PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:


2. Section 180.1316 is added to subpart D to read as follows:

§ 180.1316 Pasteuria spp. (Rotylenchulus reniformis nematode)—Pr3; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of Pasteuria spp. (Rotylenchulus reniformis nematode)—Pr3 in or on all food commodities when applied as a nematicide and used in accordance with label directions and good agricultural practices.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[MB Docket No. 11–93; FCC 11–182]

Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules to implement the Commercial Advertisement Loudness Mitigation (“CALM”) Act. Among other things, the CALM Act directs the Commission to incorporate into its rules by reference and make mandatory a technical standard, developed by an industry standards development body, that is designed to prevent digital television commercial advertisements from being transmitted at louder volumes than the program material they accompany. As mandated by the statute, the rules apply to digital TV broadcasters, digital cable operators, and other digital multichannel video programming distributors (“MVPDs”).

The rulemaking proceeding, called the Commercial Advertisement Loudness Mitigation (CALM) Act proceeding, was closed on or before December 15, 2011.

DATES: Effective December 13, 2012. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of December 13, 2012.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Evan Baranoff, Evan.Baranoff@fcc.gov, or Lyle Elder, Lyle.Elder@fcc.gov, of the Media Bureau, Policy Division, (202) 418–2120 or Shabnam Javid, Shabnam.Javid@fcc.gov, of the Engineering Division, Media Bureau at (202) 418–7000.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Report and Order (R&O), FCC 11–182, adopted and released on December 13, 2011. The full text of this document is available electronically via ECFS at http://filers.fcc.gov/ecfs/ or may be downloaded at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1214/FCC-11-182A1.doc. [Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.] This document is also available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission’s copy contractor, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to fcc504@fcc.gov or calling the Commission’s Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Document Summary

I. Introduction

1. With this Report & Order (R&O), we adopt rules to implement the Commercial Advertisement Loudness Mitigation (“CALM”) Act. 1 Among other things, the CALM Act directs the Commission to incorporate into its rules by reference and make mandatory a technical standard, developed by an industry standards development body, that is designed to prevent digital television commercial advertisements from being transmitted at louder volumes than the program material they accompany. As mandated by the statute, the rules apply to digital TV broadcasters, digital cable operators, and other digital multichannel video programming distributors (“MVPDs”). 2 Also per the statute, the rules will take effect one year after adoption, and will therefore be effective as of December 13, 2012. 3 The rules we adopt today are designed to protect viewers from excessively loud commercials and, at the same time, permit broadcasters and MVPDs to implement their obligations in a minimally burdensome manner. As described below, we will require broadcast stations and MVPDs to ensure that all commercials are transmitted to consumers at the appropriate loudness level in accordance with the industry standard.

2. In this proceeding, we also adopt a compliance provision. 4 As mandated by the statute, the rules apply to digital TV broadcasters, digital cable operators, and other digital multichannel video programming distributors (“MVPDs”). 5 Also per the statute, the rules will take effect one year after adoption, and will therefore be effective as of December 13, 2012. 6

2. Section 180.1316 is added to subpart D to read as follows:

§ 180.1316 Pasteuria spp. (Rotylenchulus reniformis nematode)—Pr3; exemption from the requirement of a tolerance. An exemption from the requirement of a tolerance is established for residues of Pasteuria spp. (Rotylenchulus reniformis nematode)—Pr3 in or on all food commodities when applied as a nematicide and used in accordance with label directions and good agricultural practices.

Summary of the Commission’s Report and Order

In the Report to H.R. 1084, Senate Floor Consideration of S. 2847, 156 Cong. Rec., S7763 (daily ed. Sept. 29, 2010) (bill passed) (“Senate Floor Debate”); House Floor Consideration of S. 2847, 156 Cong. Rec. H7720 (daily ed. Nov. 30, 2010) (“House Floor Debate of S. 2847”); H7799 (daily ed. Dec. 2, 2010) (bill passed); House Report to H.R. 1084, 115 Cong. Rec. H14907 (daily ed. Dec. 15, 2009). The Senate and House Committee Reports were prepared before the bill was amended to add Section 5(c) of the CALM Act (the compliance provision). See Senate Floor Debate at S7763–S7764 (approving “amendment No. 4687”). See also House Floor Debate of S. 2847 at H7720 (Rep. Eshoo stating that “[w]ith the passage of this legislation, we will end the practice of consumers being subjected to advertisements that are ridiculously loud, and we can protect people from needlessly loud noise spikes that can actually harm their hearing. This technical fix is long overdue, and under the CALM Act, as amended by the Senate, consumers will be in the driver’s seat.”). We note that our action herein satisfies the statutory mandate that the Commission adopt final rules in this proceeding on or before December 15, 2011. 7 See Advanced Television Systems Committee (“ATSC”) A/85, “ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,” (July 25, 2011) (“RP” or “the RP”). To obtain a copy of the RP, visit the ATSC Web site: http://www.atsc.org/cms/standards/a_85-2011a.pdf. See also CALM Act sec. 2(a); Senate Committee Report to S. 2847 at 1; House Committee Report to H.R. 1084 at 1.

4 See CALM Act sec. 2(b)(1).

5 “Locally inserted” commercials are commercials added to a programming stream by a station or MVPD prior to or at the time of transmission to viewers. In contrast, commercials that are placed...
embedded commercials that stations and MVPDs pass through from programmers, we also establish a “safe harbor” to demonstrate compliance through certifications and periodic testing. This regime will make compliance less burdensome for the industry while ensuring appropriate loudness for all commercials.

II. Background

2. The CALM Act was enacted into law on December 15, 2010 in response to consumer complaints about “loud commercials.” The Commission has received complaints about loud commercials virtually since the inception of commercial television more than 50 years ago. Indeed, loud commercials have been a leading source of complaints to the Commission since the FCC Consumer Call Center began reporting the top consumer complaints in 2002. One common complaint is that a commercial is markedly louder than adjacent programming. The problem occurs in over-the-air broadcast television programming, as well as in cable, Direct Broadcast Satellite (“DBS”) and other video programming. The text of the CALM Act provides in relevant part as follows: 10

(2)(a) Rulemaking required. Within 1 year after the date of enactment of this Act, the Federal Communications Commission shall prescribe pursuant to the Communications Act of 1934 (47 U.S.C. 151 et seq.) a regulation that is limited to incorporating by reference and making mandatory (subject to any waivers the Commission may grant) the “Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television” (A/85), and any successor thereto, approved by the Advanced Television Systems Committee, only insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor. 11

(b) Implementation

(1) Effective Date. The Federal Communications Commission shall prescribe that the regulation adopted pursuant to subsection (a) shall become effective 1 year after the date of its adoption. 12

(2) Waiver. For any television broadcast station, cable operator, or other multichannel video programming distributor that demonstrates that obtaining the equipment to comply with the regulation adopted pursuant to subsection (a) would result in financial hardship, the Federal Communications Commission may grant a waiver of the effective date set forth in paragraph (1) for 1 year and may renew such waiver for 1 additional year. 13

(3) Waiver Authority. Nothing in this section affects the Commission’s authority under section 1.3 of its rules (47 CFR 1.3) to waive any rule required by this Act, or the application of any waiver granted to stations, operators, or distributors. 14

(c) Compliance. Any broadcast television station, cable operator, or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software in compliance with the regulations issued by the Federal Communications Commission in accordance with subsection (a) shall be deemed to be in compliance with such regulations. 15

(d) Definitions. For purposes of this section—

(1) The term “television broadcast station” has the meaning given such term in section 325 of the Communications Act of 1934 (47 U.S.C. 325). 16

(2) The terms “cable operator” and “multichannel video programming distributor” have the meanings given such terms in section 602 of Communications Act of 1934 (47 U.S.C. 522). 17

3. The Commission has not regulated the “loudness” of commercials in the past, primarily because of the difficulty of crafting effective rules due to both the subjective nature of loudness and the technical limitations of the NTSC standard used in analog television. 18

The Commission has incorporated by reference into its rules various industry standards on digital television, but these standards alone have not described a consistent method for industry to measure and control audio loudness. 19

10. See House Floor Debate of S. 2847 at H7721 (Rep. Eshoo stating that the law is in response to “the complaints that the American people have registered with the FCC over the last 50 years”).

11. See 1994 Order, FCC 94-300, 49 FR 28077, July 10, 1984 (’94 Order’) (observing in 1984 that “the Commission has received complaints of loud commercials for at least the last 30 years”). See also 47 CFR 73.4075; Public Notice, “Statement of Policy Concerning Loud Commercials,” 1 FCC 2d at para. 20[a] (1965) (unpublished) (“1965 Policy Statement”) (concluding that “complaints of loud commercials are numerous enough to require corrective action by the industry and regulatory measures by the Commission”).

12. To view the FCC’s Quarterly Inquiries and Complaints Reports, visit http://www.fcc.gov/cgb/quarter/. According to the FCC Consumer Call Center, since January 2008, the Commission has received approximately 1,000 complaints and 5,000 inquiries from consumers about “loud commercials.” The average number of monthly complaints has held at about 50 percent since 2009.

13. See Senate Committee Report to S. 2847 at 1–2. See also 1965 Policy Statement, 1 FCC 2d at para. 15 (stating that a “common source of complaint is the contrast between loudness of commercials as compared to the volume of preceding program material—e.g., soft music or dialogue immediately followed by a rapid-fire, strident commercial”).

The loud commercial problem seems to have been exacerbated by the transition to digital television. Perhaps because DTV’s expanded aural dynamic range allows for greater variations in loudness for cinema-like sound quality. As a result, when content providers and/or stations/MVPDs do not properly manage DTV loudness, the resulting wide variations in loudness are more noticeable to consumers. However, DTV technology also offers industry the opportunity to more easily manage loudness. We note that, because the Recommended Practice we are instructed to incorporate by reference and make mandatory is directed only at digital programming, the rules we adopt in this R&O deal only with commercials transmitted digitally, and do not apply to analog broadcasts or analog MVPD service.

4. The television broadcast industry has recognized the importance of measuring and controlling volume in television programming, particularly in the context of the transition to digital television. In November 2009, the Advanced Television Systems Committee (“ATSC”) completed and published the first version of its A/85 Recommended Practice (“the RP”), which was developed to offer guidance to the digital TV industry—from content providers to distributors—regarding loudness control. The RP provides detailed guidance on loudness measurement methods for different types of content (i.e., short form, long form, or file-based) at different stages of distribution (i.e., production, post-production and real time production). It provides detailed guidance on how to measure loudness, including “LKFS,”34 a method that provides a numerical value that indicates the perceived loudness of the content measured in units of “LKFS”35 by averaging the loudness of

to eliminate all loudness variations, but only prevent excessive loudness variations during content transitions. The RP also contains advice for systems without metadata to achieve the same result. See RP at Annex K.

30 AC-3 is one method of formatting and encoding digital multi-channel audio, typically by TV broadcast stations and many traditional cable operators. The AC-3 audio system is defined in the ATSC Digital Audio Compression Standard (A/52B), which is incorporated into the ATSC Digital Television Standard (A/53). See ATSC A/52B: “Digital Audio Compression (AC-3, E-AC-3) Standard, Revision B” (June 14, 2005).

31 The International Telecommunication Union (“ITU”) is a specialized agency of the United Nations whose goal is to promote international cooperation in the efficient use of telecommunications, including the use of the radio frequency spectrum. The ITU publishes technical recommendations concerning various aspects of radio communications technology. These recommendations are subject to an international peer review and approval process in which the Commission participates.

32 The ITU Radiocommunication Sector (“ITU-R”) plays a vital role in the global management of the radio-frequency spectrum and satellite orbits—limited natural resources which are increasingly in demand from a large array of services such as fixed, mobile, broadcasting, amateur, space research, emergency telecommunications, meteorology, global positioning systems, environmental monitoring and communication services—that ensure safety of life on land, at sea and in the skies.

33 See RP § 5 (“The specified measurement techniques are based on the loudness and true peak measurements defined by ITU-R Recommendation BS.1770—‘‘Algorithms to measure programme [sic] loudness and true-peak audio level’’”).

34 See RP § 3.4 (defining “[sic] Loudness’” as a subjective measure based on human perception of sound waves that can be difficult to quantify and thus to measure. The ITU utilized very extensive human testing to produce an algorithm that provides a good approximation of human loudness perception of program audio to measure the loudness of programs. “Volume,” in contrast to loudness, is an objective measure based on the amplitude of sound waves. Id (defining loudness as “[a] perceptual quantity; the magnitude of the physiological effect produced when a sound stimulates the ear”).

35 The measured value is presented in units of loudness K-weighted, relative to full scale (“LKFS”). LKFS units are equivalent to decibels. See RP § 3.3 and § 5.1.
audio signals in all channels over the duration of the content. In the RP, that value is called “dialnorm” (short for “Dialog Normalization”) and is to be encoded as metadata into the audio stream required for digital broadcast television. Stations/MVPDs transmit the dialnorm to the consumer’s reception equipment. Specifically, the RP provides operators with three metadata management modes for ensuring that the consumer’s equipment receives the correct loudness value.

6. The “golden rule” of the RP is that the dialnorm value must correctly identify the loudness of the content it accompanies in order to prevent excessive loudness variation during content transitions on a channel (e.g., TV program to commercial) or when changing channels. If the dialnorm value is correctly encoded—if it matches the loudness of the content, which depends in turn on accurate loudness measurements—the consumer’s receiver will adjust the volume automatically to avoid spikes in loudness.

7. In addition to requiring the Commission to incorporate the RP by reference, the CALM Act requires the Commission to incorporate by reference “any successor thereto.” After the CALM Act’s enactment, the ATSC approved several relevant changes to the RP. The ATSC approved a first successor document to the RP on May 25, 2011 and approved a second on July 25, 2011.45 The first successor added Annex J which provides guidance with respect to local insertions for operators using AC–3 audio systems.46 The second successor added Annex K which in turn provides instructions for operators using non-AC–3 audio systems.47 The RP states that Annexes J and K contain all the courses of action necessary to perform effective loudness control of digital television commercial advertising. Both Annexes state that “[i]t is vital that, when loudness of short form content (e.g., commercial advertising) is measured, it be measured in units of KFS including all audio channels and all elements of the soundtrack over the duration of the content.” Since there is no dialnorm metadata in non-AC–3 audio systems, the operator must ensure that the loudness of content measured in KFS matches the Target Loudness of the content in some cases, precisely because it reduces the dynamic range of the audio content. See RP § 8.1.1 (c), § 2.1.2 (c), and § 9.1.

8. We initiated this proceeding on May 27, 2011 by issuing a Notice of Proposed Rulemaking (“NPRM”). We sought comment on proposals regarding compliance, waivers, and other implementation issues. As discussed below, after reviewing the concerns expressed in the record, we seek to adopt rules that recognize the distinct role played by stations and MVPDs in the transmission of commercials under the RP. Accordingly, our rules incorporate the RP and make commercial volume management mandatory, as required by the CALM Act. The burden associated with demonstrating compliance in the event of complaints, and reflect the practical concerns described in the rulemaking record.

A. Section 2(a) and Scope

9. We hereby adopt our proposal to incorporate the RP by reference into our rules, as well as our tentative conclusion that the Commission may not modify the RP or adopt other actions inconsistent with the statute’s express limitations. In addition, we adopt our tentative conclusion that “all stations/MVPDs and not only those using AC–3 audio systems” are subject to our rules. We also tentatively concluded

36 Loudness is measured by integrating the weighted power of the audio signals in all stereo audio channels (plus any surround-sound audio channels) over the duration of the content. See RP § 5.1.

37 See RP § 1.1.

38 Metadata or “data about the (audio) data” is instructional information that is transmitted to the home (separately, but in the same bit stream) along with the digital audio content it describes. See RP § 1.1. The dialnorm and other metadata parameters are integral to the AC–3 audio bit stream.

39 Use of AC–3 audio systems is required for TV stations as a result of the Commission’s incorporation by reference into its rules of the ATSC, DTV Loudness Tutorial Summary at 1 (“When content is measured with the ITU–R BS.1770 at 1 (“The DTV Loudness Tutorial Summary”)

40 From the consumer’s perspective, the dialnorm metadata parameter defines the volume level at which the sound needs to be reproduced so that the consumer will end up with a uniform loudness level across programs and commercials without a need to adjust it again. See RP § 1.1. See also ATSC DTV Loudness Tutorial Summary at 1 (“When content is measured with the ITU–R BS.1770 measurement algorithm and dialnorm metadata is transmitted that correctly identifies the loudness of the content it accompanies, the ATSC AC–audio system presents DTV sound capable of cinema’s range but without loudness variations that a viewer may find annoying.”).

41 We note, however, that compliance with the RP does not guarantee that a commercial will not seem loud to a viewer. A commercial could, for example, include loud sounds in part and softer sounds in part and overall comply with the RP. In addition, the loudness measurement does not account for all of the perceptual qualities of sound which could make a commercial seem louder to a listener.

42 See RP § 7.2.

43 See ATSC DTV Loudness Tutorial Summary at 1 (“A complaint (the golden rule) for management of loudness in an ATSC audio system is to ensure that the average content loudness in units of KFS matches the metadata’s dialnorm value in the AC–3 bit stream. If these two values do not match, the metadata cannot correctly ensure that the consumer’s DTV sound level is consistently reproduced”). See also RP § 5. Following the golden rule can be achieved in multiple ways under the RP, including using a real-time processor to ensure consistent loudness that matches the dialnorm value. We recognize, however, that this solution can be less desirable for industry and consumers in some cases, precisely because it reduces the dynamic range of the audio content. See RP § 8.1.1 (c), § 8.1.2 (c), and § 9.1.

44 See RP § 1.1 and § 4.


46 See RP at Annex J.

47 See RP at Annex K.

48 The second successor document added Annex K for use by non-AC–3 digital audio systems, which includes many MVPDs. Non-AC–3 audio systems use different compression and coding techniques from AC–3, such as MPEG–1 Layer 2 (MP2) or Advanced Audio Coding (AAC). See RP at Annex K.

49 Id. See para. 12 (reasoning that “[t]he statute explicitly expresses a preference to leave matters of personal behavior to the states”) at para. 12 (reasoning that “[t]he statute explicitly expresses a preference to leave matters of personal behavior to the states”).

50 Id. at J.4. The only difference between Annex K–4 and Annex J–4 is the phrase “short form” before “content” at the end of the sentence. Id. at K.4.

51 Target Loudness is a specified value, established to facilitate content exchange from a content provider to a station/MVPD. See RP § 3.4.
in the NPRM that "stations/MVPDs are responsible for all commercials 'transmitted' by them." We conclude that the statute makes each station/MVPD responsible for compliance with the RP as incorporated by reference in our rules with regard to all commercials it transmits to consumers, including both those it inserts and those that are "embedded" in programming it receives from program suppliers. As set forth above, this conclusion is consistent with the statutory language, the legislative history, and the RP.

10. Our conclusion rests on our reading of the CALM Act and the RP. As set forth above, the CALM Act directs the Commission to "incorporate[e] by reference and mak[e] mandatory" the RP "only insofar as" it "concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor." As one commenter accurately observes, the RP "relies not on a single entity to control the audio loudness, but rather on an entire 'ecosystem' of all participants to ensure that correct audio levels are maintained—ranging from when an advertisement is created through display on the consumer's home." Consistent with the statute, however, the rules we adopt today are limited to station/MVPD responsibilities under the RP. Our rules are also limited to the regard of the audio system they currently use. Nothing in the statutory language or legislative history suggests an intent to make an exception for MVPDs that do not use AC-3 audio systems.). See also RP at Annex K (providing "recommendations * * * based on other sections of this RP" as to "courses of action to perform effective loudness control * * * when using non-AC-3 audio codecs").

12. Our conclusion that stations/MVPDs are responsible for compliance with regard to "embedded" as well as "inserted" commercials is consistent with Congressional intent as well as the language of the statute and the RP. Examination of the legislative history reflects that Congress's purpose in regulating the volume of audio on commercials was to "make the volume of commercials and regular programming uniform so consumers can control sound levels." Our reading of the statute and the RP carries out this purpose by requiring that all commercials transmitted by stations/MVPDs comport with the RP, regardless of whether they are "inserted" or "embedded." The record reflects that most commercials are not inserted in programming by stations/MVPDs, but rather upstream by broadcast or cable networks; in some cases, more than 95% of the commercials transmitted are embedded within programming when it is sent to stations/MVPDs. Our interpretation carries out Congress's purpose by requiring compliance with the RP's provisions uniformly for all commercials transmitted by stations/MVPDs, not just the minority they happen to insert.

13. We find unpersuasive the arguments of some industry commenters that the responsibility of stations/MVPDs under the CALM Act and the RP is limited to ensuring that those

control; without it, transmission of "embedded" commercials that comport with the RP would be impractical at best.

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commercials they insert are set to the correct diurnal norm value or meet the Target Loudness.76 Several commenters argue that imposing responsibility on stations/MVPDs for a task the RP “assigns” to others would exceed our statutory authority.77 We do not disagree. As described above, however, the “practices” described in the RP include actions that stations and MVPDs must take to cooperate with their content providers78 to ensure that all of the programming they transmit conforms with the RP, including commercials that they pass through in real time.79 Thus, our interpretation is consistent with the responsibilities set forth in the RP, as well as with the statutory focus on stations and MVPDs, and does not shift responsibilities under the RP from third parties to stations/MVPDs.80

14. Some commenters also argue that stations/MVPDs can only be held responsible under the Commission’s regulations for actions that the RP identifies as “vital.”81 We disagree. The Annexes to the RP set forth a variety of “practices,” referred to variously as “vital,” “preferred,” or “should” be followed, and “critical,” which apply to various industry participants.82 Some of those industry participants are subject to the CALM Act and some are not. The statute, in turn, directs us to make the RP mandatory insofar as it “concerns the transmission of commercial advertisements” by stations/MVPDs.83 The statute makes no distinction among these types of actions or between commercials “inserted” by stations/MVPDs and others.84 In light of the fact that the RP covers parties and practices that are outside the scope of the statute, we must exercise considerable care in implementing the statutory directive to incorporate the RP by reference to the extent that it concerns transmission of commercials by stations/MVPDs. Based on our examination of the record, we believe that the most reasonable reading of the statutory language, together with the RP itself, is to make stations/MVPDs responsible, all of the commercials that they transmit, but to recognize that their responsibilities under the RP vary for inserted and embedded content.

15. We also reject the argument that station/MVPD responsibilities under the RP as incorporated into the Commission’s rules should be limited to those set forth in Annexes J and K to the RP, adopted after passage of the CALM Act.85 These Annexes do not purport to describe all practices that concern the transmission of commercials by a station/MVPD, nor do they do so. Rather, we read them as addressing only the actions required when entities insert commercials into programming. They do not override the RP as a whole.86 Sections 8.1 and 8.3 of the RP, directing stations and MVPDs to themselves take various actions to “ensure” the proper loudness level of all the content they transmit, not just the commercials they insert, provide that such actions are “critical” for compliance with the RP.87 Moreover, as set forth above, the RP as a whole depends on stations’ and MVPDs’ cooperation with their programming providers to ensure proper loudness control for the commercials that they transmit. Neither Annex, nor any other amendment to the RP, changes the critical nature of such cooperation.

16. We believe that our reading fulfills the statutory purpose better than the narrow one advocated by some industry commenters. Interpreting the statute such that stations’/MVPDs’ responsibility to ensure that they do not transmit loud commercials applies only to those commercials that they insert would render the statute largely meaningless because consistent loudness cannot be achieved without applying the RP to all commercials. That is, commercials cannot be “present[ed] to viewers at a consistent loudness” if only some—and not all—of the commercials conform to the engineering solutions developed in the RP. Simply put, inserting properly modulated commercials next to improperly modulated ones will not solve the loudness problem, and as a practical matter, consumers neither know nor care which entity inserts commercials into the programming stream. Congress did not intend to adopt only part of the industry’s technical solution or to exclude from the solution essential elements for its success. To the contrary, Congress intended the Commission to implement the engineering solution with respect to all commercials and to make stations/MVPDs responsible for achieving that solution.88

17. Some commenters contend that the legislative history of the CALM Act demonstrates that Congress’ intent was narrow, aiming at some but not all commercials. These commenters point to earlier, unsuccessful versions of the legislation that would have granted the Commission broad authority to establish loudness standards.89 We disagree. The “more circumscribed language” of the CALM Act as it was ultimately adopted does not absolve stations/MVPDs of responsibility for the vast majority of commercials they transmit.90 The legislative history reflects a Congressional decision to require regulation in accordance with the RP in lieu of a broad grant of authority for the Commission to establish technical standards. As indicated above, however, nothing in the statutory language or legislative history reflects that Congress did not intend that the RP be applied to all commercials.91

76 See, e.g., Verizon Comments at 13, NCTA Comments at 9–10, AT&T Comments at 4, ACA Comments at 6, TWC Reply at 2–3, DIRECTV Comments at 12, Comcast Ex Parte at 1 (October 6, 2011); Verizon Comments at 13, NCTA Comments at 6, TWC Reply at 2–3, DIRECTV Comments at 12, Comcast Ex Parte at 1 (October 6, 2011) (arguing that the Commission “lacks discretion to * * * assign[s] to others would exceed our statutory authority.”)
77 See, e.g., NCTA Comments at 6 (stating that “the Commission would exceed its very specific statutory focus on stations and MVPDs, for a task the RP from third parties to stations/MVPDs can only be held responsible for all of the commercials that they transmit, not just the commercials they transmit.89 The
78 See, e.g., NAB Comments at 3; ACA Comments at 11; Reply of CenturyLink at 5 (“CenturyLink Reply”)
79 See, e.g., Verizon Comments at 6, 8.
80 See, e.g., House Floor Debate of S. 2847 at H7720 (Rep. Eshoo stating that the bill would “eliminate the ear-splitting levels of television advertisements and return control of television sound modulation to the American consumer”); Senate Committee Report to S. 2847 at 1 (stating purpose of bill); NAB Comments at 3–4; RP ¶ 4.4 (“Key Idea: Goal is to present to the viewer consistent audio loudness across commercials, programs, and channel changes.”) (emphasis in original).
81 The term “vital” (used only in the Annexes) indicates that a certain course of action is preferred (no deviation is permitted). The term “should” indicates a course of action to be followed strictly (no deviation is permitted). "Critical" elements of the RP are based on other sections of this Recommended Practice."
82 47 U.S.C. 621(a).
83 Id. at §§ 8.1 and 8.3.
editorial change that would conflict with a licensee’s obligations to accept political advertisements under Section 315 of the Communications Act. Based on the current record, we also find no policy or legal reason to exempt program-length commercials or commercial advertisements promoting television programming (“promos”) from the scope of the rules.98 First, we find no basis in the statute, the legislative history, or the RP for exempting promos from the definition of commercial advertisements for the purpose of the CALM Act. Specifically, the statute does not distinguish between commercials promoting the products or services of third parties and those promoting the station’s or MVPD’s own commercial television programming, whether shown on the same or a different channel. The RP, which the statute directs us to incorporate by reference into our rules, likewise makes no such distinction. Instead, it distinguishes between “short form” or “interstitial” content and “long form” content, treating “promotional” material as “short form” content equivalent to advertising.99 Moreover, we do not believe that exempting promos would serve the statutory purpose of preventing commercials from being transmitted at louder volumes than the programming they accompany. From a consumer perspective, we believe that there is no difference between promos and other commercials. Were we to exclude promos, television programmers could advertise their own programming at a higher volume than surrounding programming or other commercial advertisements. Accordingly, we find that it is most consistent with the statutory language and purpose to require that the loudness of promos comply with the RP.100 We emphasize that our determination that promos are covered by the definition of commercial advertisements is limited to the use of that term in the CALM Act and that this determination does not change how promos are categorized for any other purpose or Commission rule. We will address any other definitional issues surrounding “commercial advertisements” on a case-by-case basis as they arise.

2. Successor Documents

20. We observed in the NPRM that Section 2(a) mandates that the required regulation incorporate by reference and make mandatory “any successor” to the RP, affording the Commission no discretion in this regard.101 Accordingly, we tentatively concluded that notice and comment would be unnecessary to incorporate successor documents into our rules.102 On further reflection, we now conclude that, although the “good cause” exception excuses compliance with notice and comment requirements under these circumstances, the public interest will be better served by an opportunity for comment in most cases. Examination of the record reflects that interpretation may be required to determine how the RP successors apply to the transmission of commercial advertisements by stations/MVPDs pursuant to the CALM Act, and that interpretive work can only benefit from public input.103 If, however, a successor is not sufficiently substantive to require interpretation or public comment, we will simply adopt the successor by Public Notice. As proposed in the NPRM, for the present we will incorporate by reference into our rules the current successor to the RP, adopted by ATSC prior to the adoption of this Report and Order.104

21. The ACA argues that the foregoing statutory mandate constitutes an improper delegation of legislative authority because it ties the Commission’s hands and provides no guidance for the ATSC as to the content

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93 NPRM at para. 11.
94 Id.
95 Id.
96 Id.
97 See, e.g., HHI Comments at 4–5; AT&T Comments at 6; ACA Reply at 5, n.19; NCTA Comments at 13.
98 This is consistent with the definition of an “advertisement” in Section 399B of the Act. Section 399B of the Communications Act defines the term “advertisement” as “any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended—(1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for public office.” See 47 U.S.C. 399b(a). It is also consistent with the definition of “commercial matter” in the children’s television commercial limits rules. In the context of commercial limits rules during children’s programming, the Commission defines “commercial matter” as “airtime sold for purposes of selling a product or service and promotions of television programs or video programming services other than children’s or other age-appropriate programming appearing on the same channel or promotions for children’s educational and informational programming on any channel.” See 47 CFR 73.670 Note 1; 47 CFR 76.225 Note 3.
100 We note that, although the Commission specifically asked about this issue in the NPRM at para. 11, it was not addressed at all in the comments or replies. Some Ex Parte filers did object to treating promotional announcements, particularly those made on premium networks, as “promos” for purposes of the CALM Act. See, e.g., Time Warner, Inc. Ex Parte (October 26, 2011), Verizon Ex Parte (December 6, 2011), NCTA Ex Parte (December 6, 2011). These Ex Partes, however, provide no justification or rational basis for such a distinction, simply stating without support that “promotion” has alternative meanings in other contexts. We reiterate that non-commercial broadcast stations are excluded from the statute except to the extent they transmit commercial advertisements as part of an “ancillary or supplementary service.”
101 47 U.S.C. 399b(a).
102 Id., citing 5 U.S.C. 552(a)(1) (providing that Administrative Procedure Act’s notice and comment requirements do not apply when the agency for good cause finds, and incorporates the finding and a brief statement of reasons therefor in the rules issued, that notice and public procedure thereon are unnecessary).
103 See ACA Comments at 17 (“By eschewing a notice and comment process, the Commission will fail to fully and properly analyze and interpret the obligations placed by any ‘successor’ [RP] on MVPDs and programmers.”).
104 See NPRM at para. 13. As the NPRM indicated, we ask that the ATSC notify us whenever it approves a successor to the RP, submit a copy of it into the record of this proceeding, and send a courtesy copy to the Chief Engineer of the Media Bureau. Id.
of successor standards. The Commission, however, “may not ignore the dictates of the legislative branch.” Our obligation to incorporate by reference into our rules successor RP is clear and, therefore, we do not address ACA’s argument that we cannot incorporate the current version of the RP. We note, however, that we disagree with ACA’s unsupported contention that if the successor clause were held to be an improper delegation, it would render the entire CALM Act null and void “since Congress clearly considered this clause an essential part of the statute.” The salient question for a court would be: “would Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?”

The CALM Act as a whole does not appear to us to be so dependent, conditional, or connected to the statutory clause “and any successor thereto” as to warrant a conclusion that Congress would not have passed the CALM Act without that clause. In any event, the severability issue makes no difference here, because the current RP is consistent with the preexisting one, and our rules implement the RP both as it existed at the time of the CALM Act’s enactment and in its current form. In other words, our action herein would be the same in material respects in the absence of the ATSC’s post-CALM Act amendments. Thus, if a court were to conclude that the successor provision in the CALM Act was an invalid but severable delegation, it would affect only incorporation of future successor RP documents.

B. Compliance and Enforcement

22. Below, we discuss procedures stations and MVPDs may follow with regard to locally inserted commercials in order to be “deemed in compliance” with the rules in the event of an FCC investigation or inquiry. We then establish a “safe harbor,” based on a proposal by NCTA, for stations and MVPDs to demonstrate compliance with regard to embedded commercials through certifications and periodic testing. We intend to initiate an investigation program to receive a pattern or trend of consumer complaints indicating possible noncompliance.

Stations or MVPDs that seek to be “deemed in compliance” or in the “safe harbor” need not demonstrate, in response to an FCC enforcement inquiry, that they complied with the RP with regard to the complained-of commercial or commercials, and they will not be held liable for noncompliant commercials that they previously transmitted. The procedures we adopt, however, are optional, and any station or MVPD may instead choose to demonstrate actual compliance, in response to an FCC enforcement inquiry prompted by a pattern or trend of complaints, with the requirements of the RP with regard to the commercial(s) in question, as well as certifying to the Commission that its current transmission equipment is not at fault. If unable to do so, the station or MVPD may be liable for penalties or forfeitures. If we find that our approach (“deemed in compliance,” “safe harbor,” complaint-driven enforcement, etc.) does not appear to be effective in ensuring widespread compliance with the RP, we will revisit it to the extent necessary.

1. Deemed in Compliance/Safe Harbor

23. The CALM Act states that “[a]ny broadcast television operator, cable operator, or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software in compliance with the regulations issued by the Federal Communications Commission in accordance with subsection (a) shall be deemed to be in compliance with such regulations.” As described in the NPRM and discussed in detail below, we conclude that the scope of this provision is limited to situations in which the station or MVPD itself installs, utilizes, and maintains the equipment required to comply with the RP. Stations and MVPDs use such equipment for locally inserted commercials, and could similarly be deemed in compliance under the statute for embedded commercials by performing real-time processing.

However, we believe that stations, MVPDs, content providers, and consumers disfavor real-time processing due to its harm to overall audio...
quality.\textsuperscript{118} Based on the information in the record submitted in response to the NPRM, we will establish a safe harbor for stations and MVPDs with respect to embedded commercials that does not require real-time processing.\textsuperscript{119} The safe harbor is derived from the RP’s reliance on cooperation by stations and MVPDs with upstream program providers to ensure proper loudness control of the content that is passed through to viewers in real time without additional processing by the station or MVPD.\textsuperscript{120} Under these circumstances, the station or MVPD itself does not use the equipment necessary to encode dialnorm value into a commercial and thus does not ensure compliance through those means. This safe harbor provides a simple way for stations and MVPDs to respond to an enforcement inquiry regarding embedded commercials so as to reduce their burden of demonstrating compliance without forcing them to use equipment that distorts the audio they transmit.

24. First, it is essential that stations and MVPDs have the proper equipment to pass-through RP-compliant programming. Therefore, we conclude that all stations and MVPDs must have the equipment necessary to pass through programming compliant with the RP, and be able to demonstrate that the equipment has been properly installed, maintained, and utilized. We note that the necessary equipment will vary depending on whether a station or MVPD uses an AC–3 audio system or not, whether it needs to encode incoming program streams, and other factors.\textsuperscript{121} MVPDs will be considered compliant with this requirement so long as the processes used for transmitting to subscribers the information contained in the transmissions of digital program networks correctly maintains the relative loudness of network commercials and long-form content consistent with the RP. This equipment is required in many cases for the provision of any audio at all, and is therefore necessary but not sufficient for parties to be “deemed in compliance” under Section 2(c) of the CALM Act, to enter the “safe harbor” we establish for embedded content, or to demonstrate actual compliance with the RP. In the context of an enforcement inquiry, any station or MVPD must be prepared to certify to the Commission that its own transmission equipment is not at fault for any pattern or trend of complaints.\textsuperscript{122}

25. Second, we have considered proposals in the record describing how stations and MVPDs may be “deemed in compliance” under the statute and the Commission’s rules, and, as discussed below, we have adopted or adapted many of these suggestions in crafting our rules. We note that our approach regarding embedded commercials is based in large part on an MVPD-focused proposal offered by NCTA, which NCTA described as having the support of other industry participants.\textsuperscript{123}

26. Consistent with our conclusion above with respect to the scope of Section 2(c) of the CALM Act, the measures set forth below for safe harbor protection with regard to embedded content fall outside of the statutory “deemed in compliance” section because they need not involve installation, use, or maintenance of “equipment and associated software” by a station/MVPD.\textsuperscript{124} Our interpretation harmonizes Section 6211c with the statutory command to “mak[e] mandatory” all of the RP’s recommendations concerning the transmission of commercials by stations/MVPDs, not just those that they insert locally. In contrast, interpreting Section 2(c) more broadly, as some industry commenters urge,\textsuperscript{125} such that stations and MVPDs would not have to take any actions beyond those prescribed in Section 2(c) even with respect to embedded commercials, would place the majority of commercials that they transmit beyond the Commission’s enforcement authority, thereby undermining the statutory purpose.

27. In the discussion below, we describe our conclusion to establish two approaches for stations and MVPDs: (1) “Deemed in compliance” (with regard to locally inserted commercials or with regard to all commercials where real-time processing is employed) and (2) “safe harbor” (with regard to embedded commercials). We emphasize, however, that following these approaches does not relieve these entities of their obligations under the CALM Act. We reiterate that all stations and MVPDs are required to comply with the RP. In response to questions raised in the NPRM,\textsuperscript{126} the record reflects that compliance can be difficult to demonstrate retroactively. Therefore, the “deemed in compliance” and “safe harbor” approaches offer alternative methods by which stations and MVPDs may demonstrate ongoing compliance with the RP in the event of a pattern or trend of complaints that leads to a Commission inquiry. If they prefer, parties may choose to demonstrate actual compliance with the RP in response to an FCC enforcement inquiry.

a. Local Insertions

28. As noted above, the CALM Act states that “[a]ny broadcast television operator, cable operator, or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software in compliance with the regulations issued by the Federal Communications Commission in accordance with subsection (a) shall be deemed to be in compliance with such regulations.”\textsuperscript{127} Application of this standard is fairly straightforward with respect to commercial advertisements inserted into the program stream by stations or MVPDs, and we agree with NAB’s argument that a station or MVPD should be deemed in compliance for these inserted commercials when it uses the equipment in the ordinary course of business 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.\textsuperscript{128}

As a practical matter, and as indicated by NAB, the equipment would be used by the station or MVPD prior to the

\textsuperscript{118} Such processing can be undesirable for industry and consumers precisely because it reduces the dynamic range of the audio content.

\textsuperscript{119} See Ex Parte DIRECTV and DISH Network Ex Parte (October 27, 2011).

\textsuperscript{120} See 47 CFR 1.17. Final Rules (47 CFR 73.682(e)(2)(i), § 76.607(a)(2)(ii)).

\textsuperscript{121} See, e.g., NPRM at para. 28.

\textsuperscript{122} Final Rules (47 CFR 73.682(e)(2)(iv), § 76.607(a)(2)(ii)).

\textsuperscript{123} Final Rules (47 CFR 73.682(e)(2)(iv), § 76.607(a)(2)(ii)).

\textsuperscript{124} See, e.g., NPRM at para. 30. Stations and MVPDs can comply with the RP by ensuring the loudness of embedded commercials is controlled by real-time processing, rather than through cooperation with program providers, but rarely do so.

\textsuperscript{125} See Ex Parte DIRECTV and DISH Network Ex Parte (October 27, 2011).

\textsuperscript{126} See 47 CFR 73.682(e)(2)(ii), § 76.607(a)(2)(ii).

\textsuperscript{127} See Ex Parte DIRECTV and DISH Network Ex Parte (October 27, 2011).

\textsuperscript{128} See 47 CFR 73.682(e)(2)(ii), § 76.607(a)(2)(ii).
insertion of each commercial to ensure that it complies with the RP. In response to an enforcement inquiry concerning local insertions, a station or MVPD must provide 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. In addition, in response to such an inquiry, the station or MVPD must certify that it either has no actual knowledge of a violation of the RP or that any such violation of which it has become aware has been corrected promptly upon becoming aware of such a violation. Upon receipt of this information and certification, the station or MVPD will be deemed in compliance with the RP with respect to commercials it inserted. We note here, as guidance for stations and MVPDs, that we do not believe that a station or MVPD that has actual knowledge of a violation but fails to correct the problem has utilized the equipment used to encode the commercials in a “commercially reasonable manner.” Therefore, it is not entitled to “deemed in compliance” treatment under the statute.

b. Embedded Commercials

30. For embedded commercials, which a station or MVPD receives from an upstream programmer, we conclude that there are two options: (1) Use a real-time processor to be deemed in compliance, or (2) follow the components of the “safe harbor” we describe herein.

Stations and MVPDs are not able to modify the embedded commercials they transmit to viewers except by use of real-time processing equipment that distorts the audio. Commenters report, and our engineering analysis confirms, that no equipment is currently available that stations or MVPDs can use to set the dialnorm value or meet the Target Loudness in real time for embedded commercials they transmit to viewers. Nor are they in direct control of the production or encoding of these commercials such that they could use their equipment to bring them into compliance with the RP prior to transmission (even if they have access to the commercials prior to transmission). Nonetheless, as explained above, the CALM Act requires stations and MVPDs to ensure the compliance of these commercials with the statute and our rules. Given the limitations in their options for controlling embedded commercials onsite, stations and MVPDs are likewise limited in their ability to rely exclusively on equipment to be deemed in compliance. Therefore, relying on the record and the RP, we establish a regulatory safe harbor, in which stations and MVPDs can take the steps discussed below to, first, significantly reduce the likelihood of any noncompliance with the RP, and, second, quickly resolve any problems that do arise. The safe harbor is based on a proposal filed by NCTA. We largely adopt the framework of NCTA’s proposal and, at the same time, modify several components in order to ensure that the goals of the statute are fully achieved.

32. To use the safe harbor, stations and MVPDs must undertake certain activities: obtain widely available certifications of compliance from programmers; conduct annual spot checks of non-certified programming to ensure compliance with the RP (for larger stations and MVPDs); and conduct spot checks of specific channels in the event the Commission notifies the station or MVPD of a pattern or trend of complaints. Not all MVPDs or stations must perform an annual spot check in order to use the safe harbor. Following NCTA’s proposal, we rely on the largest MVPDs and stations to perform spot checks in the specific situations discussed below. Because we anticipate that the need for annual spot checks will diminish after the first two years, due in part to the likely increase in the number of programmers that certify compliance, we terminate the requirement for annual spot checks after two years on an individual channel or program stream basis, provided no problems are found and certifications remain in force.

33. In formulating the safe harbor, we began with the proposal in the NPRM to consider contractual arrangements and quality control monitoring as a practical means to address embedded commercials. For example, we asked in the NPRM whether parties should rely on contracts with programmers to ensure compliance, and if that approach had downsides for small stations and MVPDs. Commenters responded with concerns about a purely contractual approach, particularly for smaller entities. As a result, we have moved away from a contractual approach and adopt instead the requirement that certifications be widely available. We also asked in the NPRM “what, if any, quality control measures [stations and MVPDs] should take to monitor the content delivered to them for compliance with the act.”

138 NCTA Ex Parte (October 18, 2011).
139 If necessary, MVPDs and stations can contract to have third parties perform the spot checks.
140 NPRM at paras. 23–24.
141 See, e.g., ACA Comments at 26–27.
transmission to consumers.”

Commenters objected to a requirement for constant monitoring, and the safe harbor instead requires spot checks in some cases. The following paragraphs describe these and other requirements for using the safe harbor.

(i) Certified Programming

34. A station or 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 station or MVPD has no reason to believe the certification is false. A programmer’s certification must be available to all stations and MVPDs in order to count as a “certification” for purposes of being in the safe harbor. Virtually all MVPDs receive the same programming feed of a given channel. Consequently, if the programmer provides RP-compliant programming and commercials to one station or MVPD, then it should be similarly compliant for all stations and MVPDs receiving that same programming, NCTA proposed use of a widely available certification (available through a Web site, for instance) as an alternative to the NPRM proposal for contractual terms that would promise compliant commercials. NCTA expressed concern about possible delays and expense to open and re-negotiate numerous individual contracts, and proposed that widely available certifications avoid these problems. ACA raised similar concerns regarding the difficulty smaller operators face in getting certifications from their programming contracts, even when, as here, the changes would be costless to the programmer. In addition, many programmers have corporate or financial relationships with particular MVPDs, raising the possibility that certifications might be offered only to an affiliated MVPD or provided on more favorable terms to certain MVPDs. Widely available certifications, as proposed by NCTA, solve all of these problems by obviating the need for individual contractual certifications. Because, as discussed above, the same program feed goes to all distributors, as a practical matter an individual certification would provide the same assurance as a widely available certification. Not all parties, however, would know of the existence of the certification, placing some at an unfair disadvantage because they would be unaware of something that would allow them to avoid the need for spot checks. Therefore, we require that a certification be widely available in order to qualify as a certification for purposes of being in the safe harbor. We express no opinion on the appropriate duration of certifications, but in order for a station or MVPD to rely on a certification, that certification must be in effect. If a programmer terminates a certification, stations and MVPDs that are required to perform annual spot checks must begin to perform annual spot checks of the programmer’s channel (as discussed immediately below) in order to continue to be in the safe harbor regarding commercials on that channel. This will be the case even if they are performing no other annual spot checks because those spot checks have “phased-out,” as discussed in paragraph 40, below. We encourage programmers to provide initial widely available certifications before December 13, 2012, when the rules take effect, to reduce the number of annual spot checks that stations and MVPDs would need to do to be in the safe harbor.

(ii) Non-Certified Programming: Annual Spot Checks

35. In order to be in the safe harbor regarding commercial channels and programming for which there is no programmer certification, larger MVPDs and stations must perform annual spot-checks of the non-certified commercial programming they carry. Specifically, large television stations and very large MVPDs must annually spot check 100 percent of noncertified programming carried by the station, or by any system operated by the MVPD. Large (but not “very large”) MVPDs must annually spot check 50 percent (chosen at random) of the noncertified channels carried by any system operated by the MVPD. Stations and MVPDs should not count (and do not need to spot check) duplicating channels or streams unless there is some reason to believe that the audio on, for instance, an SD stream should be loudness measurement equipment prior to a Commission inquiry. In the event of an inquiry, year 2011. See, e.g., BIA Kelsey Inc. Media Access Pro Television Database, showing the annual receipts for 2010. We will rely on the version of this list that is based on data available as of December 31, 2011 for purposes of the rules implementing the CALM Act.

153 “Very large MVPDs” are defined, for these purposes, as those with more than 10 million subscribers nationwide. To provide certainty and clarity to MVPDs, we will consider “very large” those MVPDs with more than 10 million subscribers as of December 31, 2011. Per NCTA, this would include the four largest MVPDs. See http://www.ncta.com/Stats/TopMSPs.aspx (visited November 16, 2011) showing the number of subscribers for the top 25 MVPDs based on 2010 data. We will rely on the version of this list that is based on data available as of December 31, 2011 for purposes of the rules implementing the CALM Act.

154 Final Rules (47 CFR 73.682(e)(3)(iii), § 76.607(a)(3)(ii)(A)).

155 “Large MVPDs,” for these purposes, are those serving more than 400,000 subscribers nationwide. This definition is derived from the Commission’s definition of “small” cable in 47 CFR 76.901(e). To provide certainty and clarity to MVPDs, we will consider “large” those MVPDs with more than 400,000 but fewer than 10 million subscribers as of December 31, 2011. Per NCTA, this would include 11 MVPDs. See http://www.ncta.com/Stats/TopMSPs.aspx (visited November 16, 2011) showing the numbers of subscribers for the top 25 MVPDs based on 2010 data. We will rely on the version of this list that is based on data available as of December 31, 2011 for purposes of the rules implementing the CALM Act.

156 Final Rules (47 CFR 76.607(a)(3)(ii)(A)).

157 This avoidance of duplication largely addresses the concerns raised by DIRECTV and DISH Network in their November 16, 2011 Ex Parte filing, about the number of channels they could potentially be required to spot check in the absence of certifications.

158 Final Rules (47 CFR 73.682(e)(3)(iii), § 76.607(a)(3)(ii)).
stations and MVPDs will have 30 days to complete a spot check. This will allow small entities to preserve their financial flexibility while still being in a position to address a pattern or trend of complaints brought to their attention by the Commission. We note, however, that small stations and MVPDs, just like larger ones, are required by the CALM Act and our rules to comply with the requirements of the RP. And, in the event of an enforcement inquiry, these small entities must be able to demonstrate that they have the equipment necessary to pass through programming compliant with the RP, demonstrate that the equipment has been properly installed, maintained, and utilized, and show that the equipment was not the source of any problem.

37. Under our approach, we place differing obligations depending on the size of the entity. These distinctions are based on both the valid NCTA argument that, if the larger companies take care of performing spot checks and obtaining certifications, the same programming carried by smaller companies is likely to comply with the CALM Act, and on our interest in reducing burdens on small entities. Each very large MVPD is required to spot check each non-certified channel on only one of its systems that carry that programming. Given that all programmers, including each regional sports network, may not be carried by the top four MVPDs, we also require the middle group of MVPDs (those with more than 400,000 but fewer than 10 million subscribers) to conduct a more limited number of spot checks. We do this to increase the likelihood that all programmers will be checked and that programming provided to all geographic areas, including regional programming, will be tested. As the parties explain, requiring annual spot checks by smaller stations and MVPDs is both unnecessary and more burdensome than asking the same of larger parties. Unlike larger stations and MVPDs, many smaller entities lack the necessary loudness measurement equipment, and, while it is appropriate to require smaller entities to obtain the use of such equipment in the case of complaints, there is little benefit to requiring small entities to do so simply in order to check a programming stream that is already being checked by others. Under our approach, small entities would be freed from the need to purchase loudness monitoring equipment, an additional expense that would provide the measurement technique specified in the RP, and reviewing the records from that monitoring to detect any commercials transmitted in violation of the RP. To promote the reliability of the spot check, the station or MVPD must not provide prior notice to the programmer of the timing of the spot check. This requirement applies with respect to all spot checks (annual or in response to a Commission inquiry) on all programming, and for all stations and MVPDs—large and small. Stations (and occasionally MVPDs) may have multiple program suppliers for a single channel/stream of programming. In these cases, there may be no single 24-hour period in which all program suppliers are represented. In such cases, an annual spot check could consist of a series of loudness measurements over the course of a 7-day period, totaling no fewer than 24 hours, that measure at least one program, in its entirety, provided by each non-certified programmer that supplies programming for that channel or stream of programming. To verify that the operator’s system is properly passing through loudness metadata, spot checking must be conducted after the signal has passed through the operator’s processing equipment (e.g., at the output of a set-top box or television receiver). If a problem is found, a station or MVPD may check multiple points in its reception and transmission process to determine the source of the noncompliance. For a spot check to be considered valid, a station or MVPD must be able to demonstrate appropriate maintenance records for the audio loudness meter and to demonstrate, at the time of any enforcement inquiry, that appropriate spot checks had been ongoing.

39. Exclusion of Broadcast Programming from Spot Checks. We will not require MVPDs to include broadcast television programming in their annual spot checks. Unlike the non-broadcast programming carried by MVPDs, which is provided by third parties totally outside the scope of these rules, a significant amount of broadcast programming will already be annually spot checked by large broadcast stations pursuant to these rules. More to the point, we have explicit jurisdiction over broadcast stations themselves under the Act, and any problems arising as a result of the loudness of their commercials can be more effectively dealt with by addressing them directly with broadcast stations. This is particularly important with must-carry broadcast signals, which MVPDs are prohibited from either modifying or dropping. All MVPDs are responsible for not harming the broadcast signal, however, and must properly use the necessary equipment to pass through programming compliant with the RP, such that the broadcast programming is transmitted without altering its compliance with the RP. We note that, if the Commission becomes aware of a pattern or trend of complaints about broadcast programming carried on an MVPD, while the over-the-air viewers of the same programming have not filed similar complaints, that may indicate that there is a problem with the MVPD's
transmission equipment, for which the MVPD will be liable.

40. Phase-Out of Annual Spot Check Obligation. Once a given station or 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 but continue to be in the safe harbor with respect to that programming.170 Because this phase-out applies to individual channels or program streams, any new, non-certified channel or programming must undergo the full two years of spot checks before the requirement phases out with respect to that programming.171 Although “large” MVPDs (between 400,000 and 10,000,000 subscribers) will be spot checking only 50 percent of their non-certified programming, 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 (that is, the two-year period will begin anew for that channel or programming until there is no noncompliance for a full two years).172 Similarly, if a spot check undertaken in response to an enforcement inquiry in the context of a pattern or trend of complaints (discussed below) reveals noncompliance, the two-year requirement will be reset for that channel or programming even if it has been previously phased out.173

(iii) Pattern or Trend of Complaints: Spot Checks

41. If the Commission becomes aware of a pattern or trend of sufficiently specific complaints, it may open an enforcement inquiry with the station or MVPD in question.174 Whether relying on a certification or not, and irrespective of size, if a station or MVPD is notified by the Commission of a pattern or trend of sufficiently specific complaints about a given channel or programming, and seeks to be or remain in the safe harbor, it 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.175 Although we do not require stations and MVPDs to perform spot checks in response to complaints they receive directly, we encourage them to do so if they become aware of a pattern or trend even absent Commission action. If a Commission inquiry is opened and a station or MVPD can demonstrate that it has already performed a spot check in response to the same pattern or trend that led to the inquiry, no additional spot check will be required. We note that, as ACA explained, a pattern or trend of complaints from viewers of a single station or MVPD about programming that is being transmitted on other stations or MVPDs without triggering complaints on those other stations or MVPDs may be an indication that the problem lies with the station’s or MVPD’s equipment, rather than with the programming itself.176

42. Financial Inability to Perform Spot Checks. Small MVPDs and stations, as discussed above, are not required to conduct annual spot checks, and will be in the safe harbor for embedded commercials transmitted in all programming that they carry, even if that programming is not certified.177 As with larger stations and MVPDs, however, stations and MVPDs that are treated as “small” for purposes of the CALM Act must have the equipment necessary to pass through programming compliant with the RP, and be able to demonstrate that the equipment has been properly installed, maintained, and utilized. In the context of an enforcement inquiry, small stations and MVPDs must be prepared to certify to the Commission that their own transmission equipment is not at fault for any such pattern or trend. They must also 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. We do not require a station or MVPD to purchase the necessary equipment to conduct spot checks in response to a Commission inquiry; it may borrow or contract for use of the equipment.178 Stations and MVPDs may seek to delay the effective date of the rules for up to two years through a financial hardship waiver and may seek general waivers (also discussed below) for non-financial reasons, as discussed below.

(iv) Outcome of Spot Checks

43. Whether performed 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 noncompliance on the part of a programmer 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).180 If the spot check indicates noncompliance, however, then the station or MVPD has actual knowledge that the channel or programming does not comply with the RP. Within seven business days, the station or MVPD must inform the Commission and the programmer in question of the noncompliance indicated by the spot check, and direct the programmer’s attention to any relevant complaints.181 We note that noncompliance can be the result of deficiencies in the equipment the station or MVPD uses to pass through programming, rather than any problem with the commercials as provided by a

170 Final Rules (47 CFR 73.682(e)(3)(iii)(C)(III), § 76.607(a)(3)(iv)(C)(III)). The two years runs from the effective date of the rules as to the given station or MVPD. This phase-out of annual spot checks does not affect the obligation to perform spot checks in response to an enforcement inquiry in the context of a pattern or trend of complaints, as discussed below.

171 Final Rules (47 CFR 73.682(e)(3)(iv)(C)(III), § 76.607(a)(3)(iv)(C)(IV)). We expect and encourage MVPDs to seek certification from new programmers as part of their carriage negotiations.


173 By a “pattern or trend” we mean complaints sufficiently numerous and specific to justify focused review by the station/MVPD and the Commission. We decline to define what number of complaints is sufficient to constitute a pattern or trend, as this judgment will be fact-specific, based on such matters as the ratio of complaints to subscribers.

174 For example, based on a staff review of the Commission’s online filing system (COALS), we know that smaller operators will often contract for technical analysis of their systems, for instance the performance of signal leakage tests.

175 Final Rules (47 CFR 73.682(e)(3)(iv)(D)(II), § 76.607(a)(3)(iv)(D)(II)).

176 The rule allows the Enforcement Bureau to specify a time other than 30 days, when appropriate. Final Rules (47 CFR 73.682(e)(3)(iv)(D)(II), § 76.607(a)(3)(iv)(D)(II)). A station or MVPD that is in the safe harbor need not verify whether the complained of programming was in compliance, although it may do so if it wishes (and obviate the need for a prospective spot check) by providing the necessary information to demonstrate past compliance. As noted above, a station or MVPD can contract with a third party to perform the spot check if necessary. A spot check performed in response to an FCC inquiry may not be counted toward any annual spot check obligations of a station or MVPD. A station or MVPD that opts not to conduct the prospective spot checks is no longer in the safe harbor and must respond to a Commission enforcement inquiry by demonstrating actual compliance with respect to the complaints referenced in the Letter of Inquiry and provide other information requested therein.


programmer. Stations and MVPDs should be mindful of this possibility in their review of the spot check data and check their own equipment as appropriate. The station or MVPD must then re-check the noncompliant commercial programming with a follow-up spot check within 30 days of notifying the Commission and the programmer, and inform both of the result of the re-check.183 If the station or MVPD finds no further noncompliance with the RP, then the station or MVPD will continue to be in the safe harbor.183

44. If, however, the re-check reveals noncompliance with the RP, then the station or MVPD, going forward, is no longer in the safe harbor for that channel or programming.184 The station’s or MVPD’s actual knowledge that the commercials in the programming are not compliant with the RP means that station or MVPD is liable for future commercial loudness violations in that programming, notwithstanding any certification or previous spot check of that programming.185

c. Third-Party Local Insertions

45. The rulemaking record evidences that some stations and MVPDs contract with third parties to handle sales of its available commercial time and encode/insert local commercials into program streams, rather than the station or MVPD handling this process itself.186 For the reasons discussed above, if a station or MVPD does not itself install, utilize and maintain the equipment used to encode the loudness of a commercial either before or at the time of its transmission, it cannot be “deemed in compliance” pursuant to the CALM Act.187 Furthermore, these third-party local insertions are unlike commercials embedded in nationally distributed programming. Third-party inserters of local commercials provide a service to stations and MVPDs and place their equipment at the station or MVPD’s facilities. The third-party inserter sells commercial time to advertisers and shares the payment with the station or MVPD, thus functioning as the agent of the station or MVPD in that process.188 The NPRM sought comment on circumstances that might pose practical problems for compliance and means of demonstrating compliance.189 Given that the record presents this situation, which does not fall neatly into one of the situations we have described above (that is, local insertion or embedded commercial), we adopt a hybrid approach for such stations and MVPDs utilizing the same components presented in the NPRM and addressed in the comments. Specifically, we find that, in order to be in the safe harbor for the commercials inserted by these third parties, the station or MVPD, regardless of size, must acquire a certification from the third party that all commercials it is inserting comply with the RP, and that it is inserting those commercials into the programming transmitted by the station or MVPD such that they comply with the RP.190 Just as with embedded commercials, in response to a FCC Letter of Inquiry, a station or MVPD must have no reason to believe that the certification is false, and perform a spot check of the inserted commercials without providing notice to the third-party inserter to determine, going forward, whether the inserted commercials in fact comply, and take steps to ensure that any discovered noncompliance is remedied.191 This spot check will follow the same format as discussed above for other embedded programming. The record supports the conclusion that stations or MVPDs that use third party inserters have the ability to insist on such certifications as part of their business relationships.192

d. Complaints

46. As discussed above, we will rely on consumers to bring any potential noncompliance to our attention. We believe that a consumer-complaint-driven procedure, rather than an audit-driven one, is the most practical means to monitor industry compliance with our rules. In order for us to detect whether a pattern or trend of noncompliance exists and for stations and MVPDs to investigate them, it is essential that consumer complaints be specific in describing the commercials complained of, as well as identifying the station or MVPD and programming network on which the commercials appeared.193 As a general matter, non-specific complaints will not be actionable. In addition, we note that while it may seem to some consumers that a commercial is loud, the commercial may, nevertheless, comply with the RP. As noted above, commercials, like the programming they accompany, include content covering a range of audio levels, some of which may seem loud without violating the RP.

47. Filing a Complaint. Consumers may file a complaint alleging a loud commercial electronically using the Commission’s online complaint form (specifically Form 2000e) found at http://esupport.fcc.gov/complaints.htm. We have added “loud commercials” as a complaint category. Consumers may also file complaints by fax to 1–866–418–0232 or by letter mailed to Federal Communications Commission, Consumer & Governmental Affairs Bureau, Consumer Inquiries & Complaints Division, 445 12th Street SW., Washington, DC 20554, although we reiterate the need for detailed information. Consumers who want assistance filing their complaint may contact the Commission’s Consumer Call Center by calling 1–888–CALL–FCC (1–888–225–5322) (voice) or 1–888–TELL–FCC (1–888–835–5322) (tty).194 There is no fee for filing a consumer complaint.

48. Complaint Details. The only way the Commission will be in a position to detect a pattern or trend of commercial loudness complaints is if consumers include detailed information allowing us to identify the specific distributor, program at issue, and commercial. Therefore, as proposed in the NPRM, we will require complaints to contain detailed information, which will enable us to take appropriate action.195 Form 2000e is designed to elicit the information that is needed for this purpose.196 To ensure that the Commission is able to take appropriate action on a complaint, the complaint

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183 Final Rules (47 CFR 73.682(e)(3)(iv)(E)(II)).

184 Final Rules (47 CFR 73.682(e)(3)(iv)(E)(I)).

185 Final Rules (47 CFR 73.682(e)(3)(iv)(E))).

186 In the context of an enforcement action the Commission can consider the specific facts and circumstances of the alleged violation, including any mitigating factors.

187 See, e.g., ACA Comments at iv; ACA Ex Parte at 3 (October 26, 2011).

188 CALM Act at sec. 2(c).

189 AACA Ex Parte (October 26, 2011).

190 NPRM at paras. 26–32.

191 Final Rules (47 CFR 73.682(e)(5)), § 76.607(a)(5).

192 ACA Ex Parte at 3 (October 26, 2011).

193 We note that a television broadcast station must retain in its local public inspection file a copy of a complaint filed with the Commission about a loud commercial under the Commission’s existing rules. See 47 CFR 73.3526(e)(10) (requiring commercial TV stations to retain in its local public inspection file material relating to a Commission investigation or complaint to the Commission). The rule requires a station to retain the complaint in its public file until it is notified in writing that the complaint may be discarded.

194 We also encourage consumers to visit the Consumer & Governmental Affairs Bureau Web site at http://www.fcc.gov/ogih/ or to visit our online Consumer Help Center at http://reboot.fcc.gov/consumers/.

195 NPRM at para. 35.

should clearly indicate that it is a “loud commercial” complaint and include the following information: (1) The complainant’s contact information, including name, mailing address, daytime phone number, and email address if available; (2) the name and call sign of the broadcast station or the name and type of the MVPD against whom the complaint is directed; (3) the date and time the loud commercial problem occurred; (4) the channel and/or network involved; (5) the name of the television program during which the commercial was viewed; (6) the name of the commercial’s advertiser/sponsor or product involved; and (7) a description of the loudness problem. We will evaluate the individual complaints we receive and track them to determine if there are patterns or trends that suggest a need for enforcement action. If we receive complaints that indicate a pattern or trend affecting multiple MVPDs or stations, we will be conscious of the greater resources available to large entities when determining where to address our initial inquiries.

C. Waivers

49. The CALM Act includes two waiver provisions: A waiver of the effective date for up to two years based on financial hardship and a reservation of the Commission’s general authority to grant a waiver for good cause.

While our goal is to provide authority to grant a waiver for good cause may be warranted in other circumstances, and, per the CVAA, stations and MVPDs may seek waivers of these statutory requirements for good cause under Section 1.3 of our rules. We conclude that the waiver process we adopt is responsive to ACA’s concerns that the equipment to monitor programming is expensive and the costs are disproportionately large for MVPDs with small systems.

We also note that we have adopted a safe harbor approach, as discussed above, that does not require smaller MVPDs to audit programming or negotiate with contractors for certifications, thereby reducing the burden for these entities to demonstrate their compliance.

50. Financial Hardship Waiver. Section 2(b)(2) of the CALM Act provides that the Commission may grant a one-year waiver of the effective date of the rules implementing the statute to any station or MVPD that shows it would be a “financial hardship” to obtain the necessary equipment to comply with the rules, and may renew such waiver for one additional year.

As we stated in the NPRM, the legislative history indicates that Congress intended us to interpret “financial hardship” broadly and, in particular, recognizes “that television broadcast stations in smaller markets and smaller cable systems may face greater challenges budgeting for the purchase of equipment to comply with the bill than television broadcast stations in larger markets or larger cable systems.”

51. We adopt the four-part test we proposed in the NPRM for larger stations/MVPDs seeking a waiver on the grounds of financial hardship based on their need to obtain equipment to comply with the loudness requirements in the RP.

Specifically, to request a financial hardship waiver pursuant to Section 2(b)(2), the station/MVPD must provide: (1) Evidence of its financial condition, such as financial statements; (2) a cost estimate for obtaining the necessary equipment to comply with the required regulation; (3) a detailed statement explaining why its financial condition justifies postponing compliance; and (4) an estimate of how long it will take to comply, along with supporting information.

52. For small stations and MVPDs, we adopt a more streamlined financial hardship waiver approach.

We agree with the commenters who argued that smaller stations and MVPDs may find it particularly burdensome to comply with our rules by the effective date.

We also agree that, because smaller entities are more likely to face financial hardship in complying with our rules, the process for smaller entities to obtain a waiver should not itself be burdensome. Accordingly, we adopt a streamlined waiver process for smaller entities that face a financial challenge in obtaining the equipment needed to comply with our rules. Specifically, a

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197 Section 2(b)(2) of the CALM Act provides as follows: “WAIVER.—For any television broadcast station, cable operator, or other multichannel video programming distributor that demonstrates that they have negative cash flow or would be a ‘financial hardship’ to obtain the necessary equipment to comply with the rules, and may renew such waiver for one additional year.”

198 As noted above, the legislative history recognizes that obtaining the necessary equipment to comply with the rules may be a financial hardship for small broadcast stations and small cable/MVPD systems. See Senate Committee Report to S. 2847 at 4.

199 As directed by Section 2(b)(2), stations/MVPDs may request a waiver for one year under our waiver standard. Entities granted a waiver may request a renewal of the waiver for one additional year if they can demonstrate that circumstances continue to prevent them from obtaining the necessary equipment to comply with the CALM Act requirements.

200 As noted above, the legislative history recognizes that obtaining the necessary equipment to comply with the rules may be a financial hardship for small broadcast stations and small cable/MVPD systems. See Senate Committee Report to S. 2847 at 4.

201 See Comments of ACA at 13–15 and Letter from Jonathan Friedman, Counsel for Comcast Corporation, to Marlene Dortch, Secretary, FCC, dated October 6, 2011, at 2.
small station or MVPD (as we define below) that seeks a waiver must file with the Commission a certification that it: (1) Meets our definition of small for this purpose, and (2) needs a delay of one year to obtain specified equipment in order to avoid the financial hardship that would be imposed if it were required to obtain the equipment sooner.210 The station or MVPD is not required to submit any proof of financial condition. Small broadcast stations and small MVPDs may consider the waiver granted when they file this information online and receive an automatic “acknowledgement of request,” unless the Media Bureau notifies them of a problem or question concerning the adequacy of the certification.

53. The streamlined financial hardship waiver is available to “small broadcast stations” and “small MVPD systems” that request a one-year delay in the effective date based on their need to obtain equipment to comply with the rules adopted to implement the CALM Act, including the RP incorporated by reference.211 We define a “small broadcast station” for purposes of the streamlined waiver as either a station with no more than $14.0 million in annual receipts or that is located in television markets 150 to 210.212 Although we proposed in the NPRM to limit small market stations that would be eligible for the streamlined waiver process to those not affiliated with a top-four network (i.e., ABC, CBS, Fox and NBC),213 we are persuaded by NAB that the waiver should be available to all stations in markets 150 through 210. We agree with NAB that a station’s network affiliation is not necessarily determinative of its financial ability to purchase new equipment, and even stations affiliated with a top-four network in smaller markets may be struggling as advertising revenue in those markets is more limited than in larger markets.214 For simplicity, we combine the definition of a small station, regardless of the market size, with the definition of a small market station, and treat them both as a “small broadcast station” for purposes of the CALM Act financial waiver.

54. Consistent with our proposal in the NPRM,216 we will define a “small MVPD system” eligible for the streamlined waiver process as one with fewer than 15,000 subscribers (as of December 31, 2011) that is not affiliated with a larger operator serving more than 10 percent of all MVPD subscribers.217 We note that our definition of “small MVPD system” for purposes of the streamlined waiver is different from our definition of smaller MVPDs for purposes of being in the safe harbor. We are using a small MVPD system definition for purposes of the streamlined waiver because we believe that this waiver should be available only to those systems that are most likely to face financial hardships in complying with the RP. We note that stations and MVPDs that want a waiver and do not qualify under the streamlined waiver provision can apply for a waiver under the four-part waiver test described above. We disagree with ACA’s proposal to use an MSO-based definition as we did in the “bargaining agent” condition in the Comcast-NBC Universal proceeding, which set the threshold at 1,500,000 subscribers.218 As discussed above, we have adopted a regulatory scheme that does not require small MVPDs to audit programming and relies them to negotiate with programmers for contractual certifications. We conclude that, combined, the approach we have taken with respect to MVPD compliance with the Act, the streamlined waiver provisions we are adopting for small MVPD systems, and the four-part waiver test for larger MVPD systems, appropriately address the concerns raised by ACA.

55. We decline to adopt a “blanket” waiver for financial hardship, as proposed by some commenters.219 We believe a blanket approach, which would automatically grant a waiver to all small entities without requiring an individual showing of financial hardship, would be over-inclusive of stations and MVPDs that do not actually need the additional time to obtain equipment and would unnecessarily delay the benefits of the CALM Act for their viewers. We also are not persuaded that a blanket approach would be consistent with the statute, which contemplates grant of waivers based on individual showings of financial hardship.220 The streamlined waiver approach we are implementing is simple and straightforward and is, in fact, less burdensome than the approach suggested by some commenters.221 Moreover, we note that stations and MVPDs seeking to be in the safe harbor are not expected to enter into contracts with program suppliers as we anticipated in the NPRM,222 but instead can rely on a less burdensome certification and spot check approach, thus meeting the argument that stations/ MVPDs need additional time to amend their contracts.223 This certification and

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210 The certifying entity must identify or provide a description of the kind of equipment it intends to obtain; however, it need not specify the model number. 211 Entities granted a waiver may request a renewal of the waiver for one additional year if they certify that (1) they meet our definition of small, and (2) financial circumstances continue to prevent them from obtaining the necessary and specified equipment to comply with the CALM Act requirements. The filing requirements to request a waiver for a second year are the same as those for the initial waiver request. 212 This definition is consistent with the SBA’s small business definition for a television broadcast station. See also 13 CFR 121.201, NAICS Code 515120. NAB proposed that we use this definition as one criterion to identify stations that qualify as “small” for purposes of the waiver. See NAB Comments at 9. 213 See NAB Comments at 9. 214 See NPRM at para. 40. 215 See NAB Comments at 9–10. 216 See NPRM at para. 40. 217 See NCTA Comments at 19. This definition is consistent with Section 76.901(c) of our rules (defining a “small system” as a cable system serving 15,000 or fewer subscribers). See 47 CFR 76.901(c). The affiliation exclusion is consistent with our definition of a small MVPD operator in the cable carriage context, which excludes an MVPD system that was affiliated with an MVPD operator serving more than 30 percent of all MVPD subscribers in DTV Broadcast Carriage Signals Order, FCC 08–193, 73 FR 61742, October 17, 2008 (holding that “cable systems that either have 2,500 or fewer subscribers and are not affiliated with a large cable operator serving more than 10 percent of all MVPD customers * * * are exempt from the requirement to carry high definition versions of broadcast signals for three years following the [DTV] Transition”). 218 See ACA Reply Comments at 6, note 25 (citing In the Matter of Applications of Comcast Corporation, Germany, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011)), Appendix A. 219 See Comments of ACA at 32 (supporting a blanket financial hardship waiver for small MVPDs) and NAB at 9–10 (supporting a blanket waiver for stations that are “small businesses”). See also Comments of NCTA at 19–20 (supporting waiver of the rules for small MVPD systems “as a class”) and OPATSCO–NCTA–WTA at 4–5 (supporting a streamlined waiver provision for small MVPDs, MVPDs using older equipment or older technologies, and rural LEC-affiliated MVPDs). 220 See 47 U.S.C. 621(b)(2) (“For any television broadcast station, cable operator, or other multichannel video programming distributor that demonstrates that obtaining the equipment to comply with the regulation adopted pursuant to subsection (a) would result in financial hardship, the [FCC] may grant a waiver of the effective date set forth in paragraph (1) for 1 year and may renew such waiver for 1 additional year.”). 221 For example, OPATSCO–NCTA–WTA would have required small MVPDs to describe the equipment purchases needed to comply with the RP and an estimate of the costs associated with the purchase, installation, and maintenance of that equipment. See OPATSCO–NCTA–WTA Comments at 4. We also note that, while we do not adopt the blanket financial hardship waiver proposed by ACA, our streamlined waiver approach is less burdensome than the blanket waiver recommended as an alternative to a blanket waiver. See ACA Comments at 32 and ACA Reply Comments at 14. 222 See NPRM, 26 FCC Rcd at 8294–5, para. 23. 223 See also Comments of NAB at 9 (noting that it can take up to a year and a half or more for a station to take the steps necessary to comply, including negotiating contracts with third-party programming providers and noting that this process
spot check procedure should prove less burdensome for all stations and MVPDs and should reduce the number of entities that need to request a waiver. We note that small stations and MVPDs are not required to perform annual spot checks, and therefore would only need equipment to perform a spot check if the FCC initiates an inquiry.\footnote{See NPRM at para. 41.}

56. General Waiver. Section 2(b)(3) of the CALM Act provides that the statute does not affect the Commission’s authority to waive any rule required by the CALM Act, or the application of any such rule, for good cause shown with regard to any station/MVPD or class of stations/MVPDs under Section 1.3 of the Commission’s rules.\footnote{See, e.g., Comments of OPASTCO–NCTA–WTA at 2–3 (noting that it is expensive for MVPDs that provide service via coaxial cable systems or Internet protocol television (“IPTV”), and that often utilize older equipment, to upgrade to comply with the RP).} We will use our general waiver authority, consistent with Section 2(b)(3), for waivers necessitated by unforeseen circumstances as well as for MVPDs that demonstrate they cannot implement the RP because of the technology they use.\footnote{For small MVPD systems, most of the steps they must take to comply with the RP may be taken on their behalf by a third-party programmer providing embedded commercials or third-party contractors providing local insertions. Consequently, we expect that small MVPDs will be less likely to need to obtain equipment, and, therefore, less likely to need a waiver to delay the effective date of the rule. In the event they are going to obtain monitoring equipment to conduct spot checks, or equipment to insert local commercials themselves, they will have the additional time afforded by the waiver, and we intend to grant waivers to small MVPDs in these circumstances.} Several commenters noted that some entities might face particular difficulty complying with the RP because of the outdated or alternative technology they employ.\footnote{See 47 U.S.C. 621(b)(3) (codifying CALM Act § 2(b)(3)). See 47 CFR 1.3 (the Commission’s rules “may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission” and “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.”).} Grant of a waiver under such circumstances would be more likely to be in the public interest if the waiver recipient can demonstrate that it, by some other means, will be able to prevent the transmission of loud commercials, as intended by the CALM Act.

57. Filing Deadline. Absent extraordinary circumstances, the deadline for filing a waiver request pursuant to either Section 2(b)(2) of the CALM Act or Section 1.3 of the Commission’s rules will be 60 days before the effective date of the rules. While we proposed a deadline of 180 days before the effective date in the NPRM,\footnote{See NPRM at para. 43.} we agree with NAB that a 60-day deadline is more practical and will still afford the Media Bureau enough time to consider these requests before our rules take effect.\footnote{We will use our general waiver authority, consistent with Section 2(b)(3), for waivers necessitated by unforeseen circumstances as well as for MVPDs that demonstrate they cannot implement the RP because of the technology they use.\footnote{For small MVPD systems, most of the steps they must take to comply with the RP may be taken on their behalf by a third-party programmer providing embedded commercials or third-party contractors providing local insertions. Consequently, we expect that small MVPDs will be less likely to need to obtain equipment, and, therefore, less likely to need a waiver to delay the effective date of the rule. In the event they are going to obtain monitoring equipment to conduct spot checks, or equipment to insert local commercials themselves, they will have the additional time afforded by the waiver, and we intend to grant waivers to small MVPDs in these circumstances.} Several commenters noted that some entities might face particular difficulty complying with the RP because of the outdated or alternative technology they employ.\footnote{See 47 U.S.C. 621(b)(3) (codifying CALM Act § 2(b)(3)). See 47 CFR 1.3 (the Commission’s rules “may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission” and “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown.”).} Requests for waiver renewals must be filed at least 60 days before the waiver expires.\footnote{See NAB Comments at 10–11. The 60-day requirement precludes the Media Bureau with adequate time to contact the waiver applicant in the event of a question regarding its certification. See 47 CFR 1.3.}

58. Filing Requirements. A station or MVPD must file a financial hardship or general waiver request electronically into this docket through the Commission’s Electronic Comment Filing System (“ECFS”) using the Internet by accessing the ECFS: http://www.fcc.gov/ecfs/. The filing must be clearly designated as a “financial hardship” or “general” waiver request and must clearly reference this proceeding and docket number. Requests for “general” waiver must comply with Section 1.3 of our rules.\footnote{See 47 CFR 1.3.} All filers will receive a confirmation online after their waiver has been successfully submitted through ECFS. It is recommended that applicants for a streamlined waiver retain this confirmation for their records. We will not impose a filing fee for waiver requests pursuant to the waiver provisions of the CALM Act.\footnote{See 47 CFR 1.3.}

IV. Conclusion

59. The CALM Act directs us to incorporate by reference into our rules and make mandatory the RP to “make the volume of commercials and regular programming uniform so consumers can control it.”\footnote{“Financial hardship” or “general” waiver requests filed by cable operators pursuant to CALM Act secs. 2(b)(2) and 2(b)(3) and 47 CFR 1.3 are not “Cable Special Relief Petitions” under § 76.7 of the Commission’s rules, and are therefore not subject to a statutory filing fee. See 47 U.S.C. 158(g). Section 76.7(a)(1) of the rules provides, inter alia, that the Commission may waive “any provision of this part 76” in response to a petition by a cable operator. Requests for waiver pursuant to Section 1.3 of the Commission’s rules would not involve waiver of any part 76 provisions, so the general procedures in § 76.7 would be inapplicable.} To achieve this directive, we incorporate the RP into our rules, establish a consumer-complaint-driven process to identify genuine instances of noncompliance, and specify the means by which all regulated parties may be “deemed in compliance” with our regulations or enter the safe harbor depending on the content involved. These rules implement the statute as Congress intended for the benefit of consumers while limiting the compliance burden on stations and MVPDs.

V. Procedural Matters

A. Final Regulatory Flexibility Act Analysis

60. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)\footnote{See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Public Law 104–121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWA”).} an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the Notice of Proposed Rule Making in this proceeding.\footnote{See 47 CFR 1.3.} The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.\footnote{See NPRM.}
This R&O incorporates the RP by reference, and, pursuant to the statute, makes stations and MVPDs fully responsible for all commercial advertisements they transmit. 238

62. Commission enforcement actions will be based on a pattern or trend of complaints. Stations and MVPDs may demonstrate actual compliance in response to such an inquiry by providing records of the audio levels of the complained-of programming. However, the statute recognizes, and the rulemaking record confirms, that such demonstrations can be impractical and difficult. Therefore, the R&O provides two methods by which entities may more easily demonstrate ongoing compliance. First, with respect to locally inserted commercials, stations and MVPDs may demonstrate that they install, utilize, and maintain, in a commercially reasonable manner, equipment and software to comply with the RP. Second, for embedded commercials, the R&O provides an alternative “safe harbor” approach. Under this approach, stations and MVPDs can rely on widely-available certifications, or annual spot checks of non-certified programming by large entities, to enter the safe harbor, 239 and can remain there by conducting a spot check of programming containing commercials that are the subject of a pattern or trend of complaints, and thereby demonstrate ongoing compliance. If any spot check demonstrates noncompliance, the station or MVPD must re-check the noncompliant commercial programming with a follow-up spot check. If the re-check reveals noncompliance with the RP, then the station or MVPD, going forward, is no longer in the safe harbor for that channel or programming.

63. Based on statutory provisions, the R&O also provides for financial hardship waivers which will allow all stations or MVPD, large or small, to delay the effective date of the rules. This waiver is easier for smaller stations and MVPD systems to obtain. The R&O also provides for general waivers for unforeseen circumstances, as well as for stations or MVPDs that demonstrate they cannot strictly implement the RP because of the technology they use and propose to use an alternative approach to achieving the same goals. The CALM Act requires the Commission to adopt these rules on or before December 15, 2011, 240 and they will take effect one year after adoption. 241

2. Legal Basis

64. The authority for the action taken in this rulemaking is contained in the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. 111–311, 124 Stat. 3294, and Sections 1, 2(a), 4(l) and (j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i) and (j), 303 and 621.

3. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

65. No comments were filed in response to the IRFA.

4. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

66. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted. 242 The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” 243 In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 244 A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). 245 The final rules adopted herein will directly affect television broadcast stations and small MVPD systems, which include cable operators and satellite video providers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

67. Wired Telecommunications Carriers. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." 246 The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers." 247 Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007, which superseded data from the 2002 Census, show that 3,188 firms operated in 2007 as Wired Telecommunications Carriers. 3,144 had 1,000 or fewer employees, while 44 operated with more than 1,000 employees. 248

68. Wireless Telecommunications Carriers (except Satellite). Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. 249 Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other WirelessTelecommunications." 250 Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. 251 For the category of

238 See CALM Act sec. 2(a).
239 This process is simplified further for smaller entities.
241 13 CFR 121.201 (NAICS code 517110).
242 http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=0600000000&-ds_name=EC0751SSSZ5&-_lang=en.
243 13 CFR 121.201, NAICS code 517210 (2007
244 13 CFR 121.201, NAICS code 517210.
247 U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging
telividad.org/servlet/IBQTable?_bm=y&-geo_id=0600000000&-ds_name=EC0751SSSZ5&-_lang=en.
248 13 CFR 121.201
250 U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging
telividad.org/servlet/IBQTable?_bm=y&-geo_id=0600000000&-ds_name=EC0751SSSZ5&-_lang=en.
Continued
Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service ("PCS"). and Specialized Mobile Radio ("SMR") Telephony services. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

69. Television Broadcasting. The SBA defines a television broadcasting station as a small business if such station has no more than $14.0 million in annual receipts. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound." The Commission has estimated the number of licensed commercial television stations to be 3,470. According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations in the United States have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational ("NCE") television stations to be 397. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

70. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

71. Direct Broadcast Satellite ("DBS") Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers," which was developed for
and broadcast auxiliary radio services. At present, there are approximately 31,549 common carrier fixed licenses and 89,633 private and public safety operational-fixed licenses and broadcast auxiliary radio licenses in the microwave services. Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. The Commission has not yet defined a small business with respect to microwave services. For purposes of the FRFA, the Commission will use the SBA’s definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons is considered small. For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which superseded data contained in the 2002 Census, show that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

73. Cable and Other Program Distribution. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. According to Census Bureau data for 2007, there were a total of 955 firms in the subcategory of Cable and Other Program Distribution that operated for the entire year. Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1,000 employees or more. Accordingly, The Commission believes that a majority of firms operating in this industry were small.

74. Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers. Thus, under this second size standard, most cable systems are small.

75. Cable System Operators. The Act also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.” The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

76. Open Video Services. Open Video Service (OVS) systems provide subscription services. The open video service section of the 1992 Cable Act: Rate Regulation, Volume II, pages D–1805 to D–1857. Factbook 2006, “Ownership of Cable Systems in the United States,” pages D–1805 to D–1857. The Act also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.” The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.
system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.” The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2007. According to that source, there were 3,188 firms that in 2007 were Wired Telecommunications Carriers. Of these, 3,144 operated with less than 1,000 employees, and 44 operated with more than 1,000 employees. However, as to the latter 44 there is no data available that shows how many operated with more than 1,500 employees. Based on this data, the majority of these firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, but some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 75 areas, and some of these are currently providing service. Affiliates of Residential Communications Network, Inc. (“RCN”) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses.

5. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

77. These rules impose new reporting, recordkeeping and/or other compliance requirements on small television broadcast stations and small MVPDs. Small stations and MVPDs must be prepared to demonstrate compliance with the RP in the event of an enforcement inquiry, including demonstrating in every circumstance that the equipment necessary to pass through programming compliant with the RP has been properly installed, maintained, and utilized. The R&O does not, however, mandate the method by which compliance is demonstrated. It does provide optional methods to demonstrate compliance by being “deemed in compliance” or in a “safe harbor.” For locally inserted commercials, a small station or MVPD must provide records showing the consistent and ongoing use of 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 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. It must also certify 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. For embedded commercials, a small station or MVPD must perform a 24-hour spot check on programming containing compliant-of commercials, and report the results to the Commission, and, if they show noncompliance, to the programmer. In the event of a failed spot check, the station or MVPD must re-check the noncompliant commercial programming, and if the re-check reveals noncompliance with the RP, then the station or MVPD has actual knowledge of noncompliance and, going forward, is no longer in the safe harbor for that channel or programming.

6. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

78. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

79. The express language of the statute requires that the RP be incorporated into the rules and made mandatory for all stations and MVPDs, regardless of size. As a result, these rules may have a significant economic impact in some cases, and that impact may affect a substantial number of small entities, although, as discussed below, the streamlined waiver process for small entities will relieve much of this impact. Nonetheless, the R&O makes significant strides to minimize the economic impact of the rules on small entities. The “safe harbor” we adopt simplifies the process by which small stations and MVPDs may demonstrate compliance with the RP, by eliminating the need for retrospective demonstrations of compliance. Larger stations and MVPDs must either seek certifications that programming is compliant with the RP, or perform annual spot checks of programming that has not been certified. Smaller entities, however, are required only to install, maintain, and utilize the equipment necessary to comply, and in the case of an enforcement inquiry triggered by a pattern or trend of complaints regarding embedded commercials, to demonstrate ongoing compliance via means of a spot check. This gives smaller entities the choice to demonstrate compliance via

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292 See 13th Annual Report, 24 FCC Rcd at 606–07. § 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

293 See http://www.fcc.gov/mb/ovs/cosvscer.html [current as of February 2007].


295 See http://factfinder.census.gov/servlet/IBQTTable?_lang=en&-_ds_name=EC0700A16&-geo_id=0&-skip=6006&-ds_name=EC0751SSSZ5&-

296 See 13th Annual Report, 24 FCC Rcd at 606–07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.


298 R&O at para. 24.

299 R&O at para 29.

300 R&O at paras. 41–42.

301 R&O at paras. 43–44.

302 5 U.S.C. 603(c)(1)–(c)(4).

303 See 47 U.S.C. 621(a).

an approach which creates minimal economic impact on those entities. 80. The smaller entities eligible for this simplified process are broadcast stations with less than $14 Million in annual receipts, and MVPDs with 400,000 or fewer subscribers, as of December 2011. The R&O adopts the SBA size standard for stations, under which, as discussed above, approximately 78 percent of television broadcast stations are small. The MVPD size standard adopted by the R&O is based on the Commission’s definition of a “small cable company,” allowing us to apply a relevant and easily-measurable size standard to all MVPDs. SBA considers MVPDs to be either Wired or Wireless Telecommunications Carriers, both of which use a 1,500 employee size standard. That standard, however, is less relevant than a subscriber-based measure to the goal of ensuring that the channels most subscribers watch are either certified or annually spot-checked, because the number of people employed by an MVPD does not necessarily directly correlate to the number of subscribers it reaches. Although the rules adopted in this R&O will look to MVPD size as of December 2011, we note that as of June 2011 all but 15 MVPDs are small.307 Because the same program streams are provided to smaller and larger entities, spot checks by even a small number of large entities should ensure compliance for all while reducing the burden on smaller stations and MVPDs. 81. Furthermore, the statute provides that the Commission may grant a one-year waiver of the effective date of the rules implementing the statute to any station/MVPD that shows it would be a “financial hardship” to obtain the necessary equipment to comply with the rules, and may renew such waiver for one additional year.308 To request a financial hardship waiver, a larger station or MVPD must provide: (1) Evidence of its financial condition, such as financial statements; (2) a cost estimate for obtaining the necessary equipment to comply with the required regulation; (3) a detailed statement explaining why its financial condition justifies postponing compliance; and (4) an estimate of how long it will take to comply, along with supporting information. We do not require waiver applicants to show negative cash flow but, instead, require only that the station/MVPD’s assertion of financial hardship be reasonable under the circumstances.309 For small stations/MVPDs that face a financial challenge in obtaining the equipment needed to comply with our rules, we adopt a particularly streamlined financial hardship waiver approach.310 Specifically, a small station or MVPD that seeks a waiver must file with the Commission a certification that it: (1) meets our definition of small for this purpose, and (2) needs a delay of one year to obtain specified equipment in order to avoid the financial hardship that would be imposed if it were required to obtain the equipment sooner. The station or MVPD is not required to submit any proof of financial condition. Small broadcast stations and small MVPDs may consider the waiver granted when they file this information online and receive an automatic “acknowledgement of request,” unless the Media Bureau notifies them of a problem or question concerning the adequacy of the certification.311 82. This streamlined process is available to stations with no more than $14.0 million in annual receipts or that are located in television markets 150 to 210. With respect to the latter, the legislative history of the CALM Act specifically expressed concern about the difficulties faced by broadcasters in smaller markets, where the advertising revenue base is much more limited than in larger markets. Unlike small MVPD systems, most of the steps small broadcasters must take to comply with the RP will be undertaken internally, rather than by a third party programmer providing embedded commercials or third party contractors providing local insertions. Consequently, we expect that small broadcast stations will be more likely to need to obtain equipment, and, therefore, more likely to need a waiver to delay the effective date of the rule. We will therefore allow all of these stations to use the streamlined process. The streamlined process is also available to MVPD systems with fewer than 15,000 subscribers (as of December 31, 2011) that are not affiliated with a larger operator serving more than 10 percent of all MVPD subscribers. Our definition of “small MVPD system” for purposes of the streamlined waiver is different from our definition of smaller MVPD operators for purposes of being in the safe harbor.312 While the waiver is available to all stations likely to face financial hardships in complying with the RP, we believe that only the smallest need an expedited process, and as discussed above, many of the steps small MVPD systems must take to comply with the RP may be undertaken by a third party. 83. Finally, Section 2(b)(3) of the CALM Act provides that the statute does not affect the Commission’s authority to waive any rule required by the CALM Act, or the application of any such rule, for good cause shown with regard to any station/MVPD or class of stations/MVPDs under Section 1.3 of the Commission’s rules. We will use our general waiver authority, consistent with Section 2(b)(3), for waivers necessitated by unforeseen circumstances as well as for MVPDs that demonstrate they cannot implement the RP because of the technology they use.313 7. Report to Congress 84. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.314 In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.315 B. Final Paperwork Reduction Act of 1995 Analysis 85. We analyzed this Report and Order with respect to the Paperwork Reduction Act of 1995 (“PRA”)316 and it contains new and modified information collection requirements.317 It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA.318 The Commission, as part of its continuing effort to reduce paperwork burdens, invites OMB, the general public, and other interested parties to comment on the information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 73 and 76 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:


2. Amend §73.682 by adding paragraph (e) and Note to §73.682 to read as follows:

§73.682 TV transmission standards.

(e) Transmission of commercial advertisements by television broadcast station.

(i) Mandatory compliance with ATSC A/85 RP. Effective December 13, 2012, television broadcast stations must comply with the ATSC A/85 RP incorporated by reference, see §73.8000), insofar as it concerns the transmission of commercial advertisements.

(ii) Commercials inserted by station.

(A) The certification is widely available by Web site or other means to any television broadcast station, cable operator, or multichannel video programming distributor that transmits that programming; and

(B) The television broadcast station has no reason to believe that the certification is false; and

(C) The television broadcast station performs a spot check, as defined in §73.682(o)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

(iii) If transmitting any programming that is not certified as described in §73.682(o)(3)(i), a television broadcast station that had more than $14,000,000 in annual receipts for the calendar year 2011 must perform annual spot checks, as defined in §73.682(o)(3)(iv)(A), (B), (C), and (E), of all the non-certified commercial programming it receives from a network or other programmer and perform a spot check, as defined in §73.682(o)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

(iv) If transmitting any programming that is not certified as described in §73.682(o)(3)(i), a television broadcast station that had more than $14,000,000 in annual receipts for the year 2011 need not perform annual spot checks but must perform a spot check, as defined in §73.682(o)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.

VI. Ordering Clauses

86. Accordingly, it is ordered that pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Pub. L. 111–131, 112 Stat. 3294, and Sections 1, 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i) and (j), 303(r), and 621, this Report and order is adopted.

87. It is further ordered that the rules adopted herein will become effective December 13, 2012. We note that these rules contain new information collection requirements subject to the Paperwork Reduction Act and will be submitted to the Office of Management and Budget for review. These requirements will not become effective until after OMB approval. The Commission will publish a notice in the Federal Register announcing such approval.

88. It is further ordered that we delegate authority to the Media Bureau to consider waiver requests filed under these rules and pursuant to Sections 2(b)(2) and 2(b)(3) of the CALM Act.

89. It is further ordered that pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), the Commission will send a copy of this Report and Order in a report to Congress and the General Accounting Office.

90. It is further ordered that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, WILL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 73 and 76

Cable television, Digital television, Incorporation by reference, and Satellite television.


320 NPRM at para. 48.
(iv) For purposes of this section, a “spot check” of embedded commercials requires monitoring 24 uninterrupted hours of programming with an audio loudness meter employing the measurement technique specified in the ATSC A/85 RP, and reviewing the records from that monitoring to detect any commercials transmitted in violation of the ATSC A/85 RP. The television broadcast station must not inform the network or programmer of the spot check prior to performing it.

(A) Spot-checking must be conducted after the signal has passed through the television broadcast station’s processing equipment (e.g., at the output of a television receiver). If a problem is found, the television broadcast station must determine the source of the noncompliance.

(B) To be considered valid, the television broadcast station must demonstrate appropriate maintenance records for the audio loudness meter. 

(C) With reference to the annual “safe harbor” in §73.682(e)(5)(ii):

(1) To be considered valid, the television broadcast station must demonstrate, at the time of any enforcement inquiry, that appropriate spot checks had been ongoing.

(2) If there is no single 24 hour period in which all programmers of a given program stream are represented, an annual spot check may consist of a series of loudness measurements over the course of a 7 day period, totaling no fewer than 24 hours, that measure at least one program, in its entirety, provided by each non-certified programmer that supplies programming that program stream.

(3) If annual spot checks are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for existing programming.

(4) Non-certified program streams must be spot-checked annually using the approach described in this section. If annual spot checks of the program stream are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that program stream.

(5) Even after the two year period for annual spot checks, if a spot check shows noncompliance on a non-certified program stream, the station must once again perform annual spot checks of that program stream to be in the safe harbor programming. If these renewed annual spot checks are performed for two consecutive years without finding additional evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that program stream.

(D) With reference to the spot checks in response to an enforcement inquiry pursuant to §73.682(e)(3)(i)(C), (2), or (3):

(1) If notified of a pattern or trend of complaints, the television broadcast station must perform the 24-hour spot check of the program stream at issue within 30 days or as otherwise specified by the Enforcement Bureau; and

(2) If the spot check reveals actual compliance, the television broadcast station must notify the Commission in its response to the enforcement inquiry.

(E) If any spot check shows noncompliance with the ATSC A/85 RP, the television station must notify the Commission and the network or programmer within 7 days, direct the programmer’s attention to any relevant complaints, and must perform a follow-up spot check within 30 days of providing such notice. The station must notify the Commission and the network or programmer of the results of the follow-up spot check. Notice to the Federal Communications Commission must be provided to the Chief, Investigations and Hearings Division, Enforcement Bureau, or as otherwise directed in a Letter of Inquiry to which the station is responding.

(1) If the follow-up spot check shows compliance with the ATSC A/85 RP, the station remains in the safe harbor for that program stream.

(2) If the follow-up spot check shows noncompliance with the ATSC A/85 RP, the station will not be in the safe harbor with respect to commercials contained in the program stream for which the spot check showed noncompliance until a subsequent spot check shows that the program stream is in compliance.

(4) Use of a real-time processor. A television broadcast station that installs, maintains and utilizes a real-time processor in a commercially reasonable manner will be deemed in compliance with the ATSC A/85 RP with regard to any commercial advertisements on which it uses such a processor, so long as it also:

(i) 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;

(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.

(5) Commercially locally inserted by a station’s agent—safe harbor. With respect to commercials locally inserted, which for the purposes of this provision are commercial advertisements added to a programming stream for the television broadcast station by a third party after it has been received from the programmer but prior to or at the time of transmission to viewers, a station may demonstrate compliance with the ATSC A/85 RP by relying on the third party local inserter’s certification of compliance with the ATSC A/85 RP, provided that:

(i) The television broadcast station has no reason to believe that the certification is false;

(ii) The television broadcast station certifies that its own transmission equipment is not at fault for any pattern or trend of complaints; and

(iii) The television broadcast station performs a spot check, as defined in §73.682(e)(3)(iv)(A), (B), (D), and (E), on the programming at issue in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials inserted by that third party.

(6) Instead of demonstrating compliance pursuant to paragraphs (e)(2) through (5) of this section, a station may demonstrate compliance with paragraph (e)(1) of this section in response to an enforcement inquiry prompted by a pattern or trend of complaints by demonstrating actual compliance with ATSC A/85 RP with regard to the commercial advertisements that are the subject of the inquiry, and certifying that its own transmission equipment is not at fault for any such pattern or trend of complaints.

Note to §73.682: For additional information regarding this requirement, see Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, FCC 11–182.

3. Amend §73.8000 by revising paragraph (b) introductory text and adding paragraph (b)(5) to read as follows:

§73.8000 Incorporation by reference.

* * * *

(b) The following materials are available from Advanced Television Systems Committee (ATSC), 1776 K Street NW., 8th Floor, Washington, DC 20006; or at the ATSC Web site: http://www.atsc.org/standards.html.

* * * *
§ 76.602 Incorporation by reference.

(a) The materials listed in this section are incorporated by reference in this part. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any change in these materials will be published in the Federal Register. The materials are available for inspection at the Federal Communications Commission, 445 12th St. SW., Reference Information Center, Room CY–A257, Washington, DC 20554 and at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(b) The following materials are available from Advanced Television Systems Committee (ATSC), 1776 K Street NW., 8th Floor, Washington, DC 20006; phone: 202–872–9160; or online at: http://www.atsc.org/standards.html.


(c) The following materials are available from Consumer Electronics Association (CEA), 1919 S. Eads St., Arlington, VA 22202; phone: 866–858–1555; or online at http://www.ce.org/standards.


(d) The following materials are available from Society of Cable Telecommunications Engineers (SCTE), 140 Phillips Road Exton, PA 19341–1318; phone: 800–542–5040 or online at http://www.scte.org/standards/Standards_Available.aspx.


(e) Some standards listed above are also available for purchase from the following sources:

(1) American National Standards Institute (ANSI), 25 West 43rd Street, 4th Floor, New York, NY 10036; phone: 212–624–4980; or online at http://webstoreansi.org/.


§ 76.607 Transmission of commercial advertisements.

(a) Transmission of commercial advertisements by cable operator or other multichannel video programming distributor. (1) Mandatory compliance with ATSC A/85 RP. Effective December 13, 2012, cable operators and other multichannel video programming distributors (MVPDs), as defined in 47 U.S.C. 522, must comply with ATSC A/85 RP (incorporated by reference, see § 76.602), insofar as it concerns the transmission of commercial advertisements.

(2) Commercially inserted by cable operator or other MVPD. A cable operator or other multichannel video programming distributor 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, which for the purposes of this provision are commercial advertisements added to a programming stream by a cable operator or other MVPD prior to or at the time of transmission to viewers. In order to be considered to have installed, utilized and maintained the equipment and associated software in a commercially reasonable manner, a cable operator or other MVPD must:

(i) Install, maintain and utilize 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) Provide 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) Certify 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) Certify that its own transmission equipment is not at fault for any pattern or trend of complaints.

(3) Embedded commercials—safe harbor. With respect to embedded commercials, which, for the purposes of this provision, are those commercial advertisements placed into the programming stream by a third party (i.e., programmer) and passed through by the cable operator or other MVPD to viewers, a cable operator or other MVPD must certify that its own transmission equipment is not at fault for any pattern or trend of complaints, and may demonstrate compliance with the ATSC A/85 RP through one of the following methods:

(i) Relying on a network’s or other programmer’s certification of compliance with the ATSC A/85 RP with respect to commercial programming, provided that:

(A) The certification is widely available by Web site or other means to
any television broadcast station, cable operator, or multichannel video programming distributor that transmits that programming; and
(B) The cable operator or other MVPD has no reason to believe that the certification is false; and
(C) The cable operator or other MVPD performs a spot check, as defined in §76.607(a)(3)(iv)(A), (B), (D), and (E), on the programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming;
(ii) If transmitting any programming that is not certified as described in §76.607(a)(3)(i):
(A) A cable operator or other MVPD that had 10,000,000 subscribers or more as of December 31, 2011 must perform annual spot checks, as defined in §76.607(a)(3)(iv)(A), (B), (C), and (E), of all the non-certified commercial programming it receives from a network or other provider that is carried by any system operated by the cable operator or other MVPD, and perform a spot check, as defined in §76.607(a)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming; and
(B) A cable operator or other MVPD that had fewer than 10,000,000 but more than 400,000 subscribers as of December 31, 2011, must perform annual spot checks, as defined in §76.607(a)(3)(iv)(A), (B), (C), and (E), of a randomly chosen 50 percent of the non-certified commercial programming it receives from a network or other provider that is carried by any system operated by the cable operator or other MVPD, and perform a spot check, as defined in §76.607(a)(3)(iv)(A), (B), (D), and (E), on programming in response to an enforcement inquiry concerning a pattern or trend of complaints regarding commercials contained in that programming.
(iv) For the purposes of this section, a “spot check” of embedded commercials requires monitoring 24 uninterrupted hours of programming with an audio loudness meter compliant with the ATSC A/85 RP’s measurement technique, and reviewing the records from that monitoring to detect any commercials transmitted in violation of the ATSC A/85 RP. The cable operator or other MVPD must not inform the network or programmer of the spot check prior to performing it.
(A) Spot-checking must be conducted after the signal has passed through the cable operator or other MVPD’s processing equipment (e.g., at the output of a set-top box). If a problem is found, the cable operator or other MVPD must determine the source of the noncompliance.
(B) To be considered valid, the cable operator or other MVPD must demonstrate appropriate maintenance records for the audio loudness meter.
(C) With reference to the annual “safe harbor” spot check in §76.607(a)(3)(ii):
(1) To be considered valid, the cable operator or other MVPD must demonstrate, at the time of any enforcement inquiry, that appropriate maintenance records for the audio loudness meter are available for each non-certified programmer that supplies programming for that channel.
(2) If there is no single 24 hour period in which all programmers of a given channel are represented, an annual spot check could consist of a series of loudness measurements over a course of a 7 day period, totaling no fewer than 24 hours, that measure at least one program, in its entirety, provided by each non-certified programmer that supplies programming for that channel.
(3) If annual spot checks are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for existing programming.
(4) Newly-added (or newly-de-certified) non-certified channels must be spot-checked annually using the approach described in this section. If annual spot checks of the channel are performed for two consecutive years without finding evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that channel.
(5) Even after the two year period, if a spot check shows noncompliance on a non-certified channel, the cable operator or other MVPD must once again perform annual spot checks of that channel to be in the safe harbor for that programming. If these renewed annual spot checks are performed for two consecutive years without finding additional evidence of noncompliance with the ATSC A/85 RP, no further annual spot checks are required to remain in the safe harbor for that channel.
(D) With reference to the spot checks in response to an enforcement inquiry pursuant to §76.607(a)(3)(i)(C), (ii), or (iii):
(1) If notified of a pattern or trend of complaints, the cable operator or other MVPD must perform the 24-hour spot check of the channel or programming at issue within 30 days or as otherwise specified by the Enforcement Bureau; and
(2) If the spot check reveals actual noncompliance, the cable operator or other MVPD must notify the Commission and the network or programmer within 7 days, direct the programmer’s attention to any relevant complaints, and must perform a follow-up spot check within 30 days of providing such notice. The cable operator or other MVPD must notify the Commission and the network or programmer of the results of the follow-up spot check. Notice to the Federal Communications Commission must be provided to the Chief, Investigations and Hearings Division, Enforcement Bureau, or as otherwise directed in a Letter of Inquiry to which the cable operator or other MVPD is responding.
(1) If the follow-up spot check shows compliance with the ATSC A/85 RP, the cable operator or other MVPD remains in the safe harbor for that channel or programming.
(2) If the follow-up spot check shows noncompliance with the ATSC A/85 RP, the cable operator or other MVPD will not be in the safe harbor with respect to commercials contained in programming for which the spot check showed noncompliance until a subsequent spot check shows that the programming is in compliance.
(4) Use of a real-time processor. A cable operator or other MVPD that installs, maintains and utilizes a real-time processor in a commercially reasonable manner will be deemed in compliance with the ATSC A/85 RP with regard to any commercial advertisements on which it uses such a processor, so long as it also:
(i) 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;
(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
DEPARTMENT OF THE TREASURY
48 CFR Parts 1002, 1032, and 1052
RIN 1505–AC41

Department of the Treasury Acquisition Regulation; Internet Payment Platform

AGENCY: Office of the Procurement Executive, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury is amending the Department of the Treasury Acquisition Regulation (DTAR) to implement use of the Internet Payment Platform, a centralized electronic invoicing and payment information system, and to change the definition of bureau to reflect the consolidation on July 21, 2011 of the Office of Thrift Supervision with the Office of the Comptroller of the Currency. This final rule follows publication of a February 23, 2012, notice of proposed rulemaking. After careful consideration of the public comments, the Department is adopting the proposed rulemaking without change.

DATES: Effective date: August 8, 2012.

FOR FURTHER INFORMATION CONTACT: Ronald Backes, Director, Acquisition Management, Office of the Procurement Executive, at (202) 622–5930.

SUPPLEMENTARY INFORMATION:

I. Background and Proposed Rule

The Federal Acquisition Regulation (FAR) sets forth the uniform regulation for the procurement of supplies and services by Federal departments and agencies (title 48, chapter 1, of the Code of Federal Regulations (CFR)). The Department of the Treasury Acquisition Regulations, which supplement the FAR, are codified at 48 CFR chapter 10. The Department announced that it will implement the Internet Payment Platform (IPP) no later than the end of fiscal year 2012; with all new payment requests in FY2013 processed using the IPP. The Internet Payment Platform (IPP) is a secure Web-based electronic invoicing and payment system that processes vendor payment data electronically, either through a Web-based portal or electronic submission, and automates the routing and approval workflow within an agency.

The IPP is provided by the Department of the Treasury’s Financial Management Service through its fiscal agent, the Federal Reserve Bank of Boston at no cost to vendors or government departments and agencies adopting the platform. The IPP benefits agencies by eliminating the need to file and store paper payment documentation; reducing the time of agency personnel researching and answering payment status questions by providing vendor and department-wide visibility into contract payments.

IPP benefits vendors by reducing time to payment, creating a standard set of electronic data to submit payment requests to the Federal government; reducing costs from having multiple processes and requirements; reducing paper and postage costs, improving cash management by eliminating the time delays associated with submitting and routing paper; and increasing transparency in the payment processes.

The Department will support vendor transition from paper-based payment processes to IPP through a series of webinar and video training on various aspects of the application, including how to view purchase orders, submit invoices, retrieve payment information, set notification preferences, and add users to IPP accounts. The IPP application includes a “Collector User Guide” on vendor landing page.

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