

FCC Proposes New Set-Top Box Rules

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On February 18, 2016, the Federal Communications Commission (FCC or Commission), in a 3-2 vote, with Commissioners Pai and O’Rielly dissenting, adopted a Notice of Proposed Rulemaking (NPRM) proposing new set-top box rules for multichannel video programming distributors (MVPDs). The Commission’s stated objective is to make cable and satellite programming available through equipment other than a set-top box or other MVPD-controlled equipment. As authority to adopt the proposed rules, the Commission relied upon Section 629 of the Communications Act.

The NPRM considers the scope of Section 629 to be “far broader than conventional cable boxes or other hardware alone,” and accordingly proposes to define the term Navigable Devices as “hardware, software (including applications), and combinations of hardware or software that consumers could use to access multichannel video programming.” The Commission seeks comment on the proposed scope, specifically whether the term encompasses both hardware and software. In his dissent, Commissioner O’Rielly argues that software is beyond the scope of “navigation devices,” and that the Commission lacks the statutory authority to interpret the term in this manner.

Additionally, the agency proposes to define the “Navigable Services” covered by the rules as an MVPD’s video programming, including both linear and on-demand offerings, in every format and resolution that the MVPD sends to its own devices and applications, and Emergency Alert Information (EAS) messages. In order to enable this competitive marketplace, MVPDs will be required to offer three “flows” of information about their Navigable Services—using specifications to be set by “Open Standards Bodies”—that will allow manufacturers, retailers and other “unaffiliated” entities to design

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and build competitive navigation devices and “assure a commercial market.” The proposed definition of an Open Standards Body is a body “(1) whose membership is open to consumer electronics, multichannel video programming distributors, content companies, application developers, and consumer interest organizations, (2) that has a fair balance of interested members, (3) that has a published set of procedures to assure due process, (4) that has a published appeals process, and (5) that strives to set consensus standards.”

The bulk of the NPRM addresses issues implicated by making MVPD programming available for access using third party navigation devices. The Commission groups these issues into four categories: (1) non-security elements—what information about the video programming do competitive providers of navigation devices need; (2) security elements—how to ensure that content accessed through competitive navigation devices is protected; (3) parity—how to ensure that MVPDs do not discriminate against competitive providers; and (4) licensing and certification—how to ensure that a particular navigation device and competitive provider will adhere to FCC requirements. Additionally, the NPRM seeks comment on other topics, such as small MVPDs, billing transparency, CableCARD support and reporting, and the integration ban.

Non-Security Elements: MVPDs would be required to provide three flows of information about their multichannel video programming to competitive providers of navigation devices:

- *Service Discovery Data:* information necessary to inform consumers about what programming is available, including, among other things, channel information, program title, rating/parental control information, and program start and stop times. The Commission asks whether other information, such as the resolution of the program, PSIP data, and information regarding closed captions and video description should also be included.
- *Entitlement Data:* information that will advise a device about the services that subscribers have rights to access and how the subscriber can use those services. This would include, among other things, copy control information, the extent to which content may be passed through certain outputs (such as HDMI, IEEE-394), and whether content can be streamed out of the home.
- *Content Delivery Data:* the video programming itself, along with information necessary to make the programming accessible to persons with disabilities. The FCC tentatively concluded that certain information that an MVPD provides to its subscribers, such as applications that provide news headlines, weather, sports scores, and social networking, is not required to be provided, as the information is available from other sources.

When implemented, these data streams will be required to conform to specifications defined by an Open Standards Body.

Security Elements: In order to ensure that content is adequately protected from theft and other improper uses, the NPRM proposes that MVPDs be required to support a content protection system—a “Compliant Security System”—that is “licensable on reasonable and nondiscriminatory terms, and has a ‘Trust Authority’ that is not substantially controlled by an MVPD or by the MVPD industry.”

In reaching its decision, the Commission considered two alternative approaches to content security provided by the Downloadable Security Technical Advisory Committee (DSTAC): the HTML5 approach and the Media Server approach. These two approaches vary by how MVPDs are able to control access to content. The HTML5 approach “relies on any digital rights management (DRM) system that [the MVPD] chooses to manage its content.” The Media Server approach is based on network security performed before the programming enters a consumer device. This approach is built on the assumption that any device certified as “trustworthy” will treat content properly in accordance with copy control information embedded in the content data.

Finding fault with both alternatives, the FCC proposes a “middle path” that will allow MVPDs to choose the content protection systems they will support, so long as they enable competitive navigation devices by providing at least one “Compliant Security System” and making the three information flows available in their entirety to any device using a “Compliant” system.

Parity: The Commission’s proposal includes parity rules designed to require that MVPDs provide access to content that ensures that “competitors have the same flexibility as MVPDs when developing and deploying devices.” The FCC’s goal is to ensure that, regardless of the device they choose, consumers maintain their rights of access to content in a manner consistent with licensing agreements between MVPDs and programmers.

First, the proposal requires that any content that an MVPD makes available without the need for MVPD-specific equipment, such as programming that may be accessed by tablets and smart TV apps, be made available to consumers using competitive navigation devices in the same manner. The Commission asks for comment on its assumption that any information that an MVPD needs to make programming available in a secure manner using a proprietary application can be provided to a non-affiliated provider of navigation devices. In addition, recognizing that DBS providers will need to have equipment of some kind in the home in order to deliver the information flows over their one-way networks, the FCC asks whether there are any content protection issues that are unique to DBS providers that would require an exception to the proposed requirement.

Second, at least one Compliant Security System must provide access to all resolutions and formats of content which the MVPD “leases, sells, or otherwise provides to its subscribers.” Under this proposal, MVPDs would be allowed to provide programming in any manner, as long as competitors are given access to the same programming on the same basis. For example, if an MVPD uses a proprietary application that only allows a subset of program content to be accessed by a wireless device, competitors would be given the ability to provide the same program content to wireless devices. The FCC proposes to permit MVPDs to rely on Entitlement Data to draw distinctions between authorized devices and other rights of access that a consumer may have, as long as competitors are not subject to more onerous requirements.

Finally, MVPDs would be required to support at least one Compliant Security System on any device on which the MVPD makes available an application to access its programming. The proposed rule does not require an MVPD to choose a Compliant Security System that would allow access from any device, but they must choose a system to which devices can be built.

Licensing and Certification: The Commission also addressed arguments that its proposed approach could violate licensing agreements between MVPDs and programmers. In particular, the agency asks whether licensing can ensure compliance with copy control and other rights information (which it calls “compliance”) and content protection (called “robustness”) requirements. The NPRM proposes rules designed to ensure that licensing terms negotiated between MVPDs and content providers regarding the use of content are honored by competitive navigation devices. In order to achieve this, MVPDs would be required to choose Compliant Security Systems that validate only navigation devices that protect content and honor Entitlement Data. The Commission asks whether it needs to define “robustness and compliance rules” in its proposed definition of Compliant Security System, and whether there are alternatives to ensure robustness and compliance.

The proposed rules also address the need to protect MVPD networks from physical and electronic harm and theft of services, and what types of testing and certification processes should be required.

The agency next addresses the need to ensure that the use of competitive navigation devices does not undermine important public policy goals, including consumer privacy, access to EAS information and compliance with children’s television advertising limits. Competitive providers would need to provide a certification of compliance to MVPDs in order to gain access to content, and MVPDs would be prohibited from providing content to a navigation device that does not have a certification. The FCC asks whether a self-certification process would be sufficient, and whether there are other viable alternatives.

The NPRM notes concerns raised by MVPDs and content providers that the proposal will disrupt elements of service presentation (such as agreed-upon channel lineups and neighborhoods) and enable competitive providers of navigation devices to replace or alter advertising, or otherwise improperly manipulate content. However, the Commission concludes that it does not have any evidence that regulations are needed to address these issues. The agency seeks comment on this conclusion, as well as whether copyright law may protect against these types of concerns.

Other Topics for Comment:

- *Small MVPDs:* The Commission asks whether different rules should be crafted for small MVPDs. It proposes to exempt all analog systems, and asks for comment on a proposal to exempt MVPDs serving one million or fewer subscribers from any rules.
- *Billing Transparency:* The FCC tentatively concludes that it should require that subscriber bills separately state the charges for leased navigation devices (including modems, routers, and set-top boxes) and that bills be reduced for customers who provide their own devices. The Commission also asks whether its rules should prohibit cross-subsidization of navigation devices.
- *CableCARD Support and Reporting:* The Commission tentatively concludes that its existing CableCARD consumer support rules continue to serve a useful purpose and should be retained, but asks whether it should eliminate the requirement that the six largest cable operators provide periodic status reports.
- *Integration Ban:* Finally, in accordance with the STELA Reauthorization Act of 2014, the FCC amended its rules to eliminate the set-top box “integration ban,” which had prohibited cable operators from

deploying set-top boxes and other navigation devices that combined both conditional access and other functions in a single device.

MVPDs will have two years to comply with the rules if the proposal is adopted. Comments will be due thirty days after the NPRM is published in the Federal Register, and reply comments sixty days after publication.

If you have any questions about set-top boxes, please contact one of the attorneys listed or the Wiley Rein attorney who regularly handles your FCC matters.