(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: September 13, 2011.

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Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 79

[MB Docket No. 11–154; FCC 11–138]

Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes rules to implement provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') that mandate rules for closed captioning of certain video programming delivered using Internet protocol (''IP''). The Commission seeks comment on rules that would apply to the distributors, providers, and owners of IP-delivered video programming, as well as the devices that display such programming.

DATES: Comments are due on or before October 18, 2011; reply comments are due on or before October 28, 2011. Written PRA comments on the proposed information collection requirements contained herein must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before November 28, 2011.

ADDRESSES: You may submit comments, identified by MB Docket No. 11–154 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Electronic Comment Filing System (ECFS) Web Site: http://fjallfoss.fcc.gov/ecfs/*. Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, *etc.*) by *e-mail*: *FCC504@fcc.gov* or *phone:* 202–418–0530 or *TTY:* 202–418–0432.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act proposed information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *Nicholas_A._Fraser@omb.eop.gov* or via fax at 202–395–5167. For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding pertaining to Section 202 of the CVAA, contact Diana Sokolow, *Diana.Sokolow@fcc.gov*, of the Policy Division, Media Bureau, (202) 418–2120. For additional information on this proceeding pertaining to Section 203 of the CVAA, contact Jeffrey Neumann, *Jeffrey.Neumann@fcc.gov*, of the Engineering Division, Media Bureau, (202) 418–7000. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking, FCC 11–138, adopted and released on September 19, 2011. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–257, Washington, DC 20554. This document will also be available via ECFS at *http://fjallfoss.fcc.gov/ecfs/*. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an e-mail to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

This document contains proposed information collection requirements. As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Public and agency comments are due November 28, 2011.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR as show in the **SUPPLEMENTARY INFORMATION** section below (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

OMB Control Number: 3060–XXXX.

Title: Section 79.4, Closed Captioning of Video Programming Delivered Using Internet Protocol.

Form Number: Not applicable.

Type of Review: New collection.

Respondents: Individuals or households; Businesses or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 1,140 respondents; 12,225 responses.

Estimated Time per Response: 0.084–5 hours.

Frequency of Response: On occasion reporting requirement; Recordkeeping requirement.

Obligation to Respond: Voluntary and required to obtain or retain benefits. The statutory authority for this collection of information is contained in 47 U.S.C. 154(i), 154(j), 303(r), and 613.

Total Annual Burden: 6,140 hours.

Total Annual Costs: $420,000.

Privacy Act Impact Assessment: Yes. The Privacy Impact Assessment (PIA) was completed on June 28, 2007. It may be reviewed at: *http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.* The Commission is in the process of updating the PIA to incorporate various revisions made to the SORN.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, ''Informal Complaints and Inquiries.'' As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published a SORN, FCC/CGB–1 ''Informal Complaints and Inquiries'', in the **Federal Register** on December 15, 2009 (74 FR 66356) which became effective on January 25, 2010.

Needs and Uses: The Commission is seeking approval for this proposed information collection from the Office of Management and Budget (OMB). On September 19, 2011, the Commission released a Notice of Proposed Rulemaking, MB Docket No. 11–154; FCC 11–138. This rulemaking proposed information collection requirements that support the Commission's IP closed captioning rules that would be codified at 47 CFR 79.4, as required by the CVAA.

The proposed information collection requirements consist of:

Certifications if Captions Are Not Required

Pursuant to proposed 47 CFR 79.4(c)(1)(i), video programming owners must send program files to video programming distributors and providers either with captions as required by Section 79.4, or with a dated certification that captions are not required for a specified reason.

Pursuant to proposed 47 CFR 79.4(c)(1)(ii), video programming owners must provide video programming distributors and providers with any revised certifications and newly required captions (if captions were not previously delivered) within seven days of the underlying change.

Pursuant to proposed 47 CFR 79.4(c)(2)(ii), video programming distributors and providers must retain all certifications received from video programming owners pursuant to proposed 47 CFR 79.4(c)(1)(i)–(ii) for so long as the video programming distributor or provider makes the certified programming available to end users through a distribution method that uses IP and thereafter for at least one calendar year.

Petitions for Exemption Based on ''Economic Burden''

Pursuant to proposed 47 CFR 79.4(e), a video programming provider or owner may petition the Commission for a full or partial exemption from the closed captioning requirements for IP-delivered video programming based upon a showing that they would be economically burdensome.

Petitions for exemption must by filed with the Commission, placed on Public Notice, and be subject to comment from the public.

Complaints Alleging Violations of the Closed Captioning Rules for IP-Delivered Video Programming

Pursuant to proposed 47 CFR 79.4(f)(1), a complaint alleging a violation of the closed captioning rules for IP-delivered video programming may be filed with the Commission. Proposed 47 CFR 79.4(f)(1) would require such a complaint to be in writing, and to include:

The name and address of the complainant;

The name and postal address, Web site, or e-mail address of the video programming distributor, provider, and/or owner against whom the complaint is alleged, and information sufficient to identify the video programming involved;

Information sufficient to identify the software or device used to view the program;

A statement of facts sufficient to show that the video programming distributor, provider, and/or owner has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

The specific relief or satisfaction sought by the complainant; and

The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that would best accommodate the complainant).

The Commission is seeking OMB approval for the proposed information collection requirements.

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. The Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') requires the Federal Communications Commission (''Commission'') to revise its regulations to mandate closed captioning on certain video programming delivered using Internet protocol (''IP'').[1] In this Notice of Proposed Rulemaking (''*NPRM*''), we initiate a proceeding that will fulfill this requirement. We seek comment on proposals that would better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, by requiring that programming be provided with closed captions if it was shown on television with captions after the effective date of the rules adopted pursuant to this proceeding. We also seek comment on requirements for the devices that are subject to the CVAA's new closed captioning requirements.[2] Our goal is to require the provision of closed captions with IP-delivered video programming in the manner most helpful to consumers, while ensuring that our regulations do not create undue economic burdens for the distributors, providers, and owners of online video programming.

2. Closed captioning is an assistive technology that provides individuals who are deaf or hard of hearing with access to television programming. Closed captioning displays the audio portion of a television signal as printed words on the television screen. Existing regulations require the use of closed captioning on television.[3] Until now, however, closed captioning has not been required for IP-delivered video programming. That changed with the enactment of the CVAA. Specifically, Section 202(b) of the CVAA revised Section 713 of the Communications Act of 1934, as amended (the ''Act''), to require the Commission to ''revise its regulations to require the provision of

[1] Public Law 111–260, 124 Stat. 2751, § 202(b) (2010). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

[2] *See* Public Law 111–260, § 203.

[3] *See* 47 CFR 79.1 (setting forth the requirements for closed captioning of video programming on television).

closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.[4]

3. The CVAA also required the Chairman of the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee (''VPAAC'').[5] Section 201(e)(1) of the CVAA required the VPAAC to submit a report on closed captioning to the Commission six months after its first meeting, or by July 13, 2011.[6] The VPAAC submitted this report on July 12, 2011.[7] By statute, within six months of the submission of the VPAAC Report, the Commission must issue final regulations to require the provision of closed captioning on IP-delivered video programming.[8] Accordingly, the Commission must revise its regulations by January 12, 2012.[9] By the same date, pursuant to Section 203 of the CVAA, the Commission must revise its regulations to include any technical standards, protocols, and procedures needed for the transmission of closed captioning delivered using IP, to ensure that certain apparatus are capable of rendering, passing through, or otherwise permitting the display of closed captions for end users.[10]

We consider below revisions to our rules that would implement the requirements of Sections 202(b) and 203 of the CVAA, as well as the conforming amendment set forth in Section 202(c) of the CVAA. These proposals could fulfill Congress' goal of enabling consumers who are deaf or hard of hearing to have access to IP-delivered video programming. As discussed below, we seek comment on rule changes that would:

- Specify the obligations of entities subject to Section 202(b) by:
- Requiring video programming owners to send required caption files for IP-delivered video programming to video programming distributors and video programming providers along with program files;
- Requiring video programming distributors and video programming providers to enable the rendering or pass through of all required captions to the end user; and
- Requiring the quality of all required captioning of IP-delivered video programming to be of at least the same quality as the captioning of the same programming when shown on television; [11]
- Create a schedule of deadlines by which:
  - All prerecorded and unedited programming subject to the new requirements must be captioned within six months of publication of the rules in the **Federal Register**;
  - All live and near-live programming subject to the new requirements must be captioned within 12 months of publication of the rules in the **Federal Register**; and
  - All prerecorded and edited programming subject to the new requirements must be captioned within 18 months of publication of the rules in the **Federal Register**; [12]
- Craft procedures by which video programming providers and video programming owners may petition the Commission for exemptions from the new requirements based on economic burden; [13]
- Establish a mechanism to make information about video programming subject to the CVAA available to video programming providers and distributors, by requiring video programming owners to provide programming for IP delivery either with captions, or with a certification that captions are not required for a stated reason; [14]
- Decline to adopt particular technical standards for IP-delivered video programming; [15]
- Decline to treat a *de minimis* failure to comply with the new rules as a violation, and permit entities to comply with the new requirements by alternate means; [16] and
- Adopt procedures for complaints alleging a violation of the new requirements.[17] Additionally, we seek comment on the appropriate requirements for devices subject to the closed captioning requirements of Section 203.[18]

II. Background

A. History of Closed Captioning

5. Captions first appeared on television in the early 1970s in an ''open captioning format'' by which the text was transmitted with the video in a manner that was visible to all viewers.[19] In 1977, the Commission adopted rules providing that line 21 of the vertical blanking interval (''VBI'') would be used primarily for the transmission of closed captioning to analog receivers.[20] For

[4] 47 U.S.C. 613(c)(2)(A).

[5] Public Law 111–260, § 201(a) (providing that, within 60 days of the CVAA's enactment, the Chairman must establish an advisory committee). The CVAA was enacted on October 8, 2010, and the Commission announced the establishment of the VPAAC on December 7, 2010. *See* Notice, *Video Programming and Emergency Access Advisory Committee Announcement of Members*, DA 10–2320, 76 FR 2686, January 14, 2011; *see also* Public Notice, Erratum, *Video Programming and Emergency Access Advisory Committee Announcement of Members* (rel. Jan. 7, 2011). Although in the CVAA, this advisory committee is formally known as the ''Video Programming and Emergency Access Advisory Committee,'' its working name was shortened to the ''Video Programming Accessibility Advisory Committee'' in order to avoid confusion with a second advisory committee required by the CVAA that is addressing 9–1–1 emergency access issues. *See* Public Law 111–260, § 106 (directing the Commission to establish an ''Emergency Access Advisory Committee'').

[6] Section 201(e)(1) of the CVAA required the VPAAC's report to include:

(A) A recommended schedule of deadlines for the provision of closed captioning service.

(B) An identification of the performance objectives for protocols, technical capabilities, and technical procedures needed to permit content providers, content distributors, Internet service providers, software developers, and device manufacturers to reliably encode, transport, receive, and render closed captions of video programming, except for consumer generated media, delivered using Internet protocol.

(C) An identification of additional protocols, technical capabilities, and technical procedures beyond those available as of the date of enactment of the [CVAA] for the delivery of closed captions of video programming, except for consumer generated media, delivered using Internet protocol that are necessary to meet the performance objectives identified under subparagraph (B).

(D) A recommendation for technical standards to address the performance objectives identified in subparagraph (B).

(E) A recommendation for any regulations that may be necessary to ensure compatibility between video programming, except for consumer generated media, delivered using Internet protocol and devices capable of receiving and displaying such programming in order to facilitate access to closed captions.

Public Law 111–260, § 201(e)(1).

[7] *See* First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, July 12, 2011, *available at http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf* (''VPAAC Report'').

[8] 47 U.S.C. 613(c)(2)(A).

[9] *See id.*

[10] Public Law 111–260, § 203(a)–(b), (d).

[11] *See* Section III.A., *infra.* As discussed below, a covered entity may be permitted to improve upon the quality of the captioning of IP-delivered video programming.

[12] *See* Section III.B., *infra.*

[13] *See* Section III.C., *infra.*

[14] *See* Section III.D., *infra.*

[15] *See* Section III.E., *infra.*

[16] *See* Section III.F., *infra.*

[17] *See* Section III.G., *infra.*

[18] *See* Section IV., *infra.*

[19] *See Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility,* FCC 96–318, 61 FR 42249, August 14, 1996.

[20] *See TV Captioning for the Deaf,* Report and Order, 63 FCC 2d 378 (1977). *See also Permissible Uses of the Vertical Blanking Interval*, FCC 93–235, 58 FR 29981, May 25, 1993 (permitting enhanced closed captioning and other broadcast-related information services on line 21, field 2 of the VBI).

analog television, closed captioning is transmitted through encoded data within the television signal's VBI ''which, when decoded, provides a visual depiction of information simultaneously being presented on the aural channel (captions).[21] Since closed captioning is hidden as encoded data transmitted within the television signal, receivers can be (and are) designed to allow consumers to turn the captioning on and off.[22] In addition to displaying the audio portion of a television signal as printed words, captions may identify speakers, sound effects, music, and laughter.[23]

6. The Television Decoder Circuitry Act of 1990 (''TDCA'')[24] required all television receivers with screen sizes of 13 inches or larger, manufactured or sold in the United States, to possess closed captioning capability.[25] In the years that followed, the use of closed captioning increased somewhat, through the voluntary efforts of the video programming industry.[26] As the number of channels of video programming increased, Congress remained concerned that ''video programming through all delivery systems should be accessible'' to individuals who are deaf or hard of hearing.[27]

7. In the Telecommunications Act of 1996, Congress added a new section entitled ''Video Programming Accessibility'' to the Act.[28] To ensure access for individuals with hearing disabilities, Section 713 of the Act requires the closed captioning of video programming.[29] In 1997, the Commission adopted rules and implementation schedules for closed captioning of video programming, as required by Section 713.[30] The schedules varied based on whether programming is analog or digital, Spanish or English, and whether it is pre-rule (*i.e.*, older) or new programming. Today, all new English and Spanish language television programming that is subject to the rule must be provided with closed captions,[31] and 75 percent of pre-rule English language television programming that is subject to the rule must be provided with closed captions.[32] In 2000, the Commission adopted rules governing the display of captions on digital receivers, and the Commission's rules now specify technical standards for the reception and display of captioning on both analog and digital receivers.[33]

B. IP-Delivered Closed Captioning and Sections 202(b) and (c) of the CVAA

8. Today, IP-delivered video programming takes a number of forms, such as programming delivered to a personal computer, tablet device, cellular telephone, game console, Blu-ray player, or set top box. The Commission previously recognized that the Internet has become a powerful method of video programming distribution, and that the amount of video content available on the Internet is continuing to increase significantly each year, as consumers increasingly utilize the Internet for this purpose.[34] The Internet's role in video programming delivery ''has progressed from negligible just a few years ago to an increasingly mainstream role today.''[35] Although much IP-delivered video programming remains inaccessible to individuals who are deaf or hard of hearing, certain entities have taken voluntarily measures to begin including captions on some of their programming.[36]

9. Through the CVAA, Congress sought to ''update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.''[37] The Committee reports state that, while modern technology such as the Internet has everyday benefits, those benefits are not always accessible to people with disabilities.[38] Section 202(b) of the CVAA requires the Commission to revise its regulations to require closed captioning of IP-delivered video programming that was shown on television with captions after the effective date of the new regulations.[39]

10. The CVAA applies broadly to the distributors, providers, and owners of IP-delivered video programming. Specifically, Section 202(b) of the CVAA amends Section 713 of the Act to require the Commission's regulations to ''include an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.[40] The Commission may delay or waive the requirements if application to live IP-delivered video programming is ''economically burdensome to providers of video programming or program owners,''[41] and it may exempt a ''service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.''[42] Section 202(b) of the CVAA also requires the Commission to ''establish a mechanism to make available to video programming providers and distributors information on video programming subject to the [CVAA] on an ongoing basis.''[43] Section 202(b) further directs the Commission not to find that a *de minimis* failure is a violation,[44] and to permit entities to meet the new requirements by alternate means.[45] Finally, Section 202(c) of the CVAA consists of a ''conforming amendment'' to Section 713(d) of the Act, regarding the process for petitioning for an exemption.[46]

[21] 47 CFR 73.682(a)(22)(i).

[22] *See 2008 Closed Captioning Order*, FCC 08–255, 74 FR 1594, January 13, 2009 (''*2008 Closed Captioning Order*'').

[23] *See id.*

[24] Public Law 101–431, 104 Stat. 960 (1990) (codified at 47 U.S.C. 303(u), 330(b)).

[25] *See TDCA Order,* FCC 91–119, 56 FR 27200, June 13, 1991 (''*TDCA Order*'').

[26] *See 1997 Closed Captioning Order,* FCC 97–279, 62 FR 48487, September 16, 1997 (''1997 Closed Captioning Order''), *recon. granted in part,* FCC 98–236, 63 FR 55959, October 20, 1998.

[27] H.R. Rep. No. 104–204, 104th Cong., 1st Sess. at 113–14 (1995).

[28] *See* Section 305 of the Telecommunications Act of 1996, Public Law 104–104, 110 Stat. 56 (codified at 47 U.S.C. 613).

[29] 47 U.S.C. 613.

[30] *See generally 1997 Closed Captioning Order.*

[31] 47 CFR 79.1(b)(1)(iv), 79.1(b)(3)(iv).

[32] 47 CFR 79.1(b)(2)(ii). As of January 1, 2012, 75 percent of pre-rule Spanish language television programming that is subject to the rule will be required to be provided with closed captions. *See* 47 CFR 79.1(b)(4)(ii).

[33] 47 CFR 15.119, 15.122.

[34] *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4256, para. 41 (2011) (''*Comcast-NBCU Order*'').

[35] *Id.* at 4262, para. 60.

[36] For example, we are aware that Apple, CBS, Comcast, DISH, Disney/ABC, Fox, Hulu, NBC, Netflix, Time Warner Cable, and YouTube/Google currently provide captions for certain IP-delivered video programming.

[37] *See* S. Rep. No. 111–386, 111th Cong., 2d Sess. at 1 (2010); H.R. Rep. No. 111–563, 111th Cong., 2d Sess. at 19 (2010).

[38] *See* S. Rep. No. 111–386 at 1–2; H.R. Rep. No. 111–563 at 19.

[39] The CVAA defines ''Internet protocol'' as including ''Transmission Control Protocol and a successor protocol or technology to Internet protocol.'' Public Law 111–260, § 206(5).

[40] 47 U.S.C. 613(c)(2)(B).

[41] 47 U.S.C. 613(c)(2)(C).

[42] 47 U.S.C. 613(c)(2)(D)(ii).

[43] 47 U.S.C. 613(c)(2)(D)(v).

[44] 47 U.S.C. 613(c)(2)(D)(vii).

[45] 47 U.S.C. 613(c)(3).

[46] 47 U.S.C. 613(d). Neither the statute nor the legislative history explains what Congress meant by characterizing the amendment as ''conforming.''

C. Section 203 of the CVAA

Congress also determined that the objectives of the CVAA could not be met unless the devices that consumers use to view video programming, including those devices that may be small and portable, are able to display closed captions. Therefore, it enacted Section 203(a), requiring ''that [the] devices consumers use to view video programming are able to display closed captions.'' [47] To do this, Congress directed the Commission to enact provisions that require all ''apparatus designed to receive or play back video programming transmitted simultaneously with sound * * * be equipped with built-in closed caption decoder circuitry or capability'' [48] and contain exceptions only for those devices which are ''display-only video monitors with no playback capability'' [49] and devices with picture screens less than 13 inches for which meeting the regulation is not ''achievable.'' [50] Additionally, the Commission must require that all devices ''designed to record video programming * * * [must] enable the rendering or the pass-through of closed captions'' [51] and that the ''interconnection mechanisms and standards for digital video source devices are available to * * * permit or render the display of closed captions.'' [52]

12. Taken together, these statutory provisions seek to encompass many devices on which consumers view video, such as portable media players, personal computers, televisions, and the devices consumers connect to their televisions to access programming via the Internet and other sources. As in Section 202(b), the Commission is required to prescribe regulations within six months of the VPAAC Report and to provide that entities may meet the requirements of these provisions through ''alternate means.'' [53]

D. VPAAC Working Group 1 and Its Report

13. The VPAAC's first meeting was held at the Commission on January 13, 2011, and a second meeting was held on May 5, 2011. During the first meeting, the VPAAC was divided into four working groups; Working Group 1 took on the task of examining ''issues involved in transferring closed captions provided on television programs to the online environment.'' [54] In addition to work conducted at the January and May meetings, Working Group 1 conferred and collaborated on these issues through weekly conference calls, regular e-mail correspondence, and the group's workshare Web site (or ''wiki''). [55] The Media Bureau also conducted informal meetings with online video programming distributors, broadcast networks, multichannel video programming distributors (''MVPDs''), consumer advocacy groups, and others that were interested in discussing Section 202 of the CVAA in anticipation of the Media Bureau's receipt of the VPAAC Report and its preparation of this *NPRM*.

14. As noted above, the VPAAC submitted its report on July 12, 2011. The VPAAC Report provided suggestions for how the Commission's regulations on IP closed captioning should address caption completeness, placement, accuracy, and timing, as well as specific technical requirements that a user's Internet-connected media players should support.[56] The VPAAC Report went on to describe technical requirements for the delivery of closed captioning of IP-delivered television programming, suggesting that the Commission require a single interchange format but not a single delivery format for IP closed captioning.[57] Next, the VPAAC Report described ''the technical capabilities and procedures needed for entities to reliably encode, transport, receive and render broadcast-television closed captions over the Internet.[58] The VPAAC Report discussed three interfaces that may require standardization—(i) interchange formats (*i.e.*, between video programming owners and video programming distributors/providers), (ii) delivery file formats (*i.e.*, between video programming distributors/providers and user devices), and (iii) linkages to users'' captioning display controls (*i.e.*, between devices or between software and firmware running on one device).[59] The VPAAC Report also briefly discussed potential developments in IP-delivered closed captioning [60] and proposed a schedule of deadlines for the provision of closed captioning over IP. [61] We describe the VPAAC recommendations more specifically in the context of our discussion of Sections 202 and 203 below.[62]

III. Section 202(b) of the CVAA

A. Entities Subject to Section 202(b) of the CVAA and Their Obligations

Various provisions of Section 202(b) of the CVAA reference ''video programming distributors'' (''VPDs''), ''video programming providers'' (''VPPs''), and ''video programming owners'' (''VPOs''). We seek comment on how the Commission should define these terms.[63] The CVAA provides some guidance on the definition of the first two terms, requiring the Commission to ''clarify that, for the purposes of implementation, [sic] of this subsection, the terms 'video programming distributors' and 'video programming providers' include an entity that makes available directly to the end user video programming through a distribution

[47] S. Rep. No. 111–386 at 14; H.R. Rep. No. 111–563 at 30

[48] 47 U.S.C. 303(u)(1).

[49] 47 U.S.C. 303(u)(2)(B).

[50] 47 U.S.C. 303(u)(2)(A). In determining whether the requirements of a provision are achievable, the Commission shall consider the following factors: (1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points. 47 U.S.C. 617(g)(1)–(4).

[51] 47 U.S.C. 303(z)(1).

[52] 47 U.S.C. 303(z)(2).

[53] Public Law 111–260, § 203(d)(1), (e).

[54] *See* VPAAC Report at 4.

[55] *See id.* at 5.

[56] *See id.* at 13–16.

[57] *See id.* at 16–20. The VPAAC Report proposed defining ''interchange format'' as ''[t]he encoded caption data that preserves all of the original semantic information and text * * * and allows easy conversion to other formats.'' *See id.* at 18. *See also id.* at 22 (''By 'interchange format' we mean the format of closed-captioning data carried within television content as it is distributed from the content provider to programming distributors.''). The VPAAC Report proposed defining ''delivery format'' as ''[t]he encoded caption data contained within a download or stream of content to a consumer device in either the standard interchange format or a different network-specific or video-player-specific format * * *.'' *See id.* at 18.

[58] *See id.* at 21–28.

[59] *See id.* at 22–23, 26–28. We discuss interchange and delivery formats in Sections III.E. and IV.B., *infra*.

[60] *See id.* at 28–29.

[61] *See id.* at 29–30. The VPAAC Report also contains three appendices. Appendix A contains a summary of recommended DTV receiver requirements. *See id.* at 31–32. Appendix B lists ''best practices'' for closed captioning of IP-delivered video programming. *See id.* at 33 (noting that ''there is not consensus about whether these practices should be mandated or only offered as suggestions''); see also id. at 13 n. 29. Lastly, Appendix C details unresolved issues that the VPAAC recommended the Commission consider in the NPRM. *See id.* at 34–35.

[62] *See* Sections III. and IV., *infra*.

[63] Our use of the terms VPD and VPP in this NPRM is meant to reference our proposed definitions of those terms in this context, and not to invoke any use of those terms in other contexts, including in our television closed captioning or video description rules. This NPRM does not propose any modifications to our television closed captioning rules.

method that uses Internet protocol.'' [64] We propose to define VPD and VPP as having the same meaning, because there does not seem to be a practical benefit in distinguishing between the two for purposes of Section 202(b) of the CVAA. We seek comment on this proposal. In addition, in recognition of the broad reach that Congress intended for Section 202(b), we propose to define both a VPD and a VPP as any entity that makes available directly to the end user video programming through a distribution method that uses IP. Further, we propose to define a VPO as any person or entity that owns the copyright of the video programming delivered to the end user through a distribution method that uses IP. We seek comment on these proposed definitions. Should the Commission instead define VPDs and VPPs separately, and if so, how should those definitions differ from one another? [65] If we were to define VPDs and VPPs differently from one another, what would be the effect on provisions of the CVAA that apply to VPPs and VPOs but not VPDs? Will a significant number of small entities be covered by the proposed definition of VPD/VPP? If multiple video programming distributors/providers are involved in making video programming available to the end user, but only one distributor/provider directly makes the video programming available to the end user, where do the distributors/providers in the middle of the chain fit within our proposed definitions? Should the definition of VPO include anything in addition to the person or entity that owns the copyright of the IP-delivered video programming, for example, any person or entity to which the copyright owner licenses IP-delivered video programming?

16. The CVAA requires the Commission to ''describe the responsibilities of video programming providers or distributors and video programming owners.'' [66] We propose to require VPOs to send program files to VPDs/VPPs with all required captions, and, as contemplated by Section 202(b), to require VPDs/VPPs to enable ''the rendering or pass through'' of all required captions to the end user.[67] When a VPD/VPP receives a program file with required captions, it would be required to include those captions at the time it makes the program file available to end users.[68] We seek comment on these proposals as well as other appropriate responsibilities of VPDs/VPPs and VPOs under Section 202(b) of the CVAA.[69] For example, should we require the VPD/VPP to provide a mechanism, such as a button or icon, on its Web site which would allow consumers to easily access closed captioning? If a VPO licenses its content to a third party for Internet distribution, what are the obligations of that third party licensee? If a VPD/VPP knows or reasonably should have known that a program is required to include captions, but the VPO failed to provide such captions, what obligations should the VPD/VPP have to obtain such captions before providing the programming to the end user? In an enforcement proceeding, what types of evidence could be considered to establish the VPD/VPP's knowledge, and should the VPD/VPP bear the burden of proof on that issue? Should the VPD/VPP have an obligation to determine whether the programming is subject to captioning requirements before providing it to the end user? In addition, what liability should the VPD/VPP face should it decide to provide the program to end users without the required captions? [70] In such a situation, should both the VPD/VPP and VPO be held responsible for the violation? We seek comment generally on the responsibilities that VPDs/VPPs should have to ensure that video programming has the required captions before they pass it through to viewers. Should we require VPDs/VPPs to include on their Web sites program listings that indicate whether a particular program is captioned? If multiple video programming distributors/providers are involved in making video programming available to the end user, what are the obligations of the distributors/providers in the middle of the chain? For example, would the distributors/providers in the middle of the chain be required to enable the rendering or pass through of all required captions?

17. In addition to requiring the presence of captions, we seek comment on whether our rules for closed captioning of IP-delivered video programming should include any required performance objectives. It is important that, in considering this issue, the Commission balances the interests of users of closed captioning against the concern that overly burdensome standards may cause VPDs/VPPs to refrain from posting videos online. The VPAAC Report made a number of proposals regarding the quality of captions of IP-delivered video programming:

(1) That the Commission require IP-delivered captions to be complete, such that ''[n]othing must be lost in transcoding when converting captions between conventional broadcast captioning formats and Internet;'' [71]

(2) That ''[f]or Internet-delivered caption content, the positioning information as originally authored shall be made available to the consumer device;'' [72]

(3) That the accuracy of IP-delivered video programming must be ''equal to or greater than the accuracy of captions shown on television;'' [73]

(4) That the Commission require IP-delivered captions to possess sufficient timing, such that ''[a]ll processing through the distribution chain, including transcoding, must provide a timing experience that is equal to or an improvement to the timing of captions

[64] 47 U.S.C. 613(c)(2)(D)(iii). The Commission's rules currently define VPDs and VPPs but these definitions apply only to the closed captioning of video programming that is being distributed and exhibited on television. Specifically, our rules define a ''video programming distributor'' as ''[a]ny television broadcast station licensed by the Commission and any [MVPD] * * * and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.'' 47 CFR 79.1(a)(2). In addition, our rules define a ''video programming provider'' as ''[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.'' 47 CFR 79.1(a)(3).

[65] The definition of VPD and VPP may be particularly relevant insofar as certain provisions of Sections 202(b) and (c) refer to VPPs and VPOs, but not VPDs. *See, e.g.*, 47 U.S.C. 613(c)(2)(C), (c)(2)(D)(vii), (d)(3).

[66] 47 U.S.C. 613(c)(2)(D)(iv).

[67] *See also* Section III.D., *infra* (discussing a proposed mechanism that would require VPOs providing a video program to VPDs/VPPs for IP delivery to provide the program either with captions, or with a certification that captions are not required for a reason stated in the certification). Congress did not explain what it meant by enabling ''the rendering or pass through'' but we presume that Congress meant that VPDs/VPPs must ensure that closed captions are transmitted appropriately.

[68] We propose in Section III.D., *infra*, that when a program previously provided to a VPD/VPP without captions becomes subject to the captioning requirement, the VPO must send a certification to that effect to VPDs/VPPs within seven days, and the VPD/VPP must make captions available within five days of receipt of the revised certification.

[69] The VPAAC indicated that it did not have sufficient time to determine the responsibilities of various stakeholders. *See* VPAAC Report at 34.

[70] Section 713(h) of the Act previously provided, ''Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.'' Section 202(a) of the CVAA redesignated former Section 713(h) as Section 713(j). *See* Public Law 111–260, § 202(a). This provision applies to the Commission's IP closed captioning regulations promulgated in accordance with the CVAA's revisions to Section 713 of the Act, in addition to the Commission's existing closed captioning regulations.

[71] *See* VPAAC Report at 13.

[72] *See id.* at 13–14.

[73] *See id.* at 14.

provided in the captioning shown on television;'' [74] and

(5) That a user's Internet-connected media players should support the ability to change character color, opacity, size, font, background color and opacity, character edge attributes, window color, and language.[75]

We note that Part 15 of the Commission's rules currently contains certain required user controls for television closed captions, including the ability to change text color, opacity, size, font, background color and opacity, character edge attributes, and window color.[76]

18. It appears that Congress intended, at a minimum, that captions of IP-delivered video programming should be of at least the same quality as captions shown on television. Accordingly, we propose to adopt a rule requiring the captioning of IP-delivered video programming to be of at least the same quality as the television captions for that programming. An evaluation of ''quality'' could include the consideration of such factors as completeness, placement, accuracy, and timing, all of which the VPAAC suggested that we consider. We seek comment as to whether the inclusion of any of these factors would lead to unintended consequences such as requiring a large amount of resources to be expended to comply. We contemplate that a requirement for captions of IP-delivered video programming to be of at least the same quality as captions of television programming would require IP-delivered captions to include the same user tools, such as the ability to change caption font and size. These proposals are consistent with the VPAAC's recommendation that captions of IP-delivered video programming should provide consumers with an experience that is equal to or better than the comparable television experience.[77] We seek comment on these proposals, which could help benefit consumers, while ensuring that compliance with our new rules is as similar as possible to compliance with existing rules for television closed captioning.

19. In meetings with Commission staff, certain VPDs/VPPs expressed concern that they would be unable to provide captions that are ''better than'' those available on television because improving the captions would violate the VPO's copyright. Under our proposal, however, VPDs/VPPs would not be *required* to improve caption quality; rather, they would be required to ensure that the quality of captions does not decline when delivered via IP as compared to when shown on television. To the extent that VPDs/VPPs have permission to alter captions on the programming so that they improve the viewing experience, we propose that they be permitted to do so.[78] We seek comment on any copyright concerns implicated by our proposals, including how we should balance any desire for certain user controls against a VPO's copyright protections.

20. Section 202(a) of the CVAA defines ''video programming'' as ''programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media (as defined in section 3).'' [79] Section 3 of the Act, as revised by the CVAA, defines ''consumer generated media'' as ''content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia content.'' [80] The Senate and House Committee reports do not shed further light on the terms ''video programming'' and ''consumer-generated media.'' [81] We seek comment on the scope of these definitions. We seek specific examples of IP-delivered video programming that is not comparable to programming provided by a television broadcast station, and examples of consumer-generated IP-delivered video programming, both of which would be exempt from the CVAA's captioning requirements. We also seek specific examples of IP-delivered video programming that is comparable to programming provided by a television broadcast station. Does ''consumer-generated media'' include content that has been published or exhibited on television with captions, which is made available online by individual consumers without the consent of the VPO?

21. We propose to apply the captioning requirements of Section 202(b) to full-length programming, and not to video clips or outtakes.[82] We seek comment on what Congress meant by the phrase ''full-length programming.'' We propose to define ''outtakes'' as content that is not used in an edited version of video programming shown on television, and we invite comment on this proposal. We propose to define ''video clips'' as small sections of a larger video programming presentation, and we invite comment on this proposal.[83] Should we specify the definition of ''video clips'' by providing a maximum duration of the video programming that constitutes a ''clip,'' or by providing that the length of a ''video clip'' may not exceed a certain percentage of the overall length of the video program? When a full-length program is posted online in multiple segments, to enable consumers to access a particular segment of the program, does each segment constitute a video clip?

22. We seek comment on whether IP-delivered content that has aired on television only in another country, and not in this country, is exempt from the CVAA's captioning requirements. Although not explicitly stated in the CVAA, it appears that the best reading of the statute requires closed captioning on IP-delivered video programming that was published or exhibited on television *in this country* with captions after the effective date of the

[74] *See id.*

[75] *See id.* at 15–16.

[76] *See* 47 CFR 15.122.

[77] *See, e.g.*, VPAAC Report at 13 (''the consumer must be given an experience that is equal to, if not better than, the experience provided as the content was originally aired on television using the CEA–608/708 system'').

[78] For example, if programming was shown live on television and then re-shown over the Internet, a VPD/VPP with permission may want to fix mistakes that occurred as a result of real-time captioning. While we do not propose requiring the correction of such errors, we encourage VPDs/VPPs to make corrections where permitted and feasible, given that the subject programming will be available on an ongoing basis to viewers on the VPD/VPP's Web site. We believe that such improvements could significantly enhance the viewing experience of people who are deaf or hard of hearing.

[79] 47 U.S.C. 613(h)(2). We note that this definition of ''video programming'' is almost identical to the definition set forth in Section 602(20) of the Act. *See* 47 U.S.C. 522(20) (defining ''video programming'' as ''programming provided by, or generally considered comparable to programming provided by, a television broadcast station''). *See also Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, FCC 09–14, 74 FR 11334, para. 8, March 17, 2009 (seeking comment on whether the definition of the term ''video programming'' from Section 602(20) of the Act is the definition that the Commission should use for purposes of the Child Safe Viewing Act, and asking whether that term includes videos provided on Internet video hosting sites such as YouTube).

[80] 47 U.S.C. 153(54).

[81] The Senate Committee report echoed the Section 3 definition of ''consumer generated media,'' stating that that term ''encompasses content created and made available by consumers to Internet Web sites and venues, including audio, video, and multimedia content.'' *See* S. Rep. No. 111–386 at 5–6.

[82] *See* 47 U.S.C. 613(h)(2) (''The term 'video programming' means programming by, or generally considered comparable to programming provided by a television broadcast station * * *''); *see also* S. Rep. No. 111–386 at 13–14 (''The Committee intends, at this time, for the regulations to apply to full-length programming and not to video clips or outtakes.''); H.R. Rep. No. 111–563 at 30 (same).

[83] This is consistent with the *Comcast-NBCU Order*, which explained that ''short programming segments'' are ''also known as clips.'' *See* 26 FCC Rcd at 4358 (Appendix A: Conditions).

regulations, and we seek comment on this determination. It appears that the differing caption standards in foreign countries could hinder the process of transferring those captions to a suitable format for U.S. consumers and seek comment on this understanding.

B. Schedule of Deadlines

23. Pursuant to the CVAA, the Commission must, by January 12, 2012, ''revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.'' [84] The regulations must ''include an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution.'' [85] Further, the regulations must define the phrases ''near-live programming'' and ''edited for Internet distribution.'' [86] Below, we seek comment on the definitions of ''live programming,'' ''near-live programming,'' ''prerecorded programming,'' and ''edited for Internet distribution.'' We propose to apply these definitions solely to regulations of IP closed captioning pursuant to the CVAA, and we seek comment on that proposal. Further, below we seek comment on the appropriate schedule of deadlines for the provision of closed captioning.

24. The VPAAC proposed to define ''live programming'' as ''programming created and presented on television and simulcast for Internet distribution to the end user as it airs on television.'' [87] Based on conversations with members of the VPAAC, we understand that the definition of ''live programming'' was meant to encompass programming such as news, sports, and awards shows, for which captioning cannot be done in advance, rather than a ''simulcast'' in which potentially prerecorded programming is shown on television and the Internet simultaneously.[88] We note that, in the recent *Video Description Order,* the Commission defined ''live programming'' in that context as ''programming aired substantially simultaneously with its performance.'' [89] The definition of ''live programming'' in the *Video Description Order* could achieve the same objective as the definition of ''live programming'' proposed by the VPAAC. In the context of our IP closed captioning rules, however, we believe it is important to clarify that programming is ''live'' if it is shown live on television. Accordingly, we propose defining ''live programming'' as video programming that is shown on television substantially simultaneously with its performance. The phrase ''substantially simultaneously'' contemplates that live programming may include a slight delay, for example, to prevent certain objectionable material from airing. We seek comment on this proposal. We understand that additional processes may need to be put in place to facilitate the captioning of live programming when it is delivered using IP, and we seek comment on what those processes entail and who would be responsible for them.

25. In addition, given the VPAAC's use of the word ''simulcast'' in its proposed definition of ''live programming,'' we also seek comment on whether there are additional difficulties in providing captioning of IP-delivered video programming, when the programming is shown on television and the Internet simultaneously. If so, should we provide a lengthier deadline by which simulcast programming must comply with Section 202(b)?

26. The VPAAC proposed to define ''near-live programming'' as ''any programming that was produced from start to finish within 12 hours of being published or exhibited on television.'' [90] As referenced in Appendix C to the VPAAC Report, we understand that members of the industry and consumer groups expressed differing views as to whether the definition of ''near-live programming'' should reference programming that was ''substantively produced'' within 12 hours of being shown on television. We understand based on conversations with members of the VPAAC that ''substantively produced'' means programming that is largely, but not entirely, produced within 12 hours of being shown on television. For example, a news magazine may include a number of live segments, but it may also include some segments that were recorded and produced weeks or months earlier. It appears that VPDs/VPPs and/or VPOs may need to put additional processes in place to handle captioning of certain video programming that is predominantly, but not entirely, recorded and produced within 12 hours of its distribution, such as some news magazines, because the audio may be captioned as the program is shown on television. Accordingly, we propose to modify the VPAAC's proposed definition, and instead to define ''near-live programming'' as video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers.[91] We invite comment on this proposal. How should we define ''substantively recorded and produced''? Should we require a certain percentage of a program to be recorded and produced within 12 hours of the program being shown on television, for the program to be considered ''substantively produced'' within that timeframe? What are examples of programming that we should consider ''near-live''? What additional processes would need to be put in place to facilitate the captioning of such near-live programming when it is delivered using IP, and who would be responsible for those processes? [92] In lieu of our proposed definition of ''near-live programming,'' should we instead define that phrase as it is defined in the *Video Description Order,* which is ''programming performed and recorded less than 24 hours prior to the time it was first aired,'' [93] or would that definition be too narrow in the IP-

[84] 47 U.S.C. 613(c)(2)(A).

[85] 47 U.S.C. 613(c)(2)(B).

[86] 47 U.S.C. 613(c)(2)(D)(i).

[87] *See* VPAAC Report at 29.

[88] We understand that a simulcast may either involve live programming or prerecorded programming.

[89] *See Video Description Order,* FCC 11–126, 76 FR 55585, para. 40, September 8, 2011 (''*Video Description Order*'').

[90] *See* VPAAC Report at 29. The VPAAC indicated that industry and consumer groups were not in agreement as to the proposed definition of ''near-live programming.'' *See id.* at 34–35. Further, the VPAAC indicated its understanding ''that this definition of near-live programming is only to be used for determining the schedule of deadlines for the provision of closed captioning.'' *See id.* at 35.

[91] If a program is not live, and is not substantively recorded and produced within 12 hours of its distribution to television viewers, then we propose that it would be considered prerecorded, as explained below.

[92] We note that, in the *Video Description Order,* the Commission adopted its proposal to define ''near-live programming'' as ''programming performed and recorded less than 24 hours prior to the time it was first aired.'' *See Video Description Order* at para. 40. We note that there are differences between video description and closed captioning which may necessitate different definitions. First, the definitions of ''live programming'' and ''near-live programming'' in the video description context had the ''primary purpose [of] determin[ing] which nonbroadcast networks are excluded from the top five. * * *'' *See id.* at para. 42. In contrast, the purpose of these definitions in the IP closed captioning context is to determine the date by which live and near-live programming must comply with our new requirements. Second, a shorter timeframe within which the performance and recording must occur for a program to be considered ''near-live'' in the closed captioning context may be appropriate since closed captioning can, in fact, be done live, whereas video description of television programming generally is not.

[93] *See id.* at para. 40.

delivered video programming context, insofar as it excludes programming that consists of both live segments and prerecorded programming?

27. The VPAAC proposed definitions for programming that is ''prerecorded and edited for Internet distribution to the end user,'' [94] and for programming that is ''prerecorded and unedited for Internet distribution to the end user'' [95] Rather than adopt these two definitions, however, we think it would be clearer to define the terms ''prerecorded programming'' and ''edited for Internet distribution.'' [96] We propose to define ''prerecorded programming'' as video programming that is not ''live'' or ''near-live.'' Also, based on the VPAAC's recommendation, we propose to define video programming that is ''edited for Internet distribution'' as video programming whose television version is substantially edited prior to its Internet distribution. We tentatively agree with the VPAAC that examples of ''substantial edits'' include when scenes are deleted or scores are changed from the television version,[97] and that changes to the number or duration of advertisements from the television version do not constitute ''substantial edits.'' We seek comment on these definitions. How should we distinguish ''substantial edits'' from ''insubstantial edits''? To what extent do VPDs/VPPs edit content for Internet distribution, and what is the nature of such editing? We assume that any editing that is subject to these definitions does not run afoul of copyright law. Is most prerecorded programming unedited for Internet distribution, as we have proposed defining that phrase?

28. The VPAAC proposed the following schedule of deadlines for compliance with the new requirements for closed captioning of IP-delivered video programming that is published or exhibited on television with captions after the effective date of the new rules: (1) For programming that is prerecorded and not edited for Internet distribution, a compliance deadline of six months after the rules are published in the **Federal Register;** (2) for programming that is live or near-live, a compliance deadline of 12 months after the rules are published in the **Federal Register;** and (3) for programming that is prerecorded and edited for Internet distribution, a compliance deadline of 18 months after the rules are published in the **Federal Register.**[98] We seek comment on the VPAAC's suggested schedule of deadlines. We believe that these compliance deadlines are reasonable, given that they have been agreed upon by the VPAAC, which includes industry representatives that will have to comply with our new rules as well as consumer groups that have a strong interest in ensuring that our rules are implemented as quickly as possible. If commenters do not believe that these compliance deadlines are reasonable, we invite them to propose alternative compliance deadlines, with explanations as to why those deadlines would be more appropriate, along with a discussion of the burden to comply with the proposed deadlines. We seek comment also on why a lengthier compliance deadline is justified or necessary for programming that is live or near-live, and for programming that is prerecorded and edited for Internet distribution.

C. Exemption Process Where Economically Burdensome

29. In the CVAA, Congress amended Section 713(d)(3) of the Act by replacing the term ''undue burden'' with the term ''economically burdensome.'' Specifically, Section 202(c) of the CVAA contains a conforming amendment providing details on an exemption process by which:

> a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome. During the pendency of such a petition, such provider or owner shall be exempt from the requirements of this section. The Commission shall act to grant or deny any such petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.[99]

The Senate Committee on Commerce, Science, and Transportation encouraged the Commission, in determining whether the requirements enacted under Section 202(b) are ''economically burdensome,'' to consider the factors listed in pre-existing Section 713(e) of the Act.[100] Section 713(e) provides that the following factors should be considered in determining whether closed captioning requirements for television programming would result in an undue economic burden: ''(1) The nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.'' [101]

30. We propose to create a process by which VPPs and VPOs may petition the Commission for a full or partial exemption of their captioning obligations based on economic burden, comparable to the Commission's procedures for exemptions based on undue burden applicable to our television closed captioning rules.[102] Since the factors that Congress encouraged the Commission to consider here in determining whether application of our new rules are ''economically burdensome'' are identical to the factors used to determine whether the television closed captioning rules impose an ''undue burden,'' it appears that Congress intended that ''economic burden'' in this context would have the same meaning as ''undue burden'' in the television closed captioning context. Accordingly, we propose to define the term ''economically burdensome'' as imposing significant difficulty or expense.[103] We further propose, in accordance with our television closed captioning rules,[104] that petitioners be required to support a petition for exemption with sufficient evidence to demonstrate that compliance with the new requirements would be economically burdensome. In determining whether the requirements for closed captioning of IP-delivered

[94] The VPAAC's proposed definition is ''any programming that is prerecorded and has been substantially edited for Internet distribution to the end user.'' *See* VPAAC Report at 30. The VPAAC suggested that substantial edits may include deleting scenes or substituting music scores due to rights restrictions. *See id.*

[95] The VPAAC's proposed definition is ''any programming that is prerecorded and has not been substantially edited for Internet distribution to the end user.'' *See id.* The VPAAC suggested that insubstantial edits may include changes to the number or duration of advertisements. *See id.*

[96] This is also consistent with the CVAA's requirement that we define ''edited for Internet distribution.'' *See* 47 U.S.C. 613(c)(2)(D)(i).

[97] According to the VPAAC, rights restrictions necessitating such edits would prevent broadcasters from repurposing the television captions on such programming for Internet distribution to the end user. *See* VPAAC Report at 30. We note that any adopted definition should not permit VPDs or VPPs to edit programming in a manner that copyright law would otherwise prohibit.

[98] *See id.*

[99] 47 U.S.C. 613(d)(3).

[100] *See* S. Rep. No. 111–386 at 14.

[101] 47 U.S.C. 613(e).

[102] *See* 47 CFR 79.1(f). The process we propose to adopt herein is consistent with the *Video Description Order,* in which we adopted our proposal ''to reinstate the previously adopted process for requesting an individual exemption from our rules, replacing the term 'undue burden' with 'economically burdensome,' while using the same range of factors previously applied under the undue burden standard.'' *See Video Description Order* at para. 43 (footnote omitted).

[103] In the *Video Description Order,* we also defined ''economically burdensome'' as ''imposing significant difficulty or expense.'' *See id.* at para. 44 and Final Rules.

[104] 47 CFR 79.1(f)(2).

video programming would be economically burdensome, we propose that the Commission consider the four factors listed above. In addition, as under the Commission's current rules in the television context, we propose that the petitioner be required to describe any other factors that it deems relevant to the Commission's final determination, and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements.[105] Finally, we propose that the Commission evaluate the extent to which a petitioner has successfully proven an economic burden on a case-by-case basis, with regard to the individual outlet or programming in question, and that the Commission could deny or approve a petition in whole or in part. We seek comment on these proposals.

31. Regarding the exemption process, we propose to require the petitioner to file with the Commission an original and two copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings. Should we instead require electronic filing? We further propose that the Commission place the petition on public notice, with comments or oppositions due within 30 days of the public notice, and the petitioner's reply to any comments or oppositions due within 20 days of the close of the comment period. Next, we propose that parties filing comments or oppositions serve the petitioner with a copy and include a certification that the petitioner was served with a copy, and that parties filing replies to comments or oppositions serve the commenting or opposing party with a copy and include a certification that the party was served with a copy. We propose that parties filing petitions and responsive pleadings include a detailed, full showing, supported by affidavit, of any facts or considerations relied on. We propose codifying the statutory requirement that the Commission consider the VPP or VPO subject to an exemption request to be exempt from the IP closed captioning requirements while the exemption petition is pending.[106] We seek comment on these proposals. We note that the CVAA permits VPPs and VPOs to petition the Commission for an exemption. Although we have proposed defining VPP and VPD to mean the same thing,[107] if we ultimately define them differently, should we conclude that Congress intended both VPPs and VPDs to benefit from the economic exemption process? [108]

32. In addition to case-by-case exemptions discussed above, the CVAA permits the Commission to ''exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment.'' [109] We note that the existing rules for closed captioning of television programming contain a number of categorical exemptions.[110] Since the new requirements for closed captioning of IP-delivered video programming will not be triggered unless the programming is shown on television with captions after the effective date of the new rules, it seems that the inclusion of the previous categorical exemptions in our new rules would generally be duplicative. In other words, if a program is not captioned on television because it is subject to one of the existing categorical exemptions, then it will not be required to be captioned when delivered via IP. For this reason, it does not appear that the categorical exemptions found in the television closed captioning rules are applicable here, and we seek comment on adopting this approach. Further, the CVAA makes no distinction as to whether the television programming must be captioned under the Commission's television captioning rules or whether the captioning was included voluntarily. Accordingly, we believe that once programming is captioned on television, it must be captioned when delivered via IP—even if it otherwise would have been subject to one of our television closed captioning exemptions. We seek comment on this proposal as well. If a program with audio in a language other than English or Spanish is captioned on television, even though such captioning is not required,[111] should we require the program to include captions when delivered via IP?

33. The CVAA also permits the Commission to delay or waive the applicability of its IP closed captioning rules to live programming ''to the extent the Commission finds that the application of the regulation to live video programming delivered using Internet protocol with captions after the effective date of such regulations would be economically burdensome to providers of video programming or program owners.'' [112] The VPAAC considered the special nature of live programming by proposing a longer compliance deadline for live programming than for prerecorded and unedited video programming. Given that the VPAAC recommendation reflects a consensus achieved by representatives of both consumers and the affected industries, we propose not to institute any further delay or waiver of the applicability of the Commission's new IP closed captioning rules to live programming at this time, and we seek comment on this proposal.

D. Mechanism for Information on Video Programming Subject to the CVAA

34. The CVAA requires the Commission to ''establish a mechanism to make available to video programming providers and distributors information on video programming subject to the [CVAA] on an ongoing basis.'' [113] The purpose of the mechanism would be to ensure that VPDs/VPPs have a way of finding out whether the video programming they intend to make available via IP has been shown on television with captions after the effective date of the new rules. The

[105] *See* 47 CFR 79.1(f)(3) (containing the comparable rule in the television closed captioning context).

[106] 47 U.S.C. 613(d)(3). Section 202(c) of the CVAA requires the Commission to resolve such exemption petitions within six months of their receipt, unless the Commission finds that an extension of the six month period is necessary to determine whether the requirements are economically burdensome. 47 U.S.C. 613(d)(3).

[107] *See* Section III.A., *supra.*

[108] *See* 47 U.S.C. 613(c)(2)(D)(iii) (clarifying that VPDs and VPPs both include entities that make IP-delivered video programming available directly to the end user).

[109] 47 U.S.C. 613(c)(2)(D)(ii). The VPAAC did not address ''the determination of economically burdensome relative to services, programs and equipment.'' *See* VPAAC Report at 35.

[110] *See* 47 CFR 79.1(d). The Commission created exemptions for the following categories of programs and providers: programming subject to contractual captioning restrictions; video programming or a video programming provider for which the captioning requirement has been waived; programming other than English or Spanish language; primarily textual programming; programming distributed in the late night hours; interstitials, promotional announcements and public service announcements; Educational Broadband Service programming; locally produced and distributed non-news programming with no repeat value; programming on new networks; primarily non-vocal music programming; captioning expense in excess of two percent of gross revenues; channels producing revenues of under $3,000,000; and locally produced educational programming.

[111] *See* 47 CFR 79.1(d)(3) (exempting from the television closed captioning requirements ''[a]ll programming for which the audio is in a language other than English or Spanish, except that scripted programming that can be captioned using the 'electronic news room' technique is not exempt''). The ''electronic news room'' television captioning technique creates captions from a news script computer or teleprompter, and it is commonly used for live newscasts.

[112] 47 U.S.C. 613(c)(2)(C).

[113] 47 U.S.C. 613(c)(2)(D)(v).

CVAA further explains that the new regulations of IP closed captioning:

> shall consider that the video programming provider or distributor shall be deemed in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the [CVAA] using the mechanism [referenced above].[114]

35. Accordingly, we seek comment on the ''mechanism'' that should be used to make available to VPDs/VPPs information on video programming that must be captioned when delivered via IP. We presume that VPOs are in the best position to know if captions are required for a particular program (*i.e.*, whether the program has been shown on television with captions after the effective date of the new rules). We seek comment on this presumption. We propose to require VPOs providing video programming to VPDs/VPPs for IP delivery to provide each program either with captions simultaneously, or with a dated certification stating that captions are not required for a reason stated in the certification. Suitable reasons for a VPO to provide a program without captions might include, for example, that the program is not a full-length program,[115] has not been ''published or exhibited on television with captions after the effective date of'' the new rules,[116] or has been exempted from the requirements.[117] Are VPOs aware of the identity of all VPDs/VPPs that are authorized to make the VPO's video programming available directly to the end user through a distribution method that uses IP? Would VPDs/VPPs and VPOs need to revise their contractual agreements to reflect their new obligations? Do VPOs have contracts with all VPDs/VPPs that are authorized to make the VPO's programming available to end users via IP, and if not, would the proposed certifications be workable?

36. We also propose to require VPDs/VPPs to retain all such VPO certifications for as long as they make the certified programming available to end users through a distribution method that uses IP and at least one calendar year thereafter. Because the CVAA provides that the Commission shall consider a VPD/VPP ''in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the [CVAA] using the mechanism,'' it seems that generally a VPD/VPP would not be subject to an enforcement action if it relied in good faith on a VPO's erroneous certification that captioning was not required for a particular program and did not know or have reason to know (at any time) that the certification was erroneous. If a VPP/VPD knew or should have known that a certification was erroneous,[118] the Commission could take action against the VPP/VPD as well as (or instead of) against the VPO that submitted the erroneous certification. Otherwise, however, the Commission's recourse in the case of a faulty certification would be enforcement action against the VPO only. We seek comment on how we should approach closed captioning compliance certifications, including comments on whether and how the inclusion of indemnification clauses in contracts between VPDs/VPPs and VPOs may affect the effectiveness of our proposed approach. We seek comment also on the situation where a VPO may pass along captions for a program but, as a legal matter, the captions are not required for that program because the program has not been shown on television with captions after the effective date of the new rules. Would the Commission have the authority to require the VPD/VPP to enable the rendering or pass through of such captions, when they are provided by the VPO? Or instead, should the VPO make known to the VPDs/VPPs that captioning is not required under Commission rules for that IP-delivered program even though the VPO is sending captions to the VPD/VPP? We recognize that, while a program may not be subject to the captioning requirements as of the effective date of the new rules, it might later become subject to the requirements, once the program is re-run on television with captions after the effective date. Accordingly, we propose to require VPOs to keep their certifications current, and to provide VPDs/VPPs with any revised information as to the captioning status of previously delivered programming within seven days of the underlying change (*i.e.*, within seven days of a program being shown on television with captions for the first time after the effective date of the new rules). If the underlying change of status requires that the programming at issue be captioned pursuant to the CVAA, we propose to require the VPO also to deliver within seven days the caption file, if not previously delivered, to the VPDs/VPPs. We also propose to require VPDs/VPPs to make required captions available online within five days of the receipt of an updated certification.[119] We seek comment on the five day timeframe, which would provide VPDs/VPPs with time to update their existing program files.[120] Are seven and five days, respectively, appropriate timeframes within which to require VPOs to provide updated certifications, and to require VPDs/VPPs to provide newly required captions?

37. In the alternative to the certification proposal discussed above, we seek comment on other types of ''mechanisms'' the Commission could adopt to ensure that VPDs/VPPs know which programming is required to be captioned. For example, should we simply permit the relevant parties to effectuate a mechanism through private contracts? [121] Or, should we instead require VPOs to send, along with the program and caption files, encoded information informing the VPDs/VPPs as to whether the program has been captioned on television (to the extent it is technically possible to do so)? Or, rather than place requirements on the relationship between the VPO and the VPD/VPP, we could require VPDs/VPPs to provide certain information to consumers, demonstrating that the VPDs/VPPs have complied with our regulations. Do we have authority to require VPDs/VPPs to provide certain information to consumers? If so, should we require the VPD/VPP to provide information to consumers such as: The name of the program, and information sufficient to identify the episode; the identity of the VPD/VPP responsible for delivering the program; the device or software on which the consumer is watching the program (to the extent known); [122] and whether the program is

[114] 47 U.S.C. 613(c)(2)(D)(vi). The VPAAC did not address the definition of a ''good faith effort to identify video programming'' subject to the CVAA. *See* VPAAC Report at 35.

[115] *See* Section III.A., *supra.*

[116] *See* 47 U.S.C. 613(c)(2)(A). Thus, the CVAA's requirements for captioning of IP-delivered video programming are not triggered unless the programming is published or exhibited on television with captions after the effective date of the new rules.

[117] *See* Section III.C., *supra.*

[118] Paragraph 16, above, includes questions regarding what types of evidence could be considered in an enforcement proceeding to determine a VPD/VPP's knowledge and who should bear the burden of proof on that issue.

[119] This five day timeframe would not apply to programming for which the schedule of deadlines was not yet triggered. *See* Section III.B., *supra.*

[120] In contrast, when a VPD/VPP receives a program initially with required captions, we see no need to provide for a delay between receipt of the captions and the date by which captions must be made available with the program, since there is no existing file to update.

[121] A private contractual mechanism might, for example, obligate the contracting VPO to provide all required captions for IP delivery, while requiring the contracting VPD/VPP to enable the rendering or pass through of all such captions to the end user.

[122] The device or software is an important consideration because if the consumer is viewing

Continued

required to include captioning, and, if not, an explanation. This information could be provided to consumers along with the IP-delivered video programming, for example, as a link from or a pop-up window adjacent to the programming. Overall, this approach would equip consumers with useful information and might lead to fewer—and better supported—complaints. While requiring VPDs/VPPs to provide this information with IP-delivered video programming would necessitate a certain level of coordination with VPOs, thus investing VPDs/VPPs and VPOs in the process, we recognize that this approach could pose technical challenges that may have to be overcome and could impose costs on the relevant parties. Accordingly, we seek comment on the costs and benefits of such an approach.

38. Still another approach would be for the Commission to rely on independent third parties to provide databases containing information on all video programming that is shown on television with captions after the effective date of the new rules. For example, we know that there are companies today that already collect this information and it is available for purchase by the Commission and other parties.[123] An advantage of this approach is that, potentially, it could allow any VPD/VPP to go to an independent source to verify whether the programming it wishes to exhibit must be shown with captions when delivered via IP. Consumers, too, might be able to access this database to learn whether programs they wish to watch are required to contain captions.[124] What technical and administrative difficulties would the use and maintenance of such a database create? Who would fund such a database? To what extent could such a database be automated? What other type of ''mechanisms'' could the Commission establish to ensure that VPDs/VPPs have up-to-date information about the captioning status of the programming they intend to show?

E. Technical Standards for IP-Delivered Video Programming

39. CEA–608 is the technical standard used for analog closed captioning, and CEA–708 is the technical standard used for digital closed captioning.[125] The VPAAC stated that CEA–708 ''provides for a rich set of features and capabilities above and beyond those supported by CEA–608 captions. In addition, CEA–608 captions can be transported within 708.'' [126] Because millions of households today still use analog television receivers that cannot decode CEA–708 captions, CEA–608 captions remain relevant.[127] On the Internet, there are currently multiple closed captioning formats.[128] In light of the decades of video programming that has been captioned using the CEA–608/708 standards, the VPAAC concluded that ''a standard format must be specified for these captions to be delivered via Internet protocols in such a way that the consumer's experience is in no way degraded.'' [129] Specifically, the VPAAC suggested ''that there be a single standard interchange format for content providers to encode closed captions into programming before they distribute it,'' such that video programming would not need to be re-captioned to comply with different standards.[130] Regarding delivery format, the VPAAC suggested that there should not be a single standard, so as to provide the Internet with sufficient flexibility to evolve.[131] The VPAAC stated that ''distributors of programming services and applications must be required to (a) receive the captioned content from the content provider encoded in the standard interchange format, and then (b) ensure that any reformatting performed before delivery to end users (consumers) is supported by the applications and devices * * * used for playback. * * *'' [132]

40. We seek comment on whether to specify a particular standard for the interchange format or delivery format of IP-delivered video programming subject to Section 202(b) of the CVAA. We note that closed captions are included on certain IP-delivered video programming today, even in the absence of a single standard for the interchange format or the delivery format. Accordingly, we propose to refrain from specifying any particular standard for the interchange format or delivery format of IP-delivered video programming at this time, in order to foster the maximum amount of technological innovation. We seek comment on this proposal. How necessary is it for the Commission to select an interchange and delivery format standard? If we decide to deem a particular standard compliant, what should that standard be? After considering several standards, the VPAAC recommended the Society of Motion Picture and Television Engineers (''SMPTE'') Timed Text (''SMPTE–TT'') standard for the interchange format because it ''best meets all the requirements'' and because it ''is already being employed in production environments to repurpose television content for Internet use.'' [133] At this juncture, however, we do not propose adopting a specific interchange format because it is our understanding that the interchange format involves negotiations between the VPO and the VPD/VPP, which typically require the entities involved to reach a mutually agreeable solution. It makes sense that, if SMPTE–TT is the best interchange format, the industry will settle on that format without Commission intervention and, if it is not, they will come to a different agreed-upon format. Further, the proposal to mandate particular features that must be supported [134] will, in effect, ensure a robust interchange format. If ultimately we do decide to deem a particular standard compliant, should we permit the parties to petition the Commission to use ''alternate means'' rather than the standard we adopt? [135] Should we require accommodation of both in-band and out-of-band delivery of closed captions? [136] What are the benefits and harms of specifying a particular

IP-delivered video programming through a device or software that is not required to support captions, that would explain why a consumer is unable to view required captions. We understand that it is possible for a device itself to fill in the information on the device's identity, without direct involvement of the VPD/VPP.

[123] Rovi and Tribune Media Services are examples of two such companies. Through their databases, they currently maintain information on when programs are shown on television with captions. This information could be used to determine when the CVAA's captioning requirements are triggered.

[124] Consumers then may be less likely to file complaints about programs that are not covered by the CVAA, thereby conserving resources for the Commission and covered entities.

[125] *See, e.g.*, VPAAC Report at 8–9.

[126] *See id.* at 9.

[127] *See id.*

[128] *See id.* at 11–12.

[129] *See id.* at 17.

[130] *See id.*

[131] *See* VPAAC Report at 17.

[132] *See* VPAAC Report at 17. In other words, ''For interchange purposes, captions may be encoded in the single, defined interchange format; for delivery purposes, captions may be encoded either in interchange or delivery formats as long as captions are always available to all video users.'' *See id.* at 18.

[133] *See id.* at 26.

[134] *See* Section III.A., *supra* (proposing a requirement that the same user tools, such as the ability to change caption font and size, which are available on television, should be made available for IP-delivered video programming).

[135] *See* Section III.F., *infra.*

[136] *See* VPAAC Report at 24 (''* * * VPAAC recommends that platforms and applications accommodate in-band and/or out-of-band delivery techniques as appropriate.''). When closed captions are delivered ''in-band,'' they are ''embedded in the video data stream or file,'' which is likely ''the most optimal delivery method for live simulating [sic] of a television channel.'' *See id.* at 23–24. When closed captions are delivered ''out-of-band,'' they are ''a separate data stream or file from the video,'' which is ''more flexible.'' *See id.*

''interchange format'' or ''delivery format'' for IP-delivered video programming subject to Section 202(b) of the CVAA?

F. De Minimis Failure To Comply and Alternate Means of Compliance

41. Section 202(b) of the CVAA requires the Commission's regulations to ''provide that *de minimis* failure to comply with such regulations by a video programming provider or owner shall not be treated as a violation of the regulations.'' [137] The statute and legislative history do not elaborate upon the meaning of ''*de minimis* failure to comply.'' We seek comment on what constitutes a ''*de minimis* failure to comply.'' In determining whether a failure to comply is *de minimis*, we propose to consider the particular circumstances of the failure to comply, including the type of failure, the reason for the failure, whether the failure was one-time or continuing, and the timeframe within which the failure was remedied. We seek comment on this proposal and any other factors that should be considered in determining what constitutes a ''*de minimis* failure to comply.''

42. Congress determined in the CVAA that an entity may meet the requirements of Section 202(b) of the CVAA ''through alternate means than those prescribed by regulations * * * if the requirements of this section are met, as determined by the Commission.'' [138] The statute and legislative history do not elaborate upon the meaning of ''alternate means'' in Section 202 of the CVAA, although the House Committee explained that in the context of Section 203, alternate means was intended ''to afford entities maximum flexibility in meeting the requirement that video programming delivered using Internet protocol be captioned,'' and that the Commission should ''provide some flexibility where technical constraints exist.'' [139] We seek comment on how to define this term to best effectuate Congressional intent. For example, did Congress mean that the Commission should permit those subject to the IP closed captioning requirements to use alternate technical standards for the transmission and exhibition of IP closed captioning? [140] We seek comment on the ''alternate means'' that we should consider permissible, with a goal of fostering technological advancement through some flexibility, and in recognition of the fact that a single standard may not be feasible for all VPDs/VPPs and VPOs in all circumstances. Should we require any ''alternate means'' to provide a viewing experience that is equal or superior to that otherwise available to the general public? If we decline to specify a particular standard for the interchange format or delivery format of IP-delivered video programming, is it still necessary for us to consider permissible ''alternate means''?

G. Complaint Procedures

43. We propose to adopt procedures for complaints alleging a violation of the IP closed captioning rules that are analogous to the procedures the Commission uses for complaints alleging a violation of the television closed captioning rules.'' [141] With some modification, it appears that these proposed complaint procedures generally would work in the IP-delivered video closed captioning context. The procedures for complaints alleging a violation of the television closed captioning rules require a complaint to be filed with the Commission or the video programming distributor responsible for delivering the program within 60 days of the problem with captioning, and they provide that ''[a] complaint must be in writing, must state with specificity the alleged Commission rule violated and must include some evidence of the alleged rule violation.'' [142] When the Commission receives complaints alleging a violation of the television closed captioning rules, it forwards the complaint to the appropriate video programming distributor (as that term is defined in the television closed captioning context), which must respond in writing to the Commission and the complainant within 30 days of receiving the complaint from the Commission.'' [143] The television video programming distributor is required ''to provide the Commission with sufficient records and documentation to demonstrate that it is in compliance with the Commission's rules.'' [144] The Commission then reviews the complaint, including all supporting evidence, and determines if a violation has occurred.[145] The Commission may request additional information from the television video programming provider, if needed.[146]

44. We seek comment on whether to apply comparable procedures to complaints alleging a violation of the closed captioning rules for IP-delivered video programming. Is 60 days the appropriate timeframe within which to require a complaint about a captioning problem? Unlike television, where programs are exhibited at specific times, Internet programming is available continuously to any viewer. Given this, we seek comment on when this 60-day period should begin to run. Should it begin to run from the latest date on which the program was available on the Internet to consumers without required captions? How should we handle intermittent problems where closed captioning may not be transmitted continuously or with every streaming session? Would the best course be to eliminate the 60-day filing window altogether as unenforceable in the IP-delivered video programming market?

45. In addressing complaints alleging a violation of the IP closed captioning rules, we propose that the Commission will forward complaints to the named VPD/VPP and/or VPO, as well as to any other VPD/VPP and/or VPO that Commission staff determines may be involved. Upon receipt of a consumer complaint, should we require the VPD/VPP or VPO to attempt to resolve the dispute with the complainant, before proceeding with the Commission's complaint process? We further propose to permit the Commission to request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violation(s) of Commission rules.[147] Generally, we expect that consumers will direct their complaints to the VPD/VPP, since that is the entity from which the consumer views the programming, but the Commission could instead, or in addition, direct any resulting investigation and subsequent enforcement action against the VPO to the extent necessary and appropriate. The bureau handling the complaint would be expected to act in an expeditious fashion to determine which entity(ies) is/are responsible and dismiss claims against any others. In that vein, we seek comment as to whether a shotclock should be imposed. In recognition of the breadth of the IP-delivered video programming market, we propose to state explicitly in the rules that, although the Commission will generally require VPDs/VPPs and

[137] 47 U.S.C. 613(c)(2)(D)(vii).

[138] 47 U.S.C. 613(c)(3).

[139] H.R. Rep. No. 111–563 at 31.

[140] *See* Section III.E., supra (discussing technical standards for IP-delivered video programming).

[141] *See* 47 CFR 79.1(g).

[142] *See* 47 CFR 79.1(g)(1).

[143] *See* 47 CFR 79.1(g)(2).

[144] *See* 47 CFR 79.1(g)(5).

[145] *See* 47 CFR 79.1(g)(7).

[146] *See id.*

[147] This flexibility would enable the Commission to determine which of the entities involved—the VPD/VPP or VPO—is responsible.

VPOs to respond to complaints within 30 days, the Commission may lengthen the required response period on a case-by-case basis (for example, when it is difficult to determine which entity is responsible for the alleged violation). We seek comment on these proposed complaint procedures. As in the television context, should we permit those filing complaints alleging a violation of the closed captioning requirements for IP-delivered video programming to file the complaint directly with the VPD/VPP first,[148] or is it preferable to require that all complaints come directly to the Commission in the first instance? If the Commission finds that a VPD/VPP or VPO has violated the requirements for closed captioning of IP-delivered video programming, what sanctions or remedies should it impose? [149] We propose to adjudicate each complaint on its merits and employ the full range of sanctions and remedies available to the Commission under the Act.

46. Complaints alleging a violation of the television closed captioning requirements can be filed online,[150] or by fax or postal mail. We seek comment on whether the same options should be available for complaints alleging a violation of the closed captioning requirements for IP-delivered video programming. As in the *Video Description Order*, should we instead permit viewers to file complaints about a failure to comply with the closed captioning rules for IP-delivered video programming by ''any reasonable means,'' including any method that would best accommodate the complainant? [151] Should the Commission revise the existing complaint form for disability access complaints (Form 2000C) to request information specific to complaints involving IP closed captioning? To foster the Commission's efficient review of complaints, should the Commission decline to consider complaints that do not include certain information, and if so, what information should be required? Such information might include, for example: (i) The name and address of the complainant; (ii) the name and postal address, Web site, or e-mail address of the VPD/VPP and/or VPO against whom the complaint is alleged, and information sufficient to identify the video programming involved; (iii) information sufficient to identify the software or device used to view the program; (iv) a statement of facts sufficient to show that the VPD/VPP and/or VPO has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation; (v) the specific relief or satisfaction sought by the complainant; and (vi) the complainant's preferred format or method of response to the complaint.

47. Section 79.1(i) of our television closed captioning rules requires video programming distributors, as that term is defined in the context of television closed captioning, to provide certain contact information. Specifically, television video programming distributors must provide contact information by which consumers may contact them immediately, at the time that a captioning problem is discovered.[152] Television video programming distributors must also provide contact information for the receipt and handling of written closed captioning complaints.[153] Television video programming distributors must file this contact information with the Commission, which then makes it available on a database of television video programming distributors.[154] We seek comment on whether we should impose comparable contact information requirements on VPDs/VPPs as part of our rules governing closed captioning of IP-delivered video programming, to assist consumers wishing to reach out to VPDs/VPPs about their concerns or complaints, and to assist the Commission in resolving complaints. Instead of providing VPD/VPP contact information through a database, should we require VPDs/VPPs to provide this information directly to viewers of IP-delivered video programming, for example, through the VPD/VPP's Web site? What contact information should we require VPDs/VPPs to provide consumers? [155] We also ask whether we should apply any other existing provisions of the television closed captioning rules to the rules governing captioning of IP-delivered video programming.

IV. Section 203 of the CVAA

A. Scope of Section 203 of the CVAA and Exempted Apparatus

48. Section 203 of the CVAA seeks to extend closed captioning requirements to the devices consumers use to access video programming.[156] Specifically, Section 203(a) of the CVAA directs the Commission to require that the devices consumers use to receive or play back video programming are equipped to decode and display closed captioning,[157] while Section 203(b) extends requirements to devices that record video and to the interconnection mechanisms that carry signals from these source devices to consumer equipment.[158] In this section, we seek to address the specific classes of devices subject to these provisions, as well as those that fall into various statutory exemptions. Additionally, we address the issues of what functionality must be supported by these devices and whether that functionality may vary based on specific devices. However, while Section 203(a) of the CVAA significantly expands the requirement to implement closed captioning capabilities to essentially all apparatus, Section 203 also provides substantial limitations on this expanded definition. These limitations—(1) that implementation of closed captioning capability be achievable for apparatus with pictures screens less than 13 inches in size and for apparatus designed to record video programming transmitted simultaneously with sound [159] (2) that the requirements do not apply to display-only monitors; [160] and (3) that the Commission may waive the requirements for devices which derive their essential utility from uses other than video playback [161]—demand varying degrees of interpretation and clarification.

49. *All Apparatus.* Section 203(a) of the CVAA requires that ''if technically feasible'' each ''apparatus designed to

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[148] *See* 47 CFR 79.1(g)(1).

[149] We note that in 2004, a petition filed by consumer groups proposed a base forfeiture of $8,000 for violations of the Commission's closed captioning rules. *See* Telecommunications for the Deaf, Inc. *et al.* Petition for Rulemaking, RM–11065 (July 23, 2004). Petitioners included Telecommunications for the Deaf, Inc., the National Association of the Deaf, Self Help for Hard of Hearing People, the Association for Late Deafened Adults, Inc., and the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN).

[150] *See http://www.fcc.gov/complaints.*

[151] *See Video Description Order* at para. 55.

[152] *See* 47 CFR 79.1(i)(1) (requiring television video programming distributors to ''designate a telephone number, fax number, and e-mail address for purposes of receiving and responding immediately to any closed captioning concerns,'' and requiring distributors to ''include this information on their Web sites (if they have a Web site), in telephone directories, and in billing statements'').

[153] *See* 47 CFR 79.1(i)(2).

[154] *See* 47 CFR 79.1(i)(3); *http://esupport.fcc.gov/vpd-search/search.action#scroll/There.*

[155] *See Closed Captioning of Video Programming,* FCC 09–109, 75 FR 7368, February 19, 2010 (describing the webform by which television video programming distributors may submit their contact information). Television video programming distributors may enter their contact information at *https://esupport.fcc.gov/vpd-data/login!input.action.*

[156] *See* S. Rep. No. 111–386 at 14; H.R. Rep. No. 111–563 at 30–31.

[157] Public Law 111–260, § 203(a).

[158] Public Law 111–260, § 203(b).

[159] 47 U.S.C. 303(u)(2)(A), 303(z)(1).

[160] 47 U.S.C. 303(u)(2)(B).

[161] 47 U.S.C. 303(u)(2)(C).

receive or play back video programming transmitted simultaneously with sound * * * be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming.'' [162] We seek comment on the issue of what constitutes an ''apparatus.'' How should the Commission determine whether it is ''technically feasible'' for apparatus to meet the requirements of Section 203? We note that neither the statute nor legislative history gives us guidance on a definition of apparatus. Nevertheless, we begin with the assumption that the term includes all hardware that is used in receiving or playing back video programming. At the same time, we note that the CVAA gives the Commission authority to waive the requirements of its rules requiring the display, render or pass through of closed captioning for apparatus or any class of apparatus ''(i) primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or (ii) for equipment designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.'' [163]

50. Therefore, we seek comment on how to determine whether hardware is primarily designed for receiving or playing back video programming transmitted simultaneously with sound, and how to determine whether hardware derives its essential utility from receiving and playing back video. The legislative history expanded on the availability of waivers by stating that the Commission may waive the Section 203 closed captioning requirements ''where, for instance, a consumer typically purchases a product for a primary purpose other than viewing video programming, and access to such programming is provided on an incidental basis.'' [164] In making waiver decisions, the Commission generally considers whether special circumstances exist that warrant deviation from the general rule, and whether the waiver will serve the public interest.[165] Accordingly, we seek comment on the factors that the Commission should evaluate in determining whether an apparatus is eligible for a waiver. Should we consider how the apparatus is designed and marketed? How should we consider the fact that different people may consider the same device as having a different ''essential utility''? In recognition of the fact that, as technology evolves, the ''essential utility'' of apparatus may change, should waivers be temporary, and if so, what should their duration be and what process should be used for renewing waivers? We invite examples of apparatus that are or are not primarily designed for receiving or playing back video programming transmitted simultaneously with sound, and examples of apparatus that do or do not derive their essential utility from receiving and playing back video. Where do devices such as video gaming consoles, cellular telephones, and tablet devices fit within these criteria? Are there are any specific classes of apparatus that warrant the establishment of a categorical or blanket waiver, or should all waivers be addressed case-by-case? We note that personal computers and video gaming consoles are used by a large percentage of viewers of VPDs/VPPs.[166] Should we make any special considerations for these devices? If the Commission considers waivers for a particular ''class'' of apparatus, what factors should we consider, and how should we determine what apparatus constitute a ''class''? Should the Commission adopt a process for determining whether to waive the closed captioning requirements of Section 203 of the CVAA, or should we handle waivers pursuant to Section 1.3 of our rules? [167]

51. We also seek comment on whether apparatus also includes software. To what extent is hardware that is designed to receive or play back video programming dependent on software for its functionality? For example, consumers view programming intended to be covered by Section 202 on personal computers and cellular telephones. Both a computer and a cellular phone can be viewed as a single apparatus or several working together, such as the processor, memory, and storage, the display and other peripheral components, and the operating system and applications. If software is considered an apparatus, we seek comment on how the Commission can ensure compliance, particularly when software is provided over the Internet directly to the end user.[168]

52. *Screen Size and Display-Only Monitors.* The closed captioning requirement of the CVAA is no longer restricted to television receivers or to those devices with screens larger than 13 inches, exceptions that were put into place by the Television Decoder Circuitry Act.[169] As Congress noted, consumers now view video programming on smaller and portable devices, and to the extent ''achievable,'' closed captioning must be made available on these devices.[170] However, apparatus that use a picture screen that is less than 13 inches in size and that are designed to receive or play back video must be equipped with built-in closed caption decoder circuitry or the capability to display closed captions only if this is ''achievable.'' [171] Therefore, while we propose to remove the screen-size limitation entirely from Section 15.119 and Section 15.122 of the Commission's rules, and to not include any screen size limitation in our new rules,[172] we address the issue of achievability below. Additionally, the CVAA provides that ''any apparatus or class of apparatus that are display-only video monitors with no playback capability are exempt from the requirements'' to display or render captions and we subsequently propose adopting this exception as written.[173] How should the Commission define devices that qualify for inclusion in this exempted category of apparatus? It would seem that Congress intended to exempt computer monitors with this language, because the monitor itself lacks playback capability. We seek comment on what other devices, if any, Congress intended to exempt by this language.

53. *Achievability.* The CVAA contains a definition for achievability, directing that for the purposes of the CVAA, determining whether a requirement is achievable consists of evaluating the following factors: (1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or

[162] 47 U.S.C. 303(u)(1)(A).

[163] 47 U.S.C. 303(u)(2)(C).

[164] *See* S. Rep. No. 111–386 at 14; H.R. Rep. No. 111–563 at 30.

[165] *Northeast Cellular Telephone Co., L.P.* v. *FCC*, 897 F.2d 1164, 1166 (DC Cir. 1990) (*citing WAIT Radio* v. *FCC*, 418 F.2d 1153, 1159 (DC Cir. 1969)); *see also* 47 CFR 1.3.

[166] Nielsenwire, ''What Netflix Viewers Are Watching * * * And How,'' July 27, 2011 at *http://blog.nielsen.com/nielsenwire/online_mobile/what-netflix-and-hulu-users-are-watching-and-how/* (visited August 30, 2011).

[167] *See* 47 CFR 1.3 (''Any provision of the [Commission's rules] may be waived by the Commission on its own motion or on petition if good cause therefor is shown.'').

[168] Section 330(b) of the Act as modified by the CVAA prohibits the shipment in interstate commerce, manufacture, assembly or import from a foreign country of apparatus violating the rules we adopt in this proceeding.

[169] Public Law 101–431, 104 Stat. 960 (1990). Previously codified at 47 U.S.C. 303(u), 330(b).

[170] S. Rep. No. 111–386 at 14.

[171] 47 U.S.C. 303(u)(2)(A).

[172] 47 CFR 15.119 (closed captioning requirements for analog television receivers), 47 CFR 15.122 (closed captioning requirements for digital television receivers).

[173] 47 U.S.C. 303(u)(2)(B).

service in question; (2) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (3) the type of operations of the manufacturer or provider; and (4) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.[174] We seek comment on how to apply this definition to apparatus subject to Section 203 of the CVAA. Under this definition, what classes of devices that are otherwise designed to display or record video are nevertheless incapable of supporting closed captioning? Is there a screen size or resolution at which it would become so difficult to read captions that there would be no benefit to justify the cost of including this capability? Are there devices which simultaneously contain the processing power to display video yet are incapable of processing the additional data necessary to display closed captions? Finally, what characteristics of a manufacturer's operations should the Commission consider in determining whether it is achievable for that manufacturer to include closed caption capability in a device with a screen size less than 13 inches? For example, should the Commission consider whether the manufacturer is a small business, and if so, is there an existing definition of ''small business'' that the Commission should apply? How should an evaluation of what is ''achievable'' differ from an evaluation of what is ''technically feasible''? [175]

54. *Recording Devices.* In addition to devices that consumers use to directly view video, those that record video must also have closed-captioning capability. Specifically, the CVAA added Section 303(z) to the Act, which requires that, ''if achievable * * * apparatus designed to record video programming * * * [must] enable the rendering or the pass-through of closed captions.'' [176] Thus, we seek comment on codifying this requirement verbatim in our rules and interpreting ''apparatus'' that are designed to ''record video programming'' to also include hardware-only products. We seek comment on whether we should also interpret ''apparatus'' that are designed to ''record video programming'' to include software-only products, such as software designed to enable a PC to function as a video recording platform. While some devices, such as digital video recorders, plainly appear to be covered by this section, other devices, such as network-connected hard drives, also can be used to record video. For example, home-networking protocol suites, such as DLNA,[177] permit networked devices, such as computers and hard-drives, to be used for video storage while control of those devices is accomplished by a combination of software running on the device itself and on devices accessing or manipulating the video stream. We seek comment on the proper scope of the definition of ''apparatus designed to record video programming.'' Additionally, to the extent the definition of ''achievable'' differs from that discussed above, we seek comment on determining the capabilities of recording devices relative to display devices.

55. *Interconnection Mechanisms.* Finally, the CVAA directs the Commission to regulate interconnection mechanisms. Specifically, the CVAA requires that ''interconnection mechanisms and standards for digital video source devices [be] available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions.'' [178] We seek input on how this objective can best be achieved. Is it sufficient to require that intermediate devices, such as set-top boxes and digital video recorders, be capable of conveying closed captions to display devices and to assume that standards for interconnection will be developed as necessary? Does the Commission need to extend its regulations to manufacturers or standards bodies that develop and deploy these interconnection mechanisms to ensure that they are capable of conveying closed captioning information? Should the Commission take a more active role in requiring a particular standard? We additionally seek comment on what specific connections Congress intended to be covered by this provision. For example, component video connections and HDMI, used to transmit high definition video signals from a set-top box or computer to a television or monitor, do not carry closed captions.[179] However, based on our requirements, those devices connected to the television or monitor via HDMI or component video would be required to render the captions prior to transmitting the video signal. Did Congress intend to cover home networking connections, such as WiFi or Multimedia Over Coax (MoCA), and if so, should we instead direct our attention to the protocol suites which use these interconnection technologies, such as DLNA? We seek comment on what it means to carry the necessary information to ''permit or render the display of closed captions'' and what existing technologies satisfy this requirement.

B. Obligations Under Section 203 of the CVAA

56. In this *NPRM*, we also seek comment on the features and specifications that must be supported by the devices covered by Section 203. Section 203(c) requires that the Commission prescribe performance and display standards for built-in decoder circuitry or capability designed to display closed captioned video programming.[180] The VPAAC Report addresses this issue, recommending a feature set which mirrors that available on television receivers and we propose rules requiring these same features. These capabilities include the presentation of captions, via roll-up, pop-on, or paint-on techniques, and the setting of semantically significant character formatting, as well as capabilities regarding character color, character opacity, character size, fonts, caption background, character edge attributes, caption window color, and language selection.[181] We further propose, pursuant to the VPAAC recommendation, that these settings be user configurable and that the user's selection be retained between viewing sessions, though where the user has not made a selection, the settings provided by the content owner are displayed.[182] While the VPAAC states that the functionality in an IP world should not be less than what is provided to consumers through digital television, there are other features the VPAAC Report identifies as components of the ''experience'' that must be provided to users, but that are not included in the VPAAC Report's discussion of specific capabilities, such as the user-controlled

[174] 47 U.S.C. 617(g).

[175] *See* para. 49, *supra.*

[176] 47 U.S.C. 303(z)(1).

[177] *See* Digital Living Network Alliance, *http://www.dlna.org.*

[178] 47 U.S.C. 303(z)(2).

[179] *See Does HDMI Support Closed Captioning?* High Definition Multimedia Interface, Frequently Asked Questions *http://www.hdmi.org/learningcenter/faq.aspx#117.* Captions are rendered by the host device, such as a set-top box and transmitted in an open matter, rendered into the video stream. While this makes captioning available, it does not utilize the functionality built into the end device, which some consumers may prefer.

[180] Public Law 111–260, § 203(c).

[181] VPAAC Report at 13–16.

[182] *Id.* at 15.

placement of captions.[183] We seek comment on the list of features included in the VPAAC Report, especially whether the requirements must be modified for specific classes of devices, such as those with very small screens or those with limited processing power. To what extent beyond what is currently available should users be able to control the appearance of their captions through user tools on video apparatus? Which aspects must, and which may, be user-controllable? Is there a need to require such functionality to ensure compliance? We also seek comment on the inherent differences, technical and otherwise, in the rendering of captions on Internet-connected devices (*e.g.*, on a Web browser or a smartphone app) versus television receivers? What are the inherent differences, technical and otherwise, in the rendering of captions on mobile devices versus fixed-use television and video receivers?

57. We seek comment on what standards, if any, the Commission should mandate to implement the goals of Section 203 of the CVAA. In particular, we seek comment on whether we should adopt a particular delivery file format that devices must support. The VPAAC Report discusses three use cases of how content can be distributed via the Internet to consumer devices: Use Case 1, where content is delivered to an unaffiliated device; Use Case 2, where content is delivered to a Web browser; and Use Case 3, where content is delivered to a managed device or application.[184] The VPAAC Report concludes that Use Cases 2 and 3 ''require a specific standard distribution format based on standards developed within an open process by recognized industry standard-setting organizations;'' however it does not identify what that standard should be.[185] When the Commission initially adopted rules for closed captioning, it adopted certain standards for delivery and decoding of captions and made those standards mandatory for all devices capable of receiving television content.[186] In those cases, however, a clear industry standard and consensus on the format already existed, and the standard was applied with respect to one television delivery standard. Furthermore, television programmers rarely maintain any relationship with the devices displaying the content they provide. In the Internet-delivery context, however, VPDs/VPPs deliver content in many different formats, each continually evolving, and a Commission-mandated standard could restrict industry innovation. Conversely, Congress clearly envisioned consumers being able to access closed captions contained in any programming on any device that is capable of displaying the associated video, and a lack of standards could make this goal more difficult and costly to achieve.[187] Furthermore, the relationship between the content provider and the device or software provider may be such that the VPP/VPD could contract with device manufacturers to support captions in the format the VPP/VPD chooses. With respect to Use Case 1, the VPAAC Report concludes that a common file format is required, and suggests SMPTE-TT as that format.[188] We seek comment on whether we should require a particular delivery standard or standards to be supported on devices pursuant to Section 203 of the CVAA. As an alternative, would a more general rule requiring that devices capable of receiving unaffiliated content from VPPs/VPDs be capable of decoding and rendering captions transmitted by VPPs/VPDs be preferable to achieve the goals of the CVAA?

58. *Alternate Means of Compliance.* The CVAA permits that ''an entity may meet the requirements of sections 303(u), 303(z), and 330(b) of the [Act] through alternate means than those prescribed by regulations * * * as determined by the Commission.'' [189] We seek comment on a process by which the Commission may determine that the alternate means selected by a party nevertheless meet the requirements of the preceding sections. Additionally, are there some requirements above that cannot be met via alternate means, such as the use of a standardized interconnection or the functional requirements prescribed above? [190]

59. *Location of Rules within the Code of Federal Regulations and Miscellaneous Issues.* Finally, we seek comment on any other issues that need to be addressed by the Commission to meet the CVAA's objective of ensuring that consumers can receive closed captions on video apparatus covered by the Act. For example, while we currently propose to create and modify requirements in Part 15 of the Commission's rules, we seek comment on whether a more appropriate location for these rules would be proximate to the existing closed captioning and video description rules in Part 79, or as a new, video-device specific section created to consolidate the device rules other than those relating to reception of radio frequency signals that the Commission currently maintains Part 15 of the Commission's rules contains numerous ancillary obligations (such as certification or verification) and attendant definitions which may or may not be beneficial to the overall goals of the rules. By creating a new section, we could consolidate various rule parts related to video devices, including other video device rules contained in Title 47 of the CFR that are not directly related to the reception of radio frequency signals. In this case, for example, Section 15.122, the closed captioning rules for digital television, could be moved, and Section 15.119 could be moved if it is still necessary, or else deleted. Are there additional benefits or implications to separating device rules for closed captioning from the general Part 15 requirements?

C. Schedule of Deadlines

60. While the CVAA specifies that the Commission must promulgate rules within six months of the submission of the VPAAC Report, it does not specify the timeframe by which those regulations must become effective.[191] Additionally, while the VPAAC Report recommends timeframes by which closed captioning must be made available, it does not address the timeframe on which devices must become compliant.[192] It notes that one group suggested that a minimum of 24 months would be required to implement the features discussed above, but that others thought this time period was too long.[193] We seek comment on the appropriate timeframe to implement closed captioning technical requirements pursuant to Section 203 of the CVAA. Should features or device classes be phased in, accelerating the deployment of devices for which the addition of closed captioning is easy, while allowing more time for those parties that need it? We note that the Commission allowed slightly less than 24 months for device manufacturers to design and build DTV closed captioning display functionality into their products.[194] Is this timeframe

[183] *Id.* at 34, Appendix C.

[184] *Id.* at 18–20.

[185] *Id.* at 27.

[186] *See DTV Receiver Closed Captioning Order*, FCC 00–259, 65 FR 58467, September 29, 2000 (''*DTV Receiver Closed Captioning Order*''); *TDCA Order.*

[187] *See* S. Rep. No. 111–386 at 14; H.R. Rep. No. 111–563 at 30.

[188] VPAAC Report at 27.

[189] Public Law 111–260, § 203(e).

[190] *See para.* 55, *supra.*

[191] Public Law 111–260, § 203(d).

[192] VPAAC Report at 34.

[193] *Id.*

[194] *See DTV Receiver Closed Captioning Order*, 65 FR 58467. (The order was adopted on July 21, 2000, released on July 31, 2000, and published in the

Continued

appropriate in light of the current electronics manufacturing process? Would it be an appropriate timeframe if we define ''apparatus'' to include software? If we adopt the compliance schedule for VPPs/VPDs discussed above (varying from six to 18 months, depending on the nature of the programming),[195] should we also ensure that some or all devices that will be used to access those services will be capable of decoding closed captions when they are available?

V. Conclusion

61. In conclusion, in this *NPRM*, we seek comment on proposed rules that would require IP-delivered video programming to include closed captions if that programming is shown on television with captions after the effective date of our new rules. We further seek comment on proposed rules that would require this capability for nearly all devices that consumers use to access IP-delivered video programming. These proposals seek to further the intent of Congress to give individuals who are deaf or hard of hearing better access to IP-delivered video programming.

VI. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

62. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''),[196] the Commission has prepared this present Initial Regulatory Flexibility Analysis (''IRFA'') concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (''*NPRM*''). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by in accordance with the same filing deadlines for comments on the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (''SBA'').[197] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.[198]

Federal Register on September 29, 2000. The rules became effective on July 1, 2002.)

[195] *See* Section III. B., *supra.*

[196] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[197] *See* 5 U.S.C. 603(a).

[198] *See id.*

1. Need for, and Objectives of, the Proposed Rule Changes

63. The Twenty-First Century Communications and Video Accessibility Act of 2010 (''CVAA'') requires the Federal Communications Commission (''Commission'') to revise its regulations to mandate closed captioning on certain video programming delivered using Internet protocol (''IP'').[199] In the *NPRM*, we initiate a proceeding that will fulfill this requirement. We seek comment on proposals that would better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, by requiring that programming be provided with closed captions if it was shown on television with captions after the effective date of the rules adopted pursuant to this proceeding. We also seek comment on requirements for the devices that are subject to the CVAA's new closed captioning requirements.[200] Our goal is to require the provision of closed captions with IP-delivered video programming in the manner most helpful to consumers, while ensuring that our regulations do not create undue economic burdens for the distributors, providers, and owners of online video programming.

64. Closed captioning is an assistive technology that provides individuals who are deaf or hard of hearing with access to television programming. Closed captioning displays the audio portion of a television signal as printed words on the television screen. Existing regulations require the use of closed captioning on television.[201] Until now, however, closed captioning has not been required for IP-delivered video programming. That changed with the enactment of the CVAA. Specifically, Section 202(b) of the CVAA revised Section 713 of the Communications Act of 1934, as amended, to require the Commission to ''revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of such regulations.'' [202]

65. The CVAA also required the Chairman of the Commission to establish an advisory committee known as the Video Programming Accessibility Advisory Committee (''VPAAC'').[203] Section 201(e)(1) of the CVAA required the VPAAC to submit a report on closed captioning to the Commission six months after its first meeting, or by July 13, 2011.[204] The VPAAC submitted this report on July 12, 2011.[205] By statute, within six months of the submission of the VPAAC Report, the Commission must issue final regulations to require the provision of closed captioning on IP-delivered video programming.[206] Accordingly, the Commission must revise its regulations by January 12, 2012.[207] By the same date, pursuant to Section 203 of the CVAA, the Commission must revise its regulations to include any technical standards, protocols, and procedures needed for the transmission of closed captioning delivered using IP, to ensure that certain apparatus are capable of rendering, passing through, or otherwise permitting the display of closed captions for end users.[208]

66. The *NPRM* considers revisions to our rules that would implement the requirements of Sections 202(b) and 203 of the CVAA, as well as the conforming amendment set forth in Section 202(c) of the CVAA. These proposals could fulfill Congress' goal of enabling consumers who are deaf or hard of hearing to access IP-delivered video programming. The *NPRM* seeks comment on rule changes that would:

- Specify the obligations of entities subject to Section 202(b) by:
  - Requiring video programming owners to send required caption files for IP-delivered video programming to video programming distributors and video programming providers along with program files;
  - Requiring video programming distributors and video programming providers to enable the rendering or pass through of all required captions to the end user; and
  - Requiring the quality of all required captioning of IP-delivered video programming to be of at least the same quality as the captioning of

[199] Public Law 111–260, 124 Stat. 2751, § 202(b) (2010). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

[200] *See* Public Law 111–260, § 203.

[201] *See* 47 CFR 79.1 (setting forth the requirements for closed captioning of video programming on television).

[202] 47 U.S.C. 613(c)(2)(A).

[203] Public Law 111–260, § 201(a).

[204] *Id.*, § 201(e)(1).

[205] *See* First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, July 12, 2011, *available at http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf* (''VPAAC Report'').

[206] 47 U.S.C. 613(c)(2)(A).

[207] *See id.*

[208] Public Law 111–260, § 203(a)–(b), (d).

the same programming when shown on television;[209]

- Create a schedule of deadlines by which:
  - All prerecorded and unedited programming subject to the new requirements must be captioned within six months of publication of the rules in the **Federal Register**;
  - All live and near-live programming subject to the new requirements must be captioned within 12 months of publication of the rules in the **Federal Register**; and
  - All prerecorded and edited programming subject to the new requirements must be captioned within 18 months of publication of the rules in the **Federal Register**; [210]
- Craft procedures by which video programming providers and video programming owners may petition the Commission for exemptions from the new requirements based on economic burden; [211]
- Establish a mechanism to make information about video programming subject to the CVAA available to video programming providers and distributors, by requiring video programming owners to provide programming for IP delivery either with captions, or with a certification that captions are not required for a stated reason; [212]
- Decline to adopt particular technical standards for IP-delivered video programming; [213]
- Decline to treat a *de minimis* failure to comply with the new rules as a violation, and permit entities to comply with the new requirements by alternate means; [214] and
- Adopt procedures for complaints alleging a violation of the new requirements.[215]

Additionally, we seek comment on the appropriate requirements for devices subject to the closed captioning requirements of Section 203.[216]

2. Legal Basis

67. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303, 330(b), 613, and 617.

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

68. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[217] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [218] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[219] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[220] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

69. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[221] First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.[222] In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' [223] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[224] Finally, the term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' [225] Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.[226] We estimate that, of this total, as many as 88,506 entities may qualify as ''small governmental jurisdictions.'' [227] Thus, we estimate that most governmental jurisdictions are small.

70. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [228] The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[229] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small

[209] *See NPRM*, Section III.A.

[210] *See id.*, Section III.B.

[211] *See id.*, Section III.C.

[212] *See id.*, Section III.D.

[213] *See id.*, Section III.E.

[214] *See id.*, Section III.F.

[215] *See id.*, Section III.G.

[216] *See id.*, Section IV.

[217] 5 U.S.C. 603(b)(3).

[218] 5 U.S.C. 601(6).

[219] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' 5 U.S.C. 601(3).

[220] 15 U.S.C. 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[221] *See* 5 U.S.C. 601(3)–(6).

[222] *See* SBA, Office of Advocacy, ''Frequently Asked Questions,'' *http://web.sba.gov/faqs* (last visited May 6, 2011; figures are from 2009).

[223] 5 U.S.C. 601(4).

[224] Independent Sector, The New Nonprofit Almanac & Desk Reference (2010).

[225] 5 U.S.C. 601(5).

[226] U.S. Census Bureau, Statistical Abstract of the United States: 2011, Table 427 (2007).

[227] The 2007 U.S Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 small governmental organizations in 2007. If we assume that county, municipal, township and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,125. If we make the same assumption about special districts, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 special districts. Therefore, of the 89,476 small governmental organizations documented in 2007, as many as 89,506 may be considered small under the applicable standard. This data may overestimate the number of such organizations that has a population of 50,000 or less. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (Data cited therein are from 2007).

[228] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers,'' (partial definition), *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110* (last visited Oct. 21, 2009).

[229] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo&_id=&-fds&_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

business size standard, the majority of such firms can be considered small.

71. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[230] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[231] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[232] Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers.[233] Thus, under this second size standard, most cable systems are small.

72. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [234] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[235] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[236] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[237] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

73. *Direct Broadcast Satellite (''DBS'') Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, ''Wired Telecommunications Carriers,'' [238] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[239] To gauge small business prevalence for the DBS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.[240] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation (''EchoStar'') (marketed as the DISH Network).[241] Each currently offers subscription services. DIRECTV [242] and EchoStar [243] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

74. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules.[244] The second has a size standard of $25 million or less in annual receipts.[245]

75. The category of Satellite Telecommunications ''comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [246] Census Bureau data for 2007 show that 512 Satellite Telecommunications firms operated for that entire year.[247] Of this total, 464 firms had annual receipts of under $10 million, and 18 firms had receipts of $10 million to $24,999,999.[248] Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our proposed action.

76. The second category, *i.e.* ''All Other Telecommunications'' comprises ''establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable

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[230] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, FCC 95–196, 60 FR 35854, July 12, 1995.

[231] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[232] 47 CFR 76.901(c).

[233] Warren Communications News, *Television & Cable Factbook 2008*, ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

[234] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[235] 47 CFR 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

[236] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[237] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to sec. 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[238] *See* 13 CFR 121.201, NAICS code 517110 (2007).

[239] 13 CFR 121.201, NAICS code 517110 (2007).

[240] *See http://www.factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[241] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 580, para. 74 (2009) (''*13th Annual Report*''). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. (''Dominion'') (marketed as Sky Angel). *See* Public Notice, ''Policy Branch Information; Actions Taken,'' Report No. SAT–00474, 22 FCC Rcd 17776 (IB 2007).

[242] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See 13th Annual Report*, 24 FCC Rcd at 687, Table B–3.

[243] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving ''Sky Angel'' service from DISH Network. *See id.* at 581, para. 76.

[244] 13 CFR 121.201, NAICS code 517410.

[245] 13 CFR 121.201, NAICS code 517919.

[246] U.S. Census Bureau, 2007 NAICS Definitions, ''517410 Satellite Telecommunications.''

[247] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo&_id=&-_skip=900&-ds_name=EC0751SSSZ4-_lang=en*

[248] *See id.*

of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.'' [249] For this category, Census Bureau data for 2007 show that there were a total of 2,383 firms that operated for the entire year.[250] Of this total, 2,346 firms had annual receipts of under $25 million and 37 firms had annual receipts of $25 million to $49,999,999.[251] Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

77. *Television Broadcasting*. The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts.[252] Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' [253] The Commission has estimated the number of licensed commercial television stations to be 1,390.[254] According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations [255] in the United States have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (''NCE'') television stations to be 391.[256] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [257] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

78. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

79. *Open Video Services*. Open Video Service (OVS) systems provide subscription services.[258] The open video system (''OVS'') framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[259] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[260] OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.'' [261] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small.[262] In addition, we note that the Commission has certified some OVS operators, with some now providing service.[263] Broadband service providers (''BSPs'') are currently the only significant holders of OVS certifications or local OVS franchises.[264] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service.[265] Affiliates of Residential Communications Network, Inc. (''RCN'') received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

[249] *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search.*

[250] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=-_skip=900 ds_name=EC0751SSSZ4&-_lang=en.*

[251] *See id.*

[252] *See* 13 CFR 121.201, NAICS Code 515120 (2007).

[253] *Id.* This category description continues, ''These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.'' Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[254] *See* News Release, ''Broadcast Station Totals as of December 31, 2010,'' 2011 WL 484756 (F.C.C.) (dated Feb. 11, 2011) (''*Broadcast Station Totals*''); also available at *http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC–304594A1.pdf''.*

[255] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*; however, we are using BIA's estimate for purposes of this revenue comparison.

[256] *See Broadcast Station Totals.*

[257] ''[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 121.103(a)(1).

[258] *See* 47 U.S.C. 573.

[259] 47 U.S.C. 571(a)(3)–(4). See 13th Annual Report, 24 FCC Rcd at 606, para. 135.

[260] See 47 U.S.C. 573.

[261] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers''; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[262] See *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[263] A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.*

[264] *See 13th Annual Report*, 24 FCC Rcd at 606–07, para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[265] *See http://www.fcc.gov/mb/ovs/csovscer.html (current as of February 2007).*

80. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. * * * These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.'' [266] To gauge small business prevalence in the Cable and Other Subscription Programming industries, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, which supersedes data from the 2002 Census, there were 396 firms that in 2007 were engaged in production of Cable and Other Subscription Programming. Of these, 386 operated with less than 1,000 employees, and 10 operated with more than 1,000 employees. However, as to the latter 10 there is no data available that shows how many operated with more than 1,500 employees. Thus, under this category and associated small business size standard, the majority of firms can be considered small.[267]

81. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.'' [268] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2007. The size standard established by the SBA for this business category is that annual receipts of $29.5 million or less determine that a business is small.[269] According to the 2007 Census, there were 9,095 firms that in 2007 were engaged in Motion Picture and Video Production. Of these, 8,995 had annual receipts of $24,999,999 or less, and 100 had annual receipts ranging from not less that $25,000,000 to $100,000,000 or more.[270] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

82. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.'' [271] We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce and/or distribute programming for cable television. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2007. Based on the SBA size standard of annual receipts of 29.5 million dollars,[272] and according to that 2007 Census source, which supersedes data from the 2002 Census, there were 450 firms that in 2007 were engaged in Motion Picture and Video Distribution. Of that number, 434 received annual receipts of $24,999,999 or less, and 16 received annual receipts ranging from $25,000,000 to $100,000,000 or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small.[273]

83. *Small Incumbent Local Exchange Carriers (LECs).* We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' [274] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.[275] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

84. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[276] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[277] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[278] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the NPRM. Thus under this category and the associated small business size standard, the majority of these incumbent local exchange service providers can be considered small providers.[279]

85. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has

[266] U.S. Census Bureau, 2007 NAICS Definitions, ''515210 Cable and Other Subscription Programming''; *http://www.census.gov/naics/2007/def/ND515210.*

[267] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[268] U.S. Census Bureau, 2007 NAICS Definitions, NAICS Code 512110, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=512110&search=2007%20NAICS%20Search.*

[269] 13 CFR 121.201, NAICS Code 512110.

[270] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds&_name=EC0700A1&-_skip=200&-ds_name=EC0751SSSZ5&-_lang=en.*

[271] *See* U.S. Census Bureau, 2007 NAICS Definitions, NAICS Code 512110, *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=512110&search=2007%20NAICS%20Search.*

[272] 13 CFR 121.201, NAICS Code 512110.

[273] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=200&-ds_name=EC0751SSSZ5&-_lang=en.*

[274] 15 U.S.C. 632.

[275] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small-business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (''Small Business Act''); 5 U.S.C. 601(3) (''RFA''). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. *See* 13 CFR 121.102(b).

[276] 13 CFR 121.201, NAICS code 517110.

[277] *See Trends in Telephone Service,* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (''*Trends in Telephone Service*'').

[278] *See id.*

[279] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[280] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers can be considered small entities.[281] According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[282] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.[283] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[284] In addition, 72 carriers have reported that they are Other Local Service Providers.[285] Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.[286] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by rules adopted pursuant to the *NPRM*.

86. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing*. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' [287] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. According to Census bureau data for 2007, there were a total of 919 firms in this category that operated for the entire year. Of this total, 771 had less than 100 employees and 148 had more than 100 employees.[288] Thus, under that size standard, the majority of firms can be considered small.

87. *Audio and Video Equipment Manufacturing*. The SBA has classified the manufacturing of audio and video equipment under in NAICS Codes classification scheme as an industry in which a manufacturer is small if it has less than 750 employees.[289] Data contained in the 2007 U.S. Census indicate that 491 establishments operated in that industry for all or part of that year. In that year, 376 establishments had between 1 and 19 employees; 80 had between 20 and 99 employees; and 35 had more than 100 employees.[290] Thus, under the applicable size standard, a majority of manufacturers of audio and video equipment may be considered small.

88. *Internet Publishing and Broadcasting and Web Search Portals*. The Census Bureau defines this category to include ''* * * establishments primarily engaged in (1) publishing and/or broadcasting content on the Internet exclusively or (2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such as e-mail, connections to other Web sites, auctions, news, and other limited content, and serve as a home base for Internet users.''

89. In this category, the SBA has deemed an Internet publisher or Internet broadcaster or the provider of a Web search portal on the Internet to be small if it has fewer than 500 employees.[291] For this category of manufacturers, Census data for 2007, which supersede similar data from the 2002 Census, show that there were 2,705 such firms that operated that year.[292] Of those 2,705 firms, 2,682 (approximately 99%) had fewer than 500 employees and, thus, would be deemed small under the applicable SBA size standard.[293] Accordingly, the majority of establishments in this category can be considered small under that standard.

90. *Closed Captioning Services*. These entities would be indirectly affected by our proposed action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, ''Teleproduction and Other Postproduction Services'' and ''Court Reporting and Stenotype Services.''

91. The first category of *Teleproduction and Other Postproduction Services* ''comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects.'' The relevant size standard for small businesses in these services is an annual revenue of less than $29.5 million.[294] For this category, Census Bureau Data for 2007 indicate that there were 1,605 firms that operated in this category for the entire year. Of that number, 1,597 had receipts totaling less than $29,500,000.[295] Consequently we estimate that the majority of Teleproduction and Other Postproduction Services firms are small

[280] 13 CFR 121.201, NAICS code 517110.

[281] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds&_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[282] *See Trends in Telephone Service* at Table 5.3.

[283] *See id.*

[284] *See id.*

[285] *See id.*

[286] *See id.*

[287] The NAICS Code for this service 334220. *See* 13 CFR 121.201. *See also http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=300&-ds_name=EC0731SG2&-_lang=en''.*

[288] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=4500&-ds_name=EC0731SG3&-_lang=en..*

[289] 13 CFR 121.201, NAICS Code 334310.

[290] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=300&-ds_name=EC0731I1&-_lang=en.*

[291] 13 CFR 121.201, NAICS Code 519130.

[292] U.S. Census Bureau, American FactFinder, 2007 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 519130 (rel. Nov. 19, 2010); *http://factfinder.census.gov.*

[293] *Id.*

[294] U.S. Census Bureau, 2002 NAICS Definitions, ''512191 Teleproduction and Other Postproduction Services''; *http://www.census.gov/epcd/naics02/def/NDEF512.HTM.* The size standard is $29.5 million.

[295] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo&_id=&-_skip=300&-ds_name=EC0751SSSZ5&-_lang=en.*

entities that might be affected by our proposed actions.

92. The second category of *Court Reporting and Stenotype Services* ''comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.'' The size standard for small businesses in these services is an annual revenue of less than $7 million.[296] For this category, Census Bureau data for 2007 show that there were 2,706 firms that operated for the entire year. Of this total, 2,590 had annual receipts of under $5 million, and 19 firms had receipts of $5 million to $9,999,999.[297] Consequently, we estimate that the majority of Court Reporting and Stenotype Services firms are small entities that might be affected by our proposed action.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

93. The *NPRM* proposes requiring video programming owners (''VPOs'') to send program files to video programming distributors (''VPDs'') and video programming providers (''VPPs'') either with captions, or with a dated certification that captions are not required for a reason stated in the certification.[298] When a program newly becomes subject to the captioning requirements, the NPRM proposes requiring VPOs to provide VPDs/VPPs with any revised certifications and newly required captions (if captions were not previously delivered) within seven days of the underlying change.[299] VPDs/VPPs would be required to retain all such VPO certifications for so long as they make the certified programming available to end users through a distribution method that uses IP, and for at least one calendar year thereafter.[300]

94. The *NPRM* proposes creating a process by which VPPs and VPOs may petition the Commission for a full or partial exemption of the requirements for closed captioning of IP-delivered video programming, which the Commission may grant upon a finding that the requirements would be economically burdensome.[301] The *NPRM* also proposes adopting procedures for complaints alleging a violation of the IP closed captioning rules.[302]

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

95. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[303]

96. We note that our discussion of alternatives is circumscribed because of the specificity of Sections 202(b), (c) and 203 of the CVAA. The CVAA does, however, recognize the special concerns of small entities by creating an exemption process where compliance with the rules would be economically burdensome. In furtherance of this statutory requirement, the *NPRM* proposes procedures enabling the Commission to grant exemptions to the rules governing closed captioning of IP-delivered video programming, where a petitioner has shown it would be an economic burden (*i.e.*, a significant difficulty or expense).[304] This exemption process would allow the Commission to address the impact of the rules on individual entities, including smaller entities, and modify the rules to accommodate individual circumstances. The exemption procedures proposed in the *NPRM* were specifically designed to ameliorate the impact of the rules for closed captioning of IP-delivered video programming in a manner consistent with the objective of increasing the availability of captioned programming.

97. Overall, in proposing rules governing the closed captioning of IP-delivered video programming, we believe that we have appropriately balanced the interests of individuals who are deaf or hard of hearing against the interests of the entities who will be subject to the rules, including those that are smaller entities. Our efforts are consistent with Congress' goal of ''updat[ing] the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.'' [305]

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

98. None.

B. Initial Paperwork Reduction Act of 1995 Analysis

99. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

C. Ex Parte Rules

100. *Permit-But-Disclose.* The proceeding this *NPRM* initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules.[306] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing

[296] U.S. Census Bureau, 2002 NAICS Definitions, ''561492 Court Reporting and Stenotype Services''; *http://www.census.gov/epcd/naics02/def/NDEF561.HTM.*The size standard is $7 million.

[297] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=400&-ds_name=EC0756SSSZ4&-_lang=en.*

[298] *See NPRM,* Section III.D.

[299] *See id.*

[300] *See id.*

[301] *See NPRM,* Section III.C.

[302] *See id.,* Section III.G.

[303] 5 U.S.C. 603(c)(1)–(c)(4).

[304] *See NPRM,* Section III.C.

[305] *See* S. Rep. No. 111–386, 111th Cong., 2d Sess. at 1 (2010); H.R. Rep. No. 111–563, 111th Cong., 2d Sess. at 19 (2010).

[306] 47 CFR 1.1200 *et seq.*

them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

D. Filing Requirements

101. *Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[307] interested parties may file comments and reply comments on or before the dates indicated in the **DATES** section of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (''ECFS''), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[308] We strongly encourage commenters to indicate which portions of their comments and reply comments pertain to Section 202 of the CVAA, and which portions of their comments and reply comments pertain to Section 203 of the CVAA.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/''* or the Federal eRulemaking Portal: *http://www.regulations.gov*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

○ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to Room TW–A325 at FCC Headquarters, 445 12th Street, SW., Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. The filing hours are 8 a.m. to 7 p.m.

○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

○ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

102. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be publically available online via ECFS.[309] These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY–A257 at FCC Headquarters, 445 12th Street, SW., Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8 a.m. to 4:30 p.m. and Friday from 8 a.m. to 11:30 a.m.

103. *People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

104. *Additional Information.* For additional information on this proceeding pertaining to Section 202 of the CVAA, contact Diana Sokolow, *Diana.Sokolow@fcc.gov*, of the Policy Division, Media Bureau, (202) 418–2120. For additional information on this proceeding pertaining to Section 203 of the CVAA, contact Jeffrey Neumann, *Jeffrey.Neumann@fcc.gov*, of the Engineering Division, Media Bureau, (202) 418–7000.

VII. Ordering Clauses

105. Accordingly, *it is ordered* that pursuant to the authority contained in sections 4(i), 4(j), 303, 330(b), 713, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303, 330(b), 613, and 617, this Notice of Proposed Rulemaking *is adopted*.

106. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 15

Communications equipment, Labeling, and Reporting and recordkeeping requirements.

47 CFR Part 79

Cable television operators, Multichannel video programming distributors (MVPDs), Satellite television service providers, Television broadcasters.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 15 and 79 as follows:

PART 15—RADIO FREQUENCY DEVICES

1. The authority citation for part 15 is revised to read as follows:

Authority: 47 U.S.C. 154, 302(a), 303, 304, 307, 330, 336, 544a, 549, and 617.

2. Section 15.119 is amended by revising paragraph (a) to read as follows:

(a)(1) Effective July 1, 1993, all TV broadcast receivers with picture screens 33 cm (13 in) or larger in diameter shipped in interstate commerce, manufactured, assembled, or imported from any foreign country into the United States shall comply with the provisions of this section.

Note to paragraph (a)(1): This paragraph places no restriction on the shipping or sale of television receivers that were manufactured before July 1, 1993.

(2) Effective [Effective Date of the rule], all television receivers shipped in interstate commerce, manufactured, assembled, or imported from any foreign country into the United States shall comply with the provisions of this section, except for television receivers with picture screens measuring less than 13 inches diagonally for which this is not achievable.

* * * * *

3. Section 15.122 is amended by revising paragraph (a)(1) to read as follows:

(a)(1) Effective [Effective Date of the rule], all digital television receivers and all separately sold DTV tuners shipped in interstate commerce, manufactured or imported for use in the United States

[307] *See id.* 1.415, 1419.

[308] *See Electronic Filing of Documents in Rulemaking Proceedings,* Report and Order, 63 FR 24121, May 1, 1998.

[309] Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

shall comply with the provisions of this section, except for digital television receivers with picture screens measuring less than 13 inches diagonally for which this is not achievable.

* * * * *

4. Add § 15.125 to read as follows:

§ 15.125 Closed caption decoder requirements for video devices.

(a) Effective [Effective Date of the rule], all apparatus designed to receive or play back video programming transmitted simultaneously with sound manufactured or imported for use in the United States and not subject to § 15.119 or § 15.122 of these rules, or is not a display-only video monitor with no playback capability shall comply with the provisions of this section.

(b) *Specific Technical Capabilities.* All apparatus subject to paragraph (a) of this section, except exempt apparatus and apparatus with picture screens measuring less than 13 inches for which these requirements are not achievable, shall have the following technical capabilities:

(1) All apparatus shall implement ''pop-on,'' ''roll-up,'' and ''paint-on'' presentation of captions.

(2) All apparatus shall make available semantically significant formatting, such as italics, text color and underlining.

(3) All apparatus shall implement consumer selectability of caption availability, including turning captions on and off, selecting font size, selecting style, selecting color, and selecting background color and background opacity.

(4) All apparatus shall provide for the user selection of language, where available multiple languages or caption versions are available.

(5) All apparatus shall preserve original caption information regarding position, font, formatting, color, style, background, opacity, and presentation mode and display captions with such attributes where consumer selection of alternative attributes has not occurred or where consumer selection of default attributes has occurred.

(6) All apparatus shall maintain user selection among video viewing session and provide the ability to preview selection of options in this section.

5. Add § 15.126 to read as follows:

§ 15.126 Closed caption requirements for video recording devices.

(a) Effective [Effective Date of the rule], all apparatus designed to record video programming transmitted simultaneously with sound manufactured or imported for use in the United States and not subject to § 15.119 or § 15.122 of these rules shall comply with the provisions of this section, if achievable.

(b) All devices must enable the rendering of captions consistent with § 15.125 or enable the pass-through of closed-captioning data utilizing closed-captioning standards for transmission or closed-captioning capable interconnection mechanisms.

PART 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

6. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613.

7. Add § 79.4 to read as follows:

§ 79.4 Closed captioning of video programming delivered using Internet protocol.

(a) *Definitions.* For purposes of this section the following definitions shall apply:

(1) *Video programming.* Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media.

(2) *Full-length video programming.* Video programming that is not video clips or outtakes.

(3) *Video programming distributor or video programming provider.* Any entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol.

(4) *Video programming owner.* Any person or entity that owns the copyright of the video programming delivered to the end user through a distribution method that uses Internet protocol.

(5) *Internet protocol.* Includes Transmission Control Protocol and any successor protocol or technology to Internet protocol.

(6) *Closed captioning.* The visual display of the audio portion of video programming.

(7) *Live programming.* Video programming that is shown on television substantially simultaneously with its performance.

(8) *Near-live programming.* Video programming that is substantively recorded and produced within 12 hours of its distribution to television viewers.

(9) *Prerecorded programming.* Video programming that is not ''live'' or ''near-live.''

(10) *Edited for Internet distribution.* Video programming whose television version is substantially edited prior to its Internet distribution.

(11) *Consumer-generated media.* Content created and made available by consumers to online Web sites and services on the Internet, including video, audio, and multimedia content.

(12) *Video clips.* Small sections of a larger video programming presentation.

(13) *Outtakes.* Content that is not used in an edited version of video programming shown on television.

(14) *Nonexempt programming.* Video programming that is not exempted under paragraph (e) of this section and, accordingly, is subject to closed captioning requirements set forth in this section.

(b) *Requirements for closed captioning of Internet protocol-delivered video programming.* All nonexempt full-length video programming delivered using Internet protocol must be provided with closed captions if the programming was published or exhibited on television in the United States with captions after [Effective Date of the rule], in accordance with the following schedule:

(1) As of [Date six months after the rule is published in the **Federal Register**], all prerecorded programming that is not edited for Internet distribution must be provided with captions.

(2) As of [Date 12 months after the rule is published in the **Federal Register**], all live and near-live programming must be provided with captions.

(3) As of [Date 18 months after the rule is published in the **Federal Register**], all prerecorded programming that is edited for Internet distribution must be provided with captions.

(c) *Obligations of video programming owners, distributors and providers.*

(1) *Obligations of video programming owners.* Video programming owners must:

(i) Send program files to video programming distributors and providers either with captions as required by this section, or with a dated certification that captions are not required for a specified reason.

(ii) Provide video programming distributors and providers with any revised certifications and newly required captions (if captions were not previously delivered) within seven days of the underlying change.

(2) *Obligations of video programming distributors and providers.* Video programming distributors and providers must:

(i) Enable the rendering or pass through of all required captions to the end user.

(ii) Retain all certifications received from video programming owners

pursuant to § 79.4(c)(1)(i) and (ii) for so long as the video programming distributor or provider makes the certified programming available to end users through a distribution method that uses Internet protocol and thereafter for at least one calendar year.

(iii) Make required captions available within five days of the receipt of an updated certification pursuant to § 79.4(c)(1)(ii).

(3) A video programming provider or owner's *de minimis* failure to comply with this section shall not be treated as a violation of the requirements.

(4) A video programming distributor, provider, or owner may meet the requirements of this section through alternate means if the requirements of this section are met, as determined by the Commission.

(d) *Determination of compliance.* To be considered captioned, the quality of the captioning of IP-delivered video programming must be at least equal to the quality of the captioning of that programming when shown on television. In evaluating quality, the Commission may consider such factors as completeness, placement, accuracy, and timing.

(e) *Procedures for exemptions based on economic burden.* (1) A video programming provider or owner may petition the Commission for a full or partial exemption from the closed captioning requirements of this section, which the Commission may grant upon a finding that the requirements would be economically burdensome.

(2) The petitioner must support a petition for exemption with sufficient evidence to demonstrate that compliance with the requirements for closed captioning of video programming delivered via Internet protocol would be economically burdensome. The term ''economically burdensome'' means imposing significant difficulty or expense. The Commission will consider the following factors when determining whether the requirements for closed captioning of Internet protocol-delivered video programming would be economically burdensome:

(i) The nature and cost of the closed captions for the programming;

(ii) The impact on the operation of the video programming provider or owner;

(iii) The financial resources of the video programming provider or owner; and

(iv) The type of operations of the video programming provider or owner.

(3) In addition to these factors, the petitioner must describe any other factors it deems relevant to the Commission's final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements of this section including, but not limited to, text or graphic display of the content of the audio portion of the programming. The Commission will evaluate economic burden with regard to the individual outlet or programming.

(4) The petitioner must file an original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard in this paragraph, and all subsequent pleadings, in accordance with § 0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Persons that file comments or oppositions to the petition must serve the petitioner with copies of those comments or oppositions and must include a certification that the petitioner was served with a copy.

Parties filing replies to comments or oppositions must serve the commenting or opposing party with copies of such replies and shall include a certification that the party was served with a copy.

(8) Upon a finding of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) Persons filing petitions and responsive pleadings must include a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an economic burden exemption from the closed captioning requirements of this section. The Commission shall act to deny or approve any such petition, in whole or in part, within 6 months after the Commission receives such petition, unless the Commission finds that an extension of the 6-month period is necessary to determine whether such requirements are economically burdensome.

(11) During the pendency of an economic burden determination, the Commission will consider the video programming provider or owner subject to the request for exemption as exempt from the requirements of this section.

(f) *Complaint procedures.* (1) Complaints concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission. A complaint must be in writing and must include:

(i) The name and address of the complainant;

(ii) The name and postal address, Web site, or e-mail address of the video programming distributor, provider, and/or owner against whom the complaint is alleged, and information sufficient to identify the video programming involved;

(iii) Information sufficient to identify the software or device used to view the program;

(iv) A statement of facts sufficient to show that the video programming distributor, provider, and/or owner has violated or is violating the Commission's rules, and, if applicable, the date and time of the alleged violation;

(v) The specific relief or satisfaction sought by the complainant; and

(vi) The complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that would best accommodate the complainant).

(2) The Commission will forward complaints to the named video programming distributor, provider, and/or owner, as well as to any other video programming distributor, provider, and/or owner that Commission staff determines may be involved. The video programming distributor, provider, and/or owner must respond to the complaint in writing, to the Commission and the complainant, within the time that the Commission specifies when forwarding the complaint, generally within thirty (30) days. The Commission may specify response periods longer than 30 days on a case-by-case basis.

(3) In response to a complaint, video programming distributors, providers, and/or owners shall file with the Commission sufficient records and documentation to prove that the responding entity was (and remains) in compliance with the Commission's rules. Conclusory or insufficiently supported assertions of compliance will not carry a video programming distributor's, provider's, or owner's burden of proof.

(4) The Commission will review all relevant information provided by the complainant and the subject video programming distributors, providers, and/or owners, as well as any additional information the Commission deems relevant from its files or public sources. The Commission may request additional information from any relevant parties when, in the estimation of Commission staff, such information is needed to investigate the complaint or adjudicate potential violation(s) of Commission

rules. When the Commission requests additional information, parties to whom such requests are addressed must provide the requested information within the time period the Commission specifies.

(5) To demonstrate closed captioning compliance, video programming distributors or providers may rely on certifications from video programming owners, as provided for in § 79.4(c)(1)(i) and (ii), unless, at any time, the video programming distributor or provider seeking to rely upon the certification knew or should have known that the certification was false or erroneous. The Commission may take enforcement action against video programming distributors, providers, or owners with respect to false or erroneous certifications.

(6) If the Commission finds that a video programming distributor, provider, or owner has violated the closed captioning requirements of this section, it may employ the full range of sanctions and remedies available under the Act against any or all of the violators.

(g) *Private rights of action prohibited.* Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

[FR Doc. 2011–24703 Filed 9–22–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2010–0076; MO 92210–0–0009]

RIN 1018–AX18

Endangered and Threatened Wildlife and Plants; Revised Endangered Status, Revised Critical Habitat Designation, and Taxonomic Revision for Monardella linoides ssp. viminea

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the June 9, 2011, proposed rule to revise the listing and critical habitat designation for *Monardella viminea* (willowy monardella) under the Endangered Species Act of 1973, as amended (Act) (76 FR 33880). We also announce the availability of a draft economic analysis (DEA) of the proposed revised designation of critical habitat for *Monardella viminea* and an amended required determinations section of the proposal. In the proposed rule that published June 9, 2011 (76 FR 33880), we recognized the taxonomic split of the listed entity, *Monardella linoides* ssp. *viminea,* into two distinct full species: *Monardella viminea* (willowy monardella) and *Monardella stoneana* (Jennifer's monardella). We proposed to retain the listing status of *Monardella viminea* as endangered; we proposed to remove protections afforded by the Act from those individuals now recognized as a separate species, *Monardella stoneana,* because the new species does not meet the definition of endangered or threatened under the Act; and we proposed revised critical habitat for *Monardella viminea.* We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed listing determinations and critical habitat designation, the associated DEA, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: We will consider comments received on or before October 28, 2011. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

ADDRESSES: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R8–ES–2010–0076, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2010–0076; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed revised designation of critical habitat for *Monardella viminea* published in the **Federal Register** on June 9, 2011 (76 FR 33880), our DEA of the proposed designation, and the amended required determinations provided in this document. We will consider comments and information from all interested parties. We are particularly interested in comments and information concerning:

(1) Specific information regarding our recognition of *Monardella viminea* and *M. stoneana* at the species rank, on the segregation of ranges of *M. stoneana* and *M. viminea,* and on our proposals that *M. viminea* should remain listed as endangered and that *M. stoneana* does not warrant listing under the Act (16 U.S.C. 1531 *et seq.*).

(2) Any available information on known or suspected threats and proposed or ongoing development projects with the potential to threaten either *Monardella viminea* or *M. stoneana.*

(3) The effects of potential threat factors to both *Monardella viminea* and *M. stoneana* that are the basis for a listing determination under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(4) Specific information regarding impacts of fire on *Monardella viminea* or *M. stoneana* individuals or their habitat.

(5) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act for *Monardella viminea* including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(6) Specific information on: