

ACA MEMBER ADVISORY

FCC Implements the Commercial Advertisement and Loudness Mitigation (CALM) Act Prohibits Loud Commercials by December 13, 2012

Overview: On December 15, 2010, Congress passed the Commercial Advertisement and Loudness Mitigation (CALM) Act directing the FCC to incorporate and make mandatory the voluntary industry standard, ATSC A/85 Recommended Practices (“RP”), which was designed to reduce loudness in digital television commercial advertisement. On December 13, 2011, the FCC released a Report and Order (available [here](#)) adopting regulations and policies to implement the new statute. The Commission requires cable and satellite multichannel video program distributors (“MVPDs”) and broadcasting stations to ensure that digital television commercial advertisements are not being transmitted at louder volumes than the program material they accompany beginning December 13, 2012. Below is a summary of the requirements imposed upon MVPDs.

In its advocacy, ACA urged the FCC to realize that CALM Act compliance could be burdensome, particularly for smaller cable operators. In response, the FCC adopted a series of measures to make the obligations on these providers less onerous. That said, small cable operators are not free of all responsibilities, and it is important that you review carefully the new “loudness mitigation” requirements discussed below and the methods by which you can ensure compliance with them.

Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television (“ATSC A/85 RP”): This technical standard was first developed by the industry in 2009 to provide detailed guidance on loudness measurement methods for different types of content at different stages of distribution. It provides guidance to creators of audio and aggregators and distributors of that audio, including broadcast stations and MVPDs, and consumer device manufacturers on measuring and reducing loudness using an algorithm called “dialnorm” encoded as metadata into the audio stream. If the audio is correctly created, transmitted, and received, loudness should be effectively controlled.

Specific Requirements of MVPDs and Complaints

Basic Obligation: All MVPDs are responsible for controlling the loudness for “all of the commercials that they transmit” *digitally* whether these are embedded in programming they receive or whether these are inserted by them. The new rules, however, recognize that these responsibilities should vary for embedded and inserted content. These rules do not apply with respect to analog transmissions.

This material contained within this advisory is meant to inform American Cable Association members of recent legal developments, and should not be considered legal advice. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

“Pass Through” Requirement for all MVPDs: Beginning on December 13, 2012, all MVPDs, regardless of size, must have the equipment necessary to “pass through” programming, including commercial advertisements, compliant with the RP and be able to demonstrate that the equipment has been properly installed, maintained, and utilized.

Complaint Process: The FCC may from time to time send complaints received from consumers about loud commercial advertisements to MVPDs, which will serve to alert distributors to potential problems; however, the Commission will not send a Letter of Inquiry (“LOI”) signaling the start of an investigation unless there is a “pattern or trend of consumer complaints indicating possible noncompliance.”

Compliance

Introduction: When an MVPD receives a LOI from the FCC based on a pattern or trend of consumer complaints, it can avoid liability by:

- Proving actual compliance with the RP for the audio in the complained-of commercial advertisements by demonstrating that it has installed, maintained and utilized equipment compliant with the RP, which may include using a real time processor to ensure embedded commercials are compliant; or
- Demonstrating that it has complied with the Commission’s prescribed alternative approaches for (1) embedded commercials (“Safe Harbor”), or (2) locally inserted commercials (“Deemed in Compliance”).

Because it would be difficult for an MVPD to demonstrate retroactively that it has been in actual compliance with the RP for commercials that have already run (as described in first bullet above), MVPDs are expected to generally rely on the Safe Harbor or Deemed in Compliance rules.

Safe Harbor -- Alternative Approach for Compliance for Embedded Commercials: For any commercial advertisements that are embedded by an upstream programmer, the MVPD may fall under the Safe Harbor by:

- (1) Obtaining a certification of compliance from programmers (which must be performed prior to receipt of an LOI);
- (2) For larger MVPDs, conducting annual spot checks of non-certified programming to ensure compliance with the RP (which must be performed prior to receipt of an LOI); and
- (3) For all MVPDs, conducting spot checks of specific channels in the event the Commission notifies the MVPD of a pattern or trend of complaints (which would be performed after receipt of an LOI).

This material contained within this advisory is meant to inform American Cable Association members of recent legal developments, and should not be considered legal advice. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

Each of these requirements is described more fully below:

Certification of Compliance from Programmers: An MVPD will be eligible for the Safe Harbor with regard to the embedded commercials in particular programming if the supplier of the programming has provided a certification that its programming is compliant with the RP and the MVPD has no reason to believe the certification is false. A programmer's certification must be available to all MVPDs to count as "certification" for purposes of being in the Safe Harbor.

Non-Certified Programming - Annual Spot Checks by Larger MVPDs: In instances where a programmer has not provided a certification, larger MVPDs must perform annual spot-checks of non-certified commercial programming they carry. Broadcast television programming can be excluded from annual spot checks. MVPDs with more than 10 million subscribers nationwide must annually spot check 100 percent of non-certified programming carried by any system operated by the MVPD. MVPDs with between 400,000 and 10 million subscribers nationwide must annually spot check 50 percent (chosen at random) of the non-certified channels carried by any system operated by the MVPD. MVPDs with fewer than 400,000 subscribers do not need to perform any annual spot checks to be in the safe harbor. The first annual spot checks must be completed by December 13, 2013.

Once an MVPD has performed two consecutive annual spot checks on a given channel or program stream and encountered no evidence of noncompliance, it may cease to perform annual spot checks of that programming and will continue to be in the Safe Harbor with respect to that programming. Even though MVPDs with between 400,000 and 10 million subscribers nationwide will only be spot checking 50 percent of their non-certified programming per year, they are also excused from continued checks after two years, except that if any annual spot check shows noncompliance, the two-year requirement for that channel or programming will be reset.

An annual spot check requires monitoring 24 uninterrupted hours of programming at the output of the set-top box or television receiver with an audio loudness meter as specified in the RP, without providing prior notice to the programmer. If an annual spot check reveals non-compliance, the MVPD must inform the FCC and the programmer within 7 days. The MVPD must then conduct a follow-up spot check within 30 days and notify the FCC and the programmer of the results.

Pattern or Trend of Complaints -- Spot Checks: If the Commission becomes aware of a pattern or trend of sufficiently specific complaints, it may open an enforcement inquiry with the MVPD in question by sending an LOI. Whether relying on a certification or not, and irrespective of size, if an MVPD is notified by the Commission of a pattern or trend about a given channel or programming, and seeks to be or remain in the Safe Harbor, it

This material contained within this advisory is meant to inform American Cable Association members of recent legal developments, and should not be considered legal advice. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

must utilize its equipment to verify actual compliance with the RP by performing a spot check on that channel or programming on a going forward basis within 30 days of receiving notification from the Commission. Even though MVPDs with fewer than 400,000 subscribers nationwide are exempted from annual spot checks, distributors of this size must be prepared to conduct spot checks, or contract to have spot checks done, in response to a Commission inquiry triggered by a pattern or trend of complaints in order to remain within the Safe Harbor.

Outcome of the Spot Checks: Whether preformed as part of an annual audit of non-certified programming or in response to an FCC Letter of Inquiry, spot checks will require further action only if they indicate non-compliance on the part of a programming with respect to embedded commercials. If the spot check reveals actual compliance with the RP, then the station or MVPD continues to be in the safe harbor and need take no further action (except, where appropriate to notify the Commission in response to the letter of inquiry). If the spot check indicates non-compliance, however, then the MVPD has actual knowledge that the channel or programming does not comply with the RP. Within 7 business days, the MVPD must inform the Commission and the programmer in question of the non-compliance indicated by the spot check and direct the programmer's attention to any relevant complaints. The MVPD must then re-check the non-compliant commercial programming with a follow-up spot check within 30 days of notifying the Commission and the programmer and inform both of the response of the re-check.

Commercials Inserted by an MVPD's Agent: For commercials added to the programming stream by a third party after it has been received from the programmer, but prior to or at the time of transmission to viewers, the MVPD can rely on the third party's certification of compliance with the RP if (1) the MVPD has no reason to believe the certification is false and (2) the MVPD performs a spot check (as directed above) in response to a Notice of Liability regarding commercials inserted by that third party.

Deemed in Compliance – Alternative Approach for Compliance for Commercials Inserted by MVPD: For any commercials inserted by the MVPD prior to or at the time of transmission to viewers, the MVPD must install, utilize and maintain the equipment and software necessary to comply with ATSC A/85 RP in the ordinary course of business to measure the loudness of the commercials and ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio. Most likely this will be done prior to the insertion of each commercial. In response to an enforcement inquiry, the MVPD must also be able to show that the equipment has been periodically maintained and certify that the MVPD either has no actual knowledge of a violation of the ATSC A/85 RP or that any violations have been corrected promptly.

This material contained within this advisory is meant to inform American Cable Association members of recent legal developments, and should not be considered legal advice. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.

Waivers

Financial Hardship Waiver: the FCC may grant a 1 year waiver of the effective date of the rules to any MVPD for a particular system if the MVPD shows that it would be a financial hardship to obtain the necessary equipment to comply with the rules for that system. The waiver may be renewed for 1 additional year thereafter. To receive a waiver,

Large MVPD Systems (more than 15,000 subscribers) must provide (1) evidence of financial condition, (2) a cost estimate for obtaining the necessary equipment to comply with rules, (3) a detailed justification statement, and (4) an estimate of how long it will take to comply.

Small MVPD Systems (fewer than 15,000 subscribers) need only file a certification with the FCC that (1) it meets the definition of a small MVPD system, and (2) needs a delay of 1 year to obtain the specified equipment. The request for waiver is considered granted with receipt of the “acknowledgment of request.”

General Waiver: the FCC’s general waiver rule is available for unforeseen circumstances and for MVPDs that demonstrate an inability to implement the requirements due to the technology that they use.

Deadline: Waivers must be filed by 60 days before the effective date of the rules (i.e., October 14, 2012).

For More Information

If you have any questions about the information contained within in this advisory, please contact Rob Shema, VP/COO, of the American Cable Association at Rshema@americancable.org or (412) 922-8300, Ext. 30.

This material contained within this advisory is meant to inform American Cable Association members of recent legal developments, and should not be considered legal advice. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.