

Robert Branson,
President & CEO
Fallon Wilson, PhD,
Vice President of Policy
Ananda Leeke, Esq.,
Chief Social Media Officer
David Honig, Esq.,
President Emeritus and
Senior Advisor
Kenley Joseph,
Telecom and Tech Attorney
Suzanne Gougherty
President of the Brokerage
Brian Dunmore, Consultant



1250 Connecticut Ave NW, 7th Floor
Washington, D.C. 20036
Phone: 202-261-6543 | MMTConline.org

BOARD OF DIRECTORS
Dr. Ronald Johnson
Chair and Treasurer
Hon. Deborah Taylor Tate
Erwin Krasnow
Vice Chairs
Ari Fitzgerald
Secretary
Hon. Henry M. Rivera
Chair Emeritus
Raúl Alarcón, Jr.
Dr. Jannette Dates
Leo Hindery
Erwin Krasnow
Nicolaine Lazarre
Francisco Montero
Steven C. Roberts
Rodney Sampson
Andrew Schwartzman
Brent Wilkes

BOARD OF ADVISORS
Debra Berlyn
Laura Berrocal
Hon. Tyrone Brown
Amador Bustos
Angela Campbell
Hon. Matthew Carter
Belva Davis
Chris Devine
Hon. Uday Dholakia
Erin Dozier
Charles Firestone
Hon. Russell Frisby
John Gibson
Joel Hartstone
Earle Jones
Larry Irving
Jason Llorenz
José Mas
John Muleta
Karen Narasaki
Eli Noam
Benjamin Perez
Rey Ramsey
Allison Remsen
Lawrence Roberts
Dr. Jorge Schement
Diane Sutter
S. Jenell Trigg
Augusto Valdez
Linda Eckard Vilardo
Joseph Waz, Jr.

MEMORANDUM

To: Multicultural Media, Telecom and Internet Council (MMTC)

From: Torryn Carter, Earle K. Moore Fellow

Re: Federal Communication Commission Equal Employment Opportunity Rules & Data

Date: January 25, 2024

I. Executive Summary

The telecommunications industry in the United States has struggled with issues of diverse representation, particularly in terms of minority management and ownership of broadcast television and radio stations and networks. To address these concerns, Congress has directed the Federal Communication Commission (“FCC” or “Commission”) to implement equal employment opportunity (“EEO”) rules. Amongst other things, these rules require corporations engaged in managing and operating broadcast stations and cable systems to establish EEO programs, prevent discrimination in employment, and report employee demographic data. The collection of employee demographic data has been a point of contention for broadcasters nationwide. Historically, the FCC collected such data through Form 395-B, but this practice was suspended in 2001 due to constitutional concerns.

Recently, the FCC issued two proposed rulemaking notices. First, in 2019, the FCC sought feedback on EEO enforcement, emphasizing the need to evaluate the Commission’s current EEO rules. Second, in 2021, the Commission aimed to refresh the record on collecting employment demographic data through Form 395-B, addressing issues such as public disclosures, data uses, confidentiality, and racial classifications.

Despite concerns about the legality of collecting demographic employment data, the FCC has various sources of authority and potential justifications for resuming employment demographic data collection. While past court decisions questioned the use of such data, they did not challenge the collection itself, suggesting that alternative uses of employment demographic data may be legally defensible.

II. FCC Equal Employment Opportunity Data Overview

Like many industries in America, the telecommunications industry has long grappled with diverse representation. Specifically, there has been a longstanding disparity in the telecommunications industry with respect to minority ownership and management of broadcast television and radio stations and networks.¹ Congress, by and through the Commission, has sought to remedy some of these disparities through EEO legislation.²

¹ See Brief for Multicultural Media, Telecom, and Internet Council, Inc. et al. as Amici Curiae Supporting Respondents, *Students for Fair Admissions, Inc. v. Pres. And Fellows of Harvard College*, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707).

² 47 U.S.C. § 554.

The FCC has administered regulations governing the EEO responsibilities of broadcast licensees since 1969,³ and of cable operators since 1972.⁴ In 1984, Congress passed the Cable Communications Policy Act.⁵ This legislation mandated the FCC's EEO rules. These rules, under 47 U.S.C. § 554, apply to corporations, partnerships, associations, joint-stock companies, or trusts primarily engaged in managing and or operating cable systems.⁶ The rules prohibit discrimination in employment based on race, color, religion, national origin, age, or sex.⁷ Entities within the scope of this law must establish and maintain an equal opportunity program to ensure fairness in their employment policies and practices.⁸ This includes defining management responsibilities, informing employees and employee organizations about equal opportunity policies, and actively recruiting qualified applicants without discrimination.⁹ Further, the law requires these entities to report annually on the number of employees in various job categories by race, sex, and job title.¹⁰ The FCC is tasked with certifying compliance and investigating employment practices periodically.¹¹ Non-compliance can result in penalties and potential license suspension.¹²

Historically, the FCC has collected data from broadcasters and multichannel video programming distributors ("MVPDs") about their workforce composition based on race and gender categories through the FCC Form 395-B.¹³ The purpose of Form 395-B was to ensure that broadcasters were actively promoting diversity and equal opportunities in their workforce. For context, here are some key points about the Form 395-B:

1. **Mandatory Reporting:** Broadcast stations were required to submit Form 395-B on an annual basis. This form is part of the FCC's broader effort to monitor and enforce EEO rules within the broadcasting industry.
2. **Data Collection:** The form requires broadcast stations to provide detailed information about their employment practices, including the recruitment, hiring, training, and promotion of employees. This data is categorized by race, gender, and job category.
3. **Compliance with EEO Rules:** The FCC uses the data collected through Form 395-B to assess whether broadcast stations are following its EEO rules. These rules are designed to prevent discrimination in hiring and employment practices, promote diversity in the broadcasting industry, and ensure that broadcasters serve the needs and interests of their local communities. The FCC's use of Form 395-B has been invalidated by courts which is why Form 395-B filings are currently suspended.¹⁴
4. **Public Inspection File:** In addition to submitting Form 395-B to the FCC, broadcast stations are required to make certain parts of their EEO information available to the public in their public inspection files, which can be accessed by interested parties.

Overall, Form 395-B is an important tool for the FCC to monitor and enforce EEO compliance within the broadcasting industry, ensuring that broadcasters make meaningful efforts to provide EEO and promote diversity in their workforce, consistent with the goals of the Communications Act of 1934.

The FCC regularly collected Form 395-B data until 2001 when the FCC suspended this practice in response to a United States Washington, D.C. Circuit Court of Appeals ("D.C. Circuit Court") decision regarding the constitutionality of the FCC's use of collected employee data.¹⁵ To date, the FCC's collection of employee demographic data remains suspended.¹⁶ Nonetheless, the FCC has released two rulemaking notices regarding EEO rules and data that could impact FCC EEO data collection. First, in June of 2019, the FCC released a Notice of Proposed Rulemaking seeking

³ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73).

⁴ *Id.*

⁵ 47 U.S.C. ch. 5, subch. V-A.

⁶ 47 U.S.C. § 554.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73).

¹⁴ *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 236 F.3d 13, 23 (D.C. Cir. 2001).

¹⁵ *Id.*

¹⁶ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73 & 76).

comment on EEO enforcement.¹⁷ Second, in July of 2021, the FCC released a Further Notice of Proposed Rulemaking seeking to refresh the record on the collection of equal employment data on Form 395-B.¹⁸ This memo will address each notice in turn.

III. FCC Proposed Rulemaking Notices

A. *FCC Seeks Comment on EEO Enforcement*

On June 21, 2019, the FCC released a Notice of Proposed Rulemaking (“NPRM”) seeking feedback and suggestions to enhance EEO compliance and enforcement.¹⁹ Specifically, this NPRM was issued in response to the FCC’s elimination of the Broadcast Midterm Report (Form 397) as part of the Modernization of Media Regulation Initiative.²⁰ The Form 397 essentially served as a cover page through which a broadcast station transmits its two most recent public file reports and other information to the FCC for a review of its EEO practices in the fourth year of its license term.²¹ Since most of the information collected by the Form 397 is now available on the FCC’s website, the Commission deemed it unnecessary to require Form 397 filings.²² Despite the elimination of Form 397 filings, the FCC retained its midterm EEO review of broadcasters.²³

Moreover, the NPRM emphasized the need to evaluate the effectiveness of the FCC’s current EEO enforcement program, seeking input on its strengths and weaknesses.²⁴ Further, the NPRM sought feedback regarding its audit program and whether it necessitates revisions.²⁵

In summary, the NPRM was focused on improving EEO compliance and enforcement in the broadcast and MVPD industries and invited public input on various aspects of the FCC’s approach to achieving equal employment opportunities.

Several organizations, including MMTC, submitted comments and proposals in direct response to the NPRM.²⁶ These organizations (collectively referred to as “EEO Supporters”) submitted nine proposals to ensure improved EEO compliance and enforcement.²⁷ These proposals are:

1. Requiring certifications that job postings preceded hiring decisions.
2. Auditing reform, which includes increasing audit frequency and randomly selecting some audited units for more thorough review encompassing applicant interviewing and employee selection.
3. Auditing of employment units that received Equal Employment Opportunity Commission (“EEOC”) probable cause determinations.
4. Opening a fact-finding, non-content-based investigation under 47 U.S.C. § 403 into the abysmal levels of minority employment in radio news.

¹⁷ FEDERAL COMMUNICATIONS COMMISSION, *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, 84 Fed. Reg. 35063 (proposed July 22, 2019) (to be codified at 47 C.F.R pt. 73 & 76).

¹⁸ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73).

¹⁹ FEDERAL COMMUNICATIONS COMMISSION, *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, 84 Fed. Reg. 35063 (proposed July 22, 2019) (to be codified at 47 C.F.R pt. 73 & 76).

²⁰ *Id.*
²¹ Kathleen Kirby, *FCC Throws EEO Form 397 Filing into “Trash Heap” But Keeps Mid-Term Review; Will Seek Comment on its EEO Track Record Within 90 Days*, WILEY REIN (Feb. 22, 2019), <https://www.wiley.law/alert-FCC-Throws-EEO-Form-397-Filing-into-Trash-Heap-But-Keeps-Mid-Term-EEO-Review>.

²² *Id.*

²³ *Id.*

²⁴ FEDERAL COMMUNICATIONS COMMISSION, *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, 84 Fed. Reg. 35063 (proposed July 22, 2019) (to be codified at 47 C.F.R pt. 73 & 76).

²⁵ *Id.*

²⁶ Joint Supplemental Comments of Asian Americans Advancing Justice et al., Comment Letter on Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Aug. 10, 2022), <https://www.mmtconline.org/wp-content/uploads/2022/08/Civil-Rights-and-Labor-Advocates-EEO-Supplemental-Comments.pdf>.

²⁷ *Id.*

5. Providing whistleblower protections, including a confidential phone number and protections against retaliation.
6. Developing and disseminating compliance tools, such as an EEO Primer, Best Practices, FAQs, and Model EEO Programs.
7. Extending EEO scrutiny to cover promotion, retention, training, and mentoring.
8. Extending pro-active EEO enforcement to high tech companies, in cooperation with the EEOC.
9. Consolidating all anti-discrimination compliance and regulatory enforcement (to include advertising, transactional, procurement and employment discrimination) in a new Civil Rights Section of the Enforcement Bureau.²⁸

These proposals were submitted on September 29, 2021, in a comment by the EEO Supporters, a group of 38 organizations led by MMTC.²⁹ Some of these proposals have been pending since 2004.³⁰ Nonetheless, the EEO Supporters noted that eight of the nine proposals may be granted now.³¹ The EEO Supporters argued that proposals 5, 6, 8, and 9 are unopposed and are thus grantable without the need for a notice and comment proceeding as they only relate to agency management and operations.³² Further, the EEO Supporters explained that proposals 2, 3, 4, and 7 are not the objects of strong opposition, and they do not require a notice and comment proceeding, as they also relate only to agency management and operations.³³

B. FCC Seeks Comment on Issues Related to EEO Data Collection

On July 26, 2021, the FCC released a Further Notice of Proposed Rulemaking (“Further NPRM”) seeking to refresh the existing record regarding the statutorily mandated collection of data on the FCC Form 395-B.³⁴ As previously mentioned, the information collected through the Form 395-B was suspended in 2001 in response to a D.C. Circuit Court opinion finding the broadcast EEO Rule outreach requirements to be unconstitutional.³⁵

For context, the 1998 case of *Lutheran Church-Missouri Synod v. F.C.C.* laid the foundation for the Form 395-B filing suspension.³⁶ In *Lutheran Church*, the D.C. Circuit Court reviewed an FCC finding that Lutheran Church had not adequately recruited minorities.³⁷ This finding was based on an FCC EEO rule that required broadcasters to submit information comparing the race and gender of job applicants and hires with the overall availability of minorities in the relevant labor force.³⁸ The court concluded that using broadcaster employee data to assess EEO compliance during license renewal pressured broadcasters into race-conscious hiring, violating the due process clause of the Fifth Amendment of the United States Constitution.³⁹ In applying strict scrutiny, the Court determined that the FCC’s broadcast EEO rules were not narrowly tailored and thus unconstitutional.⁴⁰

Following the Court’s decision in *Lutheran Church*, the FCC established new EEO rules, requiring broadcast licensees to implement outreach programs to promote equal employment opportunities in the broadcasting industry.⁴¹ The FCC also reinstated the requirement for broadcasters to

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73 & 76).

³⁵ *MD/DC/DE Broadcasters Ass’n v. F.C.C.*, 236 F.3d 13, 23 (D.C. Cir. 2001).

³⁶ *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 346 (D.C. Cir. 1998).

³⁷ *Id.*

³⁸ *Id.* at 348.

³⁹ *Id.* at 352.

⁴⁰ *Id.* at 356.

⁴¹ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73 & 76).

annually submit employee data on Form 395-B, but with a different purpose.⁴² The FCC stated that it would no longer use this employment data to screen renewal applications or assess compliance with EEO program requirements.⁴³ Instead, it would use the information solely to monitor industry employment trends.⁴⁴ Further, the FCC clarified that the collection of employment data would not result in race-based hiring decisions.⁴⁵

The revised EEO rules that followed the *Lutheran Church* decision gave broadcasters the choice between two approaches aimed at promoting employment opportunities in the industry.⁴⁶ Specifically, the revised EEO outreach rules included Option A, which mandated licensees to conduct four approved recruitment initiatives within a two-year period without reporting the race and gender of each job applicant.⁴⁷ Alternatively, Option B allowed broadcasters to create their own outreach programs, but required them to report the race and gender of each applicant.⁴⁸

In the case of *MD/DC/DE Broadcasters Association v. FCC*, various state broadcaster associations contested the updated EEO outreach regulations.⁴⁹ Specifically, broadcasters took issue with Option B. In applying strict scrutiny, the Court found that Option B of the EEO outreach rules violated the Fifth Amendment.⁵⁰ The Court held that the FCC, by investigating broadcasters with “few” or “no” women or minority applicants, essentially pressured broadcasters into allocating resources for the recruitment of women and minorities.⁵¹ The Court also found that the collection of racial data regarding job applicants did not effectively serve the FCC’s goal of promoting non-discrimination in the broadcast industry and was not narrowly tailored for that purpose.⁵²

Since the Court found that Option B could not be separated from the rest of the rules, it invalidated the entire set of EEO outreach rules.⁵³ Following this decision, in January of 2001, the FCC suspended the requirement for broadcasters and MVPDs to submit employee data on Form 395-B.⁵⁴ As a result, no workforce composition data has been collected for over twenty years.

The Court did not address whether Form 395-B itself was unconstitutional. Although the Commission has since revised its EEO rules and Form 395-B, the requirement that broadcasters submit the form remains suspended because of confidentiality concerns related to the employment data.⁵⁵ In the Further NPRM issued in July of 2021, the Commission seeks input on six key areas:

1. **Developments in Public Disclosures of Employment Data:** The FCC wants to understand how to balance previous court rulings with the statutory obligation to collect EEO data. It seeks input on whether there have been any new developments in how broadcasters disclose employment data to the public, even after the FCC’s reporting requirements were suspended.
2. **Appropriate Uses of Employment Data:** Recommendations are requested on how to ensure that employment data is used only for analyzing industry trends and congressional reports. Commenters are asked if there are other valid purposes for the data and what public interest benefits would come from making it publicly available.
3. **Employment Data Confidentiality:** The FCC is considering harmonizing how broadcaster employment data is treated with MVPD employment data. They seek input on making Form 395-B publicly available and ways to maintain confidentiality of broadcaster EEO data.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *MD/DC/DE Broadcasters Ass’n v. F.C.C.*, 236 F.3d 13, 15 (D.C. Cir. 2001).

⁵⁰ *Id.* at 22.

⁵¹ *Id.* at 19.

⁵² *Id.* at 22.

⁵³ *Id.* at 23.

⁵⁴ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73 & 76).

⁵⁵ Ari Meltzer, *FCC Seeks to Refresh the Record on Collecting Equal Employment Opportunity Data From Broadcasters*, WILEY REIN LLP (Aug. 6, 2021), <https://www.wiley.law/alert-FCC-Seeks-to-Refresh-the-Record-on-Collecting-Equal-Employment-Opportunity-Data-From-Broadcasters>.

4. **Implementation Issues:** Input is needed on how to handle issues with submitted data, conduct compliance audits, and ensure anonymity in filing. Technical aspects to prevent data linkage are also a focus.
5. **Statutory Language:** The FCC wants to ensure any changes align with Section 334(a) of the Communications Act of 1934. They are seeking input on the interpretation of “pertinent employment data” in the context of EEO regulations enforcement.
6. **Racial Classifications:** The FCC is considering harmonizing racial classifications on Form 395-B with the EEOC’s EEO-1 form.⁵⁶

Various organizations, including MMTc, submitted a joint supplemental comment in response to the Further NPRM urging the FCC to collect and publish EEO data.⁵⁷ A key concern for the Commission regarding the collection of employment demographic data is the legality of the collection of such data. The joint supplemental comments addressed this concern.⁵⁸

The Commission has several sources of authority to rely upon in its collection of employment demographic data. First, the Commission would be permitted to collect employment demographic data from broadcasters pursuant to its authority under the Communications Marketplace Report and the market entry barriers provisions of the Communications Act of 1934.⁵⁹ Moreover, courts have held that the United States Constitution does not condemn the collection of demographic data.⁶⁰ Lastly, the *MD/DC/DE Broadcasters* case never addressed the constitutionality of employment demographic data collection.⁶¹ This case merely addressed the Commission’s use of such data, not the collection of the data itself.⁶² As such, if the Commission limits its use of demographic employment data to solely analyze industry trends, then the collection of such data should not be susceptible to judicial challenge.

IV. Conclusion

The telecommunications industry has a long history of grappling with issues of diversity and equal employment opportunities. The Commission has been at the forefront of efforts to address these disparities through EEO rules and regulations. Over the years, the FCC has introduced regulations to promote diversity and prevent discrimination in the industry. However, some of these rules have either been ineffective or subject to judicial scrutiny.

One significant aspect of these efforts was the collection of employee demographic data through the FCC Form 395-B. However, the practice of collecting this data was suspended in 2001 due to legal challenges related to the use of the data in assessing EEO compliance.⁶³ Nonetheless, the FCC has taken steps to reevaluate its EEO enforcement policies. In 2019, the Commission sought input on enhancing compliance and enforcement which garnered a plethora of proposals from various organizations to improve EEO compliance and enforcement.⁶⁴ Similarly, in 2021, the FCC issued a notice seeking comments on how the Commission can collect EEO employment demographic data in a constitutional manner.⁶⁵

While challenges and complexities persist, it is clear the Commission remains committed to promoting diversity and equal opportunities in the telecommunications industry, consistent with the goals of the Communications Act of 1934. The ongoing efforts to reevaluate and update EEO policies demonstrate the importance of this issue and the determination to address it effectively and legally.

⁵⁶ *Id.*

⁵⁷ Joint Supplemental Comments of Asian Americans Advancing Justice et al., Comment Letter on Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Aug. 10, 2022), <https://www.mmtconline.org/wp-content/uploads/2022/08/Civil-Rights-and-Labor-Advocates-EEO-Supplemental-Comments.pdf>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Caulfield v. Bd. of Ed. of City of New York*, 583 F.2d 605, 611 (2d Cir. 1978).

⁶¹ Joint Supplemental Comments of Asian Americans Advancing Justice et al., Comment Letter on Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies (Aug. 10, 2022), <https://www.mmtconline.org/wp-content/uploads/2022/08/Civil-Rights-and-Labor-Advocates-EEO-Supplemental-Comments.pdf>.

⁶² *Id.*

⁶³ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73 & 76).

⁶⁴ FEDERAL COMMUNICATIONS COMMISSION, *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, 84 Fed. Reg. 35063 (proposed July 22, 2019) (to be codified at 47 C.F.R. pt. 73 & 76).

⁶⁵ FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 86 Fed. Reg. 48610 (proposed Aug. 31, 2021) (to be codified at 47 C.F.R. pt. 73 & 76).