



March 15, 2016

## Legal Memorandum

### New Closed Captioning Rules Mean Changes to Station and Programmer Practices, Procedures, Responsibilities

#### **I.** **Introduction and Brief Summary**

On February 18, 2016, the FCC adopted an [Order](#) revising and adding a series of new requirements to the rules governing closed captioning of television video programming. According to the Commission, the new rules (and rule revisions) “are intended to ensure that people who are deaf and hard of hearing have full access” to video programming on television. Immediately below is a brief overview of the new rules, and subsequent pages of this memorandum provide greater detail about these rules. As will become clear, several elements of the new rules are clear and straightforward while other elements are convoluted, complicated, and potentially burdensome to TV stations. It will take time—and probably some further clarification from the Commission on certain elements—for stations to fully understand and prepare to implement the new requirements. In an effort to better understand certain portions of the new rules, we have discussed a number of issues with the FCC’s Disability Office Staff and obtained some informal guidance, which is incorporated below.

Briefly, the new and revised rules do the following:

- Assign responsibility for the *quality* of closed captioning to video programming distributors (“VPDs”) and Video Programmers, with each entity responsible for closed captioning issues that are primarily within its control (as discussed further below, television stations and MVPDs are all VPDs, and, in addition, television stations are also, sometimes, Video Programmers);
- Maintain existing rules that place primary responsibility for the *provision* of closed captioning of television programming on VPDs and adopt new provisions to also hold Video Programmers responsible for a lack of captions where they have failed to provide captions on non-exempt programs;
- Require Video Programmers to annually file with the FCC an electronic form certifying

that the Video Programmer (i) is in compliance with the rules requiring the provision of closed captions, and (ii) either is in compliance with the captioning quality standards or has adopted and follows the Best Practices set forth in the rules or (iii) is exempt from the captioning obligations;

- Allow each VPD to satisfy its obligations regarding the provision of closed captioning by ensuring that each Video Programmer has certified its compliance with the FCC’s closed captioning rules;
- Revise the procedures for receiving, investigating, and addressing television closed captioning complaints in accordance with a detailed and nuanced burden-shifting compliance model that will require stations to be deliberate and detail-oriented and to communicate with MVPDs, Video Programmers, and viewers on a particular schedule;
- Establish a “compliance ladder” with respect to the closed captioning quality rules to provide VPDs and Video Programmers with opportunities to take corrective action prior to enforcement action by the Commission; and
- Require each Video Programmer to register its closed captioning contact information (similar to that already provided by VPDs) with the FCC, and to use an FCC web form for this purpose.

The brief summary above does not come close to providing an adequate description of either the scope or the implications of the new requirements. In order to better understand how television stations will need to adapt current practices and adopt new procedures to prepare for compliance, stations should be sure that all personnel with captioning responsibilities—GMs, engineers, GSMS, programming directors and coordinators, and others—read the next 10 pages of this memorandum.

## **II. The Devil Is in the Details**

### **A. Important Definitions**

In order to understand the rules (and this memorandum), stations must have a grasp of two important definitions: Video Programming Distributors (“VPDs”) and Video Programmers. While both of these definitions have been a part of the FCC’s closed captioning rules for years, the new rules make it even more important to understand when and how a television station fits into one or the other of the two categories.

*Definition of VPD.* A “VPD” (or “video programming distributor”) is “any television broadcast station licensed by the Commission and any multichannel video programming distributor . . . 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.”

*Definition of Video Programmer.* A “Video Programmer” is “any entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming.”

*TV Stations May Be Both “Video Programmers” and “VPDs.”* Because all television stations are VPDs, it is relatively straightforward to understand how and when stations fit the definition of VPD. With respect to whether television stations are Video Programmers, it will depend on both the programming at issue and the portion of the closed captioning rules in question. Thus, for example, with respect to a station’s own locally-produced newscast, the station would be the Video Programmer (and the VPD), but with respect to a network newscast, the station would not be the Video Programmer (the network would be) but would be the VPD.

## **B. New Allocation of Responsibilities for Captioning in Television Programming**

One of the principal, overarching goals of the new rules is to more effectively allocate responsibility for both the *provision* of captioning and the *quality* of captioning between and among VPDs and Video Programmers. Because television stations are, at times, both VPDs and Video Programmers under the closed captioning rules, television stations will continue to bear significant responsibility for both the provision and quality of captioning. Indeed, the goal of the FCC’s proceeding was not to limit the responsibility of television stations under the closed captioning rules; instead, the FCC’s goal is to make more entities responsible under the rules in an effort to create an environment where more programming is captioned with high quality captions and where there are fewer opportunities for either a VPD or a Video Programmer to “put their head in the sand” with respect to the provision and quality of closed captioning.

*Responsibility for Provision of Captioning.* The FCC’s existing rules make VPDs solely responsible for providing closed captioning in non-exempt video programming. In this proceeding, the FCC inquired whether other entities—specifically, Video Programmers—should also be held responsible for the provision of closed captioning in video programming. This inquiry made sense because there have been numerous examples of television stations receiving uncaptioned programming (for example, a local church that buys a one-hour time slot on a Sunday morning after 6 a.m.) where the station either has needed to add the captioning, reject the programming, counsel the programmer to file for an “economic burden” exemption, or take the risk of airing uncaptioned non-exempt programming in violation of the rules. Under existing rules, at the end of the day, all the responsibility for captioning (and consequences for non-captioning of) such programming has fallen to stations. Now, the FCC has determined that “the better approach” to ensure that closed captioning is *provided* on television is to continue to hold VPDs primarily responsible for this obligation on the programming they carry, but also to hold Video Programmers responsible where they fail to provide captions on non-exempt programming.

For many stations, this new allocation of responsibility may not translate into any actual changes—any station that has been requiring its program providers to include captions will be largely unaffected. Indeed, the full import of the rules is that television stations will continue to be responsible for the provision of captioning and, in some instances, the FCC *may* also “go after” Video Programmers for a failure to provide captioning. Of course, only time will tell whether there is any practical effect to this new, “shared” responsibility.

*Responsibility for Quality of Captioning.* The new rules require Video Programmers to ensure that closed captioning provided to VPDs complies with the four-prong closed captioning quality standards (accuracy, synchronicity, completeness, placement). Thus, under the new rules, Video Programmers will be responsible for closed captioning quality problems that stem from *producing* the captions and from *transmission* of the captions by the Video Programmers to the VPDs. Video Programmers' responsibility continues from production up to the point when the programming is handed off to a VPD. In turn, the VPD will be responsible for closed captioning quality problems that are the result of faulty VPD equipment or the failure of the VPD to pass through the closed captioning intact. In other words, under the new rules, a VPD will be held responsible for a violation of the captioning quality rules when the circumstances underlying the violation are primarily within the control of the VPD, and a Video Programmer will be held responsible for a violation of the captioning quality rules when the circumstances underlying the violation are primarily within the Video Programmer's control.

*Pass-Through Rule Remains Unchanged.* The existing rule that requires VPDs to pass through programming with the original closed captioning intact remains the same as it has been for more than 15 years. In short, each television station will be required to continue to pass-through all closed captioning that is already embedded in programming supplied to the station.

### **C. New Video Programmer Certification Requirement; Requirement Applies to Television Stations in Limited Circumstances**

The FCC has adopted a new, annual closed captioning certification requirement, which will apply to all Video Programmers, including television networks, paid programmers such as churches and infomercial providers, sports programming providers, program syndicators, and virtually all other Video Programmers. In a break for broadcasters (who would, otherwise, meet the definition of a "Video Programmer" as noted above), the new rule specifically states that television stations are not required to provide a certification for video programming that is broadcast by the television broadcast station. Here are the contours of the new certification requirement for Video Programmers.

*Television Stations Required to File Certifications Only in Limited Circumstances.* Generally, the new rules state that television stations will **not** be required to file the new certifications with respect to station programming that is aired **on the station itself**. With respect to programming created by one station for use by another station, however, the creating station (which is the Video Programmer for such programming) will be required to file a certification. Thus, if your station will produce video programming to air on another station or carriage by another VPD and such programming will not also air on your station, then your station will need to file an annual certification with the FCC by July 1 of each year.

*A Wrinkle: Broadcast Networks that Own Television Stations.* The FCC Staff has informally advised that a broadcast network that owns television stations will not be required to file the new certifications for any programming that airs on a network-owned station. As a result, according to the informal guidance provided by FCC Staff, the Big 4 networks (for example) will not be required to file annual Video Programmer certifications for most—if not all—of their network programming. Only time will tell if such networks go ahead and file certifications anyway.

*What Will the Certification Say?* Generally, each Video Programmer will certify:

- (1) that its programming is in compliance with the obligation to provide closed captioning

*and*

- (2) that its programming either:
  - (a) complies with the four-prong captioning quality standards or
  - (b) adheres to the Best Practices for Video Programmers with respect to captioning quality (As we have discussed previously, the term “best practices” normally refers to a set of voluntary behaviors, but, in the context of the FCC’s closed captioning quality standards, “Best Practices” refers to a long list of practices and protocols set forth in an actual FCC regulation that entities must undertake in order to certify to adhering to Best Practices) or
  - (c) is exempt (in whole or in part) under one or more of the exemption categories in the FCC’s rules (if claiming one or more exemptions, the Video Programmer will be required to identify each applicable exemption that the Video Programmer is claiming).

We will know more about the precise language and format of the certification options when the FCC makes its new certification form available at some point in the future.

*Video Programmers Claiming Exemptions in Their Certifications.* Video Programmers claiming one or more exemptions will be required to identify those exemptions in the certification form. Some Video Programmers may provide some programming that is required to be closed captioned and some programming that is exempt. In such a case, the Video Programmer will have to account in its certification form for all aspects of its programming. In this regard, the FCC “cautioned” Video Programmers to list in their certifications “only those exemptions that are applicable to their programming because certifications that include lists of inapplicable exemptions will not satisfy” the certification requirement. Thus, a Video Programmer who files a certification claiming any exemption will wish to be especially deliberate and careful in making the certification, to avoid submitting an unsatisfactory laundry-list of exemption categories that may not all apply to the Video Programmer’s programming. In the Order, the FCC also threatened to “revisit this issue should the Commission find that the goal of assisting consumers in understanding which programs are exempt and the basis for such claimed exemptions is not being met by this requirement.” The FCC Staff has informally suggested that the certification form will have a check-the-box type of interface to make it user-friendly without the need for Video Programmers to write essays or draft narratives describing their captioning practices for their programming.

*Annual Filing and Obligation to Update.* Each existing Video Programmer will be required to file a certification when the FCC announces the due date for the first certification. Then, a new certification will be due annually on or before July 1. For Video Programmers that first launch after the initial filing deadline, a certification will be due when the Video Programmer launches. Supplemental certifications will not be required when new programming is provided by a Video Programmer to a VPD, but Video Programmers will be required to update their certifications, as

needed, to identify any applicable exemptions that were not specified in the previously-filed certification.

*Is There a Due Diligence Obligation for TV Stations to Search the Certifications Filed By Video Programmers?* The answer to this question will depend on whether a station wants to be able to “rely” on a Video Programmer’s certification in the course of an FCC investigation. The rules allow stations (and other VPDs) to be considered in compliance with the closed captioning rules if they “rely” on a Video Programmer certification and have no reason to believe that the certification is inaccurate or untrue. According to the Order and informal guidance from the FCC Staff, the only way for a station to “rely” on the certification is for the station to be aware of it prior to the airing of the programming at issue. Theoretically, this reliance opportunity creates an incentive for stations (and other VPDs) to search the certification database to determine whether programming provided to the station by a Video Programmer will be compliant with the rules. If a station cannot find a certification in the FCC’s database or if the certification raises any flags—for example, if a Video Programmer certifies that its programming is exempt under an inapplicable exemption category—then the station may wish (but is not legally required) to follow up with the Video Programmer to ensure that the closed captioning will be compliant.

*New FCC Certification Form and Future Public Notice.* The FCC will develop an electronic form to be filed through an FCC online filing system. Video Programmers will be required to use the electronic form and filing system to submit their annual certifications. The form has not yet been made available, and it will require the approval of OMB. The FCC will issue a public notice in the future to establish procedures for filing certifications and to establish the deadline for the first filing of such certifications once the rules go into effect and the FCC’s website is ready to receive such certifications.

*New Certifications Replace Current Certification Process.* Since 2015, video programming providers have been required to make “widely available” a certification relating to the FCC’s closed captioning quality standards rules. When the existing certification process went into effect in March 2015, television stations received numerous certification forms from networks, syndicators, paid programmers, and other program providers. In some instances, stations had to work diligently with program providers—including infomercial providers, churches, and local paid programming buyers—in order to obtain the required certifications. The existing requirement (which has only been in effect for about a year!) will be replaced by the new requirement (once the new requirement goes into effect), and, at that time, all Video Programmers—including television stations that provide programming to other stations—will be required to file the annual certification (and any necessary updates) via the FCC’s yet-to-be devised web form process.

#### **D. New Detailed, Winding Complaint Process and Compliance “Ladder”**

*The New Process Is Full of Traps for the Unwary.* The new rules relating to the handling of viewer complaints are complicated, and they vary to some degree based on whether a viewer files the complaint with the FCC or contacts a station directly. As you review the material below, you might (or might not) be inclined to feel like the FCC is micromanaging the complaint receipt-investigation-communication-resolution-response process. Indeed, as you consider the new complaint process, you may wish to keep in mind the following Commission observation:



“Our decision in this order to allocate captioning responsibilities between VPDs and Video Programmers necessitates the establishment of an orderly process for the handling of complaints by each covered entity in order to prevent duplication of efforts, avoid potential confusion about responsibilities, and achieve overall efficiency to ensure the timely resolution of captioning complaints.”

After the new rules become effective (the effective date is not yet known), all television stations would be well-advised to contact legal counsel upon receiving a closed captioning complaint from a viewer directly or from the FCC in the form of a Notice of Informal Complaint. Because the FCC’s rules do not set any standard as to what type of correspondence to a station constitutes a “complaint” about closed captioning, stations should treat any oral or written communication from any party relating to captioning as a “complaint” (unless it sincerely praises or thanks the station for its captioning services).

*The New Complaint Process and Compliance “Ladder” Rules Are Attached to this Memorandum.* The existing portion of the FCC’s closed captioning rules relating to “Complaint Procedures” is 8 paragraphs long. The new Complaint Procedures subsection of the closed captioning rules spans multiple pages and clocks in at an astounding 36 separate paragraphs. This memorandum does not attempt to explain every aspect and requirement of the new process. Instead, a copy of the new version of the Complaint Procedures section (Subsection (g) of FCC Rule 79.1) of the closed captioning rules is included as a 4-page attachment to this memorandum. The new Complaint Procedures subsection will not be effective unless and until the federal Office of Management and Budget (“OMB”) approves it, which could take weeks or could take months. In the meantime, stations should continue to handle and investigate closed captioning complaints in the same manner that they have been doing in recent years. If and when the new Complaint Procedures are approved by OMB, stations would be well-served to develop a checklist or flowchart to ensure that complaints will be handled in a manner that satisfies all the new procedures in every regard.

*Viewer Complaints Made Directly to VPDs vs. Viewer Complaints Filed at FCC.* While the mandatory investigatory and communication steps for stations differ slightly depending on whether a complaint comes directly from a viewer or via the FCC, the bottom line for television stations is that they will need to work harder than ever to address captioning issues and to communicate with MVPDs, Video Programmers (including networks), and the viewer in a timely fashion and to follow-up and continue to coordinate with MVPDs and Video Programmers (and continue to communicate with the viewer) until the issue has been resolved. Orderly? Efficient? Avoiding duplication of efforts? Only time—and redoubled efforts—will tell.

*How to Handle Complaints Directly from Viewers.* When a station receives a captioning complaint directly from a viewer, the station must investigate the situation and, if the issue appears to be outside the station’s control, the station must forward the complaint to the relevant Video Programmer (if the issue appears to be upstream) or MVPD (if the issue appears to be downstream). When a station forwards a complaint to another entity, the station (i) must redact personal information from the viewer’s correspondence, (ii) must assign a unique identifying number to the “complaint,” and (iii) must continue to serve as the point of contact and coordinator of resolution of the issue for all parties involved. In short, under the new rules, stations must be prepared to serve as one-stop-shopping for viewers who notify the station that they are experiencing closed captioning issues. Given the regulatory requirement to forward viewer

complaints to MVPDs and/or Video Programmers (as applicable), stations may wish to discuss appropriate points of contact when negotiating retransmission consent, network affiliation, syndication, and paid programming agreements.

*Content of Complaints Filed by Viewers with the FCC.* Under the new rules, when viewers file a captioning complaint with the FCC, they are required to include certain information in the complaint. In addition, when a complaint is incomplete, the FCC’s Disability Office has been tasked with helping viewers find and provide all of the required information. Although it is somewhat irrelevant to stations whether a viewer provides all of the required information—stations should always make it a priority to investigate and respond to all complaints that contain enough information to understand—viewers are required to provide the following information in any captioning complaint filed with the FCC: (1) the channel number; (2) the channel name, network, or call sign; (3) the name of the MVPD, if applicable; (4) the date and time that the captioning problem occurred; (5) the name of the program involved; and (6) a detailed description of the problem. Any station that has received a Notice of Informal Complaint from the FCC (as filed by a viewer) knows that the “detailed description of the problem” is a rather ambiguous requirement, and virtually any allegation of closed captioning problems will be treated by the FCC as meeting that requirement.

*When the FCC Sends a Complaint, the Station Must Commence an Investigation and Take Certain Other Steps.* When the FCC receives a closed captioning complaint, it will simultaneously send the complaint to the VPD and to the Video Programmer. (If the FCC cannot determine the identity of the Video Programmer, the FCC may ask the VPD for help identifying the Video Programmer, which means stations will need to carefully review any closed captioning-related correspondence from the FCC. Indeed, in such situations, stations will have 10 days in which to reply to the FCC to identify the Video Programmer and, at the same time, forward the complaint to the Video Programmer.) After receiving a complaint, the new rules require a VPD to “exercise due diligence in its efforts to identify the source of the issue and resolve all matters within its control before shifting responsibility for addressing these matters to its Video Programmers.” This “due diligence” concept is new, and it requires that stations take certain, specific steps that are spelled out in the new rules.

*Coordination and Communication Between and Among VPDs, Video Programmers, and Viewers.* The new rules spell out various steps that VPDs and Video Programmers must take not only to investigate and attempt to resolve the closed captioning issue but also to communicate with each other and with the complaining viewer (and with the FCC). As you will see in the attached rules, many of the required communication steps must take place within defined periods of time, which means that stations will need to put systems in place to ensure timely coordination and communication occurs. Because some closed captioning issues will require investigation “downstream” (i.e., by MVPDs) and because some closed captioning issues will require investigation “upstream” (i.e., by a network, syndicator, or other Video Programmer), stations may consider discussing closed captioning complaint coordination/communication issues with MVPDs and networks in order to facilitate a smooth process when the new rules become effective. After all, the new rules essentially establish that television stations will be “on the hook” for all closed captioning deficiencies that are arguably within their control, even when another VPD or Video Programmer is also responsible for the provision or quality of the captioning in question.



*VPD “Due Diligence”—Specific Steps Required for Complaints Filed at FCC.* When the FCC sends a VPD a Notice of Informal Complaint, the new rules require the VPD, at a minimum, to take the following actions as part of the complaint investigation:

(1) *Program Stream Check:* VPDs must capture program streams and check the streams for any caption-related impairments that may have caused the reported problem and to prevent ongoing problems. (According to the FCC, by capturing the complete program stream, VPDs will be able to analyze, among other things, whether the program stream contains missing, incomplete, or inaccurate captions; missing, incomplete, or inaccurate timing data; and other video, audio, or data issues.)

(2) *Processing Equipment Check:* If there is an issue with the program stream, and there is not prior knowledge as to where the problem originated, VPDs must check post-processing equipment at the station, headend or other video distribution facility to determine whether the issue was introduced at the VPD level or was present in the stream when received by the VPD from the Video Programmer;

(3) *Consumer Premises Check:* If the VPD’s investigation indicates that the problem may be with the viewer’s home equipment, the VPD must check the end-user equipment, either remotely (which is possible for MVPDs but more difficult for television stations), or, if necessary, at the viewer’s premises, to ensure there are no issues that might interfere with the pass-through, rendering or display of closed captioning.

These three steps are not part of the existing rules, and the FCC is not merely “suggesting” that these action be taken; the new rules *require* these steps to be taken when a station receives an FCC complaint.

#### *Is the “Program Stream Check” Really a New Program Recording and Retention Requirement?*

The language of the FCC’s Order is open to the interpretation that stations will be required to record and retain programming so that they can go back and look at the programming that is the subject of the captioning complaint. Indeed, the Order states: “If the VPD’s investigation reveals that the closed captioning problems raised in the complaint are not within the VPD’s control and appear to have been present in the program stream when received by the VPD, the burden for addressing the complaint will shift to the Video Programmer.” We inquired with the FCC Staff about this language, and the informal guidance we received is that the new rules do **not require** stations to record and retain programming for review during captioning investigations. Certainly, to the extent a station already records and retains programming, it will facilitate the station’s ability to review the closed captioning in the programming at issue. The FCC Staff informally observed that the theory behind the Program Stream Check requirement is that if there is a detectable closed captioning issue when a station investigates a complaint, that issue was probably also present in the program stream at the time the subject programming aired. In that regard, the later check of the program stream may effectively lead to a diagnosis and correction of the issues that were present in the programming at the time of the complaint.

*Does the “Consumer Premises Check” Mean that Stations Will Be Required to Send Personnel to Viewer Homes?* Stations should be alarmed by the “consumer premises check” prong of the new “due diligence” rule. The new rule clearly states that stations may need to visit viewer homes if “necessary” to resolve a closed captioning issue with viewer equipment. While the rule states that

VPDs may conduct a consumer premises check remotely, there is a limit to the assistance a station can provide via telephone, and it may readily become apparent that a station will need to send personnel to visit a viewer's home in order to attempt to make adjustments to the viewer's home equipment. While the FCC stated in the Order that it "will defer to the VPD's good faith judgment about whether there is an indication that the problem might lie with the customer's customer premises equipment and whether it is necessary to go to the customer's premises to check the equipment," it would be imprudent for stations to interpret this "deference" too liberally. Not only does this language not appear in the text of the rule, but also it fails to indicate whether the FCC would take into account any decisional issues relating to practicability, potential liability, weather, staffing levels, security, or any consideration other than the "necessity" of resolving the closed captioning issue. Moreover, the FCC made clear in the Order that, in the event of a dispute or an enforcement proceeding, the television station (or other VPD) will have the burden of proving that it conducted a "thorough investigation" into the closed captioning problems raised in the complaint. In other words, if a station suspects that a viewer's home equipment is the issue, the station will be taking a significant enforcement risk if it decides not to send personnel to the viewer's home to try to solve the problem. This may create substantial issues for stations: for example, what should a station do if it receives a call from a viewer who just bought a new television and is unable to navigate through the setup menu to find the closed captioning? The station would be required to respond directly to the viewer (because the issue came directly from the viewer) and if the station does not resolve the issue then the viewer may file a complaint with the FCC, which could trigger the due diligence requirements, including a home visit.

*Deadlines, Deadlines, Deadlines!* The new rules are not only complicated but also provide numerous new sets of varying deadlines. If the maze of the complaint investigation, communication, and resolution process doesn't trap the unwary, then the varying deadlines might. Stations should carefully review the new requirements attached to this memorandum, and stations should contact legal counsel upon receipt of any captioning complaint (directly from a viewer or via the FCC) to ensure a timely and appropriate response.

*Compliance "Ladder"—Two Bites at the Compliance Apple.* The new compliance "ladder" adopted by the FCC as part of the enforcement mechanism for closed captioning issues is intended to provide television stations (and other parties with closed captioning obligations) with the opportunity to address captioning issues—and make changes to facilitate a better captioning experience—before the FCC refers complaints to the Enforcement Bureau. Indeed, under the new compliance "ladder," the FCC will not take any action against a station (or other VPD) until it discerns a "pattern or trend" of noncompliance.

*What Is a "Pattern or Trend" of Noncompliance?* In its Order, the FCC provides some insight as to what will constitute a "pattern or trend" of noncompliance that would warrant further investigation by the FCC and the invocation of the compliance "ladder." The FCC promised that it will apply a "broad definition" of "pattern or trend" when determining whether the compliance ladder is triggered. For example, a "pattern or trend" may be found when a particular entity is subject to a series of complaints over time about caption quality problems or failures or where a particular entity is subject to a large volume of complaints suggesting widespread quality problems or failures, even if they occur over a relatively short span of time. A pattern or trend of consumer complaints, even if about different programs or different types of captioning failures by the same entity, may reflect a system breakdown in that entity's processes. In other words, the Commission

may discern a pattern or trend in a series of complaints about the same or similar problems or in a multiplicity of complaints about unrelated problems.

*How Does the Compliance “Ladder” Work?* The new compliance ladder only applies to the closed captioning *quality* rules (and there is a separate compliance ladder that continues to apply to ENT captioning pursuant to another part of the rules); it does not apply to any other aspect of the FCC’s captioning rules. Here is how the compliance ladder works:

- If the FCC notifies a VPD or Video Programmer that there is a pattern or trend of possible noncompliance with the captioning quality rules, the VPD or Video Programmer must report (within 30 days) to the FCC the corrective measures that have been taken, including those measures the VPD or video programmer may have undertaken in response to informal complaints and inquiries from viewers. That’s the first rung of the ladder.
- Subsequently, if the FCC notifies a station (or other VPD or Video Programmer) that there is further evidence indicating a pattern or trend of noncompliance with the captioning quality rules, the station shall submit to the FCC (within 30 days), a “written action plan” describing additional measures it will take to bring captioning quality into compliance with the rules. For example, an action plan will involve the identification and implementation of longer term measures and may include, among other things, a commitment to train the VPD’s or Video Programmer’s personnel, the use of improved equipment, more frequent equipment checks, improved monitoring efforts, and changes in closed captioning vendors or closed captioning procedures. In addition, the VPD or video programmer will be required to conduct spot checks of its closed captioning performance and file reports (within 180 days) with the FCC about the results of the action plan and spot checks. The FCC has warned that “unlike the corrective measures that are required by the first rung, the action plan will be subject to ongoing oversight until the problems and underlying causes are fully corrected.”
- If, after the station submits a second rung report, the FCC finds continued evidence of a pattern or trend of noncompliance with the captioning quality rules, the FCC may refer the matter to the Enforcement Bureau for appropriate action (which may include admonishments, forfeitures, and other corrective actions).

Notwithstanding the new compliance ladder, the FCC also reserved for itself the ability to refer captioning matters directly and immediately to the Enforcement Bureau without first going through the ladder, in situations indicating “a systemic closed captioning quality problem or an intentional and deliberate violation” of the captioning quality standards. Whether or how often the FCC will “short circuit” the ladder process remains to be seen.

## **E. Filing of Video Programmer Contact Information**

*Video Programmers’ Closed Captioning Contact Information—New Filing Requirement.* Since 2010, television stations (and other VPDs) have been required to file certain information with the FCC (and post the same information to their own websites and, in some cases, include the same information in telephone directories). This information has included phone and fax numbers, email and mailing addresses, and the names of personnel who can be contacted when viewers experience

captioning issues. In the Order, the FCC has now extended the FCC filing requirement to all Video Programmers, but Video Programmers will not be required to post the same information to their own websites (VPDs, however, will continue to be subject to the requirement to post the closed captioning contact information to their websites). VPDs and Video Programmers will be required to update closed captioning contact information within 10 days of any changes to such information.

*Contact Information Should Help VPDs Communicate with Video Programmers to Address Complaints.* Now that Video Programmers will be required to file closed captioning contact information in the FCC’s database, television stations should have an easier time identifying the “right” person to contact when investigating a closed captioning issue that seems to have originated with the Video Programmer.

## **F. Additional Developments**

In related news, on February 23, 2016, the FCC’s multi-stakeholder Disability Advisory Committee [recommended](#) that the FCC “convene an interagency workshop with the U.S. Department of Justice and U.S. Department of Transportation to develop an understanding of accessibility problems with video programming in hotels, hospitals, airport facilities, aircraft, railway stations, trains, and other places of public accommodation and consensus around solutions to those problems.” Whether any additional closed captioning guidance or regulations for television stations ultimately develop from this recommendation remains to be seen. Certainly, stations will already have their hands full with the new captioning rules discussed above.

## **III. Conclusion**

Certain elements of the new and revised rules are straightforward while other aspects are complex, ambiguous, and will require television stations (and MVPDs) to adopt new protocols and/or adapt existing practices in order to ensure compliance. In particular, the new rules relating to the investigation and resolution of closed captioning complaints (including communication with other parties about such complaints) are particularly detailed and complex, and they are full of potential pitfalls for the unwary. OMB will have to approve a number of the new rules before they become effective, which, as of March 15, 2016, has not occurred. During the period before the new and revised rules become effective, all of the “old” closed captioning rules remain in effect, and television stations must continue to comply with them.

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If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

*Stephen Hartzell, Editor*

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New Closed Captioning Complaint Procedures Rules Adopted February 2016  
(Effective Date Unknown as of March 7, 2016)

**(g) *Complaint Procedures.***

(1) Filing closed captioning complaints. Complaints concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission or with the video programming distributor responsible for delivery and exhibition of the video programming within sixty (60) days after the problem with captioning.

(2) Complaints filed with the Commission. A complaint filed with the Commission must be in writing, must state with specificity the alleged Commission rule violated, and must include:

(A) The consumer's name, postal address, and other contact information, if available, such as telephone number or e-mail address, along with the consumer'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 consumer.

(B) The channel number; channel name, network, or call sign; the name of the multichannel video program distributor, if applicable; the date and time when the captioning problem occurred; the name of the program with the captioning problem; and a detailed description of the captioning problem, including specific information about the frequency and type of problem.

(3) Process for forwarding complaints. The Commission will forward complaints filed first with the Commission to the appropriate video programming distributor and video programmer. If the Commission cannot determine the appropriate video programmer, the Commission will forward the complaint to the video programming distributor and notify the video programming distributor of the Commission's inability to determine the appropriate video programmer. The video programming distributor must respond in writing to the Commission with the name and contact information for the appropriate video programmer within ten (10) days after the date of such notification. The Commission will then forward the complaint to the appropriate video programmer.

(4) Video programming distributor and video programmer responsibilities with respect to complaints forwarded by the Commission.

(i) In response to a complaint, the video

programming distributor must conduct an investigation to identify the source of the captioning problem and resolve all aspects of the captioning problem that are within its control. At a minimum, a video programming distributor must perform the following actions as part of its investigation:

(A) Program stream check. The video programming distributor must capture program streams, defined as digitally encoded elementary streams such as video, audio, closed captioning, timing, and other data necessary for a viewer to receive a complete television viewing experience, of the programming network identified in the complaint and check the program streams for any caption-related impairments;

(B) Processing equipment check. If the video programming distributor's investigation indicates a problem with the program stream, and there is not prior knowledge as to where the problem originated, the video programming distributor must check post-processing equipment at the relevant headend or other video distribution facility to see if the issue was introduced by the video programming distributor or was present in the program stream when received by the video programming distributor from the video programmer; and

(C) Consumer premises check. If the video programming distributor's investigation indicates that the problem may lie with the consumer's customer premises equipment, including the set-top box, the video programming distributor must check the end user equipment, either remotely or, if necessary, at the consumer's premises, to ensure there are no issues that might interfere with the pass through, rendering, or display of closed captioning.

(ii) After conducting its investigation, the video programming distributor shall provide a response to the complaint in writing to the Commission, the appropriate video programmer, and the complainant within thirty (30) days after the date the Commission forwarded the complaint.

The video programming distributor's

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response must:

- (A) Acknowledge responsibility for the closed captioning problem and describe the steps taken to resolve the problem; or
  - (B) Certify that the video programming distributor has conducted an investigation into the closed captioning problems in accordance with paragraph (g)(4)(i) of this section and that the closed captioning problem is not within the video programming distributor's control and appears to have been present in the program stream when received by the video programming distributor; or
  - (C) Certify that the video programming distributor has conducted an investigation into the closed captioning problems in accordance with paragraph (g)(4)(i) of this section and that the closed captioning problem appears to have been caused by a third party DVR, television, or other third party device not within the video programming distributor's control.
- (iii) If the video programming distributor provides a certification in accordance with paragraph (g)(4)(ii)(B) of this section, the video programmer to whom the complaint was referred must conduct an investigation to identify the source of the captioning problem and resolve all aspects of the captioning problem that are within its control.

(A) The video programmer may call upon the video programming distributor for assistance as needed, and the video programming distributor must provide assistance to the video programmer in resolving the complaint, as needed.

(B) After conducting its investigation, the video programmer must provide a response to the complaint in writing to the Commission, the appropriate video programming distributor, and the complainant within thirty (30) days after the date of the video programming distributor's certification. Such response either must describe the steps taken by the video programmer to correct the captioning problem or certify that the video programmer has conducted an investigation into the closed captioning

problems in accordance with paragraph (g)(4)(iii) of this section and that the captioning problem was not within its control, for example, because the program stream was not subject to the closed captioning problem at the time the program stream was handed off to the video programming distributor.

(C) If the video programmer certifies pursuant to paragraph (g)(4)(iii)(B) of this section that the captioning problem was not within its control, and it has not been determined by either the video programmer or the video programming distributor that the problem was caused by a third party device or other causes that appear not to be within the control of either the video programming distributor or the video programmer, the video programming distributor and video programmer shall work together to determine the source of the captioning problem. Once the source of the captioning problem is determined, the video programming distributor and video programmer shall each correct those aspects of the captioning problem that are within its respective control. Within thirty (30) days after the date of the video programmer's certification provided pursuant to paragraph (g)(4)(iii)(B) of this section, the video programming distributor, after consulting with the video programmer, shall report in writing to the Commission and the complainant on the steps taken to correct the captioning problem.

(5) Complaints filed with video programming distributors.

(i) If a complaint is first filed with the video programming distributor, the video programming distributor must respond in writing to the complainant with thirty (30) days after the date of the complaint. The video programming distributor's response must either:

(A) Acknowledge responsibility for the closed captioning problem and describe to the complainant the steps taken to resolve the problem; or

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- (B) Inform the complainant that it has referred the complaint to the appropriate video programmer or other responsible entity and provide the name and contact information of the video programmer or other responsible entity and the unique complaint identification number assigned to the complaint pursuant to paragraph (g)(5)(ii)(B) of this section; or
- (C) Inform the complainant that the closed captioning problem appears to have been caused by a third party DVR, television, or other third party device not within the video programming distributor's control.
- (ii) If the video programming distributor determines that the issue raised in the complaint was not within the video programming distributor's control and was not caused by a third party device, the video programming distributor must forward the complaint and the results of its investigation of the complaint to the appropriate video programmer or other responsible entity within thirty (30) days after the date of the complaint.
- (A) The video programming distributor must either forward the complaint with the complainant's name, contact information and other identifying information redacted or provide the video programmer or other responsible entity with sufficient information contained in the complaint to achieve the complaint's investigation and resolution.
- (B) The video programming distributor must assign a unique complaint identification number to the complaint and transmit that number to the video programmer with the complaint.
- (iii) (A) If a video programming distributor forwards a complaint to a video programmer or other responsible entity pursuant to paragraph (g)(5)(ii) of this section, the video programmer or other responsible entity must respond to the video programming distributor in writing in a form that can be forwarded to the complainant within thirty (30) days after the forwarding date of the complaint.
- (B) The video programming distributor must forward the video programmer's or other responsible entity's response to the complainant within ten (10) days after the date of the response.
- (C) If the video programmer or other responsible entity does not respond to the video programming distributor within thirty (30) days after the forwarding date of the complaint, the video programming distributor must inform the complainant of the video programmer's or other responsible entity's failure to respond within forty (40) days after the forwarding date of the complaint.
- (iv) If a video programming distributor fails to respond to the complainant as required by paragraphs (g)(5)(i) of this section, or if the response received by the complainant does not satisfy the complainant, the complainant may file the complaint with the Commission within sixty (60) days after the time allotted for the video programming distributor to respond to the complainant. The Commission will forward such complaint to the video programming distributor and video programmer, and the video programming distributor and video programmer shall address such complaint as specified in paragraph (g)(4) of this section.
- (v) If a video programmer or other responsible entity fails to respond to the video programming distributor as required by paragraph (g)(5)(iii)(A) of this section, or if a video programming distributor fails to respond to the complainant as required by paragraphs (g)(5)(iii)(B) or (C) of this section, or if the response from the video programmer or other responsible entity forwarded by the video programming distributor to the complainant does not satisfy the complainant, the complainant may file the complaint with the Commission within sixty (60) days after the time allotted for the video programming distributor to respond to the complainant pursuant to paragraphs (g)(5)(iii)(B) or (C) of this section. The Commission will forward such complaints to the appropriate video programming distributor and video programmer, and the video programming distributor and video programmer shall handle such complaints as specified in paragraph (g)(4) of this section.
- (6) In response to a complaint, a video programming distributor or video programmer is obligated to provide the Commission with

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sufficient records and documentation to demonstrate that it is in compliance with the Commission's rules.

(7) Video programming distributors may rely on certifications from video programmers made in accordance with paragraph (m) of this section to demonstrate compliance with paragraphs (b)(1)(i) and (b)(2)(i) of this section. Video programming distributors shall not be held responsible for situations where a video programmer falsely certifies under paragraph (m) of this section unless the video programming distributor knows or should have known that the certification is false.

(8) The Commission will review complaints filed with the Commission, including all supporting evidence, and determine whether a violation has occurred. The Commission will, as needed, request additional information from the video programming distributor or video programmer.

(9) Compliance.

(i) Initial response to a pattern or trend of noncompliance. If the Commission notifies a video programming distributor or video programmer of a pattern or trend of possible noncompliance with the Commission's rules for the quality of closed captioning by the video programming distributor or video programmer, the video programming distributor or video programmer shall respond to the Commission within thirty (30) days after the Commission's notice of such possible noncompliance, describing corrective measures taken, including those measures the video programming distributor or video programmer may have undertaken in response to informal complaints and inquiries from viewers.

(ii) Corrective action plan. If, after the date for a video programming distributor or video programmer to respond to a notification under paragraph (g)(8)(i) of this section, the Commission subsequently notifies the video programming distributor or video programmer that there is further evidence indicating a pattern or trend of noncompliance with the Commission's rules for quality of closed captioning, the video programming distributor or video programmer shall submit to the Commission, within thirty (30) days after the date of such subsequent notification, a written action plan describing specific measures it will take to bring the video programming

distributor's or video programmer's closed captioning performance into compliance with the Commission's closed captioning quality rules. In addition, the video programming distributor or video programmer shall conduct spot checks of its closed captioning quality performance and report to the Commission on the results of such action plan and spot checks 180 days after the submission of such action plan.

(iii) Continued evidence of a pattern or trend of noncompliance. If, after the date for submission of a report on the results of an action plan and spot checks pursuant to paragraph (g)(8)(ii) of this section, the Commission finds continued evidence of a pattern or trend of noncompliance, additional enforcement actions may be taken, which may include admonishments, forfeitures, and other corrective actions.

(iv) The Commission may take enforcement action, which may include admonishments, forfeitures, and other corrective actions, without providing a video programming distributor or video programmer the opportunity for an initial response to a pattern or trend of noncompliance or a corrective action plan, or both, under paragraphs (g)(8)(i) and (g)(8)(ii) of this section, for a systemic closed captioning quality problem or an intentional and deliberate violation of the Commission's rules for the quality of closed captioning.

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