

Closed Captioning Quality Standards Go Into Effect April 30, 2014

By Clifford M. Harrington and Christine A. Reilly

The FCC's Recent Report and Order, Declaratory Ruling and Further Notice of Proposed Rulemaking Institutes a New Wave of Compliance Deadlines

A video program distributor's ("VPD") work is never done. Pursuant to the FCC's most *recent* Public Notice on Closed Captioning ("CC") compliance,¹ VPDs are required to come into compliance with the first wave of the closed captioning quality standards outlined by the FCC in its February 24, 2014 Report and Order, Declaratory Ruling and Further Notice of Proposed Rulemaking (collectively, the "February 2014 Order") by **April 30, 2014**.² The FCC's latest effort focuses on further refining its rules while expanding the accuracy and utility of closed captions for the benefit of hard of hearing or deaf viewers.

The February 2014 Order, among other things:

- Establishes four non-technical quality standards including accuracy, synchronicity, completeness and placement;
- Outlines how those standards must be applied to live, near-live and pre-recorded programming;
- Expands the existing compliance obligations for those VPDs still utilizing the Electronic Newsroom Technique ("ENT") in lieu of live or real-time captioning;
- Codifies equipment monitoring and maintenance requirements to ensure that VPDs are taking "any steps needed to...ensure that captioning included with video programming reaches consumers" and mandates the retention of records supporting such monitoring and maintenance;

¹ See *Comment Deadlines and Effective Dates of Closed Captioning Order*, DA 14-456, CG Docket No. 05-231 (rel. April 3, 2014).

² See *Closed Captioning Quality Report and Order, Declaratory Ruling, and FNPR*, FCC 14-12, Docket No. CG 05-231 (rel. Feb. 24, 2014). In the February 2014 Order, the Commission declares that it historically "place[s] exclusive responsibility for compliance with the closed captioning requirements on VPDs because they are ultimately responsible for ensuring the delivery of programming to consumers." *Id.* at ¶ 51. Additionally, the FCC states that "video programmers typically are the entities with the most direct control over the quality of closed captioning of their programming," but to "ensure that video programming includes captions that meet the captioning quality standards set forth in this Report and Order, as an initial step, we place responsibility for compliance on VPDs. In acknowledgment of the critical role that video programmers play in the delivery of captions, we will require VPDs to fulfill this obligation by exercising best efforts to obtain a certification described below from each video programmer." *Id.* at ¶ 53.

- Establishes best efforts and “Best Practices” for purposes of supporting CC goals and compliance;
- Defines multicast streams as separate channels for purposes of determining whether a VPD qualifies for the \$3M annual gross revenue exemption;
- Determines that Exemption Requests must be filed electronically, and
- Declines to establish fixed penalties for CC violations.

The February 2014 Order also includes a Declaratory Ruling confirming the CC obligations for mixed language programming.

Lastly, the February 2014 Order includes a Further Notice of Proposed Rulemaking (“FNPR”), seeking comment on the following issues:

- Minimum Captioning Quality Standards;
- Use of ENT by Non-Broadcast Channels;
- Technical Compliance;
- Resolution of Consumer Complaints;
- Outage Reporting;
- CC Registry;
- Treatment of Consumer Complaints by VPDs that are not the Responsible Party;
- Captioning Exemptions;
- Technical Standards for the Display of CC
- CC Obstructions; and
- New Technologies

A discussion of the FNPR issues may be found at the following link: <http://www.fcc.gov/document/closed-captioning-quality-report-and-order-declaratory-ruling-fnprm>. See paragraphs 122–130. Comments are due by **April 28, 2014**. Reply comments are due by **May 27, 2014**.

Key Principles. The FCC requires that captions “(1) accurately reflect what is in the program’s audio track by matching the dialogue, music, and sounds, and identifying the speakers; (2) are delivered synchronously with the corresponding dialogue and other sounds at a speed that can be read by viewers; (3) are complete for the entire program; and (4) do not obscure important on-screen information and are not obscured by other information on the screen.”³

According to the February 2014 Order, accuracy can be achieved by “match[ing] the spoken word in the dialogue, in their original language...and includ[ing] full lyrics when provided on the audio track.”⁴ Captions should not include paraphrasing. Accurate captions, including, among other things, “slang and grammatical errors,” and certain nonverbal information (sound effects and reactions) are imperative in order for the viewer to understand the program.



³ February 2014 Order at ¶ 26.

⁴ *Id.* at ¶ 28.

Accuracy has a symbiotic relationship with synchronicity in the CC context. In the FCC's view, accuracy is worthless if the time shift, or synchronicity, between the words and video display are off by more than seconds. The FCC indicated that, "captions must coincide with their corresponding spoken words and sounds to the greatest extent possible....[W]hen captions are not synchronized with the program's audio track, it is difficult, and sometimes impossible, to follow the content of the program."⁵ Unsynchronized captions "deny accessibility to persons with hearing disabilities," thereby making it "difficult, and sometimes impossible, to follow the content of the program" – in direct contravention to the purpose of CC.⁶ The synchronicity requirement further mandates that VPDs or video programmers reformat captions in instances where edits or alterations to the programming affect the synchronicity.

In addition to accuracy and synchronicity, the FCC believes program completeness is also important to the overall content comprehension of a program. Notably, throughout the CC proceeding, certain commenters raised "concerns about captions that drop off in the middle or just prior to the end of programming."⁷ Thus, the February 2014 Order requires video programmers and VPDs to include captions for the *complete* duration of the programming in order to "maximize accessibility."⁸

Finally, with regard to the non-technical quality standards, VPDs must ensure that provided captions not "obscure important textual information, moving action, or characters' faces."⁹ This standard also mandates that the "caption font be sized appropriately for legibility and that captions be adequately positioned so that they do not run off the edge of the video screen."¹⁰

The application of the above referenced standards must be considered in the context of three types of programming – live, near-live and pre-recorded programming.

Live programming, defined as "video programming that is shown on television substantially simultaneously with its performance,"¹¹ provides the greatest challenge in complying with the quality standards discussed above. Captioning during live programming, called "real-time" captioning, can be affected by human error and the lack of time to review or correct captions prior to broadcast. As a result, the FCC declared that, "we will address complaints by considering, on a case-by-case basis, the overall accuracy or understandability of the programming, the ability of the captions to convey the aural content of the program in a manner equivalent to the aural track, the extent to which the captioning errors prevented viewers from having access to the programming, and whether the VPD made best efforts to receive a certification from programmers that the programmer is either in compliance with the Commission's non-technical quality standards or with the Best Practices adopted herein, or is exempt from the captioning obligations."¹² The FCC encourages VPDs to work with their contract captioning services to increase accuracy through the



⁵ *Id.* at ¶ 30.

⁶ *Id.*

⁷ *Id.* at ¶ 31.

⁸ *Id.*

⁹ *Id.* at ¶ 32.

¹⁰ *Id.* at ¶ 33.

¹¹ *Id.* at ¶ 39.

¹² *Id.* at ¶ 42.

use of appropriate captioner training, high speed internet connections and advance notice of vocabulary in order to improve the accuracy of real-time captioning.

This collaborative effort is also encouraged by the FCC when addressing synchronicity issues associated with live programming and real-time captions. The FCC acknowledges that “a slight delay in the delivery of live captions is inevitable....”¹³ However, video programmers or VPDs can “provide captioners with advance materials that help them to generate caption text as they hear a program’s audio, provide high quality audio program signals to reduce caption lag times, and enter into contracts with captioning agencies that require appropriate captioner training and skills to reduce captioning delays while a program is being aired” in an effort to improve synchronicity.¹⁴

Live programming also poses problems in the context of program completeness. As mentioned above, the FCC recognizes that delays in the transmission of real-time closed captions are inevitable. Such delays may affect the display of closed captions at the conclusion of the program. The FCC recommends several methods to remedy such issues, including “(1) a fade out after the last scene to add a few seconds for the transition to the next program content, (2) advance delivery of the audio to captioners by a few seconds, and (3) allowing captions remaining at the end of a program’s audio to be placed in a location on the screen during the subsequent advertisement (or program) in a manner that does not overlap with the captions on that advertisement or program.”¹⁵

The placement of closed captions during live programming, which oftentimes “make[s] extensive use of graphics and crawls,”¹⁶ can be problematic due to the impromptu nature of the programming. The FCC states that it “will take into consideration the type and nature of the programming when considering complaints regarding violations of the placement standard.”¹⁷

Near-live programming, or programming which airs within 24 hours of being recorded, is subject to the live programming compliance regulations. In such circumstances, video programmers or VPDs have a very limited amount of time to ensure accuracy, synchronicity, completeness and placement, and the FCC acknowledges that a full review of the captions prior to broadcasting is still a challenge. The FCC suggests that video programmers or VPDs, if possible, “deliver a complete program script or a near-completed program to the captioning agency,” or provide the captioning agency with access to the live feed of the program for purposes of generating captions.¹⁸

The FCC’s standards for pre-recorded programming are much more stringent since video programmers and VPDs presumably have more time in which to create, review and edit captions prior to broadcasting the program. The threshold for errors is therefore much less than in the live or near-live programming context, although the FCC does provide for instances of very limited or “de minimis” captioning failures. In an effort to retain captioning flexibility, the FCC does not prohibit the use of real-time captioning for pre-

¹³ *Id.* at ¶ 44.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 45.

¹⁶ *Id.* at ¶ 46.

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 49.

recorded programming, but does “expect that as a general matter the use of real-time captioning methods for pre-recorded programming will be limited to only those situations when it is necessary to do so.”¹⁹

The FCC has also attempted to strengthen its rules by adopting new regulations for VPDs which employ the ENT process for news programming. The ENT process, which converts scripted information presented on a teleprompter to captions, has historically failed to capture segments of live or near-live programming which air during portions of the scripted program. Examples of such instances include a local news program that incorporates live field interviews, breaking news, or sporting events. The February 2014 Order establishes new obligations for use of the ENT method which become effective on **June 30, 2014**.

The changes focus on expanding the accessibility of traditionally unscripted information, previously exempt from captioning requirements, to persons who are hard of hearing or deaf. According to the FCC, advances in technology, including the pervasiveness of broadband, enable VPDs to more easily insert textual information (i.e. crawls, graphics, and texts) into segments of the programming that are unscripted and historically without captions. The enhanced requirements are:

- News, sports, weather, and entertainment programming produced in-studio should be scripted.
- For weather interstitials where there may be multiple segments within a news program, weather information explaining the visual information on the screen and conveying forecast information should be scripted, although the scripts may not precisely track the words used on air.
- Pre-produced programming should be scripted (to the extent technically feasible).
- If live interviews or live on-the-scene or breaking news segments are not scripted, stations should supplement them with crawls, textual information, or other means (to the extent technically feasible).
- Stations must provide training to all news staff on scripting for improved ENT.
- Stations must appoint an “ENT Coordinator” accountable for compliance.

Additionally, VPDs relying on the ENT method will be required to prepare and file a progress report with the FCC within a year. That report must describe the VPD’s experience under the enhanced procedures and whether they were “successful in providing full and equal access to news programming.”²⁰ This reporting obligation will become effective following OMB approval and publication of it in the Federal Register.

VPDs employing the ENT method will be subject to informal complaint proceedings if the complaints include “the television channel number, network and/or call sign, the name of the subscription service, if relevant, the date and time of the alleged captioning problems, the name of the program with the alleged captioning problem, a detailed and specific description of the captioning problem, including the frequency and type of problem.”²¹ In circumstances where the FCC identifies a “pattern or trend” of noncompliance, VPDs will be required to respond within 30 days of an associated FCC notice. The response must include corrective measures undertaken (independent actions or actions resulting from an informal complaint). The

¹⁹ *Id.* at ¶ 38.

²⁰ *Id.* at ¶ 82.

²¹ *Id.* at ¶ 83.

FCC may deem a further inquiry necessary. In such situations, the VPD must prepare and submit an “action plan” which includes details regarding specific actions taken, including, but not limited to, employee training and the use of improved equipment. If the FCC deems additional action necessary, the VPD may be subject to enforcement actions and revocation of the right to employ the ENT method.²² This complaint process will become effective following OMB approval of it and publication in the Federal Register.

VPDs are responsible not only for captioning non-exempt programming, but for passing through existing captions delivered by the upstream programmer. This longstanding pass-through requirement is now buttressed by the FCC’s mandate that VPDs monitor and maintain equipment and take “any steps needed to monitor and maintain their equipment signal transmissions.”²³ This monitoring obligation commences on **April 30, 2014**.

Beginning **January 15, 2015**, or upon announcement in the Federal Register of OMB approval, whichever is later, VPDs must commence maintaining records, and retain them for two years, regarding compliance with the monitoring and maintenance obligations mentioned above.

In connection with video programmers, VPDs, captioning vendors, and consumers, the FCC has developed Best Practices “to achieve quality captions and to ensure that caption quality problems that do arise are quickly resolved.”²⁴ The Best Practices, which will become effective on **January 15, 2015**, or upon announcement in the Federal Register of OMB approval, whichever is later, are as follows:

- **Video Programmer Best Practices.** To satisfy its obligation to exercise best efforts to obtain certification from its programmers regarding closed caption quality, a VPD may seek certification from its video programmers that they will adhere to the following practices.
 - *Agreements with captioning services.* Video programmers complying with the Best Practices will take the following actions to promote the provision of high quality television closed captions through new or renewed agreements with captioning vendors:
 - *Performance requirements.* Include performance requirements designed to promote the creation of high quality closed captions for video programming comparable to the Captioning Vendor Best Practices.
 - *Verification.* Include a means of verifying compliance with the above performance requirements such as through periodic spot checks of captioned programming.
 - *Training.* Include provisions designed to ensure that captioning vendors’ employees and contractors who provide captioning services have received appropriate training and that there is oversight of individual captioners’ performance.
 - *Operational best practices.* Video programmers complying with the Best Practices will take the following actions to promote delivery of high quality television captions through improved operations:

²² *Id.* at ¶ 84.

²³ *Id.* at ¶ 96.

²⁴ *Id.* at ¶ 59.

- *Preparation materials.* To the extent available, provide captioning vendors with advance access to preparation materials such as show scripts, lists of proper names (people and places), and song lyrics used in the program, as well as to any dress rehearsal or rundown that is available and relevant.
- *Quality audio.* Make commercially reasonable efforts to provide captioning vendors with access to a high quality program audio signal to promote accurate transcription and minimize latency.
- *Captioning for pre-recorded programming.*
 - The presumption is that pre-recorded programs, excluding programs that initially aired with real-time captions, will be captioned offline before air except when, in the exercise of a programmer's commercially reasonable judgment, circumstances require real-time or live display captioning. Examples of commercially reasonable exceptions may include instances when (1) a programmer's production is completed too close to initial air time to be captioned offline or may require editorial changes up to air time (e.g., news content, reality shows), (2) a program is delivered late, (3) there are technical problems with the caption file, (4) last minute changes must be made to later network feeds (e.g., when shown in a later time zone) due to unforeseen circumstances, (5) there are proprietary or confidentiality considerations, or video programming networks or channels with a high proportion of live or topical time-sensitive programming, but also some pre-recorded programs, that use real-time captioning for all content (including pre-recorded programs) to allow for immediate captioning of events or breaking news stories that interrupt scheduled programming.
 - Make reasonable efforts to employ live display captioning instead of real-time captioning for pre-recorded programs if the complete program can be delivered to the caption service provider in sufficient time prior to airing.
- *Monitoring and remedial best practices.* Video programmers complying with the Best Practices will take the following actions aimed at improving prompt identification and remediation of captioning errors as they occur:
 - *Pre-air monitoring of offline captions.* As part of the overall pre-air quality control process for television programs, conduct periodic checks of offline captions on pre-recorded programs to determine the presence of captions.
 - *Real-time monitoring of captions.* Monitor television program streams at point of origination (e.g., monitors located at the network master control point or electronic monitoring) to determine presence of captions.
 - *Programmer and captioning vendor contacts.* Provide to captioning vendors appropriate staff contacts who can assist in resolving captioning issues. Make captioning vendor contact information readily available in master control or other centralized location, and contact captioning vendor promptly if there is a caption loss or obvious compromise of captions.

- *Recording of captioning issues.* Maintain a log of reported captioning issues, including date, time of day, program title, and description of the issue. Beginning one year after the effective date of the captioning quality standards, such log shall reflect reported captioning issues from the prior year.
 - *Troubleshooting protocol.* Develop procedures for troubleshooting consumer captioning complaints within the distribution chain, including identifying relevant points of contact, and work to promptly resolve captioning issues, if possible.
 - *Accuracy spot checks.* Within 30 days following notification of a pattern or trend of complaints from the Commission, conduct spot checks of television program captions to assess caption quality and address any ongoing concerns.
 - *Certification procedures for video programmers.* Video programmers complying with the Best Practices will certify to video programming distributors that they adhere to Best Practices for video programmers and will make such certifications widely available to VPDs, for example, by posting on affiliate websites.
- **Best Practices for Real-Time (Live) Captioning Vendors.**
- Create and use metrics to assess accuracy, synchronicity, completeness, and placement of real-time captions;
 - Establish minimum acceptable standards based upon those metrics while striving to regularly exceed those minimum standards
 - Perform frequent and regular evaluations and sample audits to ensure those standards are maintained;
 - Consider “accuracy” of captions to be a measurement of the percentage of correct words out of total words in the program, calculated by subtracting number of errors from total number of words in the program, dividing that number by total number of words in the program and converting that number to a percentage. For example, 7,000 total words in the program minus 70 errors equals 6,930 correct words captioned, divided by 7,000 total words in the program equals 0.99 or 99% accuracy;
 - Consider at a minimum mistranslated words, incorrect words, misspelled words, missing words, incorrect punctuation that impedes comprehension, and misinformation, as errors;
 - Captions are written in a near-as-verbatim style as possible, minimizing paraphrasing;
 - The intended message of the spoken dialogue is conveyed in the associated captions in a clear and comprehensive manner;
 - Music lyrics should accompany artist performances;
 - Consider synchronicity of captions to be a measurement of lag between the spoken word supplied by the program origination point and when captions are received at the same program origination point;

- Ensure placement of captions on screen to avoid obscuring on-screen information and graphics (e.g., sports coverage);
 - Ensure proper screening, training, supervision, and evaluation of captioners by experienced and qualified real-time captioning experts;
 - Ensure there is an infrastructure that provides technical and other support to video programmers and captioners at all times;
 - Ensure that captioners are qualified for the type and difficulty level of the programs to which they are assigned;
 - Utilize a system that verifies captioners are prepared and in position prior to a scheduled assignment;
 - Ensure that technical systems are functional and allow for the fastest possible delivery of caption data and that failover systems are in place to prevent service interruptions;
 - Regularly review discrepancy reports in order to correct issues and avoid future issues;
 - Respond in a timely manner to concerns raised by video programmers or viewers;
 - Alert video programmers immediately if a technical issue needs to be addressed on their end;
 - Inform video programmers of appropriate use of real-time captioning (*i.e.*, for live and near-live programming, and not for pre-recorded programming) and what is necessary to produce quality captions, including technical requirements and the need for preparatory materials;
 - For better coordination for ensuring high quality captions and for addressing problems as they arise, understand the roles and responsibilities of other stakeholders in the closed-captioning process, including VPDs, video programmers, producers, equipment manufacturers, regulators, and viewers, and keep abreast of issues and developments in those sectors; and
 - Ensure that all contracted captioners adhere to real-time captioner Best Practices.
- **Best Practices for Real-Time (Live) Captioners**
- Caption as accurately, synchronously, completely, and appropriately placed as possible;
 - Ensure captioners are equipped with a failover plan to minimize caption interruption due to captioner or equipment malfunction;
 - Be equipped with reliable, high speed Internet;
 - Be equipped with multiple telephone lines;
 - Prepare as thoroughly as possible for each program;
 - File thorough discrepancy reports with the captioning vendor in a timely manner;

- To the extent possible given the circumstances of the program, ensure that real-time captions are complete when the program ends;
 - Engage the command that allows captions to pass at commercials and conclusion of broadcasts;
 - Monitor captions to allow for immediate correction of errors and prevention of similar errors appearing or repeating in captions;
 - Perform frequent and regular self-evaluations;
 - Perform regular dictionary maintenance;
 - Keep captioning equipment in good working order and update software and equipment as needed;
 - Possess the technical skills to troubleshoot technical issues; and
 - Keep abreast of current events and topics that they caption.
- **Best Practices for Offline (Pre-recorded) Captioning Vendors and Captioners.**
- Ensure offline captions are verbatim;
 - Ensure offline captions are error-free;
 - Ensure offline captions are punctuated correctly and in a manner that facilitates comprehension;
 - Ensure offline captions are synchronized with the audio of the program;
 - Ensure offline captions are displayed with enough time to be read completely and that they do not obscure the visual content;
 - Ensure offline captioning is a complete textual representation of the audio, including speaker identification and non-speech information;
 - Create or designate a manual of style to be applied in an effort to achieve uniformity in presentation;
 - Employ frequent and regular evaluations to ensure standards are maintained;
 - Inform video programmers of appropriate uses of real-time and offline captioning and strive to provide offline captioning for pre-recorded programming;
 - Encourage use of offline captioning for live and near-live programming that originally aired on television and re-feeds at a later time;
 - Encourage use of offline captioning for all original and library pre-recorded programming completed well in advance of its distribution on television; and
 - For better coordination for ensuring high quality captions and for addressing problems as they arise, understand the roles and responsibilities of other stakeholders in the closed-captioning

process, including VPDs, video programmers, producers, equipment manufacturers, regulators, and viewers, and keep abreast of issues and developments in those sectors.

Multicast Channels. In the February 2014 Order, the FCC determined that, for purposes of utilizing the \$3M annual gross revenue exemption from the closed captioning requirements, each program stream represents a separate channel. Once that stream exceeds the \$3M threshold, that stream must comply with the closed captioning rules. Note that this revenue exemption does not supersede the FCC's pass-through rule, which requires VPDs to pass-through, intact, captions already present in the programming as received from the originating source. This refinement of the gross revenue exemption will become effective on **April 30, 2014**.

Waivers and Enforcement. In sync with the IP CC proceeding, the FCC decided to "require the electronic filing of individual closed captioning exemption requests in machine readable format, and further revise our rules to require that comments on and oppositions to such petitions also be filed electronically in machine readable format."²⁵ The electronic submission will "ensure that that each party to the proceeding is aware of all filings that are submitted..."²⁶ The electronic submission requirement will become effective on **April 30, 2014**.

The FCC also determined that it would not establish specific fines for CC complaints and noncompliance/enforcement actions. Instead, the FCC "will consider a wide variety of factors to determine whether enforcement is warranted, such as history of monitoring and maintenance, complaints received from consumers, frequency of captioning errors, and impact of captioning errors on the viewers' understandability of the program."²⁷

Finally, in the *Declaratory Ruling* portion of the February 2014 Order, the FCC acknowledged that "the obligations for programming in both [English and Spanish] are identical" and confirmed "that all *new* bilingual English-Spanish programming must be closed captioned, and 75 percent of *pre-rule* bilingual English-Spanish programming must be closed captioned in their respective languages at this time."²⁸ In contrast, "programs that are in neither English nor Spanish but contain small amounts or "snippets" of English or Spanish words that account for only a small percentage of these programs, are also governed by section 79.1(d)(3) and need not to be captioned."²⁹

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Clifford M. Harrington (bio)
Washington, DC
+1.202.663.8525
clifford.harrington@pillsburylaw.com

Christine A. Reilly (bio)
Washington, DC
+1.202.663.8245
christine.reilly@pillsburylaw.com

²⁵ *Id.* at ¶ 113.

²⁶ *Id.*

²⁷ *Id.* at ¶ 111.

²⁸ *Id.* at ¶ 115.

²⁹ *Id.* at ¶ 116.

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