

ALERT

FCC Restarts Collection of EEO Workforce Data on Form 395-B

February 28, 2024

As anyone who has shopped for jeans recently can appreciate, sometimes what's old is new again. Indeed, some of us wish we had not been quite so hasty in Marie Kondo-ing our closets now that '90s-style jeans are making a comeback. Also back in (regulatory) style after a 20-year hiatus is EEO Form 395-B. In a Fourth Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking released on February 22, 2024, the Federal Communications Commission (FCC or Commission) reinstated commercial and non-commercial television and radio broadcasters' obligation to annually report workforce composition data, including the gender, race, and ethnicity of their employees.

Although the Order becomes effective 30 days after publication in the Federal Register, broadcasters will not be required to file reports until after the information collection requirements contained in Form 395-B are approved by Office of Management and Budget and the Media Bureau announces a filing window. Once effective, broadcasters must submit Form 395-B by September 30 each year. The Order is expected to be challenged in court, however, which could further delay the effectiveness of the requirement.

In the Second FNPRM, the FCC seeks comment on its decision to reinstate similar reporting obligations for multichannel video programming distributors (MVPDs) through FCC Form 395-A. Comments will be due 30 days after publication in the Federal Register. Reply comments will be due 45 days thereafter.

Background

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The FCC has administered regulations for broadcasters' EEO responsibilities for over 50 years. In 1992, Congress affirmed the Commission's historical practice of collecting workforce composition data annually through Form 395-B. In 2001, however, the collection of this data was suspended following decisions by the U.S. Court of Appeals for the District of Columbia Circuit vacating aspects of the FCC's EEO rules. On July 26, 2021, the Commission released a Further Notice of Proposed Rulemaking to refresh the record on the collection and public disclosure of Form 395-B data.

This Order responds to the 2004 State Associations' petition for reconsideration of the Third Report and Order and Fourth NPRM. The State Associations' petition made three requests: (1) revise Section 73.3612 to clarify that the Commission will not use Form 395-B data for compliance or enforcement purposes; (2) address confidential treatment for Form 395-B; and (3) release a Fourth Report and Order to resolve issues raised in previous orders during the proceeding. The FCC largely granted the State Associations' first request and denied its second request. The Commission notes that the remaining issues raised by the petition are unrelated to the Form 395-B filing requirement and therefore deferred action on those requests as they are outside of the scope of this proceeding.

What Does the Order Mean for Broadcasters?

The Order reinstates the requirement that all television and radio broadcasters with five or more full-time employees file Form 395-B annually. Form 395-B collects data concerning employees' gender, race, and ethnicity. New for collection requirement imposed by the Order will be a mechanism on the form to account for broadcast employees who identify as gender non-binary. Each station's Form 395-B will be available to the public via their online public inspection files (OPIFs).

The Commission states that it will use the data it collects to analyze industry trends and submit reports to Congress only. Notably, the Order revises Section 73.3612 of the agency's rules to include in the text of the rule itself (rather than as a note) that "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."

Second FNPRM: Refreshing the Record on Form 395-A

In the Second FNPRM, the FCC seeks to refresh the record on the statutorily mandated annual collection of workforce data from multichannel video programming distributors (MVPDs) on Form 395-A. Consistent with the approach it adopted for broadcasters, the Commission proposes to reinstate the collection of Form 395-A and make Form 395-A data available for public review. It commits to not use the reported data in evaluating compliance with the Commission's EEO rules.

Because the Commission had not previously refreshed the record for MVPDs, it now seeks comment on the following proposals:

- **Place Form 395-A in the FCC's Online Public Inspection File (OPIF):** The FCC invites comment on its proposal to make Form 395-A data publicly available online through MVPDs' OPIFs, rather than housing

the information at the MVPDs' central offices.

- **Safeguard Against Using 395-A Data to Measure Individual Licensees' Compliance:** The Commission requests comment on its proposal to modify its rules to ensure that Form 395-A data will not be used in relation to individual MVPDs' compliance with nondiscrimination or equal employment opportunity requirements.
- **Define Form 395-A Parameters:** The FCC seeks comment on Form 395-A's proposed scope requiring that "each employment unit with six or more full-time employees shall file an annual employment report on the FCC Form 395-A" by September 30. Like its sister form, Form 395-A would collect data on employees' gender, race, and ethnicity.

Commissioner Reaction and Looking Ahead

The Order, approved by a 3-2 vote, includes strong dissents from Commissioners Simington and Carr. Commissioner Simington explained that he would have voted to approve the Order if the FCC collected and aggregated de-identified Form 395-B data, or if the data were privately viewed by the Commission to aid in policy decisions. Similarly, Commissioner Carr noted that he would have voted for the Order if Form 395-B consisted of non-public or non-station-identifiable data. Commissioner Carr opined that the Commission's conclusion to publish Form 395-B data creates a "compelled disclosure that runs afoul of the First Amendment." The data collection requirements in Form 395-B are expected to be challenged in court.

If you have questions, please contact one of the attorneys listed on this alert or the Wiley attorney who routinely handles your FCC matters.