Before the
Federal Election Commission
Washington, D.C. 20463

In the Matter of	)	
	)	Notice 2005-20
Definition of Electioneering	)	
Communications	)	

TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Federal Election Commission's *Notice of Proposed Rulemaking* implementing certain provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[2] In the *Notice*, the Commission sought comment on proposed changes to the definition of "electioneering communications," in response to judicial rulings interpreting BCRA. In redefining this statutory term, NAB stresses the importance of defining, as precisely as possible, which communications are included and which are excluded from BCRA's reach. NAB also urges the Commission to clearly articulate that broadcast stations are not the enforcers of the reporting obligations and funding restrictions applicable to persons and entities financing electioneering communications. Not only would broadcaster enforcement be impracticable, it would inevitably result in the chilling of protected speech.

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[1] NAB is a nonprofit incorporated association of radio and television stations and broadcast networks, which serves and represents the American broadcasting industry.

[2] Federal Election Commission, *Notice of Proposed Rulemaking*, 2005-20 Electioneering Communications, 70 Fed. Reg. 49508 (Aug. 24, 2005) ("*Notice*").

In defining the term electioneering communications and in determining the scope of the prohibition on making such communications, the Commission's rules must be as clear and precise as possible. The myriad parties affected by the disclosure requirements and the funding restrictions relating to electioneering communications must have clear notice as to which communications are included and which are exempted from BCRA's reach.[3]

In this regard, the Commission may need to provide some more specific guidance as to which communications "promote, support, attack or oppose" a federal candidate.[4] For example, broadcasters often air public service announcements ("PSAs") with members of Congress and/or their families. Would the appearance of, or reference to, a federal candidate in a PSA about any number of issues (such as disaster preparedness, alcohol or drug abuse, or breast cancer awareness) be said to "promote" or "support" the candidate simply by presenting him or her in connection with a "good cause"? Or would a candidate's appearance on an entertainment show, a talk show such as *The Tonight Show* or *Oprah*, or other interview show be considered to promote, attack, support or oppose the candidate? Would such a determination need to be case specific, depending on the tone or tenor of each particular appearance?[5] But in light of the court

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[3] Laws and regulations must be sufficiently precise to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). And because BCRA affects "the exercise of constitutionally protected rights," including "the right of free speech," a "more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

[4] *See Notice* at 49509, 49515 (proposing to exempt from the definition of electioneering communications, any communication that does not promote, support, attack or oppose any federal candidate, and asking whether such an exemption would be "meaningful and explicable to the regulated community" without further definition).

[5] It was difficulties such as these that lead NAB to agree with the Commission's original determination that electioneering communications should encompass only paid advertising, and not include these other types of candidate appearances where no consideration was paid to the

decisions requiring the Commission to modify its original limitation of electioneering communications to those publicly distributed "for a fee," NAB urges the Commission to be cognizant of these various types of non-paid for appearances and craft clear rules and exemptions that would still permit such appearances to the extent possible.

The Commission should also avoid imposing on broadcasters the duty to determine, particularly under vague or contradictory standards, whether programming that persons want to air on broadcast stations falls within BCRA's prohibitions. Were broadcasters required to ascertain whether PSAs and other advertisements and programming constitute electioneering communications (or instead fall under an exemption), stations will likely be reluctant to accept any noncandidate-purchased programming that refers to a candidate in any manner, because the task of determining permissible speech would be too onerous. Some broadcasters may simply refuse to air such advertising and programming for fear of liability. This could easily lead to a chilling of valuable speech protected by the First Amendment. *See Notice* at 49509 (noting that subjecting PSAs to electioneering communications regulations would "discourage broadcasters from performing an important public service in providing free airtime" for PSAs).[6]

To avoid these difficulties, the Commission should articulate each relevant entity's responsibility for compliance with electioneering communications regulations, however the exemptions are ultimately formulated. As a logical and practical matter, the entity actually funding the electioneering communication should be responsible for compliance with all

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broadcast station for the appearance. *See* Comments of NAB, Notice 2002-13, *Electioneering Communications* (filed Aug. 29, 2002).

[6] *See also Loveday v. FCC*, 707 F.2d 1443, 1458 (D.C. Cir. 1983) (court concluded that if an "obligation to investigate" the identity of sponsors of advertisements with political messages were imposed on broadcasters under the Communications Act of 1934, the "most likely result would be that many stations" would try "to avoid carrying advertisements of [that] type").

applicable regulations. NAB thus urges the Commission to clarify that broadcasters need not determine before airing any advertising or other programming whether (1) such advertisement or program constitutes an electioneering communication; (2) the entity or entities funding the programming should be prohibited from airing such communications; and (3) the entity or entities funding the programming adhered to BCRA's disclosure requirements. Moreover, a station's inadvertent airing of an "impermissible" electioneering communication should not result in civil or criminal liability for that broadcast licensee.

NAB emphasizes that it would be wholly impracticable for broadcasters to attempt to ensure compliance with or otherwise enforce electioneering communications regulations. Broadcasters cannot practically pre-screen each and every advertisement and program in a timely manner to determine whether an electioneering communication might be included.[7] Broadcast stations are also ill suited to making complex factual and legal determinations, such as whether the entity paying for any programming complied with BCRA's extensive reporting obligations or used the proper type of funds in paying for the programming. Making such determinations would be particularly difficult and burdensome for smaller radio and television stations with limited personnel and resources. Indeed, the D.C. Circuit Court of Appeals has previously recognized that broadcasters should not be expected to "conduct any investigation or to look behind the plausible representations" of the sponsors of political advertisements to comply with the Communications Act and the Federal Communications Commission's rules concerning the

[7] *See Notice* at 49509 (inquiring about the burden of monitoring radio and television programming to determine whether it fits within an exemption or otherwise avoids the reach of the electioneering communications rules).

sponsorship identification of political ads.[8] For many of the same reasons cited by the *Loveday* court, broadcasters cannot, as a practical matter, be expected to obtain the financial and other information necessary for determining compliance with the electioneering communications rules and to decide whether prospective advertisers and programmers in fact complied with BCRA's funding and disclosure requirements.

In sum, NAB emphasizes the importance of defining the term electioneering communications, and of determining the scope of any exemptions, as clearly and precisely as possible. To avoid a range of practical and legal difficulties, the Commission should articulate that the entity funding the electioneering communication (rather than the broadcast station airing the advertisement or program) is responsible for compliance with all applicable regulations.

Respectfully submitted,

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[8] *Loveday*, 707 F.2d at 1457. In that case, the D.C. Circuit upheld the Federal Communications Commission's decision declining to impose upon broadcast licensees a duty to investigate conflicting allegations concerning the true sponsors of certain political ads opposing a state ballot initiative. The court found that a "variety of considerations, ranging from practical ones of administrative feasibility to legal ones involving constitutional difficulties," supported its determination. *Id.* at 1449, 1457-58.