stock held in the bank's name will be voted.
- (3) the bank shall report to the Commission by February 1 of each year all agreements made by it, and actions taken by it, with respect to the shares of Columbia held in its name, or for its benefit, during the preceding calendar year.
- (4) the bank shall not take any action looking toward an assertion of control over Columbia by it alone or in concert with any other person. . . .³⁶

In *A Plus Communications of Puerto Rico, Inc.*,³⁷ the FCC reviewed a transaction whereby control of two radio stations licensed in the Domestic Public Land Mobile Radio Service ("DPLMRS") was to be transferred from A Plus to Telecom, whose stock was held by "two corporations which have alien ownership and two other companies which may have alien ownership."³⁸ The Commission approved the transaction without knowing the exact degree of alien ownership in Telecom (the proposed transferee), noting only that "[t]he alien ownership of the stock of Telecom appears to be less than 50%, and a majority of Telecom's directors will be United States citizens."³⁹ The Commission also noted that the licenses in question were passive in nature "because the licensees [did] not initiate or control the content of the transmissions" and that a denial of the transfer of control application would not be in the public interest.⁴⁰

In *PrimeMedia*,⁴¹ however, the FCC reviewed the qualifications of an applicant which, through a vertical ownership chain, had an attributable alien ownership interest of 75%. There were at least nine other applicants for the license that did not raise Section 310(b)(4) alien ownership issues. The FCC found that the public interest would not be served by allowing an applicant with alien ownership "so far in excess of the statutory benchmark" where other

36. *Id.*

37. *A Plus Communications of Puerto Rico, Inc.*, File No. 22913-CD-TC-(2)-82 (F.C.C., released May 13, 1982) ("*A Plus*").

38. *Id.*

39. *Id.*

40. *Id.*

41. *PrimeMedia*, 3 F.C.C. Rcd. 4293.

qualified applicants were present.⁴²

3. *Approval of Alien Officers or Alien Directors in Excess of One-Fourth of the Board.* On several occasions, the FCC has allowed alien officers or directors in excess of the limits in Section 310(b)(4) for corporations in direct or indirect control of licensees.⁴³ The FCC has noted that "[i]n deciding whether to prohibit aliens from serving as officers or directors of parent companies in a given instance, the Commission considers the public interest and whether the individual's position would require the radio licenses to be revoked or license renewals denied."⁴⁴ To support its decisions permitting alien representation in excess of the statutory limit, the FCC has generally relied on the following two facts: (1) that the aliens were citizens of nations with friendly relations and close ties to the United States; and (2) that the aliens would not exercise any control over or supervision of the subsidiaries holding the licenses.⁴⁵

In *Millicom*,⁴⁶ the Commission allowed a holding company controlling various FCC licensees to exceed the alien director limitation of Section 310(b)(4) by

42. *Id.* at 4295. In addition to these cases, the Commission is expected to rule in the near future on a request for declaratory ruling seeking approval of an ownership interest in excess of the twenty-five percent (25%) threshold which has recently been filed by IDB Communications Group, Inc. ("IDB"). IDB Communications Group, Inc., Request for Declaratory Ruling, File No. ISP-90-006 (F.C.C., filed July 9, 1990), Public Notice Report No. I-6484 (Aug. 20, 1990). IDB has requested the Commission to approve the sale of 4.99% of IDB's stock to Swissair, Inc., a Swiss corporation. Earlier this year, Memotec Data, Inc., a Canadian operation, through its U.S. affiliate Teleglobe International, purchased 21.2% of IDB. The sale of stock to Swissair would raise total foreign ownership of IDB to at least 26.2%.

IDB states in its request that the proposed foreign ownership of IDB would pose no national security risk and noted that its common carrier facilities are "in no manner exclusive or bottleneck facilities." Moreover, the foreign interests involved represent countries which traditionally have had close and friendly relations with the U.S. In addition, IDB argues that the Swissair investment will give it "an important foothold into the Europe '92 telecommunications market by virtue of a planned IDB/Swissair joint venture," and will provide IDB with working capital, which will allow it to "expand its facilities, enhance its services and better compete in a worldwide marketplace." IDB also argues that the proposed transaction will enhance the value of IDB's stock for its U.S. investors.

In seeking the declaratory ruling to permit the proposed Swissair purchase of 4.99% of IDB, IDB asked the FCC to approve those two foreign holdings, plus foreign ownership of "such shares as may be held from time to time by aliens purchasing IDB stock on the open market." IDB subsequently supplemented its request to clarify that foreign ownership of its stock would never exceed, in aggregate, 49.9%. It also promised to notify the FCC of the name, nationality, and quantity of stock purchased by any foreign person or entity acquiring more than 5% of its stock.

IDB also pointed out that its agreements with both Teleglobe and Swissair prohibit alien membership on the IDB Board from exceeding 25%. The company also amended its corporate by-laws to include a similar cap on alien board membership.

43. *See, e.g.*, *General Electric Co.*, 5 F.C.C. Rcd. 1335 (1990) ("*General Electric Co.*"); *Comsat General*, 3 F.C.C. Rcd. at 4218; *Data General Corp.*, 2 F.C.C. Rcd. 6060 (1987) ("*Data General II*"); *Houston Int'l Teleport, Inc.*, 2 F.C.C. Rcd. 1666 (1987); *Data General*, Mimeo No. 3385 (F.C.C., released Mar. 26, 1986) ("*Data General I*"); *Transfer of Control of Hughes Communications, Inc. to General Motors Corp.*, 59 Rad. Reg. 2d (P&F) 502 (1985) ("*Hughes Communications*"); *International Telephone and Telegraph Corp.*, 67 F.C.C.2d 604 (1978).

44. *General Electric Co.*, 5 F.C.C. Rcd. at 1335.

45. *See, e.g.*, *Data General II*, 2 F.C.C. Rcd. at 6060 (active involvement and management in Digital Electronic Messaging Systems ("DEMS") licensee by a British citizen whose expertise and background would materially advance the use of the licenses approved by the FCC).

46. *Millicom*, 4 F.C.C. Rcd. 4846.

permitting one-third alien directors on its board.⁴⁷ In approving the proposal, the Commission relied on the factors addressed in *GRC Cablevision*,⁴⁸ above, as well as (1) the close business and personal ties of the alien directors to the United States; (2) the lack of any national security threat proposed by the alien involvement; and (3) the positive domestic and international impact of the proposal.⁴⁹

4. *Factors Considered by the Commission in Making a Public Interest Determination.* In a 1987 *Notice of Inquiry and Proposed Rulemaking*, the FCC sought to determine whether the public interest exception requires it to consider telecommunications policies of foreign governments in the formulation of the FCC's international regulatory policies.⁵⁰ In considering this issue, the FCC enunciated four of the factors it considered in the past to approve foreign investments exceeding the foreign participation limits of Section 310(b)(4): (1) whether the alien's country of citizenship enjoys close and friendly relations with the United States;⁵¹ (2) the extent of foreign ownership or control of the corporation (i.e., whether the alien(s) hold(s) a majority or minority share);⁵² (3) whether the licensed facility involved is passive in nature (i.e., where the licensee exercises no control over the content of the transmission, such as a common carrier);⁵³ and (4) the qualifications of the applicant.⁵⁴

Other factors that the FCC has considered, or might be persuaded to consider include: (1) whether the aliens exercise control over, or supervise operations of the licensee subsidiary;⁵⁵ (2) whether the foreign participation raises any traditional Commission concerns relating to economic effects which may result

47. *Id.* at 4848.

48. *See supra* notes 29-31 and accompanying text.

49. *Millicom*, 4 F.C.C. Rcd. at 4847.

50. *Regulatory Policies and International Telecommunications*, 2 F.C.C. Rcd. 1022, 1032 (1986).

51. *See also Comsat General*, 3 F.C.C. Rcd. at 4218 (Swedish, U.K., and Swiss citizens approved as four of thirty-four officers); *Data General II*, 2 F.C.C. Rcd. at 6060 (U.K. citizen approved as alien officer); *Hughes Communications*, 59 Rad. Reg. 2d (P&F) 502 (Canadian officer approved).

52. *See also A Plus*, File No. 22913-CD-TC-(2)-82 at 1 (the Commission noted that alien ownership interest in company controlling the licensee "appears to be less than 50 percent").

53. *See also Millicom*, 4 F.C.C. Rcd. at 4847 (common carrier microwave facilities are passive in nature); *Data General II*, 2 F.C.C. Rcd. at 6060 (Commission allowed alien officer of a DEMS licensee's parent, in part because this type of license is "passive" in nature); *LCI Communications*, Mimeo No. 3491 ¶ 6 (Mar. 31, 1986).

54. *See also Data General II*, 2 F.C.C. Rcd. at 6060 (alien officer's technical and managerial expertise found to be valuable in providing the public a new, high quality service); *Millicom*, 4 F.C.C. Rcd. at 4847 (invaluable communications expertise contributed by alien director); *Houston Int'l Teleport*, 2 F.C.C. Rcd. at 1666 (alien officer has valuable management, technical, and foreign business expertise).

55. While the FCC has approved alien officers and/or alien directors in excess of one-fourth of the board, the Commission often imposes a condition that the officers or directors not exercise direct control over a licensee within the corporate structure. *See, e.g., Data General I*, Mimeo No. 3385; *Comsat General*, 3 F.C.C. Rcd. at 4218. However, such a restriction is not placed on aliens where the qualifications of the aliens are the reason for seeking a waiver under Section 310(b)(4). *See, e.g., Data General II*, 2 F.C.C. Rcd. at 6060 (FCC allowed foreign officer to participate actively in the operations of a DEMS licensee).

from foreign investment;⁵⁶ (3) whether foreign participation will help to ensure the continued vitality of a business, thus preserving U.S. jobs and value to the company's stockholders;⁵⁷ (4) whether the transfer is temporary, as in the case of a bankruptcy or default situation, and necessary to protect the interests of creditors;⁵⁸ (5) whether the transfer is necessary to save a failing company or will help nurture an infant industry;⁵⁹ (6) whether the transfer will protect against deterioration in programming and station operations;⁶⁰ and, perhaps, (7) whether the alien's country of citizenship allows United States' citizens to invest in similar licenses.⁶¹

56. In the past, the Commission has denied waiver requests by foreign-owned carriers of certain regulations in the context of the application of its international competitive carrier policies. A foreign-owned carrier is defined as a carrier which is over 15% directly or indirectly owned by a foreign telecommunications entity or where an employee, agent, or representative of a foreign telecommunications entity sits on the board of directors. The Commission has noted that it is in the public interest to monitor closely tariffs and operating agreements of foreign-owned carriers to ensure that markets are not manipulated in such a way that harms domestic carriers, domestic interests and domestic users. *International Competitive Carrier Policies*, 102 F.C.C.2d 812, 842 (1985), *recon. denied*, 50 Rad. Reg. (P&F) 1435 (1986). *See also Millicom*, 4 F.C.C. Rcd. at 4847; *FTC Communications, Inc.*, 2 F.C.C. Rcd. 7513 (1987).

57. *See, e.g., Millicom*, 4 F.C.C. Rcd. at 4848.

58. Allowing a corporation that exceeds the Section 310(b)(4) benchmarks to be a transferee from a defaulting borrower for the limited purpose of finding a subsequent buyer/transferee appears to be consistent with the FCC's *Second Thursday* doctrine. *Second Thursday Corp.*, 25 F.C.C.2d 112 (1970). In this case, the FCC took creditors' interests into account when deciding to allow the transfer of a license, despite the fact that renewal of license was subject to a hearing, where assignment was necessary to protect creditors and the licensee would not benefit from the sale. This equitable doctrine recognizes the public interest benefit of protecting creditors of licensees. *See also Hertz Broadcasting*, 57 F.C.C.2d 183 (1975) (FCC renewed license to permit assignment to qualified licensee to protect rights of innocent creditors); *Shell Broadcasting, Inc.*, 38 F.C.C.2d 929 (1973) (FCC approved renewal of license and assignment of qualified licensee to ensure that creditors would be repaid).

59. In *Data General II*, the Commission recognized that significant public interest benefits would result from allowing alien involvement in a failing company. The Commission found that:

DEMS, like the cable industry in its early years, is a fledgling industry and its licensees, if they are to succeed in providing this important service alternative to the public, require minimal regulatory constraints, and an opportunity to draw upon the best technical and managerial talent available. This is especially true for a company such as Digicom whose parent was recently organized under Chapter 11 of the Bankruptcy Act.

2 F.C.C. Rcd. at 6060.

60. In *Spanish International*, 2 F.C.C. Rcd. at 3336, the FCC granted conditional renewal of a license where licensee was found to have committed "technical" violations of the alien ownership restrictions. Renewal was subject to immediate transfer of the stations to unrelated, qualified buyers with no alien owners. The Commission reasoned that granting renewal-subject-to-transfer remedied the alien control problem, ended complex litigation, and removed the cloud over the stations that may have caused service quality to deteriorate. *Id.* at 3339-40.

61. The Commission is concerned with restrictive policies and practices of foreign governments with regard to the "actual and potential effect . . . on [its] ability to achieve the efficiency, equity, and national security goals set forth in the Communications Act." *Regulatory Policies and International Communications, Order on Reconsideration*, 4 F.C.C. Rcd. 323, 323 (1989). The Commission has also considered the reciprocal treatment of U.S. communications companies by foreign governments in other contexts, such as foreign ownership in transoceanic cables, international record carriers, and domestic cable systems. According to the General Counsel of the Commission, "it is appropriate for the FCC to consider the factor of international comity . . . [which] implies some notion of reciprocity."

C. Section 310(b)(4) Interests Do Not "Flow Through"

The FCC treats the Section 310(b)(3) and 310(b)(4) restrictions as distinct and non-cumulative.⁶² When calculating the extent of foreign ownership in the licensee itself, the FCC does not count, or "flow through," foreign ownership interests in a controlling entity, as determined under Section 310(b)(4). The Commission first addressed this issue in a series of cases involving Data Transmission Company ("Datran"), a licensee in the point-to-point microwave radio service.⁶³

In *Datran II*, the Commission scrutinized the ownership interests in Datran held by Mr. Walter Haefner, a Swiss national. Haefner directly owned approximately 9.5% of the common stock of Datran. In addition, Haefner owned various debentures convertible into shares of the common stock of Datran's parent company, Wylly.⁶⁴ The Commission noted that even if all such debentures were converted, Haefner would hold only 22% interest in the parent, a permissible foreign ownership interest under Section 310(b)(4).

The issue, however, was whether Haefner's combined holdings of stock in the licensee and its parent would violate Section 310(b)(3). More precisely, Datran requested a Commission ruling that Haefner's potential 22% ownership of Wylly, (the parent) which held 85.5% of Datran, (the licensee) would not be viewed as an additional 19% interest in Datran (after utilizing the multiplier)⁶⁵ aggregated with Haefner's 10.9% holdings in Datran, thus resulting in a violation of Section 310(b)(3).

The Commission held that Congress "did not intend a 'flow through' effect whereby ownership in a parent corporation would be included with the ownership interest of the subsidiary licensee."⁶⁶ The Commission agreed with

That is, in deciding what weight to accord foreign concerns in our regulatory forum, the FCC is entitled to take into account the degree of deference to U.S. policy within foreign decision making fora." See *Hearings Before a Subcommittee of the Committee on Government Operations*, 96th Cong., 2d Sess. 441, 463 (1980) (statement of Robert R. Bruce, General Counsel, FCC).

62. See, e.g., *Data Transmission Co.*, 52 F.C.C.2d 439 (1975) ("*Datran II*").

63. *Data Transmission Co.*, 59 F.C.C.2d 909 (1976) ("*Datran III*"); *Datran II*, 52 F.C.C.2d 439; *Data Transmission Co.*, 44 F.C.C.2d 935 (1974) ("*Datran I*").

64. These convertible debentures contained a conversion restriction which prevented conversion resulting in total ownership by Haefner in excess of 20% of Datran's issued shares. The Commission had decided in the previous *Datran I* ruling that "the restriction on the exercise of conversion effectively guarantees compliance with the limitations on alien ownership contained in Section 310(b)(3) of the Act." *Datran II*, 52 F.C.C.2d at 439-40.

65. The 19% interest figure is derived as follows: $9.5\% \times 85.5\% = 18.8\%$ or approximately 19%. See *supra* notes 16-21 and accompanying text for a discussion of the multiplier.

66. *Datran II*, 52 F.C.C.2d at 440. The FCC also stated that:

Congress evidenced a flexibility on alien control of parent corporations, particularly in giving the Commission discretion in waiving the alien restrictions for controlling corporations (see Section 310(b)(4)). From the legislative history we may conclude that although Section 310(b) of the Act was directed against alien control of communications facilities, this limitation was primarily based "upon the idea of preventing alien activities against the government during the time of war."

Datran that Congress intended to guard against actual control by aliens of FCC licenses rather than the mere possibility of alien control.⁶⁷

Therefore, according to the *Datran* ruling, an alien may hold up to a 20% ownership or voting interest directly in a licensee in addition to a 25% interest in the company controlling that licensee. *Datran* demonstrates that Sections 310(b)(3) and (b)(4) work in tandem, but are not cumulative.

D. De Facto Control Analysis

Even in cases where alien ownership does not exceed the statutory benchmark under Section 310(b)(3) or (b)(4), the Commission's analysis includes a determination as to "whether . . . the alien will exercise de facto control over the licensee."⁶⁸ Thus, any arrangement whereby an alien holds a sub-benchmark interest in a licensee may be scrutinized by the FCC for indications that the alien(s) may nonetheless exercise de facto control over the licensee by virtue of any stockholder or voting arrangements. For example, where an alien minority stockholder has full veto power on all or most issues, including financial plans, business plans, and other day-to-day operations of the licensee, the FCC would likely find the alien to be in de facto control of the licensee.⁶⁹ An analysis of what constitutes de facto control is an issue of fact which is resolved in light of the particular circumstances involved.⁷⁰

In *Seven Hills Television Co.*,⁷¹ a Review Board of the Commission clarified the de facto control standard by stating that the FCC "will not presume an impermissible measure of alien de facto control where the potential is highly remote or purely speculative. Conversely, where other direct or circumstantial

Id. (citing 68 CONG. REC. 3037 (1927)).

67. *Id.* The Commission noted that Section 310 was adopted from Section 12 of the Federal Radio Act of 1927. Section 12 prohibited alien ownership "where more than one-fifth of the capital stock may be voted by aliens." The words "may be" were omitted in the current Section 310(b)(3). *Id.* at n.6 (citing SENATE REPORT ON COMMUNICATIONS ACT, S. REP. NO. 781, 72d Cong., 2d Sess. 7 (1934)).

68. *Millicom*, 4 F.C.C. Rcd. at 4847. See also *Wilner & Scheiner*, 103 F.C.C.2d at 517 n.33; S. REP. NO. 781, 73d Cong., 2d Sess. 7 (1934) (Section 310(b) is intended to "guard against actual control and not the mere possibility of alien control").

69. See, e.g., *Satellite Transmission and Reception Specialist Company and Transmission Operator Provided Systems, Inc.*, DA 90-927 (F.C.C., released July 13, 1990) ("*STARS/TOPS*") (FCC found de facto control by alien-controlled company where CEO of the alien company was also CEO of the licensee and contract provisions between the two parties provided for exclusive use of the licensed earth stations by the alien-controlled company and responsibility by the alien for financial obligations incurred in connection with the operation of the stations); *Applications of Pan Pacific Television and Silver King Broadcasting of Northern California, Inc. for Transfer of Control of Pan Pacific Television, Inc.*, 3 F.C.C. Rcd. 6629 (1988) ("*Pan Pacific*") (substantial involvement by Taiwan minority shareholder in the financial affairs of licensee held to be a factor indicating de facto control). In addition, these provisions may violate general business laws which require that control and management of operations ultimately remain with the board of directors. However, certain more limited minority shareholder protections have been permitted by the Commission. See Section III, *infra*.

70. *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975); *Metromedia, Inc.*, 98 F.C.C.2d 300, 306 (1984).

71. *Seven Hills Television Co.*, 2 F.C.C. Rcd. 6867 (1987) ("*Seven Hills*").

factors animate that 'potential,' making improper de facto control not merely possible but almost probable," the Commission can act by withholding a license or taking some other action to implement the general statutory policy.⁷²

In *Seven Hills*, the FCC scrutinized the relationship between a 20% alien investor in a licensee and the licensee's operation for indications of improper de facto control. The alien investor had considerable ongoing financial ties with the licensee which allegedly resulted in effective control over the licensee's station operations in violation of Section 310(b)(3).⁷³ The Review Board found that no such de facto control existed absent extrinsic evidence that the financier ever threatened to cease financial assistance to the licensee or to call in loans if the licensee did not operate according to the alien's wishes.⁷⁴

Until *Seven Hills*, a long line of cases held that the power to control the purse is generally the power to control.⁷⁵ However, in *Seven Hills*, the Review Board noted that the Commission has diminished its emphasis on financial dominance as the controlling factor in its de facto control analysis.⁷⁶ Other factors are now equally important in making de facto control determinations. For example, the Commission may consider: (1) who supplies the programming;⁷⁷ (2) whether interlocking ownership and/or management exists,⁷⁸ and whether operating and/or management contracts effectively result in the domestic license holder surrendering decision-making authority for day-to-day operations to alien inves-

72. *Id.* at 6876 (citations omitted).

73. In addition to substantial financial leverage which the alien held over the licensee, the alien also supplied the station's programming through a network affiliation agreement and employed as a high-ranking official the 55% owner and president of the station. *Id.*

74. *Id.* at 6884-85. However, even having determined that *Seven Hills* was fully qualified to retain its license, the Board found that the potential for alien control remained and imposed conditions upon the alien investor's dealings with the licensee to ensure future compliance with the statute. *Id.* at 6888.

75. See, e.g., *George E. Cameron, Jr. Communications*, 93 F.C.C.2d 789, 812-15 (Rev. Bd. 1983); *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712 (D.C. Cir. 1958); *Heitmeyer v. FCC*, 95 F.2d 91 (D.C. Cir. 1937).

76. *Seven Hills*, 2 F.C.C. Rcd. at 6880 (discussing *KIST Corp.*, 102 F.C.C.2d 288, 290-92 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), where Commission held that a financial investment was not the "sine qua non of legal control, just one of several indicia. . ."). But see *Pan Pacific*, 3 F.C.C. Rcd. 6629 (1988). In *Pan Pacific*, the FCC ordered a full evidentiary hearing on the qualifications of a United States licensee where a Taiwan company may have exercised de facto control over the licensee, in contravention of Section 310(b), primarily through financial dealings. The Commission was concerned that the foreign company's chairman, his relatives, and companies owned by him and/or his relatives and/or his employees played roles reflecting such indicia of control of the licensee as to constitute alien ownership or control. The actions raising these concerns included: (1) providing short-term interest-free loans; (2) playing a principal role in obtaining a loan from a foreign source; (3) supplying a guarantee as security for a loan; (4) providing equipment to a licensee through a related company after lending the licensee the funds to aid in the purchase; (5) supplying free services to the licensee; and/or (6) representing the licensee in discussions with prospective purchasers and preparing documents used in the negotiations. *Id.* at 6636.

77. See, e.g., *Seven Hills*, 2 F.C.C. Rcd. at 6880.

78. See, e.g., *id.* at 6881.

tors/directors.⁷⁹

In analyzing the issue of de facto control in *McCaw Cellular Communications, Inc.*,⁸⁰ the FCC stated that:

[t]he question of whether a minority investor may be in actual control of the company is governed chiefly by the demonstration of the power of the minority investor to dominate the management of corporate affairs. A minority shareholder will not be viewed as in control of a company unless its influence is so great that it is able to determine the licensee's policies and method of operation or dominate the corporate affairs.⁸¹

In this case, McCaw Cellular Communications, Inc. ("McCaw") sold approximately 22% of the equity and voting rights in McCaw's outstanding common stock to British Telecom USA Holdings, Inc. ("BT"), a wholly-owned subsidiary of British Telecommunications, PLC. Under the terms of the transaction, BT had authority to designate up to four of the nineteen directors of McCaw's board.

LIN Broadcasting ("LIN"), at that time a competitor of McCaw, was suspicious of the McCaw stock transaction and declared that "synergies" would result from their relationship. LIN suggested that such "synergies," along with BT's leadership in the European market and the presence of restrictive covenants requiring BT's consent, might indicate that BT would have greater de facto control over McCaw than the 22% ownership interest represents.⁸² The FCC rejected LIN's arguments and found that the restrictive covenants were permissible minority shareholder protections and that there were no other factors indicating that BT would actually exercise control over McCaw.⁸³

II. EQUITY AND DEBT FINANCING UNDER 310(B)(3) AND 310(B)(4)

This Section discusses the FCC's interpretation of the benchmark "capital stock" investment limits contained in Sections 310(b)(3) and (b)(4). It first addresses the FCC's definition of "capital stock" and applies this definition to equity investments in corporations and partnerships, as well as equity interests held in trust. The Section concludes by addressing the related issue of debt financing. Much of the analysis in this Section relates to the Commission's

79. See, e.g., *Licensee, Limited Partnership*, 5 F.C.C. Rcd. 1673 (1990) ("*Licensee*") (Commission approved a management agreement that was the result of arm's-length negotiations between an alien-controlled company and licensee whereby all operational decisions would remain with the licensee).

80. *McCaw Cellular Communications, Inc.*, 4 F.C.C. Rcd. 3784, *aff'd*, 4 F.C.C. Rcd. 4865 (1989) ("*McCaw Cellular*").

81. *Id.* at 3789 (citations omitted).

82. *Id.* at 3786-87.

83. *Id.* at 3790.

attribution rules,⁸⁴ which the Commission consistently relies on in addressing ownership issues under Section 310(b).⁸⁵

A. Definition of Capital Stock Under Section 310(b)

While "capital stock" is traditionally associated with classes of stock issued by corporations, and both Section 310(b)(3) and (b)(4) address only "corporations," the FCC interprets the term "capital stock" as used in Section 310(b) broadly as applying to various forms of equity interests held in both corporate and non-corporate entities. According to the FCC, when Congress drafted Section 310(b) of the Communications Act to apply to capital stock "owned of record" as well as voted by aliens, it intended to include substantial equity investments in whatever form.⁸⁶ Thus, while it is often stated that the purpose of Section 310(b) is to guard against actual alien control (through voting interests) rather than the mere possibility of control,⁸⁷ the Commission also believes that a broader purpose of Congress in adopting Section 310(b) was to "safeguard the United States from foreign influence in broadcasting [through substantial equity ownership interests]."⁸⁸

The FCC has also reasoned that, because the Act defines corporation broadly,⁸⁹ Congress intended to cover "all business forms," including associations, corporations, and joint-stock corporations.⁹⁰ "[A]n overly restrictive administrative interpretation of the scope of [Section 310(b)] could provide the vehicle for complete circumvention of the alien ownership restrictions. . . ."⁹¹

Therefore, in applying Section 310(b) to more than just corporate entities, the Commission has "interpreted the term 'capital stock' . . . to encompass *the alternative means by which equity or voting interests are held in these businesses*,"⁹²

84. 47 C.F.R. § 73.3555 nn. 1-3 (1989).

85. See *infra* note 113.

86. *Wilner & Scheiner Recon.*, 1 F.C.C. Rcd. at 15 n.13. ("When it adopted the Communications Act of 1934, Congress, *inter alia*, changed the scope of the statutory benchmark so that it applied to equity interests 'owned of record or voted . . . by aliens.'). See S. REP. NO. 781, 73rd Cong., 2d Sess. 7 (1934).

87. See, e.g., *Wilner & Scheiner*, 103 F.C.C.2d at 516 nn. 29-30 (citing *Datran II*, 52 F.C.C.2d 439 (1975); *Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir. 1958)). See also *PrimeMedia*, 3 F.C.C. Rcd. at 4294.

88. *Wilner & Scheiner*, 103 F.C.C.2d at 517; *PrimeMedia*, 3 F.C.C. Rcd. at 4294. While these two statements seem somewhat in conflict, the FCC's Review Board has explained that it believes the Commission will not presume an impermissible measure of alien *de facto* control where the potential is highly speculative or remote. *Seven Hills*, 2 F.C.C. Rcd. at 6876. But where the potential for *de facto* control is not only possible but probable, the Commission can act to prevent Section 310(b) violations. Thus, alien equity investments not raising *de facto* control concerns would appear to be entitled to more flexible treatment under Section 310(b).

89. See 47 U.S.C. § 153(j).

90. *Wilner & Scheiner*, 103 F.C.C.2d at 514.

91. *Id.* at 515 (citing *Kansas City Broadcasting Co.*, 5 Rad. Reg. (P&F) 1057, 1094 (1952)).

92. *PrimeMedia*, 3 F.C.C. Rcd. at 4293, 4295 (emphasis in original) (citing *Wilner & Scheiner*, 103 F.C.C.2d at 516).

including interests of partnerships,⁹³ policyholders of a mutual insurance company,⁹⁴ members of a church,⁹⁵ members of a labor union,⁹⁶ and beneficiaries of an irrevocable trust.⁹⁷

1. Corporations.

a. *Classes of Stock.* The FCC considers "[t]he 'traditional' corporation [to be] characterized by stock ownership, whereby the holder possesses certain specified voting or profit-sharing rights."⁹⁸ For purposes of determining a corporation's compliance with Section 310(b), "[t]he term 'capital stock' is generally understood to encompass various classes of stock, including preferred stock,"⁹⁹ common stock, voting stock, non-voting stock,¹⁰⁰ and non-voting stock convertible to voting stock.¹⁰¹

As discussed above, the percentage of capital stock of a corporation held by aliens under Section 310(b) is calculated by aggregating the interests held by aliens in all classes of capital stock.¹⁰² For non-voting stock, regardless of the amount held or whether it is convertible to voting stock,¹⁰³ the FCC uses the same multiplier it uses to compute alien ownership interests where intervening domestic corporations appear in the vertical chain of ownership, as discussed in Section I above.¹⁰⁴ For example, assume that (1) Company A owns 45% of the license, (2) Company B owns 45% of Company A, and (3) AI, an alien investor,

93. *Wilner & Scheiner*, 103 F.C.C.2d at 519; *Continental Cellular*, 5 F.C.C. Rcd. 691, 691 (1990).

94. *Farragut Television Corp.*, 4 Rad. Reg. 2d (P&F) 350 (1965).

95. *Kansas City Broadcasting Co.*, 5 Rad. Reg. (P&F) at 1094.

96. *Chicagoland TV Co.*, F.C.C. 65R-89 (released Mar. 15, 1965), 4 Rad. Reg. 2d (P&F) 747, 752 (1965), *application for review denied*, F.C.C. 65-367 (released May 5, 1965).

97. *PrimeMedia*, 3 F.C.C. Rcd. at 4295.

98. *Transfers of Control of Certain Licensed Non-Stock Entities*, 4 F.C.C. Rcd. 3403, 3409 n.7 (1989).

99. *Wilner & Scheiner Recon.*, 1 F.C.C. Rcd. at 13.

100. *Wilner & Scheiner*, 103 F.C.C.2d. at 519 n.37.

By its express terms, the statute provides limitations on the amount of capital stock which can be owned or voted by aliens. Because the statutory limitations are cast in the disjunctive, non-voting stock owned by aliens is considered in evaluating compliance with the benchmarks established by Section 310(b).

Id. (citations omitted). See also *Spanish International Communications Corp.*, 4 F.C.C. Rcd. 2153, 2154 (1989) ("Voting and non-voting stock interests are indistinguishable for purposes of section 310(b).") (citation omitted).

101. *Wilner & Scheiner*, 103 F.C.C.2d at 521 ("Any ownership or voting interest held by an individual other than a United States citizen or by an entity organized under the laws of a foreign government is counted in the application of the statutory benchmarks.")

102. See *supra* note 15 and accompanying text.

103. *Wilner & Scheiner*, 103 F.C.C.2d at 521-22 (The FCC's use of the multiplier for non-voting stock regardless of amount held is based on the policies adopted in its *Attribution Order*.); *Wilner & Scheiner Recon.*, 1 F.C.C. Rcd. at 13 ("Because the holder of non-voting stock does not possess a controlling ownership interest . . . the non-controlling nature of this interest is unaffected by the quantity of non-voting stock which is owned.")

104. See *supra* notes 16-21 and accompanying text.

owns 80% of the equity of Company B through non-voting stock. Through the use of a multiplier for non-voting stock (even when above 50%), AI is deemed to own 16.2% of the licensee (45% x 45% x 80%), a permissible interest under Section 310(b)(3). If AI's 80% interest in Company B were voting stock, AI would be deemed to own 20.25% of the licensee (45% x 45% x 100%) because the multiplier would not be used. Here, AI would violate the statutory benchmark of 310(b)(3).

With multiple classes of stock, it is possible that the calculation of the percentage of equity ownership may take different forms. For example, equity ownership among classes of stock for a recently incorporated company may be determined by the proportion of paid-in capital or equity contribution. This is the manner in which the FCC calculates equity ownership for limited partnerships.¹⁰⁵ Over time, however, the market value of different classes of stock may vary due to such factors as dividend treatment and voting rights. In such cases, it may be necessary to look to the market value of the stock "as a measure of the value of the equity."¹⁰⁶

b. Other Equity Interests. As noted above, the FCC broadly defines capital stock to include alternative means by which equity or voting interests are held. It would appear that there are a number of "alternative means by which equity . . . interests" in a corporation may be held.¹⁰⁷ Many of these instruments

105. *Winer & Scheiner*, 103 F.C.C.2d at 520 n.42. See also *infra* note 153 and accompanying text.

106. See, e.g., 15 FEDERAL TAX COORDINATOR 2D (BNA) 32,446 G-H ¶ K-5733 (Rest. Inst. Am. Oct. 1988).

107. For example, the 1934 Securities Act defines equity securities to include:

any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

15 U.S.C. § 78(c)(11) (1976).

The Securities and Exchange Commission's Regulations also define equity securities to include:

any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so. [Adopted in Release No. 34-7581, April 23, 1965, 30 F.R. 6115 and amended in Release No. 34-10129 effective June 15, 1973, 38 F.R. 11449.]

17 C.F.R. § 240.3a11-1 (1990).

The Bankruptcy Code defines equity security as including (a) stock; (b) interests in a limited partnership; and (c) warrant or right to purchase, sell or subscribe. 11 U.S.C. § 101(15) (1982).

effectively provide their holders with an equity interest in the company by allowing them to realize a capital return beyond stock ownership.

Most common among other forms of "equity" interests are convertible interests, such as warrants, convertible debentures, and options. A warrant, normally issued with bonds or shares of stock, is a right to subscribe to, or purchase a security (i.e., stock).¹⁰⁸ Convertible debentures are notes or bonds usually not secured by a mortgage but convertible into some other security (i.e., stock).¹⁰⁹ Options or "calls" are agreements allowing the purchase of securities, often at a fixed price.¹¹⁰

While the above-described convertible interests are widely viewed as "equity interests," the FCC has not sought to include such convertible equity interests under its broad definition of the term "capital stock" for purposes of Section 310(b). Although there are a number of possible reasons why the FCC appears reluctant to include these "equity" interests in its definition of "capital stock,"¹¹¹ the most likely reason that convertible equity interests are not normally considered "capital stock" for purposes of Section 310(b) is that convertible interests are not considered for attribution of ownership purposes.¹¹² The FCC has said in the past that its attribution criteria, while not dispositive on the issues of alien ownership, are "instructive in making" determinations under Section 310(b).¹¹³

In the *Attribution Order*, the FCC found that no control of the licensee rests with the holder of a convertible interest if the right to convert is beyond the interest holder's control.¹¹⁴ Thus, if a right to convert a contingent interest requires prior FCC approval (i.e., conversion would exceed the Section 310(b)(4) safe harbor limits and would be permitted only upon a public interest finding),¹¹⁵ then the holder of the convertible interest would appear to hold little control over the licensee because the "threat" to convert the interest would be

108. See *Miller v. General Outdoor Advertising Co.*, 233 F. Supp. 790 (D.C.N.Y. 1963), *rev'd on other grounds*, 337 F.2d 944 (1964).

109. See *Kusner v. First Pennsylvania Corp.*, 531 F.2d 1234 (3d Cir. 1976); *Weitzen v. Kearns*, 271 F. Supp. 616 (D.C.N.Y. 1967).

110. See *Lloyd v. Industrial Bio-Test Laboratories, Inc.*, 454 F. Supp. 807 (D.C.N.Y. 1978).

111. The FCC may believe that the term "capital stock" for purposes of Section 310(b) needs no interpretation and that it would be beyond the intent of Congress to include non-stock equity interests. Or, the FCC may believe that holders of convertible interests are not yet "owners of record"; thus, they are beyond the reach of Section 310(b). *But see PrimeMedia*, 3 F.C.C. Rcd. at 4295 (although beneficiaries of trusts are not "owners of record," they are still subject to 310(b)).

112. See *Attribution Order*, 97 F.C.C.2d at 1021-22.

113. *Wilner & Scheiner*, 103 F.C.C.2d at 524. See also *id.* at 521-22 (*Attribution Order* cited as support for using a multiplier for insulated limited partners); *id.* at 520-21 n.43 (test of whether a limited partner is insulated for purposes of 310(b) is the standard from the *Attribution Order*); *Wilner & Scheiner Recon.*, 1 F.C.C. Rcd. at 13 (*Attribution Order* cited as support for using a multiplier for non-controlling voting stock).

114. *Attribution Order*, 97 F.C.C.2d at 1021. Cf. *William S. Paley*, 1 F.C.C. Rcd. at 126 (Section 310 prohibitions against improper de facto control operate "not upon the potential for some hypothetical future exercise of control"). The Commission has also found that convertible instruments represent important sources of financing. *Attribution Order*, 97 F.C.C.2d at 1022.

115. See *supra* notes 26-42 and accompanying text.

an empty gesture.¹¹⁶

In numerous cases where convertible interests in a license were held by non-alien, the FCC has not attributed ownership interests to these holders.¹¹⁷ In cases where ownership or control by non-alien holding convertible interests has been found, the FCC has identified other indicia of control, besides the convertible interests, to support its findings.¹¹⁸ Most importantly, the FCC often places particular emphasis on whether a convertible interest requires prior approval by the FCC before conversion.¹¹⁹ Such a requirement appears to make it less likely that the FCC will find that the holder of the convertible interest has de facto control.¹²⁰

In situations where aliens have held convertible interests in a licensee, a similar approach has been taken by the FCC. The FCC has not categorically considered convertible interests as equity interests for purposes of Section 310(b). Rather, the Commission appears to review such holdings in the larger context of whether the alien is in control of the licensee. For example, in *Spanish International*, 20% of the licensee was held indirectly by aliens through a U.S. corporation.¹²¹ The licensee then issued to another alien-controlled corporation a debenture convertible to stock in an amount equal to an additional 20% of the licensee.¹²² In considering whether the licensee violated Section

116. See *Wilner & Scheiner Recon.*, 1 F.C.C. Rcd. at 16 n.20 (citing *Attribution Order*, 97 F.C.C.2d at 1021). This explanation, however, overlooks the fact that while an alien holding such a convertible interest may have little ability to control a licensee, that convertible interest could nonetheless be sold to a non-alien who could exercise the convertible interest after Commission approval. The threat to sell such a convertible interest would not likely be "an empty gesture" if it would result in a new party taking control of the licensee. Also, although an alien holding such a convertible interest may have little ability to control the licensee, these types of interests may still represent the type of substantial equity investment that the FCC believes Section 310(b) is designed to address. See *supra* notes 86 & 88. Because of the dual purposes of 310(b) to guard against control and substantial equity ownership, the FCC has said that the criteria in the Attribution Order, which only addresses issues of control, do not consistently apply to ownership questions under 310(b). *Wilner & Scheiner*, 103 F.C.C.2d at 524.

117. *M&M Broadcasting Co.*, 26 F.C.C. 35, 17 Rad. Reg. (P&F) 1254 (1959); *Atlantic Coast Broadcasting Corp. of Charleston*, 22 Rad. Reg. (P&F) 1045 (1962); *KSOO-TV Inc.*, 19 Rad. Reg. (P&F) 28 (1959); *Belo Broadcasting Corp.*, 49 F.C.C.2d 181, 31 Rad. Reg. 2d (P&F) 944 (1974); *WDUL Television Corp.*, 33 F.C.C. 149, 22 Rad. Reg. (P&F) 545 (1962).

118. See, e.g., *George E. Cameron, Jr.*, 91 F.C.C.2d 870 (Rev. Bd. 182), *recon. denied*, 93 F.C.C.2d 789 (1983), *applications for review dismissed as moot*, F.C.C. 84-367 (released Aug. 1, 1984) (49% shareholder with option to increase to 100% was in control because he served as managing partner and, "perhaps most importantly," he "held judgments against other principals which, if exercised, would financially cripple them."); *Integrated Communication Systems, Inc. of Massachusetts*, 14 F.C.C.2d 698, 14 Rad. Reg. 2d (P&F) 372 (1968) (terms limiting the licensee's ability to exercise control over the station (e.g., salaries, liabilities) when combined with option to acquire all stock resulted in de facto control). See also *William S. Paley*, 1 F.C.C. Rcd. at 1026 ("A finding that a de facto transfer of control has occurred depends largely upon a review of the actual operation of the licensee—not upon the potential for some hypothetical future exercise of control.")

119. See, e.g., *KSOO-TV, Inc.*, 19 Rad. Reg. (P&F) at 32; *Belo Broadcasting Corp.*, 49 F.C.C.2d at 184; *Coral Television Corp.*, 29 F.C.C.2d 266, 278, 21 Rad. Reg. 2d (P&F) 1114, 1127 (1971).

120. See *infra* notes 122-24 and accompanying text.

121. *Spanish International Communications Corp.*, Initial Decision, F.C.C. 86D-1, slip op. ¶ 12 (released Jan. 8, 1986).

122. *Id.* ¶ 50.

310(b)(3), the Administrative Law Judge ("ALJ") did not treat the issuance of the convertible debenture to the second alien corporation as violative of Section 310(b)(3). Rather, the ALJ focused on such factors as interlocking management, corporate equity relationships, and the role of alien programming sources in finding a violation of Section 310(b)(3).¹²³

A similar approach was applied in *Miami 35*.¹²⁴ One applicant for a Miami UHF station indicated that the funds for its proposed facility would be provided by aliens. In return for the funds, the aliens would receive an option to acquire preferred stock equal to 49% of the equity in the applicant. In addition, the option appeared to give the aliens the right to restrict the number of voting and non-voting shares issued by the applicant, as well as the alienability of the shares.¹²⁵

In considering the effect of the option under Section 310(b), the Commission first noted:

Clearly, Section 310(b) of the Communications Act would preclude [the alien option holder] from exercising the option in a manner that would allow [the alien] to acquire more than 20 percent direct interest in [the applicant] or more than 25 percent interest through an intermediate corporation.¹²⁶

Second, the Commission pointed out that investor protection provisions contained in the option may not necessarily "run afoul of the requirements of Section 310."¹²⁷

The Commission, therefore, did not automatically rule out the existence of such an option. Instead, because it did not have a copy of the option agreement, it ordered the applicant to file a copy with the Commission for further review. The Commission seemed willing to allow an alien to hold such an option provided that it was not exercised in violation of Section 310(b) and did not raise de facto control issues.¹²⁸

The three decisions involving *Datran*,¹²⁹ the point-to-point microwave licensee, and its parent company, Wyly Corporation, also appear to show that convertible interests are not considered "capital stock" for Section 310(b) purposes. In *Datran I*, the FCC approved a \$20 million alien investment in *Datran* which gave the alien a direct 10.9% of the outstanding common stock and convertible debentures reflecting an additional 19.04% of *Datran's* common stock. The debentures contained a restriction prohibiting conversions which

123. *Id.* ¶ 176.

124. Hearing Designation Order, MM Docket No. 85-27, File No. BPCT-870802KE, slip op. (F.C.C., released Feb. 12, 1985) ("*Miami 35*").

125. *Id.* ¶ 8.

126. *Id.*

127. *Id.* (citing *Datran I*, 44 F.C.C.2d 935).

128. *Id.*

129. See *supra* notes 62-67 and accompanying text.

would result in total alien ownership of Datran in excess of 20%.¹³⁰ The Commission noted that its acceptance of the proposed investment did "not now consider the impact on control of Datran which may result from possible future conversion of the debentures by [the alien]."¹³¹

Over a year later, in *Datran II*, the FCC allowed the alien investor in Datran to invest another \$10 million in Datran and receive debentures convertible into an additional one million shares of Datran stock, as well as a stock warrant for 1.3 million shares in Datran's parent, Wylly.¹³² The debentures again contained a limitation preventing conversion if it would result in aliens holding in excess of 20% of Datran. The Commission found that this restriction "effectively guarantees compliance with the limitations on alien ownership contained in Section 310(b)(3) of the Act."¹³³ In approving the proposed investment, the Commission noted that the alien disavowed any interest in acquiring actual control and stated that the Commission should be notified at least sixty days in advance if any major alien ownership changes occur.

Less than a year after *Datran II*, the Commission issued another decision involving Datran, this time responding to two requests to approve an additional \$30 million investment by the alien in Datran—\$17 million in convertible debentures in Datran, with an additional \$13 million at a later date, if needed, and warrants to purchase an additional 1.7 million shares of Wylly.¹³⁴ All of the new warrants and debentures would contain restrictions barring conversion in violation of Section 310(b).

The Commission quickly dispensed with the issue of whether these investments would exceed the alien restrictions imposed by Section 310(b).

We are in agreement that Section 310(b) merely requires a percentage of ownership test, and that [the alien] is within the stock limitations regarding alien ownership of a licensee or the parent of a licensee (20% and 25% respectively).¹³⁵

However, the Commission was uncertain who controlled Wylly. While the Wylly family held slightly more common stock than the alien, the alien's

130. A loan agreement between Datran and the alien also imposed a number of negative covenants upon Datran. Datran was prevented from selling shares of common stock, merging, leasing or selling assets, guaranteeing loans, and purchasing the stock of other corporations without the alien's approval. The Commission found these investor protections to be acceptable provided they are not combined with investor activity in the affairs of the corporation, which can lead to transfer of control problems. *Datran I*, 44 F.C.C.2d at 937-38 (citing KSOO-TV, Inc., 19 Rad. Reg. (P&F) at 28; L.B. Wilson, Inc., 25 Rad. Reg. (P&F) 845 (1963); The Northern Corp., 15 F.C.C. 60 (1949); Atlantic Coast Broadcasting Corp. of Charleston, 22 Rad. Reg. (P&F) 1045 (1962)).

131. *Datran I*, 44 F.C.C.2d at 937.

132. *Datran II*, 52 F.C.C.2d at 439, 441.

133. *Id.* at 439-40.

134. *Datran III*, 59 F.C.C.2d at 909. During the review of these requests, the Commission approved \$10 million of the requested investment by the alien in the form of a loan subject to this review.

135. *Id.* at 910-11.

proposed total investment would be thirty times the equity investment of the Wyly family. The Commission approved a loan agreement for the additional \$10 million in alien investment but requested briefs on a number of issues to determine the degree of de facto control for purposes of Sections 310(b)(1) and 310(d), including whether the debentures held by the alien were, in effect, equity investments and whether additional sources of funding were available.¹³⁶ The subsequent bankruptcy of Datran prevented a full investigation of these issues.¹³⁷

*Channel 31, Inc.*¹³⁸ is another case involving a conditional investment held by an alien. The case arose out of an application to transfer a UHF television station in Sacramento, California from a debtor-in-possession to Sacramento Television, Inc. ("Sacramento"). Sacramento proposed to operate subscription television service with the assistance of its 20% stockholder, Universal Subscription Television, Inc. ("USTV"), a Canadian-controlled company. USTV would furnish virtually all of the funds for the station pursuant to a debenture convertible into over 87% of the company's stock. The loan agreements also provided that the licensee would sell the bulk of its broadcast time to USTV for \$500,000 per year. Initially, the licensee also gave USTV an option to purchase all of its stock at any time. But after consulting the FCC staff, conversion time periods for both the debentures and the options were set.

The Commission thought the totality of the terms of the Sacramento financial agreements raised serious questions about whether the licensee would be controlled by USTV. Most importantly, the Commission believed that, where an applicant who initially contracts to buy a station simultaneously gives a lender the right to take control of the station at any time, a question is raised concerning the true intent of the applicant to purchase and operate the station in the public interest.¹³⁹

Under the original unrestricted debenture, the Commission believed that the majority shareholder "would have been in control of the station only at the sufferance of aliens who were his key financial source."¹⁴⁰ Moreover, the Commission recognized the difficulty in "maintaining control of a broadcast station when someone other than the licensee controls the purse strings."¹⁴¹

After noting that the Commission is under a "heavy obligation" to discover and prevent any alien control of broadcast stations,¹⁴² the Commission distinguished the *Datran* cases and other non-alien option cases. The Commission stated that, contrary to USTV's possible control over the licensee, the alien investor in *Datran* was limited by the debentures to 20% interest and had no direct

136. *Id.* at 911.

137. *See* Data Transmission Co., 60 F.C.C.2d 958 (1976); Data Transmission Co., 61 F.C.C.2d 263 (1976).

138. *Channel 31, Inc.*, 45 Rad. Reg. 2d (P&F) 420 (1979) ("*Channel 31*").

139. *Id.* at 421-22.

140. *Id.* at 422.

141. *Id.* at 421.

142. *Id.* (citing *Heitmeyer v. FCC*, 95 F.2d 91 (D.C. Cir. 1937)).

involvement with Datran's activities. Also, Datran's parent, the Wyly Corporation, was a large publicly traded corporation with assets of over \$144 million. The Sacramento licensee in *Channel 31*, on the other hand, would be a thinly capitalized new company with no business experience. Furthermore, Sacramento was to send USTV detailed financial reports.

In distinguishing non-alien option holder cases,¹⁴³ the Commission stated that "in none of these [cases] were the option holders aliens who [as in this case] were providing virtually all the funding for the acquisition and the operation of the station."¹⁴⁴ This language suggests that an alien option holder would be subject to closer scrutiny by the Commission than a non-alien.

It is important to remember, however, that the options at issue in *Channel 31* raised de facto control problems under Sections 310(b)(1) and 310(d), not problems with Sections 310(b)(3) or (b)(4) investment limits. As the Commission explained in *Datran III*, investment limits in Section 310(b) merely require a percentage of ownership test that the alien investment "is within the stock limitations regarding alien ownership."¹⁴⁵ Based on the above decisions, it appears that, while the Commission does not consider conditional equity interests for purposes of the statutory investment limits of Section 310(b), such interests when combined with other indicia of control can raise de facto control issues. Thus, while the FCC says that Section 310(b) is designed to curb both substantial alien equity investments in radio licenses and actual alien control of radio facilities, the FCC does not appear to draw as sharp a line in curbing substantial alien investments as it does in addressing alien control unless those equity investments raise de facto control concerns.¹⁴⁶

2. *Partnerships.* The FCC's treatment of alien equity interests held in partnerships, particularly limited partnerships, is best articulated in the *Wilner & Scheiner* and *Wilner & Scheiner Recon.* decisions.¹⁴⁷ These decisions reflect the overlap of the attribution rules and Section 310(b) in two principal areas. First, although the FCC treats all "non-limited partners"¹⁴⁸ as officers and directors for purposes of the Section 310(b) limitations because they occupy positions comparable to those held by officers and directors in a corporation,¹⁴⁹ the FCC does not consider limited partners to be officers and directors if they are sufficiently "insulated," as set forth in the *Attribution Order*.¹⁵⁰ These insulating guidelines essentially restrict limited partners from participating in the

143. See cases cited *supra* note 117.

144. *Channel 31*, 45 Rad. Reg. 2d (P&F) at 423.

145. *Datran III*, 59 F.C.C.2d at 910-11.

146. See *Seven Hills*, 2 F.C.C. Rcd. at 6876.

147. *Wilner & Scheiner*, 103 F.C.C.2d 511; *Wilner & Scheiner Recon.*, 1 F.C.C. Rcd. 12.

148. "Non-limited partner" is defined to include both general partners and partners in partnerships without limited partners. *Wilner & Scheiner Recon.*, 1 F.C.C. Rcd. at 15 n.4.

149. *Wilner & Scheiner*, 103 F.C.C.2d at 520-521 n.43; *Wilner & Scheiner Recon.*, 1 F.C.C. Rcd. at 14; *Continental Cellular*, 5 F.C.C. Rcd. 691.

150. *Wilner & Scheiner*, 103 F.C.C.2d at 520-521 n.43.

day-to-day operations of the licensee.¹⁵¹

Second, the attribution rules come into play with respect to calculating the interests held by limited partners in a licensee. Limited partners are treated as "stockholders" for purposes of 310(b).¹⁵² The interests they hold in the partnership are determined by equity contribution.¹⁵³ In calculating the ownership interests held in the licensee by insulated limited partners, the Commission uses the same multiplier that it developed for attribution purposes as discussed above.¹⁵⁴ The multiplier is used "[r]egardless of the percentage of equity interest held by aliens in the limited partnership," so long as the limited partners are sufficiently insulated.¹⁵⁵

The following examples demonstrate the benefit of the multiplier for calculating limited partnership interests under Section 310(b)(3).

[A]ssume that (1) Company A, a domestically organized limited partnership, holds 22 percent ownership interest in the licensee; (2) [A], a natural person who is not a citizen of the United States, is a limited partner with a 25 percent ownership interest in Company A; and (3) all other direct or indirect interests in the licensee are held

151. *Attribution Recon.*, 58 Rad. Reg. 2d (P&F) at 613.

152. *Wilner & Scheiner*, 103 F.C.C.2d at 520. See also *Continental Cellular*, 5 F.C.C. Red. at 692 n.8.

153. *Wilner & Scheiner*, 103 F.C.C.2d at 520 n.42. In deciding to define ownership for purposes of 310(b) according to equity contribution, the Commission noted that it may revisit this issue in the future and define it according to partnership share. This would allow a greater level of alien investment.

154. See *supra* notes 16-21 and accompanying text; *Wilner & Scheiner*, 103 F.C.C.2d at 522. A limited partner is considered "insulated" when the partnership agreement contains provisions prohibiting the limited partners from being materially involved in the partnerships enterprises as an employee, independent contractor, or services provider, or as a result of communications with a general partner on day-to-day operations. *Attribution Recon.*, 58 Rad. Reg. 2d (P&F) at 618-20, *further modified in part*, 61 Rad. Reg. 2d (P&F) at 744-47. In addition, the partnership agreement must either prohibit the insulated limited partner from voting on the removal of the general partner or limit this right to bankruptcy or incompetency situations. *Id.* In June 1990, a petition for declaratory ruling was filed with the FCC regarding the removal powers of insulated limited partners. See Equitable Capital Management Corp. Request of a Declaratory Ruling Concerning Sections 310(b)(3) and (4) of the Communications Act of 1934, MMB File No. 900924A (F.C.C., filed June 1, 1990) ("*Petition*"), Public Notice DA 90-1098 (Aug. 17, 1990). The Petition argued that partnerships regulated by the Investment Company Act of 1940 and subject to the securities laws of each state in which interests in the partnerships are offered or sold provide limited partners with removal powers of general partners greater than those allowed by the FCC for insulated limited partners. *Id.* at 4. Because of this conflict, such partnerships described by the Petition are prevented from taking advantage of the FCC's multiplier rule, thus limiting their ability to invest in companies holding certain FCC licenses. As of the publication of this Article, the FCC has not ruled on the Petition.

155. *Wilner & Scheiner*, 103 F.C.C.2d at 522 n.49. The FCC stated:

[U]nlike the interest in a corporation, the percentage of equity ownership in a limited partnership is not necessarily an accurate reflection of the amount of influence or control conveyed by that interest. As a consequence, even a limited partner who possesses a large equity interest may be effectively insulated from actual control over the business.

Id.

by United States citizens. If [AI]'s interest is adequately insulated, under the "multiplier" approach, [AI] would be attributed with 5.5 percent ownership interest in the licensee. If [AI] is not insulated from active participation in the business, the multiplier would not be used, and [AI] would be attributed with 22 percent ownership interest in the licensee, thereby violating the ownership benchmark established in Section 310(b)(3).

Where it is applicable, the "multiplier" is utilized in any link in the ownership chain to determine the amount of alien ownership or voting interests in the licensee. For example, assume that (1) Company A, a corporation organized under the laws of the State of Delaware, owns 45 percent of the stock of the licensee; (2) Company B, a limited partnership which is organized under the laws of the State of Maryland, is itself a limited partner with a 45 percent ownership interest in Company A; (3) [AI], a natural person who is not a citizen of the United States, is a limited partner with an ownership interest of 80 percent in Company B; and (4) all direct and indirect interests in the licensee, with the exception of the limited partnership interest held by [AI], are held by United States citizens. If [AI]'s interest is adequately insulated, [AI] has a 16.2 percent interest in the licensee (45 percent x 45 percent x 80 percent). If [AI]'s interest is not adequately insulated, a multiplier is not used in calculating the limited partnership link and the 20.25 percent interest held by [AI] in the licensee (45 percent x 45 percent) is in excess of the statutory benchmark.¹⁵⁶

The FCC takes a similar approach for determining ownership and voting interests in limited partnerships controlling a licensee under Section 310(b)(4).¹⁵⁷

3. *Trusts.* The FCC recognizes the use of properly designed trusts to avoid attributable ownership for various purposes. Thus, trusts have been increasingly used to hold equity interests in FCC licensees.¹⁵⁸ Based on the Commission's

156. *Id.* at 522-23 n.51.

157. *Id.* at n.52.

158. *See Attribution Order*, 97 F.C.C.2d at 1024. The FCC has approved voting trust agreements where stock of a company that violates its multiple ownership rules is transferred to a trust. *See, e.g.*, Twentieth Holdings Corp., 4 F.C.C. Rcd. 4052, 66 Rad. Reg. 2d (P&F) 906 (1989) (Twentieth allowed to transfer stock of TV station to a trust in order to allow it to sell a prohibited newspaper holding); Lorimar Telepictures Corp., 3 F.C.C. Rcd. 6250 (1988) (transfer of stock of licensee corporation to a voting trust, which represented only about 4% of Lorimar, used to insure that the stations were not attributed to the beneficiaries of the trust). *See also Attribution Order*, 97 F.C.C.2d at 1023 (trust may be used to execute a multi-phase transaction that would otherwise violate the Commission's rules); Farmville Broadcasting Co., 47 F.C.C.2d 463 (1974) (voting trust designed to terminate upon the resignation of the trustor from his positions at other stations, thereby eliminating the multiple ownership problem). In addition, trusts are often used to effectuate hostile transfers of control. *See Tender Offers and Proxy Contests*, MM Docket No. 85-218, F.C.C. 86-67, 59 Rad. Reg.

general acceptance of the attribution rules as guidance for ownership issues under Section 310(b), it would appear that a trust might be used by an alien to hold capital stock investments exceeding the investment restrictions in Section 310(b). Since the language of Section 310(b) is limited to interests "owned of record," and the trustee of a trust is normally the owner of record of capital stock held in trust, an alien beneficiary would arguably be outside the reach of Section 310(b).¹⁵⁹ In addition, the legislative history of Section 310(b) suggests that stock purchased by an alien for investment purposes could be placed in a voting trust to avoid violating Section 310(b).¹⁶⁰

In *Banque de Paris*, the Commission approved the use of a trust for Section 310(b)(4) purposes to allow the Swiss branch of a French bank to hold approximately 38% of the stock of Columbia Pictures Corporation, the parent of several licensee radio and television stations.¹⁶¹ The stock was to be held in trust by United States Trust Company of New York, with an American citizen as trustee. In addition to reporting annually its ownership to the Commission, the bank was forbidden to acquire additional shares, seek control by itself, or in concert with, any other person, or to agree with any other party to vote the bank's stock in a certain manner.¹⁶²

2d (P&F) 1536 (released Mar. 17, 1986), *appeal dismissed sub nom.* Office of Communication of the United Church of Christ v. FCC, 826 F.2d 101 (D.C. Cir. 1987); CNCA Acquisition Corp., 3 F.C.C. Red. 6088 (1988); Application of Frank K. Mayers for JB Acquisition Corp., Subsidiary of Reliance Capital Group, File Nos. BTCTT-860606 LV, et al., F.C.C. 86-329 (released July 17, 1986); MacFadden Acquisition Corp., 104 F.C.C.2d 545 (1986); MacFadden Acquisition Corp., File Nos. BTC-860422K4, et al., F.C.C. 86-286 (released June 6, 1986), *aff'd*, F.C.C. 86-314 (released July 15, 1986); Application of Eugene McCarthy, Voting Trustee for JB Acquisition Corp., F.C.C. 86-337 (released July 30, 1986).

159. The phrase "owned of record" appears to have been added in response to licensees' concerns that they did not always know the ultimate owner or voter of stock, and therefore, should not be held to the prior standard under the 1927 Radio Act, Section 12(d), which had prohibited the granting of licenses to any corporation "of which more than one-fifth of the capital stock may be voted by aliens." *Hearings Before the Comm. on Interstate Commerce of the United States Senate on S. 2910*, 73d Cong., 2d Sess. 122-25 (1934) [hereinafter *Hearings on S. 2910*]. This change also reflected the intent that 310(b) "guard against actual control, and not the mere possibility of control." S. REP. NO. 781, 73d Cong., 2d Sess. 7 (1934).

160. *Hearings on S. 2910*, *supra* note 159, at 131.

Senator Lonergan: Are there some stockholders who are not residents who buy the stock merely for investment purposes?

Mr. Bern (President, International Telephone & Telegraph Corporation): Most of them do.

Senator Lonergan: They do not buy the stock for the purpose of having a voice in the management, do they?

Mr. Bern: No sir.

Senator Lonergan: Could not your problem be solved by creating a voting trust, insofar as stock ownership outside of the country is concerned?

Mr. Bern: We are perfectly willing to find a formula. The operating companies are quite clearly controlled by the existing Radio Act. If there were an emergency tomorrow the government could take over the property. There is no reason to create an upheaval in an international corporation of this sort.

Senator Lonergan: That was merely a suggestion.

161. *Banque de Paris*, 6 F.C.C.2d 418.

162. *Id.*

Twenty-two years after *Banque de Paris*, however, the FCC took a harder line on the use of a trust by an alien to avoid the restrictions of Section 310(b). In *PrimeMedia*, the FCC rejected the use of a trust for insulating alien interests that would otherwise violate Section 310(b)(3).¹⁶³ PrimeMedia Broadcasting, Inc. filed applications for three FM stations in which 50.1% of the voting stock of PrimeMedia was held by Metcalfe Trust. The two trustees of the Metcalfe Trust were United States citizens, but the beneficiary of the Metcalfe Trust was Mr. Jeremy Walker, a citizen of the United Kingdom. Also, PrimeMedia held a non-insulated, 75% limited partnership interest in a limited partnership filing for an FM station application for Raleigh, North Carolina.

The FCC's Mass Media Bureau dismissed all the PrimeMedia applications because it concluded that the Commission could not allow a license to be held in trust for the benefit of an alien, thus insulating a foreign national from the alien ownership restrictions contained in Section 310(b).¹⁶⁴ Although the Bureau recognized that the trustees would hold legal title and exercise legal control over the stock in the licensee corporation, it noted that "the alien would retain the equitable interest in the stock."¹⁶⁵ Relying on *Wilner & Scheiner*, the Bureau asserted that Congress sought to limit equity ownership in excess of the Section 310(b) benchmarks even if such interests may be noninfluential in nature.¹⁶⁶

In affirming the Bureau's decision, the Commission applied both a Section 310(b)(3) and 310(b)(4) analysis. The Section 310(b)(3) approach was applied to the three FM stations in which PrimeMedia would be the licensee. In terms of Section 310(b)(3), the Commission stated:

We do not believe that the legislative history or statutory language provided a clearly expressed legislative intent to exclude "capital stock" held in trust for the benefit of an alien owner from the limitations prescribed in Section 310(b). Therefore, such direct ownership interests in a broadcast licensee may not exceed the 20% benchmark set forth in Section 310(b)(3) regardless of the insulated structure of that ownership interest.¹⁶⁷

Because the Commission does not have express discretion under Section 310(b)(3) "to independently assess whether or not the grant of a license to a company in which an alien holds an ownership interest above 20% would result in undue influence or control,"¹⁶⁸ it declined to apply the "attribution standards

163. *PrimeMedia*, 3 F.C.C. Rcd. at 4293.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 4295.

168. *Id.* (citing *Wilner & Scheiner*, 103 F.C.C.2d at 517 n.33).

applicable to trusts in the multiple ownership and cross-ownership contexts.¹⁶⁹

Thus, regardless of whether an alien's equity interest would be held in trust, once the Commission determines that an alien directly holds beneficial interests in a licensee greater than 20%, its "inquiry [under 310(b)(3)] is at an end."¹⁷⁰

For purposes of Section 310(b)(4), however, the Commission found that it had discretion to apply the attribution rules to trusts.¹⁷¹ This was the situation in *Banque de Paris*.¹⁷² Accordingly, the FCC analyzed the limited partnership interest held by PrimeMedia in the Raleigh applicant to determine compliance under Section 310(b)(4). Since the PrimeMedia interests were not adequately insulated, a multiplier was not applied. Mr. Walker was therefore attributed with the full 75% limited partnership interest held by PrimeMedia in the Raleigh applicant because he owned more than 50% of PrimeMedia's capital stock.¹⁷³

Noting that the attributable 75% alien interest far exceeded the Section 310(b)(4) statutory benchmark of 25%, the Commission found that, under Section 310(b)(4), PrimeMedia's proposed ownership structure was not in the public interest.¹⁷⁴ In addition, the Commission observed that there were "at least nine other applicants" for the Raleigh station who had been found acceptable by the Commission.¹⁷⁵ "Given the diversity and number of currently competing [other] . . . applicants," none of which proposed "alien involvement in excess of the statutory benchmarks," the Commission said it could "find no public interest in allowing an applicant so far in excess of the statutory benchmark . . . to be added to [the] proceeding."¹⁷⁶

While a trust does not appear to offer any advantage for dealing with Section 310(b)(3), it may, as *Banque de Paris* demonstrates, be used to exceed the benchmark limits of 310(b)(4), provided the FCC approves the arrangement.

B. Debt Characterization under Section 310(b)

Under the Commission's attribution rules, debt and lease-back agreements do not "confer a cognizable interest in the holder."¹⁷⁷ This is because the Commission has found that "[t]here is no direct influence or control which pertains to them, and any indirect influence or control, if it occurred, would be too irregular and involve too many other factors for the Commission to oversee."¹⁷⁸ The Commission appears to take a similar position when characterizing debt under

169. *Id.* (citing 47 C.F.R. § 73.3555, Note 2(e) & § 76.501, Note 2(e)).

170. *Id.*

171. *Id.*

172. See *supra* notes 161-62 and accompanying text.

173. If a multiplier were applied, Mr. Walker's interest in the applicant would have been less than 50% ($75\% \times 50.1\% = 37.6\%$).

174. *PrimeMedia*, 3 F.C.C. Rcd. at 4295.

175. *Id.*

176. *Id.*

177. *Attribution Order*, 97 F.C.C.2d at 1022.

178. *Id.*

Section 310(b):

The statutory guidelines contained in Section 310(b) are specifically couched in terms of equity ownership and voting benchmarks. . . . [C]reditors do not possess either an ownership or voting interest over the licensee and consequently the direct restrictions embodied in Section 310(b) are not applicable to debt interests.¹⁷⁹

Even though the FCC does not normally consider debt holdings in calculating Section 310(b) benchmarks, the Commission does have the discretion to consider debt holdings for purposes of public interest findings under Section 310(b)(4).¹⁸⁰ In addition, the FCC has on many occasions considered debt in analyzing whether a licensee is subject to de facto alien control for purposes of Sections 310(b)(1) and 310(d). The de facto control test under Section 310(b) is the same for alien and domestic principals.¹⁸¹ The FCC especially scrutinizes a licensee's debt financing when the debt is a substantial part of the licensee's capitalization.¹⁸²

It is possible to envision instruments generally characterized as "debt" being reclassified by the Commission as equity instruments for purposes of Section 310(b).¹⁸³ For example, as discussed above,¹⁸⁴ contingent interests that appear likely to be exercised are more likely to be treated as equity interests or raise de facto control issues for purposes of Section 310(b) than interests not likely to be exercised.¹⁸⁵ Indeed, convertible notes or debentures that are likely to be converted are often considered equity holdings for tax purposes.¹⁸⁶

As discussed above,¹⁸⁷ the Commission considers stock ownership a conveyance of "specified voting or profit-sharing rights."¹⁸⁸ Courts have generally decided against characterizing an instrument as debt where interest rates are determined as a percentage of profits or contingent upon earnings.¹⁸⁹ The

179. *Wilner & Scheiner*, 103 F.C.C.2d at 519.

180. *Id.* at n.38 (citing *Datran II*, 52 F.C.C. Rcd. 439).

181. *Seven Hills 2* F.C.C. Rcd. at 6877, 6880.

182. See, e.g., *Channel 31*, 45 Rad. Reg. 2d (P&F) 420; *Miami 35*, MM Docket No. 85-27, File No. BPCT-870802KE; *Pan Pacific*, 3 F.C.C. Rcd. 6629 (vast sums for construction and operation of the station came from, or were obtained by, an alien with an interest in providing programming to the licensee). But see *supra* note 76; *Seven Hills*, 2 F.C.C. Rcd. at 6880 ("Lately, it seems evident, the Commission has been deemphasizing potential financial leverage as a key indicator of *de facto* control" even where such influence is significant); *KIST Corp.*, 102 F.C.C.2d at 290-92; *The O.T.R.H., Inc.*, F.C.C. 87I-097 (released Sept. 8, 1987) (third party program provider would provide funds to construct and operate station).

183. This was an issue raised, but not decided in *Datran III*.

184. See *supra* notes 114-20 and accompanying text.

185. See *Channel 31*, 45 Rad. Reg. 2d (P&F) 420.

186. 15 FEDERAL TAX COORDINATOR 2D (BNA) 32,444K, K-5714 (Rest. Inst. Am. Oct. 1988).

187. See *supra* note 98 and accompanying text.

188. *Transfers of Control of Certain Licensed Non-stock Entities*, 4 F.C.C. Rcd. 3403, 3409 n.7.

189. See, e.g., *Berkowitz v. United States*, 411 F.2d 818 (5th Cir. 1969); *Portage Plastics Co. v. United States*, 301 F. Supp. 684 (D.C. Wis. 1969), *aff'd on another issue*, 486 F.2d 632 (7th Cir. 1973).

convertible debenture at issue in *Spanish International* was sold to an alien and was later repurchased by the licensee with a guarantee that if the stock of the licensee were sold within five years, the alien would be entitled to 50% of the amount that would have been realized if the debenture had been converted into shares.¹⁹⁰ However, the FCC never reached the issue of whether this interest resulted in the alien holding an equity interest.

While the Commission reviews debt transactions closely for de facto control purposes, creditors are not without rights in protecting their investments. In *McCaw Cellular Communications, Inc.*,¹⁹¹ the Commission approved a long list of what it termed "investor protections."¹⁹² Relying on cases addressing lenders' investments, the Commission ruled that negative covenants which give a party (for example, minority shareholder or lender) the power to block certain major transactions of a company, such as the issuance of stock or sale of assets, do not by themselves constitute control under Section 310(b).¹⁹³ Of course, creditors can also take steps to force the sale of a station without effecting a transfer of control in violation of Section 310(b).¹⁹⁴

III. STRUCTURING TRANSACTIONS TO ACHIEVE SIGNIFICANT ALIEN INVESTMENT UNDER SECTIONS 310(B)(3) AND 310(B)(4)

This Section discusses two general approaches alien investors and U.S. communication companies could take to structure permissible alien investments under Section 310(b) with significant alien participation.¹⁹⁵

190. *Spanish International*, 4 F.C.C. Rcd. at 2153.

191. *McCaw Cellular*, 4 F.C.C. Rcd. 3784.

192. *Id.* at 3789. See also Section I, *supra*.

193. *Id.* (citing *News International*, 97 F.C.C.2d 349, 356 (1984); *Datran I*, 44 F.C.C.2d at 936-37; and *Flathead Valley Broadcasters*, 5 Rad. Reg. 2d (P&F) 74 (Rev. Bd. 1965)). The Commission noted that de facto control issues could be raised if the investor protections were combined with investor activity. *Id.* (citing *WHIZ, Inc.*, 36 F.C.C. 561 (1964)). See also *Datran II*, 52 F.C.C.2d at 440-41.

194. See, e.g., *Turner Communications Corp.*, 68 F.C.C.2d 559 (1978).

195. Of course, the easiest way for foreign investors to avoid Section 310(b) restrictions is to invest in communications companies not subject to Section 310(b), provided that the foreign investor is not acting as a representative of a foreign government, which cannot hold any radio station licenses under Section 310(a). In such cases, the foreign investor would be subject only to those regulations applicable to any investor, regardless of citizenship, including state and local regulations.

Communications properties not subject to Section 310(b) include, for example: (1) non-radio-telecommunications companies (i.e., carriers utilizing fiber optics); (2) cable television operators; (3) private microwave systems; and (4) separate satellite systems.

Cable Television. As noted previously, by virtue of a 1974 amendment to the Communications Act, microwave licenses used by cable television systems (CARS licenses) are not covered by Section 310(b). See *supra* note 7. Cable television systems not using CARS licenses have never been subject to Section 310(b). Recently, a bill that would include cable television systems under Section 310(b) was passed by the House. H.R. 5267, 101st Cong., 2d Sess. (1990). But, the bill did not pass the Senate. Similar legislation may be introduced in the future. Until Section 310(b) is amended, however, cable systems, including those holding CARS licenses, are open to unrestricted alien investment.

Private Microwave. In order to hold licenses set aside for private microwave carriers, an applicant must show that it meets the private carrier test set forth in *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.

First, the alien investor ("AI") could structure the investment to comply with the Section 310(b) capital stock limits, but include a number of "add-on" arrangements to maximize the alien's involvement.¹⁹⁶ The precise structure of the investment will depend upon the ultimate objective of the parties involved—that is, whether the objective of the investment is to maximize the amount of foreign capital which the licensee can obtain from one or more relatively "passive" alien investors, or whether the alien involved seeks to maximize the return on its investment and/or to obtain a more active role in the operation of the company. The AI need not obtain prior FCC approval of such an investment proposal but, in a close case, may choose to obtain a declaratory ruling from the FCC to ensure that the proposal complies with Section 310(b).

Second, the AI could seek a public interest finding from the FCC pursuant to Section 310(b)(4) to permit the AI to hold more than 25% of the capital stock of a company controlling a licensee.

1976). The court in *NARUC* specified that "a carrier will . . . be a [private] carrier [as opposed to a common carrier] where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." *Id.* at 641. Furthermore, private systems may be characterized by long term leases with users, specialized services tailored to the need of a specific user, etc. *Id.* at 642-43. See also Amendment of Part 94 of the Commission's Rules and Regulations to Authorize Private Carrier Systems in the Private Operational-Fixed Microwave Radio Service, 57 Rad. Reg. 2d (P&F) 1486, 1500 (1985). Capacity on private microwave systems may be shared with others on a non-profit cooperative basis and excess capacity may be leased for profit to other qualified private carriers. *Id.* at 1487, 1502. See also Public Service Company of Oklahoma, 3 F.C.C. Rcd. 2327 (1988) (FCC permitted leasing of excess capacity in hybrid fiber optic/microwave system pursuant to the carrier's private status).

Separate Satellite. In 1986, the FCC determined that private satellite systems separate from INTELSAT may be established to provide international communications services. These separate systems, being private, do not require common carrier licenses and therefore do not fall under Section 310(b). Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046 (1985), *recon.*, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon.*, 1 F.C.C. Rcd. 439 (1986). The FCC recently issued an opinion regarding foreign equity investment through significant limited partnership interests in a U.S.-authorized separate satellite system, indicating that so long as the station license remains in the control of the domestic licensee, the financing arrangement will not run afoul of Section 310(a) and alien ownership would not be an issue. *Orion Satellite Corporation*, F.C.C. 90-241 (released Aug. 6, 1990). A similar approach was proposed by Starsys, Inc. which sought to construct a low-earth orbit satellite system as a private carrier. Application of Starsys, Inc. for Authority to Construct a Low-Earth Orbit Communications Satellite to be Stationed in an Inclined Non-Geostationary Orbit, File No. 33-PSS-P-90(24) (F.C.C., filed May 4, 1990). North American CLS, Inc., a subsidiary of a French company, would hold 95% of the Starsys equity but elect only two of the five directors. The other 5% equity holder would elect three directors. Starsys argued that this structure is consistent with Section 310(b) because control (i.e., control of the board of directors) does not rest with a foreign corporation. If the Starsys licenses were classified as common carrier, as some challengers contend they should be (see, e.g., Reply of Orbital Communications Corporation, File No. 33-DSS-P-90(24) (F.C.C., dated Sept. 21, 1990)), then, of course, the equity in Starsys held by the French-controlled subsidiary would run afoul of Section 310(b).

196. This paper does not consider the possible income tax consequences of these various investment arrangements.

A. Structuring Investments To Fall Within Section 310(b) Limitations

1. *Maximizing Capital Stock Investment Under Section 310(b)*. If a prior FCC public interest finding for an investment plan exceeding the Section 310(b)(4) limitations is not obtained, the aggregate alien capital stock investment in a Section 310(b) company must remain within the Section 310(b) benchmarks. Under Section 310(b) capital stock benchmarks, the FCC permits aliens to hold, in companies subject to Section 310(b), interests equal to (1) 20% of each licensee, and (2) 25% of each U.S. holding company controlling the licensee, using the multiplier rules where appropriate to determine the size of the alien interest.¹⁹⁷ Thus, if an AI holds 20% of a licensee directly and another 25% of a holding company which owns the remaining 80% of the licensee, then AI effectively holds a 40% interest in the licensee.¹⁹⁸

To maximize foreign investment, it is also important to consider structuring transactions involving vertical ownership chains and/or multiple classes of stock in a manner that takes full advantage of the FCC's multiplier mechanism, especially where limited partnerships and non-voting stock can be made part of the ownership structure.¹⁹⁹

a. *Limited Partnership Interests*. The total amount of foreign capital available to a licensee or holding company of a licensee using a partnership structure under Section 310(b)(3) or (b)(4) can be maximized by utilizing insulated limited partnerships. As discussed in Section II, above, the FCC utilizes a multiplier for quantifying ownership interests held by insulated limited partners, even where the interest held is greater than 50%.²⁰⁰ As a result, use of an insulated limited partnership structure where a multilevel vertical chain of ownership exists can maximize the level of alien investment allowed for purposes of Section 310(b) calculations.

The following example illustrates how an entity, structured as a limited partnership and holding an interest in a licensee, can obtain greater amounts of foreign capital than an entity structured as a corporation. Assume that C, a U.S. holding company, controls a licensee, and U.S. citizens hold all other equity interests in the licensee.²⁰¹ D owns 30% of C, and AI or a number of different AIs owns 60% of D. If D is a corporation and the interests held by AI are common stock, the multiplier would not apply to AI's interest in D, which is greater than 50%. Thus, AI's interest would be treated as 100% interest. The level of alien investment in C is thus 30% (30% multiplied by 100%), which exceeds the Section 310(b)(4) threshold. Consequently, AI is limited to a 50%

197. See *supra* notes 9-21 and accompanying text.

198. The calculation is as follows: $(.80)(.25) + .20 = .40$ or 40%.

199. See *supra* notes 154-57, 103-04 and accompanying text.

200. As discussed above, a multiplier is not used in corporate vertical ownership chains where the ownership interest in capital stock is greater than 50%. See *supra* notes 19-20 and accompanying text.

201. Section 310(b)(4) is thus applicable.

interest in D in this scenario.

Now assume that D in the above example is a limited partnership, with AI, an alien limited partner (or group of various alien limited partners), holding a 60% limited partnership interest. Assuming also that this limited partner(s) is adequately insulated from the day-to-day operations of the licensee, the FCC would apply the multiplier. The alien ownership interest in C would be 30% multiplied by 60%, which yields an attributable alien ownership interest of 18% in C. In this example, AI could hold up to approximately 83% of D in the form of insulated limited partnership interests,²⁰² as compared to 50% of the capital stock when D is a corporation.²⁰³

b. Non-Voting Stock. Similar opportunities for maximizing the total amount of foreign capital invested in a holding company subject to Section 310(b)(4) exist where non-voting stock is issued in place of common voting stock.²⁰⁴ Again, where alien investors hold less than 100% of a corporation in the form of non-voting stock, this interest will be diluted through the use of the multiplier, thereby allowing greater levels of investment than would be the case if common stock were held.

2. *"Add-on" Arrangements to Maximize Alien Involvement.* "Add-on" arrangements are another way to maximize alien involvement beyond the Section 310(b) capital stock benchmarks. The choice of which "add-ons" to utilize in a particular transaction depends on the investment objective. Certain "add-ons," such as options and debt, are particularly attractive to a Section 310(b) company seeking to infuse foreign capital from "passive" alien investors.²⁰⁵ Other "add-ons," such as preferred dividends, investor protections, and management and turnkey arrangements, are especially appropriate for an alien entity wishing to maximize return on its investment and/or to obtain a more active role in the operation of the company.²⁰⁶

a. Debt. Where a licensee seeks additional funds, debt structures may be the simplest way of obtaining capital without Section 310(b) implications. As previously discussed,²⁰⁷ the FCC does not generally view debt agreements as ownership or voting interests. However, the FCC has considered debt in

202. The calculation is as follows: $30\% \times 83\% = 25\%$ (the benchmark under Section 310(b)(4)).

203. Under the FCC's current policy, the general partner in such a limited partnership may have contributed only 1% of the partnership's equity but can still be deemed to be in control. However, it is possible that the Commission may evaluate this situation differently in the future—that is, where the general partner has contributed only nominal equity and the alien limited partners have, in effect, financed the entire venture.

204. See *supra* notes 103-04 and accompanying text.

205. In this type of situation, the foreign capital may well come from numerous and diverse sources.

206. In this type of situation, all of the foreign investment in a given licensee or holding company is likely to come from the same or related sources.

207. See *supra* notes 177-94 and accompanying text.

analyzing whether a licensee is subject to de facto alien control for Section 310(b)(4) purposes, especially when the debt is a substantial part of the licensee's capitalization.²⁰⁸

Because conditional interests are not normally considered "capital stock," convertible debt may facilitate alien investment in Section 310(b) licensees at levels above the capital stock benchmarks.²⁰⁹ Certain measures, such as creditor protections, may be used to provide the AI with some measure of influence over the licensee while providing a degree of protection over his or her investment.²¹⁰ Ideally, the debt instrument should include an express provision that conversion of the debt is precluded where such conversion would result in alien ownership in excess of the Section 310(b) benchmarks.²¹¹ Where the AI already holds a significant interest in a licensee and participates in the management of the licensee in some capacity, it is wise to structure the debt without contingent interests to avoid raising de facto control issues.²¹²

b. Transferable Option on Remaining Stock. The AI could invest directly or indirectly in the licensee up to the Section 310(b) limits and obtain a transferable option for the remaining ownership interest of the licensee or a company holding the licensee at an additional price. Since the Commission generally does not view such an option as "capital stock" or as an indicator of de facto control,²¹³ it is likely that no public interest finding under Section 310(b)(4) would be required. Although this option could not be exercised by AI without a public interest finding, the option still could be transferred by the AI to an unrelated U.S. party at a later date.²¹⁴ This option would enable AI to take full advantage of a situation where the value of stock has risen considerably and would also provide the AI with an element of additional influence in the licensee's affairs.

c. "Put" Option. It may be possible to include a "put" option in all shares of capital stock owned by AI.²¹⁵ A "put" option conveys to its owner the right, but not the obligation, to sell an asset, including stock, at a predetermined price (or formula) until a certain date. Standing alone, this should not be considered

208. See *supra* note 182 and accompanying text.

209. See *supra* note 179 and accompanying text.

210. See *Minority Shareholders/Creditor Protections, infra* notes 255-59 and accompanying text.

211. See generally Sections I and II, *supra*.

212. See generally Sections I and II, *supra*.

213. See *supra* notes 110-16 and accompanying text.

214. The exercise of the option by the U.S. party would naturally have to be approved by the Commission if it results in a transfer of control under Section § 310(d). Approval should be forthcoming as a matter of course, however, because it would be a transfer of control from one U.S. entity to another, so long as AI and the U.S. party were not related by ownership or management.

215. While it may be possible to argue that a "put" represents an equity interest in the licensee, the FCC has generally not included such interests under the term "capital stock" for purposes of 310(b). See *supra* notes 110-16 and accompanying text, which discuss the definition of "capital stock" for these purposes.

a factor of "control" since the AI has only the negative alternative of decreasing its ownership interest.

Thus, the licensee or the holding company of a licensee could offer the AI, for an amount above the price of the stock, an option that would allow the AI to sell back its interest at any time at some predetermined price. This arrangement would allow a greater amount of foreign capital to be invested in the licensee or its holding company, while providing the AI with a certain degree of influence over the licensee's board of directors and increased liquidity.

d. Preferred Dividends. The licensee or its holding company could offer a separate class of stock to AIs, within the Section 310(b) benchmarks, which includes a preferred dividend feature. This arrangement would allow the AI to receive profits before, and possibly in amounts greater than, holders of other classes of stock. While this mechanism does not provide the AI with any greater control over the licensee, it allows the AI to recoup and benefit from its investment on a preferential basis, and an AI might be willing to pay some premium for such treatment.²¹⁶

This "add-on" is primarily a means of maximizing the alien's potential return and not a means of increasing the amount of foreign investment in a licensee. Preferred stock is, of course, included in the "capital stock" restrictions of Section 310(b).²¹⁷

e. Management, Traffic, Turnkey, and Other Agreements. Another alternative is for the AI to enter into certain management, traffic, or turnkey agreements with the licensee or its holding company in order to gain increased influence over, and profits from, the operations of the licensee. Through such agreements, the AI would also be assured of stability in the day-to-day operations of the licensee.

In the past, the Commission has approved management and traffic agreements where such agreements had limited effects on the licensee's operations and were the product of arm's length negotiations.²¹⁸ In a recent decision, *Licensee, Limited Partnership*,²¹⁹ the FCC found that Section 310(b)(4) was not violated where the foreign equity interests were within the statutory parameters and the licensee ("Licensee"), and the alien-controlled company, TMC, were to enter into

216. However, the increased amount paid in by the AI, if any, may be taken into account in calculating ownership interests because paid-in capital or equity contribution, as well as market value of stock, may be used to determine percentage of equity ownership. See *supra* notes 105-06 and accompanying text.

217. See *supra* note 99 and accompanying text.

218. See *infra* notes 221-35. See also Public Notice No. 1932, *Private Radio Bureau Reminds Licensees of Guidelines Concerning Operation of SMR Stations Under Management Contracts* (F.C.C., released Mar. 3, 1988) (a Specialized Mobile Radio ("SMR") licensee is permitted to hire another entity to manage its SMR system so long as the licensee does not contract away control of its system).

219. *Licensee*, 5 F.C.C. Rcd. 1673.

both management and traffic agreements ("Agreements").²²⁰

In its request to the Commission for a declaratory ruling, Licensee asserted that the Agreements were the result of arm's length negotiations and explained that, under the management agreement, Licensee would "make all operational decisions . . . particularly with respect to compliance with FCC rules and regulations."²²¹ TMC personnel would have "ministerial responsibilities for technical operation and maintenance . . . under the direction of Licensee."²²² The traffic agreement assured TMC of the right to lease from Licensee up to 90% of the total capacity of Licensee's microwave facilities.²²³

Apparently without requiring additional documentation or support, the FCC agreed that "[e]ach of these agreements is the product of arm's length negotiations and neither invests TMC with control over Licensee. There will be no participation by TMC in the management of Licensee's general business affairs."²²⁴ The Commission also noted that safeguards designed to prevent undue control by TMC over Licensee existed—either Licensee or TMC's ultimate corporate parent, a Swiss company, could terminate the Management Agreement without cause upon thirty days notice and TMC was prevented from modifying the facilities without written direction from Licensee.²²⁵

In addition, turnkey agreements have been approved by the Commission. In *Bloomington-Normal MSA Limited Partnership*,²²⁶ the FCC found that turnkey services provided to a licensee by an entity otherwise unqualified to hold an FCC license did not present a control problem so long as the "turnkey arrangements do not involve the [provider] company in the operation and management of [the licensed] systems."²²⁷ As long as a licensee's or its holding company's board of

220. *Id.* The Commission, in its decision, appears to have misstated the organizational structure of the companies involved in this case. The Licensee described TeleNetwork Holdings, a U.S. limited partnership, to be the general partner in Licensee, also a limited partnership, with a 99% interest. TMC, controlled by a Dutch company which in turn was wholly-owned by a Swiss company, was a 25% limited partner in TeleNetwork Holdings. The FCC, on the other hand, described TeleNetwork Holdings' interest in Licensee to be of a 75% general partner, with TMC being a 25% limited partner in Licensee. See *infra* notes 236-40 and accompanying text for additional discussion of this case, and the apparent consequences of the Commission's error.

221. Request for Declaratory Ruling at 8 (F.C.C., dated Sept. 26, 1989) (copy on file at California Western Law Review offices).

222. *Id.*

223. *Id.* at 9.

224. *Licensee*, 5 F.C.C. Rcd. at 1673.

225. *Id.*

226. *Bloomington-Normal MSA Limited Partnership*, 2 F.C.C. Rcd. 5427 (1987).

227. *Id.* at 5429. See also Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120, 1 F.C.C. Rcd. 3 (1986) ("Public Notice"). The FCC provided a checklist of factors to consider in determining whether a tentative transferee or selectee of a cellular license has retained control of and responsibility for its facility in the context of arrangements to obtain services from another company:

1. Does the licensee have unfettered use of all facilities and equipment?
2. Who controls daily operations?
3. Who determines and carries out policy decisions, including preparing and filing applications with the FCC?
4. Who is in charge of employment, supervision and dismissal of personnel?

directors retains the power to make all final management decisions, an AI would arguably not have de facto control of the licensee, and the turnkey agreement would pass FCC scrutiny.

Such agreements can, of course, go too far. In *STARS/TOPS*, for example, the Commission found that Satellite Transmission and Reception Specialist Company's ("STARS") planned assignment of licenses to Transmission Operator Provided Systems, Incorporated ("TOPS") did not in fact transfer control of the licenses to TOPS.²²⁸ In *STARS/TOPS*, STARS was wholly owned by Houston International Teleport ("HIT"), which had foreign ownership of 23.32% and less than 25% foreign membership on its board of directors. Because HIT needed immediate funds from foreign sources, STARS proposed to transfer its license and earth stations to TOPS, an entity created for this purpose, for one dollar in consideration. TOPS would not be corporately related to STARS or HIT. However, the Chief Executive Officer ("CEO") of STARS and HIT would also serve as TOPS' CEO, and, pursuant to the contract between STARS and TOPS, STARS would exercise substantial control over the operations of TOPS after the proposed assignment of licenses.

Under the proposed transaction, STARS would retain exclusive use of the facilities in question, and TOPS could not provide service to any other party without STARS' prior consent. STARS would be responsible for payment of TOPS' expenses including salaries of TOPS' personnel and charges by vendors and other third parties pertaining to the communications systems.²²⁹ The Commission concluded that, "[w]hen viewed in their totality, the circumstances of this case do not indicate that TOPS will have exclusive control of the earth stations."²³⁰

In *Channel 31*, as discussed above,²³¹ the assignee/licensee and its U.S. holding company ("USHC"), which had a 20% alien shareholder, entered into a long term contract whereby the assignee/licensee agreed to sell the bulk of its broadcast time to USHC.²³² The Commission found this agreement would allow USHC to be "very much involved in the activities" of the assignee/licensee and that this agreement, in combination with other significant factors,²³³ raised substantial questions pertaining to de facto control of the assignee/licensee.²³⁴ The FCC set the case for evidentiary hearing on these issues, but the application

5. Who is in charge of the payment of financing obligations, including expenses arising out of operations? and

6. Who receives monies and profits derived from the operation of the facilities?

Id.

228. *STARS/TOPS*, DA 90-927, slip op. ¶ 15 (F.C.C., released July 13, 1990).

229. *Id.* ¶ 13.

230. *Id.* ¶ 14.

231. See *supra* notes 131-46 and accompanying text.

232. *Channel 31*, 45 Rad. Reg. 2d (P&F) at 423.

233. *Id.* at 421-23. The alien shareholder would also furnish virtually all the funds for the acquisition of the licensee pursuant to a debenture convertible into over 87% of the company's stock.

234. *Id.* at 423.

was subsequently withdrawn. It is possible, however, that an agreement for sale of broadcast time on its face would be permissible.

The danger in utilizing such agreements arises when too many are used. A combination of comprehensive traffic, programming, production, or management services agreements, along with significant stock ownership, would likely alert the Commission to the possibility of de facto control problems.²³⁵

f. Separation of Assets. The separation of restricted assets (i.e., FCC radio licenses subject to Section 310(b)) from non-restricted assets is another possible approach that can increase foreign interests in a communications company. The restricted FCC licenses and, perhaps, the facilities essential to the operations of the licenses could be placed in an independent entity that would meet the FCC's foreign ownership restrictions. All non-license assets could be placed in a separate, unrelated entity. The AI could acquire a 100% ownership interest in the entity holding the non-restricted assets. The AI could also hold both 20% directly in the licensee entity and 25% in a holding company controlling the licensee.

This separation of assets approach was used in *Licensee*.²³⁶ Com Systems, whose majority shareholder was OmniCorp Holdings, a U.S. company ultimately owned by a Swiss company, intended to acquire TMC, which held certain FCC licenses and microwave facilities. In order to meet the requirements of Section 310(b)(4), TMC proposed to assign its licenses and facilities to Licensee, while transferring all voting stock to OmniCorp Holdings. Omnicorp Holdings would then transfer the TMC stock to Com Systems. The general partner of Licensee, holding a 99% interest, was TeleNetwork Holdings, a U.S. holding company. TMC was a 25% limited partner in TeleNetwork Holdings.²³⁷ After completion of the TMC/OmniCorp Holdings/Com Systems transaction, TMC would be partly foreign-owned through Com Systems' alien-owned majority shareholder, OmniCorp Holdings. While TMC was held by OmniCorp Holdings, however, TMC would be considered wholly foreign-owned, since OmniCorp Holdings is wholly owned by an alien corporation.²³⁸

235. See, e.g., *Telemundo, Inc. v. FCC*, 802 F.2d 513 (D.C. Cir. 1986) (In connection with a sale of the licensee to Television Broadcasting Corp. ("TBC"), affiliates of TBC's primary shareholder, an alien corporation, entered into five-year management, production and programming contracts with the licensee. The District of Columbia Circuit Court of Appeals upheld the Commission's conclusion that the cancellation of these contracts, along with a reduction in alien stock ownership in TBC reduced alien influence in the licensee's activities to an acceptable level. The court also noted, as the Commission had previously, that American citizens had been retained "to provide the management services that were the subject matter of the voided contracts." *Id.* at 515 (citing *Zaida Perez Vda. de Perez Perry, and Television Broadcasting Corp.*, F.C.C. 85-381, at 206 (F.C.C., released July 26, 1985)).

236. See *supra* notes 219-25 and accompanying text.

237. In its recitation of the facts, the Commission apparently misstated that TeleNetwork Holdings was a 75% general partner in Licensee.

238. Of the three stockholders (who were also officers and directors) of TeleNetwork Holdings' 75% general partner (TeleNetwork), all were principals of Com Systems and one was an officer of Omnicorp Holdings. However, the Commission did not appear to consider these interrelationships in its analysis.

Since Section 310(b)(4) permits a 25% alien ownership interest in a United States holding company controlling a licensee subsidiary, TeleNetwork Holdings would be in compliance with the Section 310(b)(4) alien ownership benchmarks as long as TMC did not increase its interest in TeleNetwork Holdings beyond 25%.²³⁹ As discussed above,²⁴⁰ the FCC found this arrangement to be satisfactory even with the inclusion of the Management and Traffic Agreements between TMC and Licensee, which seems to have given TMC significant influence in the operations of Licensee.

Where these types of arrangements are used, the FCC could still find the AI to be in de facto control of the new licensee subsidiary.²⁴¹ Such a finding may depend on whether the AI owns the facilities arguably essential for the new licensee subsidiary's operations, and whether the AI would be able to dictate the new licensee's policies regarding finances or personnel, or to control the licensee's management or method of operation.²⁴² In *STARS/TOPS*, for example, the Commission found that the transfer of the relevant licenses to TOPS for one dollar, in conjunction with the retention by STARS of exclusive use of the facilities and services, did not, in fact, divest STARS of control over the licensee.

Thus, it is clear that care must be taken to maintain a sufficient degree of independence in transactions involving the transfer of a license to a new entity or the separation of restricted and non-restricted assets. Although the Commission will allow significant involvement in the separate licensee's activities by other entities, such as in *Licensee*, *STARS/TOPS* shows the limits the Commission has drawn for compliance with both the letter and spirit of 310(b).

g. Staggered Board of Directors. The articles of incorporation of a licensee or its holding company, USHC, could provide for staggered terms for its directors. This provision would allow for the membership terms of the company's directors to expire in different years. Where a particular AI does not hold sufficient stock to elect favorable directors, this "add-on" ensures that such directors are more likely to remain on the board in the short term. However, this "add-on" will not provide significant protection in the long run because after over time, all of the original directors (presumably favorable to the AI) could be removed.

239. The Commission's apparently erroneous recitation of Licensee's ownership structure appears to permit Licensee to exceed the 310(b)(3) limitation of 20% alien interest in a licensee. Based upon the facts as stated, the Commission appears to be permitting an alien-controlled company, TMC (after the TMC/Omnnicorp Holdings/Com Systems transaction), to hold a 25% limited partnership interest in Licensee directly. However, the Commission has said repeatedly that it does not have the authority to waive Section 310(b)(3) restrictions, *see supra* note 21 and accompanying text, and apparently does not purport to do so in *Licensee*. In fact, the Commission concentrates on a 310(b)(4) analysis appropriate to the actual facts of the case rather than the recited facts; therefore, *Licensee* probably should not be relied upon for Section 310(b)(3) purposes.

240. *See supra* notes 224-25 and accompanying text.

241. *See, e.g., James F. Rill*, 60 Rad. Reg. 2d (P&F) 583 (de facto control exists where a minority shareholder has sufficient influence to "determine" the licensee's policies and operations, or "dominate" corporate affairs).

242. *See supra* notes 71-83 & 218-35 and accompanying text.

h. Minority Shareholder/Creditor Protections. To avoid raising Section 310(b)(3) and (b)(4) issues and the need for FCC approval, investment in FCC licensees or their holding companies could be limited to the permitted benchmarks while separate shareholder or purchase agreements are entered into to protect the investor's interest. Similar protections may also be used by creditors.

The Commission has held that covenants intended to protect a minority shareholder's investment do not necessarily amount to de facto control. However, extensive involvement in the day-to-day affairs of the company would likely be viewed as de facto control.²⁴³

In *McCaw*, as discussed above,²⁴⁴ British Telecom sought to acquire 22% of McCaw, a company whose wholly-owned subsidiaries held FCC licenses. While the proposed foreign ownership was well within the percentage limits prescribed by Section 310(b)(4), the FCC also considered whether the purchase constituted a transfer of control such that Section 310(d) would require FCC approval of the transaction.²⁴⁵ In particular, the Commission scrutinized the investor protections included in the purchase agreement between British Telecom and McCaw. These protections included a requirement that British Telecom, as a minority shareholder, must approve the issuance of any new equity or the sale of the assets of the company.²⁴⁶ British Telecom also had the right to approve or block any changes in the company's by-laws.²⁴⁷ In addition, British Telecom's right to approve any changes in the company's lines of business was considered not to equal control because approval could not be unreasonably denied.²⁴⁸ The FCC has implied, however, that approval over day-to-day operations, or financial or personnel policies of the company may constitute de facto control.²⁴⁹

3. *Additional Safeguards to Prevent a Finding of De Facto Control.* The Commission may look more favorably upon the use of "add-ons" in an investment arrangement if safeguards designed to ensure compliance with Sections 310(b)(3) and (b)(4) are also included. Such safeguards could include: (1) redemption procedures or call provisions allowing the company to buy back shares of stock from aliens as necessary to keep the percentage of alien investment within permitted guidelines; and (2) regular surveys to determine the

243. See *McCaw Cellular*, 4 F.C.C. Red. at 3789.

244. See *supra* notes 80-83 and accompanying text.

245. Under Section 310(b)(4), the FCC looks first at the specified investment and director/officer limitations and then makes a de facto control determination. See Section I, *supra*. *McCaw Cellular* does not distinguish, however, between review of control for Section 310(b)(4) purposes and review for Section 310(d) transfer of control purposes.

246. *McCaw Cellular*, 4 F.C.C. Red. at 3785.

247. *Id.* at 3787.

248. *Id.* at 3790.

249. *Id.* at 3789-90.

citizenship of shareholders.²⁵⁰ The AI should also explicitly agree not to hold more than a statutorily permissible interest in the company (20% for Section 310(b)(3) and 25% for Section 310(b)(4)) without prior Commission approval. Conditioning the exercise of any options or convertible debentures upon FCC approval and/or compliance with Section 310(b) is also recommended. The Commission may even require such a condition if it is not already included in the proposed arrangement.²⁵¹

Most importantly, a "paper trail" should be left to document that the AI does not have de facto control. The AI should also refrain from utilizing too many "add-ons" because multiple "add-ons" would increase the chance of the FCC raising de facto control issues.

These safeguards, used in combination with the mechanisms described above, should provide the AI greater protection of its investment and ensure the Commission of compliance with Sections 310(b)(3) and (b)(4).

B. Seeking An FCC Public Interest Finding To Exceed Section 310(b)(4) Limits

The AI could also exceed Section 310(b)(4) benchmarks by requesting FCC approval to hold more than 25% of a company controlling a licensee, or to place over 25% alien directors or any one or more alien officers with the company. The FCC may exercise its discretion to allow such an arrangement if it is in the public interest.²⁵² Based on past cases and general policy considerations, an AI's chances for FCC approval should improve if the AI can show as many of the following as possible:

- (1) The company has limited sources for financial support.²⁵³
- (2) It would be against the public interest for the company to become insolvent (e.g., the company offers newer, more technologically advanced services or serves customers ignored by other providers).²⁵⁴
- (3) The license in question is passive, such as a common carrier license, rather than active, as with a broadcast license (i.e., the alien would be involved in the transmission of information only and have no control over the content of the transmission).²⁵⁵
- (4) The alien(s) involved are from a country with a long history of friendly relations (e.g., Canada) and fair trade with the U.S.²⁵⁶
- (5) The transaction is structured to keep many U.S. citizens involved in the company's operations, thus preserving jobs in the U.S.²⁵⁷

250. *Id.* at 3787. See also *Farragut Television Corp.*, 4 Rad. Reg. 2d (P&F) 350 (1965).

251. *Datran II*, 52 F.C.C.2d at 441.

252. See Section I.D., *supra*.

253. See *supra* notes 57-59 and accompanying text.

254. See *supra* note 59 and accompanying text.

255. See *supra* note 53 and accompanying text.

256. See *supra* notes 51 & 61 and accompanying text.

257. See *supra* notes 56-57 and accompanying text.

- (6) The documents governing the transaction provide reassurances to the FCC that the alien(s) are not controlling the company. These reassurances include provisions that the FCC will have an opportunity to pre-approve any further changes in the corporate structure and that alien(s) will not take more than a specified percentage of stock.²⁵⁸
- (7) Equity over 310(b)(4)'s benchmark is held in a properly insulated, irrevocable trust. The trustee is a U.S. citizen and the AI is merely the beneficiary.²⁵⁹

CONCLUSION

Section 310(b) of the Communications Act was designed to limit foreign involvement with certain types of FCC licenses. In today's world, severely restricting foreign investment and participation in such licenses could significantly impair the efforts of United States communications companies to keep pace with new technologies and the increasing globalization of the industry. This would greatly endanger the United States' competitive position worldwide.

The proposals made in this Article are designed to comply with both the letter and spirit of Section 310(b) while maximizing foreign investment and participation. Structuring transactions consistent with these proposals reconciles the intent of Section 310(b) with the growing need to allow alien investment.

258. See *supra* notes 55 & 119-20 and accompanying text.

259. See *supra* notes 158-76 and accompanying text.