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

In the Matter of	)	
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Sponsorship Identification Rules and Embedded Advertising	)	MB Docket No. 08-90
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NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

Adopted: June 13, 2008 **Released: June 26, 2008**

Comment Date: (60 days after date of publication in the Federal Register)
Reply Comment Date: (90 days after date of publication in the Federal Register)

By the Commission: Chairman Martin**,** Commissioners Copps and Adelstein issuing separate statements.

I. INTRODUCTION

1. We solicit comment on the relationship between the Commission's sponsorship identification rules and increasing industry reliance on embedded advertising techniques.[1] Due, in part, to recent technological changes that allow consumers to more readily bypass commercial content, content providers may be turning to more subtle and sophisticated means of incorporating commercial messages into traditional programming. As these techniques become increasingly prevalent, it is important that the sponsorship identification rules protect the public's right to know who is paying to air commercials or other program matter on broadcast television and radio and cable. Accordingly, we seek comment on current trends in embedded advertising and potential changes to the current sponsorship identification regulations with regard to embedded advertising.

II. NOTICE OF INQUIRY

A. BACKGROUND

2. The purpose of embedded advertising, such as product placement and product integration,[2] is to draw on a program's credibility in order to promote a commercial product by weaving

[1] Embedded advertising describes situations where sponsored brands are included in entertainment programming. Embedded advertising is used here generally to describe both product integration and product placement, defined below. *See infra*, note 2.

[2] Product placement is the practice of inserting "branded products into programming in exchange for fees or other consideration." *See* Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gary Ruskin, Executive Director, Commercial Alert, 6 (Feb. 10, 2005), *available at* http://www.ftc.gov/os/closings/staff/050210productplacement.pdf. The Writers Guild and others have made a distinction between the mere use of products as props in television programming and the integration of the product into the plot of the story. Product placement is the placement of commercial products as props in television programming, whereas product integration integrates the product into the dialogue and/or plot of a program. *See e.g.*, Writers Guild of America, West and Writers Guild of America, East, White Paper, *Are You Selling to Me?*,

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the product into the program.[3] The use of embedded advertising is escalating as advertisers respond to a changing industry. Digital recording devices (DVRs) allow consumers to skip traditional commercials, giving rise to interest in other means of promoting products and services.[4] In addition, concerns have been raised that the availability of more programming options may translate into lower audience retention during commercial breaks.[5] The industry appears to be turning increasingly to embedded advertising techniques.[6] PQ Media estimates that between 1999 and 2004, the amount of money spent on television product placement increased an average of 21.5 percent per year.[7] For 2005, PQ Media estimates that the net value of the overall paid product placement market in the United States increased 48.7 percent to $1.50 billion.[8] Product placements for primetime network programming, according to Nielsen's Product Placement Services, decreased in 2006,[9] but the first quarter of 2007 shows an increase in product placements in Nielsen's Top 10 shows.[10]

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November 14, 2005, at 2, *available at* http://www.wga.org/subpage_newsevents.aspx?id=1422 ("*Writer's Guild White Paper*"); Wayne Freidman and Jean Haliday, *Product Integrators Tackle Learning Curve*, 73 ADVERTISING AGE 18 (2002). Commercial Alert in its Petition for Rulemaking (September 30, 2003) also identifies "title placement," the practice of placing brand names in the title of television programs, such as the WB's *Pepsi Smash*. *See infra,* note 15.

[3] *See, e.g.,* Namati Bhatnagar, Lerzon M. Askoy, and Selin A. Malkoc, *Efficacy of Brand Placements, the Impact of Consumer Awareness and Message Salience* in L.J. Shurm, Special Session Summary, *Where Art and Commerce Collide: A Funnel Approach to Embedding Messages in Non-Traditional Media*, 30 ADVANCES IN CONSUMER RESEARCH 170, 172 (2003) (noting that "there appears to be a general consensus that consumers are more skeptical of advertised claims (where persuasion is overt and easily perceived) than placed claims (where persuasion is harder to discern)" (citations omitted)); Cristel Antonia Russell, *Investigating the Effectiveness of Product Placement in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude,* 29 JOURNAL OF CONSUMER RESEARCH 306, 307 (2002) (noting that "[i]n today's oversaturated and fragmented advertising landscape, such hybrid advertisements … may prove more powerful than traditional advertisements if they are not perceived as persuasive messages." (citations omitted)).

[4] *See* Wayne Friedman, *NBC's Graboff: Mo' Better Branding*, MEDIA POST, June 11, 2007, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=62104 (noting that "[d]ue to increased time-shifting—and as a consequence, viewers' increasing habit of fast-forwarding through commercials—NBC will continue to try to get marketing messages inside programs"); Stuart Elliott, *The Media Business: Advertising; Ads That Are Too Fast for a Fast-Forward Button*, NEW YORK TIMES, May 18, 2007, *available at* http://www.nytimes.com/2007/05/18/business/media/18adco.html?ex=1337140800&en=726593664a9d4d95&ei=5088&partner=rssnyt&emc=rss (emphasizing that the industry may be moving away from traditional commercial breaks because of increasing prevalence of DVR owners, and because of Nielsen Media Research's decision to measure viewership of commercials).

[5] *See* Gail Schiller, *Report: Product Placements on the Rise*, THE HOLLYWOOD REPORTER, July 28, 2005 (quoting PQ Media president Patrick Quinn: "Advertisers and marketers are scrambling like never before to compete for consumers' time and money in this era of increasing audience fragmentation, advertising clutter, media multi-tasking and ad-skipping technology….").

[6] *See* Stuart Elliott, *The Media Business: Advertising; Ads That Are Too Fast for a Fast-Forward Button*, *supra* note 5; Gail Schiller, *Out of their place; Integration Dips,* THE HOLLYWOOD REPORTER, December 29, 2006, *available at* http://www.hollywoodreporter.com/hr/content_display/film/marketing/e3i73449c66171eef17b0a390b6391dfc05.

[7] *See* David Kaplan, *Product Placement Outpaces Ad Spending*, March 30, 2005, MEDIA POST, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=28681&Nid=12778&p=276816.

[8] S*ee Exclusive PQ Media Research: Global Paid Product Placement Spending Surged 42.2% to $2.21 Billion in 2005; Double-Digit Pace to Continue in 2006 and Beyond*, *available at* http://www.pqmedia.com/about-press-20060816-gppf2006.html. Based on these figures, the United States has the largest and fastest growing market in the world.

[9] *See U.S. Advertising Spending Rose 4.6% in 2006, Nielsen Monitor-Plus Reports*, *available at* http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnextoid=23

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3. These trends are also reflected in the new types of advertising offered by certain networks and radio stations. The CW network, for example, offers "content wraps," serialized stories within a group of commercials that include product integration,[11] and "cwikies," five second advertising slots interspersed in regular programming.[12] Fox Sports Network claims a specialty in "product immersion," the practice of "immersing products into programs … so that they really feel like it is part of the show."[13] NBC has instituted a policy of bringing in advertisers during programming development.[14] In 2004, Universal Television Networks sold to OMD Worldwide the exclusive rights to product placement position in a miniseries.[15] The goal of many of these new marketing techniques is to integrate products and services seamlessly into traditional programming.

4. The Commission's sponsorship identification rules are based on Sections 317 and 507 of the Communications Act of 1934, as amended ("Communications Act"), and are designed to protect the public's right to know the identity of the sponsor when consideration has been provided in exchange for airing programming.[16] Section 317 generally requires broadcast licensees to make sponsorship identification announcements in any programming for which consideration has been received.[17] Section

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922dafb3b61110VgnVCM100000ac0a260aRCRD. There were 102,793 occurrences of product placements during primetime in 2005; 79,701 occurrences in 2006.

[10] *See U.S. Advertising Spending Declined 0.6% in First Quarter 2007, Nielsen Monitor-Plus Reports*, *available at* http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnextoid=764d40cf14023110VgnVCM100000ac0a260aRCRD. During the first quarter of 2007, product placements occurred 8,893 times on Neilson's Top 10 programs compared to 8,793 times in the first quarter of 2006. Many of these top 10 shows are reality shows—such as American Idol (ranked #1) and the Apprentice (ranked #4). *See id*. *See also Writer's Guild White Paper* at 4-6 (emphasizing that reality shows spurred the development of wide-spread product placement and integration because of the lower risks associated with the short-run, open ended formats of these shows).

[11] *See* John Consoli, *CW Creates Content Wraps within Commercial Pods*, 16 MEDIAWEEK 4 (2006).

[12] *See* Jon Lafayette*, CW Tries to Break Away from Commercials*, TV WEEK, May 17, 2007, *available at* http://www.tvweek.com/news/2007/05/cw_tries_to_break_away_from_co.php (quoting Bill Morningstar, head of ad sales for CW: "[t]he idea is to surprise viewers by using nontraditional commercial forms. An individual advertiser such as a movie studio would air three of the "cwickies," either in a show or over the night …. After they air, the sponsor could have a longer-form payoff, such as a trailer"). We note that in 1962, the Commission issued a warning to broadcast stations that sponsorship identification requirements applied to "teaser announcements," a series of short, promotional messages which did not identify the product until a final announcement. *See In re Broadcasters Warned Against "Teaser" or "Come-On" Spots Where Neither Sponsor nor Sponsor's Product Is Announced,* Public Notice, 40 F.C.C. 135 (1962). There appears to be similarity between these "teaser announcements" and "cwickies," although "cwickies" may or may not identify the product.

[13] *See* Richard Linnett, *Fox Sports Specialty: Product 'Immersion': Net Inks Tie-Ins with Snapple, Labatt, Lincoln*, ADVERTISING AGE, January 20, 2003.

[14] Wayne Friedman, *NBC's Graboff: Mo' Better Branding*, MEDIA POST, June 11, 2007, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=62104 (quoting Marc Graboff, co-chairman of NBC Entertainment and NBC Universal Television Studio: "Creative has been typically in its silo here in Los Angeles, and advertising sales in its silo in New York. Why not have someone from the sales group in the room during those development meetings?").

[15] *See* Gary Ruskin, Executive Director, Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television (September 30, 2003) at 7 ("Commercial Alert Petition").

[16] *See In re Applicability of Sponsorship Identification Rules*, Public Notice, 40 F.C.C. 141 (1963) ("*Sponsorship Identification*") (emphasizing that "listeners are entitled to know by whom they are being persuaded").

[17] Section 317(a) (1) of the Communications Act of 1934, as amended ("Communications Act") provides:

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317(c) requires broadcasters to "exercise reasonable diligence" in obtaining sponsorship information from any person with whom the licensee "deals directly."[18] Section 507 of the Communications Act establishes a reporting scheme designed to ensure that broadcast licensees receive notice of consideration that may have been provided or promised in exchange for the inclusion of matter in a program regardless of where in the production chain the exchange takes place.[19]

5. Sections 73.1212[20] and 76.1615[21] of the Commission's rules closely track the language of Section 317 of the Communications Act.[22] The rules apply regardless of whether the program is primarily commercial or noncommercial[23] and regardless of the duration of the programming.[24] The

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> all matter broadcast by any radio station for which money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

Congress also inserted a proviso in Section 317(a)(1) to clarify that "service or other valuable consideration" does

> not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

Therefore, whenever a service or property is provided without charge or at a nominal charge to a station in connection with a broadcast, sponsorship identification is not required unless it is furnished in consideration for an identification that is "beyond an identification which is reasonably related to the use of such service or property on the broadcast." *Id*. The House Committee on Interstate and Foreign Commerce provided several illustrations of when an identification is beyond that "reasonably related to the use of such service or property on the broadcast." For example, a scenic travel video provided without charge by a bus company does not trigger sponsorship identification requirements if the bus "is shown fleetingly in highway views in such a manner reasonably related to that travel program," but does trigger these requirements if the bus is "shown to an extent disproportionate to the subject matter of the film…." *National Association for Better Broadcasting v. FCC*, 830 F. 2d 270, 277 (1987) (citing H.R. Rep. No. 1800, 86th Cong., 2d Sess. (1960), reprinted in [1960] U.S. Code Cong. & Admin. News 3516, 3532). By way of public notice, the Commission stated that it would use these illustrations as guidance in applying the Commission's rules. *See Sponsorship Identification*, Public Notice, 40 F.C.C. 141 (1963). Where consideration is in the form of money, the proviso does not apply and a sponsorship announcement is required. *See Earl Glickman*, 3 F.C.C. 2d 326 (1996).

[18] 47 U.S.C. § 317(c); *see also* 47 C.F.R. §§ 73.1212(b), 76.1615(b). Section 317(c) of the Communications Act provides that a licensee must:

> exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by [Section 317].

[19] 47 U.S.C. § 508.

[20] 47 C.F.R. § 73.1212.

[21] 47 C.F.R. § 76.1615.

[22] Section 76.1615 of the Commission's rules applies the broadcast provisions of Section 317 of the Communications Act to origination cablecasting. Section 507 of the Communications Act, however, is not reflected in a rule applicable to cable programming, and its provisions do not apply to cable programming. *See Amendment of the Commission's Sponsorship Identification Rules (Sections 73.119, 73.289, 73.654, 73.789 and 76.221)*, Report and Order, 52 F.C.C. 2d 701 at n.10 (1975).

[23] *National Ass'n for Better Broadcasting v. FCC*, 830 F.2d 270 (1987). In 2002, the Commission denied the Advertising Council's request for declaratory ruling or waiver concerning certain public service announcements as interpreted under the Commission's sponsorship identification requirements, concluding among other things that "[i]t is not the nature of the message conveyed in broadcast material that determines whether an identification is required but whether or not a station receives valuable consideration for broadcasting it." *Advertising Council*

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rules do not require sponsorship identification, however, when both the identity of the sponsor and the fact of sponsorship of a commercial product or service is obvious.[25] Thus, a sponsorship announcement would not be required when there is a clear connection between an obviously commercial product and sponsor.[26] Furthermore, with the exception of sponsored political advertising and certain issue advertising,[27] the Commission only requires that the announcement occur once during the programming and remain on the screen long enough to be read or heard by an average viewer.[28] Other decisions are left to the "reasonable, good faith judgment" of the licensee.[29] The Commission has issued numerous public notices over the years reminding industry participants of their sponsorship identification obligations.[30] In the past, the Commission has specifically reminded the industry that such obligations extend to "hidden" commercials embedded in interview programs.[31]

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Request For Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules, 17 FCC Rcd 22616, 22621 (2002), *recon. pending*.

[24] *See In re "Teaser" Announcements*, 40 F.C.C. 60 (1959).

[25] *See* 47 C.F.R. § 73.1212(f). Section 73.1212(f) provides:

> In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast.

An equivalent provision applies to origination cablecasting. *See* 47 C.F.R. §76.1615(e).

[26] *See* Letter to Edward G. Atsinger III, President of Salem Media Corporation, Radio Station WMCA(AM), 7 FCC Rcd 927 n.1 (1992). *See also, e.g., Classical Acquisition Limited Partnership Licensee, Radio Station WTEM(AM)*, 10 FCC Rcd 11004 (1995) (emphasizing that this exception applies when the product name and the sponsor are "obviously intertwined in the public mind.").

[27] *See In the matter of Codification of the Commission's Political Programming Policies,* Opinion and Order, 7 FCC Rcd 1616 (1992).

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

[29] *See Codification of the Commission's Political Programming Policies*, Opinion and Order, 7 FCC Rcd 678, 687 (1991).

[30] In 1970, for example, the Commission issued a public notice making clear that under Section 317 and 507, a producer receiving compensation or other valuable consideration for inclusion of matter in a program must report its receipt to the licensee, who in turn must make an appropriate disclosure. *Application of Sections 317 and 507 of the Communications Act to "Kickbacks" of Fees Paid to Performers*, Public Notice, 23 FCC 2d 588 (1970). In 1977, the Commission issued a public notice addressing the "widespread" failure of licensees to disclose sponsorship with respect to a nationwide "teaser" campaign sponsored by a religious organization, as well as for a commercial message paid for by governmental entities, local public service organizations, and trade associations. The Commission also directed attention to "numerous complaints" filed by the public claiming that the sponsorship identifications associated with certain election ads were illegible. *See Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations,* Public Notice, 66 FCC 2d 302 (1977). *See also In re Broadcasters Warned Against "Teaser" or "Come-On" Spots Where Neither Sponsor nor Sponsor's Product Is Announced,* Public Notice, 40 F.C.C. 135 (1962); *In the Matter of Amendment of Section 3.119(e) of the Commission's Rules and Regulations so as to Permit Utilization of "Teaser" Announcements Without Sponsorship Identification of Each Such Announcement,* Opinion and Order, 40 F.C.C. 60 (1959). In 1988, the Commission warned licensees about the failure to disclose sponsored promotions and payola. *See Commission Warns Licensees About Payola and Undisclosed Promotion,* Public Notice, 4 FCC Rcd 7708 (1988). In 1991, the Commission issued a public notice reminding cable operators and broadcast licensees that the sponsorship identification requirements applied to public service announcements paid for by governmental, non-profit, and other entities. *See Commission Reminds Broadcast Licensees and Cable Operators of Sponsorship*
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6. Providing "special safeguards" against the effects of overcommercialization on children, the Children's Television Act imposes time limitations on the amount of commercial matter in children's programming.[32] The Commission also has several longstanding policies that are designed to protect children from confusion that may result from the intermixture of program and commercial material in children's television programming.[33] The Commission requires broadcasters to use separations or "bumpers" between programming and commercials during children's programming to help children distinguish between advertisements and program content.[34] The Commission also considers any children's programming associated with a product, in which commercials for that product are aired, to be a "program-length commercial."[35] Such program length commercials may exceed the Commission's time limits on commercial matter in children's programming and expose the station to enforcement action.[36] The Commission has also stated that this program-length commercial policy applies to "programs in which a product or service is advertised within the body of the program and not separated from program content as children's commercials are required to be."[37]

7. In a petition for rulemaking filed with the Commission in 2003, Commercial Alert argues that the Commission's sponsorship identification rules are inadequate to address embedded advertising techniques, and thus, these rules fail to fulfill the Commission's mandate under Section 317 of the Communications Act.[38] For example, Commercial Alert asserts that "[t]here was a statement at the end of

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Identification Requirements Applicable to Paid-For "Public Service" Messages, Public Notice, 6 FCC Rcd 5861 (1991). In 2005, the Commission issued a public notice reminding licensees, cable operators and others of their disclosure obligation with respect to video news releases (VNR). *See Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video New Releases by Broadcast Licensees and Cable Operators*, Public Notice, 20 FCC Rcd 8593 (2005).

[31] *See Inquiry Into Hidden Commercials In Recorded "Interview" Programs*, Public Notice, 40 F.C.C. 81 (1960). This public notice inquired into the prevalence of "hidden commercials" in "interview programs," describing situations where during the course of the interview, one party may "casually mention one or more commercial products." Because these deals were often orchestrated by parties other than the broadcaster, the Commission requested licensees to "use more than ordinary diligence" in monitoring sponsorship activity in these shows. *Id. See also In re Sponsorship Identification of Broadcast Material*, Public Notice, 40 F.C.C. 69, 74 (1960) (addressing plugs and "sneaky" commercials, including product placement).

[32] Specifically, commercial television broadcast licensees and cable operators must limit the amount of commercial matter that airs during programs directed to children ages 12 and under to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays. *See* Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S. C. §§ 303b; 47 C.F.R. § 73.670; 47 C.F.R. § 76.255.

[33] These policies "directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter." *See Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd 2111, 2118 (1991), *recon. granted in part*, 6 FCC Rcd 5093 (1991) ("*Children's Television Programming*").

[34] *See*, *e.g.*, *Children's Television Programming*, 6 FCC Rcd at 2117-8.

[35] *See id.* at 2118.

[36] *See* 47 C.F.R. § 73.670 (a).

[37] *See Children's Television Programming,* 6 FCC Rcd at 2118 (citing *Weigel Broadcasting Company*, 41 F.C.C. 2d 370 (1973) (eight-minute segment inviting viewers to contact sponsor about entering chinchilla ranching business in half-hour program on chinchilla ranching). In addition, the host-selling rule prohibits "program talent or other identifiable program [characters]" from delivering any commercial pitches during a program. *See Policies and Rules Concerning Children's Television Programming*, Order on Reconsideration, 6 FCC Rcd at 5097.

[38] *See* Commercial Alert Petition at 3-4. Commercial Alert also filed this petition with the Federal Trade Commission (FTC), alleging that product placement without full disclosure constitutes an unfair and deceptive practice in violation of Section 5 of the Federal Trade Commission Act. In its response, the FTC stated that the
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a segment featuring the product placement that [the television program] 'Big Brother 4 is sponsored by McDonald's.' But there was not a hint that embedded plugs within the show were in fact paid ads."[39] Commercial Alert requests revision to these rules to require disclosure of product placement and integration in entertainment programming at the beginnings of programs in clear and conspicious language.[40] Commercial Alert also requests that disclosure be made concurrently with any product placement and/or integration, asserting that requiring disclosure only at the beginning or the end of the program disadvantages viewers who might miss the announcement.[41]

8. In opposition, the Washington Legal Foundation (WLF) and Freedom to Advertise Coalition (FAC) both argue that embedded advertising techniques are a longstanding fixture of broadcast advertising that cause no substantial harm to consumers, that the Commission's existing sponsorship identification rules are adequate to regulate them, and that a concurrent disclosure requirement would violate the First Amendment.[42] WLF argues that the proposed concurrent disclosure would so greatly interfere with programming that it would be paramount to a governmental ban on product placement.[43] By interfering with both the "commercial and dramatic reality of television production," asserts WLF, a concurrent disclosure requirement would be unconstitutionally overbroad.[44] Similarly, FAC argues that a concurrent disclosure requirement would so greatly interfere with the "artistic integrity" of a program that it would "censor or ban this long standing means of commercial speech."[45] FAC also asserts that a concurrent disclosure requirement lacks a "strong enough governmental interest" to justify the infringement on commercial speech.[46] Accordingly, applying the four-part test developed by the U.S.

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complaint "does not suggest that product placement results in consumers giving more credence to objective claims about the product's attributes," or sufficiently show that the product placement involves "false or misleading objective, material claims about the product's attributes. . . ." *See* Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gary Ruskin, Executive Director, Commercial Alert (February 10, 2005). Similarly, in 1991, the Center for the Study of Commercialism filed a complaint and a request for investigation and rulemaking with the FTC regarding product placements in motion pictures, alleging that product placement was an unfair and deceptive trade practice in violation of Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. § 45. *See In the Matter of Unfair and Deceptive Acts and Practices in the Placement of Product Advertisements in Motion Pictures*, Docket No. P914518, 209-59, 1991 WL 640030 (May 30, 1991). The FTC denied the petition by letter, stating that because of an "apparent lack of a pervasive pattern of deception and substantial consumer injury attributable to product placements," a rulemaking was not warranted. *See* Press Release, FTC, FTC Denies Center for the Study of Commercialism's Petition to Promulgate Rule on Product Placement in Movies, (Dec. 11, 1992), available at http://www.ftc.gov/opa/predawn/F93/csc-petit5.htm.

[39] *Id*. at 11.

[40] *Id*.

[41] *Id*.

[42] *See* Comments of the Washington Legal Foundation to the Federal Communications Commission Concerning Television Product Placement (April 6, 2004) at 6-7 ("Comments of Washington Legal Foundation"); Opposition to Petition for Rulemaking related to Disclosure of Product Placement on Television filed by Freedom to Advertise Coalition (November 12, 2003) at 5 ("Comments of Freedom to Advertise Coalition").

[43] *See* Comments of Washington Legal Foundation at 6. Because product placements add to the realism of programming, asserts WLF, a concurrent disclosure requirement would "destroy the artistic integrity of any programming containing such speech, and would be a nuisance to the viewer." *Id*. at 3. WLF also argues that product placement and/or integration is harmless, and that the petition fails to distinguish the current embedded advertising practices from those occurring in the 1950s and 1960s. *Id.* at 3 & 5.

[44] *See* Comments of Washington Legal Foundation at 7.

[45] *Id*.

[46] *See* Comments of Freedom to Advertise Coalition at 5.

Supreme Court in *Central Hudson Gas and Electric Corp. v. Public Service Commission*,[47] FAC asserts that any concurrent disclosure requirement would fail to meet the intermediate standard of review developed for lawful, non-deceptive commercial speech.[48]

9. Two years after the filing of the Commercial Alert Petition, the Writer's Guild of America, West; the Writer's Guild of America, East; the Screen Actors Guild; and the associate dean of the USC Annenberg School for Communication formulated another set recommendations, including: 1) visual and aural disclosure of product integration at the beginning of each program; 2) strict limits on product integration in children's programming; 3) input by storytellers, actors, and directors, arrived at through collective bargaining, about how a product or brand is to be integrated into content; and 4) extension of all regulation of product integration to cable television.[49] Alternatively, these groups requested the creation of an industry code on embedded advertising.[50] More recently, in 2007, Philip Rosenthal testified on behalf of the Writer's Guild of America, West and the Screen Actors Guild before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce regarding the need for greater disclosure requirements because of product placement and product integration.[51] In addition, in 2007, Patric Verrone testified on behalf of the Writers Guild of America, West, during the Federal Communications Commission's Public Hearing on Media Ownership in Chicago, Illinois regarding the need for greater disclosure requirements for product integration.[52]

B. DISCUSSION

10. We undertake this proceeding in order to consider the complex questions involved with the practice of embedded advertising, and to examine ways the Commission can advance the statutory goal entrusted to us of ensuring that that the public is informed of the sources of program sponsorship while concurrently balancing the First Amendment and artistic rights of programmers. We seek comment on current trends in embedded advertising and the efficacy of the Commission's existing sponsorship identification rules in protecting the public's right to be informed in light of these trends. More specifically, we seek comment on whether and how Sections 73.1212 and 76.1615 of the Commission's rules should be amended in order to fulfill the purposes of Section 317 and 507 of the Communications Act.

11. We seek comment on the application of the sponsorship identification regulations to various embedded advertising techniques. As noted above, the Commission in 1960 issued a public notice stating that sponsorship identification requirements applied to "hidden" commercials embedded in interview programs.[53] How often are these embedded advertising practices occurring and in what form?

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[47] 447 U.S. 557 (1980). Under this four-part analysis, the court initially determines whether the commercial speech involves unlawful activity or is misleading and thus not protected under the First Amendment; if the commercial speech is not misleading or unlawful, then the court applies an intermediate level of scrutiny, analyzing whether the government has a substantial interest; whether the regulatory policy directly and materially advances that interest; and whether the regulatory policy is no more extensive than necessary to serve that interest. *Id*. at 566.

[48] Comments of Freedom to Advertise Coalition at 6.

[49] *See Entertainment Guilds Call for Industry Code of Conduct or FCC Regulation for Product Integration in Programming and Film; Guilds Issue White Paper Report on the Runaway Use of Stealth Advertising in Television and Film*, November 14, 2005, *available at* http://www.wga.org/subpage_newsevents.aspx?id=1422. *See also Writer's Guild White Paper* at 8.

[50] *See id*.

[51] *See Digital Future of the United States, Part V: the Future of Video, Testimony of Philip Rosenthal*, May 10, 2007, *available at* http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.051007.Rosenthal-testimony.pdf.

[52] Comments of Patric Verrone, President, Writers Guild of America, West, at Chicago, Illinios, Public Hearing on Media Ownership (September 20, 2007) at 218-23.

[53] *See Inquiry Into Hidden Commercials In Recorded "Interview" Programs*, Public Notice, 40 F.C.C. 81 (1960). In (continued…)

Are the existing rules effective in ensuring that the public is made aware of product placement and product integration in entertainment programming? Are persons involved in the production or preparation of program matter intended for broadcast fulfilling their obligations under Section 507? Are broadcasters and cable operators fulfilling their reasonable diligence obligations under Section 317(c) and the Commission's rules? Does embedded advertising fit within the exception to disclosure requirements that applies where the commercial nature and identity of the sponsor is obvious?[54]

12. We also seek comment on whether modifications to the sponsorship identification rules are warranted to address new developments in the use of embedded advertising techniques. Are the concurrent disclosures requested by Commercial Alert necessary to ensure that the public is aware of sponsored messages that are integrated into entertainment programming?[55] Would concurrent disclosures be more or less disruptive to radio programming? Are other rule modifications warranted? Should we require disclosures before or after, or before and after, a program containing integrated sponsored material?[56] Should we require disclosure during a program when sponsored products and/or services are being displayed? Should we require both visual and aural disclosure for televised announcements?[57] Should these disclosures contain language specifying that the content paid for is an "advertisement" or other specific terms?[58] Should we require that radio disclosures be of a certain duration or of a certain volume?

13. We further seek comment on the First Amendment implications of possible modifications to the sponsorship identification rules to address more effectively embedded advertising techniques. In particular, we invite comment on the arguments raised by WLF and FAC in response to Commercial Alert's petition. Would the imposition of concurrent disclosure requirements or other regulations infringe on the artistic integrity of entertainment programming, as WLF argues? Would such a regulation be paramount to a ban on embedded advertising, as asserted by WLF and FAC? Does the apparently common existing practice of superimposing unrelated promotional material at the bottom of the screen during a running program belie WLF's and FAC's contention that concurrent identification would effectively preclude product integration as a form of commercial speech because it would "infringe on artistic integrity"? Are the government interests at stake here substantial enough to justify any such requirements? How can the Commission ensure that any modified regulations are no more extensive than necessary to serve these interests?

14. We also seek comment on whether Section 317 disclosure requirements should apply to feature films containing embedded advertising when re-broadcast by a licensee or provided by a cable operator. We note that in its prior Order, the Commission granted a Section 317 waiver for feature

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(…Continued from previous page)
its petition, Commercial Alert stresses that more recently, several pharmaceutical companies have used paid spokespersons to promote certain drugs, "often without disclosing that they were paid by pharmaceutical companies, or had other financial ties to them." *See* Commercial Alert Petition at 5.

[54] *See* 47 C.F.R. § 73.1212(f).

[55] *See* Commercial Alert Petition at 4.

[56] *Id*.

[57] *See Writer's Guild White Paper* at 8. We note that in a 1991 Report and Order, the Commission adopted a rule requiring both audio and video sponsorship identification for television political advertisements. *In the matter of Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991). However, as part of the same proceeding, in response to petitions for reconsideration addressing these requirements, the Commission subsequently eliminated the audio identification (agreeing with petitioners that this requirement was unduly burdensome to candidates, particularly for short spot announcements) and set forth the specific standards for video sponsorship identification currently in effect. 7 FCC Rcd 1616 (1992).

[58] *See* Commercial Alert Petition at 4.

films.[59] We found that there was a lack of evidence of sponsorship within films and observed that there was a lag time between production of feature films and their exhibition on television. In the 1963 Order, the Commission found no public interest considerations which would dictate immediate application of Section 317 to feature films re-broadcast on television. At present, the Commission's rules continue to waive the sponsorship identification requirements for feature films "produced initially and primarily for theatre exhibition."[60] We seek comment on the use of embedded advertising in feature films today, and whether the Commission should revisit the decision to waive Section 317 disclosure requirements.

III. NOTICE OF PROPOSED RULEMAKING

15. As stated above, with the exception of sponsored political advertising and certain issue advertising,[61] the Commission only requires that the announcement occur once during the programming and remain on the screen long enough to be read or heard by an average viewer.[62] In this Notice of Inquiry and Notice of Proposed Rulemaking ("*NOI/NPRM*"), we seek comment on a proposed rule change to make the current disclosure requirement more obvious to the consumer by requiring that sponsorship identification announcements 1) have lettering of a particular size and 2) air for a particular amount of time. Currently, the sponsoring announcement for any television political advertising concerning candidates for public office must have lettering equal to or greater than four percent of the vertical picture height and air for not less than four seconds.[63] Also, any political broadcast matter or broadcast matter involving the discussion of a controversial issue of public importance longer than five minutes "for which any film, record, transcription, talent, script, or other material or service of any kind is furnished…to a station as inducement for the broadcasting of such matter" requires a sponsorship identification announcement both at the beginning and the conclusion of the broadcast programming containing the announcement.[64] We seek comment on whether the Commission should apply similar standards to all sponsorship identification announcements and, if so, we seek comment on the size of lettering for these announcements and the amount of time they should air. We seek suggestions on any other requirements for these announcements.

16. We also invite comment on whether the Commission's existing rules and policies governing commercials in children's programming adequately vindicate the policy goals underlying the Children's Television Act and Sections 317 and 507 with respect to embedded advertising in children's programming. If commenters believe that these rules and policies do not do so, we invite comment on what additional steps the Commission should take to regulate embedded advertising in programming directed to children.[65] For example, we note that embedded advertising in children's programming would run afoul of our separation policy because there would be no bumper between programming content and

[59] *In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules,* Report and Order, 34 F.C.C. 829, 841 (1963).

[60] *See* 47 C.F.R. § 73.1212(h).

[61] *See In the matter of Codification of the Commission's Political Programming Policies,* Opinion and Order, 7 FCC Rcd 1616 (1992).

[62] *See Application of Sponsorship Identification Rules to Political Broadcasts, Teaser Announcements, Governmental Entities and Other Organizations*, Public Notice, 66 F.C.C. 2d 302 (1977). We note that the sponsorship identification announcement must state "paid for," "sponsored by," or "furnished by" and by whom the consideration was supplied." 47 C.F.R. §§ 73.1212(a)(1) and (a)(2).

[63] 47 C.F.R. § 73.1212(a)(2)(ii).

[64] 47 C.F.R. 73.1212 (d).

[65] *See Writer's Guild White Paper* at 8 (proposing "strict limits on the usage of product integration in children's programming.").

advertising.[66] Should that prohibition be made explicit in our rules?

17. WGA asks that we extend regulation of product integration to cable television.[67] Section 76.1615 of the Commission's rules applies to origination cablecasting by a cable operator, which is defined as "programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator."[68] Should the Commission take additional steps with respect to sponsorship identification announcements required of cable programmers?

18. We also invite comment on issues raised by radio hosts' personal, on-air endorsements of products or services that they may have been provided at little or no cost to them. In such circumstances, should we presume that an "exchange" of consideration for on-air mentions of the product or service has occurred, thus triggering the obligation to provide a sponsorship announcement? Should we do so in all such circumstances or should we limit this presumption to situations where other factors enhance the likelihood that an exchange of consideration for air time has taken place. In addition, we invite comment on the scope of the "obviousness" exception to the sponsorship announcement requirement.[69] Does that exception apply to endorsements or favorable commentary by a radio host that are integrated into broadcast programming, *i.e.*, made to sound like they are part of a radio host's on-air banter rather than an advertisement?

IV. ADMINISTRATIVE MATTERS

A. Initial Regulatory Flexibility Analysis

19. As required by the Regulatory Flexibility Act,[70] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *Notice of Inquiry and Notice of Proposed Rulemaking* ("*NOI/NPRM*"). The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *NOI/NPRM*, and they should have a separate and distinct heading designating them as responses to the IRFA.

B. Paperwork Reduction Act Analysis

20. This NPRM contains potential revised information collection requirements. If the Commission adopts any revised information collection requirements, the Commission will publish a

[66] As noted above, the Commission requires broadcasters to use separations or "bumpers" between programming and commercials during children's programming: "The separation policy is an attempt to aid children in distinguishing advertising from program material. It requires that broadcasters separate the two types of content by use of special measures such as 'bumpers' (e.g., 'And now it's time for a commercial break,' 'And now back to the [title of the program]')." *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2127 n. 147 (1991), recon. granted in part, 6 FCC Rcd 5093 (1991).

[67] *See Entertainment Guilds Call for Industry Code of Conduct or FCC Regulation for Product Integration in Programming and Film; Guilds Issue White Paper Report on the Runaway Use of Stealth Advertising in Television and Film*, November 14, 2005, *available at* http://www.wga.org/subpage_newsevents.aspx?id=1422. *See also Writer's Guild White Paper* at 8.

[68] 47 C.F.R. § 76.5(p). *See also Amendment of the Commission's Sponsorship Identification Rules (Sections 73.119, 73.289, 73.654, 73.789 and 76.221)*, Report and Order, 52 F.C.C.2d 701, 712 (1975) ("We see no reason why the rules for such cablecasting should be different from those for broadcasting, for the consideration of keeping the public informed about those who try to persuade it would appear to be the same in both cases.").

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

[70] *See* 5 U.S.C. § 603.

notice in the Federal Register inviting the public to comment on the requirements, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

C. Ex Parte Rules

21. *Permit-But-Disclose.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[71] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[72] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

D. Filing Requirements

22. *Comment Information*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, *interested* parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

    - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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

[71] *See* 47 C.F.R. § 1.1206(b); *see also* 47 C.F.R. §§ 1.1202, 1.1203.

[72] *See* 47 C.F.R. § 1.1206(b)(2).

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

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

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

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

23. *Additional Information*. For additional information on this proceeding, contact John Norton, John.Norton@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

V. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED**, pursuant to the authority contained in Sections 4(i) & (j), 303, 317, 403, and 507 of the Communications Act of 1934, 47 U.S.C §§ 154(i) & (j), 303(r), 303a, 317, 403, and 508, this *Notice of Inquiry and Notice of Proposed Rulemaking* **IS ADOPTED**.

25. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Inquiry and Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact of the policies and rules proposed in the *Notice of Inquiry and Notice of Proposed Rulemaking* ("*NOI/NPRM*") on a substantial number of small entities.[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NOI/NPRM*. The Commission will send a copy of the *NOI/NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *NOI/NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[4]

A. Need for, and Objectives of, the Proposed Rules

2. Our goal in commencing this proceeding is to seek comment on current trends in embedded advertising and potential changes to the current sponsorship identification regulations with regard to embedded advertising. Given the increased prevalence of embedded advertising techniques, it is important that sponsorship identification rules protect the public's right to know who is paying to air commercials or other program matter on broadcast television and radio and cable.

3. In this *NOI/NPRM*, we seek comment on a proposed rule change to make the current disclosure requirement more obvious to the consumer by requiring that sponsorship identification announcements 1) have lettering of a particular size and 2) air for a particular amount of time, and seek suggestions for any other requirements for these announcements. We also invite comment on whether the Commission's existing rules and policies governing commercials in children's programming adequately vindicate the policy goals underlying the Children's Television Act and Sections 317 and 507 with respect to embedded advertising in children's programming. We also ask whether we should take additional steps with respect to sponsorship identification announcements required of cable programmers. In addition, we invite comment on issues raised by radio hosts' personal, on-air endorsements of products or services that they may have been provided at little or no cost to them: should we presume that an "exchange" of consideration for on-air mentions of the product or service has occurred, thus triggering the obligation to provide a sponsorship announcement; and does the "obviousness" exception to the sponsorship announcement requirement apply to endorsements or favorable commentary by a radio host that are integrated into broadcast programming, *i.e.*, made to sound like they are part of a radio host's on-air banter rather than an advertisement?

B. Legal Basis

4. The authority for the action proposed in this rulemaking is contained in Sections 4(i) & (j), 303(r), 317, 403, and 507 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(i) & (j), 303(r), 303a, 317, 403, and 508.

[1] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603.

[3] *See* 5 U.S.C. § 603(a).

[4] *Id.*

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

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").

6. *Television Broadcasting*. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."[5] The SBA has created a small business size standard for Television Broadcasting entities, which is: such firms having $13 million or less in annual receipts.[6] The Commission has estimated the number of licensed commercial television stations to be 1,379.[7] In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of $13 million or less.[8] We therefore estimate that the majority of commercial television broadcasters are small entities.

7. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included.[9] Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

8. In addition, the Commission has estimated that number of licensed noncommercial educational (NCE) television stations to be 380.[10] These stations are non-profit, and therefore considered small entities.[11] In addition, there are also 2,295 low power television stations (LPTV).[12] Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above

[5] U.S. Census Bureau, 2002 NAICS Definitions, "515120 Television Broadcasting" (partial definition); http://www.census.gov/epcd/naics02/def/NDEF515.HTM.

[6] 13 C.F.R. § 121.201, NAICS code 515120.

[7] *See FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-280836A1.pdf.

[8] We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

[9] "[Business concerns] are affiliates of each other when one concern controls or has power to control the other or a third party or parties controls or has power to control both." 13 C.F.R. § 21.103(a)(1).

[10] *See FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-280836A1.pdf.

[11] *See generally* 5 U.S.C. § 601(4), (6).

[12] *See FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-280836A1.pdf.

SBA small business size standard.

9. *Cable Television Distribution Services*. Since 2007, these services have been newly defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[13] The SBA has developed an associated small business size standard for this category, and that is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts.[14] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[15] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[16] Thus, the majority of these cable firms can be considered to be small.

10. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[17] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[18] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[19] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[20] Thus, under this second size standard, most cable systems are small.

11. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[21] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual

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

[14] 13 C.FR. § 121.201, NAICS code 517110.

[15] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAIC code 517510 (issued November 2005).

[16] *Id*. An additional 61 firms had annual receipts of 25 million or more.

[17] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[18] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[19] 47 C.F.R. § 76.901(c).

[20] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[21] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

revenues of all its affiliates, do not exceed $250 million in the aggregate.[22] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[23] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[24] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

12. *Radio Stations*. The proposed rules and policies potentially will apply to all AM and commercial FM radio broadcasting licensees and potential licensees. The SBA defines a radio broadcasting station that has $6.5 million or less in annual receipts as a small business.[25] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[26] Included in this industry are commercial, religious, educational, and other radio stations.[27] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[28] However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.[29] According to Commission staff review of BIA Publications, Inc. Master Access Radio Analyzer Database on March 31, 2005, about 10,840 (95%) of 11,410 commercial radio stations have revenue of $6.5 million or less. We note, however, that many radio stations are affiliated with much larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action.

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

13. The *NOI/NPRM* does not propose any additional recordkeeping requirements but these types of requirements may be suggested by commenters. Some of the proposed rules do require additional on-air reporting to the public of sponsorship identification, which could result in more sponsorship identification announcement requirements for stations/cable systems to monitor and for producers to insert into their programming.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

14. The RFA requires an agency to describe any significant alternatives, specifically small business alternatives, that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the

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[22] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[23] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

[24] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[25] *See* 13 C.F.R. § 121.201, 2007 NAICS Code 515112.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

15. The proposals in the *NOI/NPRM*[30] would apply equally to large and small entities and we have no evidence that the burden of any of our proposals is significantly greater for small entities. As noted, some of the proposed rules do require additional on-air reporting to the public of sponsorship identification, which could result in more sponsorship identification announcement requirements for stations/cable systems to monitor and for producers to insert into their programming. We anticipate that some portion of the cost of compliance with the proposals will fall on producers of programming, which are indirectly affected. However, we acknowledge that some portion of the cost may fall on stations themselves. Accordingly, we welcome comment on modifications of the proposals if such modifications might assist small entities and especially if such comments are based on evidence of potential economic differential impact of the regulations on small entities that might have to absorb some of the cost of compliance.

F. Federal Rules that May Duplicate, overlap, or Conflict with the Commission's Proposals.

16. None.

[30] *See* para. 3 of IRFA.

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: Sponsorship Identification Rules and Embedded Advertising, MB Docket No. 08-90.

At our first media ownership hearing in June of 2006, several witnesses raised concerns about the issue of product integration. TiVos and Digital Video Recorders now allow viewers to more easily skip commercials. Due, in part, to these technological developments, networks may be turning to more subtle and sophisticated means of incorporating commercial messages into traditional programming. As these techniques become increasingly prevalent, there is a growing concern that our sponsorship identification rules might fall short of their ultimate goal: to ensure that the public is able to identify both the commercial nature of any programming, as well as its source.

I believe it is important for consumers to know when someone is trying to sell them something. That is why, at our media ownership hearing in September of 2007, I called on my colleagues to adopt this Notice, which seeks comment on the relationship between the Commission's sponsorship identification rules and increasing industry reliance on embedded advertising techniques. Specifically, we examine whether it is necessary to amend the Commission's sponsorship identification rules to ensure adequate disclosure to the public.

I am pleased that the Commission has finally and unanimously voted to approve this item.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Sponsorship Identification Rules and Embedded Advertising, MB Docket No. 08-90.

The fundamental premise of our sponsorship identification rules is that the American public is entitled to know who is trying to persuade them. That premise applies to a wide range of conduct, from payola to political advertising to product placement. This rulemaking is intended to determine whether our sponsorship identification rules need updating in order to provide adequate notice of certain types of "embedded" advertising practices that have proliferated in recent years.

It is difficult to watch television and not be struck by the amount of product placement. According to press reports, product placement on broadcast TV during the first quarter of 2008 was up almost 40% from the previous year—including a whopping 3,291 product placements on top-rated *American Idol* alone. Concerns have also been raised about the growth of "product integration," in which, unlike product placement, the commercial product is not shown but is woven into the plot of a storyline or script. These kinds of stealth advertising may be particularly insidious because viewers often are unaware that someone is trying to influence, persuade, or market to them.

Whether these embedded advertising techniques have proliferated because DVR households fast-forward through commercials or for other reasons, it is the Commission's job to make sure that sponsored programming is properly identified. I agree with the recent filing by a group of 23 public health, media and child advocacy groups that all of these issues could have been addressed—and should have been addressed—in a *Notice of Proposed Rulemaking (NPRM)*. Unfortunately, that position did not command a majority at the Commission. In the end, I supported the proposal to split the docket into an *NPRM* and a *Notice of Inquiry (NOI)*. While this means more time than I would like to reach final rules in some areas, I believe it is important to initiate the public dialogue and begin developing a detailed record. Moreover, the *NPRM* section tees up certain key issues on which we can move directly to rules—such as whether and how to make sponsorship identification more obvious to consumers, and rules regarding embedded advertising in children's programming.

On the latter point, it is my strong initial belief that embedded advertising in children's programming is already prohibited because it would run afoul of our existing requirement that there be adequate separation between programming content and advertising. The Commission's existing policies in this area—which also include a ban on host-selling and tie-ins on children's programming—target those practices that unfairly take advantage of the inability of children to distinguish between programming and commercial content. I hope we can move quickly to clarify our rules in this area as necessary and to take any appropriate enforcement action.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: *Sponsorship Identification Rules and Embedded Advertising,* MB Docket No. 08-90.

Today's *Notice of Proposed Rulemaking* addresses head-on a concern I have pushed for many years: the need to clarify our sponsorship identification rules. It also addresses concerns at the heart of my Agenda to Protect American Children and Families,[1] specifically whether our current rules governing commercials in children's programming need to be updated to adequately protect children from embedded advertising.

"Reality TV" should mean informing viewers about who is secretly pitching to them in the TV shows they are watching. The true reality is that news and entertainment alike are practically being turned into undisclosed commercials. Many current practices fly in the face of viewers' legal right to know who is pitching to them.

After more than three years since I originally called on the Commission to update our sponsorship identification rules and to clarify the application of these rules to children's programming,[2] I am pleased that we are finally seeking comment on what additional steps the Commission should take. Just this month, I have spoken twice about the urgency to move this item forward and explained the need for the Commission to protect our children from marketers' efforts to prey upon their unsuspecting minds. Despite longstanding majority support, including Chairman Martin's commendable leadership, the release of this *Notice* has suffered from almost unprecedented delays.

The *Notice* takes an important step in addressing the concerns that parents, experts, and I have been voicing for years about the unhealthy messages American media are feeding our kids. Children under the age of eight simply do not recognize that ads are trying to persuade them and tend to accept them as true and unbiased.[3] Given that the majority of TV ads targeted to kids are for food products,[4] and that the ad industry spends more than $10 billion per year in marketing food to them,[5] it is no surprise that studies have linked commercials to the dramatic increases in childhood obesity and associated health problems like diabetes.[6] Because children are ill-equipped to identify advertising, especially when it is embedded in a program with their favorite character,[7] we need to review and update our sponsorship identification rules. Those of us who are concerned about children need to show leadership, not foot-dragging, in addressing these practices.

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[1] Remarks of Commissioner Jonathan S. Adelstein, "Stuck in the Mud: Time to Move an Agenda to Protect America's Children," June 11, 2008. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282885A1.pdf

[2] Remarks of Commissioner Jonathan S. Adelstein, "Fresh is Not as Fresh as Frozen:" A Response to the Commercialization of American Media," May 25, 2005. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-258962A1.pdf

[3] *See* Dale Kunkel, "Children and Television Advertising," *Handbook of Children and the Media,* ed. Dorothy G. Singer & Jerome L. Singer (Thousand Oaks, CA: Sage Publications, 2001): 375-393.

[4] *Id.*

[5] Comm. On Food Mktg. & the Diets of Children & Youth, Inst. Of Med., Food Marketing to Children and Youth: Threat or Opportunity? 145 (J. Michael McGinnis et al. eds., The National Academies Press 2006), available at http://www.nap.edu/books/0309097134/html/R1.html.

[6] *See* Kaiser Family Foundation, *The Role of Media in Childhood Obesity* (Menlo Park: Kaiser Family Foundation, 2004), http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/ getfile.cfm&PageID=32022, generated April 4, 2005.

[7] *See* Angela J. Campbell, *Food Marketing to Children and the Law*. 39 LOY. L.A. L. REV. 447, 465 (2006).

I am also pleased that today's *Notice* has adopted the suggestion I made in 2005 to define what is meant by "disclosure" in our sponsorship identification rules. Many current practices make a mockery of our regulatory requirement that consumers have a right to "full and fair" disclosure.[8] If it takes a magnifying glass to see a tiny acknowledgement whizzing by the screen at the end of a show, that is evading the spirit of the law. More clarification is clearly needed. The main accomplishment of this *Notice* is that it seeks to establish specific guidelines addressing the nature of the disclosure, including font size of the sponsorship credits and the amount of time they are aired. The need for updating the disclosure rules is critical. Not only do we need to help parents protect their children from over-commercialism, we need to ensure that all Americans have the tools necessary to separate the programming wheat from the advertising chaff.

I would have liked to have gone further in asking more questions in the *NPRM*, rather than shunting them off to a *Notice of Inquiry*. We should not be afraid to put all options on the table. As Congressmen Markey and Waxman noted in their September 26, 2007 letter to the FCC regarding this proceeding, as embedded advertising expands, sponsorship identification law must evolve to ensure that broadcasters and cable operators comply in a meaningful way. Because an *NOI* cannot lead directly to rule making, the result may be a piecemeal approach to reforming these rules.

Embedded advertising is increasing at a staggering rate, and we must examine how to update the rules in a comprehensive fashion. Product placement on broadcast TV rose at an annual rate of almost 40 percent in the first quarter of 2008, with reality shows *The Biggest Loser* and *American Idol* each embedding over three thousand product placements during that time.[9] Also, major networks have created client-facing divisions specifically focused on how best to embed advertisers' messages and products into programming. In the age of convergence, the line between promotional and editorial voices has been blurred. Viewers engrossed in the story are not likely to apply critical thinking to identify advertising. Even if they do look for sponsorship ID, it is nearly impossible to detect them in the single, instantaneous period they roll by in the credits at the end of the program.

Such inadequate disclosure is bad for content, democracy, and our children's health. When viewers cannot distinguish content from advertising, the market check on content quality fails, and we see a race to the bottom where television shows become program-length infomercials. We have heard from the Writers Guild about this – writers are upset about being told to write story lines around advertisements.[10] Further, when audiences are fooled into believing they are watching real news by video "news releases" and so-called news analysts who are paid off, their trust in the discourse shapers – the news broadcasters, TV writers, and DJs – suffers and so does the marketplace of ideas.[11] The public deserves to know what it is watching, and democracy demands it. This *Notice* makes real progress in helping ensure those goals are met.

While it does not accomplish everything I would have liked, we are moving in the right direction by adopting this *Notice* to consider improvements to our sponsorship identification and children advertising rules. Accordingly, I approve this item.

[8] 47 CFR 73.1212(e)

[9] Amy Schatz, *Product Placements Get FCC Scrutiny*, WALL ST. J., June 23, 2008, at B3.

[10] *See* Writers Guild of America, Are You Selling to Me?: Stealth Advertising in the Entertainment Industry (2005).

[11] *See* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*. 85 TEX. L. REV. 83, 125 (2006).