

FCC Seeks Comments on Implementation of CALM Act Regulating Loud Commercials on Broadcast and Cable Television

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The Federal Communications Commission (FCC) has just released its Notice of Proposed Rulemaking (NPRM), looking to adopt rules to implement the CALM Act regulating loud commercials on over-the-air television broadcast stations, cable systems, satellite, and other multichannel video programming providers. In December, the Commercial Advertisement Loudness Mitigation (CALM) Act was adopted by Congress and signed by the President, addressing consumer complaints about television commercials that seem louder than the program content that they accompanied.

As we wrote in our [summary](#) of the Act when it was adopted, Congress has long received many complaints about the volume levels of commercials and decided to act, even though many industry groups were concerned about the ability to design an effective system to deal with the contrasts that sometimes exist between the quiet dialogue that might precede a commercial break and the commercial advertisement itself.

In adopting the CALM Act, Congress instructed the FCC to adopt implementing rules within a year. This NPRM is to adopt those rules, and the FCC asks many questions trying to clarify the details of CALM Act implementation.

The NPRM raises a broad array of implementation issues, ranging from deciding exactly which broadcast stations and which MVPDs are subject to its terms, to the establishment of safe harbors for technical compliance. As discussed in more detail below, the Commission also asks whether stations and systems can shift the burden for compliance with these rules to program suppliers, such as broadcast and cable networks, and whether contractual means of guaranteeing compliance (such as indemnification provisions in contracts between networks and affiliates) are sufficient to ensure compliance by these program providers. Questions about how MVPDs deal with retransmission of broadcast programs, and who is responsible for noncompliant broadcast programming, are also asked. Finally, the FCC suggests processes for consumer complaints and the grant of waivers to stations and systems that cannot quickly comply with the new rules.

As directed by the statute, the Commission looks to determine when commercials are too loud by relying on ATSC A/85 RP, a series of recommended practices developed by the Advanced Television Systems Committee (ATSC), a standards group that principally works with over-the-air TV. While the Commission deemed this standard “instructive” for MVPDs, it also noted that, in industry meetings, some cable companies reported that they did not use the AC-3 digital encoding standard on which ATSC A/85

RP was based. The statute specifically directs that the ATSC A/85 practices serve as the basis for compliance with the Act, so the Commission asked a number of questions about how this set of practices can be applied throughout the television industry

The questions set forth below will demand much attention from broadcasters, cable systems, satellite providers, program suppliers, and advertisers. Comments will be due 30 days after this Notice is published in the Federal Register, with replies 15 days later. Expect that these dates will not shift much if at all, so that the Commission can meet the December deadline for adoption of new rules. The specifics of the Commission's proposals are set forth below.

Definitional issues

The Commission first asks questions about which entities are subject to the law, and about the meaning of specific phrases in the statute. The issues on which comment are sought include the following:

- Though the Commission does not believe it has any discretion but to adopt ATSC A/85 RP as the basis of the new rules, ATSC has already adopted a successor document, so the NPRM asks what weight to give standards contained in that update, tentatively concluding that future updates of the standard will automatically become part of the rules;
- The FCC tentatively concludes that stations and cable systems are responsible for the compliance of all commercials with this standard, not just the commercials that they insert locally (more on how this conclusion is to be implemented below);
- As the statute addresses only the insertion of commercial advertisements, the FCC tentatively concludes that noncommercial television stations are exempt from the application of the new rules—but asks how the rules might apply to the digital streams of noncommercial stations in which some commercial material may be present;
- The Commission concludes that cable systems that do not use the AC-3 transmission standard are nevertheless required to comply with the Act, but asks how such systems can comply with the requirements of ATSC A/85 RP (noting, however, that the ATSC update of the standard may address how non AC-3 cable systems can deal with loud commercials).

Compliance and enforcement

The NPRM then addresses the heart of the matter—how the rules should be set up to allow stations and systems to demonstrate compliance with the new statutory requirements. The FCC first proposes a “safe harbor,” adherence to which will be deemed to constitute compliance, though stations and systems may be able to demonstrate compliance through other methods if they can convince the FCC that the same results are achieved. The safe harbor would require that the stations and systems

install and maintain their own equipment and software necessary “in a commercially reasonable manner” to achieve compliance with ATSC A/85 RP. This would require that the station or system install its own equipment, and not simply rely on networks and other program suppliers to meet the obligations of the statute. The FCC asks for comments on this tentative conclusion.

In addition, the FCC asks a number of other questions about compliance issues, including:

- Whether the safe harbor can work given that industry sources have suggested that stations and systems can use ATSC A/85 RP equipment on site to regulate loudness of the commercials that they insert into commercials themselves, but not commercials that have already been inserted by networks or other program suppliers;
- What is a “commercially reasonable manner” is? Does this mean compliance with a general industry standard, or are there specific issues that must be evaluated for each station or system?
- The Commission proposes to require that stations and systems ensure that the equipment that they purchase works in a manner that secures compliance with ATSC A/85 RP, yet the Commission does not propose to certify equipment that would be sold to ensure such compliance. Thus, the Commission seeks comments on how stations and systems can ensure compliance. Similar questions are asked about how stations and systems can ensure that installation and maintenance is carried out in a manner that ensures compliance with ATSC A/85 RP;
- What evidence of compliance will be necessary from a station or system to respond to a complaint, beyond simply relying on the installation of equipment compliant with ATSC A/85 RP?
- In perhaps the most important proposal for most stations and systems, the Commission proposes that, for compliance purposes, they be able to rely on those of their program suppliers which “ensure” that their programs meet the required standards (e.g. program networks). But, as the individual station or system will be ultimately responsible for compliance, how will they be able to “ensure” that the programming supplied by others really meets these standards? The FCC asks for comments on the following:
 - Are contracts between stations and systems and their program suppliers sufficient to ensure that the standards will be met?
 - Will stations and systems be able to get indemnification provisions in contracts from program suppliers to cover penalties for their noncompliance?

- How long will such indemnities take to negotiate, and should the Commission take that time into account in its implementation timetable?
- Are contractual solutions available to small systems? Do they receive sufficient metadata from program suppliers to ensure compliance?
- Are there other practical compliance issues? The Commission indicates that parties have indicated issues including:
- How can cable systems ensure the compliance of programming that they receive from television stations, and other programming received with no time for prior review before it is transmitted by the system?
- Do television stations face that same problem with respect to network programs?
- If a complaint is received about a loud commercial contained in an over-the-air television station's program that is being retransmitted by a cable system, who should be responsible for any violation—the TV station or the system?
- Are there any special issues with legacy programs, or with political commercials?
- Are there any copyright implications to enforcing any of these rules?

Complaint and enforcement process

To enforce these rules, the NPRM sets out a proposed process for consumer complaints and FCC enforcement. The Commission asks for comments on the following:

- A consumer driven complaint process, as opposed to one based principally on FCC inspections.
- A standard complaint form that is available online, and can be filed electronically, or by mail or by fax. That complaint form would require that the consumers with complaints provide the following:
- Their name and their contact information, including their email address and phone number;
- The call sign of the TV station about which they are complaining, or information about which MVPD transmitted the loud commercial;
- The date and time of the loud commercial;
- The program in which it aired;
- The network that was being watched;
- The name of the commercial sponsor;

- A description why the commercial was objectionable.
- What records need to be maintained for stations and systems to respond to complaints?
- Should stations and systems be required to designate specific employees who are tasked to respond to complaints?
- The FCC concludes that TV stations should keep complaints in their public file, but asks if cable systems should also provide that information in a public file.
- The FCC expects that it will fine stations and systems for noncompliance, and asks whether it should establish a base fine and, if so, what that base fine should be.

Waiver standards

The Act specifically provides for waivers for stations and systems that cannot afford to comply with the new rules. The Commission asks a number of questions about the waiver process, including:

- How to demonstrate the need for a financial hardship waiver? The FCC suggests that a petition for waiver would need to include:
 - Financial statements for the business;
 - Cost estimates for compliance;
 - A statement detailing how and when the station or system will be able to come into compliance;
 - Public interest reasons why a waiver is justified in these circumstances.
- Whether there are there special issues that would arise for an MVPD that is carrying a broadcast station that has a compliance waiver?
- Should there be a streamlined process for small MVPDs and small broadcasters? Would a standard that automatically grants waivers to a non-network TV station outside the Top 100 markets, or to an independent cable system with fewer than 15,000 subscribers, be appropriate?
- Are there other waiver issues that should be addressed?
- The Commission tentatively proposes that waiver requests be due 180 days after the effective date of the new rules.

Clearly, for a seemingly straightforward statute, there are many issues that need FCC attention on a very tight timeframe to meet the Congressionally mandated requirement

that these rules be in place by mid-December. If any of these issues may affect your operations, consider filing comments in this proceeding. For more information about this proceeding, or for assistance in filing comments, please contact any of the Communications attorneys at DWT.

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