

ALERT

FCC Updates and Clarifies Television Closed Captioning Rules, Seeks Comment on Extending Responsibility Beyond Broadcasters and MVPDs and Elimination of Certain Exemptions

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On February 24, 2014, the Federal Communications Commission (FCC or Commission) released a Report and Order (Order) and Declaratory Ruling updating and clarifying the rules for closed captioning on television.

The rules promulgated by the Order mandate new quality standards, adopt additional requirements for broadcasters utilizing Electronic Newsroom Technique (ENT), and require that video programming distributors (VPDs) monitor and maintain captioning equipment. The Declaratory Ruling clarifies captioning requirements for foreign language and on-demand programming, confirms that these rules apply to low power television (LPTV) stations, and reiterates the requirement to make closed captioning contact information available to viewers.

The Commission also released a Further Notice of Proposed Rulemaking (FNPRM) seeking comment on numerous issues, including expanding captioning compliance responsibility beyond VPDs, updating the complaint process, and eliminating the self-implementing closed captioning exemptions.

The Order

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Based upon “widespread frustration among the viewing public with the inconsistencies in captioning quality,” the Commission concludes that captioning quality standards are necessary to effectuate the purposes of Section 713(b) of the Communications Act. The Order defines four non-technical quality standards for closed captioning: (1) accuracy, (2) synchronicity, (3) program completeness, and (4) placement. To be *accurate*, captions must identify the speakers and reflect the dialogue, sounds, and music of the programming. To be *synchronous*, captions must coincide with the corresponding programming and appear at a readable speed for viewers. To be *complete*, the captions must run for the entirety of the program. To be properly *placed*, captions must not obscure essential on-screen information.

The obligation to comply with one or more of these standards depends on the type of programming being broadcast. *Pre-recorded programming*, which is programming that is not performed and recorded within 24 hours of airing, must comply with all four standards, notwithstanding *de minimis* errors. The Order cautions that for pre-recorded programming, real-time captioning methods may be insufficient to meet the quality requirements. *Live and near-live programming*, which is performed and recorded within 24 hours of airing, must be sufficiently accurate, synchronous, complete and appropriately placed to allow a viewer to understand the program. But, given the challenges of captioning live programming, the Commission will evaluate compliance with the standards on a case-by-case basis. In the FNPRM, the FCC asks whether it should require VPDs to improve the captioning quality of live and near-live programming before it is re-broadcast.

Unlike the closed captioning rules for video programming delivered using Internet Protocol, commonly known as the IP Captioning rules, the television closed captioning rules place compliance responsibility with VPDs—broadcasters and multichannel video programming distributors (MVPDs)—rather than video programmers. However, because much closed captioning originates at the production stage, the Order requires VPDs to exercise best efforts to obtain compliance certifications from its video programmers. Video programmers can certify that they (i) are exempt, (ii) comply with the new quality standards, or (iii) adhere to the new “Best Practices” set forth in the Order. Best Practices for video programmers include performance requirements, verification, and training obligations. The Order also details Best Practices for captioning vendors.

Importantly, as detailed in a recent WileyonMedia blog post, the Order preserved the ability of certain broadcasters to utilize ENT while imposing enhanced compliance procedures. Currently, the FCC’s rules allow the use of ENT by stations outside of the top 25 television designated market areas (DMA) or non-network affiliated stations in the top 25 DMAs. The Order implements a “safe harbor” model that deems broadcast stations otherwise allowed to use ENT in compliance if: (1) in-studio produced programming, weather information, and pre-produced information is scripted; (2) non-scripted live interviews and/or breaking news segments are supplemented with crawls, textual information, or other means; (3) stations provide training to all news staff; and (4) stations appoint an ENT Coordinator. The enhanced ENT compliance measures will take effect 90 days after the Order is published in the Federal Register. As part of a “compliance ladder” approach, stations will be given opportunity to take corrective measures should the FCC notify a certifying station of a “pattern or trend” of alleged noncompliance.

The Order also codified that VPDs must monitor and maintain closed captioning equipment and signal transmissions, including requiring technical equipment checks and imposing new recordkeeping obligations. As part of the FNPRM, the Commission asks whether equipment checks should be done at specific intervals.

In addition, the Order:

- clarified that each broadcast multicast stream will be considered separately for purposes of the \$3 million annual gross revenue exemption;
- declined to obligate additional VPD reporting requirements;
- rejected implementing an audit-driven enforcement process. Instead, the Commission will continue to rely on consumer informal complaints to monitor compliance; and
- declined to establish base forfeiture amounts for closed captioning violations.

Declaratory Ruling

The Declaratory Ruling clarified the applicability of the rules, notably:

- bilingual English/Spanish programming is subject to the rules;
- foreign-language programming (other than Spanish-language programming) that contains “snippets” of English or Spanish is not subject to the rules;
- VPDs exempt from the closed captioning rules must make contact information available pursuant to Rule 79.1(i);
- on-demand programming is subject to the rules; and
- LPTV stations also must comply with the captioning rules.

Further Notice of Proposed Rulemaking

The FNPRM seeks comment on additional changes to the closed captioning rules. Notably, it asks about the costs and benefits of extending compliance responsibility for the captioning rules, including the new captioning quality standards, to video programmers, meaning those who provide the programming intended for distribution by VPDs.

The Commission also seeks comment on ending the exemption for “new networks,” a self-implementing exemption that allows new networks to forego closed captioning for four years after the network’s launch. In addition, the FNPRM asks whether to end other self-implementing exemptions, including: advertisements of five minutes or less; late-night programming; locally-produced and distributed non-news programming with no repeat value, interstitials, promotional announcements, and public service announcements 10 minutes or less in duration; and channels producing revenues under \$3 million.

In addition, the FNPRM seeks comment on:

- applying the new ENT requirements adopted in the Order to non-broadcast networks;
- adopting best practices for resolution of consumer complaints;
- requiring notification procedures in the event of a captioning outage;
- technical solutions for improving captioning synchronicity and completeness;
- measures to improve the quality of captioning for near-live programming;
- error correction for rebroadcasts of live and near-live programming;
- practices and capabilities with regard to captioning of 3D TV and Ultra HDTV programming
- requiring that contact information be submitted only using the FCC's web form;
- amending Rule 79.1(g)(3) to require VPDs receiving a complaint for programming over which it does not exercise control to notify the complainant of the correct responsible party;
- current practices for formatting of closed captions; and
- possible problems with on-screen visual changes obstructing captions.

There are two sets of comments and reply comment deadlines for the FNPRM. Comments and reply comments on the portion of the FNPRM addressing responsibility for compliance are due 30 days and 60 days, respectively, after publication in the Federal Register. Comments and reply comments on the remainder of the FNPRM are due 90 days and 120 days, respectively, after publication in the Federal Register.