their own recruitment strategies will result in more individualized, and thus more effective, EEO programs.[287] While most of the specific, comprehensive recruitment proposals offered by commenters were geared toward broadcasters, one commenter recommends offering both broadcasters and cable entities a "menu" of options for recruitment.[288] Another commenter suggests conforming the cable EEO rules with the revised broadcast EEO Rule to the extent possible to eliminate confusion between the two sets of requirements.[289]

182. For the reasons set forth above with respect to broadcasters, we believe that broad and inclusive recruitment by cable entities is essential to deter discrimination and foster diversity of programming. We also believe that our objective of ensuring that minority and female applicants have the opportunity to apply for positions in the cable industry, underlying the recruitment requirement set forth in Section 634(d)(2)(B), can be achieved without requiring recruitment methods that are specifically targeted to those groups.[290] Broad outreach efforts should be effective to reach minorities and women, as well as other segments of the community that may previously have been deprived of the opportunity to compete for employment in the cable industry due to limited access to word-of-mouth recruitment networks. We conclude that adoption of a recruitment rule for cable entities similar to that adopted for broadcasters will afford cable entities flexibility to design outreach programs that best suit their individual circumstances and needs. We recognize, however, that some modifications to the rule are necessary to conform the rule to statutory requirements particular to cable. Accordingly, we adopt for cable entities a modified version of the broadcast recruitment rule, as described below. In addition, we revise the cable EEO rules, as well as the annual employment reports and SIS forms filed by cable employment units, to make it clear that cable entities are not required to target any particular recruitment sources. Cable entities are given wide discretion in designing their outreach programs provided they reach a broad cross-section of the community, including minorities and women, with information concerning job vacancies.

183. As in the case of broadcasters, we will afford cable entities the option of ensuring that their EEO programs are successful in achieving broad outreach through the use of one of two approaches: the use of the two supplemental recruitment measures as detailed in the discussion concerning the broadcast EEO Rule; or the use of the alternative recruitment program. The requirements we will apply to cable entities are similar to those applicable to broadcasters with one exception. Thus, while we are incorporating into our recruitment rule for cable entities a menu of options for supplemental recruitment measures similar to the menu we are adopting for broadcasters, which includes job fairs, intern programs, training programs, mentoring programs, and interaction with educational and community groups, instead of requiring cable employment units to implement four of these options every

Association (SCBA) Comments at 8 (organization representing 300 small cable businesses and systems); CRB Comments at 5-7; Camrory Comments at 3-4.

[287] NCTA Comments at 9-10; CRB Comments at 5.

[288] NOW Comments at 24-27.

[289] Camrory Comments at 3.

[290] Section 634(d)(2)(B) provides that cable entities shall "use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever jobs are available in its operation." 47 U.S.C. § 554(d)(2)(B).

two years as with broadcasters, we will require cable employment units to implement two of these options each year. The two-year period for broadcasters coincides with the requirement to file the Statements of Compliance every two years. Cable employment units, on the other hand, are required by statute to file annual employment reports, which include a series of compliance questions. Rather than require cable employment units to file a separate Statement of Compliance every two years like broadcasters, we think it would be less burdensome to simply add a question regarding compliance with the new recruitment rule to the employment reports that cable employment units are required by statute to file annually. We modify the annual employment reports for cable employment units as described below to add this requirement. Since cable employment units will be certifying compliance with the recruitment requirements on an annual basis, we think it is appropriate to modify the required number of menu options to fit the shorter implementation period.

184. Initially, we will require that cable entities file with the Commission and place in their public file a statement as to their election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach within forty-five days of the effective date of the new rules. This will ensure that both the Commission and the public are aware of the approach the broadcaster intends to implement. In order to facilitate the initial election, we are preparing a form to be utilized for the initial election. Any cable entity that does not receive a copy of the form by mail may obtain one from the Commission. Thereafter, cable entities may change their election annually at the time of the filing of their annual program reports (FCC Form 395-A or FCC Form 395-M). We will amend those forms to provide for the election. We are permitting cable entities to modify their election annually (instead of every two years, as in the case of broadcasters) because, as noted, cable EEO compliance is administered on an annual basis as required by statute. Copies of the initial election statements will be on file in the Commission's Public Reference Room. In the future, we intend to make information regarding an entity's election electronically available on our web site.

185. Our recruitment rule for cable entities will apply to all full-time positions, both upper-level and lower-level. One commenter argues that any recruitment requirements for cable entities should be limited to upper-level positions that directly influence programming diversity because the court in *Lutheran Church* specifically found that the Commission has no evidence linking lower-level employees to programming diversity.[291] This commenter acknowledges that the *Lutheran Church* decision did not directly address the cable EEO rules, but asserts that the court's analysis of programming diversity as a justification for the broadcast EEO Rule applies equally to the cable EEO rules.[292] However, as discussed above, the Commission has express statutory authority under Section 634 of the Communications Act to adopt recruitment requirements and other EEO rules for cable entities. Moreover, Section 634(d)(2)(B) requires cable entities to recruit "whenever jobs are available,"[293] and Section 634(d)(3)(A) requires cable entities with five or more full-time employees to report both upper-level and lower-level employees on their annual employment reports.[294] The Commission, therefore, not only has statutory authority to apply

[291] Ameritech Comments at 3-4.

[292] Id.

[293] *See* 47 U.S.C. § 554(d)(2)(B).

[294] *See* 47 U.S.C. § 554(d)(3)(A).

recruitment requirements for cable entities to both upper-level and lower-level positions, but is required to do so.

186. For the reasons stated in our discussion of the broadcast recruitment requirements, we will apply the same policies on promotions, temporary employees, interns, part-time employees and former employees to cable entities as we are applying to broadcasters. Thus, we will not ordinarily require cable entities to recruit for internal promotions, temporary employees and interns. However, temporary employees and interns will be subject to recruitment requirements if they are later considered for permanent positions. With respect to part-time positions, we will include a provision in our cable rules clarifying that, in the case of part-time hires, cable entities need only substantially comply with the requirement to recruit for every vacancy. For example, cable entities choosing that approach will not be required to provide notification to requesting organizations for part-time vacancies. We will also expect cable entities to conduct recruitment for hires involving former employees.

187. Analysis/Recordkeeping. In the *NPRM*, we proposed that cable entities retain certain records in order to meaningfully self-assess the effectiveness of their EEO programs and to prove that they have made good faith efforts to broaden their applicant pools for all vacancies. Among other things, we proposed to continue to require cable entities to maintain records as to the race, national origin and gender of all applicants generated by each recruitment source according to vacancy.[295] We nevertheless requested comment on whether extensive applicant pool records were necessary. While NCTA and TCI support retention of the requirement that cable entities maintain extensive applicant pool data,[296] other commenters complain that this recordkeeping requirement is time-consuming, burdensome and inherently unreliable because it relies primarily on voluntary self-identification by applicants of their race and national origin.[297]

188. As we explained in our discussion of the recordkeeping requirements for broadcasters, our purpose in establishing any recordkeeping requirement for cable entities is primarily to ensure that cable entities engage in meaningful outreach and to provide a basis upon which they and the Commission can analyze their recruitment efforts. As in the case of broadcasters, we conclude that this goal can be achieved in many cases, without the necessity of maintaining applicant pool data. However, we will afford those cable entities that believe they can best ensure meaningful outreach through the use of the alternative recruitment program, rather than the use of the supplemental recruitment measures, the option to do so.

189. Accordingly, we will require that cable entities maintain the same records of their EEO recruitment efforts as broadcasters, which will differ in part based on whether the cable entity elects to employ supplemental recruitment measures or the alternative recruitment program.[298] Thus, we will require cable entities to retain in their own records documentation necessary to verify that recruitment occurred for each vacancy, including a list of the vacancies filled during the pertinent review period, the

[295] *NPRM*, 13 FCC Rcd at 23029-30 (para. 73).

[296] NCTA Comments at 13-14; TCI Comments at 15; NCTA Reply Comments at 6-7.

[297] Ameritech Comments at 7-8; CRB Comments at 11.

[298] *See* discussion of broadcast recordkeeping requirements, above.

recruitment sources contacted for each vacancy and other recruitment efforts undertaken. In addition, we will require that cable entities maintain records of the recruitment source of their hirees and interviewees (in the case of those cable entities that elect to utilize supplemental recruitment measures) or maintain applicant pool data (in the case of cable entities that choose the alternative recruitment program). We will expect cable entities to use these records as a starting point in analyzing the success of their recruitment efforts in achieving broad outreach to all segments of the community and, in the event of problems in that respect, to make modifications in their recruitment efforts, as warranted. Thus, the rules we are adopting require a cable entity to analyze the effectiveness of its outreach program, and address any problems found.

190. We will require that cable entities maintain these recruitment records for a minimum of seven years.[299] As requested by one commenter,[300] we clarify that cable entities may maintain records of their EEO efforts electronically, *e.g.*, by retaining electronic copies of e-mail notices of job openings to recruitment sources and scanning pertinent documents into a computer format. Permitting cable entities to maintain electronic records of their EEO efforts will reduce burdens on cable entities and will also reduce the likelihood that records could be lost, as computer records can be backed up. In this regard, we caution cable entities that, absent a showing of extraordinary circumstances, we will not credit claimed recruitment efforts that cannot be supported by records.

191. Public File. As with broadcasters, we believe that it is important that local community residents have a role in monitoring cable entities' compliance with our outreach requirements. In order to facilitate public participation in this process, we will require that each cable employment unit place in its public file annually, and post on its web site, if it has one, on the anniversary of the date that the employment unit's annual employment report is due to be filed, the following information: (1) a list of all full-time vacancies filled by the cable employment unit during the preceding year, identified by job title; (2) for each such vacancy, the recruitment source(s) utilized to fill the specific vacancy (including, in the case of cable entities utilizing the supplemental recruitment measures, organizations entitled to notification of vacancies, which should be separately identified), including the address, contact person, and telephone number of each source; and (3) a statement as to the cable entity's initial election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach and changes resulting from a substantial change of ownership (other changes in the entity's election will be in its annual employment reports, which already must be included in the public file). In addition, cable employment units which elect to utilize the supplemental recruitment measures will be required to include in their public file: (1) a list of the recruitment source that referred the hiree for each full-time vacancy; (2) data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source utilized in connection with any such vacancies, the total number of interviewees referred by that source; and (3) a list and brief description of the menu options engaged in during the preceding year. Those cable employment units which do not elect to utilize the supplemental recruitment measures will be required to include in their public file data reflecting, for each recruitment source utilized for any full-time vacancy

[299] Under Section 634(f)(1) of the Communications Act, if the Commission finds that a cable entity has failed to comply with the statutory EEO requirements three or more times during any seven-year period, such failure shall constitute a "substantial failure to comply" with Title VI of the Communications Act. 47 U.S.C. § 554(f)(1).

[300] Ameritech Comments at 9.

during the preceding year, the total number of applicants generated by that source, the number of those applicants who were female, and the number of those applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated.

192. Relief for Qualifying Units. We will also insert a provision for cable employment units with six to ten full-time employees, similar to the provision that we are adopting for broadcast stations that are part of an employment unit with five to ten full-time employees, because we agree with SCBA that small staff cable employment units have limited financial/administrative resources[301] and that there should be regulatory parity, to the extent possible, between the broadcast and cable industries.[302] The rule provision relating to qualifying cable employment units will state that they are required to choose only one option from the supplemental recruitment measures menu. Larger cable employment units will be required to choose two of these options. Qualifying cable employment units will be expected to meet all other EEO requirements, including, *e.g.*, filing Forms 395-A and 395-M, and maintaining a copy of their EEO public file report in their public file. We will continue our current policy of not requiring cable employment units with fewer than six full-time employees to demonstrate compliance with the EEO program requirements. We emphasize, however, that all cable entities, including those with fewer than six full-time employees, are subject to the provision of the EEO rules that prohibits discrimination. Further, although we are not requiring cable employment units with fewer than six full-time employees to comply with specific recordkeeping and reporting requirements, these units continue to be required to maintain an EEO program, pursuant to Section 634 of the Communications Act. In accordance with our prior practice, we will consider employees to be full-time if their regular work schedule is 30 hours per week or more.

193. Other Matters Concerning Cable EEO Rules. In the *NPRM*, we proposed to require that a cable entity analyze its efforts to recruit, hire and promote in a nondiscriminatory fashion and address any difficulties in implementation of its EEO program.[303] We suggested that such analysis include review of union agreements, seniority practices, productivity of recruiting sources, employee pay and benefits, utilization of media for recruitment purposes, and selection techniques or tests. Commenters who address the issue support adoption of this requirement for cable entities.[304] We will adopt this requirement for the reasons set forth in the *NPRM*. Furthermore, because we have decided to ask for this information by means of a question in the SIS, as discussed below, we will not require that cable employment units submit a separate statement detailing their analysis every five years along with their SIS, as we suggested in the *NPRM*.

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[301] In its Reply Comments, NCTA maintains that, just like small staff stations, small staff cable employment units have limited financial, personnel and time resources available for recruiting and, just like small market stations, small market cable employment units may have difficulties competing with units in larger markets. Therefore, NCTA urges the Commission to recognize the need for flexibility regarding recruitment contacts and sources used by small cable employment units in small markets. NCTA Reply Comments at 5.

[302] SCBA Comments at 2-7. However, for the reasons already discussed, we do not agree that a total exemption from EEO program requirements, as proposed by SCBA, is necessary.

[303] *NPRM*, 13 FCC Rcd at 23029 (para. 72).

[304] NCTA Comments at 12; TCI Comments at 13-14; CRB Comments at 7.

194. We proposed in the *NPRM* to retain the general EEO policy requirements for cable entities, which are outlined in Section 76.73 of the Commission's Rules.[305] We also proposed to retain the EEO program requirements for cable entities which are included in Sections 76.75(a), (d) and (e).[306] No commenters addressed these proposals. Accordingly, we will retain these general EEO policy and program requirements for cable entities.

195. Finally, we will include in our cable EEO rules language clarifying that the provisions in those rules are not intended to require that any person be given preferential treatment based on race, color, national origin, religion, age, or gender.

196. Enforcement. As required by 47 U.S.C. § 554(d)(3)(A), cable employment units with six or more full-time employees will be required to file annual employment reports with the Commission. The Commission will use the recruitment-related information provided in the Forms 395-A or 395-M, but not the employment profile, to determine annually whether units are in compliance with the EEO rules, as required by 47 U.S.C. § 554(e)(1).[307] Data required to be included in the Forms 395-A and 395-M are described herein. We emphasize, however, that statistics provided about race, ethnicity, and gender of employees will not be used to determine compliance with EEO rules but will only be used to monitor industry trends and report to Congress. Systems found to be in compliance will receive a Certificate of Compliance. Systems found not to be in compliance will receive notice that they are not certified for a given year.

197. Normally, before notifying a unit that the Commission has found it noncompliant, the Commission will send an inquiry to the unit requesting information addressing the Commission's concerns. As part of an inquiry, the Commission may request information from the cable entity concerning its recruitment efforts. Also, annual employment reports should be based on recruitment efforts documented in items contained in a unit's own records. Consequently, a unit should retain any records necessary to document its recruitment efforts, including documentation of information provided in annual employment reports and supplemental investigation responses (described below), even though the records will not be required to be placed in the public file or filed with the Commission on a regular basis. These records could include copies of letters notifying sources of job openings, copies of the unit's job listings in newspapers or on web sites, and, if applicable, copies of requests from sources that they be notified of openings and copies of notices sent to them, information verifying participation at job fairs, and other similar types of outreach information. In addition, the Commission's cable EEO public file rules, 47 C.F.R. §§ 76.79 and 76.1702, will be amended to require units, by the same date they are due to file their annual employment reports, to place in their public file a record of the items listed above.

198. As provided in 47 U.S.C. § 554(f), a cable entity may be found to have committed a "substantial failure to comply" with the requirements of the Communications Act if a unit is found to have three or more failures in compliance in a seven-year period. Thus, units will be required to retain for a minimum of seven years any records necessary to document their recruitment efforts.

[305] *NPRM*, 13 FCC Rcd at 23024 (para. 54).

[306] *Id.* at 23024-25 (para. 55).

[307] We had also proposed in the *NPRM*, 13 FCC Rcd at 23030 (para. 74), that we continue to evaluate cable entities' EEO programs every year as part of the annual certification process.

199. As noted above, we are required by statute to certify annually whether units are in compliance with our EEO rules. Thus, in order to verify compliance with the EEO rules and the accuracy of the recruitment-related information in Forms 395-A or 395-M, the Commission may send inquiries to cable entities, as mentioned above. The Commission may at random conduct an inquiry of a unit requesting information relating to the unit's compliance with the EEO rules. We may also conduct an inquiry if the Commission has evidence of a possible violation of the EEO rules. Initially, the inquiry may request documentation of recruitment-related information reported in the Forms 395-A or 395-M. Further inquiry or inquiries may be conducted requesting additional retained recruitment effort documentation that is not reported in the forms, such as the information required to be included in a unit's public file and other data.

200. In addition to annual certifications, the Commission will investigate each cable and MVPD unit at least once every five years, as required by 47 U.S.C. § 554(e)(2). Units will be required to submit supplemental investigation information, as requested in the SIS form, with their regular 395-A or 395-M reports in the years they are investigated.[308] The requirements of the SIS form are described below. Supplemental investigation responses will be filed with annual employment reports when due, and thus will be required to be included in a unit's public file.

201. Most commenters support the continued use of such tools as the annual certifications and the supplemental investigations, as proposed herein.[309] TCI states that annual certifications, periodic inquiries, supplemental investigations every five years, and the possibility of a forfeiture for violations provide incentives to cable entities to evaluate their own programs annually, provides incentives for repeat violators to comply with rules, and serves as a deterrent to others.[310] We agree. Some commenters also suggest that the Commission base its evaluations of units' EEO programs on efforts and not on results and that the Commission not use labor force comparisons.[311] We adopt these suggestions, as discussed above. The public may file complaints concerning the EEO programs of units, which might be based on annual employment reports, supplemental investigation information, or the contents of a unit's public file. Cable entities found to be in violation of the EEO rules may be subject to sanctions and remedies including noncertification, admonishment, reporting conditions, and forfeitures. The appropriate sanction or remedy will be determined on a case-by-case basis.

b. Forms

202. Pursuant to statute, the Commission requires cable employment units with six or more full-time employees to file an employment report (Form 395-A) annually, which calls for responses to

[308] One commenter notes that the statute requires supplemental investigations to be conducted once every five years but suggests that the Commission recommend that Congress change the provision to once every eight years to bring cable more in line with reviews of broadcast EEO programs that take place at the time licensees file for license renewal. SCBA Comments at 5, n.10. This suggestion, however, is beyond the scope of this proceeding.

[309] *See* AWRT Comments at 9; NCTA Comments at 12; NCTA Reply Comments at 6; CRB Comments at 6, 8; TCI Comments at 8.

[310] TCI Comments at 9. *See also* NCTA Reply Comments at 8.

[311] TCI Comments at 9, n. 11; NCTA Comments at 12.

questions about the entity's EEO efforts as well as employment, hiring, and promotion data.[312] The information requested on Forms 395-A and 395-M, including a series of compliance questions, is required by statute.[313] Specifically, the current forms require cable employment units to provide employment data for all employees, as well as information on employee promotions and job hires. In addition, cable employment units must provide a "yes" or "no" response to a series of compliance questions. In the *NPRM,* we proposed to modify our cable forms to the extent necessary to avoid constitutional problems. As stated previously, we believe that broad rulemaking authority granted to us in Section 634 of the Communications Act permits us to change both the cable EEO rules and the cable EEO forms to advance the congressional goals identified in the statute, as well as to avoid constitutional problems.

203. After consideration of the comments on this issue, we have concluded that we should continue to require cable employment units with six or more full-time employees to provide annual employment profile data on all positions in order to continue our monitoring of industry trends and to report to Congress.[314] Thus, these cable employment units will be required to submit to the Commission annual employment profile data for all jobs on Forms 395-A and 395-M. However, these employee statistics will not be used to assess EEO compliance but will be used solely for the preparation of trend reports and to report to Congress. Further, we will continue to require cable entities, consistent with 47 U.S.C. § 554(d)(3)(B), to keep copies of Form 395-A and 395-M available for public inspection.

204. We have determined, however, that it is appropriate to eliminate or revise certain questions on Forms 395-A and 395-M in Section III. Specifically, we will eliminate question three because we conclude that it is not "possible"[315] for us to require cable entities to enforce an obligation that a court has found infringes constitutional rights.[316] For the same reason, we eliminate all form sections concerning available labor force and occupational availability data, employee promotions, and job hires. Therefore, we have eliminated Sections V.B., V.C., and VI of Forms 395-A and 395-M. We also eliminate employee promotion and job hires data in Section VII.

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[312] 47 U.S.C. § 554(d)(3); 47 C.F.R. § 76.77. Form 395-M, the Multi-Channel Video Program Distributor Annual Employment Report, is similar to the Form 395-A.

[313] 47 U.S.C. §§ 554(d)(2), (3)(A),(B).

[314] While not challenging reinstatement of the reporting requirement on constitutional grounds, Ameritech argues that the Commission has statutory authority to regulate work place discrimination only to the extent that it affects programming, and that we should therefore modify the cable EEO reporting requirement to apply only to positions that can directly influence programming and program diversity. Ameritech Comments at 5. As discussed above, the Commission has *explicit* statutory authority to regulate the EEO practices of cable entities with respect to all job categories. *See* 47 U.S.C. § 554. Moreover, Section 634 of the Communications Act specifically requires cable entities with more than five full-time employees to file annual reports identifying the race, sex and job title of employees in 15 comprehensive categories. *See* 47 U.S.C. § 554(d)(3). Thus, the Commission not only has statutory authority to continue collecting employment information from cable entities with respect to all job categories, it is required to do so.

[315] *See* 47 U.S.C § 554(d).

[316] Question three asked, "Do you evaluate your employment profile and job turnover against the availability of minorities and women in your franchise area?"

205. We also believe that it is appropriate to amend the questions on Forms 395-A and 395-M to reflect our new EEO program requirements. Thus, former question one (now question two) will be revised to require cable entities to answer whether they have "widely" disseminated their EEO programs.[317] In addition, we amend the instructions to former question two (now question three) to clarify that we require that a unit engage in broad and inclusive outreach.[318] Question four will be changed to emphasize that promotions are to be offered to all persons in a nondiscriminatory manner.[319] Question five will be revised to make clear that any such efforts should be broad so as to include all segments of the community, and that no entity should be excluded on the basis of race, ethnicity or gender.[320] Further, question five will be amended to emphasize that efforts to seek out entrepreneurs shall be conducted in a nondiscriminatory manner. We also revise question six to ask whether cable employment units have analyzed the results of their EEO efforts in a nondiscriminatory manner.[321] The new Forms 395-A and 395-M will have a new question (question one, Section III) which will require cable employment units to answer whether they have complied with the outreach provisions in accordance with Section 76.75(b) or (f), as applicable, of the Commission's Rules. We believe that the rulemaking authority granted to us by Section 634, as discussed above, affords us sufficient latitude to make these changes. We will continue our current exemption for cable employment units with fewer than six full-time employees from filing employment and compliance data on the 395-A, 395-M, and SIS forms.

206. Cable employment units are subject to a more thorough review every five years with the SIS form, pursuant to statute.[322] The SIS requests information regarding specific recruitment efforts and job categories. The questions on the SIS reflect the compliance questions on the Forms 395-A and 395-M, but ask for narrative responses, instead of "yes" or "no" answers. Thus, consistent with the changes we stated above, we conclude that we may eliminate and revise the corresponding questions in Part 2 of the SIS. Specifically, we will delete question three from the SIS.[323] We also believe that it is appropriate to change former question one (now question two) to ask cable entities to describe their efforts to widely

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[317] Former question one asked, "Do you disseminate your EEO program to job applicants, employees, and those with whom you regularly do business?"

[318] Former question two and current question three asks, "Do you contact minority organizations, women's organizations, media, educational institutions, and other potential sources of minority and female applicants for referrals whenever job vacancies are available in your organization?"

[319] Formerly, question four read, "Do you undertake to offer promotions to positions of greater responsibility to minorities and women in a nondiscriminatory manner?"

[320] Formerly, question five asked, "To the extent possible, do you seek out minority and female entrepreneurs and encourage them to conduct business with all parts of your organization?"

[321] Formerly, question six asked, "Do you analyze the results of your efforts to recruit, hire, promote, and use the services of minorities and women and use these results to evaluate and improve your EEO program?"

[322] *See* 47 U.S.C. § 554(e)(2); 47 C.F.R. § 76.77.

[323] Question three read, "Report the findings of the employment unit's evaluation of its employment profile and job turnover against the availability of minorities and women in the relevant labor force."

disseminate their EEO programs.[324] Also, we clarify that former question two (now question three) contemplates broad, inclusive outreach.[325] In addition, similar to the revisions to questions four, five, and six on Forms 395-A and 395-M, we amend questions four, five, and six on the SIS to clarify that we intend for such efforts to be conducted in a nondiscriminatory manner.[326] The SIS will also have a new question (question one) which will require cable employment units to describe their efforts to comply with the outreach provisions of Section 76.75(b) or (f), as applicable, of the Commission's Rules. Finally, the SIS will require the submission of the information placed in the entity's public file for the preceding year.

207. Part I of the SIS requires cable employment units to provide brief descriptions of specified job categories.[327] We will change this section to remove the requirement that cable entities provide a breakdown of employees by gender and race, and job descriptions for minorities and females. The *NPRM* proposed to require cable entities to submit a statement detailing an analysis of their EEO programs for the preceding 12 months, and ask questions concerning what training or internship programs for minorities and/or women they have implemented on their Form 395-A or 395-M Supplemental Investigation Sheet. Upon further reflection, we have decided not to require cable employment units to file such statements. We believe that the information that cable entities are to submit to the Commission on Forms 395-A, 395-M, and the SIS will be sufficient to allow us to assess their EEO outreach efforts. Also, cable employment units which elect to employ the supplemental recruitment measures will not be required to submit information concerning the total number of applicants received from each listed source, or the total number of minority and female applicants received. We will, however, continue to require cable entities to report part-time, as well as full-time, employees on Forms 395-A and 395-M, as required by statute.[328]

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[324] Former question one asked, "Describe the employment unit's efforts to disseminate its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business."

[325] Former question two and current question three read, "Name the minority organizations, organizations for women, media, educational institutions, and other recruitment sources used to attract minority and female applicants whenever job vacancies become available."

[326] Formerly, questions four, five, and six read as follows: "Explain the employment unit's efforts to promote minorities and women in a nondiscriminatory manner to positions of greater responsibility;" "Describe the employment unit's efforts to encourage minority and female entrepreneurs to conduct business with all parts of its operation and provide an analysis of the results of those efforts;" "Report the findings of the employment unit's analysis of its efforts to recruit, hire and promote minorities and females and explain any difficulties encountered in implementing its EEO program."

[327] This section reads: "Give brief job descriptions for employees in the job categories specified below. The number specified in the box indicates the number of different job descriptions that are to be submitted for each category. If no female or minorities are employed in the specified job category, choose another job category and indicate this on the form. Job descriptions should include the position title and a brief description of the major duties and responsibilities of the individual(s) in the position. In addition, the number of individuals currently employed under the position title and a breakdown of these employees by sex and minority/national origin should be included."

[328] *See* 47 U.S.C. § 554(d)(3)(A), (B).

208. Commenters favor the process currently used by the Commission, with an annual submission of Form 395-A or 395-M, and an SIS filed once every five years.[329] These commenters support the form changes proposed in the *NPRM* and state that the Commission should revise Form 395-A to reflect the Commission's cable EEO rule modifications. These commenters are opposed, however, to a revision to the forms that would request information concerning the total number of applicants received from each listed source or the total number of minority applicants received. As stated earlier, we do not believe that maintaining or reporting to the Commission applicant pool data is necessary if entities elect to employ the specific supplemental recruitment measures which we believe ensure the success of their outreach. Therefore, we will not require that cable entities that elect to employ the supplemental recruitment measures report such data in their cable EEO forms. However, such entities will be required to submit with their SIS response data concerning the recruitment source of hirees and interviewees for the preceding year that is required to be placed in the public file. Also, entities that elect not to employ the supplemental recruitment measures will be expected to submit with their SIS response data concerning applicant pools for the preceding year that is required to be placed in the public file.

209. One commenter urges the Commission to permit cable entities to file a "Common Carrier Annual Employment Report" (FCC Form 395) or an EEO-1 in place of Form 395-A.[330] We will not adopt this proposal. Forms 395-A and 395-M collect job title information within 15 job categories and employment data for six upper-level job sub-categories, which are required by statute.[331] Neither the Form 395 nor the EEO-1 call for this information.

C. Constitutional Issues

210. In the *NPRM*, we sought comment on our view that the EEO outreach and reporting requirements proposed in the *NPRM* would be constitutional under the *Lutheran Church* decision and other precedent.[332] We reasoned that EEO requirements designed simply to ensure that minority and female job candidates, as well as the community at large, are informed of job openings and encouraged to apply do not raise equal protection concerns as long as they are inclusive, assuring that all job candidates have access to information about job openings without regard to their race or gender; impose no greater burdens on non-minority broadcasters or cable entities than minority broadcasters or cable entities; and do not require, pressure, or encourage employers to adopt racial preferences.[333]

211. Several cable entities and other organizations commenting on the proposals concur with our view that they do not raise equal protection concerns. They state that the proposed outreach rule would require no more than inclusive outreach efforts to all sectors of the labor force, and would not in any way pressure or encourage employers to prefer minorities or women in hiring. Therefore, they

[329] *See* CRB Comments at 12; TCI Comments at 16; NCTA Comments at 12.

[330] Ameritech Comments at 9-10.

[331] See 47 U.S.C. §§ 554(d)(3)(A), (B); Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities, 3 FCC Rcd 5389 (1993) (petitions for reconsideration pending).

[332] *NPRM*, 13 FCC Rcd at 23011-13 (paras. 18-23).

[333] *Id.*

contend, the proposed rule would not infringe rights protected by the Equal Protection Clause and would not be subject to heightened scrutiny.[334] They note that the proposed rule lacks the feature that caused its predecessor to be subjected to strict scrutiny. Under the new rule, broadcasters and cable entities would not be required to compare the racial composition of their employment profile with the racial composition of the labor force in their communities, and the Commission would not make that comparison in processing renewal applications.[335] Thus, the new rules would not indirectly pressure employers to make race-based hiring decisions contrary to the *Lutheran Church* decision. In addition, under the new rule, employers would gain no procedural advantage by bringing their levels of women and minority employees up to certain levels.[336] Accordingly, these commenters argue that the new rule could not be viewed as pressuring employers to hire minorities or women.[337] Further, these parties find nothing objectionable in the compilation or reporting of information concerning the race, ethnicity or gender of an employer's staff to enable the Commission to monitor industry trends and report to Congress.[338]

212. In contrast, broadcast industry commenters and several other organizations point to a number of aspects of the proposed recruitment requirements that they claim will be subject to strict scrutiny.[339] First, some of the commenters claim that the proposed requirement that broadcasters and cable entities use minority and female specific recruitment sources, as well as general recruitment sources, utilizes a "racial classification" and is therefore subject to strict scrutiny under *Adarand* -- regardless of whether it adversely affects any person.[340] One commenter claims that "by encouraging the

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[334] *See, e.g.,* UCC Comments at 5-7, Appendix ; MMTC Comments at 55-86; Time Warner Cable (Time Warner) Comments at 2 (owner of cable systems).

[335] *See, e.g.,* UCC Comments at 5-6; MMTC Comments at 62, 74.

[336] The *Lutheran Church* panel concluded that the Commission's processing guidelines – which made it unlikely that that an employer's EEO program would be examined at renewal if women and minorities were employed at half the rate of their presence in the local labor force – encouraged employers to favor women and minorities in hiring. *Lutheran Church* at 353-54. No such processing guideline would be used in enforcing the proposed rule.

[337] MMTC also argues that the proposed collection of data on the race and gender of *applicants* to assess the productivity of recruitment sources would not pressure employers to grant preferences in hiring because "there is no possible regulatory benefit or detriment available to a broadcaster by hiring or not hiring minorities or women." MMTC Reply Comments at 5.

[338] *See, e.g.,* TCI Comments at 15-16; UCC Comments at 16-18; MMTC Comments at 82.

[339] *See, e.g.,* NAB Comments at 25-29; 46 Named StBAs Comments at 10-14; Institute Comments at 2-6; Delta Radio, Inc. and 11 other broadcasters (Delta Radio) Comments at 7-10; Evening Post Comments at 12-16.

[340] Institute at 2-3; Delta Radio at 8-10; Pacific Legal Foundation (PLF) at 3 (non-profit corporation that engages in litigation in matters affecting the public interest); VAB/NCAB Comments at 3-5; Roger Clegg Comments, Attachment (Vice-President and General Manager of the Center for Equal Opportunity); 46 Named StBAs Reply Comments at 7-8.

One commenter makes an attempt to identify how qualified candidates might be disadvantaged by a minority-specific recruitment requirement. Institute asserts that such a requirement would disadvantage non-minorities because broadcasters have finite advertising budgets. Thus, it argues, a requirement that a broadcaster run an advertisement in a

recruitment of specific classifications of applicants, the Commission implicitly would be encouraging preferential hiring of those groups."[341]

213. Second, some commenters argue that the proposed requirement that broadcasters and cable entities monitor the productivity of their chosen recruitment sources by maintaining records of the race, ethnicity, and gender of applicants generated by each source, and change recruiting sources that prove unproductive, would be subject to strict scrutiny.[342] Forty-six Named StBAs, for example, assert that this requirement would require race-based decision-making and would pressure stations to make hiring decisions on the basis of race.[343] NAB similarly finds the proposed requirement for stations to assess the productivity of their recruitment sources to "instill improper pressures," though it does not specify what stations will be "pressured" to do that is "improper."[344] Institute complains that the applicant monitoring requirement replaces "an unconstitutional system of proportional hiring with an equally flawed system of proportional recruiting."[345] It charges that the "true aim" of the policy is to ensure "proportional numbers of minorities are in the applicant pool rather than assuring that job vacancies are advertised in a nondiscriminatory manner."[346]

214. Third, some commenters assert that reinstatement of the requirement that broadcasters file the annual employment report on Form 395-B "threatens to improperly force stations to consider race or gender when hiring."[347] For example, while acknowledging that the Commission stated that it will use the data submitted in these reports only to monitor industry trends, NAB "opposes reinstatement of this reporting requirement because the Commission has not guaranteed that the Commission or others

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minority publication will "inevitably mean that in some instances, a broadcaster will not run an advertisement in a non-minority publication," and that some non-minorities will thus fail to learn about the opening. Institute Comments at 4. *See also* Roger Clegg Comments, Attachment ("A recruitment policy that is aimed at increasing applications from some groups and not others -- as the FCC would require -- is discriminatory.").

[341] CRB Comments at 11 (law firm representing various cable operators).

[342] *See, e.g.,* NAB Comments at 25-27; 46 Named StBAs Comments at 10-11; VAB/NCAB Comments at 12-13; TAB Comments at 4-5; Golden Orange Broadcasting Company (Golden Orange) Comments at 2 (owner of a California television station); Evening Post Comments at 13-14; CRB Comments at 11; Curators Comments at 7-8; Institute Comments at 2-6; ACLJ Comments at 2-3; 46 Named StBAs Reply Comments at 9-10.

[343] 46 Named StBAs Comments at 10; 46 Named StBAs Reply Comments at 9-10.

[344] NAB Comments at 25-27. *See also* Curators Comments at 7 (targeted recruitment coupled with requirement for analysis of productivity of sources would "pressure stations to make race-conscious hiring decisions"); Golden Orange Comments at 2. Golden Orange argues that any self-assessment requirement that focuses on the results of the outreach program, rather than the employer's outreach efforts, would create the "pressure" that the court found offensive in *Lutheran Church.*

[345] Institute Comments at 5.

[346] *Id.*

[347] NAB Comments at 28. *See also* 46 Named StBAs Comments at 11-12; 46 Named StBAs Reply Comments at 11-12.

will not use the collected information against an individual broadcaster in case the 'numbers' look low."[348]

215. Fourth, a few commenters assert that proposed regulations requiring that broadcasters and cable entities exercise care to ensure that their selection techniques and tests, seniority practices, promotional practices, fringe benefit policies and dealings with labor unions do not have the effect of discriminating against qualified minorities or women raise equal protection concerns. They argue that these provisions are subject to strict scrutiny because they increase stations' and cable entities' race consciousness and pressure them to make race-conscious employment decisions.[349] Regarding the proposed requirement that employers refrain from discriminating in making hiring and promotion decisions, one commenter asserts that the "FCC makes plain that stations are expected to recruit, hire, and promote minorities and women, even if they do not have the qualifications or pass the tests required of other personnel."[350]

216. Finally, the commenters who claim that our proposed rules would be subject to strict scrutiny under the Equal Protection Clause generally also assert that they are unlikely to withstand such scrutiny because they are not narrowly tailored to serve a compelling governmental interest.[351]

217. Since the new EEO program requirements we adopt today impose several distinct obligations, we will address the constitutionality of each. The basic recruitment obligation we impose gives broadcasters and cable entities discretion to recruit from whatever sources they choose as long as they widely disseminate information concerning job vacancies so that all qualified persons, including minorities and women, have an equal opportunity to apply for the position. Thus, this basic recruitment obligation requires fair and active outreach to all qualified persons, as many commenters advocate.[352] The courts have consistently held that recruitment measures that are designed to *expand* the applicant pool,

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[348] NAB Comments at 28. *See also* 46 Named StBAs Comments at 11-12; NAB Reply Comments at 11.

[349] 46 Named StBAs Comments at 12; Curators comments at 7-8; PLF Comments at 3-4; Roger Clegg Comments (Attachment). PLF and 46 Named StBAs argue that the requirement to avoid the use of selection techniques and tests that have the effect of discriminating against minorities and women is more stringent than the parallel Title VII requirement; the latter, they argue, permits employers to use tests that the employer demonstrates are job related even if they have a disparate impact on minorities and women. *See* 46 Named StBAs Comments at 12-13; PLF Comments at 4. As discussed below, the Commission requirement was never intended to be more stringent than the parallel Title VII requirement, and, in fact, the Commission will apply its requirement in a less stringent manner than the Title VII requirement. Thus, the 46 Named StBAs and PLF have no cause for complaint in this regard.

[350] PLF Comments at 4.

[351] *See, e.g.,* Evening Post Comments at 16-20; S&B Comments at 15-22; Institute Comments at 6-8.

[352] *See, e.g.,* VAB/NCAB Comments at 7-8; CRB Comments at 11. CRB, representing cable companies, urges that "[r]ather than require certain outreach thresholds or targets for particular classes, the Commission simply should require nondiscriminatory and aggressive outreach to all segments of the population." CRB Comments at 11. Similarly, VAB/NCAB, representing broadcasters, does not oppose the imposition of recruitment requirements, but urges the Commission to adopt EEO requirements that "focus on whether a broadcaster is acting in a fair and nondiscriminatory manner and has taken reasonable steps to provide employment opportunities to all qualified persons." VAB/NCAB Comments at 7-8.

and that do not favor anyone *in* the applicant pool on the basis of race, are race-neutral and are not subject to strict scrutiny.[353] No commenter has cited any case, and we are not aware of any case, that has ever held inclusive outreach requirements to be constitutionally suspect, much less unconstitutional. Indeed, the court in *Lutheran Church* held that "[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated."[354] The basic outreach requirement we adopt today does just that, and thus raises no equal protection concerns.

218. While we have decided, for policy reasons, not to require broadcasters to use recruitment sources specifically targeting minority and female job applicants, we disagree with those commenters who argue that a targeted recruitment requirement would be constitutionally suspect. As long as recruitment requirements are inclusive and do not afford any group superior access to information about job vacancies or pressure employers to make employment decisions on the basis of race or gender, we do not believe that they would raise constitutional concerns.[355] Nevertheless, we have decided, as discussed above, to afford broadcasters considerable discretion in selecting the recruitment sources that will disseminate vacancy information most effectively to everyone in their communities, including minorities and women, rather than dictating the number or type of sources that all broadcasters must use. Thus, the constitutional objections raised by some commenters to targeted recruitment requirements are moot at the present time. As discussed above, we intend to monitor the effectiveness of the new rules to determine if different requirements are in order.

219. In addition to the wide dissemination requirement, broadcasters and cable entities will be required to undertake two kinds of supplemental recruitment measures: (1) sending notices of job vacancies to any recruitment organization that requests such notice, and (2) conducting supplemental recruitment initiatives selected from a menu of options, such as periodic participation in job fairs and internship programs. Under the first supplemental requirement, any national or local community organization that distributes information about employment opportunities to job seekers or refers job seekers to employers will be entitled to request notice of openings without regard to the organization's

[353] *See Raso v. Lago,* 135 F.3d 11 (1st Cir. 1998) (curtailment of statutory preference to reside in redeveloped housing granted to former residents of area, most of whom were white, in order to make some of apartments available to all applicants regardless of race was not subject to strict scrutiny); *Duffy v. Wolle,* 123 F.3d 1026 (8th Cir. 1997) (affirmative efforts to recruit women did not constitute reverse discrimination or support a finding that employer's reasons for hiring a woman were pretexts); *Ensley Branch, NAACP v. Seibels,* 31 F.3d 1548 (11th Cir. 1994) (both voluntary and consent decree provisions requiring recruitment of Black and women employees viewed by court as race neutral measures); *Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1557-58 (11th Cir. 1994) (*Peightal*) (affirmative action plan for county fire fighters designed to remedy past discrimination held narrowly tailored, in part, because fire department had tried "race-neutral" measures such as recruitment outreach to minorities and women in an attempt to diversify its applicant pool, with only limited success); *Shuford v. Alabama State Board of Education,* 897 F. Supp. 1535, 1553 (M.D. AL 1995) ("*Shuford*") (outreach requirements are not subject to strict scrutiny because they only expand the pool of qualified applicants).

[354] *Lutheran Church,* 141 F.3d at 351.

[355] *See Ensley Branch, NAACP v. Seibels,* 31 F.3d 1548, 1571 (11th Cir. 1994) (consent decree provisions requiring strengthened recruitment of Blacks and women viewed favorably by court); *Peightal,* 26 F.3d at 1557-58 (affirmative action plan for county firefighters was held to be narrowly tailored, in part, because fire department had previously tried "race-neutral" measures such as recruitment outreach to minorities and women in an attempt to diversify applicant pool, with only limited success).

affiliation with members of any racial, ethnic, or gender group. Thus, this requirement will not favor any group based on a suspect classification, and will not require employers to take any action based on a suspect classification. It will simply ensure that if, despite the employer's good faith efforts to widely disseminate information concerning job vacancies, any group believes its constituents are not adequately being reached or simply wants to assist in disseminating the information, it can do so. Similarly, the supplemental measures selected from the menu do not require employers to take any action based on race, ethnicity or gender, and do not favor or disadvantage any job applicant based on his or her race, ethnicity or gender. They are simply designed to supplement employers' vacancy-specific recruitment actions with longer term recruitment and training activities that will raise the level of community awareness of opportunities in the broadcasting and cable industries and develop a talent pool for companies to draw from as future vacancies occur.

220. Further, the records that broadcasters and cable entities will be required to keep, place in their public files, or file with the Commission to document compliance with their basic and supplemental recruitment obligations are race neutral. They are designed to provide a means to verify that broadcasters and cable entities have widely disseminated information concerning their vacancies and notified requesting organizations before filling those vacancies. The information is also designed to verify that broadcasters and cable entities have considered in good faith the applicants who respond to their outreach efforts. Thus, the requirements of the rules that broadcasters and cable entities recruit for all vacancies encompasses an obligation to consider the applications received as part of the hiring process.

221. Many broadcasters and cable entities who filed comments in this proceeding have asked for complete discretion regarding how to conduct their outreach programs to suit their own needs and communities. We have decided to give them the option of designing their own outreach programs, subject only to the requirements that they widely disseminate information concerning job openings (which they can do through any channels they desire) and monitor the composition of their applicant pools so that they can determine whether their outreach efforts have in fact been successful in permeating their community. Several commenters argue that requiring employers to maintain records of the race, ethnicity and gender of job applicants generated by their recruitment sources and change sources if their recruitment sources prove unproductive or their efforts fail to reach the entire community would be constitutionally suspect. They claim that such requirements would pressure stations to make hiring decisions on the basis of race or otherwise "instill improper pressures."[356] Forty-six Named StBAs assert that analyzing the representativeness of applicant pools "will effectively create a quota system for hiring."[357] None of these commenters explains, however, how monitoring the race, ethnicity or gender of applicants will pressure employers to prefer anyone who applies for a job on the basis of race or gender or take any other action that could be prejudicial to any job applicant, and we do not believe it will. Indeed, in enforcing the recruitment requirements, the Commission will not even know the race, ethnicity or gender of the persons hired from the applicant pools. Thus, the regulatory scheme will not pressure employers to favor any applicant on the basis of his or her race, ethnicity or gender because granting a preference based on those factors will not improve the employer's posture under that scheme or make its EEO practices less likely to be scrutinized by the agency.

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[356] *See* NAB Comments at 25-27; 46 Named StBAs Comments at 9-10.

[357] 46 Named StBAs Comments at 9-10.

222. Nor is there any merit in the argument that we are instituting an unconstitutional system of "proportional recruiting."[358] The sole purpose of the applicant pool data is to assist employers and the agency in evaluating whether employer outreach efforts are inclusive. We have made it clear that there is no requirement of applicant pool "proportionality" to the composition of the local work force, nor could there be, since employers cannot control who applies for a position. Nevertheless, we believe that monitoring the composition of its applicant pools will give an employer some useful information about whether its outreach efforts are missing a significant sector of the community, such that it should modify its recruitment measures to be more inclusive. For example, if an employer's outreach efforts fail to attract any Hispanic applicants in a metropolitan area with a large Hispanic population, it may decide that the recruitment sources it is using are not disseminating its job advertisements as widely as it thought, and it should take action to rectify the situation. Such action might consist, for example, in advertising its openings in a newspaper of wider circulation or perhaps in a Spanish-language newspaper. We do not see how any job applicant would be prejudiced by either the collection of the information or the subsequent broadening of outreach efforts. As the court observed in *Shuford*,[359] no job applicant can rightly complain about being forced to compete with a larger field of qualified candidates.

223. The cable entities who support the collection of data concerning the race and gender of applicants recognize that there is a difference between reaching out widely in recruiting and making discriminatory hiring decisions.[360] Our new rule requires broad outreach, and we believe that employers trying to reach out in good faith to all parts of their communities may find it helpful to collect data to monitor the effectiveness of their efforts. But the collection of statistics to test whether broad outreach has been effective in no way requires or fosters hiring discrimination, which is unlawful under the Commission's rules and Title VII.[361]

224. In addition, we note that the alternative recruitment program is completely optional; any employer who prefers not to collect data concerning the race, ethnicity or gender of its applicants can comply with the basic and supplemental recruitment requirements fashioned by the Commission, none of which require the collection of such data. No broadcaster or cable entity has cause to complain about a program with which it is not required to comply.

225. We also do not believe that there is any substance to the argument that reinstatement of the Form 395-B filing requirement implicates equal protection concerns because it will force or pressure broadcasters to consider race, ethnicity or gender in making hiring decisions. We stated in the *NPRM*

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[358] Institute Comments at 5. *See also* 46 Named StBAs Comments at 9, asserting that the "fatal flaw" in the proposed regulatory scheme is the "requirement that hiring pools be proportional to the minority population."

[359] 897 F. Supp. at 1552-53.

[360] *See, e.g.,* TCI Comments at 14-16; NCTA Comments at 13-14.

[361] Moreover, the fact that in some circumstances statistical evidence relating to the employment of minorities and women is relevant does not render a nondiscrimination or outreach requirement constitutionally suspect. Statistical evidence plays a key role in determining compliance with Title VII and other statutes barring employment discrimination, but those statutes plainly are not unconstitutional. *See* B. Lindemann and P. Grossman, *Employment Discrimination Law*, 34-45 (statistics in disparate treatment cases), 89-106 (statistics in adverse impact cases), 1687-1740 (statistical proof generally).

and repeat in this *Report and Order* that we will require the filing of that data only for the purposes of monitoring industry trends and reporting to Congress. We also state in the clearest possible terms that we will *not* use the data to assess broadcasters' or cable entities' compliance with our EEO rules.

226. Thus, contrary to NAB's contention, we *have* guaranteed that we will not use the Form 395-B information against any broadcaster in enforcing our EEO rules. Moreover, having stated that we will not use the employment profile data collected on Form 395 to assess compliance with our EEO rules, we will be legally foreclosed from doing so.[362] Therefore, no broadcaster or cable entity has reasonable cause for concern that the Form 395 employment profile data will be used against it in FCC enforcement actions. The fact that a few commenters suggest, without any factual foundation, that an agency has a concealed motive, cannot thereby deprive the agency of authority to adopt requirements that are clearly within its statutory authority. Of course, we cannot guarantee that no third party will file a petition against a broadcaster based on the Form 395-B employment profile data -- or some other equally inadequate basis, for that matter. But we will dismiss any such petition summarily.

227. Finally, a few commenters complain that even those provisions of the Commission's proposed rules that would merely require broadcasters and cable entities to take steps to assure that their policies and procedures for hiring and promoting employees do not discriminate against any person on the basis of race, ethnicity, or gender are constitutionally suspect because they "would collectively add to the pressure on stations to take race-based employment actions ...."[363] These commenters appear to be arguing that even a race-neutral measure that is designed to *prevent racial discrimination* is subject to strict scrutiny because it is "race conscious."[364] Under this reasoning, Title VII and all other laws banning discrimination would be subject to strict scrutiny. The only authority cited for this novel proposition is *Lutheran Church,* but nothing in that decision supports it. As noted above, the court stated in *Lutheran Church* that race-neutral outreach or nondiscrimination requirements would raise no constitutional concerns.[365] We do not believe that rules requiring only nondiscriminatory employment decisions could reasonably be viewed as pressuring employers to "take race-based employment actions .... "[366] Indeed, the Supreme Court plurality explained in *City of Richmond v. J.A. Croson,*[367] that a

[362] *See, e.g., Service v. Dulles,* 354 U.S. 363, 388-89 (1957) (Department of State was legally obligated to comply with its own regulations governing discharge of employees, notwithstanding more permissive statutory provisions); *Gardner v. FCC,* 530 F.2d 1086, 1089-91 (D.C. Cir. 1976) (an agency is bound by its own rules and established procedures). Of course, we are also foreclosed by the *Lutheran Church* decision from using the Form 395-B employment profile data to assess compliance with our EEO rules.

[363] 46 StBAs Comments at 13. *See also* PLF Comments at 3-5.

[364] PLF contends that, by requiring that broadcasters promote employees in a nondiscriminatory fashion and avoid the use of selection techniques and tests that have the effect of discriminating against minorities, the FCC expects stations "to recruit, hire, and promote minorities and women, even if they do not have the qualifications or pass the tests required of other personnel." PLF Comments at 4. Neither the cited rules nor anything the Commission has said can reasonably be interpreted in the manner suggested by PLF.

[365] *See Lutheran Church,* 141 F.3d at 351.

[366] 46 Named StBAs Comments at 13.

[367] 488 U.S. 469 (1989).

government entity is free to employ a "whole array of race-neutral devices" to ensure that individuals or businesses provide equal opportunities to minorities and do not discriminate against them:

> Many of the formal barriers to new entrants ... may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. *Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.*[368]

228. Thus, we are confident that we can take steps to ensure that minorities and women are not either intentionally or "unthinkingly" denied an equal opportunity to compete for jobs in the broadcast and cable industries without treading on rights guaranteed by the Equal Protection Clause. Indeed, nondiscrimination and inclusive outreach requirements like those we adopt today advance the principle that is at the heart of the Equal Protection Clause: equal protection of the laws and equal opportunity for all citizens, regardless of race or gender. It turns equal protection analysis on its head to suggest that they are suspect under it.

V. CONCLUSION

229. In this *Report and Order*, we establish a new broadcast EEO Rule and policies and amend our cable EEO rules and policies. We believe that the rules and policies adopted herein are consistent with the court's decision in *Lutheran Church*, while at the same time ensuring equal employment opportunity in the broadcast and cable industries through vigorous outreach and prevention of discrimination. We acknowledge that some commenters urged us to adopt remedial rules, or, alternatively, initiate a national employment disparity study, pursuant to *City of Richmond v. Croson* and *Adarand Constructors v. Pena*, to gather a record sufficient to sustain a remedial approach. We will not pursue either of these alternatives at this time, but will keep MM Docket No. 98-204 open to allow any interested party to submit whatever information it deems germane to these issues and proposals. We will consider any submissions and determine what, if any, action is appropriate at a later date.

VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

230. *Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *NPRM*. The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, a Final Regulatory Flexibility Analysis ("FRFA") is contained in Appendix B.

231. *Paperwork Reduction Act of 1995 Analysis*. The actions herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to, and become effective upon, approval by the

[368] *Id.* at 510 (emphasis added).

Office of Management and Budget as prescribed by the Act. One commenter submits that the FCC's proposed collection of information from broadcasters and cable entities is not necessary for the legitimate functions of the Commission, that it therefore does not have practical utility, and that the administrative burden should be reduced by not collecting it.[369] We disagree. As stated in the *NPRM*, the court in *Lutheran Church* did not abrogate the Commission's authority to require broadcasters and cable entities to file employment data in order to enable the Commission to analyze industry trends or prepare annual trend reports.[370] Furthermore, statutory provisions require the Commission to collect employment data for television and cable industries.[371] As we further stated in the *NPRM* and this *Report and Order*, knowledge of industry trends enables the Commission to monitor the effectiveness of, and need for, EEO rules and make appropriate recommendations to Congress for legislative change.

232. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554, this *Report and Order* IS ADOPTED, and Part 0, Part 73 and Part 76 of the Commission's Rules ARE AMENDED as set forth in attached Appendix C. It is our intention in adopting these rule changes that, if any provision of the rules, or the application thereof to any person or circumstance, are held to be unlawful, the remaining portions of the rules not deemed unlawful, and the application of such rules to other persons or circumstances, shall remain in effect to the fullest extent permitted by law.

233. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the American Center for Law and Justice IS DISMISSED.

234. IT IS FURTHER ORDERED that the late-filed comments and reply comments in this proceeding are considered as part of the record in this proceeding.

235. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix C WILL BECOME EFFECTIVE either 60 days after their publication in the Federal Register or upon receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, whichever is later, and the information collection contained in these rules will become effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

236. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

237. IT IS FURTHER ORDERED that MM Docket No. 96-16 is terminated.

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[369] Oxley/Hall Comments at 2-3.

[370] *NPRM*, 13 FCC Rcd at 23023 (para. 49).

[371] Id.

238. IT IS FURTHER ORDERED that the present phase of MM Docket No. 98-204 is terminated. However, MM Docket No. 98-204 will remain open for the limited purpose described in paragraph 229 and to facilitate any additional proceedings upon further order of the Commission. This action does not affect the effective date of the EEO Rules adopted herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary