

Important Closed Captioning Deadlines Land in March 2015

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Several deadlines arrive on March 16, 2015 stemming from the Federal Communications Commission's (FCC or Commission) new closed captioning quality rules. Notably, the agency places responsibility for television closed captioning compliance on broadcasters and multichannel video programming distributors (MVPDs) – what the FCC terms “video programming distributors” (VPDs).

Closed captioning quality standards

Beginning March 16, consumers will be able to file informal complaints based on non-compliance with the four non-technical quality standards for closed captioning: (1) accuracy, (2) synchronicity, (3) program completeness, and (4) placement.

The obligation to comply with one or more of these standards depends on the type of televised programming. *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. “Offline captioning,” which describes a method for adding captions after program production, is generally used for pre-recorded programming. As a result, the FCC believes there should be time for “careful review and editing of captions” with pre-recorded programming. The Commission also cautions that for pre-recorded programming, real-time captioning methods may be insufficient to meet the quality requirements and should be utilized only when necessary.

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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. The FCC encourages VPDs to seek contractual guarantees of quality from programmers and captioning vendors. But, given the challenges of captioning live programming, the Commission will evaluate compliance with the standards on a case-by-case basis and consider the nature of the programming and associated challenges for accurate captioning.

Certifications from video programmers.

By March 16, VPDs must exercise best efforts to obtain compliance certifications from each of their video program suppliers regarding the new quality standards. To exercise such best efforts, a VPD must request in writing that the video programmer certify that it is (i) exempt, (ii) complies with the new quality standards, or (iii) adheres to the new "Best Practices," which also take effect March 16 and are explained in detail in a previous client alert. VPDs must also request in writing that the programmer make the certification widely available within 30 days after receiving the request from the VPD. VPDs are obliged to check websites used to post certifications to determine which of their programmers have certified as to compliance.

VPDs that fail to exercise best efforts to obtain certification by March 16 will be subject to enforcement action. Where a video programmer does not provide the certification and the VPD still carries the program, the VPD must report the non-certifying programmer to the Commission. Doing so will avoid enforcement action against the VPD. Notably, MVPDs do not need to obtain certifications from broadcast television stations.

Monitoring, maintenance, and recordkeeping.

VPDs must pass through all programming received with captions to viewers with captions intact. To ensure full compliance with the pass-through requirement, the new rules codify affirmative monitoring, maintenance, and recordkeeping requirements for VPDs that are meant to ensure that captions are delivered to viewers intact.

By March 16, VPDs must maintain records for a minimum of two years that include: (1) information about the VPD's monitoring and maintenance of equipment and signal transmissions to ensure pass through of closed captions; (2) information about technical equipment checks; (3) information that repairs were promptly undertaken as needed; and (4) information about other activities undertaken to ensure captioning equipment is maintained in good working order.

Electronic Newsroom Technique (ENT) enforcement

Only the major national broadcast television networks (i.e., ABC, CBS, Fox and NBC), affiliates of those networks in the top 25 markets, and national non-broadcast networks serving at least 50% of all homes subscribing to MVPD services, must use real-time captioning in order to comply with the closed captioning rules.

The remainder of VPDs may use ENT to convert the dialogue included in a teleprompter script into captions for their news programming, as long as VPDs take significant steps to ensure that the bulk of a local newscast is scripted, and therefore captioned. These “Enhanced ENT” rules took effect June 30, 2014.

Enforcement of the ENT rules begins March 16. Specifically, using a so-called “compliance ladder” approach, the Commission will afford VPDs an opportunity to correct deficiencies before it sends the matter to the Enforcement Bureau. Actions will still be generated by informal consumer complaints. However, notably, the FCC will forward complaints to stations only if the complaint contains certain specific information.

For alleged ENT noncompliance:

- If the Commission notifies a VPD that the FCC has identified “a pattern or trend” of possible noncompliance by the station, the VPD will be required to respond within 30 days and describe, if applicable, the corrective measures it has taken, including if it has responded to informal complaints and inquiries from viewers.
- If, after the date by which the response is due, the FCC notifies the VPD that there is further evidence indicating a pattern or trend of noncompliance, the VPD will be required to provide to the Commission, within 30 days, an action plan describing specific measures the station will take to bring its ENT performance into compliance. Action plans could include, for example, additional training of personnel, reminding staff about the need for accessibility and implementing additional protocols, and, if appropriate, the use of improved equipment. The station will also be required to conduct spot checks of its ENT performance and report to the Commission on the results of its action plan and spot checks 180 days after submission of such action plan.
- If, after the date for submission of such report, the Commission still finds continued evidence of a pattern or trend of noncompliance, the FCC will then consider, through its Enforcement Bureau, appropriate enforcement action. The penalties could include admonishments, forfeitures, and other corrective actions. Significantly, the FCC may also mandate injunctive relief by requiring the VPD to cease using ENT and instead use real-time captioning for live programming.