

UPDATE

February 22, 2022

FCC Acts to Prohibit Certain Types of Arrangements Between MDUs and MVPDs

On February 15, 2022, the FCC released a [Report and Order and Declaratory Ruling](#) in an attempt to promote tenant choice and competition in the provision of communication services to multiple tenant environments (“MTEs,” but also known as multiple dwelling units, or “MDUs”).

The FCC took three specific steps. First, in the Report and Order, the FCC adopted rules that will prohibit telecommunication carriers and multichannel video programming distributors (“MVPDs”) from entering into exclusive revenue sharing agreements and graduated revenue sharing agreements with an MTE owner. Second, the FCC also adopted rules requiring telecommunication carriers and MVPDs to disclose the existence of exclusive marketing arrangements to MTE tenants. Finally, in the Declaratory Ruling, the FCC clarified that its rules prohibit sale-and-leased inside wiring arrangements.

These actions will cover all new MTE/MDU agreements and will prohibit enforcement of existing exclusive or graduated revenue sharing agreements on a going forward basis. **All MVPDs serving MTEs and MDUs should review their existing agreements.**

Background. Congress and the FCC have long recognized the need to promote competition and access to telecommunications, cable and broadband services in MTEs. Both the 1992 Cable Act and 1996 Telecommunications Act directed the FCC to promote competition between telecommunications carriers as well as prohibit certain practices by MVPDs.

Accordingly, the FCC has prohibited agreements between providers of certain communications services and MTE owners that grant the provider exclusive access and rights to provide service to the MTE. In 2000 and 2008, the FCC prohibited telecommunications carriers from entering into or enforcing exclusivity contracts with MTE owners in both commercial and residential MTEs. And in 2007, the FCC prohibited certain MVPDs from entering into or enforcing exclusivity contracts with residential MTE owners.

Nonetheless, the FCC has declined to prohibit MVPDs from entering into exclusive marketing arrangements, and in response to competitive concerns by other providers, the FCC further examined the MTE service industry in a 2017 Notice of Inquiry and 2019 Notice of Proposed Rulemaking. Last summer, President Biden released an executive order encouraging the FCC to further examine the issues raised in these proceedings.

Prohibition of Revenue Sharing Agreements. The new rules prohibit two specific forms of revenue sharing arrangements. First, telecommunication carriers and MVPDs may no longer enter into – or enforce – exclusive revenue sharing agreements with MTE owners. Second, telecommunications carriers and MVPDs may no longer enter into – or enforce – graduated revenue sharing arrangements with MTE owners (arrangements where an MTE owner receives a higher percentage of revenue as the provider serves a larger number of tenants).

Effective Dates. The rules prohibiting both types of revenue sharing agreements apply to new contracts and existing arrangements, but the effective dates are different. The prohibition on entering into new contracts will take effect 30 days after the order is published in the *Federal Register* and the prohibition on enforcing existing arrangements will take effect 180 days after publication.

Disclosure of Exclusive Marketing Arrangements. The FCC's new rules require telecommunications carriers and MVPDs to disclose the existence of an exclusive marketing arrangement to MTE tenants on all written marketing material directed at tenants or prospective tenants.

Required Disclosure. Telecommunications carriers and MVPDs with an exclusive marketing arrangement must inform tenants that the provider has the right to exclusively market its communications services to tenants in the building, that such a right does not mean that the provider is the only entity that can provide such services to tenants in the building, and that service from an alternative provider may be available. This disclosure must:

- Be included on all printed or electronic written marketing material directed at tenants or prospective tenants of the MTE;
- Identify the existence of the exclusive marketing arrangement and include a plain-language description of the arrangement and what it means; and
- Be made in a manner that it is clear, conspicuous and legible.

Written Marketing Material. "Written marketing material" includes electronic or print material. Written marketing material is "directed at" a tenant or prospective tenant if it:

- Contains specific mention of the MTE;
- Is provided directly to the tenant or prospective tenant because of its relationship (or prospective relationship) to the MTE, regardless of the means by which it is provided (including, but not limited to, being sent via email, regular mail, mailbox insert, or door hanger); or
- Given to a third party, including the MTE owner, with the understanding it will be directed at tenants or prospective tenants of the MTE.

Written marketing material does not, however, include general-purpose marketing material that incidentally reaches tenants or prospective tenants of the MTE (e.g., general area media or online advertising, website promotions).

Effective Dates. The rules requiring disclosure of exclusive marketing arrangements apply to both new arrangements and existing agreements, but the effective dates are different. For new arrangements, the disclosure requirement will become effective after the Office of Management and Budget ("OMB") approves the requirement. Disclosure of existing exclusive marketing agreements will take effect the later of OMB approval or 180 days after the FCC order is published in the *Federal Register*.

Ban on Sale and Leaseback of Cable Inside Wiring. In the Declaratory Ruling, the FCC clarified that its rules prohibit sale-and-leaseback arrangements. Existing FCC rules have long governed the disposition of cable wiring, both cable home wiring (wiring inside an MTE resident's unit) and home run wiring (wiring that runs from a common space to an MTE

resident's unit). Generally, the rules require MVPDs, after termination of service, to either remove the wiring, abandon and not disable the wiring, or sell it to another party.

Sale-and-leaseback arrangements, as defined by the FCC, are when an incumbent provider conveys its inside wiring – typically both home and home run wiring – to a residential MTE owner and then leases it back on an exclusive basis. To the FCC, this allows incumbent providers to maintain existing subscriber relationships in furtherance of a practice that is inconsistent with the requirements of the FCC's cable inside wiring rules.

Effective Date. The ban on sale-and-leaseback arrangements applies to any arrangements entered into since the FCC initiated the current proceeding in June 2017.

If you have any questions regarding exclusive marketing agreements, revenue sharing agreements, the cable inside wiring rules or any other MDU-related questions, please contact Bruce Beard at (314) 394-1535 or bbeard@cinnamonmueller.com or Scott Friedman at (314) 462-9000 or sfriedman@cinnamonmueller.com.

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