Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Sponsorship Identification Rules	)	MB Docket No. 08-90
and Embedded Advertising	)	

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. Introduction and Summary

The National Association of Broadcasters ("NAB")[1] submits these comments on the Commission's *Notice of Inquiry and Notice of Proposed Rulemaking* in this proceeding.[2] The combined *NOI/NPRM* asks generally whether the Commission's long-standing rules regulating identification of sponsors in television and radio programming remain fit to inform consumers in today's media market. NAB's short answer to that question is "yes" – the current statutory and regulatory requirements for sponsorship identification strike the proper balance between the public's right to know when programming is sponsored and its desire to have access to free, advertiser supported broadcasting service.

[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

[2] *Notice of Inquiry and Notice of Proposed Rulemaking* in MB Docket No. 08-90 (rel. June 26, 2008) ("*NOI/NPRM*").

The principle that the public has a right to know when sponsors are supporting broadcast programming has existed since the beginning of radio. NAB continues to support this principle as well as rules to inform the public. NAB disagrees, however, with those who suggest that current product placement practices warrant expansion of sponsor identification mandates. The history of sponsor identification rules shows that product placement and product integration are not new developments in television and radio. The rules have been written to account for these types of advertisements. In addition, the FCC's current rules are buttressed by the authority of the Federal Trade Commission (FTC), under Section 5 of the FTC Act, to penalize advertisers that create commercials intended to mislead or harm the public.

More specifically, the current rules already address the issues raised in the *NOI/NPRM*. For example, the current rules prevent broadcasters from embedding advertising in children's programming. The Commission itself recently determined these rules provide adequate protection for children from commercial influence, and there is no need for change at this time. Similarly, existing rules provide for reasonable regulation of on-air announcements by radio personalities. Specific endorsements either require sponsor identification or appear to be covered by the obviousness exception to the sponsor identification rules. The Commission also has a long history of distinct sponsorship identification rules for political and issue advertising, and no showing has been made that these heightened requirements need to be extended beyond this unique area to all generic commercial sponsorship.

There exists little to no evidence that suggests the current rules are insufficient to inform an American public that is savvier to the pressures of commercial influence today than ever before. Indeed, rule changes that would impose on broadcasters another financial burden at a time when many are struggling to adapt to a changing media marketplace would harm the public interest in maintaining free over-the-air broadcasting. Commercial support remains the financial backbone of free radio and television broadcasting. Without advertising, free broadcasting would not exist. As it evaluates the public interest, the Commission must carefully weigh the costs of potential rule changes, and consider the effect any such changes could have on the public's continued access to free over-the-air broadcasting.

It is also important to note that commercial advertisements, including product placement, remain protected by the First Amendment. Any proposed rule changes must clear the high hurdles set by the Supreme Court in *Central Hudson*.[3] To impose new rules that affect commercial speech, the government, *inter alia*, must demonstrate some actual harm that needs remedy. Again, there is no evidence of such harm.

In sum, NAB urges the Commission to recognize that current practices of product placement do not provide a basis for altering long-standing rules for sponsorship identification on broadcast stations. The Commission should be particularly cautious of acting without a sufficient basis in an area replete with First Amendment concerns.

II. Current Sponsorship Identification Rules Provide Adequate Protection for Consumers

Federal rules mandating identification of sponsors on radio are nearly as old as the medium itself. The Radio Act of 1927 included a provision requiring sponsorship

[3] *Central Hudson and Electric Company v. Public Service Commission*, 447 U.S. 557, 565-566 (1980).

identification that is remarkably similar to that which remains on the books today.[4] That provision was replaced by Section 317 of the Communications Act of 1934, and like its predecessor, Section 317 is purposefully broad. It covers "[a]ll matter broadcast by any radio station," and requires stations to identify "any … valuable consideration" paid to the station. 47 U.S.C. § 317(a)(1).

Even as broadcasting has changed through the decades, the broad requirements of Section 317 have held up remarkably well. Since the 1920s, commercial advertisers have played a crucial role in the development and support of broadcasting. Many early radio shows were sponsored entirely by one brand or company, and similar sponsorship was crucial to the development of television too, with early leading programs such as the "Texaco Star Theater" and the "U.S. Steel Hour." By the late 1930s, broadcasters started to implement "spot advertising," short clips of commercial material interspersed throughout a program and began to experiment with other ways to incorporate advertising content into their shows. Despite these changes to the medium, few changes were deemed necessary to the FCC's sponsorship identification rules until the late 1950s, when the Commission clarified its rules in the wake of payola and quiz show scandals.[5] The series of FCC rulings on sponsorship identification between 1960 and

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[4] Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, § 19 (repealed 1934) ("All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.").

[5] *See* Richard Kielbowicz and Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 Fed. Comm. Law J. 329, 346-353 (2004).

1963 remain to date the most comprehensive analysis of Section 317 requirements available.

A quick scan of those rulings shows that even then Congress and the Commission had considered the impact of product placement and product integration into programming, deeming the rules sufficient to prevent any potential harms. A 1963 Public Notice issued by the Commission contained 36 examples of possible situations that may or may not require sponsorship identification and includes several "product integration" examples covered by the rules.[6] For instance, example 22: "A refrigerator is furnished by X with the understanding that it will be used in a kitchen scene on a dramatic show and that the brand name will be mentioned. During the course of the program the actress says: 'Donald go get the meat from my new X refrigerator.' An announcement is required because the identification by brand name is not reasonably related to the particular use of such refrigerator in this dramatic program." 1963 Public Notice at 147. The majority of the FCC's list of examples was taken directly from a list generated by Congress designed "to illustrate the intended effect of the provisions contained in Section 317(a)(1)."[7] At no point in any of those notices does the Commission separate out product placement or product integration as particularly harmful types of advertising; nor did the Commission appear to consider expanding the rules to single out that type of advertising.

In the intervening decades, some advertising deemed potentially harmful by the government has been limited by acts of Congress, including advertisements of

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[6] *See In re Applicability of Sponsorship Identification Rules*, Public Notice, 40 FCC 141, 146-149 (1963) ("1963 Public Notice").

[7] 40 FCC 88, 89, Appendix A (1963) (quoting examples set forth in H. Rept. 1800, 86th Congress, 2d Session).

cigarettes, little cigars and smokeless tobacco,[8] and particular types of advertising aimed at children.[9] These restrictions, coupled with the Federal Trade Commission's (FTC's) authority under Section 5 of the FTC Act,[10] provide a comprehensive blanket of protection that keeps consumers safe from misleading, deceitful or potentially harmful advertising.

NAB submits that the long-standing sponsorship identification rules provide consumers with the necessary information about legal, harmless product advertisements directed at rational free-thinking adults. Under Section 317, broadcast licensees must make sponsorship identification announcements in any programming for which "money, service, or other valuable consideration" has been received.[11] A broadcast licensee is required to use reasonable diligence to obtain sponsorship

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[8] 15 U.S.C. § 1335.

[9] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394.

[10] Section 5 of the Federal Trade Commission Act ("FCT Act") provides the Federal Trade Commission ("FTC") with authority to eliminate advertisements deemed unfair or deceptive. 15 U.S.C. § 45. According to a recent FTC letter, "an act or practice is deceptive under Section 5 of the FTC Act: 1) if there is a representation or omission of information that is likely to mislead the consumer acting reasonably under the circumstances; and 2) if that representation or omission is 'material' – defined as an act or practice 'likely to affect consumer's conduct or decision with regard to a product of service.'" *See* Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gray Ruskin, Executive Director, Commercial Alert, 6 (Feb. 10, 2005).

[11] 47 U.S.C. § 317(a)(1). Congress explicitly stated that "service or other valuable consideration" does not include service or property provided without charge or at a nominal charge for use in connection with a broadcast, unless it is being provided for the purpose of obtaining an on-air mention or identification. For example, an auto manufacturer's provision of a car for use in a car chase in a detective series would not warrant an announcement, unless "the car is loaned in exchange for a mention on the program beyond that reasonably related to its use, such as the villain saying: 'If you hadn't had that speedy Chrysler, you never would have caught me.'" *See* 1963 Public Notice at ¶ 17*; see also* H.R. Rep. No. 1800, 86th Cong., 2d Sess. (1960), reprinted in [1960] U.S. Code Cong. & Admin. News 3516, 3532.

information from any person with whom it "deals directly."[12] Section 507 of the Act sets forth a system of mandatory reporting designed to ensure that broadcast licensees are made aware of consideration that may have been provided elsewhere in the program production chain.[13] Section 73.1212 of the Commission's rules closely tracks the language of Section 317 of the Act.[14] The rules do not require sponsorship identification, however, when both the identity of the sponsor and the fact of sponsorship of a commercial product or service are obvious.[15] Except for specific requirements governing political and issue-oriented broadcasts (discussed further below),[16] the Commission requires only that sponsorship identification announcements

[12] 47 U.S.C. § 317(c); *see also* 47 C.F.R. § 73.1212(b).

[13] 47 U.S.C. § 508.

[14] 47 C.F.R. § 73.1212.

[15] *See* 47 C.F.R. § 73.1212(f). Section 73.1212(f), sometimes called the "obviousness" exception provides as follows: "In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast."

[16] 47 C.F.R. § 73.1212(a)(2)(ii) (the sponsoring announcement for any television political advertising concerning candidates for public office must have lettering equal to or greater than four percent of the vertical picture height and air for not less than four seconds); 47 C.F.R. § 73.1212(d) (any political broadcast matter or broadcast matter involving the discussion of a controversial issue of public importance longer than five minutes "for which any film, record, transcription, talent, script, or other material or service of any kind is furnished…to a station as inducement for the broadcasting of such matter" requires a sponsorship identification announcement both at the beginning and the conclusion of the broadcast programming containing the announcement).

occur once during the sponsored programming for a duration sufficient to be read or heard by an average viewer.[17]

Despite a blustery attack on broadcast television, petitioners Commercial Alert fail to provide any evidence that product placement or product integration is causing actual harm to American consumers.[18] Although Commercial Alert claims that broadcasters are engaged in a systematic attack on the American public using “stealth advertising” and “tricks of the trade,” they do not offer any empirical data to back up their claim. Instead, they provide limited anecdotal evidence and plead to “common morality” as a basis for a radical rule change. Commercial Alert Petition at 1.

Stereotypical assumptions that commercial material is automatically harmful to consumers, however, are not the proper basis on which the Commission can alter its long-standing sponsorship identification rules. Indeed, recent Nielsen data on product placement suggests that the types of products most often advertised in product placement or product integration circumstances reflect American’s new found desire for a healthier lifestyle. For example, among the top 10 products most advertised using product placement or product integration in primetime broadcast programming are 24-Hour Fitness gyms, Nike sports apparel, and exercise equipment from Freemotion Fitness and Precor.[19] Even if they could show that product placement or product

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[17] *See Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations*, Public Notice, 66 FCC 2d 302 (1977).

[18] *See* Gary Ruskin, Executive Director, Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television (Sept. 30, 2003) at 2 (“Commercial Alert Petition”).

[19] *See* B & C Staff, *TV Placements Dip in 1H ’08*, Broadcasting and Cable, Sept. 15, 2008, available at: http://www.broadcastingcable.com/article/CA6596226.html.

integration somehow “tricks” consumers into buying a particular product, which they cannot, Commercial Alert and other commenters proposing expansion of sponsor identification rules would find it difficult, if not impossible, to show that such inducements are harmful to consumers.

As we note below, establishment of an actual harm is crucial if the Commission were to implement any rule change that both inhibits the ability of broadcasters to finance stations operations and raises serious First Amendment concerns. It is axiomatic that an “agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”[20] Absent any meaningful evidence that demonstrates otherwise, the Commission must conclude that current sponsorship identification rules provide the proper balance between informing consumers, burdening free, advertiser-supported programming, and protecting the free speech rights of broadcasters.[21]

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[20] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co*. 453 U.S. 29, 42 (1983). *See also ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that FCC had failed to establish “the requisite ‘reasoned basis’ for altering its long-established policy” on certain television commercial limits).

[21] *See Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021, 1034 (D.C. Cir. 1991) (court vacated FCC order altering accounting requirements applicable to telecommunication service companies, explaining that if the FCC rejects a “time-tested traditional procedure” and replaces it with a new procedure, then the FCC must be able to show that this “new procedure is superior” because, “if not, why the change?”).

III. The Changes Discussed in the *NPRM* Are Unnecessary

A. The Purposes Underlying the Children's Television Act Are Well-Served by Current Rules

The Commission specifically invites comment on whether its existing rules and policies effectuate the policy goals underlying the Children's Television Act of 1990[22] and Sections 317 and 507 with respect to embedded advertising in children's programming.[23] The Commission asks commenters who do not think the current rules are adequate to discuss what additional steps the Commission should take to regulate embedded advertising in programming directed to children.[24] It further notes that embedded advertising in children's programming would run afoul of its separation policy because there would be no bumper between programming content and advertising,[25] and asks whether that prohibition should be made explicit in its rules.

NAB believes that broadcasters and others are well aware that embedded advertising is not permitted under the current rules. Such advertising would violate not only the Commission's separation policy, but in certain circumstances might also bring a station within the scope of the host-selling prohibition.[26] As a practical matter, stations

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[22] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394.

[23] *NOI/NPRM* at ¶ 16.

[24] *NOI/NPRM* at ¶ 16 (citing *Writer's Guild White Paper* at 8 (proposing "strict limits on the usage of product integration in children's programming.")).

[25] The Commission requires broadcasters to use separations or "bumpers" between programming and commercials during children's programming (e.g., 'And now it's time for a commercial break,' 'And now back to the [title of the program]'). The requirement is intended to "aid children in distinguishing advertising from program material." *See Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2127 n. 147 (1991), recon. granted in part, 6 FCC Rcd 5093 (1991).

[26] The Commission's long-standing host selling policy prohibits the use of program characters or show hosts to sell products in commercials during or adjacent to shows in

are well aware of, and are complying with, the limitations on advertising in children's programming as they apply to embedded advertising. Although there would be no harm in providing clarification that makes the existing prohibition explicit, there also appears to be no need to do so.

It is also clear that no new or additional restrictions are needed to protect children from advertising in the modern media marketplace. Less than two years ago, the Commission concluded a multi-year proceeding evaluating the responsibilities of broadcasters in the digital age with respect to children's programming.[27] The Commission's thorough review resulted in rules that met its "overall goals of ensuring the provision of sufficient children's educational programming and protecting children from excessive advertising as we transition to the digital era."[28] The proceeding, which began in 2000, was the subject of extensive public and industry comment, as well as a joint proposal involving numerous media entities, organizations representing parents and educators, and others.[29] The Commission's current rules and policies regulate the number of minutes of commercial matter that can appear during each hour of children's

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which the character or host appears. *See Children's Television Report and Policy Statement,* 50 FCC 2d 1, 13-14 (1974).

[27] *See In the Matter of Children's Television Obligations of Digital Television Broadcasters*, 21 FCC Rcd 11065 (2006).

[28] *Id.* ¶ 13.

[29] The Commission adopted a report and order in this proceeding in 2004. *In the Matter of Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943 (2004). Multiple petitions for reconsideration and for judicial review were filed. The court challenges were consolidated into a single case before the U.S. Court of Appeals for the Sixth Circuit. Ultimately, numerous broadcast and cable companies, as well as consumer organizations, discussed their differences and negotiated a joint proposal which was codified in the Commission's *2006 Order.*

programming,[30] require the use of a "bumper" between programming and commercial matter,[31] prohibit host selling,[32] specify whether (and under what circumstances) the display of Web site addresses during programming causes a program to be treated as commercial time,[33] and restrict the display of Web sites during children's programming under certain circumstances.[34] The rules also prohibit "program-length commercials,"[35] a prohibition that is rigorously enforced.[36] The Commission's rules require broadcasters to air educational and informational programming targeted to children aged 16 years and under, define what constitutes educational and informational programming in both the analog and digital contexts, and apply different processing guidelines to license renewal applications depending upon how a licensee satisfies the children's

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[30] 47 C.F.R. § 73.670(a).

[31] *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2127 n. 147 (1991), recon. granted in part, 6 FCC Rcd 5093 (1991). *See also* 47 C.F.R. § 73.670(c) (applying separation policy to programming that contains links to certain Web sites).

[32] *See Children's Television Report and Policy Statement,* 50 FCC 2d 1, 13-14 (1974).

[33] 47 C.F.R. § 73.670(b).

[34] 47 C.F.R. § 73.670(d). Specifically, licensees may not "display a website address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program or a character appearing in that program: (1) products are sold that feature a character appearing in that program; or (2) a character appearing in that program is used to actively sell products." This rule is not applicable to: (1) third-party sites linked from the companies' web pages; (2) on-air third-party advertisements with website references to third-party websites; or (3) pages that are primarily devoted to multiple characters from multiple programs.

[35] *Mass Media Bureau Advises Commercial Television Licensees Regarding Children's Television Commercial Limits*, 13 FCC Rcd 10265, 10266 (MMB 1998). A program becomes a "program-length commercial" if it involves host selling, if a licensee fails to use separation "bumpers," or if a product associated with a program appears in advertisements shown during that program.

[36] *See, e.g., Acme Television Licensees of Wis., LLC*, 23 FCC Rcd 8187 (2008).

programming requirements.[37] Information regarding these programs is required to be provided to publishers of program guides,[38] and compliance with the children's programming rules must be documented on quarterly reports filed with the Commission and made part of each station's public inspection file.[39]

The Commission has assembled and utilized a broad array of tools to protect children from excessive advertising. There is no evidence that these tools are insufficient to protect children from embedded advertising. In view of existing requirements, the fact that a very recent proceeding thoroughly re-examined the relevance of Commission rules in the modern media market, the participation of multiple concerned parties in developing those rules, and the fact that Commission believed that its revised rules would protect children in the digital age, there is no reason to adopt new or expanded requirements at this time.

B. No Further Regulation Is Needed to Ensure Public Awareness of the Sponsorship of On-Air Mentions or Endorsements

The Commission also requests comment on issues raised by radio hosts' personal, on-air endorsements of products or services that may have been provided at little or no cost.[40] In particular, the Commission asks whether (and if so, under what circumstances) it should presume that an exchange of consideration for the on-air mention has occurred, thus triggering the obligation to provide a sponsorship

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[37] 47 C.F.R. § 73.671.

[38] 47 C.F.R. § 73.673.

[39] 47 C.F.R. §§ 73.3526(e)(11)(iii); 73.671(c)(6).

[40] *NOI/NPRM* at ¶ 18.

announcement.[41] The Commission also invites comment on the scope of the "obviousness" exception to the sponsorship announcement requirement,[42] asking whether the exception applies to endorsements and favorable commentary by a radio host that are integrated into broadcast programming. NAB's discussions with broadcast licensees indicate that on-air mentions or endorsements integrated into programming are relatively uncommon, while scripted, pre-recorded announcements in exchange for cash consideration are more common. To the extent that mentions or endorsements by on-air personalities occur, stations are complying with the rules by making the appropriate sponsor identification announcement or by meeting the "obviousness" exception to the sponsor identification rules. NAB knows of no reason why a radio hosts' on-air banter should be treated separately from other broadcast content, and, thus, no reason why the current rules are inadequate to address any problems should they occur.

The Commission should recognize that there is a powerful disincentive for on-air talent to mention or endorse goods or services simply because such goods or services have been provided at little or no cost (*e.g.,* a local business delivers free food to station personnel and the on-air personality mentions this and raves about the quality of the food). Simply put, if local advertisers are providing free goods/services with the hope of receiving an on-air mention, the station is losing potential advertising revenues. In such instances, a would-be purchaser of advertising inventory and/or a costly endorsement

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[41] *Id*. ("Should we do so in all such circumstances or should we limit this presumption to situations where other factors enhance the likelihood that an exchange of consideration for air time has taken place?").

[42] *See* 47 C.F.R. § 73.1212 (no announcement required "when it is clear that the mention of the product constitutes a sponsorship identification").

by a popular radio personality is obtaining thousands of dollars of advertising and endorsements for a fraction of their market value. Few if any licensees can afford to allow personnel to eat or drink away a portion of a station's core revenue stream. Rather than allowing integrated on-air mentions, licensees generally prefer to make pre-recorded, scripted on-air endorsements involving on-air talent that involve cash compensation by the purveyors of the goods and services (and which are properly identified under the FCC's rules).

To the extent that stations permit on-air personalities to mention products and services that may have been provided free or at a nominal cost, NAB agrees with the Commission's assessment that the provision of goods and services, if it rises to the level of valuable consideration,[43] would trigger the obligation to provide a sponsorship announcement, unless an exemption applies. Based on conversations with member stations, stations are either providing the required announcements or have determined that the obviousness exemption applies to their particular facts and circumstances. To the extent that consideration is changing hands, licensees already are providing notice

[43] As the Commission has recognized, certain gifts are too nominal to be considered "valuable consideration" and do not come within the scope of the payola or sponsorship identification requirements. *See, e.g., Applications of Dena Pictures, Inc. and Alexander Broadcasting, Co., d/b/a Kaye Smith Enterprises,* 71 FCC 2d 1402 ¶ 13 (1979) (denying payola complaint on multiple grounds including that alleged consideration accepted from a record promoter (including a coffee service valued at $35.00 per week, attendance at a single party, and a single night's lodging) was too nominal to be characterized as valuable consideration; "consideration must, by definition, be 'valuable'; gifts of nominal value or social exchanges between friends are not 'payola'"); *Applicability of Sponsorship Identification Rules,* 40 Fed. Reg. 41936, Section B (1975) (if a manufacturer of perfume gives five dozen bottles to a program producer, some of which are for an on-air giveaway promotion and some of which are for the producer to retain, an announcement is required because the bottles of perfume constitute payment for the product identification; gift of a car to station or announcer in return for broadcast mentions constitutes consideration).

or meeting the obviousness standard. New regulations to target on-air mentions are therefore not necessary or appropriate.

The Commission need not and should not "presume" that consideration has changed hands in connection with any on-air mention, but should apply current rules on a case-by-case basis if presented with an allegation that a licensee has violated Sections 317 or 508 and/or related Commission rules. Based on the facts of a particular case, the Commission might determine that the consideration exchanged did not rise to the level of being "valuable," that the on-air mention of a product or service did not involve any consideration at all, or that there was consideration but that the on-air mention was either identified by an announcement or simply "obvious" within the meaning of its rules.

C. It Is Appropriate to Have Distinct Sponsorship Identification Rules for Political and Issue Programming

The Commission also seeks comment on whether all sponsorship identification announcements should be required to comply with requirements similar to those in place for political and issue advertising. In this regard, NAB notes that the Commission has nearly always applied a different standard to sponsorship identification announcements for political broadcasts and broadcasts involving "controversial issues of public importance." This distinction pre-dates the 1960 revisions to Section 317 and the adoption of Section 508. Rules already in place at that time required that, "[i]n the case of any political program or any program involving the discussion of public controversial issues…an announcement shall be made at both the beginning and end of the program."[44]

In 1992, in response to "increased Congressional interest in more rigorous sponsorship identification requirements" for political broadcasts, the Commission added a requirement that sponsorship identification announcements associated with political broadcasts use lettering equal to or greater than four percent of the vertical picture height and air for not less than four seconds.[45] This change was made as part of a rulemaking proceeding to update and revise the Commission's multiple rules governing political broadcasting and to provide guidance to licensees, media buyers, and candidates in advance of the 1992 election season.[46] This proceeding did not address the rules governing sponsorship identification announcements in general.

When the Commission has revised rules governing sponsorship identification rules generally, it has sometimes declined to relax the rules as they apply to political and issue ads. For example, when it eliminated the requirement to maintain in stations' public files a list of the members of the governing body of any sponsoring organization, the Commission retained the rule for political and issue broadcasts. There, the Commission stated that it sought to make its rules "less stringent while maintaining the

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[44] 1963 Public Notice, 40 FCC at 143 (citing Section 3.119(d) of the Commission's rules).

[45] *See Codification of the Commission's Political Programming Policies*, Memorandum Opinion and Order, 7 FCC Rcd 1616 ¶¶ 6-7 (1992).

[46] *See Codification of the Commission's Political Programming Policies*, Notice of Proposed Rulemaking, 6 FCC Rcd 5707 ¶¶ 1-2 (1991).

requirement for those *instances where we feel there is a high public interest* in protecting the public's right to know."[47]

The Commission clearly has a history of interpreting the sponsorship identification obligations differently for political and issue broadcasts than for other content, and has noted particular Congressional interest in stricter obligations for political programming. Where, as here, there is no factual basis or rationale for applying the different, more burdensome standards that apply to political and issue advertising to every other sponsored announcement, the Commission should not graft rules intended for sponsored content that the agency itself considers unique and subject to a heightened public interest standard onto all other sponsored matter.

IV. Unnecessary New Sponsor Identification Rules Will Stifle Broadcaster Growth and Harm the Public Interest

The Commission cannot properly assume that current trends in advertising represent a wholesale change in the methods that advertisers use to reach viewers and listeners. Indeed, as noted above, the sponsorship identification rules that remain the law today were designed with both product placement and product integration in mind. Unnecessary expansion of those rules is contrary to the public interest.

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[47] *See, e.g., Amendment of the Commission's Sponsorship Identification Rules,* 52 FCC 2d 701 ¶ 31 (1975). The Commission reasoned that its list retention requirement remained appropriate for political and issue broadcasts because campaigns are "periodic, hectic manifestations coincident to the democratic mode for attaining elective office" which often involve sponsoring organizations that are "temporary and short-lived," all of which might result in public confusion as to the identity of the persuader. *Id*. at ¶ 30. The Commission stated that the public often lacked information about the "true identities of the protagonists" of issue ads. *Id*. It stated that maintaining the list retention requirement for political and issue broadcasts would make information available about sponsors while at the same time minimizing the amount of air time used for identification.

A. As the Industry Continues to Change, Broadcasters Must Have Flexibility to Experiment with New Types of Advertising

Although some proponents of expanded sponsorship identification rules may prefer otherwise, broadcasting remains primarily an advertiser-supported medium. The free over-the-air broadcasting business model is reliant on advertising to survive. If advertising revenue slips, even by a small percentage, the free broadcasting model may be in jeopardy, particularly in today's highly competitive media marketplace. There are clear public interest benefits to helping ensure broadcasters have unimpeded access to advertising revenue streams. Our broadcasting system in the United States is firmly rooted in localism and the FCC should tread lightly with any regulation that could threaten that system. Indeed, the Commission has recently reiterated that localism is a core value in broadcast regulation.[48] In the localism proceeding, the Commission expressed a strong desire to increase locally oriented programming. If, however, broadcasters are precluded from experimenting with new advertising techniques and accessing potential new revenue streams, local programming, including news, weather, sports, emergency information and public affairs programming, could suffer. While changes to the sponsorship identification rules are designed ostensibly to help the public interest, the real world effect could be the opposite.

As the *NOI/NPRM* (at ¶ 2) acknowledges, technological advances such as the digital video recorder (DVR) and competition from a multitude of video sources have forced advertiser-supported broadcasters to think creatively about new ways to provide value to advertisers while at the same time maintaining the integrity of popular

[48] *See Report on Broadcast Localism and Notice of Proposed Rulemaking* in MB Docket No. 04-233 (rel. Jan. 24, 2008).

broadcast programming. According to one television executive, "[t]he Tivo effect" has required programmers and stations to address legitimate demands from advertisers that are growing increasingly concerned that the classic 30-second television spot is being skipped by viewers.[49] Broadcasters do not dispute the fact that technology is changing the nature of the television, radio and advertising businesses. But they do dispute the assertion that the industry's reaction to technology represents a major shift in the core principles of broadcasting, requiring significant changes in the FCC's long-standing sponsorship identification rules.

First, advertising trends are unpredictable. The amount of product placement or product integration advertising tends to ebb and flow. Indeed, recent reports suggest that the number of product placements in broadcast television decreased in the first half of 2008, reports which belie any assumption that the amount of embedded advertising is inexorably trending upward.[50] Second, there is a natural limit on the amount of commercial material that can be interjected into programming. At the end of the day, broadcasting's principle business objective is simple: draw eyes and ears to the medium. Broadcasters and producers that disrupt quality programming with intolerable amounts of commercial interruption will find themselves without an audience to serve. In this age of media abundance, broadcasting does not play to a captive crowd. For the vast majority of American consumers, if they don't like what they see on one channel, there are hundreds of other places for them to turn.

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[49] *See* Wayne Friedman, *NBC's Graboff: Mo' Better Branding*, Media Post, June 11, 2007.

[50] *See* B & C Staff, *TV Placements Dip in 1H '08*, Broadcasting and Cable, Sept. 15, 2008, available at: http://www.broadcastingcable.com/article/CA6596226.html?q=placement&.

Media companies have been responding to this concern recently by voluntarily limiting commercial content in programming. In 2004, for example, a major radio operator elected to decrease the number and length of commercial breaks at approximately 1,200 of its stations. The move, aimed at removing clutter and maintaining listener attention, has been applauded within advertising and broadcasting circles.[51]

Television is also experimenting with less advertising. For example, one network limited commercial time in connection with two series premiers to about five minutes in an effort to keep viewers from changing the channel.[52] Another network experimented with the concept of a "program sponsorship" format for news programming.[53]

The trend towards fewer commercials and shorter commercial breaks is beneficial to both consumers and broadcasters. Studies have shown that fewer commercials lead to higher recall rates and more positive perceptions of the advertisements among consumers.[54] And by limiting the number of commercial interruptions, programmers can extend the length of each show by several minutes, thereby improving the quality of the shows and the overall viewing experience. Generalized assertions about over-commercialization by proponents of regulation thus

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[51] *See* Alex Mindlin, *More Music, Fewer Ads, and More Listeners*, The New York Times, Jan. 16, 2006; David B. Wilkerson, *Clear Channel: Ad Cuts a Success*, MarketWatch Feb. 9, 2005.

[52] *See* Jon Lafayette, *Fox Promises Half the Ads in 2 New Dramas*, TV Week, May 15, 2008, available at: http://www.tvweek.com/news/2008/05/fox_promises_half_the_ads_in_2.php

[53] On Dec. 4, 2006, NBC aired "NBC Nightly News" under a "program sponsorship" format. The entire 30-minute program was sponsored by Philips and featured just three commercials.

[54] Burke, Inc., "Less is More" Executive Summary, 2005; Naviguage independent study

appear inaccurate. But even if there remain more commercials on broadcast radio and television than some parties prefer, such opinions provide no basis for undercutting the viability of free, over-the-air advertiser supported programming for the public as a whole through the imposition of unnecessary restrictions on advertising.[55]

V. The Imposition of More Extensive and Burdensome Sponsor Identification Rules Would Violate the First Amendment

Beyond adversely impacting the broadcasting business, proposals to increase governmental regulation of broadcast advertising would likely violate the First Amendment. As noted above, neither the *NOI/NPRM* nor Commercial Alert provides any empirical evidence that advertising in programming – be it defined as “integrated” or “placed” – harms the public in any manner that new or expanded sponsorship identification rules would address. Indeed, neither the *NOI/NPRM* nor Commercial Alert identifies any harm at all beyond an ill-defined general distaste for “over-commercialization” of American broadcasting, which, as discussed above, cannot be a sufficient basis for increased regulation. Absent the identification of actual harm to the public, the government cannot show a substantial interest that justifies increased regulation of speech, as the Supreme Court has made clear.

Any governmental restriction on commercial speech must pass muster under the four-part test set forth in *Central Hudson and Electric Company v. Public Service Commission*, 447 U.S. 557, 565-566 (1980). If commercial speech concerns a lawful activity and is not misleading, the speech is clearly protected under the First

[55] NAB also notes that concerns about over-commercialization lack any substantive connection to the fundamental purpose of the sponsorship identification rules. The purpose of these rules is to ensure that the public knows when programming is sponsored, not to regulate or reduce the overall amount of commercial material.

Amendment. To regulate protected commercial speech, the government must show that (1) its asserted interest is substantial, (2) the regulation directly advances that interest, and (3) the regulation is no more extensive than necessary to serve that interest. Proposals to regulate embedded advertising cannot clear any one of these hurdles, let alone all three.

As an initial matter, it is clear that embedded advertising in broadcast programming is protected commercial speech. Such advertising concerns lawful activities and is not inherently misleading. Notably, the FTC has already determined that product placement or product integration alone is not deceptive or misleading.[56] In other words, even when "consumers are not aware when an advertiser paid for a product to appear in programming, it does not appear that failure to identify the placement as advertising violates" FTC rules against deceptive advertising. *FTC Letter* at 2.

The FTC has express authority, under Section 5 of the Federal Trade Communications Act, to penalize advertisers that create commercials intended to mislead the public and that cause or are likely to cause substantial injury to consumers. 15 U.S.C. § 45(n). The government has previously employed this authority to remove deceptive or unsafe commercial advertisements from the airwaves. There is no need for the Commission to duplicate the FTC's role in the regulation of advertising, especially by considering further restriction of lawful commercial speech.

[56] *See* Letter from Mary K. Engle, Associate Director of Advertising Practices, FTC, to Gary Ruskin, Executive Director, Commercial Alert (Feb. 10, 2005) ("*FTC Letter*").

A. The Government Cannot Identify a Substantial Interest That Justifies Expanded Regulation of Product Placement or Integration

The *Central Hudson* test requires the government to identify a substantial state interest in the regulation of commercial speech. In this case, the government must show not only that the state has a substantial interest in regulation of commercial speech in broadcast programming, but also that it has a new or greater interest in protecting consumers from product placement that justifies expanded regulation of that speech specifically. Without actual evidence that broadcasters are engaging in a particular form of advertising that harms television and radio consumers, increased regulation of product placement would not satisfy *Central Hudson*.

While the *NOI/NPRM* asserts with little substantiation that broadcasters are using "more subtle and sophisticated means of incorporating commercial messages into traditional programming," and that the trend of embedded advertising is increasing, it fails to provide any clear evidence that these trends are harmful to the American public. *NOI/NPRM* at ¶ 1. It is well-established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 71, fn. 20 (1983). Further, the government cannot satisfy that burden "by mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). Rather, the government "seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*

Here, the *NOI/NPRM* fails to identify *any* concrete harm that product placement or integration causes to consumers, let alone makes any effort to determine whether or not that harm is "real." Restrictions on commercial speech cannot be justified by assumptions that commercials are *per se* undesirable and that consumers cannot be trusted to "protect" themselves from the messages, however benign they may be. In light of long-established FTC powers to regulate misleading and deceitful advertising, NAB challenges these underlying assumptions, particularly given the Supreme Court's recognition that "speech does not lose its First Amendment protection because money is spent to project it." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). Without actual evidence that advertising methods such as product placement and product integration harm consumers, the government does not have a substantial interest that justifies regulation of this protected speech.

Clearly the government cannot meet its burden of demonstrating that embedded advertising causes "real" harm by mere incantations to the "public's right to know." As noted above, the current rules have been crafted to satisfy that need. Moreover, American consumers are able to make rational independent decisions after viewing or listening to advertising.[57] Mere assumptions to the contrary cannot demonstrate the required substantiality of the government's interest in more burdensome regulation of broadcast advertisements. *See, e.g., Thompson v. Western States Medical* Center, 535

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[57] As it does on nearly every subject, the Internet provides a repository of interesting information regarding product placement. Countless online discussions of television programs appear to show that consumers are aware that commercials are part of the television experience, and generally appear to prefer product placement to the classic 30-second commercial. See, for example, a post recently added to the TV Guide Web site about product placement, available at: http://community.tvguide.com/blog-entry/TVGuide-News-Blog/Todays-News/Dont-Hate-Product/800041386. This frank discussion among active television watchers shows that consumers understand why product placement may be included in their favorite television shows. Some even appear to prefer product placement of real brands to fake props that subtract from the realism of the show.

U.S. 357, 374-375 (2002) (explaining that the Supreme Court has rejected, as a basis for restricting truthful commercial speech, governmental assumptions that the public will respond to the advertising "irrationally" or by "making bad decisions").[58]

B. New or Expanded Sponsor Identification Rules Would Not Advance a Substantial Governmental Interest and Would Be More Extensive Than Necessary

Even if the government could identify a substantial interest that justifies increased regulation of embedded advertising, any new regulations adopted must directly advance that interest. Assuming, *arguendo*, that the government could show that embedded advertising causes some real, not merely speculative, public harm, there is no evidence that expanded sponsorship identification requirements would advance the interest in alleviating that harm.

Under the third prong of the *Central Hudson* test, a restriction on commercial speech violates the First Amendment "if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas and Electric Corp.*, 447 U.S. at 564. The burden is on the government to show not only that the regulation in question will advance its stated interest directly, but also "to a material degree." *Edenfield*, 507 U.S. at 771. Proponents of regulation cannot merely assume, without evidence, that the existing sponsorship identification rules are ineffective and that new restrictions, in

[58] It is important to note, as the Commission does, that advertisements directed to children are already subject to greater regulation under the Children's Television Act. *See NOI/NPRM* at ¶ 6. The *NOI/NPRM* provides no reason to believe that rational adults are in need of such special protections from advertising messages. Traditionally, courts have rejected governmental attempts to restrict speech in an effort to protect children at the expense of the legitimate free-flow of information to adults. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957) ("The incidence of this enactment is to reduce the adult population … to reading only what is fit for children); *See also Bolger v. Young Drug Products Corp.,* 463 U.S. at 74 ("The level of discourse reaching a mailbox simply cannot be limited to that which is suitable for a sandbox").

contrast, would be effective in supporting the government's purpose. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (noting the "critical" nature of this prong of the *Central Hudson* test).

Finally, *Central Hudson* requires that any regulation infringing on free speech be no more extensive than necessary to achieve the government's goal. Here, again, the proposals set forth in the *NOI/NPRM* would fail this test because the *NOI/NPRM* never establishes that the existing sponsorship identification rules are inadequate and that new regulations are necessary. By default, without an actual harm to be remedied, more restrictive and burdensome rules will be more extensive than necessary.

While regulation of commercial speech does not require the Commission to use the least restrictive means of regulation to achieve its goals, the agency must, at the very least, provide a "reasonable fit between the means and ends of the regulatory scheme." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001). The Supreme Court has reaffirmed that this entails a careful calculation by the state of "the costs and benefits associated with the burden on speech imposed" by the regulation. *Lorillard*, 533 U.S. at 561 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)). A regulation that overly burdens embedded advertising or other specific forms of broadcast advertising could well fail this required calculation. For example, requiring sponsorship identification notices at the same time as any product placement (even if in the middle of a comedy or drama) would likely be so disruptive to the programming and annoying to viewers as to discourage almost all such placements. Clearly, such a regulation would fail this final prong of the *Central Hudson* test. Moreover, such a burdensome rule would have the unintended consequence of diminishing broadcasters' ability to earn vital advertising revenue in an increasingly competitive marketplace. As discussed above, the broadcast and advertising industries are experiencing significant change, and, in this environment, the Commission should not adopt rules unduly inhibiting the ability of broadcasters to experiment with new forms of advertising to support the continued offering of free, over-the-air broadcast programming.

VI. Conclusion

The *NPRM* in this proceeding asks whether changes to certain rules are needed to ensure that broadcast viewers and listeners know by whom they are being persuaded. NAB knows of no evidence that the Commission's current rules are failing to effectuate statutory goals. We therefore urge the Commission to continue to enforce existing rules and resist any calls to adopt unduly burdensome restrictions that may run afoul of First Amendment protections and impede broadcasters' continued ability to support high quality, free over-the-air programming.

Respectfully submitted,

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