

Client Advisory | *September 23, 2011*

FCC Proposes Closed Captioning Rules for IP-Delivered Programming

The Federal Communications Commission (“FCC”) has released a Notice of Proposed Rulemaking (“NPRM”) proposing rules to implement the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). The CVAA directs the FCC “to revise its regulations to require closed captioning of video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.” The deadline for the FCC to adopt these new regulations is January 12, 2012.

New Rules in General. Pursuant to the terms of the CVAA, the FCC established an advisory committee (the “VPAAC”) in December 2010 for the purpose of recommending the new IP captioning rules. The recommendations of the VPAAC are reflected in the NPRM, which proposes to implement the CVAA by, *inter alia*, adopting a series of new rules applicable to “video programming distributors” (“VPDs”), “video programming providers” (“VPPs”), and “video programming owners” (“VPOs”). For purposes of these rules, the FCC proposes to define VPP and VPD as having the same meaning (i.e., any entity that makes available directly to the end user video programming through an IP-based distribution method). VPOs would be defined as including any entity that owns the copyright of the video programming distributed to the end user by a VPD or VPP. The proposed rules also establish requirements designed to ensure that captions can be displayed on a wide range of devices that consumers use to view video programming.

As discussed below, the specific implementing rules on which the FCC is seeking comment would:

- Require VPOs to either send caption files for IP-delivered video programming to VPPs and VPDs along with program files or to provide VPPs and VPDs a dated certification stating that captions are not required for the specific reason certified;
- Require VPPs and VPDs to either enable or pass through all captions to the end user;
- Require the quality of mandated captioning on IP-delivered programming to be of at least the same quality as the captioning of the same programming as aired on television;
- Create a schedule of deadlines for compliance with the captioning obligation based on the type of programming (i.e., prerecorded/unedited; live/near-live; and prerecord/edited);
- Establish procedures by which VPPs and VPOs may petition the FCC for exemptions from the new captioning requirements based on economic burden;
- Establish a means by which information about programming subject to the CVAA would be made available to VPPs and VPDs;
- Establish a complaint process for enforcing the new rules;
- Allow the industry to develop technical standards for captioning IP-delivered video programming; and
- Generally require (but subject to exemptions and exceptions) all apparatus designed to receive or playback video programming to be capable of displaying captions.

Effective Date and Schedule of Deadlines. Under the NPRM’s framework, captioning would be required for the IP-distribution of video programming that was aired on television with captions after the effective date of the rules. Programming that was aired with captions before the effective date of the rules would not require captioning when IP-delivered; however, if the programming is re-aired on television with captions after the effective date of the rules, the FCC proposes that subsequent IP-delivered showings would require captioning. The FCC proposes to require that the VPO certify that such programming now must be captioned for IP-distribution, after which a VPD or VPP would have five days to include the required captions.

In order to give VPDs and VPPs time to make the technical changes necessary to implement the IP-delivered programming captioning requirements, the FCC has proposed the following schedule based on the recommendations of the VPAAC:

- Pre-recorded programming that is IP-delivered without further editing would have to be captioned within six months of the publication of the rules in the Federal Register.

- Live and “near-live” programming that is IP-delivered would have to be captioned within 12 months of publication of the rules in the Federal Register.
- Pre-recorded programming that is edited before being IP-delivered must be captioned within 18 months of publication of the rules in the Federal Register.

It is not clear from the NPRM why the FCC proposes triggering these dates to publication of the rules in the Federal Register rather than the actual effective date of the rules, which typically occurs 30 days after Federal Register publication. In any event, under the NPRM’s framework, after the rules have become effective and once the specific time periods described above have expired, VPPs and VPDs must ensure that all IP-delivered programming subject to the new captioning rules is captioned.

Exceptions and Exemptions. Under the NPRM, the new IP-delivered captioning rules will only apply to full-length programming, not to clips or outtakes. The FCC proposes that an “outtake” be defined to mean content that is not shown in the edited version of the programming shown on television, while a “video clip” would be a small section of a larger video presentation.

In the event that the programming at issue is subject to one of the categorical exemptions governing the television closed captioning rules, the programming would not require captioning if IP-delivered. However, the NPRM proposes that if the

programming that would otherwise be exempt is captioned voluntarily when aired on television, it would then require captioning when IP-delivered.

The CVAA provides that a VPP or VPO can petition the FCC for an exemption from the IP-delivered captioning rules in the event compliance would be “economically burdensome.” Under the Act, such claims are to be evaluated based upon: 1) the nature and costs of compliance; 2) the “impact” of compliance on the provider or programmer’s operations; 3) the financial resources of the provider or programmer; and 4) the “type of operations” of the provider or programmer. As is the case with similar requests, the FCC would require the petitioner to make a sufficient showing of burden. Such petitions would be placed on public notice with the opportunity for public comment or oppositions. While the petition was pending, the petitioning party would be exempt from the captioning rules.

The CVAA also provides that the FCC’s implementing rules should not make a “de minimis” failure to comply a violation. Because the CVAA does not define what constitutes a “*de minimis*” violation, the NPRM seeks comment on this concept.

Device Applicability. With respect to the equipment that must be able to decode and display IP-delivered captioning, the CVAA specifies that: 1) closed captioning capability should be possible for a) displays less than 13 inches in size and b) for devices designed to record video programming

(e.g., digital video recorders); 2) display-only monitors need not be able to display IP-delivered captioning; and 3) the FCC may waive its rules for devices that “derive their essential utility from uses other than video playback.” In light of these specifications, the NPRM seeks comment regarding what devices should be required to decode and display IP-delivered captioning and what features these devices should be required to possess to perform such functions.

Enforcement. The NPRM proposes that it adopt a similar enforcement mechanism to that in place for current television captioning complaints. Viewers are encouraged to bring complaints directly to VPPs or VPDs in lieu of or before bringing them to the FCC. In the event the FCC determines a violation has occurred, the NPRM seeks comment on potential sanctions.

In the event that a VPO certifies that a program is not subject to IP-delivered captioning, the NPRM proposes that the VPP or VPD would not be subject to an enforcement action unless the provider or distributor knew or should have known that the certification was incorrect.

In light of the statutory requirement that new rules be adopted by January 12, the FCC has established a very short time-frame for comments and reply comments. Comments regarding the NPRM and proposed rules will be due 20 days after the NPRM is published in the Federal Register with Reply Comments due 10 days later.

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