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## FCC Initiatives to Promote Diversification of Broadcast Ownership

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The Federal Communications Commission has announced changes to its rules and policies, together with future proposals, intended to increase broadcast ownership by entities that historically have been under-represented in the broadcasting industry. Although the current initiatives are directed toward new entrants and small businesses generally, the Commission has slated for future consideration policies targeted toward minority- and women-owned businesses. All of these steps are intended to advance the Commission's fundamental policy assumption that expanded opportunities to own broadcasting outlets will propagate information from diverse and antagonistic sources.

The benefits of the Commission's new measures will be available to "eligible entities." That term is defined by the Commission as any entity that would qualify as a small business under the standards of the Small Business Administration. Presently, SBA qualification is limited to no more than \$13 million in annual receipts for television and no more than \$6.5 million in annual receipts for radio. Parent entities and affiliates are included in the revenue count. In addition, the Commission imposes a control test, by which the eligible entity must hold at least 30% of the equity and 50% of the voting power of a broadcast licensee. There are two exceptions to the equity (but not the voting power) test – the equity ownership limit falls to 15% if no other person or entity owns or controls more than 25% of the equity, and the equity test is eliminated altogether for publicly-traded companies.

The Commission has taken the following actions to expand opportunities for eligible entities:

**Construction Period Deadlines** – Generally, broadcast facilities must be constructed within three years (eighteen months for low-power FM stations) unless an "act of God" interferes with construction or the permit is the subject of certain administrative or judicial review. The Commission will now afford an additional eighteen months to construct when any permit having a lesser period before expiration is sold to an eligible entity.

**Attribution Rule** – The Commission's "equity/debt plus" ("EDP") attribution standard considers as an owner any entity that holds both 33% or more of the total assets (equity plus debt) of a licensee and a triggering relationship as either a major program supplier or the holder of an attributable interest in another media entity in the same market. The Commission has modified its EDP standard to enable eligible entities to acquire a broadcast station when an investor in the eligible entity holds up to 50% of combined equity and debt or where the total debt held by the investor in the eligible entity does not exceed 80% of the station's

asset value (and there can be no option or other means by which the debt holder can increase its share).

**Distress Sale Policy** – The Commission currently permits a license designated for a revocation or renewal hearing on basic qualification issues to be assigned to a minority-controlled entity for a price substantially below fair market value. This current distress sale policy is subject to the same constitutional infirmity by which the Commission’s former EEO rules were rejected by courts as based upon impermissible racial classification. Consequently, the Commission has decided to place its distress sale policy on a more sound legal footing by allowing a licensee faced with a revocation or renewal hearing to sell to any eligible entity at an appropriate discount.

**Discrimination Ban for Broadcast Transactions** – The Commission has added a new rule section 73.2090 stating as follows: “No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV, or international broadcast stations (as defined in this part).” The license assignment and transfer of control applications (FCC Forms 314 and 315) will be modified to require an appropriate certification that this policy has not been violated.

**“Zero Tolerance” Policy for Ownership Fraud** – The Commission seeks to deter fraudulent broadcast ownership representations, including situations where real-parties-in-interest structure transactions so that putative principals have no genuine control. The Commission will not audit applications to ensure compliance with this policy. However, it plans to resolve complaints alleging ownership fraud expeditiously (within ninety days) and, when permissible, it will provide confidentiality to whistleblowers who disclose potential ownership fraud.

**Non-Discrimination Provisions in Advertising Contracts** – The Commission remains concerned by reports of “no urban/no Spanish” dictates in orders for advertising placed on broadcast stations. While rejecting a request that it mandate language in advertising contracts, the Commission will add to its license renewal form a certification that advertising contracts do not discriminate on the basis of race or gender and that such contracts contain non-discrimination clauses. Thus, broadcasters should revise their internally-generated advertising contracts, and require all contracts provided by agencies or direct buyers, to have appropriate language affirming that the contracts do not discriminate on the basis of race or gender.

**Duopoly Priority for Companies that Finance or Incubate an Eligible Entity** – In television markets that can only support one additional duopoly situation, where multiple entities simultaneously file to create the last possible duopoly the Commission intends to give priority to a company financing or incubating an eligible entity.

**Extension of Divestiture Deadlines** – When approving large mergers, the Commission often affords an opportunity to divest facilities that exceed its ownership limits within a set time limit. A new policy will extend divestiture deadlines when applicants have actively solicited bids for noncompliant properties from eligible entities or when applicants will place the properties in an irrevocable trust for sale by an independent trustee to an eligible entity. This change could benefit small broadcasters who assembled a group under the former ownership rules but who now find themselves over the current ownership limit yet wish to sell their group intact. A buyer that qualifies as an eligible entity would have up to one year to spin off non-compliant stations.

**Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities** – In a similar policy relaxation, the Commission will permit an assignment or transfer of an entire cluster of grandfathered radio stations to any buyer (rather than just to an eligible entity, as is currently permitted), provided that within twelve months after acquisition the buyer assigns the excess stations to an eligible entity (or to an irrevocable divestiture trust for purposes of ultimate assignment to an eligible entity).

The Commission also considered but rejected a number of other initiatives that proponents had suggested. Among these, the most wide-ranging would have been to open the FM spectrum for new entrants by repealing third-adjacent channel protection, requiring only 50% coverage of the area or population of the proposed community of license, and accepting more than the current limit of four contingent FM applications for minor changes. Others, such as reinstating tax certificates (permitting a deferral of capital gains for sales to minority-controlled firms) and permitting AM stations to use FM translators, are already the subject of separate legislative or Commission proceedings

In addition to the rule and policy changes the Commission is implementing, it has launched a *Third Further Notice of Proposed Rule Making* to consider the following in the future:

**SDBs** – Instead of extending benefits only to “eligible entities,” the Commission will consider the use of a definition of socially and economically disadvantaged businesses (“SDBs”) to define the relevant class of beneficiaries of its relaxed policies. Although the Commission is aware of courts’ rejection of similar race-conscious approaches, it notes that several state university admission departments are using an individualized “full file” review which, while race-neutral, permits an applicant to demonstrate that it has overcome significant social and economic disadvantages in a way that is predictive of success in a challenging industry and that it would promote diverse information and perspectives while satisfying unmet needs. Even so, the Commission raises a number of questions as to how such “full file” review would be structured and implemented.

**Share-Time Proposals** – The Commission suggests that a licensee could assign its right to operate an HD radio stream to an SDB for non-entertainment programming. If permitted, the Commission questions whether the SDB would be considered a licensee in its own right or whether it would have lesser obligations.

**Transfer of AM Expanded Band Facilities** – Currently, the Commission requires that, after a five-year transition period, either a paired standard band or expanded band AM station be surrendered to free up the frequency for other users. The Commission now proposes that a small business be permitted to permanently retain both facilities and that other entities be permitted to sell one of the facilities to a small business for up to 75% of its fair market value. The Commission also appears willing to consider reinstatement of the twenty licenses that already have been unconditionally surrendered by the owners of AM expanded band stations.

**Ownership Report Modifications** – The Commission is concerned that the data collection process derived from its biennial ownership reports (FCC Forms 323) should be enhanced to better measure current levels of minority and female broadcast ownership. In that regard, the Commission may consider removing the current filing exclusion for sole proprietorships and partnerships composed entirely of natural persons, establishing a uniform filing date for all stations (rather than filing on the anniversary of renewal dates), implementing other as-yet unspecified changes to the form to increase the reliability of the reported data, and conducting audits to assess the accuracy of the reported information.

**FM and TV Spectrum Allocation** – The Commission proposes allowing FM stations to change to any community of license within the same market even if the community being vacated has no other full-time radio station, so long as the applicant underwrites the cost of a new LPFM station there. The Commission also seems willing to consider reallocating TV channels 5 and 6 for FM broadcasting, which potentially could lead to thousands of additional radio stations on channels below the current FM band, although they could only be heard on new radios that include the ability to receive the additional spectrum.

It seems only fair to note that several of the Commission's initiatives, while grounded in logic and social intentions, may, at best, have a severely limited practical impact. Thus, its discrimination bans for broadcast transactions and advertising sales are wholly dependent upon the honesty (or, perhaps, the thoroughness of knowledge) of the parties undertaking the certification. Without random audits, and given the Commission's proclivity to decline investigation of any but the most solidly-documented allegations, the impact of additional certifications of compliance with the new policies seems unclear. Moreover, while the new policies are intended to put an end to overt discriminatory directives, it is widely assumed that much of the problem has been on a more veiled level of verbal understandings.

Similarly, while the Commission views its modified distress sale policy as a “win-win” for diversity of ownership, for swift delivery of new services to the public, and for conservation of public and private resources, until now the designation of a broadcast license for hearing has been so extremely rare as to afford few opportunities to invoke the new policies in that context. An unfortunate, if unintended, consequence may be that the FCC might become far less restrained in designating licenses for renewal or revocation hearings, on the assumption that most licensees will invoke a distress sale rather than tax the Commission’s (and their) resources with a full hearing or assume the risk of an adverse outcome.

Finally, in addition to the matters noted above, the Commission has announced initiatives to encourage local and regional banks to participate in SBA-guaranteed loan programs, to convene an access-to-capital conference, and to issue a guidebook on *Increasing Diversity in the Media and Telecom Industries*. The practical reality, though, is that most institutional lending decisions are likely to remain based upon financial considerations rather than social objectives, even with whatever additional information the Commission intends to make available.

In any event, it seems clear that the Commission has reacted to both internal and external pressure to create a more diverse broadcast environment in an era of consolidation and business uncertainty. Yet the genuine impact of the rule and policy changes remains to be seen.

A complete copy of the Commission’s *Report and Order and Third Further Notice of Proposed Rule Making* is available at the Commission’s website or we would be glad to provide a copy upon request. If you would like to file comments concerning the proposed rules, the Commission will announce comment and reply dates following publication in the *Federal Register*. The recent rule and policy changes, too, will become effective following publication in the *Federal Register*.

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