

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's Broadcast and Cable)	MB Docket No. 98-204
Equal Employment Opportunity Rules and Policies)	
)	

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 23, 2021

Released: July 26, 2021

Comment Date: (30 days after date of publication in the Federal Register)

Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission: Acting Chairwoman Rosenworcel and Commissioner Starks issuing separate statements.

I. INTRODUCTION

1. By this Further Notice of Proposed Rulemaking (Further Notice), we seek to refresh the existing record regarding the statutorily mandated collection of data on the FCC Form 395-B,¹ as contemplated by the Communications Act of 1934, as amended (Act).² This employment report form is intended to gather workforce composition data from broadcasters on an annual basis but the form and data have not been collected for many years. The filing of the form was suspended in 2001 in the wake of a decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacating certain aspects of the Commission's Equal Employment Opportunity (EEO) requirements.³ While the Commission in 2004 adopted revised regulations regarding the filing of Form 395-B and updated the form, the requirement that broadcasters once again submit the form to the Commission was suspended until issues were resolved regarding confidentiality of the employment data.⁴ To date, those issues remain unresolved, and the filing of Form 395-B remains suspended. Accordingly, by this Further Notice, we seek to refresh the record regarding the collection of broadcaster workforce composition data and obtain further input on the legal, logistical, and technical issues surrounding FCC Form 395-B.

¹ Form 395-B, the broadcast station Annual Employment Report, can be found at <https://transition.fcc.gov/Forms/Form395B/395b.pdf>.

² 47 U.S.C. §§ 334(a).

³ See *Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements*, Memorandum Opinion and Order, 16 FCC Rcd 2872 (2001) (*Suspension Order*). In this order, the Commission suspended the Equal Employment Opportunity outreach program requirements applicable to both broadcast licensees and MVPDs, which included the requirement that broadcasters and MVPDs file a Form 395-B and 395-A, respectively, with the Commission on an annual basis.

⁴ See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Procedures*, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, 9978, para. 13 (2004) (*Third Report and Order* or *Fourth NPRM*), *pet. for recon. pending*; see also, 47 CFR §§ 73.3612, 76.1802.

II. BACKGROUND

2. The Commission has administered regulations governing the EEO responsibilities of broadcast licensees since 1969,⁵ and of cable operators since 1972.⁶ The Commission's EEO rules prohibit employment discrimination on the basis of race, color, religion, national origin, age, or sex, and require broadcasters and MVPDs to provide equal employment opportunities.⁷ In addition to the broad EEO protections applicable to all full-power radio and television broadcasters, licensees including Low Power and Class A television stations and multichannel video programming distributors (MVPDs) of a specific size must also adhere to EEO program requirements.⁸ Specifically, the Commission's rules require that each broadcast station that is part of an employment unit of five or more full-time employees, and each MVPD employment unit with six or more full-time employees establish, maintain, and carry out a positive continuing program to ensure equal opportunity and nondiscrimination in employment policies and practice.⁹

3. The Commission has also historically collected data from broadcasters and MVPDs about their workforce composition based on race and gender categories.¹⁰ After finding that, among other things, "increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media,"¹¹ Congress established a statutory requirement for the Commission to maintain its existing EEO regulations and forms as applied to television stations, which included its

⁵ See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Employment Practices*, Docket No. 18244, Rm 1144, Report and Order, 18 FCC 2d 240 (1969).

⁶ See *Amendment of the Commission's Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Systems to Show Nondiscrimination in Their Employment Practices*, Docket No. 19246, Report and Order, 34 FCC 2d 186 (1972).

⁷ 47 CFR §§ 73.2080(a); 76.73(a).

⁸ *Id.* §§ 73.2080(a); 76.73; 76.75(i). Permittees and licensees of Low Power FM are not subject to the EEO program requirements of this rule section. See *id.* § 73.801.

⁹ *Id.* §§ 73.2080; 76.75. Among other things, EEO recruitment rules require an employment unit to use recruitment sources for each full-time vacancy that, in its reasonable and good faith judgment, are sufficient to widely disseminate information about the job opening. *Id.* §§ 73.2080(c)(1)(i); 76.75(b)(1)(i). Broadcasters and MVPDs must use a three-pronged approach to ensure broad outreach regarding employment opportunities: 1) widely disseminate information concerning each full time (30 hours or more) job vacancy, except for a vacancy filled in exigent circumstances, 2) provide vacancy notices to recruiting organizations that request them, and 3) depending upon size of the unit and market in which it operates, complete two or four of the longer-term recruitment initiatives enumerated in the rule within either a two-year period, for broadcast stations, or a one-year period, for MVPDs. *Id.* §§ 73.2080(c); 76.75(b). In 2017, in response to a broadcaster petition that received wide support from the industry, the Commission updated its EEO policy to allow online job postings to be used as a sole means by which to advertise a vacancy to satisfy the "wide dissemination" prong of the recruitment rules. See *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirement*, MB Docket No. 16-410, Declaratory Ruling, 32 FCC Rcd 3685 (2017) (*Internet Recruiting Declaratory Ruling*).

¹⁰ 47 U.S.C. §§ 334(a), 554(a) and (h).

¹¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 § 22, 106 Stat. 1460 (1992) (*1992 Cable Act*).

collection of workforce composition data from television broadcasters.¹² In addition, Congress revised the requirement that cable operators report employment data, first established in the 1984 Cable Act,¹³ to include additional job categories and extended the requirement to include MVPDs.¹⁴

4. Section 334(a) of the Communications Act of 1934, as amended (the Act), states that “except as specifically provided in this section, the Commission shall not revise (1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.”¹⁵ Section 334(c) authorizes the Commission to make only “nonsubstantive technical or clerical revisions” to the regulations described in Section 334(a) “as necessary to reflect changes in technology, terminology, or Commission organization.”¹⁶ Thus, the Commission has previously concluded that it is directed by statute to require the submission of such employee data from television broadcast licensees.¹⁷ The Commission regularly collected this data from 1970¹⁸ until 2001 when the Commission suspended filing of Form 395-B in response to two D.C. Circuit decisions regarding the unconstitutionality of the Commission’s use of data collected on the Form 395-B to assess compliance with EEO requirements, although the collection of data itself has never been held facially invalid on constitutional grounds.¹⁹

5. Specifically, in *Lutheran Church-Missouri Synod v. FCC (Lutheran Church)*, the D.C. Circuit reversed and remanded a Commission finding—based on rules that required comparison of the race and sex of each applicant and person hired with the overall availability of minorities in the relevant labor force—that Lutheran Church had failed to make adequate efforts to recruit minorities.²⁰ The court concluded that use of broadcaster employee data to assess EEO compliance in the context of license renewal pressured broadcasters to engage in race-conscious hiring in violation of the equal protection

¹² *Id.* § 22(f), codified as 47 U.S.C. § 334(a). Congress thus expressly ratified and codified the Commission’s existing EEO rules for television broadcasters, including the collection of employee data. See *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket No. 98-204, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, 24030-35, paras. 31-40 (2002) (*Second Report and Order and Third NPRM*), *pets. for recon. pending*. While Section 334 did not codify the Commission’s previously existing EEO requirements for radio broadcast licensees, the Commission has found that Congress ratified the Commission’s authority to promulgate EEO rules for radio as well as television licensees. *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies; Termination of EEO Streamlining Proceeding*, MM Docket Nos. 98-204, 96-16, Notice of Proposed Rulemaking, 13 FCC Rcd 23004, 23014-15, para. 28 (1998) (*1998 NPRM*).

¹³ See Cable Communications Policy Act of 1984, Pub. L. No. 98–549, Section 1 *et. seq.*, 98 Stat. 2779 (1984) (*1984 Cable Act*).

¹⁴ *1992 Cable Act* § 22(c), codified as 47 U.S.C. § 554(d); see also *Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992 - Equal Employment Opportunities*, MM Docket 92-261, Notice of Proposed Rule Making, 8 FCC Rcd 266 (1993).

¹⁵ 47 U.S.C. § 334(a).

¹⁶ *Id.* § 334(c).

¹⁷ See *1998 NPRM*, 13 FCC Rcd at 23023, para. 49 (citing Section 334(a)(2) as mandating the collection of employment data from TV stations).

¹⁸ *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, Docket No. 18244, RM 1144, Report and Order, 23 FCC 2d 430 (1970) (adopting Form 395).

¹⁹ See *Suspension Order*, 16 FCC Rcd at 2872. While the Commission suspended collection of employee data from both MVPDs (Form 395-A) and broadcasters (Form 395-B), the D.C. Circuit opinions discussed in the following paragraphs concerned only EEO requirements for broadcasters.

²⁰ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 347-48 (D.C. Cir. 1998) (*Lutheran Church*), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. 1998).

component of the Due Process Clause of the Fifth Amendment of the Constitution.²¹ In reaching this conclusion, the court applied strict constitutional scrutiny applicable to racial classifications imposed by the federal government and determined that the Commission's stated purpose of furthering programming diversity was not compelling and its broadcast EEO rules were not narrowly tailored to further that interest.²² The court made clear that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated."²³

6. On remand, the Commission crafted new EEO rules requiring that broadcast licensees undertake an outreach program to foster equal employment opportunities in the broadcasting industry.²⁴ The Commission also reinstated the requirement that broadcasters file employee data on Form 395-B with the Commission annually.²⁵ In adopting these revised rules and reinstating the collection of workforce data, the Commission stated that:

The Commission will no longer use the employment profile data in the annual employment reports in screening renewal applications or assessing compliance with EEO program requirements. The Commission will use this information only to monitor industry employment trends and report to Congress.²⁶

On reconsideration, the Commission explained that it "disagree[d] with [the] contention that the collection of employment data might result in raced-based hiring decisions."²⁷ The Commission also explained that it "will summarily dismiss any petition filed by a third party based on Form 395-B employment data" and it "will not use this data as a basis for conducting audits or inquiries."²⁸ The Commission also codified the following Note to Section 73.3612 of its Rules (which requires the collection of employment data from broadcasters):

Data concerning the gender, race and ethnicity of a broadcast station's workforce collected in the annual employment report 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 compliance with the equal employment opportunity requirements of § 73.2080.²⁹

7. In *MD/DC/DE Broadcasters Association v. FCC*, several state broadcaster associations challenged the revised EEO outreach rules, which had allowed broadcasters the flexibility to choose between two options designed to foster employment opportunities in the industry. Specifically, the

²¹ *Lutheran Church*, 141 F.3d at 349-56.

²² *Id.* at 350-351, citing *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995). The Court stated that it also could not uphold the Commission's action under rational basis scrutiny, which requires only that a regulation have a substantial relation to the government interest it furthers. *Lutheran Church*, 141 F.3d at 356.

²³ *Lutheran Church*, 141 F.3d at 351. In response to the Commission's rehearing petition, the D.C. Circuit reiterated that it had not held that a regulation "encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny." 154 F.3d at 492.

²⁴ See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket Nos. 98-204, 96-16, Report and Order, 15 FCC Rcd 2329 (2000) (*First Report and Order*).

²⁵ *Id.* at 2332, para. 6.

²⁶ *Id.*

²⁷ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket Nos. 98-204, Memorandum Opinion and Order, 15 FCC Rcd 22548, 22559, para. 37 (2000) (*2000 Reconsideration Order*).

²⁸ *Id.* at 22559, para. 39.

²⁹ *Id.* at 22560, para. 40 ("Since we are legally obligated to comply with our own rules, this should put to rest the concerns of even the wariest broadcaster.") (citations omitted).

revised EEO outreach rules consisted of Option A, which required licensees to undertake four approved recruitment initiatives in a two-year period without reporting the race and sex of each job applicant, or Option B, which allowed broadcasters to design their own outreach programs but required reporting of the race and sex of each applicant.³⁰ The D.C. Circuit again applied strict judicial scrutiny and found that Option B violated the equal protection component of the Due Process Clause of the Fifth Amendment because, by examining the number of women and minorities in the applicant pool and then investigating any broadcaster with “few or no” women or minority applicants, the Commission “pressured” broadcasters to focus resources on recruiting women and minorities.³¹ The court further found that racial data about job applicants were not probative on the question of a broadcaster’s efforts to achieve broad outreach or “narrowly tailored to further the Commission’s stated goal of non-discrimination in the broadcast industry.”³² Because the court found that Option B was not severable from the rest of the rules, it vacated them in their entirety.³³ Following this decision, on January 31, 2001, the Commission suspended the requirement for broadcasters and MVPDs to file employee data on Forms 395-B and 395-A, respectively, and thus no workforce composition data has been collected in over twenty years.³⁴

8. On November 20, 2002, the Commission released its *Second Report and Order and Third NPRM*, establishing new EEO rules requiring broadcast licensees and MVPDs to recruit for all full-time job openings,³⁵ provide notice of job vacancies to recruitment organizations that request notification,³⁶ undertake additional outreach measures, such as job fairs and scholarship programs,³⁷ and refrain from discrimination in employment practices.³⁸ The Commission eliminated the former Option B, which had linked the outreach requirement to data regarding the race and sex of each applicant. The Commission explained that its new EEO rules were “race and gender neutral” and “will not pressure employers to favor anyone on the basis of race, ethnicity, or gender.”³⁹ The Commission deferred action on issues relating to the annual employment report forms, in part because it needed to incorporate new standards for classifying data on race and ethnicity adopted by the Office of Management and Budget (OMB) in 1997.⁴⁰ The Commission also explained that the annual employment report is “unrelated to the implementation and enforcement of our EEO program” and “data concerning the entity’s workforce is no longer pertinent to the administration of our EEO outreach requirements.”⁴¹

9. On June 4, 2004, the Commission released its *Third Report and Order and Fourth Notice of Proposed Rulemaking* reinstating the requirement for broadcasters and MVPDs to report employee data

³⁰ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 17 (2001) (*MD/DC/DE Broadcasters*), *pet. for reh’g denied.*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002).

³¹ *MD/DC/DE Broadcasters*, 236 F.3d at 18-21. The court found the rule was not narrowly tailored because investigations were not predicated on a finding of past discrimination or reasonable expectation of future discrimination. *Id.* at 21-22.

³² *Id.* at 22.

³³ *Id.* at 23.

³⁴ *Suspension Order*, 16 FCC Rcd at 2872.

³⁵ *Second Report and Order and Third NPRM*, 17 FCC Rcd at 24043-53, paras. 72-105.

³⁶ *Id.* at 24053-55, paras. 106-112.

³⁷ *Id.* at 24055-56, paras. 113-117.

³⁸ *Id.* at 24035-36, para. 46.

³⁹ *Id.* at 24074, para. 180.

⁴⁰ *Id.* at 24024-25, 24074, paras. 17, 180. The Commission’s decision in January 2001 to suspend the filing of Forms 395-B and 395-A remained in effect at the time of the *Second Report and Order*.

⁴¹ *Second Report and Order and Third NPRM*, 17 FCC Rcd at 24068, para. 159 and 24073, para. 173.

on Forms 395-B and 395-A, respectively.⁴² The Commission re-adopted the Note to Section 73.3612 that it previously adopted in 2000 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.⁴³ Although the Commission stated that it does not "believe that the filing of annual employment reports will unconstitutionally pressure entities to adopt racial or gender preferences in hiring,"⁴⁴ it acknowledged the concerns raised by broadcasters and sought comment in the *Fourth NPRM* on whether, moving forward, data reported on Form 395-B should be kept confidential.⁴⁵

10. In the *Fourth NPRM*, the Commission noted that its practice for more than thirty years before suspending collection of the Form 395-B in 2001 had been to make the Forms 395-B filed by broadcasters available for public inspection.⁴⁶ The Commission also stated that there was no exemption from the disclosure requirements of the Freedom of Information Act (FOIA)⁴⁷ that would have permitted the Commission to keep the Form's data confidential, and therefore it did not specifically seek comment on this issue.⁴⁸ The Commission noted, however, that the then-recently passed Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA) allows agencies to collect information for statistical purposes under a pledge of confidentiality.⁴⁹ The *Fourth NPRM* noted that, if an agency collects information pursuant to CIPSEA under a pledge of confidentiality, the information is exempt from release under FOIA and may not be disclosed in an identifiable form for any non-statistical purpose without the informed consent of the respondent.⁵⁰ The *Fourth NPRM* therefore sought comment on whether CIPSEA could apply to the Form 395-B and whether changing the Commission's approach of making the information public would be consistent with Section 334 of the Act.⁵¹ These issues remain

⁴² *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9975, para. 4. The Commission allowed a one-time filing grace period "until a date to be determined in the Commission's Order addressing the issues raised in the *Fourth Notice of Proposed Rulemaking*..." *Id.* at 9978, para. 13. Because such an Order has not yet been adopted, the Commission has not resumed collecting the Forms 395-B or 395-A.

⁴³ 47 CFR § 73.3612 Note ("Data concerning the gender, race and ethnicity of a broadcast station's workforce collected in the annual employment report 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 compliance with the Equal Employment Opportunity requirements of § 73.2080."); *id.* at § 76.1802 Note (same).

⁴⁴ *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9976, para. 9.

⁴⁵ *See id.* at 9978-79, paras. 14-17.

⁴⁶ *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9978, para. 14. Stations were required to keep these forms in their public inspection files, which, at the time, were only available for review at the station. Today, each station's public inspection file is hosted online by the FCC (<https://publicfiles.fcc.gov/>) and is available for review by any individual with Internet access.

⁴⁷ *See* 5 U.S.C. § 552.

⁴⁸ *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9978, para. 14.

⁴⁹ Confidential Information Protection and Statistical Efficiency Act of 2002, Pub. L. 107-347, 116 Stat. 2962 (2002), *codified as* 44 U.S.C. §§ 3561-64.

⁵⁰ *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9979, para. 14 (citing CIPSEA, Sec. 502(5)(B)); *cf.* 5 U.S.C. § 552(b)(3) (agencies may withhold records "specifically exempted from disclosure by statute").

⁵¹ *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9979, para. 15, citing 47 U.S.C. § 334(a). The *Fourth NPRM* also asked whether Congress's directive that MVPDs make Form 395-A publicly available would allow the Commission to keep it confidential pursuant to CIPSEA, and whether the directive had any bearing on whether Form 395-B broadcaster employee data should be made publicly available. The Commission further asked whether CIPSEA would allow it to keep the identity of Form 395-B filers confidential while making employee data public and what policy objectives such an approach would further. *Id.* at 9976, paras. 16-17.

unresolved, and to date, the collection of employee data from broadcast stations or MVPDs has not recommenced.⁵²

III. DISCUSSION

11. As discussed above, this Further Notice seeks to refresh the record with respect to the questions raised in the 2004 *Fourth NPRM* and specifically asks for any additional input on the outstanding issue of whether employee data reported by broadcast licensees on Forms 395-B can or should be kept confidential and/or on a non-station-attributable basis. As detailed below, there are a number of statutes, regulations, and legal precedent relevant to the issue, as well as technical concerns regarding the collection and maintenance of the data. In exploring these issues, we seek to balance our statutory obligation under Section 334(a) of the Act to collect pertinent employment data with the guidance provided by the D.C. Circuit's rulings in *Lutheran Church* and *MD/DC/DE Broadcasters*,⁵³ which place limits on how data regarding the racial, ethnic, and gender make-up of a licensee's workforce may be used in the regulatory context. We seek comment on these and other relevant issues. We note that the Commission has broad authority under the Act to collect information to carry out its responsibilities and prepare reports to inform Congress and the public.⁵⁴

12. Importantly, neither *Lutheran Church* nor *MD/DC/DE Broadcasters* invalidated the Congressionally mandated data collection of employment data or making the data available to the public. Rather, the courts vacated certain rules based on how the Commission *used* employment data to assess EEO compliance, but neither court ruled that simply collecting and making the data public is unconstitutional. Nor did the courts address the constitutionality of the Form 395-B itself, or the requirement that the Commission collect employee data using the Form 395-B that would be available to the public.⁵⁵ Given the passage of time, we seek to update the record to better inform the Commission's consideration of these matters as they may bear on the collection and permissible use of this required data collection. Specifically, we seek to refresh the now sixteen-year-old record by encouraging commenters to provide any new, innovative, and different suggestions for collecting and handling employment information on Form 395-B.

13. Broadcasters have expressed concern previously that the collection of employment data on a station-attributed basis and its access by Commission staff and, in particular, release to the public will "pressure" stations to adopt race- or gender-based hiring policies in contravention of the D.C. Circuit's decisions.⁵⁶ Since the Commission last sought comment on this issue, have there been any relevant developments in the public disclosure of employment data? For example, do broadcast licensees,

⁵² In addition to this proceeding, in June 2019 the Commission commenced a separate rulemaking proceeding regarding compliance with, and enforcement of, the Commission's Equal Employment Opportunity (EEO) rules. *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, MB Docket No. 19-177, Notice of Proposed Rulemaking, 34 FCC Rcd 5358 (2019) (*2019 EEO NPRM*). Although the Form 395-B data collection was not explicitly raised in the *2019 EEO NPRM*, some commenters to that proceeding nonetheless offered suggestions related to the collection of employee data from the broadcasting and MVPD industries and the use of the Form 395-B. For example, the EEO Supporters, consisting of the Multicultural Media Telecom and Internet Council (MMTC) and other public interest groups, proposed a manner in which the Commission might use such data. Comments of EEO Supporters at 13-17 (rec. Sept. 19, 2020) (EEO Supporters Comments). See also Letter from Leadership Conference on Civil Rights to FCC Chairman Pai and Commrs. O'Rielly, Carr, Rosenworcel, and Starks at 2-3, (filed Nov. 4, 2019). To the extent that comments raised in the *2019 EEO NPRM* may be germane to our discussion regarding the Commission's collection of workforce composition data from broadcasters on Form 395-B, we invite parties to submit those comments in the instant record.

⁵³ See *supra* paras. 5-7.

⁵⁴ See, e.g., 47 U.S.C. §§ 154(i) and (k), 303(r), 403.

⁵⁵ *MD/DC/DE Broadcasters*, 236 F.3d at 18-19).

⁵⁶ *Fourth NPRM*, 19 FCC Rcd at 9975, paras. 6, 9; see also e.g., Joint Comments of Named State Broadcasters Associations at 8-11 (rec. Jul. 29, 2004).

either themselves or through third parties, now make station-attributed employment data available to the public, despite suspension (but not repeal) of our reporting requirements? If so, how prevalent is the practice? And if some, but not all, stations are releasing such information to the public, how should that impact our consideration of the issue of confidentiality?

14. To the extent that broadcasters are concerned that the Commission or the public might use employment data against stations as a basis for audits or to file petitions to deny, should the Commission take any additional steps to ensure that the employment data it is required to collect will be used only for its stated purposes (i.e., analyzing industry trends and making reports to Congress)?⁵⁷ Are there other appropriate purposes aside from official Commission actions that we should consider? What are the public interest benefits of making the information publicly available? What impact, if any, should the requirement in the Act that MVPDs make their employment reports “available for public inspection” at their facilities have on our consideration of whether broadcasters must also make their employment data available for public inspection?⁵⁸

15. Recognizing that these data have historically been made publicly available on a station-attributed basis, we seek comment on the benefits of continuing to do so. In particular, we ask commenters about specific circumstances in which public availability of Form 395-B would be beneficial to the public interest or helpful to the Commission, Congress, and industry observers. If we decide to collect and make this data available publicly on a station-attributed basis, how should we go about doing so? Moreover, given that the Act explicitly requires MVPDs to make their employment reports “available for public inspection” at their facilities,⁵⁹ would it make sense for the Commission to harmonize the treatment of employment data from broadcasters with that of MVPDs and require Form 395-B be publicly available? If not, what purpose would be served by treating broadcasters and MVPDs differently for purposes of EEO data collection? To the extent broadcasters can provide appropriate grounds for treating Form 395-B data as confidential, we also seek comment on specific filing approaches that would enable the Commission to collect and maintain Form 395-B employee data confidentially. In particular, if the Commission were to collect employment data confidentially, we seek input on collection mechanisms that could segregate the employment data from any station or employment unit identifying information, thereby allowing the data to be filed on a non-station-attributable basis while at the same time capturing whether a particular entity or station has complied with the annual reporting requirement. For example, could the completed Form 395-B be collected in such a way that the employment data would be filed separately from the station/employment unit identifying information? We note that the Commission previously had raised concerns about a similar filing approach almost twenty years ago,⁶⁰ particularly

⁵⁷ 47 CFR. § 73.3612 Note.

⁵⁸ 47 U.S.C. § 554(d)(3)(B).

⁵⁹ *Id.*

⁶⁰ See *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies; Termination of the EEO Streamlining Proceeding*, MM Docket Nos. 98-204, 96-16, Memorandum Opinion and Order, 15 FCC Rcd 22548, 22559-60, para. 39 (2000) (*NAB Reconsideration and Clarification Order*) (discussing NAB proposal to use a paper filing with a “tear off” sheet to separate the identity of the filer from the employee data). Under the approach suggested by NAB in 2000, the Commission would tear off the identifying information, separating the licensee’s identity from the employment data. For some, albeit brief, period of time, however, the Commission would maintain the broadcaster specific information to ensure that each broadcaster had met its obligation to make a complete filing. Previously, the Commission had determined that, pursuant to FOIA, it would not be able to withhold the complete filing from members of the public during even its initial brief review period. *Id.* at 22559-60, para. 39.

with regard to FOIA and the Federal Records Act (FRA).⁶¹ In that case, however, the Commission was considering an approach where it would receive completed paper filings and then “tear off” the station information from the employment data. We ask commenters to consider whether an electronic filing approach would raise concerns under either FOIA or the FRA if information were collected or maintained in a separated fashion. For example, how could the Commission ensure that the separation of station identifying information and employment data will not prevent the identification of employee data relating to a specific station if the Commission was required to produce information pursuant to a FOIA request?

16. The Commission also previously expressed concerns about the public’s and its own inability to connect data with the station filing the data, were it to adopt a completely anonymous filing methodology. Specifically, the Commission noted that an anonymous filing approach could impede it from contacting the licensee if there were problems with the data.⁶² We invite comment on how we might address that concern. Further, how would we conduct audits of compliance with the Form 395-B annual filing requirement if Form 395-B is not filed on a station-attributable basis? In such a case, should we require each filer to retain a copy of their filings in order to present them to Commission staff in case of an audit to verify the submission of the report and the accuracy of the data submitted? To the extent data submitted in response to an audit can be obtained under FOIA, does that undermine the goal of this separation regime? Alternatively, would a certification by the licensee, for example on the FCC Form 396-B Broadcast Equal Employment Opportunity Program Report or the FCC Form 303-S License Renewal, attesting to the submission of the required annual Form 395-B be sufficient for tracking compliance with the annual filing of a Form 395-B for a particular station?

17. We also seek comment on any implementation issues that might arise from either an approach in which the Form 395-B is filed and maintained completely anonymously, or where station-specific information is available to the Commission but not the public. What technical issues, from both the station and the Commission perspective, would need to be addressed to ensure that the employment data cannot in any way be linked to the individual licensee who filed the data, by either Commission staff or others? We also welcome any examples of similar filing approaches that have been established, either in the private or public sector, and the benefits or drawbacks of using such systems.

18. We further invite comment on whether any potential changes to the collection of this information or Form 395-B would be consistent with the directive in Section 334(a) of the Act, which states that the Commission “shall not revise . . . the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080)” as they pertain to TV stations or the “forms used by such licensees to report pertinent employment data.”⁶³ What impact does this statutory language have on potential revisions to Form 395-B, including on the ability of the Commission to modify the Form’s public filing requirements? To the extent commenters believe that the language of Section 334(a) allows for some changes in the format of the Form 395-B or the manner in which the employment data is collected as applied to broadcast licensees, please specify

⁶¹ 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.* The Commission had previously found that, under FRA, the agency could not “alienate or destroy” any information that is an integral part of an agency record except in compliance with FRA. The Commission found that, under the FRA, the identity of the filer would be considered an integral part of the employment record that could not be severed from the employment statistics. *NAB Reconsideration and Clarification Order*, 15 FCC Rcd at 22559-60, para. 39 and n. 34 (citing *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993)).

⁶² *NAB Reconsideration and Clarification Order*, 15 FCC Rcd at 22559-60, para. 39 (“If we separated the identity of the filer from its filing immediately, we would have no way to contact the filer in the event that we discovered, upon review, that its submission was incomplete.”); *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9976, para. 9 (“[T]he Commission must preliminarily review each Form 395-B to ensure completeness and contact the filer, if necessary. If the filer’s identity were unknown to the Commission’s staff, it could not ensure the completeness of the data.”).

⁶³ 47 U.S.C. § 334(a).

19. Additionally, we seek comment on how we should interpret the phrase “pertinent employment data” as used in Section 334(a)(2). Should the term “pertinent employment data” be read in context as data related to administration and enforcement of the EEO regulations, considering that Section 334(a)(1) codified “the regulations concerning equal employment opportunity as in effect on September 1, 1992”? The Commission no longer uses station-specific employment data to screen licensee renewal applications or assess any aspect of a broadcaster’s compliance with the Commission’s EEO rules as a result of the D.C. Circuit’s decisions.⁶⁴ To what extent is station-specific data necessary to carry out our statutory and regulatory obligations, including to monitor industry employment trends and report to Congress. How can the Commission continue to meet these obligations to collect EEO data from broadcast station licensees and permittees without requiring station-specific data? Is station-specific data no longer “pertinent” employment data within the meaning of Section 334(a)(2) because the data are no longer used to screen licensee renewal applications or assess EEO compliance, thereby allowing us to revise the forms to accommodate the filing of information on a non-station-specific basis? Does the permission granted to the Commission in Section 334(c) to make technical revisions to “the regulations described in subsection (a)” provide sufficient authority to revise the Form 395-B or the filing procedures? In particular, Section 334(c) contemplates that the Commission may make “nonsubstantive technical or clerical revisions in such regulations,” but says nothing about FCC forms. Assuming the authority in subsection (c) extends to Form 395-B, would the revisions contemplated constitute “nonsubstantive technical or clerical revisions” and would they be necessary “to reflect changes in technology, terminology, or Commission organization”? If not, what impact would this have on the Commission’s ability to make changes to the Form 395-B and the collection of the relevant employment data? In addition, the Commission previously noted that it could be “called upon to provide trend data based on markets, size of stations, services, or other criteria” that could not be reconstructed from data submitted on a non-station-attributable basis.⁶⁵ Would the collection of other types of information from filers lead to a more useful data set and enable meaningful tracking of industry trends?

20. In the *Third Report and Order*, the Commission noted that it had previously sought to track the racial classification standards employed by the Equal Employment Opportunity Commission (EEOC), which in turn applies the classifications established by the Office of Management and Budget (OMB).⁶⁶ Given the passage of time, it is possible that 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.⁶⁷ Accordingly, we seek comment on the desirability of harmonizing the racial classifications employed on the Form 395-B with the EEOC’s current EEO-1 form, and any related issues. In addition, although we note that the Commission has made such changes to the Form 395-B in the past, consistent

⁶⁴ *Second Report and Order and Third NPRM*, 17 FCC Rcd at 24068, para. 159 (stating that annual employment data is now “unrelated to the implementation and enforcement of our EEO program”).

⁶⁵ *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9976, para. 9.

⁶⁶ *Id.* at 9978, para. 12. At the time the *Third Report and Order and Fourth NPRM* was adopted, the EEOC was in the midst of modifying its racial classifications standards and updating the EEO-1 form, which required OMB approval. The FCC subsequently modified Forms 395-A and B to track the EEOC and OMB modified racial classifications, concluding that such non-substantive, technical, or clerical revisions necessary to reflect changes in terminology were consistent with Section 334 of the Act. *See Commission Proposes Changes to FCC Forms 395-A and 395-B*, MM Docket No. 98-204, Public Notice, 23 FCC Rcd 13142-43 (MB 2008).

⁶⁷ We note that although the filing of the Form 395-B has been suspended since 2001, OMB has approved the information collection through June 2023, subject to the Commission’s decision resolving the data confidentiality issues. OMB Control Number History, OMB Control Number: 3060-0390, https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202004-3060-047 (last visited Feb. 16, 2021). Thus, the Commission must consult further with OMB prior to re-implementing the data collection.

with the discussion above, we seek comment on whether the form can be revised to reflect any updated racial classifications consistent with Section 334 of the Act.⁶⁸

21. As part of refreshing the record, we also seek comment on whether the Form 395-B data could be collected pursuant to the CIPSEA under a pledge of confidentiality.⁶⁹ While the Commission previously sought comment on the applicability of CIPSEA in 2004, at that time the statute was barely two years old.⁷⁰ Given the passage of time and our desire to obtain as complete a record as possible, we seek comment anew on the applicability of CIPSEA. Could the Commission or one of its subordinate offices or bureaus qualify as a federal “statistical agency or unit” as defined in CIPSEA⁷¹ and in accordance with the various directives issued by the Office of Management and Budget over the years?⁷² To the extent the Commission, as a non-statistical agency,⁷³ could avail itself of CIPSEA’s provision protecting data from public disclosure, we note CIPSEA imposes various limitations and requirements on the confidential collection of data by a non-statistical agency that could significantly impede the Commission’s ability to collect and use the data, including the requirement for direct acquisition of data by Commission employees without the use of contractors.⁷⁴ Because the Commission relies on information technology contractors to assist filers with questions and to compile reports and other information based on data in its forms, we question whether the Commission can comply with this requirement. We seek comment on these issues.

22. Moreover, we note that, in the intervening years since the Form 395-B was suspended, additional regulations or guidance may have arisen that could affect our analysis and the restoration of this data collection. In particular, we note that the Foundations for Evidence Based Policymaking Act of 2018 (Evidence Act) would appear to require that the Commission publish data it collects in an open format if the data collection mechanism [is] created on or after January 14, 2019, the Act’s date of enactment, and absent a statutory exemption prohibiting the disclosure of the information.⁷⁵ Accordingly, we seek comment on whether this recently enacted statute would require the publication of employment data collected on Form 395-B. If the Commission were to reinstate the Form 395-B data collection, with or without modifications to the form or filing system, would this constitute a new data collection mechanism subject to the Evidence Act? And if so, would any existing FOIA exemptions apply to this

⁶⁸ See *supra* para. 21; see also 47 U.S.C. § 334.

⁶⁹ 44 U.S.C. §§ 3561-14.

⁷⁰ *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9978-79, paras. 14-17.

⁷¹ CIPSEA and the *2007 CIPSEA Guidance* differentiate between statistical agencies or units and non-statistical agencies or units. A “statistical agency or unit” is defined as “an agency or organizational unit of the executive branch whose activities are predominantly the collection, compilation, processing, or analysis of information for statistical purposes.” See 44 U.S.C. §3561(8); OMB’s Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA), Notice of Decision, 72 Fed. Reg. 33362 (June 15, 2007) (*2007 CIPSEA Guidance*).

⁷² See, e.g., *2007 CIPSEA Guidance*; OMB Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units, Notice of Final Decision, 79 Fed. Reg. 71610 (Dec. 2, 2014); OMB Statistical Policy Directive No. 4: Release and Dissemination of Statistical Products Produced by Federal Statistical Agencies, Notice of Final Decision, 73 Fed. Reg. 12622 (March 7, 2008).

⁷³ CIPSEA defines “agency” as any entity that falls within “the term ‘executive agency’ as defined in Section 102 of title 31, United States Code, or ‘agency,’ as defined in Section 3502 of title 44, United States Code.” 44 U.S.C. §3561(1). CIPSEA provides that “[d]ata or information acquired by an agency under a pledge of confidentiality and for exclusively statistical purposes shall be used by officers, employees, or agents of the agency exclusively for statistical purposes.” CIPSEA § 512(a) (emphasis added).

⁷⁴ See *2007 CIPSEA Guidance*. See also CIPSEA, § 512(d) (allowing only a “statistical agency or unit” to designate agents).

⁷⁵ Foundations for Evidence Based Policymaking Act of 2018, Pub. L. 115-435 § 202(c), 132 Stat. 5529 (2019), codified as 44 U.S.C § 3506(b)(6).

data collection? We seek comment on the applicability of FOIA exemptions in general, including any recent developments in FOIA case law applicable to Form 395-B data.⁷⁶

23. Finally, given the significant passage of time since the FCC Form 395-B filing requirement was suspended, are there any other issues or developments that we should consider at this time? We also seek comment on the attendant costs and benefits of any proposals advanced in response to this item.

IV. PROCEDURAL MATTERS

24. *Ex Parte Rules - Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁷⁷ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

25. *Filing Requirements—Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.U.S.

⁷⁶ *See, e.g., Food Marketing Institute v. Argus*, 139 S. Ct. 2356 (2019) (rejecting the court-established “substantial competitive harm” test used for determining whether information is “confidential” under FOIA Exemption 4); *but see Center for Investigative Reporting v. U.S. Department of Labor*, 424 F. Supp. 3d 771, 776-779 (N.D. Cal. 2019) (information contained in federal contractors’ employment diversity (EEO) reports requested from Department of Labor under FOIA was not “commercial,” and thus did not fall under FOIA Exemption 4, and further questioning whether the information was “confidential”), *appeal pending sub nom. Evans v. U.S. Dept. of Labor*, Case Nos. 20-16416, 20-16538, 20-16826 (9th Cir. filed July 22, 2020).

⁷⁷ 47 CFR §§ 1.1200 *et seq.*

- Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.⁷⁸
- During the time the Commission’s building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

26. *Initial Regulatory Flexibility Act Analysis.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁷⁹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸⁰ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁸¹

27. With respect to this Further Notice, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in the Appendix. Written public comments are requested on the IRFA and must be filed in accordance with the same filing deadlines as comments on this Notice of Proposed Rulemaking, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this Further Notice and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the Federal Register.

28. *Paperwork Reduction Act.* This document seeks comment on whether the Commission should adopt modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

29. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

⁷⁸ See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

⁷⁹ 5 U.S.C. § 603.

⁸⁰ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

⁸¹ 15 U.S.C. § 632.

30. *Additional Information.* For additional information on this proceeding, please contact Brendan Holland of the Media Bureau, Industry Analysis Division, Brendan.Holland@fcc.gov, (202) 418-2757.

V. ORDERING CLAUSES

31. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 1, 4(i), 4(j), 4(k), 303, 334, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 154(k), 303, 334, and 403, this Further Notice of Proposed Rulemaking **IS ADOPTED**.

32. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this Further Notice of Proposed Rulemaking (Further Notice). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the Further Notice. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. The Further Notice seeks to refresh the record regarding the Commission's annual collection of broadcaster workforce composition data by race and gender on FCC Form 395-B.⁴ The filing of this Form was suspended in 2001 in the wake of a D.C. Circuit decision vacating certain aspects of the Commission's Equal Employment Opportunity requirements.⁵ While the Commission adopted revised regulations regarding its data collection to prevent use of the data in assessing compliance with its general EEO rules and possibly exerting pressure on broadcasters to hire women and minorities,⁶ and subsequently obtained OMB approval for collecting data on updated Form 395-B, collection of the data was delayed until issues regarding confidentiality of the data were resolved.⁷ To date, those issues remain unresolved. Accordingly, the Further Notice seeks to refresh the record regarding the collection of broadcaster workforce composition data, and asks for further input on the legal, logistical, and technical issues surrounding FCC Form 395-B.

3. Specifically, the Further Notice seeks to refresh the record with additional input on the outstanding issue of whether employee data reported by broadcasters can or should be kept confidential and/or on a non-attributable basis, or whether there are benefits from disclosure. Among other issues, the Further Notice asks whether there have been relevant developments in the public disclosure of employment data since the Commission last sought comment on collecting these data, including whether broadcast licensees now make station-attributed employment data available to the public, how prevalent this practice may be, and how such practices should impact our consideration of the issue of confidentiality.

4. The Further Notice asks, to the extent that broadcasters are concerned that the Commission or the public might use employment data against stations as a basis for audits or to file

¹ 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

² 5 U.S.C. § 603(a).

³ *Id.*

⁴ Form 395-B, the broadcast station Annual Employment Report, can be found at <https://transition.fcc.gov/Forms/Form395B/395b.pdf>.

⁵ See *Suspension Order*, 16 FCC Rcd at 2872. In this order, the Commission suspended the equal employment opportunity outreach program requirements applicable to broadcast licensees and MVPDs, which included the requirement that broadcasters and MVPDs file a Form 395-B and 395-A, respectively, with the Commission on an annual basis.

⁶ See generally *Second Report and Order and Third NPRM*, 17 FCC Rcd 24018 (2003).

⁷ *Third Report and Order and Fourth NPRM*, 19 FCC Rcd at 9973, 9978, para. 13; see also, 47 CFR § 73.3612.

petitions to deny license applications, whether it should take any additional steps to ensure that the employment data it is required to collect will be used only for their stated purposes (i.e., analyzing industry trends and making reports to Congress)?⁸ The Further Notice asks whether there are other appropriate purposes of collecting data aside from official Commission actions that it should consider, and what public benefits derive from making the information publicly available. The Further Notice also asks what impact the Act's requirement that MVPDs make their employment reports "available for public inspection" at their facilities have on its consideration of whether broadcasters must also make their employment data available for public inspection.⁹

5. Recognizing that these data have historically been made publicly available on a station-attributed basis, the Further Notice seeks comment on the benefits of continuing to do so. The Further Notice asks commenters to describe circumstances in which public availability of Form 395-B would be beneficial to the public interest or helpful to the Commission, Congress, and industry observers. The Further Notice asks how the Commission should go about making data publicly available on a station-attributed basis if it decides to continue doing so. To the extent broadcasters can provide appropriate grounds for treating Form 395-B data as confidential, the Further Notice seeks comment on specific filing approaches that would enable the Commission to collect and maintain Form 395-B employee data confidentially. The Further Notice asks commenters to consider whether an electronic filing approach would raise concerns under either FOIA or the Federal Records Act (FRA)¹⁰ if information were collected or maintained in a separated fashion.

6. The Further Notice invites comment on how the Commission might address any concerns that an anonymous filing approach could impede it from contacting the licensee if there were problems with the data or from conducting compliance audits. The Further Notice also seeks comment on any implementation issues that might arise from either an approach in which the Form 395-B is filed and maintained completely anonymously, or where station-specific information is available to the Commission but not the public.

7. The Further Notice also invites comment on whether any potential changes to the collection of this information or Form 395-B would be consistent with the directive in Section 334(a) of the Act, which states that the Commission "shall not revise . . . the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080)" as they pertain to TV stations or the "forms used by such licensees to report pertinent employment data."¹¹ As part of refreshing the record, the Further Notice asks whether the Commission or one of its subordinate offices or bureaus qualify as a federal "statistical agency or unit" as defined in CIPSEA¹² and in accordance with the various directives issued by the Office of Management and Budget since passage of CIPSEA in 2002.¹³ The Further Notice also seeks comment on whether the Foundations for Evidence-Based Policymaking Act¹⁴ would require the publication of employment data collected on Form 395-B. Finally, given the significant passage of time since the FCC Form 395-B filing requirement was suspended, the Further

⁸ 47 CFR. § 73.3612 Note.

⁹ 47 U.S.C. § 554(d)(3)(B).

¹⁰ 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*

¹¹ 47 U.S.C. § 334(a).

¹² Confidential Information Protection and Statistical Efficiency Act of 2002, Pub. L. 107-347, 116 Stat. 2962 (2002), *codified as* 44 U.S.C. §§ 3561-64.

¹³ *See, e.g., 2007 CIPSEA Guidance*; OMB Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units, Notice of Final Decision, 79 Fed. Reg. 71610 (Dec. 2, 2014); OMB Statistical Policy Directive No. 4: Release and Dissemination of Statistical Products Produced by Federal Statistical Agencies, Notice of Final Decision, 73 Fed. Reg. 12622 (March 7, 2008).

¹⁴ Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115-435 § 202, 132 Stat. 5529 (2019), *codified as* 44 U.S.C § 3506(b)(6)).

Notice seeks comment on any other issues or developments that the Commission should consider and on the attendant costs and benefits of any proposals advanced in response to the Further Notice.

B. Legal Basis

8. The proposed action is authorized under Sections 1, 2(a), 4(i), 4(j), 4(k), 303, 334, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(k) 303, 334, and 403.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

9. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted.¹⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁶ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (SBA).¹⁷ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹⁸ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

10. *Television Broadcasting.* This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”¹⁹ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.²⁰ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.²¹ The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25 million or less, 25 had annual

¹⁵ 5 U.S.C. § 603(b)(3).

¹⁶ 5 U.S.C. § 601(6); *see infra* note 14 (explaining the definition of “small business” under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining “small organization” as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register”); 5 U.S.C. § 601(5) (defining “small governmental jurisdiction” as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register”).

¹⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.*

¹⁸ 15 U.S.C. § 632(a)(1)-(2)(A).

¹⁹ U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²⁰ *Id.*

²¹ 13 CFR § 121.201; 2012 NAICS code 515120.

receipts between \$25 million and \$49,999,999 and 70 had annual receipts of \$50 million or more.²² Based on these data, we estimate that the majority of commercial television broadcast stations are small entities under the applicable size standard.

11. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,371.²³ Of this total, 1,265 stations (or 92%) had revenues of \$41.5 million or less in 2020, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on February 9, 2021, and therefore these stations qualify as small entities under the SBA definition. In addition, the Commission estimates the number of noncommercial educational stations to be 388.²⁴ The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 388 Class A stations.²⁵ Given the nature of this service, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard.

12. *Radio Stations.* This U.S. Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”²⁶ Programming may originate in the establishment’s own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.²⁷ Economic Census data for 2012 show that 2,849 firms in this category operated in that year.²⁸ Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.²⁹ Based on these data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

13. The Commission has estimated the number of licensed commercial AM radio stations to be 4,551 and the number of commercial FM radio stations to be 6699 for a total of 11,250 commercial stations³⁰ Of this total, 11,245 stations (or 99%) had revenues of \$41.5 million or less in 2020, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on February 9, 2021, and therefore these stations qualify as small entities under the SBA definition. In addition, there were 4195 noncommercial educational FM stations.³¹ The Commission does not compile

²² U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

²³ Broadcast Station Totals as of December 31, 2020, News Release (MB Jan. 5, 2021) (*December 31, 2020, Broadcast Station Totals*), available at <https://www.fcc.gov/edocs/search-results?t=advanced&titleText=broadcast%20station%20totals>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

²⁷ 13 CFR § 121.201; 2017 NAICS code 515112.

²⁸ U.S. Census Bureau, U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112 Radio Stations) https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

²⁹ *Id.*

³⁰ *December 31, 2020, Broadcast Station Totals.*

³¹ *Id.*

and does not have access to information on the revenue of NCE radio stations that would permit it to determine how many such stations would qualify as small entities.

14. In assessing whether a business concern qualifies as small under the above definition, business (control) affiliations³² must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the proposed rules may apply does not exclude any radio or television station from the definition of small business on this basis and is therefore possibly over-inclusive.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

15. In this section, we identify the reporting, recordkeeping and other compliance requirements contained in the Further Notice and consider whether small entities are affected disproportionately by any such requirements. The Further Notice proposes no new reporting, recordkeeping or compliance requirements, only seeks to refresh the record on resuming, after a suspension, collection of broadcaster workforce composition data on FCC Form 395-B. The Further Notice also seeks to refresh the record to resolve an issue outstanding since 2004 on whether the Commission can or should change its handling of the data to keep it confidential.³³ The Further Notice also asks whether and how more recently-enacted statutes affect its handling of broadcaster employee composition data. If the Further Notice is adopted, broadcasters will simply resume filing Form 395-B and the FCC may change the way it handles data contained in Form 395-B. Because the Further Notice contains no new reporting or recordkeeping obligations and proposes only resuming filing of an existing Form, the reporting, recordkeeping and other compliance requirements of small entities will not change from such requirements under existing rules, and the burden imposed by the Further Notice will be no greater than under current rules. Additionally, stations with four or less full-time employees are exempt from filing the report.³⁴ Therefore, because no new requirements are imposed and small stations are exempt, the Commission concludes that small entities will not be disproportionately affected by the Further Notice.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

16. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.³⁵

17. This Further Notice seeks to refresh the record regarding the Commission’s annual collection of broadcaster workforce composition data by race and gender on FCC Form 395-B. It would lead only to resumption of this data collection and would impose no new requirements for which the

³² “[Business concerns] are affiliates of each other when one [concern] controls or has the power to control the other, or a third party or parties controls or has to power to control both.” 13 CFR § 121.103(a)(1).

³³ See *supra*, paras. 2-4.

³⁴ 47 CFR § 73.3612

³⁵ See 5 U.S.C. § 603(c).

Commission can consider alternatives that would minimize the economic burden on small entities. Further, as detailed in the Further Notice, Section 334(a) of the Act states that the Commission shall not revise either the EEO regulations in effect as of September 1992 as such regulations apply to television broadcast station licensees or permittees or the “forms used by such licensees to report pertinent employment data.”³⁶

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Further Proposed Rule

18. None.

³⁶ 47 U.S.C. § 334(a).

**STATEMENT OF
ACTING CHAIRWOMAN JESSICA ROSENWORCEL**

Re: *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MB Docket No. 98-204, Further Notice of Proposed Rulemaking.

Today we restart the effort to collect data from broadcasters about the race and gender composition of their workforce. This data is a vitally important to assess the industry's workforce diversity. Moreover, its collection is required under the law.

For decades, and later pursuant to Section 334 of the Communications Act, the Federal Communications Commission amassed this data to support its Equal Employment Opportunity obligations and address workforce discrimination. This effort was the byproduct of a hard-fought history, informed by civil rights struggles, the work of the Kerner Commission, and the recognition that what we hear and see on the screen plays a special role in defining who we are as communities and as a Nation.

But during the last two decades the agency has done too little to honor this history. The FCC paused collection of this data in 2001, in response to a court decision raising due process concerns about how it might be used. Efforts to fix this stalled in 2004, even after the FCC made clear that the data collected would be used exclusively for the purpose of compiling industry employment trends and developing reports to Congress. After so much time, this pause turned into a standstill.

I know we can do better than this. In fact, this rulemaking was the very first Media Bureau initiative I shared with my colleagues after taking the reins as Acting Chairwoman. I am proud that the questions we ask here are the first full-fledged effort to address this issue in more than a decade and a half. I look forward to the record that develops and the day—hopefully soon—when we can address this outstanding element of our Equal Employment Opportunity policies. The consensus we reached here benefited immensely from the work of Commissioner Starks, who has consistently championed the effort to fix this issue. I appreciate also the work of Commissioner Carr, who offered careful edits and worked collaboratively to help get this done.

A thank you is also due to Senator Chris Van Hollen and Representative Yvette Clarke who have pressed the FCC to make progress on this matter. We do that today—but more work lies ahead.

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS**

Re: *Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Further Notice of Proposed Rulemaking, MB Docket No. 98-204.

Diversity matters. This is particularly clear in the media space, where representation is not abstract or theoretical—how we receive and process information is deeply intertwined with what we see and hear, and who delivers the message. Broadcasters tell our story to America, and so it is imperative that they represent all of America. Who sits in front of the camera; who decides what is newsworthy; and who decides what talent is hired and promoted—all of these are mission critical factors that go on behind the public’s view.

Recent stories in the news confirm the need for more transparency and insight into how media companies hire, retain, and treat people of color and women, in particular. For example, one investigation reported allegations that a major television broadcaster has for many years been cultivating a hostile work environment that included bullying female managers and blocking efforts to hire and retain Black journalists.¹ Harmful reverberations from such practices can be felt not only by employees directly, but also more broadly by members of the public when they are subjected to content that lacks balance, fairness, or accuracy.²

Without a reliable window into the Equal Employment Opportunity (EEO) practices of broadcasters, we may never be able to fully understand the scope of the issue, least of all address it. Diversity in the media is critical to ensuring that all stories are told and all communities are well-served.

EEO data will help us develop a better understanding of the landscape of our media workforce, and the failure to collect it has hampered our ability to determine what regulatory actions are necessary to ensure equal employment opportunities. This inquiry is therefore long overdue.

In 2001, the Commission temporarily paused the use of Form 395-B to collect EEO data after a pair of D.C. Circuit decisions determined that *using* employment data to assess EEO compliance implicated the equal protection component of the Due Process Clause of the Fifth Amendment of the Constitution.³ The rulings did not, however, invalidate the collection of employment data or making the data available to the public—and no decision has ever done so. While the EEO data collection has been stalled for two decades, I am proud to say that this Notice starts our long overdue work to finally address

¹ *Inside CBS’ fraught investigation into allegations of racism and misogyny*, L.A. TIMES (Jan. 24, 2021), <https://www.latimes.com/entertainment-arts/business/story/2021-01-24/cbs-television-stations-peter-dunn-racism-sexism>.

² More broadly, several major newspapers also have confirmed the value of diversity in media company hiring and management, including one close to home for me personally. In December 2020 the Kansas City Star issued an apology, acknowledging that over decades through its news coverage the paper had “disenfranchised, ignored and scorned generations of Black Kansas Citizens” and “robbed an entire community of opportunity, dignity, justice and recognition.” The paper explained: “Like most metro newspapers of the early to mid-20th century, The Star was a white newspaper produced by white reporters and editors for white readers and advertisers.” *The truth in Black and white: An apology from The Kansas City Star*, THE KANSAS CITY STAR (Dec. 20, 2020), <https://www.kansascity.com/news/local/article247928045.html>. Other papers, including the LA Times, have made similar public apologies. *Editorial: An examination of The Times’ failures on race, our apology and a path forward*, L.A. TIMES (Sep. 27, 2020), <https://www.latimes.com/opinion/story/2020-09-27/los-angeles-times-apology-racism>.

³ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh’g denied*, 154 F.3d 487, *pet. for reh’g en banc denied*, 154 F.3d 494 (D.C. 1998); *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), *pet. for reh’g denied.*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002).

any valid outstanding concerns—constitutional or otherwise—regarding our statutory obligation to monitor broadcaster employment practices and ensure that broadcasters provide equal employment opportunities.

Years ago, I raised the urgent need to restart the collection of EEO data as soon as possible. I would like to extend my thanks to the Acting Chairwoman for bringing this item to a vote, and to my fellow commissioners for working with me to advance this proceeding, which should be among our highest priorities in the media regulatory space. Also, thank you to staff in the Media and Enforcement Bureaus, and in the Office of General Counsel for their work on this important item.