

FCC Seeks to Refresh the Record on Collecting Equal Employment Opportunity Data From Broadcasters

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On July 26, 2021, the Federal Communications Commission (FCC or Commission) released a Further Notice of Proposed Rulemaking (FNPRM) seeking to refresh the record on the collection of equal employment opportunity (EEO) data on FCC Form 395-B. Comments are due 30 days from publication in the Federal Register and reply comments are due 60 days from publication in the Federal Register.

Form 395-B requires broadcasters to provide, on an annual basis, information about the racial and gender makeup of a station's full-time employees by job category. The FCC is statutorily required to maintain this form under the Communications Act of 1934, as amended (the Act). In 2001, however, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) suspended the requirement for broadcasters to file Form 395-B. Although the Commission revised both its rules and Form 395-B in 2004, the requirement that broadcasters submit the form remains suspended because of confidentiality concerns related to the employment data.

In the FNPRM, the Commission seeks additional input about whether employee data reported by broadcasters on Forms 395-B can or should remain confidential and/or whether this data should be kept on a non-station-attributable basis. Specifically, the FNPRM seeks comment on the following seven key areas:

- **Recent Developments in Public Disclosures of Employment Data:** When the D.C. Circuit vacated certain data collection rules, it was based on how the Commission *used* employment data to assess EEO compliance. The court did not address

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whether Form 395-B itself is unconstitutional. As a result, the Commission seeks to better understand how to balance the prior D.C. Circuit rulings with the statutory obligation under Section 334 of the Act to collect EEO data. In particular, the Commission seeks comment on whether there have been any developments in the public disclosure of employment data. This includes information about whether broadcast licensees make station-attributed employment data available to the public themselves or through third parties, despite the suspension of the FCC's reporting requirements.

- **Appropriate Uses of Employment Data:** The Commission seeks recommendations on additional steps it should take to ensure that the employment data is used only for the purposes of analyzing industry trends and making reports to Congress. The Commission also asked commenters to address whether there are other appropriate purposes for the data that the FCC should consider and what the public interest benefits are for making the data publicly available.
- **Employment Data Confidentiality:** The Act requires Multichannel Video Programming Distributors (MVPDs) to make their employment reports available for inspection at their facilities. In the FNPRM, the Commission seeks comment on whether it should harmonize the treatment of broadcaster employment data with the treatment of MVPD employment data by requiring broadcasters to make Form 395-B publicly available as well. The Commission also seeks comment on collection mechanisms it could use to remove or separate employment data from any identifying information if the Commission were to collect and maintain broadcaster EEO data confidentially.
- **Implementation Issues:** Similarly, the Commission seeks comment on how it should contact licensees with problems with submitted data and conduct Form 395-B compliance audits if it were to adopt a completely anonymous filing methodology. The Commission requests comment on other implementation issues that could arise with anonymous filing, including technical items that should be addressed to ensure that submitted employment data cannot be linked to the individual licensee who filed the data by Commission staff or others.
- **Statutory Language:** The Commission seeks comment on whether possible changes to the collection of EEO data is consistent with Section 334(a) of the Act. The Commission also requests input on how to interpret the term "pertinent employment data" and whether this should be read in the context of data as related to the administration and enforcement of EEO regulations. Because the Commission no longer uses station-specific employment data in the context of license renewal applications or compliance with the Commission's EEO rules, there is an open question whether station-specific data is necessary to carry out the Commission's statutory obligations.
- **Racial Classifications:** The Commission seeks comment on whether to harmonize the racial classifications on Form 395-B with the EEOC's current EEO-1 form.
- **Additional Legislative Requirements:** The Commission seeks to refresh the record on the applicability of the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) and whether the Commission or one of its subordinate offices or bureaus could qualify as a federal "statistical agency or unit" as contemplated by CIPSEA and related Office of Management and Budget directives. The Commission also requests input on whether the Foundations for Evidence Based Policymaking Act of 2018 requires the Commission to publish data it collects in an open format when there is no statutory

exemption prohibiting the disclosure of the information and the applicability of the Freedom of Information Act to Form 395-B data.

If you have any questions about proposed changes to the EEO data collection rules or are interested in filing comments, please contact the Wiley attorney who regularly handles your FCC matters or one of the attorneys listed on this alert.

Kelly Laughlin, a Law Clerk at Wiley Rein LLP, contributed to this alert.