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## Overview of the Commercial Advertisement Loudness Mitigation (CALM) Act

The FCC recently approved the implementation of the Commercial Advertisement Loudness Mitigation ("CALM") Act. Compliance with these rules will be mandatory as of December 13, 2012 (the "Effective Date") unless a cable operator or multichannel video programming distributor ("MVPD") qualifies for a waiver (as discussed in greater detail below). The CALM Act applies only to digital service (as the technology needed to comply is only feasible using a digital system).

### 1. OVERVIEW - CALM ACT

The CALM Act requires compliance with the Advanced Television Systems Committee (ATSC) A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television." These technical standards focus on audio measurement, production, and postproduction monitoring techniques, and methods to effectively control loudness for content delivery or exchange. They also recommend methods to effectively control program-to-interstitial loudness, discuss metadata systems and use, and describe modern dynamic range control.

The CALM Act covers various methods of transmission including the transmission of commercial advertisements by cable operator or other multichannel video programming distributor (See Part 76, Section 76.607).

Methods of Compliance (by type of commercial advertisement):

- I. **Commercials inserted by cable operator or other MVPD – commercial advertisements added to a programming stream by a cable operator or other MVPD prior to or at the time of transmission to viewers.**
  - A. A cable operator or other MVPD that installs, utilizes, and maintains in a commercially reasonable manner, the equipment and associated software to comply with ATSC A/85 RP shall be deemed in compliance with respect to locally inserted commercials provided that it:
    - i. Installs, maintains and utilizes equipment to properly measure the loudness of the content and to ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer;
    - ii. Provides records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;

- iii. Certifies that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and
- iv. Certifies that its own transmission equipment is not at fault for any pattern or trend of complaints.

**II. Embedded Commercials – Commercial advertisements placed into the programming stream by a third party and passed through by the cable operator or other MVPD to viewers.**

- A. A cable operator or other MVPD must certify that its own transmission equipment is not at fault for any pattern or trend of compliance and may demonstrate compliance with ATSC A/85 RP by:
  - i. Relying on a network's or other programmer's certification of compliance with ATSC A/85 RP with respect to commercial programming provided that:
    - 1. Such certification is widely available by website or other means;
    - 2. The cable operator or other MVPD has no reason to believe that the certification is false; and
    - 3. The cable operator or other MVPD performs a spot check in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in its programming.
  - ii. Performing mandatory annual spot checks (Note: these are only mandatory for cable systems with a subscriber base greater than or equal to 400,000 as of 12/31/11). Annual spot checks are not mandatory for entities with a smaller subscriber base and will only be required in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in its programming. Such spot checks would need to be in compliance with 76.607(a)(3)(iv)(A),(B),(D) and (E).

**III. Use of a real-time processor.**

- A. A cable operator or other MVPD that installs, maintains and utilizes a real-time processor in a commercially reasonable manner will be deemed to comply with ATSC A/85 RP with regard to any commercial advertisements on which it uses such a processor provided that it:
  - i. Provides records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrates that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;
  - ii. Certifies that it either has no actual knowledge of a violation of the ATSC A/85 RP, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and
  - iii. Certifies that its own transmission equipment is not at fault for any pattern or trend of complaints.

**IV. Commercials inserted by cable operator or other MVPD's agent – commercial advertisements added to a programming stream for a cable operator or other MVPD by a third party after it has been received from the programmer but prior to or at the time of transmission to viewers.**

- A. Compliance with ATSC A/85 RP can be demonstrated by a cable operator or other MVPD by relying on the third party local inserter's certification of compliance provided that:
  - i. The cable operator or other MVPD has no reason to believe that the certification is false;
  - ii. The cable operator or other MVPD certifies that its own transmission equipment is not at fault for any pattern or trend of complaints; and
  - iii. The cable operator or other MVPD performs a spot check in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in its programming.

**2. OVERVIEW - WAIVERS**

The two types of waivers that can be granted under the CALM Act are as follows:

- A. Waiver of effective date for up to two years based on financial hardship.
- B. FCC's general authority to grant a waiver of compliance for good cause.

In both cases, the deadline for filing a waiver request will be 60 days prior to the Effective Date.

The FCC notes that it will not require waiver applicants to show negative cash flow but require that the assertion of financial hardship be reasonable under the circumstances. With respect to the general waiver, the FCC will grant such waivers as necessary (i) due to unforeseen circumstances and (ii) for MVPDs that demonstrate they cannot implement the CALM Act's requirements because of the technology that they use.

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## For More Information

**Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:**

Dana Frix  
+1 (202) 974-5691  
[dfrix@chadbourne.com](mailto:dfrix@chadbourne.com)

Christopher Bugel  
+1 (202) 974-5689  
[cbugel@chadbourne.com](mailto:cbugel@chadbourne.com)

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