• *Mail:* U.S. Environmental Protection Agency, Region III, Attn: Darius Ostrauskas (3HS23), 1650 Arch Street, Philadelphia, PA 19103–2029.

• *Hand Delivery:* U.S. Environmental Protection Agency, Region III, Attn: Darius Ostrauskas (3HS23), 1650 Arch Street, Philadelphia, PA 19103–2029, Phone: 215–814–3360, Business Hours: Mon. thru Fri.—9 a.m. to 4 p.m. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–1987–0002. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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FOR FURTHER INFORMATION CONTACT: Darius Ostrauskas, Remedial Project Manager (3HS23), U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–3360, e-mail: *ostrauskas.darius@epa.gov.*

SUPPLEMENTARY INFORMATION: In the "Rules and Regulations" Section of today's **Federal Register**, we are publishing a direct final Notice of Deletion of the Coker's Sanitation Service Landfills Superfund Site without prior Notice of Intent To Delete because EPA views this as a noncontroversial revision and anticipates no adverse comment. We have explained our reasons for this deletion in the preamble to the direct final Notice of Deletion, and those reasons are incorporated herein. If we receive no adverse comment(s) on this deletion action, we will not take further action on this Notice of Intent to Delete. If we receive adverse comment(s), we will withdraw the direct final Notice of Deletion and it will not take effect. We will, as appropriate, address all public comments in a subsequent final Notice of Deletion based on this Notice of Intent to Delete. We will not institute a second comment period on this Notice of Intent to Delete. Any parties interested in commenting must do so at this time.

For additional information, see the direct final Notice of Deletion, which is located in the Rules section of this **Federal Register.**

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: April 29, 2011.

James W. Newsom,

Acting Regional Administrator, Region III.

[FR Doc. 2011–13844 Filed 6–2–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[MB Docket No. 11–93; FCC 11–84]

Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes 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 standard-setting body that is designed to prevent television commercial advertisements from being transmitted at louder volumes than the program material they accompany. Specifically, the CALM Act requires the Commission to incorporate by reference the ATSC A/85 Recommended Practice ("ATSC A/85 RP") and make it mandatory "insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor." As mandated by the statute, the proposed rules will apply to TV broadcasters, cable operators and other multichannel video programming distributors ("MVPDs"). The new law requires the Commission to adopt the required regulation on or before December 15, 2011, and it will take effect one year after adoption. The document seeks comment below on proposals regarding compliance, waivers, and other implementation issues.

DATES: Comments are due on or before July 5, 2011; reply comments are due on or before July 18, 2011.

ADDRESSES: You may submit comments, identified by MB Docket No. 11–93, by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Federal Communications Commission's Electronic Comment Filing System (ECFS) Web Site: http://fjallfoss.fcc.gov/ecfs/.* Follow the instructions for submitting comments.

• *Mail:* All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

• *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530; or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the section V. "PROCEDURAL MATTERS" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Evan Baranoff, *Evan.Baranoff@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 *Notice of Proposed Rulemaking* (NPRM), FCC 11–84, adopted and released on May 27, 2011. The full text of this document is available electronically via ECFS at *http://fjallfoss.fcc.gov/ecfs/* or may be downloaded at *http://www.fcc.gov/document/implementation-commercial-advertisement-loudness-mitigation-calm-act* or *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-84A1.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 e-mail to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Summary of the Notice of Proposed Rulemaking

I. Introduction

1. In this Notice of Proposed Rulemaking ("NPRM"), we propose 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 standard-setting body that is designed to prevent television commercial advertisements from being transmitted at louder volumes than the program material they accompany.[2] As mandated by the statute, the proposed rules will apply to TV broadcasters, cable operators and other multichannel video programming distributors ("MVPDs").[3] The new law requires the Commission to adopt the required regulation on or before December 15, 2011,[4] and it will take effect one year after adoption.[5] We seek comment below on proposals regarding compliance, waivers, and other implementation issues.

II. Background

2. The CALM Act was enacted into law on December 15, 2010 in response to consumer complaints about loud commercials.[6] The Commission has received complaints about "loud commercials" virtually since the inception of commercial television, more than 50 years ago.[7] 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.[8] One common complaint is that a commercial is abruptly louder than the adjacent programming.[9] The problem occurs in over-the-air broadcast television programming, as well as in cable, Direct Broadcast Satellite ("DBS") and other video programming.

3. The Commission has not regulated the "loudness" of commercials, primarily because of the difficulty of crafting effective rules "due to the subjective nature" of loudness.[10] The Commission has incorporated by reference into its rules various industry standards on digital television, but these standards do not describe a consistent method for industry to measure and control audio loudness.[11] The loud

[1] The Commercial Advertisement Loudness Mitigation ("CALM") Act, Pub. L. 111–311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. 621). The CALM Act was enacted on December 15, 2010 (S. 2847, 111th Cong.). The relevant legislative history includes the Senate and House Committee Reports to bills S. 2847 and H.R. 1084, respectively, as well as the Senate and House Floor Consideration of these bills. *See* Senate Commerce, Science, and Transportation Committee Report dated Sept. 29, 2010, accompanying Senate Bill, S. 2847, 111th Cong. (2010), S. REP. 111–340 ("*Senate Committee Report to S. 2847*"); House Energy and Commerce Committee Report dated Dec. 14, 2009, accompanying House Bill, H.R. 1084, 111th Cong. (2009), H.R. REP. 111–374 ("*House Committee 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*") and H7899 (daily ed. Dec. 2, 2010) (bill passed); House Floor Consideration of H.R. 1084, 155 Cong. Rec. H14907 (daily ed. Dec. 15, 2009). Note that the Senate and House Committee Reports were prepared before the bill was amended to add Section 2(c) of the CALM Act (the compliance provision). *See Senate Floor Debate* at S7763- S7764 (approving "amendment No. 4687").

[2] *See* ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (May 25, 2011) ("ATSC A/85 RP"). To obtain a copy of the ATSC A/85 RP, visit the ATSC website: *http://www.atsc.org/cms/standards/a_85-2009.pdf. See also* 47 U.S.C. 621(a); *Senate Committee Report to S. 2847* at 1; *House Committee Report to H.R. 1084* at 1.

[3] We refer herein to covered entities collectively as "stations/MVPDs" or "regulated entities."

[4] *See* 47 U.S.C. 621(a).

[5] *See* 47 U.S.C. 621(b)(1).

[6] *See also House Floor Debate of S. 2847* at H. 7721 (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").

[7] *See 1984 Order,* FCC 84–300, 49 FR 28077, July 10, 1984 ("*1984 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 10, 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").

[8] 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 819 complaints and 4,582 inquiries from consumers about "loud commercials."

[9] *See Senate Committee Report to S. 2847* at 1–2. *See also* Public Notice, "Statement of Policy Concerning Loud Commercials," 1 FCC 2d 10, para. 15 (1965) ("*1965 Policy Statement*") (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").

[10] *See 1984 Order* at para. 14.

[11] 47 CFR 73.682(d) incorporates by reference and requires compliance with most of the Advanced Television Systems Committee ("ATSC") A/53 Digital Television Standard (2007 version) relating to digital broadcast television and 47 CFR 76.640(b)(1)(iii) incorporates by reference the American National Standards Institute/Society of Cable Telecommunications Engineers ("ANSI/SCTE") Standard 54 (2003 version) relating to digital cable television. The rules do not currently incorporate by reference a standard that applies to satellite TV ("DBS") providers. Part 5 of the ATSC Standard A/53, which includes the Dolby AC–3 DTV audio standard, has recently been updated by ATSC. In our *Video Description NPRM,* we propose to update our DTV transmission standard in Section 73.682(d) of our rules to incorporate by reference the 2010 version of Part 5 of the ATSC A/53 Digital Television Standard (relating to audio systems). *See Video Description NPRM,* FCC 11–36, 76 FR 14856, March 18, 2011 ("*Video Description NPRM*"). *See also* ATSC A/53, Part 5: 2010 "ATSC Digital Television Standard, Part 5—AC–3 Audio System Characteristics" (July 6, 2010) ("2010 ATSC A/53 Standard, Part 5"). We note that this proposal is consistent with our proposed rules herein because the ATSC A/85 RP references and requires compliance with the same testing methodology adopted in the 2010 ATSC A/53 Standard, Part 5. *See, e.g.,* ATSC A/85 RP §§ 2.1 at 9 (referencing A/

Continued

commercial problem seems to have been exacerbated by the transition to digital television. 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.[12] However, DTV technology also offers industry the opportunity to more easily manage loudness.

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") [13] completed and published its A/85 Recommended Practice ("ATSC A/85 RP"),[14] which was developed to offer guidance to the TV industry—from content creators to distributors to consumers—about DTV audio loudness management.[15] On May 25, 2011, the ATSC approved a successor document to the A/85 RP, which, among other things, adds an Annex J concerning "the courses of action necessary to perform effective loudness control of digital television commercial advertising." [16] Although the ATSC A/85 RP, like most ATSC documents, was primarily intended for over-the-air TV broadcasters, the ATSC A/85 RP also offers guidance to cable and DBS operators, and other MVPDs to the extent that they use the AC–3 digital audio system [17] when they transmit digital programming content, including commercial advertisements, to consumers.[18] The ATSC A/85 RP adopts the International Telecommunication Union [19] Radiocommunication Sector ("ITU–R") [20] Recommendation BS.1770 measurement algorithm as the loudness measurement standard [21] and sets forth various techniques for industry to manage and control the audio loudness of digital programming content as it flows down the production stream.[22] The ITU–R BS.1770 measurement algorithm provides a numerical value that indicates the perceived loudness of the content.[23] That numerical value is encoded in the audio content by the content provider or station/MVPD as a metadata parameter called "dialnorm." [24] Stations/MVPDs transmit the "dialnorm" to the consumer's reception equipment along with the programming to direct the consumer's equipment to manage and control the loudness of the programming.[25] The "golden rule" of the ATSC A/85 RP is that the dialnorm value must correctly identify the perceived loudness of the content it accompanies in order to prevent loudness variation during content transitions on a channel (*e.g.,* TV program to commercial) or when changing channels.[26] If the "dialnorm"

53) and 7.1 at 17 (stating that the ATSC A/85 RP "identifies methods to ensure consistent digital television loudness through the proper use of dialnorm metadata for all content, and thus comply with A/53"). The previous version of the ATSC A/53 Standard, Part 5, which is incorporated by reference in Section 73.682(d), includes an outdated audio loudness measurement method. *See* ATSC A/53, Part 5: 2007 "ATSC Digital Television Standard, Part 5—AC–3 Audio System Characteristics" § 5.5 at 9 (Dialogue Level) (Jan. 3, 2007) ("2007 ATSC A/53 Standard, Part 5"). The 2010 ATSC A/53 Standard, Part 5, contains the new methods to measure and control audio loudness, reflected in the ATSC A/85 RP. *See* 2010 ATSC A/53 Standard, Part 5 at § 2.1 at 5 (referencing A/85) and § 5.5 at 9 (Dialogue Level). We anticipate that the Video Description proceeding, MB Docket No. 11–43, will be completed before we adopt the regulation required by the CALM Act. *See Video Description NPRM,* para. 5, n.14 (the Communications and Video Accessibility Act requires reinstatement of the video description rules one year after the date of its enactment, which occurred on October 8, 2010).

[12] *See* ATSC Letter by Mark Richer, ATSC President, and attached "Executive Summary of the ATSC DTV Loudness Tutorial Presented on February 1, 2011" (dated Apr. 8, 2011) ("*ATSC Letter* and *DTV Loudness Tutorial Summary*") (stating "[t]he ATSC AC–3 Digital Television Audio System has 32 times the perceived dynamic range (ratio of soft to loud sounds) than the previous NTSC analog audio system. Although this increase in dynamic range makes cinema-like sound a reality for DTV, greater loudness variation is now an unintentional consequence when loudness is not managed correctly").

[13] ATSC is an international, non-profit organization developing voluntary standards for digital television. The ATSC member organizations represent the broadcast, broadcast equipment, motion picture, consumer electronics, computer, cable, satellite, and semiconductor industries. ATSC creates and fosters implementation of voluntary Standards and Recommended Practices to advance digital television broadcasting and to facilitate interoperability with other media. *See http://www.atsc.org/aboutatsc.html.*

[14] *See* ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (Nov. 4, 2009).

[15] *See* ATSC A/85 RP § 1 at 7. A key goal of the ATSC A/85 RP was to develop a system that would enable industry to control the variations in loudness of digital programming, while retaining the improved sound quality and dynamic range of such programming. *Id.*

[16] ATSC A/85 RP Annex J.

[17] AC–3 is one method of formatting and encoding digital multi-channel audio, used 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). The ATSC A/85 RP provides methods for establishing and maintaining audio loudness using Dialog Normalization (dialnorm) metadata, a parameter unique to the AC–3 audio system. *See, e.g.,* ATSC A/85 RP § 4 at 13.

[18] *See, e.g.,* ATSC A/85 RP Annex H at 61. As discussed *infra,* the ATSC A/85 RP provides some guidance for handling content without metadata, including non-AC–3 audio content; but the A/85 RP contemplates encoding all content into AC–3 and setting dialnorm appropriately.

[19] 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 radiocommunication technology. These recommendations are subject to an international peer review and approval process in which the Commission participates.

[20] 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 and growing number 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.

[21] The internationally accepted ITU–R BS.1770 measurement algorithm, presented in units of loudness K-weighted, relative to full scale ("LKFS"), was developed to give industry professionals a contemporary and accurate tool to measure loudness by modeling the human hearing system. ITU is currently considering improvements to its recommendation. *See* ITU Press Release, titled "Sound advice from ITU to keep TV volume in check; ITU Recommendation to control volume variations in TV programming" at *http://www.itu.int/newsroom/press_releases/2010/03.html* (dated Jan. 18, 2010).

[22] *See* ATSC A/85 RP § 7.1 at 17 (the ATSC A/85 RP "identifies methods to ensure consistent digital television loudness through the proper use of dialnorm metadata for all content").

[23] *See* ATSC A/85 RP § 3.4 at 12 (defining ITU–R BS.1770). "Loudness" is 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 which 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. *See* ATSC A/85 RP § 3.4 at 13 (defining loudness as "[a] perceptual quantity; the magnitude of the physiological effect produced when a sound stimulates the ear").

[24] 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* ATSC A/85 RP § 1.1 at 7. The dialnorm and other metadata parameters are integral to the AC–3 audio bit stream. *Id.* at 8. The dialnorm value identifies the average measured loudness of the content.

[25] From the consumer's perspective, the dialnorm metadata parameter defines the volume level the sound needs to be reproduced so that the consumer will end up with a uniform volume level across programs and commercials without a need to adjust it again. *See* ATSC A/85 RP at 7. *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.").

[26] *See ATSC DTV Loudness Tutorial Summary* at 1 ("An essential requirement (the golden rule) for management of loudness in an ATSC audio system is to ensure that the average content loudness in

parameter is present and set correctly, the AC–3 audio decoder in the consumer's home receiver will automatically adjust the volume to eliminate spikes in loudness at these transitions. The ATSC A/85 RP also clarifies that the ATSC A/53 DTV Transmission Standard requires that the dialnorm value be encoded accurately and carried with the audio content and assumes compliance with this technical requirement.[27] If all stations/MVPDs measure content with the ITU–R BS.1770 measurement algorithm and transmit dialnorm metadata that correctly identifies the loudness of the content it accompanies, then consumers will be able to set their volume controls to their preferred listening (loudness) level and will not have to adjust the volume between programs and commercials.[28]

5. Following Congress's adoption of the CALM Act, Commission staff held informal meetings with industry representatives for preliminary information gathering purposes and to obtain technical guidance on how the various industry segments currently manage audio loudness and how they intend to comply with the required regulation.[29] In these meetings, industry representatives described certain challenges they may face with complying with the required regulation. For example, industry representatives explained that some MVPDs do not exclusively use the AC–3 audio system on which the ATSC RP A/85 is based. Also, industry representatives explained that some stations/MVPDs may face challenges with respect to the content which they do not create or insert into the program stream. We address these issues in the discussion section that follows.

6. The statutory text of the CALM Act provides in relevant part as follows:[30]

(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.[31]

(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.[32]

(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.[33]

(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 such rule, for good cause shown to a television broadcast station, cable operator, or other multichannel video programming distributor, or to a class of such stations, operators, or distributors.[34]

(c) Compliance. Any 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.[35]

(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);[36] and

(2) The terms "cable operator" and "multi-channel video programming distributor" have the meanings given such terms in section 602 of Communications Act of 1934 (47 U.S.C. 522).[37]

III. Discussion

7. In this discussion, we consider the scope of the CALM Act and identify the entities responsible under the law for preventing the transmission of loud commercials. Next, we address how stations/MVPDs can demonstrate compliance with the ATSC A/85 RP pursuant to the provisions of the CALM Act and propose a consumer-driven complaint process to enforce regulations mandated by the Act. We also seek information and comment on challenges for stations/MVPDs in complying with the statute and approaches that will enable them to comply consistent with their statutory responsibilities. Finally, we consider how to implement the waiver provisions in the statute.

A. Section 2(a) and Scope

8. We begin by addressing Section 2(a) and the scope of the CALM Act. As indicated above, Section 2(a) directs the Commission to "prescribe * * * a regulation that is limited to incorporating by reference and making mandatory" the ATSC A/85 RP.[38] This language not only requires us to incorporate by reference and make mandatory the ATSC A/85 RP, but it expressly limits our authority in that regard. Therefore, we tentatively conclude that the Commission may not modify the technical standard or adopt other actions inconsistent with the statute's express limitations. Accordingly, we propose to incorporate by reference the ATSC A/85 RP into our rules.[39]

units of LKFS 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* ATSC A/85 RP § 5.2 at 15.

[27] *See* ATSC A/85 RP § 7.1 at 17 ("Carriage of and correct setting of the value of dialnorm is mandatory"); ATSC A/85 RP Annex J at § J.3.

[28] *See* ATSC A/85 RP § 4 at 13. If the ATSC A/85 RP is applied to all channels, the loudness will also be consistent across channels. *Id.* We note that the AC–3 audio system does not intend to eliminate all loudness variations, but only prevent loudness variations during content transitions. Indeed, the AC–3 audio system increases the dynamic range to provide consumers with cinema-like sound quality. *See ATSC DTV Loudness Tutorial Summary* at 1.

[29] *See* Appendix: List of Participants. These informal meetings occurred prior to commencement of this proceeding and are not subject to the *ex parte* requirements. These meetings do not supplant official comments in this proceeding.

[30] *See* 47 U.S.C. 621 (2010). *See also* 47 U.S.C. 609 (2010).

[31] *Id.* 621(a).

[32] *Id.* 621(b)(1).

[33] *Id.* 621(b)(2).

[34] *Id.* 621(b)(3).

[35] *Id.* 621(c).

[36] *Id.* 621(d)(1). Section 325 of the Communications Act defines the term "television broadcast station" as "an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station." 47 U.S.C. 325(b)(7)(B).

[37] *Id.* 621(d)(2). Section 602 of Communications Act defines the term "cable operator" as "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. 522(5). Section 602 of Communications Act defines the term "multichannel video programming distributor" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. 522(13).

[38] *See* 47 U.S.C. 621(a).

[39] *See* proposed rules 47 CFR 73.682(e) and 76.607. As required by the Office of the Federal Register ("OFR"), we will obtain approval from the Director of the Federal Register to incorporate by reference the ATSC A/85 RP into our rules. *See* 5 U.S.C. 552(a); 1 CFR 51.3; and generally 1 CFR part 51 (Incorporation by Reference). We note that the ATSC A/85 RP will be incorporated into our rules as it exists on the date it is approved by the OFR for incorporation by reference. We will incorporate future versions of the ATSC A/85 RP as they

Continued

9. Section 2(a) further mandates that the Commission incorporate by reference and make mandatory the ATSC A/85 RP "only insofar as [it] concerns the transmission of commercial advertisements. * * *"[40] We seek comment on whether and how to identify the portions of the ATSC A/85 RP "concern[ing] the transmission of commercial advertisements" for purposes of the statute.[41] We note that the ATSC recently approved a successor document to the A/85 RP which, among other things, adds an Annex J, titled "Requirements for Establishing and Maintaining Audio Loudness of Commercial Advertising in Digital Television," addressing "the courses of action necessary to perform effective loudness control of digital television commercial advertising."[42] We invite comment on the successor document and on the significance of Annex J.

10. We also interpret the statutory language "the transmission of commercial advertisements" to apply to all such transmissions by stations/MVPDs. In our informal meetings, some industry representatives noted that in some circumstances stations/MVPDs do not create or insert all the commercials that they ultimately transmit to consumers. They further asserted that the rules the Commission will adopt to implement the CALM Act should limit a station/MVPD's responsibility to commercials that the station/MVPD itself "inserts" into the programming stream and not apply to all commercials a station/MVPD transmits to the consumer. We believe such an approach and limitation would be inconsistent with the statutory language, the purpose of the CALM Act, the legislative history, and ATSC A/85 RP. The statute expressly applies to commercials transmitted by a station/MVPD and makes no exception for commercials not inserted by the station/MVPD. Nothing in the statutory language or legislative history distinguishes between different sources of commercial content or suggests any intent to limit a station/MVPD's responsibility only to those commercials "inserted" by it. Nor does the ATSC A/85 RP make such a distinction.[43] To the contrary, the legislative history underscores that the purpose of the statute is to address consumers' experiences with loud commercials, and the statute imposes responsibility for addressing the problem on the station/MVPD.[44] Limiting regulations to only certain commercials would undermine the statute's purpose. As a practical matter, consumers neither know nor care which entity inserts commercials into the programming stream. Therefore, we tentatively conclude that "transmission of commercial advertisements" means transmission of all commercials, and therefore that stations/MVPDs are responsible for all commercials "transmitted" by them, including commercials inserted by stations/MVPDs, as well as those commercials that are in the programming that stations/MVPDs receive from content providers and transmit (or retransmit) to viewers. We believe this interpretation is required by the express language of the statute, but we invite commenters to address this analysis. We also seek specific information from stations and MVPDs on the percentage of the commercials they transmit to consumers that is inserted by the station/MVPD itself, as compared to the percentage of commercials that is part of programming from a content provider (*e.g.,* from a network or cable programmer).

11. Section 2(a) applies to "commercial advertisements," but does not define this term for purposes of the statute.[45] Nor does the legislative history address the definition of "commercial advertisements." We seek comment on how to define this term for purposes of the CALM Act.[46] For example, does the term "commercial advertisements" include political advertising, including uses by legally qualified candidates?[47] Does the term "commercial advertisements" apply to promotions of television or cable/MVPD programs? We anticipate that noncommercial broadcast stations will largely not be affected by this proceeding, because Section 399B of the Communications Act, as amended, prohibits them from broadcasting "advertisements."[48] In 2001, however, the Commission concluded that the prohibition in Section 399B does not apply to nonbroadcast services provided by noncommercial stations, such as subscription services provided on their DTV channels.[49] We seek comment on whether the CALM Act applies to noncommercial stations to the extent they transmit advertisements on nonbroadcast streams and, if so, whether this raises any issues unique to the noncommercial service. We note that the definition of a "television broadcast station" used by the CALM Act includes both a commercial and noncommercial television broadcast station.

12. Section 2(a) expressly applies to each "television broadcast station, cable operator, or other multichannel video programming distributor." The CALM Act incorporates definitions of these terms contained in the Communications Act.[50] In our informal meetings, some industry representatives explained that not all MVPDs use the AC–3 audio systems on which the ATSC A/85 RP is based for all content.[51] Therefore, they asserted that, to the extent that an MVPD does not use AC–3 audio technology, the statute should not apply to them. The statute, however, expressly applies to all stations/MVPDs regardless 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. The purpose of the statute is to address the problem of loud commercials for all TV consumers, not just those served by stations/MVPDs that use a particular audio system. Not only would limiting the statute's scope to stations/MVPDs

become available and will publish notice of updates to this incorporation by reference in the **Federal Register.**

[40] *See* 47 U.S.C. 621(a).

[41] We note that, under the CALM Act, each regulated entity is responsible for determining how to use the ATSC A/85 RP to ensure that its viewers receive commercials and programming at a consistent loudness. *See, e.g.,* ATSC A/85 RP § 8 (describing effective solutions for managing variations in loudness during program-to-interstitial transitions); ATSC A/85 RP Annex J § J.2.

[42] ATSC A/85 RP Annex J § J.1.

[43] *See* ATSC A/85 RP § 8 at 23. ("Methods to effectively control program-to-interstitial loudness"). *See also* ATSC A/85 RP § 8.4 at 24–25 ("TV Station and MVPD local ad insertion").

[44] *See House Floor Debate of S. 2847* at H7720 (Rep. Eshoo stating that the bill would "eliminate the earsplitting 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 law).

[45] We note that 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 political office." *See* 47 U.S.C. 399b(a).

[46] We note that, in the context of commercial limits 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 1.

[47] *See* 47 U.S.C. 315.

[48] 47 U.S.C. 399b.

[49] *See* Report and Order, FCC 01–306, 66 FR 58973, November 26, 2001.

[50] 47 U.S.C. 621(d).

[51] We note that broadcast TV stations are required to use AC–3 audio systems by Section 73.682 of our rules, which incorporates by reference the ATSC A/53 Standard.

that use AC–3 audio systems be inconsistent with the express language of the statute, we think such a reading would undermine the statute's purpose. Therefore, we tentatively conclude that the CALM Act defines the scope and application of the new technical loudness standard as mandatory for all stations/MVPDs and not only those using AC–3 audio systems. We believe this interpretation is required by the express language of the statute, but we invite commenters to address this analysis. In addition, we seek comment below on whether and how MVPDs that do not use AC–3 audio systems can comply with the CALM Act.[52] We note that ATSC is considering amending the ATSC A/85 RP to address how an MVPD that does not exclusively use an AC–3 audio system can follow the ATSC A/85 RP.[53]

13. Finally, Section 2(a) mandates that the required regulation be prescribed "[w]ithin 1 year after the date of the enactment of this Act" and incorporate by reference and make mandatory "any successor" to the ATSC A/85 RP.[54] Because the statute requires the Commission to incorporate successors to the ATSC A/85 RP, and affords the Commission no discretion in this regard, we tentatively conclude that no notice and comment will be necessary to incorporate successor documents into our rules.[55] In accordance with this statutory directive and consistent with the requirements of the Office of the **Federal Register**, we tentatively conclude that any successors to the ATSC A/85 RP will take effect when the Commission has obtained approval from the Director of the Federal Register to incorporate by reference such successors into our rules and publishes a technical amendment in the **Federal Register** to codify the successors into the Commission's rules.[56] If the ATSC adopts a successor to the ATSC A/85 RP before we issue a Report and Order in this proceeding, we tentatively conclude that we will incorporate by reference into our rules the successor standard adopted by ATSC. We ask that the ATSC notify us whenever it approves a successor to the ATSC A/85 RP, and submit a copy of it into the record of this proceeding.[57] We direct the Media Bureau to issue a public notice announcing the ATSC's approval of any successor to the ATSC A/85 RP. We seek comment on our tentative conclusions.

B. Compliance and Enforcement

14. As established above, each station/MVPD is responsible for complying with the CALM Act. In this section, we address how stations/MVPDs can demonstrate compliance with the statute. Specifically, we believe that a station/MVPD can demonstrate compliance with the statute by showing that it has satisfied the safe harbor requirements set out in Section 2(c) of the CALM Act, as described in detail below, or by proving through other means that any commercials that are the subject of a complaint meet the standards of the statute. We also address stations/MVPDs that seek to ensure that the commercials they transmit to viewers comply with the ATSC A/85 RP through contracts with their content providers. We recognize that there may be alternative means of complying and demonstrating compliance with the regulations required by the CALM Act, and we intend to take into consideration challenges that stations/MVPDs may face in complying with the ATSC A/85 RP, and how those challenges may vary depending upon the technology the entity uses, as well as its size and market power.

15. We note that the ATSC A/85 RP identifies several options for actions that stations/MVPDs may take to control and manage loudness.[58] Under the ATSC A/85 RP, stations/MVPDs can control and manage loudness either by (1) using one or more types of equipment, such as a loudness measurement device and/or software, a file based scaling device, or a real time loudness processing device; or (2) ensuring that their content suppliers deliver the content to them in accordance with their loudness specification (*e.g.,* a fixed "target" loudness value or the correct dialnorm value).[59] In the latter case, a station/MVPD may be able to comply with the ATSC A/85 RP without having equipment capable of managing audio loudness on its premises because the ATSC A/85 RP recognizes that the adjustments and/or loudness calculations for setting the correct dialnorm value may be performed during production or post-production or otherwise upstream of the station/MVPD. The statute, however, makes the station/MVPD responsible for ensuring that such adjustments and/or calculations have been performed on the content transmitted to its viewers/subscribers, particularly because the ATSC A/85 requires the station/MVPD to ensure the dialnorm is set correctly.[60] We seek to adopt rules that achieve the goals of the statute, are easy to enforce and, at the same time, pose minimal administrative burdens. Therefore, as explained below, we also propose a consumer complaint procedure that enables consumers to file complaints with the Commission and permits stations/MVPDs to demonstrate compliance in response to those complaints in a straightforward manner.

1. Section 2(c) "Safe Harbor"

16. Section 2(c) expressly provides that a station/MVPD will be "deemed to be in compliance" with our rules implementing the CALM Act[61] if such entity "installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software" necessary to comply with the ATSC A/85 RP.[62] The legislative history indicates an intent for this provision to be construed as a "safe harbor" for stations/MVPDs that obtain and use the necessary equipment.[63] Consistent with Section 2(c)'s language and history, we propose to interpret this provision to require the Commission to accept showings that a regulated entity has satisfied Section 2(c)'s requirements as demonstrating compliance, but not to restrict regulated entities to such showings as the only means of demonstrating compliance. We tentatively conclude that the Section 2(c) safe harbor provision requires that a station/MVPD must, itself, install, utilize, and maintain the necessary equipment, based on our reading of the statutory language and associated

[52] *See infra* discussion considering compliance by stations/MVPDs that face practical challenges, such as the use of non-AC–3 audio systems.

[53] *See ATSC Letter* ("ATSC has also started work on the development of a new "Annex K" that addresses loudness management for commercial advertising when using non-AC–3 audio systems.").

[54] 47 U.S.C. 621(a).

[55] *See* 5 U.S.C. 552(b)(B) (providing that Administrate 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).

[56] *See* 5 U.S.C. 552(a); 1 CFR 51.3; and *generally* 1 CFR part 51.

[57] We request that the ATSC also send a courtesy copy of the notice to the Chief Engineer of the Media Bureau.

[58] *See* ATSC A/85 RP § 8.1. *See also* ATSC DTV Loudness Tutorial Summary at 2–3.

[59] *See id.*

[60] As noted, *supra,* "Section 2(a) expressly applies to each 'television broadcast station, cable operator, or other multichannel video programming distributor.'" *See also* ATSC A/85 RP § 8.1 at 23.

[61] *See* 47 U.S.C. 621(c) and proposed rules 47 CFR 73.682(e) and 76.607.

[62] *See* 47 U.S.C. 621(c) (which describes when a station "shall be deemed in compliance with [our rules]").

[63] *See House Floor Debate of S. 2847* at H7720 (Rep. Terry describing this provision as "a kind of 'safe harbor' by deeming an operator that installs, utilizes and maintains the appropriate equipment and software in compliance with the [CALM Act]").

definitions.[64] That is, we believe that Section 2(c) contemplates action by the television broadcast station[65] and the MVPD itself, and not action by a third party, such as a network with which the station is affiliated or a programmer providing content to the MVPD. We seek comment on this tentative conclusion and on whether there are any circumstances in which a station/MVPD could satisfy the safe harbor parameters by utilizing a third party that has the necessary equipment, rather than installing the equipment itself. For example, would it be consistent with the statutory language for a station to demonstrate Section 2(c) safe harbor compliance by showing that the network with which it is affiliated installed, utilized, and maintained the necessary equipment in a commercially reasonable manner? Is there any relevant distinction in this regard between a network providing content to an affiliate and a programmer providing content to an MVPD?

17. In our informal meetings with industry, MVPD representatives indicated that they can use equipment to ensure compliance with A/85 for a commercial they insert into a channel, but not for a commercial contained in a block of programming they receive from a content provider. We believe, in this situation, the MVPD may be able to rely on the safe harbor with respect to the commercial it inserts into the programming stream, but not with respect to the commercials for which it does not utilize the equipment. In this situation, the MVPD would be required to use an alternative method of loudness control,[66] and could not rely on the safe harbor in response to a complaint. We seek comment on the situations in which a station/MVPD would be able to satisfy the safe harbor provision with respect to some, but not all, of the commercials it transmits to consumers.

18. Below, we propose the interpretations for each of the statutory terms in Section 2(c) and seek comment on these interpretations. We also seek comment on what "commercially reasonable" means in this context. Does the term "commercially reasonable" mean consistent with industry practice? Does it imply consideration of individual circumstances?

19. *Installation.* We propose to interpret installation of equipment in a commercially reasonable manner to mean that a station/MVPD has obtained and readied for use in its video distribution system equipment that conforms with the ATSC A/85 RP to control loudness of commercials transmitted to consumers.[67] The solutions set out in ATSC A/85 RP may rely on loudness measurement devices and/or software, file based scaling devices, or real time loudness processing devices depending on the method chosen to control loudness.[68] Loudness measurement devices and/or software must be able to measure loudness using the ITU–R BS.1770 measurement algorithm and support the use of dialnorm metadata.[69] We seek comment on our proposed interpretation and on how to determine whether particular equipment conforms to ITU–R BS.1770 as required in the ATSC A/85 RP. We recognize that stations/MVPDs may want regulatory certainty that the equipment they may purchase (or have already purchased) will enable them to comply with the ATSC A/85 RP (and, thus, the statute).[70] However, we do not propose to require equipment authorization through an equipment performance verification procedure or to establish an administratively burdensome or time-consuming process for determining compliance based on satisfying the installation requirement.[71] We invite comment on what measures we should require stations/MVPDs to take to ensure that they have installed the correct equipment to enable them to take advantage of the safe harbor provided for in Section 2(c) of the CALM Act.

20. *Utilization.* We propose to interpret utilization of equipment in a commercially reasonable manner to mean that a station/MVPD operates the equipment in conformance with the ATSC A/85 RP to ensure that commercials are transmitted to consumers at a loudness level that is consistent with the programming the commercials accompany.[72] As discussed, the key goal of the ATSC A/85 RP and the statute is to prevent the transmission of loud commercials to consumers.[73] Consistent with that goal, we propose to interpret the term utilization in Section 2(c) to mean that, in order to satisfy the safe harbor provision, mechanisms must be in place to properly measure the loudness of the content for which the safe harbor is claimed and ensure that dialnorm metadata is encoded correctly before transmitting the content to the consumer. We seek comment on this interpretation and on the utilization that is necessary to perform these functions. We also seek comment on how stations/MVPDs that seek to rely on the safe harbor in response to a complaint may demonstrate utilization of the required equipment with regard to the programming in question.

21. *Maintenance.* We propose to interpret maintenance of equipment in a commercially reasonable manner to mean that a station/MVPD performs routine maintenance on the equipment at issue to ensure that it continues to function in a manner that prevents the transmission of loud commercials to consumers and timely repairs equipment when it malfunctions.[74] Accordingly, we believe maintenance in a "commercially reasonable manner" requires a station/MVPD to routinely perform quality control tests, such as spot checks to ensure that their equipment is properly detecting inappropriate loudness and to take swift corrective action to the extent problems are detected. We seek comment on this interpretation. We also invite comment on what, if any, other quality control measures should be required in order for stations/MVPDs to take advantage of

[64] We also consider, *infra,* use of contractual arrangements through which a station/MVPD would require that content be delivered to it by a content provider in conformance with the ATSC A/85 RP. *See, e.g.,* ATSC A/85 RP § 7.3.2 at 18 (stating that "[a] content delivery specification should specify the Target Loudness for all content").

[65] We note that Section 2(a) refers to a "television broadcast station" and Section 2(c) refers to a "broadcast television operator." *See* 47 U.S.C. 621(a) and (c). We seek comment on the significance, if any, of the use of these different terms.

[66] *See infra* discussion of Other Ways to Demonstrate Compliance.

[67] *See* ATSC A/85 RP § 8 at 23.

[68] *See* ATSC A/85 RP § 8 at 23.

[69] *See* ATSC A/85 RP § 3.3 at 13 (defining "measured loudness") and ATSC A/85 RP § 5.1 at 14.

[70] Based on industry sources, Congress estimated that the cost of equipment that controls the volume of programming ranges from a few thousand dollars to about $20,000 per device, depending on the method used to comply with the mandate. *Senate Committee Report to S. 2847* at 3.

[71] We note that our existing equipment authorization procedures would be inappropriate here because they are generally used to ensure compliance with RF safety or interference issues, neither of which is relevant to demonstrating compliance with the CALM Act. *See, e.g.,* 47 CFR 2.902 (verification) and § 2.907 (certification).

[72] *See, e.g.,* ATSC A/85 RP Annex H at 61 (stating "[g]oal is to present to the viewer consistent audio loudness across commercials, programs, and channel changes"). *See also, e.g., House Floor Debate of S. 2847* at H7720 (Rep. Eshoo stating that the bill would "make the volume of commercials and regular programming uniform so consumers can control sound levels."); *Senate Committee Report to S. 2847* at 1 (stating Congress' expectation that the ATSC A/85 RP will "moderat[e] the loudness of commercials in comparison to accompanying video programming"); *House Committee Report to H.R. 1084* at 1 (stating goal of statute is "to preclude commercials from being broadcast at louder volumes than the program material they accompany").

[73] *Id.*

[74] *See Senate Committee Report to S. 2847* at 4 ("the Committee expects that stations and MVPDs will use commercially reasonable efforts to maintain equipment and to repair or replace malfunctioning equipment").

the CALM Act's safe harbor provision. Do stations/MVPDs, in the ordinary course of doing business, maintain records about the routine maintenance of equipment on which they should be able to rely to be deemed in compliance with this element of the statute? Also, how much time is commercially reasonable for repairing malfunctioning equipment?

2. Other Ways To Demonstrate Compliance

22. While stations/MVPDs shall be "deemed" in compliance if they show that they have installed, utilized and maintained equipment in a commercially reasonable manner pursuant to Section 2(c), we do not believe that the CALM Act limits entities to just this one means of demonstrating compliance. As described below, we propose that demonstrations of compliance would be required in response to a consumer complaint alleging a loud commercial.[75] Thus, for example, in response to a consumer complaint, a station/MVPD may demonstrate that the dialnorm value of the complained of commercial actually matches the perceived loudness of the content, following the "golden rule." In this manner, the station/MVPD would thereby show that the transmission of the commercial complied with the requirements of the ATSC A/85 RP, rather than showing it installed, utilized and maintained equipment, pursuant to the provisions of Section 2(c). We believe that the ability to make such a showing would be useful for stations/MVPDs that have other means of meeting the goal of the statute and do not choose to rely on the safe harbor to demonstrate compliance. We seek comment on this and other means of complying and demonstrating compliance.

23. We also recognize that stations/MVPDs may take a contractual approach to compliance with the ATSC A/85 RP. Specifically, they may contract with their content providers to ensure that the content delivered to them complies with the ATSC A/85 RP.[76] As noted above, we tentatively conclude that the statute requires that commercials and adjacent programming be transmitted to consumers in compliance with the ATSC A/85 RP and holds stations/MVPDs responsible for preventing the transmission of loud commercials to consumers.[77] However, the ATSC A/85 RP recognizes that it may be more efficient for content providers to measure and encode dialnorm values at the production stage and states that content providers may play a significant role in the process.[78] The ATSC A/85 RP describes several effective solutions for controlling relative loudness of programs and commercials, including that a distributor "ensure" that content is labeled with the correct dialnorm value.[79] Therefore, we believe it is consistent with the ATSC A/85 RP for a station/MVPD to "ensure" that the dialnorm matches the loudness of the content by incorporating the ATSC A/85 RP requirements into its contracts with content providers.[80]

24. Importantly, however, the station/MVPD would remain responsible for noncompliance with the regulations required by the CALM Act where the program source fails to deliver content in compliance with the ATSC A/85 RP, the station/MVPD transmits the nonconforming content to viewers, and the content is the subject of consumer complaints. In this regard, stations/MVPDs may choose to negotiate for indemnification clauses in their content contracts in the event the content provider fails to follow the A/85 RP and the Commission takes enforcement action against the station/MVPD. We seek comment on whether and how regulated entities that use contracts to ensure compliance with ATSC A/85 RP may demonstrate compliance with the regulations required by the CALM Act in response to consumer complaints, and what, if any, quality control measures they should take to monitor the content delivered to them for transmission to consumers. We also welcome comment from content providers and, in particular, from the advertising industry to gauge industry's ability to provide stations/MVPDs with content in compliance with the ATSC A/85 RP. Moreover, should regulated entities pursue the contractual option for ensuring compliance, what amount of time might be necessary for negotiation of new indemnification provisions? Should the Commission factor this contract negotiation timeframe into its approach to enforcement?

25. We specifically invite comment on compliance methods that would be well-suited for small stations/MVPDs. Would a contractual approach be beneficial and workable for small stations/MVPDs? To what extent do large and small stations/MVPDs receive the same content streams, including metadata, from programmers? What other factors that affect stations/MVPDs' compliance as a result of their size should we consider? [81]

3. Station/MVPD Practical Challenges

26. As noted above, in our informal meetings with industry, we heard that MVPDs face specific challenges in complying with the new law. We describe two of these concerns below. We seek comment from industry about these and other practical challenges to compliance. We also seek comment on whether broadcast stations face similar or other challenges. We request that commenters offer solutions as well as describing challenges, and specify how stations/MVPDs can meet their statutory responsibilities.

27. First, as indicated above, several MVPD representatives indicated that they use audio systems that differ from the AC–3 audio system on which the ATSC A/85 RP is based.[82] Furthermore, the ATSC A/85 RP, which the statute directs the Commission to make mandatory, was originally intended for TV broadcast stations and other operators of an ATSC AC–3 audio system and may not be suitable for use

[75] *See infra* discussion of complaint process.

[76] As discussed below, we emphasize that such agreements will not alter the station's/MVPD's obligation to ensure that it is complying with our rules, and any failure to comply may subject the station/MVPD to enforcement action.

[77] *See* 47 U.S.C. 621(a).

[78] *See ATSC DTV Loudness Tutorial Summary* at 2 (stating that, under both fixed and agile dialnorm systems, controlling loudness can be achieved by ensuring that content is delivered properly to the station/MVPD operator). *See also, e.g.,* ATSC A/85 RP § 7.3.2 at 18 and Annex I at 67.

[79] *See* ATSC A/85 RP § 8.1 at 23. *See also* ATSC A/85 RP § 7.3.2 at 18.

[80] A contractual approach to compliance with the ATSC A/85 RP seems consistent with the requirements associated with commercial limits on children's programming. *See 1991 Children's TV Order,* FCC 91–113, 56 FR 19611, April 29, 1991. ("*1991 Children's TV Order*") (stating an MVPD remains liable for violations of the commercial limits on cable network children's programs they carry). In contrast, we believe the rules pertaining to closed captioning are inapposite. *See 1997 Closed Captioning Order,* FCC 97–279, 62 FR 48487, September 16, 1997. ("*1997 Closed Captioning Order*"); and 47 CFR 79.1(g)(6) (stating an MVPD may rely on the accuracy of certifications and is not held responsible for situations where a program source falsely certifies that programming delivered to the MVPD meets the Commission's captioning requirements if the MVPD is unaware that the certification is false). Unlike the CALM Act and the Children's Television Act of 1990 (47 U.S.C. 303a and 303b), Section 713 of the Communications Act, 47 U.S.C. 613, refers to the closed captioning of programming by providers and "owners" of video programming and allocates to owners some responsibility for compliance. *1997 Closed Captioning Order,* at paragraphs 28–29 (noting that "[t]he references to program "owners" in Section 713 reflect Congress' recognition that it is most efficient to caption programming at the production stage, and the assumption that owners and producers will be involved in the captioning process").

[81] *See also infra* discussion of financial hardship and general waiver provisions.

[82] In addition to the AC–3 audio system, MVPDs may use MPEG–1 Layer 2 (MP2), advanced audio coding (AAC) or other systems.

by MVPDs to the extent they use other audio systems.[83] Although the ITU–R BS.1770 audio loudness measurement algorithm can be applied to all audio systems, the specific methods for establishing and maintaining the audio loudness mentioned in the ATSC A/85 RP are not applicable to the non-AC–3 audio systems. Because the statute makes the ATSC A/85 RP mandatory for every station/MVPD, we seek comment on whether and how MVPDs that do not use AC–3 audio system can comply.[84] From our informal discussions with MVPD representatives, we understand that some MVPDs which do not use AC–3 in the transmission of audio content to consumers nevertheless use AC–3 within their distribution networks and transcode content to a non-AC–3 format after commercials are inserted.[85] We also understand that if the dialnorm was set properly while the content was encoded in the AC–3 format, the loudness adjustments will be made when the content is transcoded to another format as if such transcoding occurred in the consumer's own equipment. We seek comment on whether the CALM Act should be interpreted to permit non-AC–3 transmission of commercials if the loudness of commercials is effectively controlled using the techniques described within the ATSC A/85 RP prior to such transmission occurring. Would such an interpretation be consistent with the statutory language mandating that we incorporate ATSC A/85 RP "only insofar as such recommended practice concerns the transmission of commercial advertisements"? Again, we note that ATSC may revise the A/85 RP to account for users of other audio systems. If it does not do so, we also seek comment, as discussed further below, on whether exercise of our waiver authority, conditioned upon use of other effective technology, would be appropriate to address this issue.

28. Second, some MVPDs pointed out that they generally do not create most of the content they transmit to consumers and often receive programs and commercials together in programming blocks from the broadcast station or content provider and pass through these programming blocks to consumers. In addition, they reported that they transmit (or retransmit) channels to consumers on a real time basis and do not have the technical capability to prescreen and correct audio content before transmitting to the consumer. We seek specific comment from MVPDs about how they receive the content from programmers and their technical ability to prescreen and correct audio content that they do not create or insert. To what extent does the contractual approach to compliance discussed above address any such practical challenges faced by MVPDs?

29. Although broadcast industry representatives did not express these same concerns, we seek comment on whether broadcast stations generally have an opportunity to prescreen and correct audio content before transmitting to the consumer.[86] For example, would stations have this ability with respect to their local content, but not for network programming? To what extent can network/affiliate agreements be expected to require that the networks deliver content in compliance with the ATSC A/85 RP?

30. We also seek comment on whether special considerations apply to MVPD carriage of broadcast stations. If a station complies with the ATSC A/85 RP, and the MVPD carries the station without altering the audio content, will the MVPD's retransmission of the station to the consumer likewise comply with the A/85 RP?[87] If broadcast content carried by an MVPD contains loud commercials that are the subject of a complaint, how can we determine which party to hold responsible? We seek comment on these issues.

31. Finally, we also invite comment on other challenges that stations/MVPDs may face and how they can solve these challenges consistent with their responsibilities under the CALM Act. For example, will there be challenges in conforming legacy or inventory content? Also, will MVPDs face particular practical challenges associated with carriage of public, educational and governmental ("PEG") or leased access programming?[88] Are there any legal impediments to MVPD adjustment of audio content to meet the RP A/85 requirements and the goals of the CALM Act? Does Section 315's prohibition on "censorship" of political advertisements pose any legal obstacles?[89] Do small market broadcast stations or small cable/MVPD system operators face particular practical challenges related to their size?

32. Is the contractual approach to compliance discussed above sufficient to address the challenges that stations/MVPDs may face? Or, are there other means of addressing some of these challenges. For example, can retransmission consent agreements be used to clarify responsibilities between stations and MVPDs? Can a similar approach be used for commercial stations that elect mandatory carriage? What, if any, are the implications under copyright licenses? Would the waiver provision in the CALM Act, as discussed below, be an appropriate tool to address certain challenges or special circumstances that stations/MVPDs encounter? Would such a waiver conditioned on compliance by use of a different audio technology that will prevent the transmission of loud commercials to consumers be consistent with the goal of the statute?

4. Complaint Process

33. The overall focus and intent of the CALM Act is to address the problem of loud commercials as consumers experience them. Therefore, we propose to enforce compliance with the statute by focusing on consumer complaints after the rules take effect. If stations/MVPDs take the actions necessary to eliminate or significantly reduce valid loud commercial complaints, then we believe the CALM Act will achieve its purpose. We believe that a consumer complaint driven procedure is the most practical means to monitor industry compliance with our proposed rules. In addition to investigating individual consumer complaints alleging transmission of a loud commercial, we

[83] *See* ATSC A/85 RP § 1 at 7. The ATSC A/85 RP's scope includes MVPDs that use AC–3 audio systems as being "a specific community of interest." *Id.* The A/85 RP also provides guidance regarding how to manage loudness of content without metadata, including non-AC–3 audio content. *Id.* 6 at 16 (discussing delivery or exchange of content without metadata). *See also id.* Annex H.7 at 63–64, Annex I.7 at 69.

[84] The legislative history does not expressly consider the use of non-AC–3 technologies, whether other audio technologies can be effective at addressing the loud commercials problem, whether there would be significant costs associated with changing to exclusively AC–3 systems, or whether the waiver provision in Section 2(b)(3) is intended to address use of other technologies. *See infra* discussion of general waiver.

[85] Transcoding "is a procedure for modifying a stream of data carried" (in this context, the AC–3 audio stream) "so that it may be carried via a different type of network" (in this context, the non-AC–3 audio system). *See* Newton's Telecom Dictionary (definition of "transcoding") at 846 (20th ed. 2004).

[86] As explained *supra,* broadcast TV stations are required to use AC–3 audio systems by Section 73.682 of our rules, which incorporates by reference the ATSC A/53 Standard.

[87] We note the Commission exempts MVPDs from liability under the closed captioning and children's television commercial limits for broadcast content they passively carry, because the Copyright Act of 1976 bars MVPDs from altering the content (including commercials) of retransmitted broadcast channels. *See* 47 CFR 76.225(e) and 25.701(e)(2); *see* 47 CFR 79.1(e)(9). *See also* 17 U.S.C. 111(c)(3), 119(a)(5) and 122(e).

[88] *See* 47 U.S.C. 531(e) and 532(c)(2). *See also* 47 CFR 76.901(a).

[89] 47 U.S.C. 315.

intend to monitor consumer complaints and follow trends to determine where enforcement action is warranted. We invite comment on whether we should supplement the complaint-driven approach with occasional equipment audits, and under what circumstances such audits would be appropriate. We seek comment on our proposed consumer complaint-driven approach and the proposed consumer complaint procedure, as described below.

34. *Filing a Complaint.* We propose that consumers may file their complaints electronically using the Commission's online complaint form (the Form 2000 series) found at *http://esupport.fcc.gov/complaints.htm.* We propose to modify the online complaint form to specifically accommodate complaints about loud commercials.[90] Consumers may also file their complaint 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. Consumers that 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).[91] There is no fee for filing a consumer complaint.

35. *Complaint Details.* To ensure that the Commission is able to take appropriate action on a complaint, the consumer should complete fully the online complaint form. For consumers that choose not to use the online complaint form, they can submit a written complaint. The complaint 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 e-mail address if available; (2) the name and call sign of the broadcast station or the name and type of 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 loud commercial problem.

36. We will evaluate the individual complaints we receive to determine which complaints indicate a possible violation of our rules. In addition, we will track these consumer complaints, as well as stations/MVPDs' responses to them, to determine if there are trends that suggest a need for enforcement action. We will generally forward individual complaints to the appropriate broadcast station or MVPD so that stations/MVPDs can both be aware of a potential problem and take action to address it and to respond to their viewers/subscribers appropriately. When appropriate, we will investigate the station/MVPD and require it to respond to the alleged violation(s) with a detailed explanation of its actions. If the station/MVPD asserts in its response to us that it did not violate the rules, we would expect it to provide us with sufficient records and documentation to demonstrate compliance. We seek comment on what records and documentation stations/MVPDs should be required to retain to demonstrate compliance, including but not limited to records and documentation to demonstrate compliance with the Section 2(c) safe harbor provision.[92] If the station/MVPD acknowledges in its response to us that it violated the rules, we intend to require an explanation of why the violation occurred and what corrective actions it will take to prevent future violations. We seek comment on whether to require stations/MVPDs to designate a contact person to receive loud commercial complaints, or if we can use existing contact information from our various databases (*e.g.,* CDBS, COALS, etc.) for this purpose.[93] We note that a television broadcast station would be required to 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.[94] We seek comment on whether to require MVPDs to do the same in their local public inspection files or, to the extent some MVPDs are not obligated to maintain a public inspection file, to retain such complaints for a comparable period of time in an accessible location.[95] We also seek comment on what, if any, requirements should be imposed on stations/MVPDs to retain copies of loud commercial complaints that they receive directly from consumers.[96]

5. Enforcement

37. Under the general forfeiture provisions of the Communications Act, stations/MVPDs are subject to forfeitures for violations of the Communications Act and Commission's rules.[97] We will apply these provisions to enforce compliance with the CALM Act and our rules implementing it. This approach is consistent with the legislative history of the CALM Act.[98] Accordingly, we will use the full range of enforcement tools available to us.[99] We seek comment on whether there are any general situations that may warrant special consideration in enforcing the Act. We also invite comment on whether we should establish a base forfeiture amount for violations of our rules implementing the CALM Act, and if so, on the appropriate base forfeiture amount.[100]

C. Financial Hardship and General Waivers

38. 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/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.[101] The legislative history indicates congressional intent for us to interpret "financial hardship" broadly and, in particular, recognizes "that television broadcast stations in smaller markets and smaller cable

[90] We intend to add "loud commercials" as a complaint category under the complaint type menu for "Broadcast (TV and Radio), Cable, and Satellite Issues." We will also add specific questions which relate to the filing of a loud commercial complaint. *See, infra,* discussion of complaint details.

[91] We also encourage consumers to visit the Consumer & Governmental Affairs Bureau website at *http://www.fcc.gov/cgb/or* to visit our online Consumer Help Center at *http://reboot.fcc.gov/consumers/.*

[92] *See, supra,* discussion of demonstrating safe harbor compliance and of other ways to demonstrate compliance.

[93] The Commission's Consolidated Database System ("CDBS") Electronic Filing System is publicly available online via the Media Bureau's Electronic Filing and Public Access website at: *http://www.fcc.gov/mb/cdbs.html* or CDBS website at: *http://fjallfoss.fcc.gov/prod/cdbs/forms/prod/cdbs_ef.htm.* The Media Bureau's Cable Operations and Licensing System (COALS) database is publicly available online at *http://fjallfoss.fcc.gov/csb/coals/index.html.*

[94] *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. *Id. See also* 47 CFR 73.3527(e)(11) (relating to noncommercial TV stations).

[95] *See, e.g.,* 47 CFR 76.1700 *et seq.* and 25.701.

[96] We note that, if we require stations/MVPDs to retain in their public file copies of loud commercial complaints which they receive directly from consumers, our trends analysis may include consideration of consumer complaints filed directly with the station/MVPD.

[97] 47 U.S.C. 503.

[98] *See, e.g., Senate Committee Report to S. 2847* at 4.

[99] *See* 47 U.S.C. 503(b)(1)(B) and 47 CFR 1.80(a)(2) (stating that any person who willfully or repeatedly fails to comply with the provisions of the Communications Act or the Commission's rules shall be liable for a forfeiture penalty).

[100] *See* 47 CFR 1.80.

[101] *See* 47 U.S.C. 621(b)(2).

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." [102] In addition, 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.[103] We intend to delegate authority to the Media Bureau to consider waiver requests filed pursuant to Sections 2(b)(2) and 2(b)(3) of the CALM Act.

39. *Financial Hardship.* We propose a financial hardship waiver standard for evaluating requests for one-year extensions of the effective date. To request a financial hardship waiver pursuant to Section 2(b)(2), we propose to require a station/MVPD to provide: (1) Evidence of its financial condition, such as financial statements; [104] (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. Consistent with the statements in the legislative history that we should interpret "financial hardship" broadly, we do not propose to require waiver applicants to show negative cash flow, as we have done in other contexts.[105] Instead, we propose to require only that the station/MVPD's assertion of financial hardship be reasonable under the circumstances.[106] As part of the showing set forth above, we propose to require a station/MVPD that requests a financial hardship waiver to describe the equipment it intends to obtain to comply with the CALM Act and the expense associated with that equipment.[107] We seek comment on our proposals. Should we allow a station/MVPD to provide federal tax returns in lieu of financial statements? We also seek comment on how to address the situation in which an MVPD is carrying a broadcast station that has been granted a financial hardship waiver. We also invite comment on whether the financial hardship waiver provisions of the statute should be interpreted to apply to any successors to ATSC A/85 RP.

40. *Small Stations/MVPD Systems.* We seek specific comment on whether to create a streamlined financial hardship waiver approach for small market broadcast stations and operators of small MVPD systems. One way of streamlining the hardship waivers would be to reduce the amount of information stations/MVPDs that meet an appropriate definition of "small" would be required to submit to justify the waiver postponing the effective date for one year. We seek comment on whether such additional relief for small stations/systems would be appropriate; how to streamline the process for requesting waivers; and how to define "small" for this purpose. For example, would it be appropriate to define a "small market television broadcast station" as a station that is in television markets 101–210 and is not affiliated with a top-four network (*i.e.,* ABC, CBS, Fox and NBC)? [108] Would it be appropriate to define a "small MVPD system" as one with fewer than 15,000 subscribers (on the effective date of the rules) [109] and that is not affiliated with a larger operator? [110]

41. *General Waiver Authority.* Section 2(b)(3) of the CALM Act provides that the Commission may waive any rule required by the CALM Act, or the application of any such rule, to any station/MVPD for good cause shown under Section 1.3 of the Commission's rules.[111] In addition to any requests for waiver necessitated by unforeseen circumstances, we believe this provision preserves our inherent authority to grant waivers to MVPDs that cannot implement the ATSC A/85 RP because of the technology they use. 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. We seek comment on the appropriate exercise of our waiver authority under such circumstances, and on whether non-AC–3 audio systems can effectively prevent loud commercials.

42. We also invite comment on whether and how waivers should be used to address challenges that stations/MVPDs foresee in complying with the regulations required by the CALM Act. For example, would it be appropriate and consistent with the provisions of the CALM Act to grant a blanket one-year extension of the effective date of our rules to small market stations or smaller MVPD operators because such entities are generally likely to face financial hardships and/or because of the administrative burdens associated with requesting financial hardship waivers for such entities? [112] Are small

[102] *See Senate Committee Report to S. 2847* at 4. The legislative history, in particular, states that the Commission "should not require stations or MVPDs to demonstrate that they have negative cash flow or are in receivership for bankruptcy to be eligible for a waiver based on financial hardship." This appears to be a reference to the strict financial hardship standard established in 2008 for DTV station build-out extensions given the short time remaining before the DTV transition deadline. *See Third DTV Periodic Report and Order,* FCC 07–228, 73 FR 5634, January 30, 2008. ("*Third DTV Periodic Report and Order*") (requiring a station to either (1) submit proof that they have filed for bankruptcy or that a receiver has been appointed, or (2) submit an audited financial statement for the previous three years showing negative cash flow).

[103] *See* 47 U.S.C. 621(b)(3).

[104] Financial statements should be compiled according to generally accepted accounting practices ("GAAP"). Stations/MVPDs may request confidential treatment for this financial information pursuant to 47 CFR 0.459.

[105] *See, e.g., Third DTV Periodic Report and Order,* at para. 74 (generally requiring three years showing negative cash flow for DTV station build-out extensions); *2002 Broadcast Ownership Review* Order, FCC 03–127, 68 FR 46286, August 5, 2003 (generally requiring three years of negative cash flow to show that a station is a "failed station" for purposes of a waiver of the local TV ownership rules); *Great Plains Cable Television, Inc. et al. Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules,* 22 FCC Rcd 13414, 13426–7, paragraphs 39–40 (2007) (unpublished) (granting waiver for extraordinary financial hardships upon evidence of negative cash flow).

[106] This approach is consistent with the more liberal process for DTV build-out extensions prior to 2008. *See 2001 DTV Recon Order,* FCC 01–330, 66 FR 65122, December 18, 2001 (establishing four-part test for financial hardship to obtain a DTV build-out extension: (1) An itemized estimate of the cost of meeting the build-out requirements; (2) a detailed statement explaining why its financial condition precludes such an expenditure; (3) a detailed accounting of the applicant's good faith efforts to meet the deadline, including its good faith efforts to obtain the requisite financing and an explanation why those efforts were unsuccessful; and (4) an indication when the applicant reasonably expects to complete construction).

[107] If, for example, an MVPD does not intend to install, utilize and maintain equipment to demonstrate compliance with the CALM Act, but rather intends to rely primarily on contractual arrangements with content providers, and more limited monitoring equipment, then it would not qualify for a financial waiver based upon the cost of equipment it never intends to obtain.

[108] *See, e.g., Third DTV Periodic Report and Order,* 23 FCC Rcd at 3041, para. 97, n.292 (defining a small market broadcast station in the DTV context).

[109] *See, e.g.,* 47 CFR 76.901(c) (defining a "small system" as a cable system serving 15,000 or fewer subscribers in the context of cable rate regulation).

[110] *See, e.g., DTV Broadcast Carriage Signals Order,* FCC 08–193, 73 FR 61742, October 17, 2008 (defining a "small cable operator" in the context of broadcast carriage requirements and excluding cable systems affiliated with a cable operator serving more than 10 percent of all MVPD subscribers).

[111] *See* 47 U.S.C. 621(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 that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown").

[112] We also note that a blanket one-year extension for small stations/MVPDs would eliminate a significant administrative burden on the

stations/systems as a class likely to need more time to obtain the necessary equipment to comply with the CALM Act? We also invite comment on the potential impact on consumers of a blanket one-year extension for small stations/MVPDs, including whether it would engender confusion and frustration if the effective date for the CALM Act were delayed for some stations/MVPDs but not others. What impact might a blanket waiver approach have on consumers?

43. *Filing Deadline.* We propose that, absent extraordinary circumstances, the deadline for filing a waiver request pursuant to either Section 2(b)(2) or 2(b)(3) of the CALM Act will be 180 days before the effective date of our rules. This will afford the Bureau time to consider these requests before our rules take effect. Requests for waiver renewals must be filed at least 180 days before the waiver expires. Requests for waiver based on unforeseen circumstances, of course, can be filed at any time. We seek comment on these proposed filing deadlines.

44. *Filing Requirements.* We propose to require a station/MVPD to file its 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/cgb/ecfs/*. The filing must be clearly designated as a "financial hardship" or "general" waiver request. Such requests must also comply with Section 1.3 of our rules.[113] We believe this process will ensure that all interested parties receive notice and an opportunity to comment on such waiver requests. We propose that we will not impose a filing fee for waiver requests pursuant to the waiver provisions of the CALM Act. We seek comment on our proposed filing requirements.

IV. Conclusion

45. Congress' directive to us in the CALM Act is clear: Incorporate by reference into our rules and make mandatory the ATSC A/85 RP to prevent TV broadcast stations, cable and DBS operators, and other MVPDs from transmitting "loud commercials" to consumers. To achieve this directive, we propose a consumer complaint-driven process to evaluate and ensure compliance with our rules, similar to what we have done in other contexts. We believe our proposed implementation of the CALM Act appropriately focuses on benefits for consumers, while limiting costs to stations and MVPDs to the extent possible.

V. Procedural Matters

A. Initial Regulatory Flexibility Act Analysis

46. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[114] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* ("*NPRM*"). Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the NPRM[115] and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[116] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register.**[117]

1. Need for, and Objectives of, the Proposed Rule Changes

47. This document proposes rules to implement the Commercial Advertisement Loudness Mitigation (CALM) Act.[118] 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 standard-setting body that is designed to prevent television commercial advertisements from being transmitted at louder volumes than the program material they accompany.[119] Specifically, the CALM Act requires the Commission to incorporate by reference the ATSC A/85 Recommended Practice ("ATSC A/85 RP")[120] and make it mandatory "insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor."[121] The NPRM considers proposals for implementing the statute and applying the required regulation. Some of these proposals are contained in Sections A.4. and A.5. of this IRFA, and we invite comment on these proposals. As mandated by the statute, the proposed rules will apply to TV broadcasters, cable operators and other multichannel video programming distributors ("MVPDs").[122] The new law requires the Commission to adopt the required regulation on or before December 15, 2011,[123] and it will take effect one year after adoption.[124]

2. Legal Basis

48. The proposed action is authorized pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Public Law 111–311, 124 Stat. 3294, and Sections 1, 2(a), 4(i) 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. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

49. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[125] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[126] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[127] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of

Commission of processing hardship waiver requests.

[113] *See* 47 CFR 1.3.

[114] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et. seq.,* has been amended by the Contract With America Advancement Act of 1996, Pub. L. 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[115] *See* Section IV.D. of the *NPRM.*

[116] *See* 5 U.S.C. 603(a).

[117] *See id.*

[118] The Commercial Advertisement Loudness Mitigation ("CALM") Act, Pub. L. 111–311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. 621).

[119] *See* 47 U.S.C. 621(a); *Senate Committee Report to S. 2847* at 1; *House Committee Report to H.R. 1084* at 1.

[120] *See* ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (May 25, 2011) ("ATSC A/85 RP"). To obtain a copy of the ATSC A/85 RP, visit the ATSC Web site: *http://www.atsc.org/cms/standards/a_85-2009.pdf.*

[121] *See* 47 U.S.C. 621(a).

[122] We refer herein to covered entities collectively as "stations/MVPDs" or "regulated entities."

[123] *See* 47 U.S.C. 621(a).

[124] *See* 47 U.S.C. 621(b)(1).

[125] 5 U.S.C. 603(b)(3).

[126] 5 U.S.C. 601(6).

[127] 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**." 5 U.S.C. 601(3).

operation; and (3) satisfies any additional criteria established by the SBA.[128] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

50. *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.[129] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[130] The Commission has estimated the number of licensed commercial television stations to be 1,390.[131] 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[132] 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 391.[133] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[134] 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.

51. 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 does not exclude any television station from the definition of a small business on this basis and is 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.

52. *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."[135] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[136] According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.[137] Of this total, 939 firms had employment of 999 or fewer employees, and 16 firms had employment of 1000 employees or more.[138] Thus, under this size standard, the majority of firms can be considered small and may be affected by rules adopted pursuant to the NPRM.

53. *Cable Companies and Systems (Rate Regulation Standard).* 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.[139] As of 2008, out of 814 cable operators,[140] all but 10 (that is, 804) qualify as small cable companies under this standard.[141] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[142] Current Commission records show 6,000 cable systems. Of these, 726 have 20,000 subscribers or more, based on the same records. We estimate that there are 5,000 small systems based upon this standard.

54. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, 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."[143] There are approximately 63.7 million cable subscribers in the United States today.[144] Accordingly, an operator serving fewer than 637,000 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.[145] Based on available data, we find that the number of cable operators serving 637,000 subscribers or less is also 804.[146] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues

[128] 15 U.S.C. 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[129] *See* 13 CFR 121.201, NAICS Code 515120 (2007).

[130] *Id.* This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[131] *See* News Release, "Broadcast Station Totals as of December 31, 2010," 2011 WL 484756 (F.C.C.) (dated Feb. 11, 2011) ("*Broadcast Station Totals*"); also available at *http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf.*

[132] We recognize that this total differs slightly from that contained in *Broadcast Station Totals,* however, we are using BIA's estimate for purposes of this revenue comparison.

[133] *See Broadcast Station Totals.*

[134] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 CFR 121.103(a)(1).

[135] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition), *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[136] 13 CFR 121.201, NAICS code 517110 (2007).

[137] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

[138] *See id.*

[139] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[140] Cable MSO Ownership, A Geographical Analysis, 2009 Edition, 14–31, SNL Kagan (June 2009).

[141] *Id.* at 12.

[142] 47 CFR 76.901(c).

[143] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[144] *See* Cable TV Investor: Deals & Finance, No. 655, SNL Kagan, March 31, 2009, at 6.

[145] 47 CFR 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

[146] Cable MSO Ownership at 12.

exceed $250 million.[147] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

55. *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,"[148] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[149] However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[150] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and EchoStar Communications Corporation ("EchoStar") (marketed as the DISH Network).[151] Each currently offers subscription services. DIRECTV[152] and EchoStar[153] each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider. We seek comments that have data on the annual revenues and number of employees of DBS service providers.

56. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[154] which was developed for small wireline firms.[155] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[156] However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[157] As of June 2004, there were approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[158] The IMCC indicates that, as of June 2006, PCOs serve about 1 to 2 percent of the multichannel video programming distributors (MVPD) marketplace.[159] Individual PCOs often serve approximately 3,000–4,000 subscribers, but the larger operations serve as many as 15,000–55,000 subscribers. In total, as of June 2006, PCOs serve approximately 900,000 subscribers.[160] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest 10 PCOs, we believe that a substantial number of PCOs may have been categorized as small entities under the now superseded SBA small business size standard for Cable and Other Program Distribution.[161]

57. *Open Video Services.* The open video 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.[162] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[163] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[164] 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 3,188 firms in this previous

[147] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR 76.901(f).

[148] *See* 13 CFR 121.201, NAICS code 517110 (2007). The 2007 North American Industry Classification System ("NAICS") defines the category of "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.*" (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; *http://www.census.gov/naics/2007/def/ND517110.HTM.*

[149] 13 CFR 121.201, NAICS code 517110 (2007).

[150] 13 CFR 121.201, NAICS code 517510 (2002).

[151] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, 24 FCC Rcd 542, 580, para. 74 (2009) ("13th Annual Report"). We note that, in 2007, EchoStar purchased the licenses of Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel). *See* Public Notice, "Policy Branch Information; Actions Taken," Report No. SAT–00474, 22 FCC Rcd 17776 (IB 2007).

[152] As of June 2006, DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 16.20% of MVPD subscribers nationwide. *See id.* at 687, Table B–3.

[153] As of June 2006, DISH Network is the second largest DBS operator and the third largest MVPD, serving an estimated 13.01% of MVPD subscribers nationwide. *Id.* As of June 2006, Dominion served fewer than 500,000 subscribers, which may now be receiving "Sky Angel" service from DISH Network. *See id.* at 581, para. 76.

[154] *See* 13 CFR 121.201, NAICS code 517110 (2007).

[155] Although SMATV systems often use DBS video programming as part of their service package to subscribers, they are not included in Section 340's definition of "satellite carrier." *See* 47 U.S.C. 340(i)(1) and 338(k)(3); 17 U.S.C. 119(d)(6).

[156] 13 CFR 121.201, NAICS code 517110 (2007).

[157] 13 CFR 121.201, NAICS code 517510 (2002).

[158] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Eleventh Annual Report, FCC 05–13, para. 110 (rel. Feb. 4, 2005) ("*2005 Cable Competition Report*").

[159] *See 13th Annual Report,* 24 FCC Rcd at 684, Table B–1.

[160] *Id.*

[161] 13 CFR 121.201, NAICS code 517510 (2002).

[162] 47 U.S.C. 571(a)(3)–(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 06–189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, para. 135 (2009) ("*Thirteenth Annual Cable Competition Report*").

[163] *See* 47 U.S.C. 573.

[164] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

category that operated for the entire year.[165] Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1,000 employees or more.[166] Thus, under this size standard, most cable systems are small and may be affected by rules adopted pursuant to the NPRM. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[167] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[168] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

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

58. The NPRM contains proposals that, if adopted, would impose new reporting, recordkeeping and/or other compliance requirements, including the following. First, the NPRM considers what showing is required to satisfy the Section 2(c) safe harbor compliance provision.[169] Second, the NPRM considers what types of showings are required for a station/MVPD that chooses not to demonstrate Section 2(c) safe harbor compliance, but instead chooses to demonstrate compliance with the rules implementing the CALM Act by some other means.[170] This includes, for example, whether and how regulated entities could use contracts to ensure compliance and what quality control measures they can take to monitor the content delivered to them for transmission to consumers.[171] Third, the NPRM considers whether to require stations/MVPDs to designate a contact person to receive loud commercial complaints.[172] Fourth, the NPRM notes that television broadcast stations will be required to retain in their local public inspection file material a copy of a complaint filed with the Commission about a loud commercial, and considers whether to require MVPDs to do the same in their local public inspection file.[173] The NPRM also considers what, if any, requirements should be imposed on stations/MVPDs to retain a copy of a loud commercial complaint that it receives directly from consumers?[174] Finally, the NPRM considers what showing is required to respond to a consumer complaint alleging a loud commercial that is forwarded to it by the Commission.[175] The NPRM proposes to require the station/MVPD to investigate the alleged violation and provide a detailed explanation of its findings. In addition, if the station/MVPD asserts in its response that it did not violate the rules, it must provide the Commission with sufficient records and documentation to demonstrate compliance. The NPRM considers what records and documentation should be required to demonstrate compliance. If the station/MVPD acknowledges in its response that it violated the rules, it must provide the Commission with an explanation of why the violation occurred and what corrective actions it will take to prevent future violations.

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

59. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed 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.[176]

60. The express language of the statute requires that the new technical loudness standard (*i.e.,* the ATSC A/85 RP) be made mandatory for all stations/MVPDs, regardless of size.[177] However, the statute also provides for 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 allows renewal of such waiver for one additional year.[178] The NPRM proposes a broad financial hardship waiver standard for approving such waivers. In particular, this waiver provision should benefit television broadcast stations in smaller markets and smaller MVPD systems, which may face greater challenges in budgeting for the purchase of equipment to comply with the law than television broadcast stations in larger markets or larger MVPD systems. The NPRM also specifically considers whether to create a streamlined financial hardship waiver process for small market broadcast stations and operators of small MVPD systems.[179] Finally, the statute also provides that the Commission may waive any rule required by the CALM Act, or the application of any such rule, for good cause shown to any station/MVPD.[180] This provision allows us to consider legitimate requests for waiver of specific compliance with the ATSC A/85 RP, provided the station/MVPD can prevent the transmission of loud commercials to consumers and, thus, comply with the overarching goal of the statute and the ATSC A/85 RP. The NPRM considers alternative approaches to implementing the waiver provisions of the statute and specifically considers if an alternative approach would facilitate small businesses' compliance with the ATSC A/85 RP (and thus our rules).

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

61. None.

B. Initial Paperwork Reduction Act of 1995 Analysis

62. This NPRM has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA")[181] and contains proposed new and modified information collection requirements.[182] It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the

[165] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued Nov. 2010).

[166] *See id.*

[167] A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.*

[168] *See Thirteenth Annual Cable Competition Report,* 24 FCC Rcd at 606–07, para. 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.

[169] *See NPRM* paragraphs 16–21. Section 2(c) requires a station/MVPD seeking "safe harbor" compliance to demonstrate that it has installed, utilized and maintained the necessary equipment in a commercially reasonable manner.

[170] *See id.* paragraphs 22–23.

[171] *See id.* para. 23.

[172] *See id.* para. 36.

[173] *See id.*

[174] *See id.*

[175] *See id.*

[176] 5 U.S.C. 603(c)(1)–(c)(4)

[177] *See* 47 U.S.C. 621(a).

[178] *See Id.* 621(b)(2).

[179] *See NPRM* paras. 40 and 42.

[180] *See* 47 U.S.C. 621(b)(3).

[181] The Paperwork Reduction Act of 1995 ("PRA"), Public Law 104–13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[182] We propose to modify existing information collection requirements relating to the Commission's online complaint form (the Form 2000 series). *See* OMB Control No. 3060–0874. We also propose to create a new information collection requirement to cover the filing of financial hardship and general waiver requests pursuant to Sections 2(b)(2) and 2(b)(3) of the CALM Act.

PRA.[183] 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 document, as required by the PRA.

63. Written PRA comments on the proposed information collection requirements contained herein must be submitted on or before 60 days after the date of publication in the **Federal Register.** Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.[184] In addition, we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.[185]

64. In addition to filing comments with the Office of the Secretary, a copy of any PRA comments on the proposed information collection requirements contained herein should be submitted to the Federal Communications Commission (FCC) via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *Nicholas_A._Fraser@omb.eop.gov* or via fax at 202–395–5167. For additional information concerning the information collection requirements contained in this NPRM, send an e-mail to *PRA@fcc.gov* or contact Cathy Williams, *Cathy.Williams@fcc.gov,* of the Office of Managing Director, Performance Evaluation and Records Management, (202) 418–2918.

65. To view a copy of the information collection requests (ICRs) submitted to OMB: (1) Go to the OMB Information Collection Review Data on Reginfo.gov web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the Select Agency box, (5) click the "Submit" button to the right of the "Select Agency" box, (6) when the list of FCC ICRs currently under review appears, look for the title of the ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

OMB Control Number: 3060–0874

Title: FCC Form 2000 A through F, FCC Form 475–B, FCC Form 1088 A through H, and FCC Form 501—Consumer Complaint Forms: General Complaints, Obscenity or Indecency Complaints, Complaints under the Telephone Consumer Protection Act, and Slamming Complaints.

Form Number: FCC Form 2000 A through F, FCC Form 475–B, FCC Form 1088 A through H, and FCC Form 501.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; individuals or household; not-for profit institutions; State, local or tribal government.

Number of Respondents and Responses: 523,193 respondents and 523,193 responses.

Frequency of Response: On occasion reporting requirement.

Estimated Time per Response: 0.25 to 0.5 hours.

Total Annual Burden: 198,204 hours.

Total Annual Cost to Respondents: None.

Obligation to Respond: Voluntary. The statutory authority for this collection of information is contained in 47 U.S.C 151, 152, 154(i) and (j), 303(r) and 621.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's updated system of records notice ("SORN"), FCC/CGB–1, "Informal Complaints and Inquiries," which became effective on January 25, 2010.

Privacy Impact Assessment: The Privacy Impact Assessment ("PIA") for Informal Complaints and Inquiries was completed on June 28, 2007. It may be reviewed at *http://www.fcc.gov/omd/privacyact/Privacy-Impact-Assessment.html.*

Needs and Uses: Consumers may file complaints about loud commercials using the Commission's online complaint form (specifically, the Form 2000E). Consumers may also file their complaint by fax or by letter. The information obtained by consumer complaints will be used by Commission staff to evaluate and ensure that TV stations and MVPDs are in compliance with the rules implementing the Commercial Advertisement Loudness Mitigation ("CALM") Act. FCC Form 2000E is the only form that is contained in this collection that has proposed form revisions to it. All of the other forms contained in this collection would remain unchanged.

OMB Control Number: 3060–xxxx.

Title: Commercial Advertisement Loudness Mitigation ("CALM") Act; Financial Hardship and General Waiver Requests.

Form Number: Not applicable.

Type of Review: New collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 4,500 respondents and 4,500 responses.

Frequency of Response: On occasion reporting requirement.

Estimated Time per Response: 20 hours.

Total Annual Burden: 90,000 hours.

Total Annual Cost to Respondents: $2,700,000.

Obligation to Respond: Required to obtain benefits. The statutory authority for this collection of information is contained in 47 U.S.C 151, 152, 154(i) and (j), 303(r) and 621.

Nature and Extent of Confidentiality: There is no assurance of confidentiality provided to respondents, but, in accordance with the Commission's rules, 47 CFR 0.459, a station/MVPD may request confidential treatment for financial information supplied with its waiver request.

Privacy Impact Assessment: No impact(s).

Needs and Uses: TV stations and MVPDs may file financial hardship waiver requests to seek a one-year waiver of the effective date of the rules implementing the CALM Act or to request a one-year renewal of such waiver. A TV station or MVPD must demonstrate in its waiver request that it would be a "financial hardship" to obtain the necessary equipment to comply with the rules. TV stations and MVPDs may file general waiver requests to request waiver of the rules implementing the CALM Act for good cause. The information obtained by financial hardship and general waiver requests will be used by Commission staff to evaluate whether grant of a waiver would be in the public interest.

C. Ex Parte Rules

66. *Permit-But-Disclose.* This proceeding will be treated as a "permit-but-disclose" proceeding in accordance

[183] *See* 44 U.S.C. 3507(d).

[184] *See* 44 U.S.C. 3506(c)(2).

[185] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Public Law 107–198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

with the Commission's *ex parte* rules.[186] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed.[187] More than a one- or two-sentence description of the views and arguments presented is generally required.[188] Additional rules pertaining to oral and written presentations in "permit-but-disclose" proceedings are set forth in section 1.1206(b) of the rules.[189]

D. Filing Requirements

67. *Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[190] interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System ("ECFS"), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[191]

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/or* the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

○ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to Room TW–A325 at FCC Headquarters, 445 12th Street, SW., Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8 a.m. to 7 p.m.

○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

○ U.S. Postal Service first-class, Express, and Priority mail must be addressed to FCC Headquarters, 445 12th Street, SW., Washington, DC 20554.

68. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be publically available online via ECFS.[192] These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY–A257 at FCC Headquarters, 445 12th Street, SW., Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8 a.m. to 4:30 p.m. and Friday from 8 a.m. to 11:30 a.m.

69. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

70. *Additional Information.* For additional information on this proceeding, contact Evan Baranoff, *Evan.Baranoff@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.

VI. Ordering Clauses

71. Accordingly, *it is ordered* that pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Public Law 111–311, 124 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, *notice is hereby given* of the proposals and tentative conclusions described in this Notice of Proposed Rulemaking.

72. *It is further ordered* that the Reference Information Center, Consumer Information Bureau, shall send a copy of this Notice of Proposed Rulemaking, including the Initial 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, Satellite television, Television.

Federal Communications Commission.

Avis Mitchell,

Federal Register Liaison.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 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:

Authority: 47 U.S.C. 154, 303, 334 and 336.

2. Section 73.682 is amended by adding paragraph (e) to read as follows:

§ 73.682 TV transmission standards.

* * * * *

(e)(1) *Transmission of commercial advertisements by television broadcast station.* Effective [one year after date of FCC adoption], television broadcast stations must comply with the ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," (May 25, 2011) ("ATSC A/85 RP"), and any successor thereto, approved by the ATSC (incorporated by reference, see § 73.8000), insofar as it concerns the transmission of commercial advertisements. ATSC A/85 RP is available from Advanced Television Systems Committee (ATSC), 1750 K Street, NW., Suite 1200, Washington, DC 20006, or at the ATSC Web site: *http://www.atsc.org/standards.html.*

(2) A television broadcast station that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software to comply with ATSC A/85 shall be deemed in compliance with this section.

3. Section 73.8000 is amended by adding paragraph (b)(5) to read as follows:

[186] *See* 47 CFR 1.1206 (rule for permit-but-disclose" proceedings); *see also id.* 1.1200–1.1216.

[187] *See* 1.1206(b)(2).

[188] *See id.*

[189] *See id.* 1.1206(b). *See also Commission Emphasizes the Public's Responsibilities in Permit-But-Disclose Proceedings,* Public Notice, 15 FCC Rcd 19945 (2000). We note that the Commission recently amended the rules governing the content of *ex parte* notices. *See Amendment of the Commission's Ex Parte Rules and Other Procedural Rules,* Report and Order and Further Notice of Proposed Rulemaking, GC Docket No. 10–43, FCC 11–11, paragraphs 35–36 (rel. Feb. 2, 2011).

[190] *See id.* 1.415, 1419.

[191] *See Electronic Filing of Documents in Rulemaking Proceedings,* Report and Order, 63 FR 24121, May 1, 1998.

[192] Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

§ 73.8000 Incorporation by reference.

* * * * *

(b) * * *

(5) ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television" (May 25, 2011), IBR approved for § 73.682.

* * * * *

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

4. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

5. Section 76.607 is added to read as follows:

§ 76.607 Transmission of commercial advertisements.

(a) Effective [one year after date of FCC adoption], cable operators and other multichannel video programming distributors must comply with the ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television" (May 25, 2011) ("ATSC A/85 RP"), and any successor thereto, approved by the ATSC (incorporated by reference, see § 76.602), insofar as it concerns the transmission of commercial advertisements. ATSC A/85 RP is available from Advanced Television Systems Committee (ATSC), 1750 K Street, NW., Suite 1200, Washington, DC 20006, or at the ATSC Web site: *http://www.atsc.org/standards.html*.

(b) 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 shall be deemed in compliance with this section.

6. Section 76.602 is amended by adding paragraph (b)(10) to read as follows:

§ 76.602 Incorporation by reference.

* * * * *

(b) * * *

(10) ATSC A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television" (May 25, 2011), IBR approved for § 76.602.

Note: The following Appendix will not be included in the Code of Federal Regulations.

Appendix: List of Participants in Informal Meetings

ABC
American Cable Association ("ACA")
AT&T
Advanced Television Systems Committee, Inc. ("ATSC")
CBS
Consumer Electronics Association ("CEA")
Consumers Union ("CU")
DIRECTV, Inc. ("DIRECTV")
DISH Network L.L.C. ("DISH")
Dolby Laboratories, Inc. ("Dolby")
FOX
Free press
Massillon Cable TV
Association for Maximum Service Television, Inc. ("MSTV")
National Association of Broadcasters ("NAB")
National Cable & Telecommunications Association ("NCTA")
NBC Universal
Public Broadcasting Service ("PBS")
Verizon
Wide Open West

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[EO–13563–FAR–Docket Number 2011–0085; Sequence 1]

48 CFR Chapter 1

FAR Council's Plan for Retrospective Review Under Executive Order 13563—Preliminary Plan

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Request for Information.

SUMMARY: The Federal Acquisition Regulatory (FAR) Council has developed a preliminary plan for the retrospective analysis of provisions in the FAR, in accordance with Executive Order (E.O.) 13563, "Improving Regulation and Regulatory Review." The E.O. sets forth principles and requirements designed to strengthen regulations and regulatory review by promoting public participation, improving integration and innovation, increasing flexibility, and increasing retrospective analysis of existing rules. The E.O. requires every agency to develop "a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether such regulations should be modified, streamlined, expanded or repealed to make the agency's regulatory program more effective and or less burdensome in achieving its regulatory objectives." To comply with E.O. 13563, the FAR Council invites interested members of the public to submit comments on its preliminary plan available at *http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.*

DATES: *Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before July 5, 2011 to be considered in the formulation of a final plan.

ADDRESSES: Submit comments identified by Regulatory Burden; Federal Acquisition Regulatory Council Retrospective Review Under Executive Order 13563 Preliminary Plan by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting the document title under the heading "Enter Keyword or ID" and selecting "search." Select the link "Submit a Comment" that corresponds with "FAR Council's Plan for Retrospective Review under Executive Order 13563—Preliminary Plan." Follow the instructions provided to complete the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Council's Plan for Retrospective Review under Executive Order 13563—Preliminary Plan" on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., 7th floor, ATTN: Hada Flowers, Washington, DC 20417.

Instructions: Please submit comments only and cite the "FAR Council's Plan for Retrospective Review under Executive Order 13563—Preliminary Plan" in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Julia Wise, Procurement Policy Analyst at (202) 395–7561 or *jwise@omb.eop.gov.* Please cite the "FAR Council's Plan for Retrospective Review under Executive Order 13563—Preliminary Plan."