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

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

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"We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) at 650.

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INTRODUCTION AND SUMMARY

N.E. Marsden, an educator and consultant who has conducted research on integrated marketing for more than ten years, respectfully submits these reply comments pursuant to the Commission's *Notice of Inquiry and Notice of Proposed Rulemaking* ("NOI/NPRM") in this proceeding.[1]

Media companies and industry trade groups have challenged the rulemaking authority of the Federal Communication Commission in this matter, and in the extreme, suggest that Sponsorship Identification rules may be unconstitutional.[2] This document reviews the statutory law supporting the FCC's authority to enact rules proposed by petitioners in this proceeding. A review of the case law suggests that, not only is the Commission authorized to amend and extend existing Sponsorship Identification rules to keep pace with changes in the telecommunications industry, such action is compatible with the First Amendment and constitutional law.

The Commission's NOI/NPRM is an appropriate response to public concern about the use of sophisticated and often deceptive embedded advertising techniques. The Commission has initiated a fair and deliberative inquiry, in order to determine whether current practices are deceptive, misleading and potentially harmful, and if so, how best to remedy such deception in compliance with Section 317 of the Communications Act of 1934 ("the Act"), subsequent rules and amendments, and constitutional law.[3]

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[1] Federal Communications Commission. *Notice of Inquiry and Notice of Proposed Rulemaking* in MB Docket No. 08-90. June 26, 2008.
[2] NOI/NPRM: Comments of National Media Providers.
[3] NOI/NPRM at 2-7.

A variety of possible remedies have been proposed in the NOI/NPRM, including: specifying the precise size, duration, wording and placement of Sponsorship Identification disclosures, enacting prior disclosures, and "real time" disclosures, etc. This document reviews these options in light of scientific research and relevant case law, and concludes that the Commission has latitude to adopt *any* of the proposals on the table provided it is *narrowly tailored* to remedy deception and make such practices transparent. Due to the substantial harms associated with inadequately disclosed embedded advertising, any such action is consistent with the Commission's legislative mandate, good public policy, and constitutional law.

Media providers have framed this proceeding as a bid to regulate constitutionally protected speech, citing First Amendment cases that, in fact, support the Commission's rulemaking authority in the NOI/NPRM. Their line of argument evokes a series of errors: First, it fails to recognize that Sponsorship Identification rules are ethical in nature; the U.S. Congress empowered the FCC to oversee embedded advertising precisely because these techniques are *deceptive and misleading*. Secondly, in denying that current practices are deceptive, media providers and advertising trade groups find no substantial harm to citizens and the public, which is inaccurate. Because they do not acknowledge the deceptive nature of their techniques, industry lobbies conclude that the Commission has no authority to amend existing regulations. Finally, they confuse disclosure of truthful information with censorship, and arrive at the faulty conclusion that any rulemaking in this proceeding will be judged unconstitutional.

This document provides evidence that embedded advertising is indeed deceptive and misleading (without effective disclosure). It enumerates the harms to individuals and

society perpetrated by such deception, and suggests avenues of scientific research which may assist the Commission in crafting effective and narrowly tailored remedies. Finally, it offers statutory support for any claims which may be levied against the Commission as a result of rulemaking. The Supreme Court has long supported the dissemination of truthful information, and has struck down attempts to suppress information that helps consumers make informed choices in a market economy. This rationale is the baseline for First Amendment protection of commercial speech, and we argue that it is also the legal justification for requiring clear, timely and conspicuous disclosures of the sources of paid embedded advertising.

I. THE NOI/NPRM IS A RESPONSE TO INDUSTRY CHANGE AND PUBLIC CONCERN

A. The television industry has embraced "advertainment" as a business model.

Media providers claim that embedded advertising techniques have not changed, and that therefore there is no need to update existing Sponsorship Identification rules.[4] Although it is true that product placement (branded props) and product integration (scripted advertising) have been in existence since the turn of the last century, from the beginning these advertising techniques were controversial and often considered "shady" and exploitive of the audience.[5]

The industry holds up 1950's television as a model; but the FCC should not forget that sponsor-controlled content and rampant "plugs" in TV's early years soon foundered on charges of unfair and deceptive practices. Following the quiz show scandals in 1960,

[4] NOI.NPRM: Comments of National Media Providers; National Association of Broadcasters; Trinity Christian Center of Santa Ana, Inc., etc.
[5] Segrave, Kerry. *Product Placement in Hollywood Films*, McFarland. 2004, pg. 3-52.

under pressure from Congress and the public, TV networks voluntarily separated advertising from program content. [6]

In this regard, the Commission is advised to review comments filed in this proceeding by Korby Siamis, a former producer/screenwriter on *The Bill Cosby Show* and *Murphy Brown*. Ms. Siamis describes the gatekeeping role played by the networks after 1960:

> During my career, there was a clear distinction between art and advertising. On occasions that we used a product name, we would receive notices from the network Standards and Practices department. If the reference were necessary for the joke, it would stay. Otherwise we would take it out. And under no circumstances would a product be named if the network knew that there was a commercial for that product scheduled to run during the airing of the episode.…The concept that we would ever have been expected to include product names or usage in our writing would have been beyond ludicrous, and would have been strongly fought as the worst kind of assault on our creative process… [7]

In other words, beginning in the 1960's, Section 317 of the Act was practically moot because, as Ms. Siamis attests, broadcast licensees maintained a line between commercials and content. Today, the television industry has reversed this longstanding policy. Integrated marketing is no longer viewed as a conflict of interest, but the centerpiece of the industry's business model; in fact, media providers have claimed in this proceeding that free broadcast television *cannot survive without it.*

This policy reversal constitutes the central change addressed by the NOI/NPRM. Today, network executives literally *solicit* embedded ads – and the results are obvious: a

[6] Samuel, Lawrence. *Brought to You By: Postwar Advertising and the American Dream.* Austin, TX: University of Texas Press. 2001, pg 122-152.
[7] NOI/NPRM: Comments of Korby Siamis.

growing proliferation of branded content on broadcast television, and *six times more* on cable networks (25,950 broadcast placements compared to 163,737 in 2007).[8]

There is no question that the advertising and entertainment industries are converging. Producers are forming joint ventures and partnerships with sponsors, who may share in the profits or even own the production.[9] TNS Media Intelligence reports that in the first quarter of 2008, advertising comprised 45% of primetime broadcast programming (embedded advertising + commercials).[10] Artistic, informative and educational programming are being edged out, as in-show plugs and brand integrations get center stage.

As the Commission has noted in the NOI/NPRM, and comments filed in this proceeding confirm, along with the growing proliferation, we are witnessing greater sophistication in embedded advertising practices.[11] In light of these developments, the NOI/NPRM seeks to evaluate whether the Commission's Sponsorship Identification rules are sufficient, and if not, how the FCC can remedy their deficiency consistent with the statutory framework and constitutional law.

B. <u>The NOI/NPRM is an appropriate response to public concern.</u>

It is important to keep in mind that the NOI/NPRM is a response to public and Congressional concern. In 2003, the consumer watchdog group Commercial Alert petitioned the FCC and the FTC for rulemaking to insure effective disclosure of paid embedded messages. The Writer's Guild of America West (WGAW) has appealed to

[8] Nielsen. "US Advertising Spending UP 0.6% in 2007, Internet Ad Spend UP 18.9%," nielsen.com, 31 March, 2008.
[9] NOI/NPRM: Comments of N.E. Marsden.
[10] TNS Media Intelligence, "First Quarter Ad Spending Report," in "Branded Entertainment on the Rise," *Madison & Vine*, June 12, 2008.
[11] NOI/NPRM at 2-3.

Congress and the FCC since 2005 for rulemaking concerning what the Guild calls "stealth" and "deceptive" practices.[12] In 2007, Congressmen Edward Markey and Henry Waxman called for a full investigation, stating that embedded advertising is "unfair and deceptive if it occurs without adequate disclosures to the viewing public." [13] In 2008, twenty-three health, media and child advocacy groups called for regulation of product placement and product integration in the public interest. The response to this NOI/NPRM is further evidence that embedded advertising is on the public radar.

Broadcast licensees profess to be perplexed by mounting concerns, asking "What is the harm?" One industry advocate writes: "I've never met a victim of a product placement." [14] The same might have been said of credit default swaps and derivatives a year ago. If we have learned anything from the catastrophic mortgage crisis, it is that short-term gain accrued through unsound and deceptive practices inflicts long-term harms upon individuals, society and business institutions – and that government has a responsibility to establish fair and ethical "rules of the road."

Financial hardship does not justify the use of deceptive advertising techniques.

Embedded advertising is admittedly profitable, and it may enrich consumer choice by fueling otherwise unmarketable television shows that appeal to niche markets. However, no short term financial benefit justifies deceptive practices – as the mortgage crisis clearly illustrates.

Per claims that DVR technology is justification for embedded advertising, Nielsen reports that time-shifting (recording programs and watching them later) accounted for

[12] WGAW. "Are You SELLING to Me?" Stealth Advertising in the Entertainment Industry, November, 2005. Clearly, TV writers are "canaries in the coal mine" -- insiders forced to betray their integrity by scripting ads in the guise of program content.
[13] Markey, Edward & Waxman, Henry. Letter to FCC Chairman Kevin Martin. September 26, 2008.
[14] NOI/NPRM: comments of Seth L. Cooper, September 22, 2008.

less than 5% of total television viewing in the first quarter of 2008.[15] As for new technologies, a 2008 survey indicates that 94% of adults who subscribe to cable or satellite television services "prefer to watch television on traditional TV sets" rather than the Internet, iPods or cellphones.[16] In addition, in spite of claims to the contrary, Nielsen reported this year that "television is alive and well" and that Americans are watching *more TV than ever before* (127 hrs per month, or 4 hours per day). [17]

While it would be naïve to suggest that new technologies have NOT impacted broadcast licensees, it is unclear that the impact is all negative. For example, it is true that multiple program options fragment the television audience, but the major broadcast licensees own multiple networks, enabling them to capture the overflow.

Nor has the industry provided evidence that embedded advertising will solve their current hardships. Does anyone seriously believe programming that is 45% advertising will enhance ratings?

Most importantly, even if all financial claims are well-founded, and embedded advertising is the magic bullet, unfair and deceptive techniques must NOT be part of the solution, any more than relaxing safety standards is an acceptable remedy for problems afflicting the airline, auto and steel industries. Creative solutions are required, but misleading the public is not among them.

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[15] Nielsen. "Under 35's Watch Video on Internet and Mobile Phones More Than Over 35's; Traditional TV Viewing Continues to Grow," 8 July 2008.
[16] CTAM. "TV Websites Grow More Popular, But Viewers Still Prefer Their TV Sets, According to Nielsen and CTAM." *www.ctam.com*. June 30, 2008.
[17] Nielsen Media Research. "Nielsen Reports TV, Internet and Mobile Usage Among Americans." July 8, 2008.

C. Sponsors are demanding opportunities for in-show advertising because *it works*.

Despite claims that the television industry will collapse without branded entertainment, evidence suggests that marketers are driving the trend. As Congressmen Edward Markey and Henry Waxman pointed out in a letter to FCC Chairman Martin in 2007, advertisers are putting pressure on broadcasters to provide opportunities to interweave commercial pitches into plots.[18] This point has been developed in depth elsewhere in this proceeding[19]and we will not restate it, with one exception. Coca-Cola's CEO, Steven J. Heyer told it like it is at the first *Madison & Vine* conference, and his telling words bear a second look. In a keynote that has been dubbed a "call to arms for branded entertainment," [20] he warned entertainment industry executives that the stories they tell are ***"no longer just intellectual property. They're emotional capital."*** [21] In so many words, he issued an ultimatum: play ball, or you won't have a place in the game.

> The media and marketing executives among us better recognize that corporate marketers will not reflexively turn to TV advertising when what we [need] is powerful communication and consumer connection…**we need your content, your storytelling, your influence, your ability to create experiences. We need your ability to help us sell.** As you need ours…
>
> …**We will use a diverse array of entertainment assets to break into people's hearts and minds. In that order. For this is the way to their wallets…**the ideas which have always sat at the heart of the stories you've told and the content you've sold, whether movies or music or television**,** are no longer just intellectual property. They're emotional capital…

[18] Markey, Edward & Waxman, Henry. Letter to FCC Chairman Kevin Martin. September 26, 2008.
[19] Comments of N.E. Marsden, NOI/NPRM, September 23, 2008, 7-9.
[20] Donaton, Scott. *Madison & Vine: Why the Entertainment and Advertising Industries Must Converge to Survive*, New York: McGraw Hill, 2004, pg. 25.
[21] Donaton, 25.

> …any ad agency that thinks a jingle connects like real music or a powerful movie and doesn't collaborate is lost**.** [22] [emphasis added]

As broadcast licensees cleave to advertisers' demands, allowing them to manipulate storylines and use beloved TV characters as shills, the deceptiveness of embedded advertising, and the inadequacy of the current regulatory structure to remedy the resultant harms, is a serious concern.

II. EMBEDDED ADVERTISING IS DECEPTIVE, THEREFORE HARMFUL

A. <u>The format is deceptive, even if the content of the ad is not.</u>

The Commission is clearly on record that its view of the purpose of Section 317 of the Act is to insure that audience members are informed when the material they are viewing or listening to has been induced by consideration, and that the entity paying for the broadcast must be clearly identified. See, In re National Broad Co., 27F.C.C. 2d 75 (1970); Letter to Mr. Earl Glickman 3 F.C.C. 326 (1966).

Closer to the point, the FCC has clarified that the purpose of Sponsorship Identification rules is to **prevent deception**:

> The congressional intent in enacting section 317 of the Communications Act and similar antecedent legislation was clearly *to prevent deception* on the part of the public growing out of concealment of the fact that the broadcast of particular program material was induced by consideration received by the licensee. [emphasis added]
> *FCC 60-239 Public Notice 85460, March 16, 1960.*

Comments submitted by media providers in this proceeding deny the deceptive nature of embedded advertising, citing among other arguments the Federal Communication Commission's view that product placement does not make material

[22] Donaton, 26-31.

claims about a product, therefore it cannot be misleading (2005). [23] It is clear that the FTC confused false and misleading advertising claims with deceptive advertising techniques, or formats.

Embedded advertising is deceptive, not because it makes false claims about a product's performance or attributes, *but because it "mimics" program content*. Like a Trojan horse, it delivers messages in a manner that appears to be neutral or objective.[24] At least two product placement agencies have said as much on their websites:

> *The benefit to the marketer is the exposure to a large audience in an environment that is perceived to be objective**…Often consumers do not even realize they are being marketed to.***
> --OnPoint Marketing & Promotions [emphasis added][25]

> *Products shown on screen within a film's storyline have higher credibility than products in advertisements **which the audience knows are paid announcements.***
> --Vista Group [emphasis added] [26]

When promotional material is woven seamlessly into the very fabric of the program, the resulting amalgam delivers a compelling but misleading message. To the extent that the placement is "seamless," the pitch is indistinguishable and may not be perceived as advertising at all.

The industry's preference for seamless placements has been well documented in the NOI/NPRM. Market research is clear that seamless placements are generally more

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[23] Engle, Mary K. Letter to Gary Ruskin, Executive Director, Commercial Alert, February 10, 2005.
[24] Wenner, Lawrence. "On the Ethics of Product Placement in Media Entertainment," in Galacian, M. Ed., *Handbook of Product Placement in the Mass Media*, New York: Hayworth, 2004, pg 103.
[25] OnPoint Marketing & Promotions, "Product Placement Defined," http://www.onpoint-marketing.com/product-placement.htm, downloaded 24 July 2006.
[26] Vista Group,, http://vistagroupusa.com/serv02.htm, downloaded 10 July 2008.

effective than "obvious" placements.[27] Studies further suggest that when branded material draws conscious notice, it may elicit irritation and backlash from the audience.[28]

Clearly the dual nature of embedded ads (commercial speech passing in the guise of artistic expression) is a profitable illusion, a lucrative sleight of hand, and the root of deception. As revealed by Mr. Heyer's comments above, marketers benefit from that deception.

B. <u>The effectiveness of embedded advertising rests on blurring the line between commercial and non-commercial speech.</u>

The difference between material that was incorporated because of a payment (or "bribe") and material that was chosen *on merit* is fundamental to this proceeding. The former is commercial speech, the latter is artistic expression (in the case of entertainment) or objective reporting (in the case of documentaries and news).

The difference between the two genres of speech is INTENT. Is the intent to entertain, educate or inform? Or, is the intent, to promote, solicit, or sell? If the latter, then there is a promotional agenda which must be disclosed. The agenda is to persuade, cajole or entice the audience to like and ultimately buy the product.

C. <u>The audience cannot identify paid embedded advertising without a disclosure.</u>

Commercial speech can be artistic, and artistic expression or objective reporting can express points of view. Adding to the muddle, producers often use branded products *without payment* to evoke realism – which is not advertising, but an artistic use of a brand. Research indicates that viewers often assume that branded props reflect the

[27] Bhatnagar N., Aksoy, L., and Malkoc, S., "Embedding Brands Within Media Content: The impact of Message, Media, and Consumer Characteristics on Placement Efficacy," in Shrum, L.J., *Psychology in Entertainment Media: Blurring the Line Between Advertising and Entertainment,* Mahway, NJ: Erlbaum, 2004, pg. 99-116.

[28] Russell, Cristel Antonia, Investigating the Effects of Product Placements in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude, *Journal of Consumer Research,* Vol 29, December, 2002.

producer's attempt to create realism, or interpret them as signs of increasing commercialism in the culture.[29] This perception is fueled by frequent claims from within the industry that placements which appear to be promotional are NOT paid advertising.[30] In the end, as long as trademarked brands are sometimes used for creative effects *without* payment or for a nominal fee, the audience cannot discern when content was "induced by consideration."

As confusing as this is to the consumer, the law is clear on what triggers a disclosure. The guidelines issued by the U.S. Congress containing more than 30 instructive examples of incidences that would and would not require a Sponsorship Identification disclosures make it clear that it all boils down to *the payment.*

When content is induced by a payment, two factors are of material interest to the consumer: 1) there is a promotional motive underlying the choice to pay for the placement, and 2) the content might NOT have been included without the payment.

III. "PROMOTIONAL BIAS" IS HARMFUL IF NOT ADEQUATELY DISCLOSED

When program material is "induced by consideration" promotional bias is introduced without the viewer's awareness. The premise behind Sponsorship Identification is that "promotional bias" must be made salient to the viewer. The motive to sell is an incentive for advertisers to manipulate the visual and auditory power of

[29] Russell.
[30] Schiller, Gail. "Brands take buzz to bank through free integration," *Hollywood Reporter*, April 13, 2006. (See also Friedman, Wayne. "Product Placement Dealing: Try to Keep Your Hands in Your Pockets – Paying for Product Placement? Sucker." *MediaPost*, April 14, 2006.)

media for persuasive ends. Without adequate Sponsorship Identification disclosure, the consumer may not be aware of the subtle effects of "promotional bias."

A. <u>The emotional appeals in TV programs are fertile ground for manipulation.</u>

To understand the manner in which "promotional bias" impacts consumers, we must first recognize that an embedded ad is a sales pitch, or solicitation. The FTC overlooked this critical point in its 2005 ruling on product placement. A pitch need not be a rhetorical statement of the merits of a product or brand. Many traditional commercials rely on celebrity endorsements, storytelling techniques and other "emotive" appeals to promote a product or brand without even mentioning the product's attributes and performance.[31]

When examining the subtle effects of embedded advertising techniques, it is important to bear in mind that the courts have long been cognizant that "speech" may be defined as emotive content as well as the spoken word.

In *Cohen vs. California*, 403 U.S, 15 (1971) the Court recognized this duality. "Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for the emotive function, which, practically speaking, may often be the more important element of the overall message sought to be communicated."

[31] Brock, Timothy & Green, Melanie. *Persuasion: Psychological Insights and Perspectives.* Thousand Oaks, CA: Sage. 2005. 41-63; 281-305.

It is important for the Commission to note that the most effective forms of embedded advertising may be those which are emotive, and that these forms of speech are equally subject to the constitutional requirement that they NOT be misleading or deceptive.

Placement and product integration techniques intentionally hijack TV's storylines, emotional content and familiar characters for precisely the same purpose. In this respect, Steven Heyer's admonition to television executives is instructive: "**we need your content, your storytelling, your influence, your ability to create experiences. We need your ability to help us sell…We will use a diverse array of entertainment assets to break into people's hearts and minds. In that order. For this is the way to their wallets…"**[32]

"Hearts before minds" evokes one of Madison Avenue's core strategies, and shows why television programs are effective marketing vehicles.[33] Emotional engagement is the "brass ring" for the advertising industry, and that's the thing Hollywood screenwriters, actors and directors do best.

The ability of emotional appeals to influence behavior was demonstrated in a 2008 study at the Rudd Center on Food Policy and Obesity. Children who watched four "fun" food commercials among 16 commercials interspersed through a 30-minute TV program ate 45% more snack food while watching than a control group that did NOT see food commercials. Importantly, the snack foods were not the same as those advertised, pointing to the power of emotion-based advertising to induce EATING.[34]

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[32] Donaton.
[33] Brock T. & Green, M. *Persuasion*, Thousand Oaks, CA: Sage2005.
[34] Harris J.L., Bargh JA, Brownell, K.D., "Priming effects of television food advertising on eating behavior." *Health Psychology*. In press.

In the second part of the experiment, *adults* who watched a program with "fun" food commercials ate significantly more snack food than those who watched rhetorical "nutritional" food commercials. In fact, the reason-based nutritional appeals stimulated NO extra snacking whatsoever, matching a control group that saw no food commercials.[35]

These studies demonstrate that, contrary to Madison Avenue's longstanding claims, emotional appeals used by advertisers influence not just brand choice but *behavior.* How much more persuasive, then, is the advertising that is woven seamlessly throughout a program, with beloved characters as endorsers?

Congressmen Edward Markey and Henry Waxman touched on this issue in their letter to the FCC in 2007, describing two episodes of the primetime family series, *Seventh Heaven* which, they said, verged on "program-length infomercials." Both episodes portrayed the "fun" of eating Oreos – cookie-dunking, high-fiving Oreos, cozy family scenes with Oreos front and center.

When marketers input dialogue, scenes and story plot points, television shows like the Oreo episodes are indeed "program-length infomercials" with profound capacity to induce attitudes, values, needs, desires, and cravings.

For youth, there is arguably *no remedy* for this harmful manipulation except limiting exposure – which is why children's advocacy groups have aptly called for a ban on embedded advertising in children's programming and during family viewing hours.

For adults, the tailored remedy is a clear and conspicuous disclosure.

B. <u>Promotional bias influences subject matter without consumer awareness.</u>

A far less apparent type of "promotional bias" is the decision to focus on a particular subject in the first place. Products and brands are becoming the subject of more

[35] Harris et al.

and more TV programs, edging out options that do NOT have lucrative payoffs for broadcast licensees and producers. For example, a depressed character could talk to a friend, take a walk in the countryside, fill up on Doritos, or get drunk on Budweiser. The latter two options are supported by revenue streams and therefore carry a default advantage in an industry driven by embedded advertising.

Promotional bias also occurs when material that was "induced by consideration" conveys to the public that certain targeted behaviors are "what normal people do." Television programs convey social norms.[36] As the Marin Institute pointed out in this proceeding, by paying to place alcohol, beer and liquor companies convey to the public what is normal drinking behavior.[37] This "biased" view can be harmful to the consumer if the sponsorship of the material is not disclosed.

C. Promotional bias means that "side effects" and "downsides" are not portrayed.

The potential harm associated with "promotional bias" is clearly illustrated in the case of drug placements. *Fortune* says product placement allows pharmaceutical companies to advertise drugs *without mentioning the side effects*.[38] Familiar characters tacitly endorse the drug a context that seems objective.[39] During the first three quarters of 2007, more than 700 plugs for pharmaceutical drugs occurred in primetime, according to Nielsen.[40] Lest anyone think these "plugs" go unpaid, iTVX, the website of product placement guru Frank Zazza, suggests otherwise:

> Does the average viewer take note of the marketing brilliance on display when a certain sad gangster confesses a Prozac dependence

[36] Slater, Michael. "Entertainment Education and the Persuasiveness of Narratives," in M.C. Green, J. Strange & T. Brock, *Narrative Impact: Social and Cognitive Foundations.* Mahwah, NJ: Erlbaum, 2002, pg. 157-181.
[37] NOI/NPRM: Comments of Marin Institute at 4.
[38] Simons, John. "Big Pharma's ready for prime time," *Fortune,* September 28, 2007.
[39] See "More Pharmaceutical Sales Relying on TV Product Placement, *itvx.com,* May 11, 2008.
[40] Simmons.

> to his brothers-in-crime?" the site inquires. "When a desperate housewife suspects, via voiceover, that her husband/lover has turned to Viagra to better his bedroom performance? When a pill-popping wunderkind doctor names a particular med to counter the mysterious ailment of the week? Probably not. But many of these seemingly casual references are anything but, and the practice may soon create some legal dust-ups of its own.[41]

In 2008, researchers at U.C.L.A. issued a warning that embedded drug ads pose substantial risks to consumers.[42] Clearly, weak sponsorship identification rules are an invitation to advertisers of all stripes to manipulate the public via "seamless" embedded ads.

D. <u>Promotional bias is a form of censorship.</u>

That promotional bias sometimes verges on censorship is a subtle factor that the FCC should consider. The Writer's Guild of America West cites examples of reality show contestants who make negative remarks about a product or brand, and are then called back to dub in lines that are approved by the sponsor. In some cases, they must consume and even *promote* products they don't like. This deception is then broadcast as "reality."

We need only look at the television industry's checkered history to see what's coming down the road. Censorship by sponsors ultimately destroyed the 50's TV advertising model (which the television industry now cites as an exemplar of the merits of integrated marketing). In 1959, the *New York Times* reported that advertising agencies "in practice may be virtually the actual producers." Per testimony to the FCC in the quiz show hearing, producers "don't make an important move without an approving nod from the

[41] "More Pharmaceutical Sales Relying on TV Product Placement, *itvx.com*, May 11, 2008.
[42] Rivera, Enrique, "Does drug product placement on TV require new regulations?" *UCLA Newsroom Press Release*, May 17, 2008.

agency" and agencies "review all scripts in advance, scrutinize dialogue and story lines and have their 'program representatives' on hand to check each day's production work."

A company that manufactured unfiltered cigarettes demanded that villains smoke only filter cigarettes.[43] A southern firm insisted that a drama about a lynching be moved to New England.[44] In a program about the Nuremberg trials, an advertising executive sitting at the control panels on behalf of Associated Gas and Electric turned off the sound when he saw the words "gas chambers" coming up in the script.[45]

The *Times* summed it up: "…in one way or another, the function of selling, not the show, is paramount."

IV. EMBEDDED ADVERTISING HAS PSYCHOLOGICAL EFFECTS THAT CAN BE HARMFUL TO CONSUMERS

A. Critical thinking and counterarguing are reduced.

Consumers typically react to television commercials and other forms of advertising with healthy skepticism.[46] But narrative dramas and comedies are processed differently than rhetorical persuasion.[47] When the viewer is "lost" in a story, critical thinking is reduced, and false premises may be accepted as true.[48] Because the message appears as part of the program, the ad flies under the radar. The purpose of Sponsorship Identification disclosures is to level the playing field for the consumer by informing the audience when persuasion is the goal.

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[43] Samuel. Lawrence. *Brought to You By: Postwar Television Advertising and the American Dream,* Austin, TX: University of Texas Press. 2001 at 138.
[44] Samuel.
[45] Samuel.
[46] Wegener, D. T., & Petty, R. E. "The flexible correction model: The role of naive theories of bias in bias correction." In M. P. Zanna, Ed., *Advances in experimental social psychology* San Diego: Academic Press. Vol. 29, pp. 141-208, 1997.
[47] Green, M. & Brock, T, "Persuasiveness of Naratives," in Brock, T. and Green, M, *Persuasion: Psychological Insights and Perspectives,* Thousand Oaks, CA: Sage, 2005.
[48] Green & Brock.

Persuasion research, notably the work of Dr. Richard Petty of Ohio State University, provides evidence of the need for *effective* disclosures in order to mitigate the effects of "stealth" persuasion. Dr. Petty confirms that the key to avoiding manipulation is knowing that the source of the message may be biased or lacks credibility: [49]

> There is plenty of evidence that if you forewarn someone of a persuasive attempt or something they disagree with, it can reduce the persuasive impact of the appeal. That is, people will counterargue and resist influence if they are warned. .. Secondly, there is evidence that if you indicate to people that something might bias their judgment or you make a source of possible bias salient, they will often attempt to debias their own judgment. [50]

In other words, far from being "paternalistic" as has been claimed by opponents of the NOI/NPRM, effective disclosures *empower* consumers through fair dissemination of necessary information, which in turn enables them to accurately evaluate and respond to the message, thereby mitigating the deceptiveness and harm of stealth persuasion.

B. Embedded advertising can "prime" the audience for targeted behaviors *unless the viewer is aware of the intent to persuade.*

Automaticity research, notably represented by Dr. John Bargh, psychologist at Yale University, demonstrates that people can be "primed" to respond "automatically" without their conscious awareness – a technique that is commonly associated with embedded advertising.[51] Importantly, the effects of priming are largely *prevented* when the person *knows* they are being primed, or persuaded. In an email, Dr. Bargh explains:

> Passive priming effects…rely on the person's lack of awareness of their influence; if one is aware of possibly being influenced, the representation is no longer passively but instead actively 'on' – with

[49] Petty, R. E., & Cacioppo, J. T. (1977). Forewarning, cognitive responding, and resistance to persuasion. *Journal of Personality and Social Psychology*, *35*, 645-655. See also: Petty, R. E., & Cacioppo, J. T. (1979). Effects of forewarning of persuasive intent and involvement on cognitive responses and persuasion. *Personality and Social Psychology Bulletin*, *5*, 173-176.
[50] Petty, Richard. Email. October 3, 2008.
[51] Law & Braun-Latour, in Shrum, L.J., *The Psychology of Entertainment Media.* Muhwah, NJ: Earlbaum. 2005

> the conscious knowledge of the individual. Now the situation becomes one in which the person is aware of the potential influence, much [52]like when watching an ad on television, and so can actively defend against the (unwanted) external influence. [53]

"Transportation" research**,** represented by Melanie C. Green, coauthor of *Persuasion: Psychological Insights and Perspectives,* reveals that when people become "lost" in a narrative storyline, persuasive material which is known to be false, or which might otherwise be counterargued, may be accepted as true and later influence attitudes and beliefs. Clearly, embedded advertising is aided by the "story trance" which contributes to implicit "priming" without the viewer's awareness. Further, the quest for seamless placements is in part a desire NOT to break the trance. Although truly engaging narratives are compelling, if there is any remedy, according to Dr. Green, it is AWARENESS of possible presence of biased material.[54]

C. The use of narrative television dramas to manipulate behavior is documented in the field of entertainment education.

Research on Entertainment Education**,** initiated by Albert Banduras, a social cognitive theorist at Stanford University, involves the use of television and radio soap operas to alter social norms "for the public's good." As applied in more than 60 nations worldwide, [55] the controversial practice is significant for the FCC because it employs the *same subtle persuasive techniques* that are used by advertisers to promote products and

[52] Green & Brock.
[53] Bargh.
[54] Green & Brock.
[55] Foster, Christine. "Confidence Man: Psychology pioneer Albert Bandura puts his theories to work helping people to believe in themselves and change their world," *Stanford Magazine,* September/October, 2006.

services in American television programs. [56] Engaging characters model (and thereby teach) attitudes and behaviors (or brand awareness). Storylines reinforce targeted behaviors by showing positive outcomes and peer approval for characters who engage in the desired behavior (or use the product).

The impact of this stealth persuasion is well documented. For example, following a series broadcast in Ethiopia between 2002 and 2004, requests for contraception increased 157% and the fertility rate fell from 5.4 to 4.3.[57]

D. <u>Psychographic testing can be used to make TV shows more persuasive.</u>

Of additional interest to the FCC, extensive audience testing is used to calibrate Entertainment Education programs to the psyche of the target audience. [58] Chillingly, similar psychographic tests are being administered to evaluate America's television programs – a predictor of where television is heading. Companies like IAG Research are utilizing brain scans, eye-tracking and other tests to gauge consumer responses to the shows and products embedded in the storylines.[59] The Nielsen Company recently purchased IAG Research[60] and also bought a stake in the neuromarketing firm NeuroFocus in order to provide psychographic data to the television industry.[61] According to the chief executive of NeuroFocus, "We measure attention second by

[56] Slater, Michael. "Entertainment Education and the Persuasiveness of Narratives," in M.C. Green, J. Strange & T. Brock, *Narrative Impact: Social and Cognitive Foundations.* Mahwah, NJ: Erlbaum, 2002, pg. 157-181.
[57] Foster.
[58] Slater.
[59] Marich, Robert. "Measuring Engagement: Audience Metric Exerts Increasing Influence on Ad Spending," *Broadcast Cable,* April 26, 2008.
[60] Eggerton, John. "Nielsen-IAG Research Deal Done," *Broadcasting Cable,* May 16, 2008.
[61] Elliot, Stuart. "Is the Ad a Success? The Brain Waves Tell All," *New York Times,* March 31, 2008.

second, how emotionally engaged you are with what you're watching…and memory retention."[62]

V. WEAK RULES INVITE STEALTH MARKETING

A. Embedded advertising has been used to market under the radar.

Lack of transparency in embedded advertising caused by *weak* Sponsorship Identification rules is an invitation to embed messages in artistic content and thereby escape public censure or legislative oversight. The pharmaceutical drug placements discussed above suggest that embedded advertising techniques may be used by industries which are subject to statutory or voluntary advertising regulations, or which face opposition from consumer advocates and the public. Evidence abounds of product placement by the alcohol industry. [63] The tobacco industry has a long history of stealth marketing in movies and television, for example the so-called "Cigar Caper" of 1998. [64]

Cigars appeared in movies and TV shows like *Friends* and *Seinfeld,* which garner a large youth audience, as part of a campaign to promote cigar smoking *as a behavior.* Launched by an umbrella tobacco trade group, the Cigar Association of America, the campaign which incorporated product placement saw 60% increase in teen cigar smoking in a single year.[65]

The latter case demonstrates the potential STEALTH use of embedded advertising techniques by trade organizations – without the use of brands, nor any tip-off to alert consumers that the material was "induced" by a payment. Trade groups promote

[62] Elliott.
[63] Marin Institute, FCC NOIO/NLPRM 08-90, September 19, 2008.
[64] Klein, Alec. "The Cigar Caper." *Baltimore Sun.* January 11, 12, 13,1998.
[65] Klein.

commodities and BEHAVIOR, not brands. Marketers understand what the producers of "entertainment education" have demonstrated the 1970's: that television is a ripe medium for inculcating *attitudes, values* and *behavior* in target populations.

Consider the recent glut of gambling portrayals on television, which are often influenced by product placement revenue.[66] For example, Insomnia Entertainment, a Las Vegas production company that is backed by owners of the Golden Nugget and Green Valley Ranch Resort casinos, were heavily involved in the 2003 Fox reality show, *The Casino.* The owners of the casino were featured in the show, received producer credits[67] and shared in the profits.[68] One owner told *Advertising Age*, "There were millions of eyeballs on the Golden Nugget…We took a risk and it created a buzz."[69]

In other words, the program was a promotion, and it worked. During the six-week period between June 14 and July 25 (2004) the Golden Nugget scored second highest in brand recall among products integrated in Fox's summer programs.[70] Ironically, in 2006, FOX reported that gambling "is on the rise among teens and preteens" and that experts predict "it's only a matter of time before teen gambling addiction becomes an epidemic."[71] Youths are three times as likely to become "hooked" on bad habits, meaning 12% of children and teens who gamble will become addicts.[72]

The FCC should take note that any time a sponsor is integrally involved in a production, and/or shares in the profits, Sponsorship Identification is critically important

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[66] Nielsen. "Paris Las Vegas Hotel-Casino Tops Week of June 30-July 6, *Advertising Age,* July 10, 2008. See also Stanley, T.L., "Vegas is Latest Brand Integration for 'Queer Eye'" *Madison & Vine,* April 5, 2006.
[67] Adalian, Josef. "Fox rolling reality dice: Net bets on Vegas 'Casino.'" *Variety,* December 9, 2003.
[68] Linnett, Richard. "Inside Mark Burnett's New TV Show 'The Casino.'" *Advertising Age.* April 2, 2004.
[69] Stanley, T.L., "A Sprawling Las Vegas Product-Placement Strategy: Insomnia's Big Plans and Deep Pockets," *Madison & Vine,* October 27, 2004.
[70] "Product Placement in Fox's New Summer Shows," *Madison & Vine,* July 28, 2004.
[71] Donaldson-Evans. "Junior Jackpot: Teen Gambling on the Rise." www.foxnews.com, May 17, 2006.
[72] Donaldson-Evans.

because promotional bias—i.e., the glamorization of the product – is inevitable. Obviously, if a casino is being promoted, then realistic treatment of the harmful or addictive aspects of gambling is unlikely, and large devastating losses will not be shown. Significantly, a disclosure stating "promotional consideration provided by the Golden Nugget" does NOT inform consumers of the depth of the financial relationships involved, nor the pro-sponsor bias in the production.

B. <u>Weak sponsorship identification rules undermine corporate accountability</u>

Any lack of transparency in embedded advertising invites marketing practices that might otherwise provoke consumer resistance. Weak disclosure rules provide a "cover" for marketers, in part because the producer, not the advertiser, is held responsible for program content.[73] From marketing junk food to kids during an epidemic of obesity and diabetes, to using sexually promiscuous teen characters as endorsers to sell sexy lingerie to youth directly in a manner that might provoke backlash in a traditional commercial,[74] weak Sponsorship Identification rules undermine corporate accountability to the public interest.

C. <u>Weak sponsorship identification rules invite PROPAGANDA</u>

Just as lack of transparency is an open door for stealth marketing, it is the entry point for propaganda. As long as entities or individuals can pay to influence television or radio content behind the scenes without full and *effective* disclosure to the viewing audience, the American people are subject to manipulation that is unacceptable in a democratic society.

[73] Russell.
[74] Pressler, J., and Rovzar, C., "The Genius of Gossip Girl," *New York Magazine.* April 21, 2008.

VI. DECEPTIVE PRACTICES ARE A SLIPPERY SLOPE

A. Without regulatory oversight, deceptive practices become acceptable.

The "slippery slope" of unethical and deceptive practices is the fact that deception breeds more deception, as it becomes acceptable within the social networks where it is practiced. It took a decade for TV "plugola" to become business as usual, beginning with a few sitcoms and dramas, then greater time blocks within those same programs, then use of the practices to market gambling, pharmaceuticals and other products that should raise red flags, and finally spilling over into all forms of programming from sports casting to news. The increasing use of promotional Video News Releases (VNR's) in lieu of objective news reporting without adequate disclosure demonstrates America's decent on the slippery slope of propaganda.[75]

B. Deceptive advertising erodes CONSUMER CONFIDENCE in media.

Ethical communication is the currency of commerce in a market economy. When embedded messages are NOT adequately disclosed, media becomes a tool of manipulation, and loses the public trust. Please see part IX for more on this harm.

C. Weak Sponsorship Identification Rules BLUR COMMERCIAL AND NONCOMMERCIAL SPEECH.

Perhaps most sobering is the claim by National Media Providers that: "To the extent product placement and program content are intertwined, any proposed rules must be analyzed as restrictions on speech that is fully protected by the First Amendment…"[76]

This industry lobby goes so far as to suggest that product placement and product integration may not be commercial speech at all…that once commercial speech crosses the line into creative content, it is somehow transformed to constitutionally protected artistic

[75] See comments of CENTER FOR MEDIA DEMOCRACY in this proceeding.
[76] NOI/NPRM: Comments of NATIONAL MEDIA PROVIDERS.

expression. This powerful consortium of global corporations and advertising trade groups would negate centuries of legal and ethical precedent, enabling advertisers full sway to entwine their messages in creative content and thereby attain immunity from regulations that govern advertising – including the need to be accurate and truthful.

Here we see the inevitable harm in seamless ads that "mimic" creative content: a society in which no one, not even the Supreme Court, can distinguish between commercial and noncommercial speech, where there is no distinction between selling and broadcasting, and the telecommunication industry airs a steady stream of advertainment and advernews, manipulating the public without their awareness or consent.

This latter claim by National Media Providers is a call to action, and a vivid illustration of the pressing need to enact effective Sponsorship Identification disclosures.

VII. SPONSORSHIP IDENTIFICATION RULES ARE INADEQUATE

The Commission asks in the NOI/NPRM whether existing Sponsorship Identification rules are effective. Petitioners have resoundingly testified: NO. The rules are open-ended, leaving implementation to the licensees. As a result, industry executives who have a vested interest in suppressing sponsorship identification information decide what to say, and when and how to say it.

A. <u>Existing disclosures are too small, too fleeting, too confusing and too late.</u>

At present, the television industry's interpretation of "disclosure" does not satisfy the bare minimum standard, as explicated by the Commission. *In re Nat'l Broad Co.*, 27F.C.C.2d 75 (1070):

> …the announcement should at least state in language identifiable to the majority of viewers that suppliers of goods or services have paid the network or producer of the program to display or promote the products or services, and each supplier should be properly identified. In order to achieve the purpose of Section 317 and our Rules, the video portion of such announcement should be given in letters of sufficient size to be readily legible to an average viewer; should be shown against a background which does not reduce their legibility, and should remain on the screen long enough to be read in full by an average viewer.

As interpreted by broadcast licensees, "disclosure" means announcing their financial ties with marketers in small type that scrolls past the eye at a rapid pace, often on a split screen, with distracting material flashing nearby. The wording ("promotional consideration provided by") is confusing, lending the impression that the company has perhaps provided product free of charge as a donation. This obfuscation enhances the deceptiveness of embedded advertising and defeats consumer awareness.[77]

Most importantly, end-credit disclosures are too late to be effective. Research is clear that once people process a message as neutral or objective, a later disclosure that the source is biased or lacks credibility has only a short-term effect. Viewers may discount the information as a result of the disclosure, but after a few days, the impact of the initial message resurfaces, a phenomenon known as the "sleeper effect."[78] Only when the consumer knows the material is advertising *at the time they view the material* can appropriate critical thinking and counter-arguing take place.[79]

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[77] It is important to note that existing Sponsorship Identification rules originated in the radio era and were not designed for visual media. Visual disclosures must be *read* by the audience, and fail to inform the consumer unless they are clear, conspicuous and of sufficient duration.

[78] For a review of the sleeper effect studies see: Kumkale, G. T; Albarracin, D. (2004). The sleeper effect in persuasion: A meta-analytic review. *Psychological Bulletin, 130*, 143-172.

[79] Petty, R. E., & Cacioppo, J. T. (1977). Forewarning, cognitive responding, and resistance to persuasion. *Journal of Personality and Social Psychology, 35*, 645-655. See also: Petty, R. E., & Cacioppo, J. T. (1979). Effects of forewarning of persuasive intent and involvement on cognitive responses and persuasion. *Personality and Social Psychology Bulletin, 5*, 173-176.

B. <u>The Commission has exercised its authority to amend its rules in the past.</u>

The FCC has legitimately amended and extended Sponsorship Identification rules over the years, and it certainly has the authority to do so today. For example, in 1992, the Commission enacted exact criteria for disclosing the sources of political ads. Given the harms inherent in this technique, and the fact that embedded advertising is now a major component of the television industry's business model, the public interest requires that the same steps be taken for embedded advertising.

The Commission has inquired whether the criteria used in political ads should be adopted for product placement and product integration (4% of the vertical screen height and 4 seconds duration).[80] Disclosures for political ads are difficult for many viewers to read. It is recommended that the FCC conduct tests to ensure that the size and duration of all Sponsorship Identification disclosures enable viewers to read and process them effectively.

On the other hand, what "works" about the disclosures used in political ads is their direct proximity to the message. Concurrent disclosures are undoubtedly the most effective way to alert the viewer that the material on the screen may be biased by "consideration."

In short, when amending existing rules, the guiding principle should be consumer AWARENESS.

[80] NOI/NPRM at 10.

VIII. THE AMENDMENTS AND EXTENSIONS OF THE RULES PROPOSED IN THE NOI/NPRM ARE CONSTITUTIONAL

Opponents of rulemaking in this NOI/NPRM have universally challenged the Commission's authority to amend its rules, and some have gone so far as to challenge the rules themselves. Most industry commentators, in an attempt to preserve the regulatory status quo, have framed the proposed rules as infringements on protected speech. They argue, for example, that concurrent or "real time" disclosures constitute a "ban" on the practice of embedded advertising, which they claim is "longstanding and legitimate"[81] and deserving of protection under the First Amendment.

The fallacies underlying these claims are multifaceted, resting both on inaccurate inferences and biased interpretations of the relevant case law. We will attempt to unravel the misconceptions step by step, to arrive at a truthful understanding.

A. The proposed rules do not infringe upon, nor "ban" speech.

The first fallacy is that a disclosure is a ban on speech. An affirmative disclosure for the purpose of imparting necessary information to the consumer does not alter or infringe on protected speech any more than a road sign alerting drivers to points of interest, or to a bump in the road, alters the surrounding terrain. The Supreme Court has supported the notion that disclosures may be necessary, and are not infringements upon protected speech when the harms they remedy are substantial.[82]

Even for concurrent or "real time" disclosures, industry's use of "bugs" and "snipes" during programming undermines claims that such disclosures will alienate the audience and thereby exact a "ban" on embedded advertising techniques.

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[81] NOI/NPRM: Comments of Group M Worldwide, Inc.
[82] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) at 650.

In fact, based on licensees' increasing use of distracting interruptions during television shows, the issue for industry seems to be the nature of the *information imparted to the consumer*, rather than any visual distraction the disclosure may cause.

Clearly, the consumer's response to truthful disclosure of the real nature of the material (i.e., that it is advertising) is legitimate and must be honored. Any attempt to avoid consumer response by *obfuscating the nature of the material* is unacceptable. In a democratic market economy, the choices of the citizenry both reflect and *determine* the direction of culture and society. If consumers reject programs containing embedded advertising, or certain types of embedded advertising, it is incumbent upon the advertiser or licensee to respond by making their techniques more palatable – not by masking them.

B. <u>The Supreme Court has long supported the flow of truthful information.</u>

A review of the case law cited by opponents of rulemaking in this procedure reveals that most of the cases in which the Supreme Court struck down restrictions on commercial speech involved attempts to restrict the flow of information. For example, in *Virginia Pharmacy*, the Court held that ads stating the prices of pharmaceutical drugs could not be suppressed because consumers need that information in order to make choices in a market economy.

The free flow of truthful information is the basis for the Court's protection of commercial speech. We believe this interest will also prove to be the basis for the Court's protection of rules requiring *effective* Sponsorship Identification.

IX. *CENTRAL HUDSON* IS NOT AN OBSTACLE IN THIS PROCEEDING

A. Updated rules will be upheld as constitutional under *Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557* and its progeny.

Embedded advertising, whether explicit or emotive, is nothing more than a disguised solicitation, an "offer for sale of any property or service." *Hays County Guardian v. Supple,* 969 F.2d111

The degree of protection afforded such solicitations has been reviewed under a line of Supreme Court and Federal Circuit decisions. The discussion in this line of cases is instructive in that it provides extensive analysis of the tests employed to determine whether the speech, sought to be either banned or protected, is fully protected under the First Amendment, or entitled to a lesser degree of protection when balanced against a substantial government interest.

In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S.620, at 632 the Court articulated the principle that commercial speech and noncommercial speech are both protected under the First Amendment. However, the Court also held that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."

Similarly, the government may ban forms of communication more likely to deceive the public than inform it. (*Friedman v. Rogers*, at 440 U.S. 13, 440 U.S. 15-16 Ohralik *v. Ohio State Bar Assn.* at 436 U.S., 464-465, or commercial speech related to illegal activity by *Pittsburgh Press C. v. Human Relations Commission*, 413 U.S. 376 413 U.S.388 (1973).

B. <u>Embedded advertising FAILS the first prong of the *Central Hudson* test.</u>

The Court in its seminal decision *in Central Hudson Gas & Elec. Corp v Public Service Commission of New York,* 447 U.S. 557, 563, , 100 S.CT. 2343, 65 L.Ed.341 (1980) articulated its now famous four (4) prong test to determine whether commercial speech may be restricted.

The first part of the test is usually glossed over, as it has been by industry commentators in this NOI/NPRM. The Court has held that in order for commercial speech to be protected it must not be misleading.[83] Most of the decisions cited in this proceeding focus on the other prongs of the Central Hudson test, the strength of the state interest, the directness of the methods employed to effectuate the state's interest, and the need to tailor less overreaching restrictions on speech.

We urge the Commission not to gloss over the first prong of the *Central Hudson* test. As discussed above, embedded advertising techniques are by nature deceptive and misleading. Thus they do not pass the first prong of *Central Hudson*. The consequence is that the Commission could, arguably, constitutionally ban such misleading or deceptive programming under the authority of *Schaumberg, Friedman v. Rogers, Ohralik, Central Hudson, Ibanez v. Florida department of Business and Professional Regulation*, 512 U.S. 136, 142 (1994).

As the FTC has elucidated, the content of the advertising message conveyed via product placement or product integration in and of itself may not be false or misleading. In fact, the message may not include information about the product's attributes or

[83] *Central Hudson*, at 566.

performance at all.[84] Nevertheless, the format or techniquee is deceptive and misleading because commercial speech "travels" in the guise of artistic expression or news, and thereby presents a false impression as to its real nature.

Even when the two types of speech are inextricably intertwined, commercial speech maintains its true character in the eye of the Court. For example, *Bolger v. Youngs Drug Products Co*, 463 U.S, 60 (1983) held that "advertising which links a product to a current public debate is not thereby entitled to the Constitutional protections afforded to noncommercial speech, because advertisers should not be permitted to immunize false or misleading product information from government regulation simply by references to public issues."

Here we see that the Court has little patience with commercial speech that tries to wrap itself in the mantle of protected speech – and thereby gain immunity. As demonstrated above, embedded advertising does precisely that, exploiting "artistic expression" or "objective news reporting" as its Trojan horse.

Recall that, as documented above, a stated goal of the advertising industry is to achieve "seamless placements" which are not perceived as advertising. Recall, too, the comments by National Media Providers suggesting that when advertising is embedded in creative content, it is no longer advertising at all, but should be considered artistic expression with the full benefit of First Amendment protection.

All this conjures the specter of a world in which there is no distinction between commercial and noncommercial speech, a world in which persuasion masquerades freely

[84] Engle.

as art or news. It is highly unlikely that the Supreme Court will condone such a premise in a democratic society in which the currency of value is truth.

That said, even given the substantial harms for citizens and society which we have enumerated above, the FCC has not proposed banning the use of the profitable marketing strategy known as embedded advertising – except insofar as the material influences children who are not able to comprehend a disclosure. No one has suggested that banning the broadcast of embedded advertising is necessary or appropriate for the adult audience, although there is clear authority for doing so under the line of cases cited above. What is proposed is simply the amendment and/or extension of existing rules in order to make Sponsorship Identification rules effective.

C. Effective disclosures do not restrict information that is necessary for consumers; however, *ineffective* disclosures DO restrict necessary information.

Florida Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995) and *Ohralik at 457n.13v.* can certainly be read for the proposition that constitutional restrictions on false, deceptive or misleading speech are permissible so long as such restrictions leave "ample alternative channels for receipt of information."

In this respect, the notion put forth by some respondents that making Sponsorship Identification rules more effective amounts to *suppressing information* is unfounded. First, as the FTC has ruled on two occasions, product placement does not generally seek to impart information about a product's attributes or performance.[85] Secondly, per *Florida Bar* and *Ohralik*, there are certainly *ample* "alternative channels for receipt of information" from marketers -- i.e., opportunities for consumers to benefit from

[85] Engle.

advertising. Marketers freely, even relentlessly, "speak" to consumers today. The Internet, mobile phones and iPods have been harnessed as advertising platforms, along with radio, television, newspapers, billboards, and magazines. Advertising has been placed on eggs and oranges, in the trays where travelers put their belongings during airport security screening, in the bottoms of golf holes, on screens that start talking as soon as you begin fueling at the gasoline pump, and in the stalls of public restrooms. There are many alternative channels for "receipt of information" flowing from marketers.

D. EFFECTIVE disclosure is a necessary contingency for using otherwise deceptive techniques.

Significantly, the remedies which citizens have proposed in this proceeding are all far less restrictive than the Court has sanctioned in *Florida Bar* and *Ohralik*. We propose that the Commission *permit* the use of arguably deceptive advertising techniques provided that the licensee ALSO broadcasts *the remedy* for such deception: an effective, affirmative Sponsorship Identification disclosure.

Critical to this less restrictive approach is the stipulation that the disclosure MUST be effective. It must successfully inform the viewer of the true nature of the material being broadcast, dispel potential deception, and thereby comply with the intent of Sections 317 and 507 of the Act and the Commission's rules. This narrowly tailored remedy is what is minimally required under the law, and what is minimally necessary in the public interest.

In other words, the Commission's proposed amendment of its existing rules is a *necessary contingency* for the continued use by licensees of misleading and potentially harmful broadcasting/advertising techniques. Without EFFECTIVE disclosures, such

techniques would unlawful, but especially when disseminated to the population via mass media.

The commentators who oppose this point of view point to such cases as *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991) for the proposition that if a ban on commercial speech is prohibited, then the "lesser power" to prohibit the dissemination of such information is equally invalid.

Such commentators fail to note that the "lesser restriction" referred to in *Simon & Schuster* refers to a restriction on the dissemination of truthful information. In the case of embedded advertising, we are concerned about the dissemination (and restriction on) what is otherwise misleading or deceptive commercial speech.

E. Even if the Court were to find that embedded ads are not deceptive, the regulations proposed pass the second prong of the *Central Hudson Test.*

The second prong of the *Central Hudson* test is "whether the asserted governmental interest is substantial." [86] We suggest that, indeed, the Commission's interest is substantial in that it seeks to modernize its rules to fulfill its legislative mandate to provide the Sponsorship Identification required by Section 317 of the Communications Act. What could be more substantial than an agency of the Federal government seeking to administer its Congressional mandate, as the Commission seeks to do under The Communications Act, by the exercise of its rulemaking authority?

The substantial nature of the Commission's interest consists in preventing the type of specific harms and societal harms that have been clearly set forth in this document. If one of the Commission's responsibilities is to protect the public from the potentially harmful deception and promotional bias that may occur due to *ineffective* sponsorship

[86] *Central Hudson* at 566.

identification, then the modification of its rules to ensure proper disclosure *also* asserts a substantial governmental interest, because the harms its seeks to prevent are serious.

As discussed earlier, the root of these harms is misleading techniques and formats, which result in undisclosed promotional bias, censorship of content by advertisers, subtle psychological effects such as reduced counterarguing and/or resistance to commercial appeals, and the potential to market harmful or addictive products and target youth under the radar. Societal harms include the ability of persuaders to avoid accountability to the public interest, the potential for undisclosed propaganda, degradation of ethical communication, erosion of consumer confidence in media, and ultimately, the blending of commercial and noncommercial speech such that it is nigh impossible to tell the difference.

Cases which pass muster under the second prong of *Central Hudson* inevitably demonstrate a "substantial" government interest that is asserted, for example the prevention of fraud. But the courts have often been hard pressed in these cases to find realistic and concrete harms that the substantial interest, prevention of fraud for example, was intended to alleviate by regulation. See, *Village of Schaumberg v. Citizens For A Better Environment*, 444 U.S. 620 (1980) and *Riley v. National Federation Of The Blind Of North Carolina, Inc.*, 487 U.S. 781 (1988) for examples of the court having difficulty in establishing the harm and, therefore, any substantial government interest.

However, where the Court *did* find a concrete harm it also found a substantial government interest in protecting the citizens from the harm. See, *Ohralik* and *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

In this comment, we have cited specific examples of discrete harms that embedded advertising can cause individual citizens, as well as broader harms that the use of deceptive and misleading formats can inflict on society. Should the Commission agree that the harms enumerated here are real and substantial, it should find the following amendments and extensions of the FCC's rules suitable remedies:

1. Make disclosures clear, precise, timely and conspicuous.
2. Apply the rules uniformly, by extending Sponsorship Identification requirements to non-origination cable and satellite networks; and to movies, songs and music videos aired on either television or radio.
3. Restrict the use of embedded advertising techniques in programs for children, and adopt protective measures for youth during prime time programming.

F. Proposed regulations pass the third prong of *Central Hudson.*

Having established the harms associated with deceptive and misleading embedded advertising techniques, and the remedy for such harms, the third prong of the *Central Hudson* test asks "whether the regulation directly advances the governmental interest asserted." [87] With respect to prong three, the governmental interest asserted is the *public interest*, and the means for advancing it is amending and extending the Commission's Sponsorship Identification rules under Section 317 and 507 and the Commission's rules. Thus for prong three, the Commission must ask whether an amendment or extension of its rules *directly advances the intent and purpose of the rules themselves.* As stated by the Commission in 1965, the intent of the rules is to ensure that the public is "clearly informed that what they are viewing has been paid for, and that the entity paying for the

[87] *Central Hudson* at 566.

broadcast must be clearly identified." See *In re National Brand Co*., 27 F.C.C. 2d 75 (1970); *Letter to Mr. Earl Glickman* 3 F.C.C. 326 (1965).

In answering this question, we begin with the premise supported above that existing rules do NOT fulfill the mandate to *inform* insofar as disclosures are not noticed at all, or when noticed, cannot be read and understood. Nor do they *clearly* inform when they are confusingly worded, infringed upon by background distractions, and too late to have a meaningful relationship to the content of the message. The Commission's proposed remedy is to revise its rules so that they will do the job for which they were intended. We submit that in remedying the inadequacy of its rules, the Commission directly addresses the harm sought to be prevented.

For the same reasons, under prong three the Commission can legitimately *extend* its rules if the government's substantial interest is advanced by such extension. For example, the Commission asks in the NOI/NPRM whether it should extend its Sponsorship Identification rules to non-origination cable and satellite programming, where there are NO Sponsorship Identification rules at all. [88] In the cable sphere, the public is left in the

[88] CABLE/SATELLITE: Claims by cable providers that the Commission's rulemaking authority in this matter does not extend to non-origination cable programming should not deter the FCC from exercising its legal mandate to remedy harms associated with deceptive embedded advertising techniques. The FCC oversees telecommunications in America, and cable television and radio fall within that parameter.

Cable operators rightly assert that their status as private providers, and their customers' status as paying subscribers, exempts cable networks from the greater restrictions applied to broadcast licensees who operate on the public airwaves. However, such exemption pertains to attempts by government to restrict speech which it deems offensive or unacceptable. In this rulemaking procedure, the government is not restricting speech, but requiring disclosure of what are otherwise misleading advertising formats. In this rulemaking procedure, government's interest cuts across all platforms under the FCC's authority, because the ethical principle of honest broadcasting, and the individual and societal harms associated with deceptive advertising formats and techniques, are material in all platforms; indeed the problem is far greater on cable.

Even were the Court to accept the preposterous notion that cable customers have the right to pay to be deceived, the harm invoked by undisclosed "promotional bias," potential propaganda, manipulation of children and adolescents, degradation of media ethics and the deterioration of the distinction between

dark when paid messages are embedded in content. As a result, the viewer (in specific) and society (in general) are subject to all of the harms enumerated above, and in far greater measure, since broadcast licensees must at least adhere to existing rules. Little wonder in 2007 there were six (6) times more brand mentions on cable's top ten shows than on the broadcast networks.[89] One MTV executive aptly called the proliferation of embedded advertising on cable a "perfect storm of self-interest." [90]

This perfect storm is brewing in a regulatory vacuum. Even if we accept the controversial claim that "advertainment" furthers creative programming options for consumers, it is unfair and deceptive to use these techniques without full and fair disclosure of the financial ties between marketers and producers.[91]

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commercial and noncommercial speech cuts to the very heart of a democratic society and must be remedied by government oversight.

Not only is it unsound to exempt cable from ethical standards and thereby create a haven for deceptive practices, such action would place broadcast licensees at adisadvantage in the competition for advertising revenue. Based on the premise that seamless placements may be more effective, and that disclosures undermine the ability of marketers to influence the consumer in subconscious ways, advertising will certainly flow to cable.

Those who assert that the FCC overstepped when it extended disclosure rules to origination cable in the 1960's muddle the issue. Government's authority in this matter was never based on proprietary considerations, or scarce programming options available to consumers. It is true that these factors influenced the Court to allow government a certain latitude to require beneficial programming options such as educational content, etc. in furtherance of the public interest. It is also true that that authority does not extend to cable. However, this argument misses the point: the NOI/NPRM addresses deceptive and unfair broadcasting formats, and the need to remedy such deception is even more critical on cable, where existing Sponsorship Identification rules do not apply.

[89] Nielsen. "US Advertising Spending UP 0.6% in 2007, Internet Ad Spend UP 18.9%," nielsen.com, 31 March, 2008. Nielsen reported a 13% increase in the number of product placement occurrences in primetime broadcast network television in 2007, with the top ten programs scoring 25,950 placements. Cable programming was six times more saturated, with 163,737 occurrences in the top ten shows.

[90] Atkinson, Claire. "Testing the Boundaries of Branded Entertainment, *Advertising Age,* 14 Apr. 2008.

[91] It is clear to this and other respondents that movies, songs and music videos are crammed with branded content, much of it targeting youth, making it extremely important to address the existing Sponsorship Identification exemption for feature films that air that on television, and to enact rules for disclosure of paid messages embedded in music videos and in songs aired on the radio. Extension of the Commission's rules

As *Advertising Age* describes it, cable is heading for total convergence of advertising and entertainment:

> …cable channels and their marketing partners are engaged in much more sophisticated partnerships…One-off deals have been replaced with complete commitments to TV concepts from birth…The future appears to hold even more promise. Coming soon: series' production costs paid for entirely by marketers, which will collaborate with programmers like never before.
>
> --Advertising Age[92]

G. Narrowly-tailored rules and amendments are compatible with the fourth prong of *Central Hudson*

The fourth prong of *Central Hudson* is often discussed in the case law in conjunction with the third. Here, the Court asks "whether it (the governmental interest asserted) is not more extensive than necessary to serve that interest." [93] The fourth test, in effect, acts as a companion to the third test: to make sure that the remedy to the problem is not overreaching.

Significantly, while the third prong addresses the efficacy of the proposed rule in relation to the government interest (which in this case equates to remedying harms in the public interest) the fourth prong represents government's responsibility to resist overbroad regulation and thereby also consider the industry position in this matter.

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is thornier here, because these genres, at their point of origination, are not governed by the FCC. However, the very fact that movies now air on television *because of an exemption enacted by the Commission* suggests that the Commission has the authority to abolish the exemption. There is no doubt that conditions have changed since the Commission found that there was no reason to expect that advertisers would care to embed products into movies. Unfortunately, although the requirement to fully disclosure the sources of paid embedded messages *should* apply to all genres, at this juncture the FTC has not updated its policies. As a result, the advertising industry faces no regulatory obstacles as it injects embedded advertising in every media genre from movies, songs, music videos, and videogames to novels, and even comic books. Perhaps the most productive path for the FCC on the matter of films aired on television is to work in concert with the FTC toward a unified policy on product integration disclosures.

[92] Atkinson.
[93] *Central Hudson* at 566.

We believe that in weighing the goals represented by prongs three and four, the substantial nature of the harms cited above, and the potential for "sneaky" coercion and manipulation of mass media for commercial or subversive effects, tips the scales in this matter to prong three: disclosing information necessary to the citizenry.

It cannot be overstressed that *the harms* associated with FAILING to disclose truthful Sponsorship Identification (and thereby dispel deception) are magnified when such deception is broadcast via mass media to millions of people, and are therefore *exponentially harmful*. Since the proposed remedies do not ban the use of these marketing techniques, but simply promote transparency to protect the public, the FCC's first responsibility is disclosure.

In other words, the guiding principle in crafting narrowly-tailored rules under the NOI/NPRM should be *"Is the disclosure effective?"* The second responsibility is to tailor the remedy so that the rules extend no farther than is necessary.

Based on persuasion theory, automaticity theory and the other lines of research cited earlier, it is evident that the guiding principle for effectiveness is: the viewer must know, and be consciously aware AT THE TIME the ad is playing that the material is, in fact, an advertisement and that therefore it may contain promotional bias. As stated, persuasive messages are processed differently than narratives; critical thinking is required. This may point to the need for concurrent disclosures. Automaticity theory, which explains the subconscious effects of "priming," may support the need for concurrent disclosures.

For this reason, the fourth prong is best applied in conjunction with research by the Commission to determine the efficacy of each of the remedies under consideration. This research should NOT be conducted by the industries that are opposing this rulemaking process. Authentic research will be a worthwhile expenditure, because American media companies are leading not just the U.S., but nations around the globe toward a "brave new world" of advertainment. Certainly, any research that provides a better understanding of the subtle effects of these advertising techniques is prudent.

As for industry's claim that effective disclosures will amount to a "ban" on the practice, there is no evidence that the American audience will reject such disclosures. They may appreciate them. The American television audience is extremely tolerant, evidenced by the acceptance of snipes and bugs which the industry is already splashing on the screen. This tolerance would likely apply to concurrent, or "real time" disclosures. A small red button which says "advertisement," for example, would be less invasive than the flashy irritations that are already in use. Even a "crawl" is nothing new to television viewers.

H. <u>Transparency is a narrowly-tailored remedy for deception.</u>

The well reasoned decision in *Hays* (above) discussing the validity of a college's ban on campus of an off-campus newspaper containing advertisements, defined "narrowly tailored" as:

> A regulation is "narrowly tailored" when it does not 'burden substantially more speech than is necessary to further the government's legitimate interest.' *Ward*, 491U.S. at 799, 109 S.Ct.at 2758. At a minimum, a regulation cannot be narrowly tailored unless the cost to speech is 'carefully calculated' and the fit between the burden and the state interest is 'reasonable' *Bd of Trustees of State University of New York v. Fox*, 492 U.S. 460,481,109 S.Ct.3028,3035, 106 L.Ed2d388 (1989)

We submit that Sponsorship Identification rules *in general* are a narrowly-tailored remedy for the deceptive advertising/broadcasting techniques known as product placement and product integration. The remedy for deception is transparency, which is precisely what such disclosures seek to provide. Rather than exacting a "ban" on this lucrative marketing practice, disclosure strikes like an arrow at the heart of the deception and eradicates it, freeing broadcast licensees to use these techniques as they so choose.

The proposed rule changes, including concurrent disclosures, do not interfere unduly with the content of programming, and are minimally disruptive to the viewing experience. Provided the FCC does its homework and determines which proposal or combination of proposals is a fit between the burden imposed and the mandate to achieve effective Sponsorship Identification disclosure, the rule should be constitutional.

The FCC should make the disclosure policy consistent, with precise guidelines. That way, the viewer will know the meaning of the disclosure instantly, and in time, will be alerted automatically when the disclosure appears. This occurs with the warning against unlawful use of films which is posted at the beginning of a movie on a DVD: the public sees the warning, knows what it means, and does not have to read it word for word. The same occurs with the "Surgeon General's Warning" on tobacco products. Per

comments by Commercial Alert, were the FCC to include in its rulemaking a concurrent disclosure in the form of a button that says "advertising," in time the button will be noticed peripherally while the viewer pays attention to the storyline.

Of course, a thorough examination of the fourth prong is not possible without a specific rule on the table. However, the line of solicitation cases that has made its way through the Supreme Court and the Federal Appeals Circuit courts is instructive in examining the FCC's proposed rulemaking in the context of the third and fourth prongs of the *Central Hudson* test. A survey of these cases indicates that the Commission will have latitude to enact any of the proposed remedies that fits the "Goldilocks standard" – not too much regulation, and not too little, but just the right amount of federal oversight.

In *Edenfield v. Fane* 507 U.S. 761 (1993), the Court reviewed the constitutionality of a flat ban on direct solicitation by CPAs and, in so doing, focused a great deal of attention on the fourth prong of the *Central Hudson* test. In its discussion of the State's interest in banning the solicitation, the Court invoked the fourth prong by asking whether "*the extent of the restriction on protected speech is in reasonable proportion to the interest served*."[94]

For our purposes, the fourth prong asks whether the rules proposed by the Commission are restrictive only insofar as is necessary to remedy the specific and societal harms associated with embedded advertising (the governmental interest served).

Although we submit that there is no protection for deceptive speech, and that affirmative disclosures do not restrict protected speech, it is nevertheless incumbent upon

[94] *Edenfield v. Fane* 507 U.S. 761 (1993)

government to narrowly tailor all rulemaking so as not to inflict unnecessary burden; therefore the fourth prong is instructive in any case. Examination of the proposed rule changes in NOI/NPRM shows that they are narrowly tailored in that they provide for effective sponsorship identification by means that are not overly invasive of the broadcast material, do not restrict or infringe upon creative content, and require only that sponsorship identification be made effective so that the public understands that it is being solicited to buy a product or service.

I.The Supreme Court does not protect *deceptive* commercial speech that is intertwined with fully protected speech.

Riley v National Federation of Blind, 487 U.S.781 (1988) has been frequently quoted for the phrase "we do not believe that the speech [commercial speech] retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." But *Riley* was a single case which does not accurately mirror the situation before us.

In *Riley,* the state of North Carolina adopted an ordinance regulating the fees that charitable organizations could charge for professional fundraising. In reliance on *Schaumberg* and *Secretary of State of Maryland v. Joseph H. Munson Co*., 467 U.S. 947 (1984) the Court found that the State, in the guise of an economic regulation, had in reality sought to impose a substantial and unacceptable burden on fully protected speech. Significantly, the State could not satisfy the Court that its interest in this specific instance was as weighty as the State asserted, or that the means chosen to accomplish it were not unduly burdensome and overly broad. The ordinance did not pass the *Central Hudson*

test; however that failure should not be generalized to this matter, wherein the FCC's interest is substantial and the potential harms to individuals and society are profound.

As in many cases cited by the television and advertising industries in this proceeding, *Riley* instructs us that, if the government (here, the Commission) *can* assert a harm that is not only sufficiently "weighty" (the harm is real and significant) but that the means to remedy it are not unduly burdensome and are narrowly tailored, it is likely to pass constitutional muster.

J. Paternalism, No. Honest Speech, Yes. *Zauderer* Sets the Precedent

Some have charged that the Commission should be wary of substituting its views for those of the marketplace, claiming that the viewer is capable of distinguishing truth from falsehood. They argue that the proposed amendments and extensions of existing rules are "paternalistic."

As articulated above, because embedded ads may be "seamless," and because consumers may assume the branded content was included for sake of realism, [95] the public cannot evaluate the nature of the message without an effective disclosure. It is necessary to provide affirmative disclosures that dispel deception and inform the consumer who paid for, and is profiting from, the message.

In so doing, the Commission would not be substituting its judgment for those of the marketplace. The Commission would simply be requiring that the information conveyed not be materially misleading to the consumer, as the Court has held is

[95] Russell.

permissible in *Zauderer v. Office of Disciplinary Counsel of "Supreme Court of Ohio,* 471 U.S. 626 (1985).

In Zauderer, the Court assessed and upheld the constitutionality of a restriction on a lawyer's advertising. The restriction required that a lawyer advise potential clients in his advertising that if they lost the lawsuit, the clients might be liable for substantial court costs. (The advertisement omitted this fact.) The Court noted that while lawyers would know that the court costs to the losing party might be substantial, the lay public could easily assume it had a "free ride" and no downside. For this reason, the Court concluded that the restriction on this lawyer's advertising furthered the State's interest in preventing the deception of consumers, and accordingly, upheld the restriction on advertising.

The Court, in reviewing the line of case law that involves the tension between advertiser's First Amendment rights and protection of the consumer to whom such advertisements were directed, stated at page 650: "We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."

The Court went on to further illustrate the use of reasonable and constitutional restrictions on advertising by citing the experience of the FTC: "The experience of the FTC is, again, instructive. Although that agency has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the task an impossible one: in many instances, the agency has succeeded in identifying and

suppressing visually deceptive advertising. See, e.g., FTC v. Colgate-Palmolive Co. 380 U.S. 374 (1965)."

We believe that *Zauderer* correctly reflects the balance the Commission should be seeking to fulfill its mandate to protect the public interest by not permitting deceptive broadcasting to mislead consumers and to serve its licensees.

Equally significant is the Court's response to the argument that the State might substitute its views for those of the marketplace. In viewing the possibility of the deception as likely, and that large numbers of consumers would be misled, the Court had no hesitancy in agreeing that the State could insist that the advertising include purely factual and uncontroversial information about the terms under which the lawyer's services would be available.

In the context of this Comment, we are proposing that the Commission adopt Sponsorship Identification rules that will protect millions of consumers from substantial specific harms, that the Commission's Sponsorship Identification rules can protect our society from accepting false information as the truth. This is not the substitution of the Commission's views for the marketplace. This is the State fulfilling its time honored function of imposing reasonable and effective, affirmative disclaimers on commercial speech to make the speech not misleading. It is also consistent with the holding of *Zauderer* in providing a reasonable restriction on commercial speech in order to prevent the dissemination of misleading speech to consumers.

X. EFFECTIVE SPONSORSHIP IDENTIFICATION RULES WILL EXPAND THE FLOW OF TRUTHFUL INFORMATION.

In sum, it is important for broadcasters, content producers, advertisers, and other groups involved in the creation, promotion, sale and distribution of programming, *and the public* to know the "rules of the road." To the extent that the Commission's current rules are inadequate, it is appropriate for the Commission to provide the necessary certainty. As Joseph R. Grodin stated in *Are Rules Really Better Than Standards*, 45 Hastings L.J. 569, 570 (1994), "Stability, certainty, and predictability are valued because they promote confidence in the rule of law and make the resolution of disputes a less costly enterprise."

By adopting the proposed Sponsorship Identification rules, the Commission would be expanding, not restricting, the free flow of honest information. The Commission, without inserting its views on the speech sought to be broadcast, but by insisting on narrowly tailored sponsorship disclosures, would be following the advice provided by the Court in *Edenfield* when, in discussing the societal value of the interchange of ideas, the Court said, "Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service. . ."

The point to be emphasized at this juncture is that the Commission's revised rules as to sponsorship identification would promote the interchange of truthful information that the Supreme Court has long believed invaluable for consumers to have. Without this information, the consumer will be subject to the bias of the sponsor and this bias would likely be unknown to the viewer. As the use and sophistication of embedded advertising techniques proliferates, one of the most insidious associated harms is that the veracity of the information conveyed to the consumer via telecommunications media would become

suspect. Over time, due to the ongoing use of deceptive and misleading practices, the media-driven flow of information that is vital to commerce and democratic society would become corrupted, and the confidence of the public in what it is being told would deteriorate. While the public would probably not be able to distinguish truth from deception in any given broadcast, it would know that it was being deceived much of the time and the currency of our free market economy – truthful information – would become devalued.

In the long run, the corruption of media integrity threatens the very core of democracy, which depends on the flow of truthful information and an informed citizenry. As this respondent has argued, when communication is laced with stealth messaging which is not disclosed, the public will cease to trust media, and may discount important *truthful* information as well.

CONCLUSION

In view of the deceptive and misleading nature of embedded advertising techniques, the resultant substantial individual and societal harms, and the FCC's substantial interest in ensuring the flow of truthful information via telecommunications media, the Commission is advised to use the full extent of its authority under Sections 317 and 507 of the Communications, and the Communications Act of 1996, to amend and extend existing Sponsorship Identification rules as follows:

1. Make disclosures clear, precise, timely and conspicuous.
2. Apply the rules uniformly, by extending Sponsorship Identification requirements to non-origination cable and satellite networks; and to movies, songs and music videos aired on either television or radio.
3. Restrict the use of embedded advertising techniques in programs for children, and adopt protective measures for youth during prime time programming.