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## SSN Disclosure Requirement Largely Written Out Of Form 323

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While broadcasters were finally compelled to submit biennial Ownership Reports on revised Form 323 by July 8, their attributable principals were *not* required to provide Social Security Number (SSN)-based FCC Registration Numbers (FRNs). In a last-minute ruling by the U.S. Court of Appeals for the D.C. Circuit, the Court expressly confirmed that the FCC has taken the position that “no individual attributable interest holder will be required to submit a Social Security number to obtain an FRN for the July 8, 2010, biennial filing deadline or for any imminent non-biennial filing of Form 323.” That ruling came in response to a petition for writ of mandamus filed by Fletcher Heald and a number of broadcasters and state broadcast associations. Since the Court’s denial of our mandamus petition was based on the FCC’s stated position, it appears extremely doubtful that the FCC will be moving off that position soon.

As a result, any person holding an attributable interest in a commercial broadcast licensee – *i.e.*, any person who would have to be reported on Form 323 – who has not already submitted his/her SSN to the FCC in order to obtain an FRN need not do so simply to complete Form 323. This is a significant development, and a significant retreat on the part of the Commission.

Here’s a step-by-step chronology of the rise and fall of the FRN requirement.

### ***Behind closed doors***

Back in May, 2009, the Commission announced that Form 323 would be revised. But at that time the Commission said absolutely nothing about requiring individual attributable interest holders to cough up their SSNs as part of that process. Likewise, when the Media Bureau announced, in June, 2009, that it had revised the form, it didn’t mention any SSN requirement; to the contrary, the Bureau specifically said that the revised form did not give rise to any need for confidentiality and did not raise any privacy concerns. (Even though the Bureau solicited public comments on its revised form, it elected not to make the revised form available for review, which made it difficult – no, wait, make that *impossible* – to comment on the draft form.)

***From behind a cloud of denial,  
the revised form appears***

In August, the Bureau shipped its revised Form 323 over to the Office of Management and Budget (OMB) for its approval. In so doing, the Bureau – or maybe it was the Commission itself (it’s impossible to tell exactly who sent the item over to OMB) – again expressly claimed that its handiwork did not present anything to worry about from a confidentiality or privacy perspective. But OMB posted the revised form for all to see, finally. Lo and behold, the revised form required that every attributable interest holder listed in any Form 323 be identified by his/her own SSN-based FCC Registration Number (FRN). In other words, in order to complete the form, licensees would have to force their various attributable interest holders to obtain their own FRNs, and that in turn would require those interest holders to hand over their SSNs to the FCC.

Accompanying the form was a “supporting statement” which again asserted that the revised form did not involve privacy or confidentiality issues.

A number of broadcast-related parties pointed out to OMB that, *au contraire*, the SSN/FRN requirement did indeed implicate serious privacy/confidentiality considerations . . . and oh, by the way, the FCC had never given anybody the opportunity to comment on that requirement in the first place. A month later, a “revised supporting statement” was submitted – presumably by the Commission, although it was unsigned and otherwise unattributed – in which the obvious privacy/confidentiality concerns were finally acknowledged.

In a separate response to the various comments, an official in the FCC’s Office of Managing Director claimed that the SSN-based FRN requirement was a “vital mechanism for data quality assurance”. In essence, the Commission was moving full speed ahead with its revised form, FRN requirement and all.

***The FCC blinks once, or maybe twice***

Despite the problematic record underlying the revised form, OMB approved it in October, 2009, and the Bureau promptly announced that the new form would have to be filed by December 15. In November, Fletcher Heald asked the Commission to stay the implementation of the form, noting (among other things) that an impressive number of shortcomings in the development of the revised form precluded its implementation. The Commission ignored our pleading, but a week or two later postponed the filing deadline into January.

In early December, the Commission made the revised form available for folks to fill in, at

least for a while. But it also revealed a further change relating to the FRN requirement. Now parties could avoid disclosing SSN-based FRNs, *but only after the licensee had made good faith, diligent efforts* to obtain all necessary FRNs. If they had done so but still were unable to come up with the FRNs, respondents could use randomly-generated “special use FRNs” (*SUFRN*) as a temporary expedient – emphasis on the word “temporary”. According to the revised instructions, use of a *SUFRN* did **not** relieve the respondent of its “ultimate duty” to hunt down “fully compliant” FRNs for all concerned. And the *SUFRN* was **not** available for non-biennial Ownership Reports (such as those filed by assignees or transferees after the consummation of their acquisition of licenses).

So the *SUFRN* option in fact did nothing to eliminate the FRN obligation.

In late December, with the January deadline fast approaching, Fletcher Heald – joined by ten state broadcaster associations – asked the D.C. Circuit to intercede. Several hours after that request was filed, the FCC announced that it was indefinitely postponing the filing of the revised form, giving rise to cautious optimism that the FCC might be re-thinking the FRN requirement. (Apparently as a result of the indefinite postponement, three months later the Court denied Fletcher Heald’s December request.)

### ***It’s baaaack***

In early April, it became clear that any optimism, cautious or otherwise, was unfounded. The Bureau announced that the revised Form 323 was back on the calendar. New due date: July 8. The announcement said nothing about the FRN question. But careful review of the FRN question on the form revealed new language. Gone was the admonition that respondents had some “ultimate duty” to chase down SSN-based FRNs for all their attributable interest holders. Instead, the form now provided that

[r]espondents who use a non-SSN based “Special Use FRN” will be deemed fully compliant with the Form 323 filing obligation for purposes of this initial filing and the lack of SSN-based FRNs in response to Question 3(a) will not subject Respondents to enforcement action.

The Commission did not provide any public notice announcing, much less explaining, this change.

### ***The Court steps in***

Fletcher Heald, along with several state associations and a number of broadcast licensees, headed back to court with a second mandamus petition. With the new deadline just weeks away, on June 14 the Court ordered the FCC to respond to our arguments by June 21 (later extended to June 23).

Here's where things got interesting.

On June 17, the [FCC sent OMB yet another revision to the form](#), changing the instructions to the FRN question further:

*Old language:* A *SUFRN* could be used “[i]f, after using diligent and good-faith efforts, Respondent is unable to obtain a Social Security Number”.

*New language:* An *SUFRN* may be used “[i]f, after using diligent and good-faith efforts, Respondent is unable to obtain, **and/or does not have permission to use**, a Social Security Number in order to generate an FRN”. (emphasis added)

In other words, even if a respondent had somebody's SSN and could theoretically have signed that person up for his/her own FRN, the respondent was not obligated to do so if the individual had not given his/her permission. Obviously, the Commission was moving away from its original notion that all respondents had an unavailable “ultimate duty” to nail down SSN-based FRNs for all attributable interest holders.

Additionally, the new instruction made the *SUFRN* option available not only for the biennial Ownership Report, but also for all other non-biennial uses of the Form 323.

OMB approved that new language on June 21, and on June 23 the Commission relied on the newly-relaxed instructions in responding to our arguments. The Commission didn't bother to issue any public notice announcing its revised instructions. More surprisingly, in its response to the Court the Commission also didn't bother to alert the Court that the language on which the FCC was relying was brand-spanking new – and that that language had been concocted only *after* the Court had ordered the Commission to respond.

What the Commission *did* do in its response to the Court was to provide its own gloss on the revised instruction. According to the Commission's response, that revision makes it “clear” that

users are not required to provide SSN-based FRNs for the July 8 filing if they object to the submission of their Social Security Numbers.

To some, that gloss might go somewhat beyond the precise language of the latest revised instruction. But that's what the FCC told the Court.

The Court then interpreted the Commission's gloss to mean that “no individual

attributable interest holder will be required to submit a Social Security number to obtain an FRN for the July 8, 2010, biennial filing deadline or for any imminent non-biennial filing of Form 323.” And, based on that interpretation, the Court denied our second mandamus petition.

Call us crazy, but we’re prepared to declare a significant (although not yet total) victory here. Yes, the mandamus petition was “denied”, but only because the Commission backed off the FRN requirement. And since the Court clearly identified that retreat as the basis for the Court’s decision, any attempt by the Commission to re-impose its previous, unrelaxed standard would open the door for another mandamus action. In other words, a major flaw in the revised report has been corrected, at least temporarily, as a result of our efforts.

Unfortunately, the last-minute timing of the FCC’s response and the Court’s action kept these developments out of the public eye just as the July 8 deadline rolled around. As a result, it’s likely that a number of folks who might not otherwise have provided their SSNs did so under the misimpression that they had to. Next time, they might want to check out CommLawBlog first.

### ***Epilog***

Is the relaxation – or effective elimination – of the SSN-based FRN requirement permanent? Who knows? Since the FCC has never bothered to explain precisely why such FRNs are supposedly essential, it’s hard to say whether the FCC could justify such a requirement (although many strongly doubt it). And the longer the Commission relies on *SUFRNs*, the harder it will be to justify any claim that there is no adequate substitute for SSN-based FRNs.

But the Commission clung tightly to the requirement in the face of strong arguments, and relented only when forced by the Court to try to explain its position. That suggests that we may not have seen the last of the SSN-based FRN requirement. We’ll keep our eyes out for further developments – check in at our blog ([www.commlawblog.com](http://www.commlawblog.com)) for updates.