

September 17, 2009

MEMORANDUM TO CLIENTS

Re: FCC Issues Reminders Regarding Closed Captioning Obligations for Video Programming Distributors

The FCC has issued two public notices relating to the obligations of cable operators, direct broadcast satellite providers, over-the-air broadcasters and other “Video Programming Distributors” (“VPDs”) to make video programming accessible to persons with hearing or vision disabilities. The first item reminds VPDs that any emergency information they voluntarily provide to viewers must be accessible to the deaf and visually impaired. The second notice concerns upcoming deadlines for providing increased amounts of closed captioned Spanish language programming.

I. Accessibility of Emergency Information to Persons With Hearing or Vision Disabilities.

Emergency information is information about a current emergency that is intended to further the protection of life, health, safety, and property, i.e., “critical details” regarding the emergency and how to respond to the emergency. Because critical details would include information related to evacuation orders, evacuation routes, and ways to obtain relief assistance, the obligation to provide such information is not limited to the immediate geographic areas affected by the emergency. For example, during Hurricane Katrina, there were a number of non-impacted areas offering shelter to individuals displaced by the disaster, and as a result, the need to comply with requirements relating to the accessibility of emergency information extended to areas where evacuees were temporarily relocated. In addition, there are times when national emergencies are also of local concern, and thus information about these events must likewise be made accessible.

None of the closed captioning exemptions apply to the provision of emergency information to the hearing- and vision-disabled. Thus, any emergency information provided in the audio portion of the programming must be made accessible using closed captioning or other methods of visual presentation, such as open captioning, crawls, scrolls that appear on the screen, or even handwritten information on a whiteboard.¹ It is important to note, however, that any VPDs that are not permitted to rely on the Electronic Newsroom Technique (“ENT”) method of closed captioning, or that are permitted to rely on ENT but do not do so, are obligated to closed caption breaking news and emergency alerts, and may only rely on the alternative methods described above during a reasonable period until they are able to secure closed captioning services for emergency programming.²

¹ Moreover, emergency information provided by these means should not block any closed captioning, and closed captioning should not block any emergency information provided by crawls, scrolls, or other visual means.

² In other words, given that it can be difficult to obtain closed captioning resources on short notice in emergency situations, the FCC generally will not penalize a VPD for any *de minimis* or reasonable failure to caption emergency information so long as critical emergency information is provided by some other method of visual presentation. The

For the visually impaired, emergency information provided in the video portion of the programming must be aurally described. Additionally, where emergency information is not provided in a regularly scheduled newscast or a newscast that interrupts regularly scheduled programming, the aural description must be accompanied by an aural tone. This tone is intended to alert persons with vision disabilities that the VPD is providing emergency information, and therefore such persons should tune to another source, such as a radio, for more information.

II. Closed Captioning of Spanish Language Programming

The second closed captioning-related item released by the FCC reminds VPDs of upcoming deadlines for providing increased amounts of closed captioned Spanish language programming. Specifically, effective January 1, 2010, 100% of all new, nonexempt Spanish language programming must be closed captioned, and effective January 1, 2012, the benchmark for pre-rule, nonexempt Spanish language programming will increase to 75% per quarter.³ Under the current benchmarks, VPDs must caption only 1,350 hours of new, nonexempt Spanish language programming and 30% of pre-rule Spanish language programming per quarter. The FCC is urging consumers to file complaints if they notice a lack of captioned television programming in accordance with the applicable benchmarks.

We would be pleased to respond to any questions regarding these matters.

FLEISCHMAN AND HARDING LLP

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Commission's rules also permit the use of open captioning or subtitles in the language of the target audience in lieu of closed captioning.

³ New programming is analog programming first published or exhibited on or after Jan. 1, 1998 and digital programming first published or exhibited after July 1, 2002. Pre-rule programming is analog programming first displayed before Jan. 1, 1998 and digital programming first displayed on or before July 1, 2002.