



ADA MATTERS

DOJ RULE ON CAPTIONING AND AUDIO DESCRIPTION

Introduction

On December 2, 2016, the Department of Justice (DOJ) published its Final Rule on Nondiscrimination on the Basis of Disability by Public Accommodations-Movie Theaters; Movie Captioning and Audio Description (Final Rule). The Final Rule requires movie theaters to provide closed captioning (CC) and audio description (AD) devices under the Americans with Disabilities Act (ADA) in order to accommodate patrons who are deaf, hard of hearing, blind, or otherwise visually impaired. The rule went into effect January 17, 2017. This Frequently Asked Questions (FAQ) document is intended to explore the requirements of the Final Rule. **This FAQ is not exhaustive and does not address every detail of the Final Rule. Theater owners installing these systems should consult with legal counsel on the details of their obligations.**

Theater owners should note that plaintiff's firms and advocacy groups are likely to be very vigilant in monitoring theater compliance with the Final Rule, and will not hesitate to bring a complaint against a theater that is perceived to be out of compliance.

This FAQ was updated in May 2018 to include additional commonly asked questions.

The documents referred to in this FAQ are the Final Rule on Nondiscrimination on the Basis of Disability by Public Accommodations-Movie Theaters; Movie Captioning and Audio Description ("Final Rule"); the 2010 ADA Title III Regulations, with DOJ guidance ("2010 Guidance"); and the 2010 ADA Standards for Accessible Design ("2010 Standards").

These documents can be found in their entirety at these links:

Final Rule: https://www.ada.gov/regs2016/movie_rule.htm

2010 Guidance: https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm

2010 Standards: <https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm>

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1. What types of theaters are included in the Final Rule?

All digital auditoriums are required to be outfitted with CC and AD systems, regardless of whether the theater is for-profit or non-profit. Analog auditoriums are excluded from the requirement to provide CC and AD systems. The DOJ may engage in rulemaking at a later date regarding exclusively analog auditoriums.

If a movie auditorium is converted from analog to digital projection after December 2, 2016, the theater must install CC and AD systems in that auditorium within six months of the digital conversion or within 24 months of December 2, 2016, whichever is later.

Drive-in theaters are exempted from the Final Rule.

2. When must theaters comply with the Final Rule?

The compliance date for the Final Rule is June 2, 2018. There are some aspects of the rule that are already in effect (see question 15).

3. What are CC devices, and how many CC devices does a theater need to have?

Closed captioning devices are receivers that provide captions to a patron at his or her seat. Theaters covered by the Final Rule are required to have a minimum number of CC devices based on the facility's screen count. Those minimums are:

- Single screen: 4 devices
- 2-7 screens: 6 devices
- 8-15 screens: 8 devices
- 16+ screens: 12 devices

4. What are AD devices, and how many AD devices does a theater need to have?

Audio description devices allow a patron to access an audio description track. Audio description is essentially a supplementary soundtrack that describes what is occurring in a scene when there is no dialogue. Theaters covered by the Final Rule are required to have a



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minimum number of AD devices based on the facility’s screen count: Theaters must have one AD device for every two digital auditoriums (rounded up to the nearest whole number in case of a fraction), with a minimum of two devices per theater. For example, a five-screen theater would need three AD devices.

Theaters that use two-channel assistive listening receivers that are compatible with AD systems do not need to buy additional AD devices in order to meet their AD scoping requirements, as long as the number of assistive listening receivers meets the AD device minimum.

5. Are theaters still required to provide assistive listening systems?

Yes. Assistive listening systems amplify sound and help to distinguish dialogue from background noise. The 2010 Standards require theaters and other assembly areas where “audible communication is integral to the use of the space” to provide assistive listening systems. This requirement is still in effect. The minimum number of assistive listening receivers required to be provided is listed in the chart below. A theater would calculate the number of receivers required based on the total number of seats in the theater facility. If the theater has an induction loop assistive listening system, the minimum number of receivers required to be hearing-aid compatible is not applicable.

Capacity of Seating in Assembly Area	Minimum Number of Assistive Listening Receivers Required	Minimum Number of Receivers Required to be Hearing-Aid Compatible
50 or less	2	2
51 to 200	2, plus 1 per 25 seats over 50 seats, or fraction thereof	2
201 to 500	2, plus 1 per 25 seats over 50 seats, or fraction thereof	1 per 4 receivers, or fraction thereof
501 to 1000	20, plus 1 per 33 seats over 500 seats, or fraction thereof	1 per 4 receivers, or fraction thereof
1001 to 2000	35, plus 1 per 50 seats over 1000 seats, or fraction thereof	1 per 4 receivers, or fraction thereof
2001 and over	55, plus 1 per 100 seats over 2000 seats, or fraction thereof	1 per 4 receivers, or fraction thereof

Section 216.10 of the 2010 Standards requires an assembly area to provide signs informing patrons of the availability of these systems. Section 703.5 set technical requirements for these signs. The signs must include the International Symbol of Access of Hearing Loss, per Section 703.7.2.4 of the 2010 Standards.

Theaters that use two-channel assistive listening receivers that are compatible with AD systems do not need to buy additional AD devices in order to meet their AD scoping requirements, as long as the number of assistive listening receivers meets the AD device minimum.



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6. Is there a recordkeeping requirement in the Final Rule?

The DOJ did not impose a recordkeeping requirement in the Final Rule. However, the DOJ does intend to engage stakeholders at a future date on whether or not to create a supplemental rule regarding recordkeeping. Theaters should note there has been at least one lawsuit in which lack of records on access to services for guests with disabilities has been used against a venue.

7. What if demand for either CC or AD devices exceeds supply?

The DOJ did not require theaters to increase their minimum device amounts if demand exceeds supply. Instead, the DOJ “strongly encourages” theaters located in places with an “unusually high concentration” of deaf and hard of hearing individuals to work voluntarily with their local communities to maintain an appropriate number of devices or adopt other approaches, including open-captioned showtimes, to satisfy this higher demand. The DOJ does intend to engage stakeholders at a future date on whether or not to create a supplemental rule that addresses situations when demand exceeds the minimum device requirements.

8. What does the Final Rule require for device maintenance?

Theaters must “properly maintain” CC and AD devices so that the devices are fully operational, available in a timely manner, and easily usable. CC devices must be adjustable and must provide clear, sharp images to ensure readability. Theater owners should note that proper device maintenance has been the subject of a number of cases.

9. What if a device is rendered temporarily unusable? Will a theater be considered out of compliance?

Section 36.211(b) of the 2010 Standards “does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.” In its 2010 Guidance on the 2010 Standards, the DOJ clarified that allowing out of service equipment to persist “beyond a reasonable period of time” would violate this section of the 2010 Standards. Repeated mechanical failures due to improper or inadequate maintenance of devices would also be considered a violation of Section 36.211.

10. Where and how are theaters required to provide notice of CC and AD availability?

The Final Rule requires theaters to advertise the availability of CC and AD showtimes in the following ways, if the theater uses these methods to announce showtimes: At the box office and other ticketing locations, on websites and mobile apps, in newspapers, and over the telephone. Movie theaters that already have CC and AD systems installed and available for patrons must comply with this now, even if the installation occurred or will occur before the compliance date, because the rule is already in effect.

The Final Rule did not require a specific format or logos for such notice. The DOJ noted that theaters already routinely use fairly uniform methods of advising the public of such showtimes, like “CC” and “OC” to indicate closed and open captioning and “AD” or “DV” to indicate audio description.



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- 11. Does the Final Rule mandate that theaters advertise CC and AD availability next to each movie title? Is it sufficient to advertise that all auditoriums are equipped with CC and AD systems, without indicating next to each movie title whether CC and AD are available?**

The Final Rule requires movie theaters to provide notice of the availability of captioned and audio-described movies. This notice must be provided at the box office and other ticketing locations, websites, mobile apps, newspapers, and the telephone. The information must “inform potential patrons of the movies or showings that are available with captioning and audio description.” This language would suggest that availability of CC and AD should be listed by each individual movie title, so that patrons will know exactly which movies or showtimes come with CC and AD.

- 12. Does a theater need signs in the lobby or at the box office telling patrons where to obtain CC and AD devices?**

The Final Rule requires every theater to have one employee on duty at all times who can assist patrons in using CC and AD equipment (or in activating the open-captioned version of a movie, if the theater is using open captioning on demand to comply with the Final Rule). This employee is required to “communicate effectively” with patrons about using and troubleshooting the equipment. Many theaters have signage in the box office or in the theater lobby informing patrons that CC and AD equipment is available either at the box office or a customer service desk. Use of such signage is not required by the Final Rule, but certainly is advisable to meet the effective communication requirement.

- 13. Are theaters required to provide open-captioned shows?**

Open captioning is when the movie dialogue and some descriptive text is displayed on the screen for the whole audience to see, similar to subtitles in a foreign film. The Final Rule does not require theaters to provide open-captioned shows. However, a theater can use open captioning as an alternative way to comply with the requirement to obtain CC devices IF (1) the theater exhibits open-captioned movies at all showtimes of all movies available with open captions or (2) the theater turns on open captions at all times it receives a request to turn on open captioning prior to the start of a movie. If a theater holds only some open-captioned showtimes, the theater will still have to comply with the requirements to obtain CC devices.

The DOJ notes in the Final Rule that there are places with an “unusually high concentration” of deaf and hard of hearing individuals, where demand may exceed the minimum number of required devices. The DOJ encourages movie theaters in those areas to work voluntarily with their local communities to maintain an appropriate number of devices or adopt other approaches, including open-captioned showtimes, to satisfy this higher demand.

- 14. If a theater does not install CC and is using open captioning either at all showtimes or on demand as a way to comply with the rule, how should the theater advertise this option?**

If a theater does not install CC and is using open captioning at every showtime or on demand to meet the requirements of the rule, the same advertising requirements apply: The theater



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should include notice of open-caption availability for movie titles on its website, mobile app, newspaper ads, telephone recordings, and wherever tickets are sold.

A theater that is using open captioning at every showtime or on demand to meet the requirements of the Final Rule should be careful to have the open-captioned version of the film ingested into its server so that that version is available.

15. Can a theater set a time limit on how close to a movie showtime an open captioning request can be made?

If a theater is using open captioning on demand as a way to comply with the rule, the rule requires movie theaters to screen the open-captioned version of a movie when open captioning is requested by a patron “prior to the start of the movie.” The rule does not specify what “prior to the start of the movie” means. Given the technological limitations of “turning on” open captioning, theaters can require that requests for open captioning are made a certain amount of time in advance of the showtime so that it is technologically feasible to play the open-captioned version of the movie. For example, if it will take a theater 15 minutes to adjust the projector so that the open-captioned version of a movie plays instead of the regular version, the theater should provide notice to patrons that requests for open captioning must be made no later than 15 minutes in advance of a showtime. Such notice should be included along with the notice of open captioning availability on each movie title.

16. What does the Final Rule require with regard to staff training?

At least one employee must be available at all times to assist a patron requesting CC and AD devices. This employee must be able to locate, activate, and operate the devices; address any problems with device usage; turn on open captioning if the theater is relying on open captioning to meet the requirements of this rule; and communicate effectively with patrons about how to use, operate, and resolve issues with the devices. Movie theaters that already have CC and AD systems installed and available for patrons must comply with this now, even if the installation occurred or will occur before the compliance date, because the rule is already in effect.

17. Does a theater need to upgrade its CC and AD systems if newer technology becomes available?

The Final Rule does not require that movie theaters upgrade to the latest technology. The DOJ believed that concerns expressed by equipment users about issues like poor power connection or poor device signal would be addressed by the requirements for the devices to be fully operational and maintained.

18. What aspects, if any, of the Final Rule are already in effect?

Theater operators should be aware that they must presently be following certain aspects of the Final Rule if they have CC and AD systems installed and available to patrons. The Final Rule became effective on January 17, 2017, requiring all digital auditoriums that were already equipped with CC and AD equipment and making those technologies available to the public to immediately comply with the Final Rule’s requirements on advertising and staff training.



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Similarly, any movie theater that installed or will install captioning and description technologies from January 17, 2017 onward is also required to comply with the advertising and staff training requirements, even if that installation occurs before the June 2, 2018 compliance date.

19. How does the Final Rule address movies that don't come with CC or AD files?

The Final Rule does not prohibit movie theaters from exhibiting movies that do not come with captioning or audio description files. Movie theaters are not required to add captioning and audio description files to a movie that is not distributed with those features.

20. May a theater ask for collateral, like a driver's license, when a patron requests a CC or AD device?

The Final Rule does not address this matter. However, the DOJ has taken the position that requiring certain types of collateral, such as a driver's license, an ID with a picture, or a credit card, may be discriminatory, as some people with disabilities may not have such IDs or a credit card. In recognition of the DOJ's position, NATO agreed to the following recommendation in the voluntary commitments to deaf and hard of hearing advocacy groups: "Theatre operators, requesting patron contact information prior to providing closed captioning or audio description devices, are encouraged to make efforts to obtain said contact information without holding official identification as collateral." The voluntary commitments were filed in conjunction with the joint comment written by NATO and the groups. Theaters should consult with counsel about appropriate ways to note patron information when CC and AD devices are requested.

21. Does the ADA offer an undue burden defense?

Per the DOJ's guidance on the Final Rule, "all movie theaters, regardless of size, status of conversion to digital cinema, or economic viability, continue to have available to them the individualized and fact-specific undue burden limitation" under the ADA. The 2010 Standards consider an "undue burden" to mean "significant difficulty or expense." Determining whether installing CC and AD systems is an undue burden is an individual and fact-specific assessment that must take into account considerations such as the nature and cost of the action; overall financial resources; number of employees; relationship of the facility to a parent corporation or entity; the size of the parent corporation or entity; and other factors.

However, the guidance on the Final Rule also notes that if it is an undue burden for a theater to install CC and AD systems in all its digital auditoriums, "the movie theater is still obligated to comply with [the ADA's requirement to provide auxiliary aids and services] and provide alternatives to full compliance by providing captioning and audio description in some of its auditoriums up to the point where the cost becomes an undue burden." The DOJ does not require open captioning as a means of compliance, even if it is an undue burden for a theater to install a CC system. However, plaintiff's firms and advocacy groups can be expected to argue that theaters that do not install CC because of an "undue burden" should agree to turn on open captioning upon request as digital films come with open captioning that can be played at no extra cost.



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22. Is there a tax incentive available?

Small businesses that provide auxiliary aids to comply with the ADA can claim a federal tax credit of up to \$5,000 for expenses between \$250-10,250. To qualify for this tax credit, the business must have 30 or fewer employees or \$1 million or less in gross receipts from the previous year. Small businesses that meet these qualifications can claim this credit on IRS Form 8826.

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