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After More than 20-Year Hiatus, Divided FCC Reinstates Annual EEO Form 395-B Reporting Requirement; Rejects Broadcaster Calls for Confidentiality

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As we wrote last week, the FCC recently adopted a [Report and Order](#) (the "Order") by a 3-2 margin formally reinstating the requirement for broadcasters with five or more full-time employees to annually file EEO Form 395-B. Despite broadcasters' requests for confidentiality, the Form 395-B for each station employment unit will be available to the public via the Commission's website. In the Order, the FCC claims that making the information public will "ensure maximum accuracy of the submitted data, is consistent with Congress's goal to maximize the utility of the data an agency collects for the benefit of the public, allows [the FCC] to produce the most useful reports possible for the benefit of Congress and the public, and allows for third-party testing of the accuracy of [its] data analyses."

Most broadcasters with five or more full-time employees will be required to file the report annually, on or before September 30, after the Order takes effect.

Background

Since the 1970s the Commission has administered regulations governing the equal employment opportunity obligations of broadcasters and multi-channel video providers ("MVPDs"). As part of those regulations, from approximately 1970 to 2001 the FCC required broadcasters to regularly file EEO Form 395-B, which collects data regarding the race, ethnicity, and gender composition of broadcaster employment units. However, the FCC suspended the collection of that data in 2001 in response to two decisions by the United States Court of Appeals for the D.C. Circuit, which together found constitutional issues with both the FCC's EEO regulations then in effect and the FCC's use of the data reported on Form 395-B.

First, in *Lutheran Church-Missouri Synod v. FCC*, the D.C. Circuit held that the FCC's then-current EEO regulations unconstitutionally required "stations to grant some degree of preference to minorities in hiring" because the FCC would expressly consider the proportional diversity of a station's employment unit in determining whether to audit or penalize the station. Further, the D.C. Circuit held that "the risk lies not only in attracting the Commission's attention, but also that of third parties," given that a purported lack of proportional employment diversity could "often" be "the impetus . . . for the filing of a petition to deny, which in turn triggers intense EEO review."

The FCC adopted new EEO regulations in response to the Synod decision, including by terminating its then-current practice of using EEO Form 395-B data to screen license renewal applications and assess licensee EEO compliance. However, the FCC's new regulations were again quickly challenged in the D.C. Circuit in *MD/DC/DE Broadcasters Association v. FCC*. There, the D.C. Circuit again held that the FCC's EEO rules unconstitutionally placed "official pressure on [broadcasters] to favor minorities in the hiring process." In particular, under the EEO rules then in effect the FCC allowed broadcasters to satisfy the EEO "outreach" requirements either by performing a sufficient number of recruitment initiatives / menu options (as broadcasters do today), or by reporting the race, sex, and referral source for each job applicant so that the Commission could determine whether the licensee reported a sufficient number of women and minorities to confirm that vacancy "notifications are reaching the entire community." If a broadcaster reported "few or no" applications from women or minorities, the FCC "promised to investigate" the broadcaster. The D.C. Circuit held this to be unconstitutional, declaring that the FCC's rules were "evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them."

In response to the foregoing federal court decisions, the FCC ultimately adopted several new EEO Rules, including those under which broadcasters currently operate, such as the requirements to recruit for all full-time job openings, provide notice of job vacancies to recruitment organizations that request notification, undertake additional measures designed to promote “broad and inclusive outreach,” and refrain from discrimination in employment practices. The rules were designed to dictate process rather than outcomes, be “race and gender neutral,” and not “pressure employers to favor anyone on the basis of race, ethnicity, or gender.” With those goals in mind, in 2004 the FCC also readopted the requirement for broadcasters to annually file Form 395-B; however, the FCC suspended the newly readopted filing until lingering issues could be resolved regarding the data collection, including whether such data should or could be treated as confidential.

Fast forward to 2021, when the FCC—within several months of FCC Chair Rosenworcel assuming her leadership position—issued a Further Notice of Proposed Rulemaking seeking comment on various issues related to the Form 395-B filing requirement, including how to address the lingering confidentiality concerns. NAB and others within the industry, including all State Broadcaster Associations, filed comments in the proceeding arguing, among other things, that making Form 395-B data public could result in third parties and/or the government pressuring stations to engage in preferential hiring practices. After the comment window closed, the proceeding then lay dormant for multiple years under an evenly divided FCC. However, the September 2023 appointment of current fifth Commissioner, Anna Gomez, ultimately paved the way for the FCC to reinstate the Form.

The Order

Due to the complexities inherent in reinstating a long-dormant filing requirement, as well as the history of legal turmoil surrounding the Commission’s EEO rules, the Order is fairly long. Below, this memo summarizes some of the Order’s most important aspects.

What are my current obligations regarding Form 395-B? All five Commissioners agreed to the most fundamental aspect of the Order—the reinstatement of the Form as a required annual filing for station employment units with five or more full-time employees. However, the Form must undergo minor revisions and additional regulatory approval before annual filings can commence. Consequently, it is not yet known whether broadcasters will be required to file a Form 395-B in 2024. We will be monitoring the status of the proceeding and will let stations know if a filing is required in 2024.

When will annual Form 395-B filings be due? Once the new rules take effect, the Form will be due annually, by September 30. The Order indicates that the Media Bureau will issue a Public Notice in advance of the first filing deadline to “provide broadcasters ample time to put into place whatever data collection processes they require, including, for example, the development of employee surveys and instructions for employees regarding which job classification to report.”

What data must be reported in Form 395-B filings? Generally speaking, broadcasters will need to report employees’ race, gender, ethnicity, and job categories (as selected from among ten various job categories). Although the Order indicates that the Form will undergo revisions to include non-binary gender options, the data broadcasters must report are generally summarized in the current version of the Form, available here: <https://omb.report/icr/202004-3060-047/doc/100723701>.

Once the new rules take effect, for the first report, broadcasters will be permitted to report the foregoing data from any payroll period in July, August, or September of the relevant year. Going forward, however, broadcasters must continue to report using the same payroll period in each subsequent year.

Where/How will the filing be made? Although the Order specifies that the Form 395-B will be filed “electronically,” the Order does not provide any further guidance on how the filing will be accomplished. Presumably, this filing information will be part of the Media Bureau’s forthcoming Public Notice containing “instructions about how to submit the filings, prior to the first filing after the Order becomes effective.”

Will the FCC be able to use the data stations report against them? The Order states multiple times that the FCC will use each station’s Form 395-B only “for purposes of analyzing industry trends and making reports to Congress.” In response to advocacy from the State Broadcast Associations, the Order also strengthens the FCC’s current rule statement to this effect, which going forward will state that:

Data concerning the gender, race and ethnicity of a broadcast station's workforce collected in the [Form 395-B] will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee's or permittee's compliance with the nondiscrimination or equal employment opportunity requirements of Section 73.2080.

Moreover, in the Order the FCC commits to "quickly and summarily dismiss any petition, complaint, or other filing submitted by a third party to the Commission based on Form 395-B employment data." The Order further encourages broadcasters to report to the FCC "any evidence that a third party has misused or attempted to misuse Form 395-B employment data."

Will the FCC keep stations' Form 395-B reports confidential? No. According to the Order's 3-2 majority, each station's Form "will be accessible to the public via the Commission's website." Again according to the Order, making the data publicly available: (1) will increase the likelihood that "erroneous data" will be discovered by third parties and corrected; (2) "is consistent with Congress's goal to maximize the utility of the data an agency collects for the benefit of the public"; (3) will allow the FCC the freedom to analyze and publish the data without having to worry about inadvertently disclosing "identifiable information"; and (4) will allow third-parties to meaningfully review and question FCC analyses conducted with the data.

Notably, this particular aspect of the Order drew vigorous dissents from Commissioners Carr and Simington, with both arguing that the FCC's decision to make the data publicly available amounts to yet another unconstitutional FCC pressure on broadcaster hiring in the vein of the D.C. Circuit's prior decisions in *Synod and MD/DC/DE Broadcasters Associations*.

What happens next? As noted above, the Order directs the Media Bureau to issue a future Public Notice announcing the effective date of the filing requirements, as well as the availability of the revised version of the Form and instructions regarding how to submit the first filing. In the meantime, given the prior legal challenges surrounding the EEO Form 395-B and the strong dissents to the Order by Commissioners Carr and Simington, lawsuits may be filed against the Order. (The underlying FCC proceeding will also continue; at the same time the FCC issued the Order, it also released a Second Further Notice of Proposed Rulemaking proposing to reinstate the collection of similar information from MVPDs.)

Thus, we will continue to monitor these issues and provide updates when warranted.

If you have any questions or need additional information about this matter, please contact the OAB FCC Hotline at 888-705-0678.

Legal bulletin provided by Brooks, Pierce, McLendon, Humphrey & Leonard, LLP.

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