APPENDIX B:
ANA CSVA COMMENTS

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

In the Matter of	)	
	)	
Implementation of the Child Safe Viewing Act;	)	MB Docket No. 09-26
Examination of Parental Control Technologies	)	
for Video or Audio Programming	)	

COMMENTS OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

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COMMENTS OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

The Association of National Advertisers, Inc. ("ANA"), hereby comments in response to the Notice of Inquiry in the above-captioned matter.[1] The ANA leads the marketing community by providing insights, collaboration and advocacy to its membership, which includes over 350 companies with 9,000 brands that collectively spend over $100 billion in marketing communications and advertising annually in the U.S. The ANA strives to communicate marketing best practices, lead industry initiatives, to influence industry practices, manage industry affairs, and to advance, promote and protect advertisers and marketers. As discussed below, the *NOI*'s reference to the possibility of separately rating commercials so that V-chips, filters, or other technology might eliminate them from surrounding program content is contrary to congressional intent in its support of parental control technology. Any policy based on the concept of separately rating and potentially stripping out advertisements from programs they support would undermine the viability of a vast amount of programming and raise a host of legal and practical problems.

INTRODUCTION AND SUMMARY

As the *NOI* makes clear, we live in a media environment transformed by diversity and convergence. The variety of platforms over which consumers obtain programming, and the

[1] *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd. 3342 (2009) ("*NOI*" or "*Notice*"). The *Notice* was issued pursuant to the Child Safe Viewing Act of 2007, P.L. 110-452, 122 Stat. 5025 (December 2, 2008) ("CSVA").

extent to which they exert exacting control over the times, places, and means by which they access content, confirm the "continuing technological convergence of media." *NOI*, 24 FCC Rcd. at 3343. The FCC has observed that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history." [2] Additionally, a recent far-ranging survey of available parental controls across the broad media landscape found "there has never been a time in our nation's history when parents have had more tools and methods at their disposal to help them decide what constitutes acceptable media content in their homes and in the lives of their children." [3]

A quick inventory of available technologies reveals a diverse array of methods that permit viewers to exert control over the programming they receive. These include age- and content-based "V-chip" controls, specialty remote controls, and cable and satellite boxes with advanced blocking/filtering capabilities. Other technologies, such as VCRs and DVDs, enable users to control 100 percent of content brought into a home. Additionally, digital video recorders ("DVRs") combine set-top box controls with an ability to amass programming tailored to a user's sensibilities. Beyond the television platform, a wide selection of products and technologies exist to enable filtering or blocking for online content, and "white listing" can be used to tailor household access to the World Wide Web. Such technologies also are available for various wireless platforms. [4] We are confident that the comments in this proceeding will provide the Commission a detailed picture of each of these tools and their capabilities.

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[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd. 1606, 1608 (2004).

[3] Adam Thierer, *Parental Controls & Online Child Protection: A Survey of Tools and Methods, Special Report*, Progress & Freedom Foundation, Ver. 3.1, at 9 (Fall 2008) ("*Parental Controls Report*"). *See also id*. at 7 ("every family will bring different values and approaches to the challenging task of raising children and dealing with unwanted media exposure").

[4] *NOI*, 24 FCC Rcd. at 3345, 3347-48, 3352-53, 3355-56, 3358-60. *See also Parental Controls Report*, *supra* notes 4-5.

Given these developments, it is entirely appropriate for the Commission to conduct this inquiry pursuant to the CSVA, but it is equally important to stay focused on the purpose of that legislation. Congress adopted the law to authorize a genuine study so that it may better understand the changing media environment, not as a prelude to rulemaking.[5] The law is clear that where Congress instructs the FCC to conduct a study, the Commission must report findings and not treat the statute as an invitation to regulate.[6] This is especially true when it comes to issues implicating program content,[7] as any regulation of "parental control technology" surely would.[8]

The very nature of the inquiry under the CSVA focusing on "*parental* control technology" underscores why information-gathering, rather than regulation, is the necessary legislative purpose. Most homes in the United States – more than two-thirds – have no children residing in them under age 18, and the number with children is declining.[9] Accordingly, any contemplated regulation that might apply to all households or that has a potential to affect programming across the board would necessarily exceed the scope of the CSVA. For that reason, the Commission should not deviate from the Act's core purpose.

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[5] Congressional intent to avoid prejudgment was revealed by its decision to jettison the ersatz "findings" section of the original bill, which would have prejudged both the factual elements of the required inquiry as well as the criteria for determining the "effectiveness" of parental control technology. *See* 154 Cong. Rec. 10601 (Nov. 17, 2008).

[6] *See, e.g.*, *MPAA, Inc. v. FCC*, 309 F.3d 796, 801-02 (D.C. Cir. 2002).

[7] *Id*. at 803-05 ("Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content").

[8] *See, e.g.*, *NOI*, 24 FCC Rcd. at 3343 (discussing "amount of time children are exposed to media *content*") (emphasis added).

[9] Adam Thierer, *Who Needs Parental Controls? Assessing the Relevant Market for Parental Control Technology* (Feb. 2009) at 4 (between 1960 and 2007, the number of U.S. households with children under 18 declined from 48.7 percent to 31.7 percent); U.S. Census Bureau, *Profiles of General Demographic Characteristics, 2000 Census of Population and Housing* (May 2001) (36.0% of U.S. households have children under age 18).

I. RATING ADVERTISEMENTS IS CONTRARY TO CONGRESSIONAL INTENT

In addition to the question of whether the inquiry should concentrate on information gathering rather than regulatory proposals, the *NOI* appears to go beyond the scope of the CSVA by raising the question of ratings for commercials separate from the programming in which they appear. This is an issue the FCC considered (and properly rejected) in V-chip proceedings a decade ago. *See Implementation of Section 551 of the Telecommunication Act of 1996, Video Program Ratings*, 13 FCC Rcd. 8232 (1998) ("*TV Parental Guidelines Order*"). Nevertheless, the *NOI* refers to assertedly "inappropriate or adult-oriented commercials during programming directed to or widely viewed by children," and seeks comment on "possible solutions." *NOI*, 24 FCC Rcd. at 3350. More directly, the *NOI* asks whether commercials could be rated "so that [ ] V-chip or other technology could … filter out commercials with inappropriate content," and "[w]hat role should the Government, industry, or third-parties play in this effort?" *Id*. The *NOI* also suggests the subject matter of ratings might be expanded beyond issues of sexual or violent programming to include ratings based on the appearance of certain products. *See id*.

Putting aside for a moment constitutional issues that would arise from the Commission determining, or offering input on labels suggesting, that a given commercial has "inappropriate content" or promotes "taboo" products or services, nothing in the CSVA contemplates the filtering or blocking of advertising. As the *NOI* elsewhere recognizes, Congress intended that the Commission focus on programming content "and the variety of platforms over which [it] can be displayed and … technologies capable of blocking inappropriate audio or video content transmitted *as* <u>*part*</u> <u>*of*</u> such *programming*."[10] This clearly anticipates that FCC fact-finding would focus on programming, not the commercials inserted therein to provide financial support for it. *See also* Child Safe Viewing Act § 2(d) (Act's focus on "blocking technologies" are those

[10] *NOI*, 24 FCC Rcd. at 3345 (emphases added).

that target "indecent or objectionable … *programming*, as determined by [ ] parent[s]") (emphasis added). Consistent with this purpose, the Act directs the Commission to consider blocking alternatives that "do not affect … the pricing of a content provider's service offering." It would be at odds with this provision to explore the possibility of blocking or filtering commercial content, since doing so obviously would undermine financial support for, and thus the pricing of, current program offerings. *See infra* Section II.

Moreover, to the extent Congress focused primarily on television programming and "concern with the efficacy of the V-chip," [11] the Commission's previous findings excluding commercials from program rating requirements are directly relevant. In the proceedings approving the V-Chip rating scheme, the Commission reinforced the program-oriented purpose of the V-chip and the ratings system developed by the industry. It noted "Congress' goal of achieving an effective method by which … parents [can] block *programming* they believe is harmful to their children." *TV Parental Guidelines Order*, 13 FCC Rcd. at 8233 (emphasis added). *See also id*. at 8232 (Sections 303(x) and 330(c) seek to "allow [parents] to [ ] block … *programming* …") (emphasis added). Consequently, when the question of separately rating commercials arose, the Commission held that "the [ ] standard [ ] adopt[ed] in the V-chip proceeding accommodates the rating of programs, *including commercials within*." *Id*. at 8242-43 (emphasis added). Thus, while the *NOI* correctly notes that V-chip ratings "apply to most television programming, except for … advertisements," *NOI*, 24 FCC Rcd. at 3348, the decision not to require ratings for advertisements separate from the programs in which they appear was made after due deliberation and was correct. *See supra* Section II.A.

[11] *NOI*, 24 FCC Rcd. at 3345 (citing 47 U.S.C. § 303(x), quoting S. Rep. No. 268, 110th Cong., 2nd Sess. 1, at 2 (2008)).

II. RATING ADVERTISEMENTS IS UNNECESSARY AND WOULD UNDERMINE FREE BROADCASTING

The possibility of rating advertising separately from content in which it appears is not only an unnecessary diversion from the purpose for this inquiry, but if effectuated by regulation would be economically ruinous for content providers. First, requiring many thousands of advertisements to be rated because some may be offensive is a clear example of regulatory overkill, as very few ads give rise to controversy in this regard. Second, development of separate systems for rating commercials might enable viewers to more broadly block advertisements altogether while consuming the surrounding content, a possibility that would quickly diminish the value of – and thus price paid for – ad availabilities. This would choke off a vital revenue stream on which broadcast and cable programs (among others) depend.

A. Rating Ads is Unnecessary

The notion that *all* advertisements must be separately rated because *some* may be inappropriate for children lacks any sound basis in policy. To be sure, there has been disproportionate media attention devoted to certain types of commercials, such as advertisements for various erectile-dysfunction treatments, but reaction to these advertisements led to the adoption of industry guidelines to limit the exposure of children to such ads. Advertising guidelines adopted by Pharmaceutical Research and Manufacturers of America ("PhRMA") provide that advertisements containing content that may be inappropriate for children under 18 should be targeted to programs or publications that are reasonably expected to draw an audience of approximately 80 percent adults. [12]

Other industry guidelines similarly address "inappropriate" advertising during programs with children in the audience, in the form of, for example, the *Self-Regulatory Program for*

[12] PhRMA Guiding Principles, Direct to Consumer Advertisements About Prescription Medicines (revised Nov. 2005).

Children's Advertising maintained by the Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus.[13] The CARU Guidelines require adherence to "standards [that] take into account the special vulnerabilities of children" age 12 and under. *Id*. at 3. The guidelines address "Unsafe and Inappropriate Advertising" and require that ads "not portray or encourage behavior inappropriate for children (*e.g*., violence or sexuality) or [ ] material that could unduly frighten or provoke anxiety."[14] In connection with such industry initiatives, the FTC has conducted ongoing reviews of TV, print, and Internet advertising, and has found the motion picture, music recording, and electronic game industries generally comply with their own voluntary standards of ratings and labels.[15]

In light of such efforts to coordinate the age-appropriateness of advertising with programming, the FCC correctly found in the *TV Parental Guidelines Order* that because programs are rated, it is unnecessary to have separate ratings for commercials. It noted that "[s]ince advertisers target specific audiences reached by particular programming, it is not unreasonable … to rely on [ ] program blocking [ ] to also filter commercials that appear in a program." *TV Paren-*

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[13] *See* www.caru.org/guidelines/guidelines.pdf (last visited Apr. 15, 2009), at 3. Separately, the Distilled Spirits Council of the United States administers a *Code of Responsible Practices for Beverage Alcohol Advertising and Marketing* applicable to all print and electronic media (including the Internet and other on-line communications) that, among other things, governs the responsible placement and content of brand communications for producers and marketers of distilled spirits, malt beverages and wines. *See* http://www.discus.org/pdf/61332_DISCUS.pdf (last visited Apr. 15, 2009). The Code requires beverage alcohol ads to be placed only in broadcast, cable, radio, print, and Internet/digital communications where at least 70% of the audience is reasonably expected to be above the legal purchase age, and the content of the advertising should not primarily appeal to individuals below the legal purchase age. *See also* http://www.beerinstitute.org/BeerInstitute/files/ccLibraryFiles/Filename/000000000384/2006ADCODE.pdf; http://www.wineinstitute.org/initiatives/issuesandpolicy/adcode/details.

[14] *Id*. at 13. This section of the Guidelines also requires that "only age appropriate videos, films and interactive software [should be] advertised to children." *Id*. at 12.

[15] *Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, (FTC April 2007) (available at http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf).

tal Guidelines Order, 13 FCC Rcd. at 8343. Significantly, the Commission went on to hold that, though an occasional commercial not specifically targeted to the surrounding program may appear, this was not reason to believe that "failure to rate advertisements individually will defeat the purpose" of V-chip ratings or their utilization. [16]

B. Content Ratings for Ads Would Undermine Commercial Support for Over-the-Air Broadcasting and Other Ad-Supported Media

Not only is separately rating commercials to be independently "blockable" unnecessary, it would impose a far greater burden on advertising than can be justified by the regulatory interest in targeting a few offensive ads. If regulations effectuating such ratings were implemented, the impact on advertising would be significant, particularly given the *NOI*'s suggestion that the subject matter of ratings could be expanded or extended to third-party ratings. Of most concern, of course, is that developing a unique or separate rating system for commercials will allow advertising to be blocked while passing through the programming in which it appears. Just as, for example, "TV-MA" allows V-chip (and cable/satellite box) users to avoid reception of programs bearing that rating, a new "AD-MA" rating for ads, for example, would allow blocking, but only ads carrying that rating. Programming a V-chip or cable or satellite box to block the universe of unique potential ad ratings would in effect block all commercials. If these were used to the exclusion of program ratings, consumers would be able to access programming, but would miss seeing advertising included with – and financially supporting – the content they elect to receive.

Enabling viewers to automatically delete commercials would undermine the economic foundation of broad swaths of the media market including, not least of which, free over-the-air broadcasting. There is no doubt that "ignoring the fundamentally commercial nature of the com-

[16] *Id*. This observation used the example of locally inserted ads in making the point, but it is equally applicable to any ad that, for whatever reason, presents an isolated case in a given program of a commercial's age appropriateness not aligning perfectly with that of the show.

mercial broadcasting system is done at great risk," as the Commission has recognized.[17] Significantly, the FCC is charged with making available "so far as possible, to all the people of the United States … Nation-wide … radio communication service" as part of a "policy … to encourage the provision of new technologies and services to the public,"[18] and it is long-settled that "[b]roadcast television in the United States is financed by the sale of advertising time."[19]

As recognized more than 60 years ago, "[a]dvertising represents the only source of revenue for most American broadcast stations and … is an indispensable part of our system of broadcasting."[20] Accordingly, there is no question that:

> The problem of program service is intimately related to economic factors. A prosperous broadcasting industry is obviously in a position to render a better program service to the public than an industry which must pinch and scrape to make ends meet. Since the revenues of American broadcasting come primarily from advertisers, the terms and conditions of program service must not be such as to block the flow of advertising revenues[.]

Id. at 224. A more recent FCC Office of Plans and Policy Working Paper confirms that this likely will always be true: "Sale of advertising time and payments from advertiser-supported networks comprise, for practical purposes, the sole sources of revenue for broadcast stations.

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[17] *Petition for Rulemaking Pertaining to a Children's Advertising Detector Signal*, 100 FCC.2d 163, ¶ 9 (1985). *See also Children's Television Programming and Advertising Practices*, 96 FCC.2d 634, 654 n.9 (1984).

[18] 47 U.S.C. §§ 151, 157(a).

[19] Jonathan Levy, Marcelino Ford-Livene & Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, OPP Working Paper No. 37 at 7 (Sept. 2002). *See also Revision of Programming & Commercialization Policies*, 98 FCC.2d 1076 ¶ 66 (1984) (acknowledging the "fundamental, advertiser supported nature of commercial television").

[20] Federal Communications Commission, *Public Service Responsibility of Broadcast Licensees* (1946), at 208-09, *reprinted in Documents of American Broadcasting* 151, 224 (Frank J. Kahn ed., 2d ed. 1973).

Consequently the state of the overall advertising market, and competition from other advertising media, crucially affect the health of broadcast television." [21]

While this concern is most acute for "free" over-the-air broadcasting, it by no means can be discounted with regard to subscription programming such as that provided by cable and satellite services, especially given the extent to which the Commission has recognized the importance of ad revenues to them. [22] Although certain "premium" channels may not derive revenue from spot advertising, the vast majority of cable and satellite programming is ad-supported and depends on the same kinds of "commercial breaks" and other sponsorship as over-the-air programming. [23] The proliferation and splintering of media platforms discussed above and implicitly underlying the *NOI* present particular challenges to advertiser-supported media such as broadcast and cable networks, which compete with more media for the same pool of ad dollars. [24] As a former FCC Chairman recognized, skipping ads may be "awesome, but … to continue having high-quality programming," advertisements are an absolute necessity. David Lazarus, *What's between the ads? More ads*, L.A. TIMES, June 29, 2008, at C1. As a conse-

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[21] Florence Setzer and Jonathan Levy, *Broadcast Television in a Multichannel Marketplace*, OPP Working Paper No. 26, 6 FCC Rcd. 3996, 4069 (1991). In proceeding after proceeding, the Commission has recognized the importance of these economic considerations as a fundamental component of its public interest determinations. *E.g.*, *Newspaper-Broadcast Cross-Ownership Order*, 23 FCC Rcd. 2010 (2008); *Application for Consent to the Transfer of Control of Licenses of XM Satellite Radio Holdings*, 23 FCC Rcd. 12348, 12365 (2008).

[22] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd. 2503, 2551 (2006).

[23] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, FCC 09-32, ¶ 8 (rel. Apr. 9, 2009).

[24] *See, e.g.*, Suzanne Vranica, *At MTV, a new show that pushes deodorant*, Associated Press (Sept. 13, 2007) ("Facing intensifying competition for ad dollars from the Web, television executives need to please advertisers."). At the same time, ad revenue has been declining. *See, e.g.*, Michael Malone, *TVB: Broadcast Ad Revenue Down 4% in Q2*, BROAD. & CABLE, Aug. 18, 2008, at 45. Program producers and networks also cope with skyrocketing production costs, Gene DeWitt, *Network TV Scheduling: A New Prime-Time Paradigm*, TELEVISION WEEK, Apr. 14, 2008, due at least in part to the growing number of competitors vying for programming that bid up the cost of producing it.

quence, proposals to restrict advertising have been rejected over the years because they would be too burdensome, and would reduce advertiser support.[25] The Commission should do the same with respect to any proposal in this proceeding that would give viewers an opportunity to, effectively, transform ad-supported programming into commercial-free content.

Finally, any attempt to impose requirements for rating commercials would raise various legal and practical problems. Without going into detail at this early stage of the inquiry, the First Amendment would limit any regulation of commercial time that would act as a disincentive for speech.[26] Moreover, any regulatory regime that would require separate ratings for the many thousands of advertisements aired, including potential avenues of oversight and appeal, would be far more complex than the current system for rating programs. This would be exacerbated if Congress or the Commission were to consider adopting some other proposals, such as the use of various third-party rating schemes.

CONCLUSION

In this era of unprecedented media convergence and diversity, Congress charged the FCC with conducting a study of available parental empowerment technologies. In adopting the CSVA, Congress took this opportunity to conduct a genuine study of the available tools. For that reason, it deleted proposed "findings" that would have prejudged various issues as a precursor to regulation. Consistent with this approach, the Commission should avoid proposals to require

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[25] *See Children's Advertising Detector Signal*, 100 FCC.2d 163 ¶ 7 ("petitioners' proposal, while not a total prohibition, would … cause broadcasters to suffer substantial revenue losses").

[26] For example, in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), the Third Circuit held that application of a Pennsylvania law banning advertisers from paying for dissemination of "alcoholic beverage advertising" by media affiliated with educational institutions imposed an impermissible economic burden in violation of the First Amendment. *See id*. at 106 ("Imposing a financial burden on a speaker based on the content of the speaker's expressions is a content-based restriction of expression and must be analyzed as such."). *See also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (striking down "Son of Sam" law because it "impose[d] a financial disincentive" on "speech of a particular content").

separate ratings for advertisements as being contrary to congressional intent. Just as the Commission found a decade ago when it approved the industry rating system for the V-chip, separately rating advertisements is unnecessary. Moreover, any attempt to do so would create significant constitutional and practical problems. For the foregoing reasons, the Commission should disavow any intention to regulate or facilitate the rating of commercials so that V-chip or other technology could be used to filter them out of the programming in which they appear.

Respectfully submitted,

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