July 30, 2021

Legal Memorandum

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FCC Releases Further Notice of Proposed Rulemaking Regarding

EEO Form 395-B Data Collection

As forecast by prior statements from interim FCC [Chairwoman Rosenworcel](https://docs.fcc.gov/public/attachments/FCC-19-10A5.pdf) and [Commissioner Starks](https://docs.fcc.gov/public/attachments/FCC-19-10A6.pdf), the FCC has issued a [Further Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/FCC-21-88A1.pdf) (the “Further Notice”) intended to “refresh the record” on the FCC’s currently unutilized EEO Form 395-B. The 395-B is intended to gather workforce diversity composition data from broadcasters on an annual basis; however, the FCC’s collection of the Form has been suspended for approximately 20 years in light of several federal court decisions and lingering issues regarding the confidentiality of the employment data submitted on the Form. The Further Notice aims to refresh the record regarding the long-dormant Form, including any legal, logistical, and technical issues that would prevent the FCC from again requiring broadcasters (and others) annually to complete and submit the Form.

*Background.* For more than 50 years the Commission has administered regulations governing the equal employment opportunity obligations of broadcasters and multi-channel video providers (“MVPDs”), including by prohibiting employment discrimination on the basis of race, color, religion, national origin, age, or sex, and requiring broadcasters and MVPDs to provide equal employment opportunities. As part of those regulations, from approximately 1970 to 2001 the FCC regularly collected data regarding the race and gender composition of broadcaster employment units via the FCC’s [EEO Form 395-B](https://transition.fcc.gov/Forms/Form395B/395b.pdf). However, the FCC suspended the collection of the Form 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 collected on the Form 395-B.

 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 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, albeit with a caveat in the rules “stating that the data collected would be used exclusively for the purpose of compiling industry employment trends and making reports to Congress, and not to assess any aspect of a broadcaster’s or MVPD’s compliance with the EEO rules.” The FCC temporarily suspended the newly readopted filing until lingering issues could be resolved regarding the data collected on the Form, including whether such data should or could be treated as confidential. As of this writing, those lingering issues remain unresolved and, therefore, the Form 395-B filing requirement remains suspended.

*What the Further Notice Proposes.* Although the Further Notice does not expressly propose “unfreezing” the current suspension on Form 395-B filings, separate accompanying statements by interim Chairwoman Rosenworcel and Commissioner Geofferey Starks make clear that at least half of the current Commissioners are in favor of unfreezing the filing requirement. As a precursor to likely doing so, however, the Further Notice seeks comment on multiple outstanding issues related to the filing, which nonexclusively include the following:

* Whether employee data reported by broadcast licensees on Form 395-B can or should be kept confidential and/or on a non-station-attributable basis;
* Whether circumstances or legal precedent have changed in the approximately 20 years during which the Form 395-B filing requirement has been suspended such that there now exist new, innovative, or different suggestions for collecting and handling employment information on Form 395-B;
* If the Form 395-B is to be filed on a non-attributable basis, whether and how the Commission could contact the filing licensee if there are problems with the data and/or conduct audits of compliance with the Form 395-B annual filing requirement; and
* Whether, given the passage of time, the racial classifications reflected on the FCC Form 395-B are no longer entirely consistent with the classifications employed by the current EEO-1 form.

Comments on the Further Notice will be due within 30 days of the date on which it is published in the *Federal Register*. Reply comments will be due within 60 days of such publication. As of this writing, the Further Notice has not yet been published.

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FCC Likely to Consider Minor Political File Rule Changes

at August Open Meeting

As first officially stated in an [announcement](https://docs.fcc.gov/public/attachments/DOC-374108A1.pdf) by acting FCC Chairwoman Rosenworcel, the FCC is likely to consider minor political file rule changes at its forthcoming August 5, 2021, open meeting. As of this writing, the Media Bureau has issued a [Public Notice](https://docs.fcc.gov/public/attachments/DA-21-835A1.pdf) opening a new docket captioned “*Revisions to Political Programming and Record-Keeping Rules*,” and the FCC has released a tentative draft of a corresponding [Notice of Proposed Rulemaking](https://docs.fcc.gov/public/attachments/DOC-374112A1.pdf) (the “Notice”). Based on the current draft of the Notice, it appears that the primary items the FCC is likely to address are minor updates to: (1) the list of indicia bearing on whether someone is or is not a “legally qualified candidate” for public office, and thus is or is not entitled to the various benefits and protections of the political programming rules; and (2) the FCC’s political file recordkeeping rules, to conform them to the pre-existing statutory political file recordkeeping rules for so-called third-party issue advertisements.

*Background.* As broadcasters are all too well aware, various statutory and FCC rules govern many of the specifics related to requests to purchase political advertising time, particularly when those requests are either (1) made by or on behalf of a “legally qualified candidate” or (2) communicate a message relating to “any political matter of national importance.” Those political broadcasting rules have been in the spotlight for the last several years—particularly those relating to broadcasters’ political file recordkeeping obligations—as the full Commission has issued several Orders “clarifying” aspects of the rules and as the Media Bureau has entered into consent decrees with broadcasters both large and small for what the Bureau has viewed to be deficient political file recordkeeping compliance.

Among the various political broadcasting rules, three are of particular relevance to the draft Notice. The first relates to the records broadcasters must maintain regarding requests for advertising time by a third-party (i.e., by someone other than a legally qualified candidate or their authorized campaign committee) that communicate a message relating to any political matter of national importance, including a legally qualified candidate; any election to Federal office; or a national legislative issue of public importance. By statute, broadcasters must maintain political file records of the following categories of information for such national third-party “issue ads”: whether the request to purchase broadcast time is accepted or rejected by the station; the rate charged for the broadcast time; the date and time on which the advertisement is aired; the class of time that is purchased; all political matter of national importance to which the advertisement refers; and the name of the person or entity purchasing the time, including the name, address, and phone number of a contact person for such purchaser and a list of the chief executive officers or members of the executive committee or of the board of directors of such purchaser.

The next two rules implicated by the draft Notice hinge on whether an individual requesting to “use” the station’s facilities (e.g., either by placing an ad or otherwise making a positive appearance on the station) is a “legally qualified candidate for public office.” Generally speaking, a candidate is “legally qualified” if he or she (1) has publicly announced his or her candidacy for the office, (2) has qualified for a place on the ballot or has made a “substantial showing” of genuine candidacy, and (3) is qualified under the applicable federal, state, or local law to hold the office (if elected). The person seeking the legal benefits created by the political broadcasting laws bears the burden of establishing that he or she is a legally qualified candidate.

Once a candidate is “legally qualified,” various political advertising rules kick in, including the “equal opportunities” and “lowest unit charge” requirements. As to the former, although many nuances can arise when applying the “equal opportunities” requirement, at an extremely high level the rule requires stations that have permitted a legally qualified candidate to “use” the station’s facilities, upon timely request, to provide equal time to an opposing candidate for the same office. For example, if a station decides during a general election to sell 30 minutes of “prime time” to legally qualified candidate “Sylvia” for Governor, then the station must, if timely demand is made, sell 30 minutes of prime time to “Lakshmi” and “Michelle” if they are also legally qualified candidates for Governor.

As for the “lowest unit charge” requirement, during the 45-day period preceding the date of a primary or primary run-off election and during the 60-day period preceding the date of a general or special election, a broadcaster may not charge a “legally qualified” candidate any more than the station’s “lowest unit charge” for the same class and amount of time for the same time period.

*What the Tentative Notice Would Propose.* As noted above—if adopted—the draft Notice would propose modest changes to the Commission’s rules regarding what evidence may demonstrate a “substantial showing” of genuine candidacy sufficient to classify someone as a “legally qualified candidate,” as well as broadcasters’ recordkeeping responsibilities for national third-party issue ads.

 Currently, the Commission’s rules define “substantial showing” of bona fide candidacy as follows: “evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning,” including “making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters.” The draft Notice would propose to update that definition by adding to the list of activities that may constitute evidence of a “substantial showing” of bona fide candidacy: (1) the use of social media and (2) creation of a campaign website. As currently drafted, the Notice would tentatively make clear that social media presence is insufficient—standing alone—to constitute a “substantial showing.” However, the Notice seeks comment on that tentative conclusion, as well as whether other activities, such as digital marketing and advertising, should be added to the list of recognized campaign activities.

 As to the required records to be kept for national issue ads, fundamentally the Notice would simply harmonize the Commission’s rules with broadcasters’ pre-existing statutory obligations, which were adopted in 2002. Put differently, the records broadcasters are required to keep for national third-party issue ads would not change under the Notice’s proposal as currently drafted; instead, the FCC’s rules would merely be modified to restate the same obligation to which broadcasters are already subject under federal congressional command. The draft Notice would seek comment on that seemingly ministerial change.

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FCC Identifies Additional C-Band Earth Station Antennas Believed to Be Inactive; Requires Response from Registrants by October 21, 2021

According to a recent [Public Notice](https://docs.fcc.gov/public/attachments/DA-21-893A1.pdf) (the “Notice”) by the FCC’s International Bureau, additional incumbent earth station antennas (e.g., qualifying broadcaster C-band downlink dishes) have recently been identified by the C-band Relocation Coordinator (RSM US LLP) as potentially “inactive.” The International Bureau has generated a [list](https://docs.fcc.gov/public/attachments/DA-21-893A2.xlsx) of such earth stations, and is requiring any earth station operator who appears on the list to take one of the following actions: either (1) in the case of earth station antennas that are correctly identified as “inactive,” submit a filing with the FCC to remove the identified antenna from its current registration (or surrender the registration entirely, if appropriate); or (2) in the case of any earth station antenna that is incorrectly identified as “inactive,” submit a filing in the FCC’s IB Docket No. 20-205 affirming the antenna’s continued operational status and the registrant’s intent to participate in the C‑band transition. Any such filing of continued operational status must be submitted **by October 21, 2021, or the antenna appearing on the “inactive” list will have its authorization automatically terminated, lose its incumbent status and right to interference protection, and be rendered ineligible for reimbursement as part of the C-band transition.**

Given the significant potential practical and economic implications of failing to file a notice of continued operational status by the October 21, 2021, deadline, we strongly encourage you to consult the list (available for download as the “appendix” here: <https://www.fcc.gov/document/ib-identifies-inactive-c-band-incumbent-earth-station-antennas>) to ensure that your earth station does not appear as “inactive” and to take timely action to resolve the issue if it does appear as “inactive.”

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Comment Deadlines Extended for Record Refresh in

2018 Quadrennial Review

 The Media Bureau has extended by approximately one month the comment and reply comment deadlines in the FCC’s efforts to see a “refresh” of the record in its 2018 Quadrennial Review proceeding. According to a recent [Public Notice](https://docs.fcc.gov/public/attachments/DA-21-851A1.pdf), broadcasters (and all other interested parties) now have until September 2, 2021 (rather than the prior deadline of August 2, 2021), to file comments, and until October 1, 2021 (rather than the prior deadline of August 30, 2021), to file reply comments in the proceeding. The extension comes after a request by multiple parties for “additional time to address the many complex economic and legal issues through research, updates to previously filed material, and new information.”

 As a reminder, in the Quadrennial Review the FCC is looking at whether the Local Radio Ownership Rule, the Local Television Ownership Rule, and the Dual Network Rule remain “necessary in the public interest as a result of competition.” The Commission is supposed to evaluate those Rules every four years to ensure that they continue to serve core policy goals of competition, localism, and diversity. The initial comment period on the 2018 Quadrennial Review closed in May 2019; the extended comment deadlines for the “record refresh” provide broadcasters with additional time to submit into the record information, experience, and advocacy in light of the more than two years that have passed since the original comment period closed in the proceeding.

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As August 11, 2021, National EAS Test Date Approaches, FCC Issues Enforcement Advisory Targeting EAS Alert Accessibility

 A recent FCC [Enforcement Advisory](https://docs.fcc.gov/public/attachments/DA-21-857A1.pdf) reminds all Emergency Alert System (“EAS”) Participants—including broadcasters—that the FCC’s rules require that all EAS alerts be made visually and aurally accessible.

 In brief, the following requirements apply to the visual presentation of EAS alerts on broadcast television:

(1) The visual message portion of an EAS alert, whether video crawl or block text, must be displayed:

(i) At the top of the television screen or where it will not interfere with other visual messages;

(ii) In a manner (i.e., font size, color, contrast, location, and speed) that is readily readable and understandable;

(iii) In a manner that does not contain overlapping lines of EAS text or extend beyond the viewable display (except for video crawls that intentionally scroll on and off the screen); and

(iv) In full at least once during any EAS message.

The Enforcement Advisory provides further gloss on the above requirements, including that text must scroll at a speed that allows the viewer to read and understand the message and have sufficient contrast with the background to allow for readability. By way of example, the Enforcement Advisory notes that, “to the extent possible, the crawl speed should allow viewers to read the crawl as if they were going to read it aloud,” and that the colors green and red should “be avoided” because viewers who are color blind have difficulty seeing those colors.

 For all audio EAS messages (including those on broadcast television and radio), the EAS message must air in full at least once, and the text should be spoken at a pace that allows for a listener to understand the content. Put differently, the text of the alert should be delivered via audio in a manner and cadence that is sufficient for consumers who do not have hearing loss to readily comprehend it.

 The Enforcement Advisory also “encourages” the following actions to enhance the accessibility of the emergency information contained in EAS alerts:

• Include a scroll in RWTs (required weekly tests). The FCC’s rules do not require that EAS Participants include a scroll or other visual component during RWTs. However, the FCC observed that including a scroll in weekly tests informs all viewers, including persons with disabilities, that the station is conducting a test and reminds viewers of the EAS system.

• Ensure that all components of EAS tests and alerts are accessible and complete. The Enforcement Advisory goes so far as to suggest that EAS Participants partner with accessibility groups that can serve in an advisory capacity regarding accessibility. (Broadcasters may wish to consult with their communications counsel before making such an entreaty to a consumer accessibility group.) Review tests and alerts to ensure accuracy—e.g., EAS text messages should not interfere with closed captions, unless the text crawl is on the top of the screen.

• Monitor your state EAS plan and follow specific guidance regarding that plan. State EAS plans often have additional guidance that can further enhance EAS tests and alerts.

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*Tim Nelson, Editor*

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Mark J. Prak
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Coe W. Ramsey
Stephen Hartzell

Julia C. Ambrose

Elizabeth E. Spainhour

J. Benjamin Davis

Timothy G. Nelson

Patrick Cross

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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