

2016

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### Recommended Citation

Sushma Raju, *The FCC's Abandonment of Sponsorship Identification Regulation & Anonymous Special Interest Group Political Advertising*, 93 WASH. U. L. REV. 1103 (2016).

Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol93/iss4/9](http://openscholarship.wustl.edu/law_lawreview/vol93/iss4/9)

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# THE FCC'S ABANDONMENT OF SPONSORSHIP IDENTIFICATION REGULATION & ANONYMOUS SPECIAL INTEREST GROUP POLITICAL ADVERTISING

## I. INTRODUCTION AND OVERVIEW

*“Voters have a right to know who is really behind all those glossy and sometimes wildly misleading ads we see on TV.”*<sup>1</sup>

—Former FCC Commissioner Michael J. Copps, June 9, 2011

The modern political landscape in the United States is one dominated by increasingly expensive political campaigns, funding from undisclosed donors, and barrages of political advertising. In the 2012 presidential election, candidates Barack Obama and Mitt Romney and their corresponding parties spent a total of \$1.8 billion on their campaigns, and outside special interest groups spent an additional \$550 million.<sup>2</sup> Both candidates outspent counterparts in all previous presidential elections, and much of that spending went toward television advertisement.<sup>3</sup>

Ensuring that voters know who is behind all those “glossy and sometimes wildly misleading ads” when viewing political advertisements has long been the duty of the Federal Communications Commission (“FCC”), and it is an important one.<sup>4</sup> With the ubiquity of political advertisements in today’s election cycles, voters would be hard pressed to escape the constant stream of political propaganda. Federal sponsorship identification law requires broadcasters to identify the individuals or groups sponsoring those persuasive political advertisements, and this area of law has a specific purpose: to protect “[t]he public’s basic right to know by whom it is being informed.”<sup>5</sup> Theoretically, sponsorship

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1. Press Release, Michael J. Copps, Comm’r, Fed. Commc’ns Comm’n, Statement of Michael J. Copps on Release of FCC Staff Report: “The Technology and Information Needs of Communities” (June 9, 2011), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-307421A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-307421A1.pdf), archived at <https://perma.cc/SVZ6-5JGQ>.

2. See *infra* note 75.

3. *Id.*

4. See *infra* Part III.

5. Amendment of the Comm’n’s “Sponsorship Identification” Rules, 52 F.C.C.2d 701, 703 (1975) (quoting Amendment of the Comm’n’s Sponsorship Identification Rules, 34 F.C.C.2d 1104, 1105 (1972)).

announcements for political advertisements should be clueing viewers in to the identities of the special interest groups; such groups spend significant sums of money to ensure the election of candidates who promise to advance the groups' agendas once in office. And theoretically, sponsorship identification law is written to reveal to viewers the identities of even those groups that would prefer to remain unknown. But in practice, the FCC and federal courts have stripped sponsorship identification law of its power to inform voters about the individuals and entities seeking to influence and persuade them.

This Note examines the FCC's historical and current approaches to sponsorship identification regulation in political advertisements and the resulting consequences for voting viewers in upcoming elections. Part II offers a brief primer on the development and current status of the sponsorship identification laws. Part III discusses the substance of the 1944, 1963, and 1975 revisions to the law made by the FCC and Congress. This Part also takes note of the events and industry changes that prompted regulation revision and examines prominent enforcement decisions by the FCC and federal courts during that period. Part IV focuses on the growing prevalence of special interest group and political action committee ("PAC") advertising and its effects on voters and the political landscape. Part V examines an FCC decision published in 2014 in which the Commission refused to enforce the regulations for two political advertisements sponsored by special interest groups. The analysis of the 2014 decision situates the FCC's response within the framework of the agency's historical approach to the sponsorship identification regulations detailed in Part III. It also demonstrates how the Commission's enforcement of these regulations has steadily whittled away the responsibilities that broadcasters have to their viewers. Finally, this Note concludes by exploring the consequences of the FCC's current stance on enforcement for the broadcast industry, the public, special interest groups, and the Commission.

## II. A BRIEF PRIMER ON SPONSORSHIP IDENTIFICATION LAWS

The federal government's first attempt at regulating American airwaves occurred in 1927. Congress passed the Radio Act of 1927,<sup>6</sup> implementing

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6. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934). The Act created the Federal Radio Commission and bestowed on it a range of responsibilities, including classifying stations, assigning frequencies, overseeing technical aspects of radio broadcasting, and requiring equal access to air time for competing political candidates. *Id.* Overall, the statute directed the Federal Radio

a slew of regulations related to the structure and function of the burgeoning radio industry. Among those regulations, the first sponsorship identification requirement slipped uneventfully into section 19 of the statute. The section required stations to orally identify any content for which they received consideration and the “person, firm, company, or corporation” furnishing that consideration or content.<sup>7</sup> Within five years, Congress revisited the regulation of the communications industry and passed the Communications Act of 1934 (“Communications Act”),<sup>8</sup> which provided for the creation of the FCC. The sponsorship identification provision in section 19 of the Radio Act of 1927 migrated into the new statute mostly unchanged.<sup>9</sup> In 1944, the FCC promulgated its own

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Commission to base its decisions on “public convenience, interest, or necessity.” LAURENCE F. SCHMECKEBIER, *THE FEDERAL RADIO COMMISSION: ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 17 (1932).

7. Radio Act of 1927 § 19 (“All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.”).

The provision brooked little controversy, but it had at least one outspoken critic in Representative Emanuel Celler of New York. Celler argued section 19 should provide even more transparency by requiring broadcasters to recognize sponsored content as “advertising,” rather than merely labeling it as “paid for” or “furnished by” a party. See Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 *FED. COMM. L.J.* 327, 332 (2004). While the Radio Act of 1927 received attention, section 19 appeared to raise little concern for contemporary commentators. ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* 10–13 (2d ed. 1978); see also *Loveday v. FCC*, 707 F.2d 1443, 1451–52 (D.C. Cir. 1983) (footnote omitted) (“The contemporary literature thoroughly canvassed what were then thought to be the major provisions and purposes of the Act, and the sponsorship identification provision was hardly noticed. . . . [S]ection 19 provoked no controversy whatever.”). Moreover, the congressional debate and committee reports on the predecessor bills to the Radio Act show robust debate, but lawmakers spent next to no time discussing the provision. See *Loveday*, 707 F.2d at 1449–52 (discussing at length the versions and amendments to the bills preceding the Radio Act of 1927 and taking note that the sponsorship identification provision garnered no debate).

8. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.). The statute replaced the Federal Radio Commission with the FCC, and granted it the broad authority to regulate as “public convenience, interest, or necessity require[d].” Communications Act of 1934 § 303; see also KRASNOW & LONGLEY, *supra* note 7, at 13–14. The Communications Act revamped the old organization’s structure, tasking the new agency with greater authority over more aspects of the communication industry, and setting long-range social goals for the agency. KRASNOW & LONGLEY, *supra* note 7, at 13–14.

9. Compare Communications Act of 1934 § 317, with Radio Act of 1927 § 19. The only difference between the two statutes is that the Radio Act of 1927 required a sponsorship announcement when a station received consideration or payment from any “person, firm, company, or corporation.” Radio Act of 1927 § 19. The original § 317 of the Communications Act only required an announcement when a station received consideration or payment from any “person.” Communications Act of 1934 § 317. At first glance, this difference could be said to signal a significant change in the legislative intent to limit the sponsorship identification requirements to individual sponsors; however,

sponsorship identification regulations.<sup>10</sup> Through Commission and Congressional action, sponsorship identification laws have been substantively amended on four occasions—1960,<sup>11</sup> 1975,<sup>12</sup> 1992,<sup>13</sup> and 2012.<sup>14</sup> The current regulations largely match section 317 of the Communications Act, though the former contains additional specifications for the announcements.<sup>15</sup>

The current regulations can be understood as imposing three general duties on broadcasters: (1) the general announcement requirement; (2) the reasonable diligence requirement; and (3) the duty to disclose the ultimate or true sponsor. First, the general announcement requirement directs broadcasters to make an announcement for any content aired in exchange for money or other consideration, and broadcasters must announce “[b]y whom or on whose behalf” the payment was made.<sup>16</sup> In simpler terms, broadcasters must identify airtime that has been paid for, and they must identify who paid for it. Second, the regulations require broadcasters to “exercise reasonable diligence to obtain from [their] employees” and others any information necessary to make the sponsorship

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the legislative history shows no discussion of this change, nor does the FCC’s enforcement of the 1934 law in the years after its passage indicate the Commission applied the law only to individuals. Again, the legislative history around the Communications Act does not indicate that any lawmakers voiced concern about the provision. *See* H.R. REP. NO. 73-1918, at 47 (1934) (Conf. Rep.); S. REP. NO. 73-781, at 8 (1934); H.R. REP. NO. 73-1850, at 7 (1934). In addition to integrating the provision, the Communications Act also authorized the FCC to promulgate other regulations as necessary to achieve the goals of the statute. Communications Act of 1934 § 303(f).

10. Announcement of Sponsored Programs, 9 Fed. Reg. 14,734 (Dec. 19, 1944).

11. Unlike the other revisions discussed herein, the 1960 revision of the sponsorship identification requirements came from an amendment of the Communications Act. Communications Act Amendments, 1960, Pub. L. No. 86-752, 74 Stat. 889, 895–96 (1960). In 1963, the FCC amended its regulations to match the 1960 amendments to the Communications Act. Applicability of Sponsorship Identification Rules, 40 F.C.C. 141 (1963).

12. Amendment of the Comm’n’s “Sponsorship Identification” Rules, 52 F.C.C.2d 701, 713 (1975) (codified as amended at 47 C.F.R. § 73.1212 (2016)).

13. Sponsorship Identification Requirements, 57 Fed. Reg. 8278 (Mar. 9, 1992) (codified as amended at 47 C.F.R. § 73.1212). This Note will not discuss the 1992 revisions to the sponsorship identification regulations in depth. The 1992 revisions pertain to the technical aspects of the visual sponsorship announcement, which are not relevant to the discussion in this Note. *Id.* at 8279 (requiring broadcasters to visually announce a sponsor using text covering four percent of the vertical height of the TV image for a period of four consecutive seconds).

14. Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 77 Fed. Reg. 27,631 (May 11, 2012) (codified as amended at 47 C.F.R. § 73.1212). This Note will also not discuss the 2012 revisions to the regulations. *See infra* note 21.

15. *See infra* notes 16–21 and accompanying text; *cf.* Communications Act of 1934, 47 U.S.C. §§ 315, 317 (2014).

16. Sponsorship Identification, 47 C.F.R. § 73.1212(a) (2016). This portion of the regulations remains consistent with the language in the Radio Act of 1927, and applies to both commercial and political content aired by broadcasters. *See id.*; *supra* note 6. In its current version, section 317(a) of the Communications Act contains functionally identical language.

announcement.<sup>17</sup> On its face, this language imposes a duty on broadcasters to go beyond blindly accepting information provided by or about the purported sponsor of a political advertisement. Third, the regulations require broadcasters to “fully and fairly disclose the *true identity* of the person or persons . . . or other entity by whom *or on whose behalf* [payment or consideration for the advertisement] is made.”<sup>18</sup> The regulation further clarifies that where the entity paying for the advertisement acts on behalf of another and “such fact is known *or by the exercise of reasonable diligence . . . could be known* to the station, the announcement shall disclose the identity” of the person or entity on whose behalf the advertisement is placed.<sup>19</sup> The language of this final requirement builds upon the duty imposed by the second to exercise “reasonable diligence.”<sup>20</sup> Broadcasters are prohibited from willfully ignoring situations in which a middleman purports to be the true sponsor of an advertisement, and the regulations unequivocally require that broadcasters identify the true sponsor in those instances. Though the regulations impose other requirements on broadcasters, the three aforementioned duties are most relevant for the purpose of this Note.<sup>21</sup>

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17. 47 C.F.R. § 73.1212(b). In addition to requiring the broadcaster to obtain information from its employees, the regulations also specify that the same diligence is required to obtain information from “other persons with whom it deals directly in connection with any matter for broadcast.” *Id.* Identical language appears in section 317(c) of the amended Communications Act, 47 U.S.C. § 317(c) (2014). This latter category of individuals appears to be relatively broad, but neither the regulations nor the section of the statute appear to have spawned any litigation or clarification through enforcement decisions as to who specifically may or may not be included in that group. In relation to the requirement cited here, it also bears noting that section 73.1212(c) of the regulations and section 317(b) of the Communications Act reference section 508 of the Communications Act, which imposes criminal liability for any station employee who fails to provide information relating to payment accepted for air time. 47 C.F.R. § 73.1212(c); 47 U.S.C. § 317(b); 47 U.S.C. § 507.

18. 47 C.F.R. § 73.1212(e) (emphasis added).

19. *Id.* (emphasis added).

20. *Id.* § 73.1212(b).

21. The other duties imposed on broadcasters comprise two additional categories to the three categories mentioned above. Fourth, the regulations also prescribe technical requirements for the sponsorship announcement, including the size of the text for the visual sponsorship announcement, the length of time it must remain on the screen, and the number of times it must be made during the course of the advertisement. *Id.* §§ 73.1212(a)(2)(ii), (d). Fifth, the regulations specify that when a broadcaster airs political content sponsored by a corporation or other business entity, it must retain a political file, accessible to the public for a period of two years, listing the chief executive officers or board members of the sponsoring entity. *Id.* § 73.1212(e). Prior to the 2012 revision, the regulations specified the file should be kept at the broadcaster’s physical station location; the revision then required broadcasters to upload the files to the FCC’s public database. Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 77 Fed. Reg. 39,439, 39,440 (July 3, 2012) (to be codified at 47 C.F.R. pt. 73).

### III. THE HISTORICAL DEVELOPMENT & ENFORCEMENT OF SPONSORSHIP IDENTIFICATION LAW

In the thirty years following the FCC's promulgation of the 1944 regulations, the Commission inched toward providing the public with greater information about sponsors.<sup>22</sup> After 1975, however, the Commission's enforcement decisions evidenced a sea change. Since that time, the FCC has slowly stripped meaning from the regulatory provisions requiring broadcasters to exercise reasonable diligence and identify the true sponsors of political content, leaving the public with incomplete or inaccurate information about the advertisers who seek to persuade them.<sup>23</sup>

#### A. *The Early Years of Enforcement Under the Communications Act and the Commission's New Regulations*

In the years leading up to American involvement in World War II, business and labor movement voices competed for the opportunity to present their political viewpoints on the radio.<sup>24</sup> The incidence of unattributed political messaging on the airwaves increased as the 1944 presidential election between Franklin D. Roosevelt and Thomas Dewey neared, prompting the FCC to remind broadcasters that section 317 of the Communications Act applied to political content.<sup>25</sup> In December 1944, the Commission unveiled its first set of regulations governing sponsorship identification for commercial, political, and otherwise "controversial" content.<sup>26</sup> Like the statute, the regulations were limited, only imposing on broadcasters a general duty to identify sponsored content.

Nevertheless, broadcasters soon sought further clarification as to "the nature of the burden of investigation" imposed on them to identify sponsors and the process by which the FCC would determine whether that burden had been satisfied.<sup>27</sup> The Commission provided guidance in a

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22. See *infra* Parts III.A–C.

23. See *infra* Part III.D.

24. Kielbowicz & Lawson, *supra* note 7, at 339–41.

25. *Id.* at 339. On October 18, 1944, the Commission published a brief notice citing "numerous complaints" it had received regarding the "failure of radio stations to identify the sponsors of political spot announcements." Identification of Sponsors, Notice to All Station Licenses, 9 Fed. Reg. 12,817 (Oct. 25, 1944). The notice also reminded broadcasters that a "full and fair disclosure" of the sponsor's identity was necessary. *Id.*

26. Announcement of Sponsored Programs, 9 Fed. Reg. 14,734 (Dec. 19, 1944). The regulations largely mirrored the language of section 317. See *id.*; Communications Act of 1934 §§ 315, 317.

27. Albuquerque Broad. Co., 40 F.C.C. 1 (1946). The Albuquerque Broadcasting Company wrote to the Commission seeking guidance on a related sponsorship identification issue, and the Commission replied on May 16, 1946, with the public letter. *Id.*; *infra* note 28.

public letter to the Albuquerque Broadcasting Company, writing that the regulations required broadcasters to take “all reasonable measures” of investigation to determine the sponsors of political messages, and that the measure of the reasonableness of the investigation varied by the circumstances of each case.<sup>28</sup> The Commission’s position recognized the public’s right to a certain level of information about the identity of a sponsor, but acknowledged that the actions expected of the broadcaster in investigating and providing that information may well vary from one announcement to the next.<sup>29</sup> More importantly, it suggested broadcasters would have to conduct some investigation in order to meet their regulatory burden, a position it has since abandoned.<sup>30</sup>

*B. The Payola Scandal Prompts a Congressional Amendment to the Communications Act and the FCC Abashedly Follows Suit*

In the late 1950s, the “payola” scandal grabbed the attention of the American public and Congress, ultimately prompting a revision of the Communications Act and the FCC’s regulations. The term “payola” most often referred to the practice of record companies secretly paying disc jockeys to play certain songs on the air; disc jockeys, of course, made no sponsorship announcement or acknowledgment of the consideration they received.<sup>31</sup> The consideration disc jockeys received ranged from cash to

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28. *Albuquerque Broad. Co.*, 40 F.C.C. at 1. The Commission also clarified, in response to inquiry by the Albuquerque Broadcasting Company, that a broadcaster’s undertaking of greater investigation for some political content than for others did not violate other sections of the Communications Act. *Id.* Namely, section 315 of the Communications Act required that broadcasters provide equal opportunities for use of the broadcast station’s services for all candidates for a public office. Communications Act of 1934 § 315. The FCC assured the Albuquerque Broadcasting Company that “impos[ing] different requirements of proof of source-of-funds” would not create unequal opportunities between candidates. *Albuquerque Broad. Co.*, 40 F.C.C. at 1. To illustrate, the FCC provided an example in which a broadcaster would reasonably be expected to take greater investigative steps to determine the identity of the sponsor: “For example, if a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay, a licensee should make an investigation of the source of the funds to be used for payment.” *Id.*

29. *Albuquerque Broad. Co.*, 40 F.C.C. at 1. The Commission left the door open to provide further indication in the future of what it would deem to be reasonable steps. However, in the following decades, the requirement of “reasonable investigation” scarcely grew any clearer. *See infra* Part V.

30. *See* discussion *infra* Part III.D.

31. The term “payola” broadly applies to two practices investigated by Congress beginning in 1959: the practice of record companies secretly paying radio disc jockeys to encourage them to play particular songs on the radio and the rigging of television quiz shows. *See generally* KERRY SEGRAVE, *PAYOLA IN THE MUSIC INDUSTRY: A HISTORY, 1880–1991* (1994). Lawmakers took an interest in payola because it clearly violated the sponsorship identification regulations: music that had been quietly paid for in the form of money or gifts to disc jockeys was being played on the air without any acknowledgement of the gratuity. *Id.*

lavish travel and gifts.<sup>32</sup> Though the public controversy over pay-for-play on the radio had been brewing for several years,<sup>33</sup> Congress did not launch an official probe into the radio industry's payola practice until November 1959.<sup>34</sup> While Congress conducted its investigation, the FCC belatedly took its own actions to address the problem. The Commission warned broadcasters that their practices were illegal and later sent out an inquiry to all licensed stations asking for an account of their payola practices.<sup>35</sup>

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32. *See id.*

33. *See id.* The fact of the payments to disc jockeys was well known and a frequent topic of commentary for contemporary news outlets. *Id.* at 86–99. Interestingly, much of the commentary appeared to be prompted by the rise of the rock 'n' roll genre; many commentators assumed disc jockeys increasingly played the new music only because of the payments they received, and they faulted the deejays for the popularity of the controversial and highly criticized musical style. *Id.* at 125–26. Among the factors that caused Congress to initiate a formal probe was a memorandum from the president of the American Guild of Authors and Composers claiming there was “no doubt that commercial bribery has become a prime factor in determining” the music on the radio, and it was also responsible for “surreptitiously [inducing the public] to buy.” *Id.* at 100. Even after the government investigations took off, the public's interest remained high and many publications continued to foretell “the death of rock and roll.” *Id.* at 137.

34. The House of Representatives Committee on Legislative Oversight ran the most highly publicized investigation, and it held public hearings to interview disc jockeys from across the country. *Id.* at 126. The Congressional probe created a disc jockey witch-hunt. *Id.* at 105–10. Both before, during, and after Congress launched its formal investigation, many disc jockeys were fired from radio stations as broadcasters hastened to correct their conduct. *Id.*

The Internal Revenue Service, the District Attorney of New York County, the Federal Trade Commission, and the FCC were also investigating the payola practices independent of the Congressional probe. *See id.* at 100. The District Attorney's investigation in New York later ended in the indictment of eight station employees, who were all charged with commercial bribery. *Id.* at 150. The IRS investigations also later yielded criminal charges for tax evasion. *Id.* at 153.

35. *Id.* at 101–17. After warning broadcasters at least twice that accepting payment for playing music violated the sponsorship identification regulations, the Commission sent an inquiry to each licensed broadcaster. *Id.* The inquiry demanded disclosure of any payments received by employees for broadcasts that were not accompanied by sponsorship announcements, and it required broadcasters to identify steps they planned to take to prevent future instances of payola. *Id.* Broadcasters saw these demands as “sudden and unexpected,” suggesting they had previously been engaging in the practice under the assumption that no real threat of FCC sanction existed. *Id.* at 117.

In an attempt to take hold of the payola problem, the Commission even went so far as to withhold broadcaster licenses for violations—something it had never done before. *Id.* at 138. Upon receiving responses to the inquiry that the Commission sent to all licensees, the FCC withheld the licenses of four stations for, *inter alia*, partaking in payola practices. *Id.* The responses indicated that nearly all broadcasters engaged in some form of payola, with the vast majority accepting free records from record companies. *Id.* at 138. The FCC quickly moved to implement a new rule requiring that stations make an announcement before playing a record that they had received for free. *Id.* The hasty rule change appeared to be largely aimed at appeasing the Congressional investigators, as evidenced by the Commission's decision to dispense with the notice and comment portion of its usual rulemaking process, its omission of an effective date for the new rule, and the resulting confusion amongst its own members about the new rule's interpretation. *Id.* at 140–42. The 1960 amendments to the Communications Act later undid the FCC's new rule, relieving broadcasters of the duty because of the hardship caused by having to make sponsorship announcements for each and every song it played. Communications Act Amendments, 1960, § 317(a)(1), Pub. L. No. 86-752, 74 Stat. 889, 895 (codified as amended at 47 U.S.C § 317(a)(1) (2014)); *see also* Kielbowicz & Lawson, *supra* note 7, at 356.

These hasty steps proved inadequate in placating those who pointed fingers at the FCC for allowing payola to become a rampant practice and an open “secret” in the radio business.<sup>36</sup> The Commission received the majority of the blame, and the Congressional probe even questioned whether Commission members were themselves involved in condoning or partaking in the practice.<sup>37</sup>

After conducting its investigation, Congress revised the Communications Act in 1960 and made a major change to sponsorship identification law, and the FCC followed suit.<sup>38</sup> The new provisions in section 317 created the reasonable diligence requirement. The amended law required broadcasters to exercise “reasonable diligence to obtain from its employees, and from other persons with whom it deals directly,” the information necessary to make a full and accurate sponsorship announcement.<sup>39</sup> The simplistic requirements imposed by the Radio Act of

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36. SEGRAVE, *supra* note 31, at 138. Representative Emanuel Celler—the same Congressman who had criticized section 19 of the Radio Act of 1927 for not going far enough to identify sponsored announcements—also harshly criticized the Commission. *See supra* note 6. Celler denounced payola as the “kind of corruption that should have been dealt with years ago by the Federal agency charged with primary responsibility in this area – the Federal Communications Commission.” SEGRAVE, *supra* note 31, at 137. Despite common knowledge of the payola practice, the Commission had undeniably been lax in its enforcement of the sponsorship identification regulations. The laxity may be explained by two factors: the political ideology of the Commission’s members and the changing nature of the broadcast industry that the Commission was tasked with regulating. Kielbowicz & Lawson, *supra* note 7, at 354. First, the Commission members could have been described as “disinclined to regulate broadcast content, an ideological bent reinforced by personal and political ties to broadcasters.” *Id.* Second, the changing nature of television and radio programming made it easier for broadcasters to hide when they aired sponsored content. *Id.* at 355.

37. The House subcommittee eventually brought in FCC Chairman John Doerfer to testify in the investigation. SEGRAVE, *supra* note 31, at 139. Doerfer’s testimony raised questions about whether he himself had accepted benefits from players in the broadcasting industry. Doerfer had connections to George Storer of Storer Broadcasting Company, the owner of several radio and television stations. *Id.* He and his wife spent several days vacationing with Storer, using Storer’s private plane and yacht without reimbursing him. *Id.* The leader of the House subcommittee, Representative Oren S. Harris, pointed out that Doerfer’s conduct seemed very similar to that of the disc jockeys. *Id.* Doerfer met with President Dwight Eisenhower after testifying before the subcommittee and resigned from his position. *Id.* Another member of the Commission also resigned after it was revealed that he accepted money from a licensed station. *Id.*

38. Communications Act Amendments, 1960, § 8, Pub. L. No. 86-752, 74 Stat. 889, 895 (codified as amended at 47 U.S.C. § 317 (2014)). After the lengthy investigation and publicized scandal, the passage of the amendments to the statute garnered much debate and disagreement in both chambers of Congress. *See* SEGRAVE, *supra* note 31, at 156. The FCC announced its new regulations in 1963. Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 143–44 (1963) (codified as amended at 47 C.F.R. § 73.119 (1964)).

39. Communications Act Amendments, 1960 § 8. In addition, the newly added section 508 of the Act required that broadcast employees “disclose the fact of such acceptance or agreement [of payment for broadcast of content]” to their employers. *Id.* Failure to make such disclosure carried a criminal penalty of a fine of not more than \$10,000 and/or up to a year of imprisonment. *Id.* Despite the vigorous disparagement of the practice, the revision to the Communications Act did not illegalize

1927, the original version of the Communications Act, and the FCC's original regulations were gone.<sup>40</sup> The more expansive and specific regulations set forth in the 1960 revision meant broadcasters could no longer be willfully blind to the practices of sponsors attempting to air content anonymously or disguised as other entities. As a result, viewers received more frequent and consistent notice that aired content was sponsored, but this victory for public policy was short lived.<sup>41</sup>

### C. *United States v. WHAS and the Commission's Response*

In 1964, after much public critique, the FCC put its newly expanded regulations to work, and the focus shifted from the reasonable diligence required of broadcasters to whether broadcasters were accurately identifying the true sponsors of paid content.<sup>42</sup> In *In re WHAS*,<sup>43</sup> the Commission found the broadcaster in violation of the regulations by failing to identify the true sponsor of a political advertisement that disparaged a candidate in the 1963 Kentucky gubernatorial race.<sup>44</sup> According to the Commission, WHAS originally knew the sponsor to be a PAC named Business Friends for Breathitt, which was openly affiliated with candidate Ned Breathitt; but, at the request of the agency placing the ad, WHAS changed the announcement to identify the Committee for Good

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payola—it merely required broadcasters to acknowledge to the public when they or their employees were engaging in it. See SEGRAVE, *supra* note 31, at 157. Nevertheless, the imposition of a criminal penalty was a significant change aimed at exposing payola, which had been an open secret prior to 1960. *Id.*

While payola concerns were clearly reflected in the revisions to the Act, Congress also took the opportunity to explicitly indicate that political or “controversial issue” content aired by broadcasters was subject to the same sponsorship announcement requirements. Communications Act Amendments, 1960 § 8 (“Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.”).

40. See *supra* notes 7, 9 and accompanying text.

41. See *infra* Part III.D.

42. The first broadcaster to feel the Commission's renewed vigor for enforcement was a Kentucky television station, WHAS-TV. See *Loveday v. FCC*, 707 F.2d 1443, 1455 (D.C. Cir. 1983). The WHAS matter also appears to be the first prominent case in which the Commission took issue with the sponsorship announcement in the broadcast of political content. *Id.* (discussing the history of the sponsorship identification regulations and prominent decisions by the Commission).

43. *WHAS, Inc.*, 40 F.C.C. 190 (1964).

44. On a “closely divided vote,” the Commission concluded that WHAS willfully committed the violation. *United States v. WHAS, Inc.*, 385 F.2d 784, 785 (6th Cir. 1967).

Government (“CGG”) as the sponsor.<sup>45</sup> The FCC acted quickly in filing a forfeiture action, finding that WHAS “knew or should have known” that Breathitt was the true sponsor.<sup>46</sup> The Commission specified that under the regulations WHAS did not have the option to choose between identifying the true sponsor and the apparent sponsor because the regulations definitively demanded the former.<sup>47</sup> Federal courts quickly turned the Commission’s interpretation of its regulations on its head.<sup>48</sup> The Sixth

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45. In communicating with the advertising agency preparing the content for broadcast, the station had initially been told that the sponsor of the advertisement was “Business Friends for Breathitt,” a group working in support of gubernatorial candidate Ned Breathitt. *WHAS, Inc.*, 40 F.C.C. at 191. The program, a thirty-minute special reviewing the years Breathitt’s opponent A.B. Chandler had spent in political office, proclaimed itself as “the true story of what A.B. Chandler has done for, and to, Kentuckians.” *Id.* Within a week of identifying Business Friends for Breathitt and prior to the airing of the advertisement, the advertising agency changed the sponsor to the “Committee for Good Government,” and the station aired the content using the latter name in the sponsorship announcement. *Id.* Despite the advertising agency informing WHAS of the new sponsor for the program, the contract between the two parties named the sponsor as the “Committee for Good Government for Ned Breathitt.” *Id.* Nevertheless, the station eliminated Breathitt’s name from the sponsorship announcement, presumably at the request of the advertising agency. *Id.* at 192.

46. *Id.* Less than a month after the airing of the special, the FCC issued a Notice of Apparent Liability, notifying WHAS of its violation of section 317(a) of the Communications Act and its liability for forfeiture under section 503(b)(1)(B) in the amount of \$1,000. *Id.* at 196. Section 503(b)(1)(B) authorized the Commission to impose a maximum fee of \$1,000 for every instance in which a licensed broadcaster “willfully or repeatedly” violated one of its regulations or a provision of the Communications Act. Communications Act Amendments, 1960 § 7 (codified as amended at 47 U.S.C. § 503 (2014)).

47. The Commission found WHAS’s actions to be “an extremely serious violation” of the regulations. *WHAS, Inc.*, 40 F.C.C. at 192. WHAS’s primary argument against the Commission’s interpretation required a close reading of the regulations. *See id.* Subsection (c) of section 3.654, which codified the sponsorship identification requirements for TV stations that applied to radio stations, specified that a sponsorship announcement had to identify the sponsor “by whom *or* in whose behalf such payment is made or promised.” *Id.* at 190 n.2 (emphasis added). WHAS argued that the phrase quoted above required only an identification of either the paying sponsor or the true sponsor. *Id.* at 192. The FCC dismissed this argument by citing subsection (c) of section 3.654, which instructed:

Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.

*Id.* This eliminated any choice the broadcaster had between identifying the apparent sponsor or the true sponsor.

48. The Commission filed the action in federal court when WHAS refused to pay the fine. *See supra* note 46. Section 504 as amended by the 1960 amendments to the Communications Act provided that the forfeitures authorized in section 503 could be collected by the Commission in a legal action. Communications Act Amendments, 1960 § 7 (codified as amended at 47 U.S.C. § 504 (2014)). In the forfeiture action to recover the fine against WHAS, a Kentucky district court sided with WHAS. *United States v. WHAS, Inc.*, 253 F. Supp. 603 (W.D. Ky. 1966). The court found that the Commission’s regulations, as written, did not require the broadcaster to identify Breathitt as the true sponsor of the political content and that WHAS “had no reasonable basis for doubting, challenging or otherwise investigating the sponsorship and financing information furnished by [the advertising agency].” *Id.* at 605. The court reached this holding despite acknowledging that the political content clearly aimed to support Breathitt’s candidacy. *Id.* at 604. Calling the Commission’s interpretation of

Circuit Court of Appeals rejected the FCC's argument that the regulations required Breathitt to be identified as the sponsor because the CGG had acted on his behalf and with his funding.<sup>49</sup> The court's examination of the plain language of the statute did not support the FCC's interpretation; instead, the court believed that WHAS could properly identify either the apparent sponsor or the true sponsor and still meet its regulatory duties.<sup>50</sup>

In 1975, the FCC responded to the outcome in *United States v. WHAS, Inc.* by making a key amendment to its regulations, imposing on broadcasters the duty to identify the true sponsors behind paid content.<sup>51</sup> The new regulations required that "[w]here an agent . . . makes arrangements with a station on behalf of another, and such fact is known [or should be known] to the station," the broadcaster "shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent" in the sponsorship announcement.<sup>52</sup> In other words, broadcasters were to name the ultimate sponsors, not the middlemen. The clarification of this duty was to be read in conjunction with the reasonable diligence requirement.<sup>53</sup> The Commission explicitly announced its intent in promulgating the amended regulations:

[W]here a political broadcast is presented, promoting one candidate directly or through criticism of his opponent, by a committee which is really a campaign instrumentality for a candidate or a political organization, the public should be made plainly aware of the latter

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the regulations "novel" because it required broadcasters to identify the true sponsor, the court found that the station did not willfully violate any of the Commission's regulations. *Id.* at 606. The opinion also took a chiding tone with the Commission for attempting to rein in the efforts of the CGG. *Id.* After recognizing that the CGG had existed as a political committee for years, the court stated its opinion on the FCC's efforts:

The use of such committees, desirable or undesirable as it may be, has long been countenanced by those in the Federal and State Governments having authority therefor and I find no basis for substituting the Commission as a self-appointed [sic] arbiter of political morality through a novel interpretation of Commission Rules and Regulations.

*Id.*

49. *United States v. WHAS, Inc.*, 385 F.2d 784, 786 (6th Cir. 1967). In its brief, the FCC alleged that the regulations required that:

[I]f the ostensible sponsoring committee is not in fact independent of the candidate and his campaign organization, but is acting in his behalf, with the funds coming directly or indirectly from the candidate or his organization[,] the licensee who knows or has reason to know the facts must identify the candidate on whose behalf the program is broadcast.

*Id.*

50. *Id.*

51. See generally Amendment of the Comm'n's Sponsorship Identification Rules, 52 F.C.C.2d 701 (1975).

52. *Id.* at 702.

53. *Id.* at 709.

fact. The public's basic right to know by whom it is being informed, particularly as to a political matter . . . is too basic to need lengthy discussion here.<sup>54</sup>

The Commission, perhaps still fresh from the stinging criticisms it received after the payola scandals, took a decisive step to require greater disclosure from broadcasters—something it had seemed unwilling to do before.<sup>55</sup> As in 1963, the development seemed to be a strong move toward providing the public with more information, but when the Commission began to enforce the new regulations in earnest, all forward progress stalled.

*D. Enforcement of Sponsorship Identification Regulations in the Era of Special Interest Group Political Advertising*

Almost immediately, the Commission's enforcement of the 1975 revisions indicated that the agency sought to retreat from the new regulatory burden it had imposed.<sup>56</sup> *Loveday v. FCC*<sup>57</sup> definitively

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54. *Id.* at 703.

55. *See supra* notes 35–37 and accompanying text.

56. In the matter of *VOTER*, the harbinger to *Loveday v. FCC*, discussed below, a group of concerned citizens, collectively called *VOTER*, complained to the FCC that local broadcasters aired messages opposing an upcoming ballot initiative related to the establishment of a county utilities agency and misidentified the true sponsor of the content. *Loveday v. FCC*, 707 F.2d 1443, 1456 (D.C. Cir. 1983) (citing *VOTER*, 46 Rad. Reg. 2d (P & F) 350 (1979)). The stations identified the sponsor as “Westchester Citizens Against Government Takeover” (“WCAGT”), but *VOTER* alleged that the true sponsor was Consolidated Edison (“ConEd”), a public utilities company opposing the initiative. *Id.* In response to the Commission's inquiry, WCAGT acknowledged that “substantial” funding came from ConEd, but it assured the Commission that ConEd exercised no control over the content of the political messaging and that ConEd employees were ineligible for membership in WCAGT. *Id.* The Commission found that the stations had the option to identify either ConEd or WCAGT as the sponsor to satisfy their responsibilities under the regulations, but they were not required to name ConEd. *Id.* Moreover, the Commission found the stations had acted “in good faith and without closing their eyes to any attempted misrepresentation.” *Id.* (citing *VOTER*, 46 Rad. Reg. 2d (P&F) at 352). While the holding seemed to controvert the argument the Commission made in *WHAS*, the agency reasoned that the stations were free to identify either group as the sponsor because the stations had acted reasonably in accepting WCAGT's representation that it controlled editorial content of political messaging. *Id.* Nevertheless, the Commission recognized that the substantial funding to WCAGT from ConEd “might suggest” that further investigation was necessary to determine the identity of the sponsor, if WCAGT had not made assurances to the stations that it was the true sponsor. *Id.* at 1456 (citing *VOTER*, 46 Rad. Reg. 2d (P & F) at 352).

The main difference between the facts in *WHAS* and in *VOTER* appears to be that the purported true sponsors (Breathitt and ConEd, respectively) varied in whether they exercised editorial control over the messaging of political advertisement. In *WHAS*, no record indicates whether the Breathitt political action committee made any assurances about its lack of editorial control over CGG. *See supra* notes 44–49 and accompanying text. To square the *VOTER* holding with *WHAS*, it must be assumed that if CGG had claimed that candidate Breathitt's campaign had no editorial control over the political advertisement, the Commission may not have found *WHAS* in violation of the regulations for failing

indicated this retreat. In response to a public complaint, the FCC investigated the sponsorship announcements California broadcasters made in relation to political advertisements opposing a state ballot measure to limit cigarette smoking in public.<sup>58</sup> The broadcasters identified the sponsor as Californians Against Regulatory Excess (“CARE”), but the complainant alleged that large tobacco companies provided CARE with virtually all of its funding and selected and hired the advertising agency that produced the advertisement.<sup>59</sup> The Commission found that the broadcasters had acted with reasonable diligence to ensure the accuracy of the sponsorship announcement by accepting the assurance provided by the apparent sponsor.<sup>60</sup> The broadcasters could have reasonably identified either CARE or the tobacco industry, but the regulations did not obligate them to name the latter under the “true sponsor” requirement.<sup>61</sup> The D.C. Circuit Court

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to identify the true sponsor. However, the Commission argued before the Sixth Circuit that Breathitt was the only sponsor who could properly be named because CGG had acted on his behalf. *United States v. WHAS*, 385 F.2d 784, 786 (6th Cir. 1967). That argument tugs against the Commission’s reasoning in *VOTER*.

57. *Loveday*, 707 F.2d 1443.

58. *See generally id.*

59. Ninety-eight percent of the funding for CARE came from the tobacco companies. *Id.* at 1445–46 n.1. “Yes on 10,” a political action committee working for the passage of the proposition, and one of its members, Paul Loveday, spearheaded the effort to get the FCC involved. *Id.* at 1446. Later, Loveday would be the named complainant in the court case against the FCC. *Id.* at 1445. According to Loveday and Yes on 10, the tobacco industry had historically involved itself in advertising against similar measures and was likely repeating the practice in this instance. *Id.* Initially, Yes on 10 communicated its concerns to the broadcasters directly, detailing why it believed the sponsorship announcements were incorrect. *Id.* A member of Yes on 10 wrote letters to the 155 radio and television stations that were broadcasting CARE’s advertisements, advising them of their violation of the sponsorship identification regulations. *Id.* at 1446. The group believed that representation of the advertisement’s sponsor as a California civic entity (here, CARE) obscured key facts, namely that the money and support came almost exclusively from out-of-state sources in the tobacco industry and that the tobacco industry donors had selected and hired an advertising firm for CARE. *Id.* at 1445. Yes on 10 also alleged the tobacco companies provided the advertising funding to CARE after the state’s campaign finance reporting deadline to purposely avoid detection of their involvement. *Id.* 1445–46 n.1. In response to the Yes on 10 letters, CARE sent its own letters to the broadcasters, acknowledging that it received funding from the tobacco industry, but assuring the group that the tobacco companies did not exercise control over CARE and were using a “hands-off approach” in making donations to groups opposing the measure. *Id.* at 1446. Nevertheless, Yes on 10 urged the broadcasters to change the sponsorship announcement to “Paid for by the Tobacco Industry,” instead of identifying CARE. *Id.* at 1445–46. It also threatened the initiation of a complaint with the FCC if the stations failed to act. *Id.* at 1446. When the broadcasters did not change their sponsorship announcements, Yes on 10 sought a declaratory ruling from the FCC. *Id.*

60. *Loveday*, 707 F.2d at 1447. Specifically, the FCC based its decision on CARE’s assurance to the broadcasters that the tobacco companies did not exercise any editorial control over the advertisement. *Id.* It is unclear whether any of the broadcasters took affirmative steps to meet their reasonable diligence requirement. Despite this seeming lack of affirmative investigation, the FCC was satisfied that there was no violation of the requirements. *Id.*

61. The Commission suggested that broadcasters could have simply used the phrase “Paid for by the Tobacco Industry” to satisfy their burden. *Id.* at 1447. This finding seems to directly contradict the

of Appeals confirmed the FCC's decision.<sup>62</sup> The court also suggested that neither precedent nor the legislative history of the regulations supported the Commission's claimed ability to require broadcasters to engage in a full investigation to determine sponsors' identities.<sup>63</sup> Moreover, in the court's view, the imposition of further duties on broadcasters could raise a myriad of issues and invite abuse, presumably by political opponents.<sup>64</sup> The court did note, however, the possibility of "so strong a circumstantial case that [a third party] other than the named sponsor is the real sponsor that licensees, in the exercise of reasonable diligence, would have to" name the third party.<sup>65</sup>

*Trumper Communications of Portland*<sup>66</sup> proved to be one such strong circumstantial case in which the broadcasters erred by failing to name the third party as the true sponsor. Yet despite finding a violation of the regulations, the FCC refused any enforcement measures and clearly reinforced the *Loveday* reasoning.<sup>67</sup> The complaint alleged that several Portland, Oregon, stations had aired a series of advertisements misidentifying the Fairness Matters to Oregonians Committee ("FMOC") as the sponsor, when in fact the true sponsor was The Tobacco Institute ("TBI").<sup>68</sup> The advertisements opposed a state ballot initiative to increase the tax on tobacco products, and the complainant showed that virtually all of FMOC's funding came from TBI.<sup>69</sup> The Commission noted that

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Commission's reasoning in *WHAS* and the very reason for the 1975 revision to the regulations. *See supra* note 56.

62. *Loveday's* appeal of the FCC's decision went directly to the appellate court. *Loveday*, 707 F.2d at 1447.

63. *Id.* at 1457–60.

64. *Id.* at 1449. The court believed the imposition of further investigatory duties created practical, administrative, and constitutional questions. *Id.* Practically, the court explained that broadcasters had different resources (e.g., personnel) to put toward such an investigation, and setting a high bar for investigation would strain those with fewer resources. *Id.* at 1457–60. Administratively, the Commission itself would have to expend many more resources in adjudicating whether broadcasters had met their investigatory burdens. *Id.* Constitutionally, the court expressed concern that the intrusive nature of the investigation would chill political speech in contravention of the First Amendment and allow political opponents to limit each other's speech simply by raising doubts about sponsor identity, thereby leading to FCC investigation. *Id.* Nevertheless, it is important to note that in making this argument, the court assumed that the kind of investigation would be extremely in-depth, including "field investigations" and "observations of suspected persons." *Id.* at 1457.

65. *Id.* at 1459.

66. *Trumper Comm'n's of Portland*, 11 F.C.C. Rcd. 20415 (1996).

67. *See id.* The *Trumper* decision was set forth in a letter to several broadcasters that had aired political advertisements by one sponsor. *Id.* at 20415. The Commission declined to pursue enforcement against the broadcasters and issued the letter as an "advisory" opinion. *Id.* at 20418.

68. *Id.* at 20415–16.

69. The complainant, the Media Access Project, showed that FMOC had raised \$2,664,600, and TBI had contributed all but \$20 of that sum, according to a filing with the Oregon Secretary of State. *Id.*

broadcasters were not required “to act as private investigators” and were only required to question assurances of the apparent sponsor if they were “furnished with credible, unrefuted evidence that a sponsor is acting at the direction of a third party.”<sup>70</sup> In this instance, the Commission determined that there had been credible, unrefuted evidence provided to the stations because the complainants had shown that funding for the apparent sponsor and editorial control over that entity both came from TBI.<sup>71</sup> As such, the stations had violated the regulations by failing to name TBI as the sponsor, but the Commission declined to pursue enforcement because it found that the stations had learned of the evidence less than two weeks before the advertisement aired.<sup>72</sup> This outcome was somewhat confounding; the Commission identified two factors that constituted adequate evidence to warrant not accepting an apparent sponsor’s assurances, but it did not suggest that the stations had any duty to investigate this information themselves.<sup>73</sup>

Between the inception of sponsorship identification law in 1934 and the 1975 revision to the regulations, the FCC made slow but significant progress toward providing viewers with complete and accurate sponsorship identification information. With *Loveday* and *Trumper*, however, the Commission significantly weakened the reasonable diligence and true sponsor identification requirements. Nearly forty years later, the FCC has all but done away with them.<sup>74</sup>

#### IV. MODERN POLITICAL ADVERTISING & THE IMPORTANCE OF THE FCC’S APPROACH TO SPONSORSHIP IDENTIFICATION REGULATION

The FCC’s decimation of the requirements that kept the voting public fully informed of hidden advertising particularly harms voters in modern political campaigns. The political landscape of the 2000s has been marked by steadily increasing campaign expenditures, including on television advertisements.<sup>75</sup> In election year 2012, local TV broadcasters reported a

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70. *Id.* at 20417.

71. *Id.* at 20417–18.

72. *Id.* at 20418. The Commission also suggested enforcement was inappropriate because the stations may have found a dearth of “definitive guidance” from the Commission. *Id.* at 20418.

73. Additionally, the Commission’s decision also seemed to imply some unspecified deadline, and if stations did not have such credible evidence before that time, then they would not be required to change their sponsorship announcements prior to airing the advertisements. *See id.*

74. *See infra* Part V.

75. Data from the political watchdog group Center for Responsive Politics chronicle the upward trend in campaign expenditures by both candidates and outside groups. The data for the 2004 election show that the two main presidential candidates, George W. Bush and John Kerry, spent approximately

record-setting \$2.9 billion in revenue from political broadcasting—an increase from \$2.1 billion in 2010 and \$1.5 billion in 2008.<sup>76</sup> A great deal of the political messaging now comes from outside special interest groups, as evidenced by election data from races between 2008 and 2014.<sup>77</sup>

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\$717.9 million on the race, collectively. Center for Responsive Politics, *2004 Presidential Race*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres04/index.php?graph=spending> (last visited Oct. 13, 2014), *archived at* <http://perma.cc/8CHH-6YN6>. The 2008 presidential race between John McCain and Barack Obama culminated in the two candidates spending approximately \$1.06 billion on their campaigns. Center for Responsive Politics, *Summary Data for Barack Obama*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/summary.php?cycle=2008&cid=N00009638> (last visited Oct. 13, 2014), *archived at* <http://perma.cc/2PFB-KG7J>; Center for Responsive Politics, *Summary Data for John McCain*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/summary.php?cycle=2008&cid=N00006424> (last visited Oct. 13, 2014), *archived at* <http://perma.cc/9CJ5-A6L4>. The data for the 2012 presidential election present even more impressive figures; including outside spending, candidates Barack Obama and Mitt Romney spent a total of approximately \$2.4 billion on their campaigns altogether. Center for Responsive Politics, *2012 Presidential Race*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres12/index.php> (last visited Oct. 13, 2014), *archived at* <http://perma.cc/WB9P-TF2Q>. The increase in expenditures from previous campaigns corresponded with an increase in the number of political advertisements on the air; the 2012 presidential election yielded significantly more ads than each of the two preceding presidential elections. *2012 Shatters 2004 and 2008 Records for Total Ads Aired*, WESLEYAN MEDIA PROJECT (Oct. 24, 2012), <http://mediaproject.wesleyan.edu/releases/2012-shatters-2004-and-2008-records-for-total-ads-aired/>, *archived at* <http://perma.cc/VQ2P-VAXX>.

76. Deborah Potter et al., *Local TV: By the Numbers*, PEW RESEARCH CTR., <http://stateofthemedialab.org/2013/local-tv-audience-declines-as-revenue-bounces-back/local-tv-by-the-numbers/> (last visited Oct. 14, 2014), *archived at* <http://perma.cc/96F2-R9GG>. The logical inference to draw from the increasing numbers is that they signal the established—or perhaps even growing—success of political advertising in persuading voting viewers. Somewhat surprisingly, there is debate among political strategists and political scientists on what, if any, effect political advertising has on viewers. STEPHEN ANSOLABEHERE & SHANTO IYENGAR, *GOING NEGATIVE: HOW POLITICAL ADVERTISEMENTS SHRINK AND POLARIZE THE ELECTORATE* 17 (1995). For the sake of analyzing sponsorship identification regulations and their potential impact on the American public, this Note assumes political advertisements do affect voters. *See, e.g.,* Michael M. Franz & Travis N. Ridout, *Does Political Advertising Persuade?*, 29 *POL. BEHAV.* 465, 485 (2007) (finding “ample evidence” that political ads influence voters’ choices and change their attitudes). *But see* Jonathan S. Krasno & Donald P. Green, *Do Televised Presidential Ads Increase Voter Turnout? Evidence from a Natural Experiment*, 70 *J. POL.* 245, 258 (2008) (finding that political advertisements had minimal effect on voter turnout in the 2000 general election).

77. No data was available on spending by outside groups in the 2004 presidential election. Outside groups spent \$233.6 million in the 2008 race on all presidential candidates. Center for Responsive Politics, *2008 Presidential Race: Independent Expenditures*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres08/indexp.php> (last visited Oct. 13, 2014), *archived at* <http://perma.cc/FD4E-ZWTP>. Nearly tripling the figure from the previous election cycle, outside groups spent \$652.81 million on the 2012 presidential race. Center for Responsive Politics, *2012 Presidential Race: Independent Expenditures*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres12/indexp.php> (last visited Oct. 13, 2014), *archived at* <http://perma.cc/XE4S-7MD9>. In the 2014 midterm Congressional elections, outside groups spent approximately \$795.5 million. Center for Responsive Politics, *2014 Outside Spending, by Group*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=A> (last visited Dec. 9, 2015).

In addition to increasing their spending on political ads, outside groups have also upped the number of advertisements they put on the airwaves. Data for the first two weeks of the “traditional campaign cycle” show that outside groups have significantly increased the number of ads they aired

While the sheer volume of ads and the corresponding expenditures may not be troubling in themselves, the anonymous messaging that can reach voters raises concerns. When considered in light of the frequently repeated refrain—from the FCC and the courts—that the public has a right to know when and by whom it is being persuaded, anonymous messaging is particularly troubling.<sup>78</sup> The nature of persuasion in political advertising has three significant effects on voters that are problematic when messages are not accompanied by sponsor identification. First, when advertisement sponsors are not obviously affiliated or aligned with political parties, viewers assign more credibility to the message than if it came from a sponsor clearly identifying its political affiliations.<sup>79</sup> Many outside groups airing a high volume of political advertisements have ambiguous names, such as “Club for Growth,” “Americans for Prosperity,” and “Patriot Majority USA.”<sup>80</sup> Some groups purposefully use ambiguous names to

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between the 2010 midterm elections and the 2014 midterm elections. *2014 General Election Advertising Opens Even More Negative than 2010 or 2012*, WESLEYAN MEDIA PROJECT (Sept. 16, 2014), <http://mediaproject.wesleyan.edu/releases/2014-general-election-advertising-opens-even-more-negative-than-2010-or-2012/>, archived at <http://perma.cc/5TSK-539B>. Outside groups aired 567 ads between August 29, 2010, and September 11, 2010; in contrast, outside groups in 2014 aired 40,897 ads between August 29, 2014, and September 11, 2014, showing an approximately 7114 percent increase between the two cycles. *Id.*

78. See Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules, 34 F.C.C. 829, 849 (1963) (stating knowledge of sponsor’s identity is “[p]aramount to an informed opinion and wisdom of choice”); see also *Inquiry Concerning Sponsorship Identification Announcements by Station KOOL-TV on Behalf of Mr. Sam Grossman*, 26 F.C.C.2d 42, 42 (1970) (stating that the “basic purpose” behind the FCC’s regulations and the Communications Act is ensuring that the public knows “by whom it is being persuaded”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371 (2010) (discussing campaign donor disclosure in the context of the FEC regulations, but noting the importance of identifying corporate donors for the purpose of “[enabling] the electorate to make informed decisions and give proper weight to different speakers and messages”).

79. Christopher Weber et al., *It’s All in the Name: Source Cue Ambiguity and the Persuasive Appeal of Campaign Ads*, 34 POL. BEHAV. 561, 579 (2012). Weber et al. found that “being unconnected to the race itself leads to more perceived sponsor credibility,” and “unknown political groups can be a powerful force in political communication.” *Id.* Specifically, political advertisements sponsored by interest groups in general were more persuasive to viewers than advertisements sponsored by the candidates themselves. Among those groups, viewers found “lesser-known, ambiguously named” outside groups credible and the authors labeled such unknown political groups a “powerful force in political communication.” *Id.* It bears noting that the authors acknowledged that ambiguously named outside groups added a “new layer of complexity” to the study of political advertising and require further scholarly attention to improve the understanding of their impact on viewers. *Id.*

80. All three named entities were among the top twenty special interest group spenders on political advertising in the 2014 midterm elections, as ranked by the Wesleyan Media Project. *Heated Battle for U.S. Senate Draws Deluge of Outside Group Ads, Most Are Dark Money*, WESLEYAN MEDIA PROJECT (Sept. 4, 2014), <http://mediaproject.wesleyan.edu/releases/heated-battle-for-u-s-senate-draws-deluge-of-outside-group-ads-most-are-dark-money/>, archived at <http://perma.cc/K8Q9-QEE6>.

obscure their political alignment and true agendas from viewers—a tactic that has proven effective.<sup>81</sup> Second, because voters have become increasingly inundated with political messages over the last several election cycles, they may attach credibility to certain advertisements simply because of repeated exposure to the content.<sup>82</sup> Moreover, in the echo chamber created by social media websites, like Facebook, the effects of repetition are significantly increased.<sup>83</sup> Third, negative advertisements are more likely to provoke reactions in voters,<sup>84</sup> and a growing number of

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81. See Weber, *supra* note 79, at 564 (“With recent changes to American campaign finance law . . . an increasing number of political message sponsors are unknown, rendering it important to understand the consequences of these groups with respect to campaigning and political persuasion.”). Trends in 2014’s election spending suggest donations are increasingly going to groups that are not bound by the FEC’s donor disclosure requirements. Those groups are free to withhold donor names and present the public with “generic names and unclear agendas.” Nicholas Confessore, *Secret Money Fueling a Flood of Political Ads*, N.Y. TIMES (Oct. 10, 2014), [http://www.nytimes.com/2014/10/11/us/politics/ads-paid-for-by-secret-money-flood-the-midterm-elections.html?\\_r=0](http://www.nytimes.com/2014/10/11/us/politics/ads-paid-for-by-secret-money-flood-the-midterm-elections.html?_r=0). Donors from both conservative and liberal ends of the spectrum have shifted their giving to non-disclosing groups, but conservative donors appear to donate to non-disclosing groups far more heavily than liberal donors. Approximately eighty percent of the election advertising in support of Republican candidates came from outside groups that do not disclose donor names. *Id.*

The tactic of purposefully keeping viewers ignorant has paid some dividends. See Andy Kroll, *This Machine Turned Colorado Blue. Now It May Be Dems’ Best Hope to Save the Senate*, MOTHER JONES (Oct. 29, 2014, 6:30 AM), <http://www.motherjones.com/politics/2014/10/colorado-udall-hickenlooper-senate-democracy-alliance>, archived at <http://perma.cc/6VAJ-5Q8M>. The phenomenon of obscuring donor identity and group agendas is not particularly new, but the practice may have increased after the Supreme Court ruled in *Citizens United v. FEC* that the donations of corporations to political candidates could not be limited. *Citizens United*, 558 U.S. at 371; see also Alison Fitzgerald & Jonathan D. Salant, *Hiding the Identities of Mega-Donors*, BLOOMBERG BUSINESSWEEK (Oct. 18, 2012, 9:21 PM), <http://www.businessweek.com/articles/2012-10-18/hiding-the-identities-of-mega-donors#p1>, archived at <http://perma.cc/ZB43-8838>.

82. Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 160–61 (2010). “[T]he ability to repeat a campaign message or secure repeated exposure for a political candidate has real potential to skew the results of an election in favor of a campaign that leverages that ability.” *Id.*; see also Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. U. L. REV. 97, 118–19 (2011).

83. Levi, *supra* note 82, at 119 (footnote omitted) (“[V]oters might assume the credibility of the nominal sponsor and all of its ads, and have no reason to assess the credibility of the ad’s true sponsor. This misdirected assumption of credibility can have significant consequences in today’s recommendation-based Facebook culture . . .”). The prevalence of YouTube and other similar sites also make it easy to share online political advertisements that originally aired on television.

84. Samuel D. Bradley et al., *Psychophysiological and Memory Effects of Negative Political Ads: Aversive, Arousing, and Well Remembered*, 36 J. ADVERTISING 115, 116 (2007) (finding negative political ads to be memorable and to evoke physiological and emotional responses in viewers). Negative political advertisements reinforce those voters who have established political viewpoints, but they may also be more effective in persuading those who are “the undecided or in some rare instances [converting] the normally hostile audience.” KAREN S. JOHNSON-CARTEE & GARY A. COPELAND, *NEGATIVE POLITICAL ADVERTISING: COMING OF AGE 13–14* (2013). Political scientists, however, have some disagreement as to whether negative advertising has any effect on actual political decision-

political advertisements are negative in tone.<sup>85</sup> Importantly, the viewers most affected by political advertisements with these three qualities are voters with low independent political knowledge.<sup>86</sup> In other words, the people most vulnerable to the covert persuasion now permitted by lax enforcement of the sponsorship identification regulations are those most vulnerable to being misled or misinformed when they arrive at the ballot box. In sum, political advertising has been shaped—made anonymous, ubiquitous, and negative—to make it as persuasive to voters as possible. Thus, if the most persuasive advertisements are aired without proper sponsorship identification, the regulations and the FCC have failed.

#### V. THE FCC'S VIRTUAL ABANDONMENT OF THE SPONSORSHIP IDENTIFICATION REGULATIONS & THE RESULTING IMPLICATIONS

Nearly forty years after the decision in *Loveday*, the FCC has only become further entrenched in its refusal to enforce the sponsorship identification regulations, even as anonymous political advertising grows more common. Two recent decisions in which the Commission declined enforcement confirm its position. In 2014, several media watchdog groups jointly filed two complaints with the FCC alleging that television stations failed to identify the true sponsors behind political advertisements. In the first complaint, the groups alleged that WJLA, a Washington, D.C., news station, aired political advertisements related to the Virginia gubernatorial election and identified the sponsor as NextGen Climate Action Committee (“NextGen”).<sup>87</sup> The complainants alleged that WJLA knew the true sponsor to be Tom Steyer, billionaire philanthropist and founder of NextGen.<sup>88</sup> On its news program, the station itself had reported on NextGen’s—and specifically on Steyer’s—expenditures to push environmental issues to the forefront of the race.<sup>89</sup> This left the station

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making. See Richard R. Lau et al., *The Effects of Negative Political Campaigns: A Meta-Analytic Reassessment*, 69 J. POL. 1176, 1176 (2007).

85. See 2014 General Election Advertising Opens Even More Negative than 2010 or 2012, *supra* note 77.

86. See Franz & Ridout, *supra* note 76, at 485.

87. See generally *Complaint of Campaign Legal Center et al. v. ACC Licensee, LLC, Licensee of WJLA-TV*, at 1–2, INST. FOR PUB. REPRESENTATION, available at <http://instituteforpublicrepresentation.org/wp-content/uploads/2014/07/WJLA-Complaint-Final.pdf> (last visited Jan. 19, 2015), archived at <http://perma.cc/7TJY-3NC4>.

88. *Id.* at 6–7. Moreover, the complaint argued, even a cursory scan of NextGen’s website prominently displayed Steyer as both founder and president of the organization. *Id.*

89. *Id.* at 6–9. The complaint alleged WJLA aired two political advertisements with improper sponsorship announcements in September and October 2013. *Id.* at 1. In August 2013, the station’s news department aired a story and posted to its website that Steyer would be injecting a substantial

with little excuse for failing to identify Steyer as the true sponsor.<sup>90</sup> In the second complaint, the complainants alleged that an Oregon news station, KGW, failed to exercise reasonable diligence in naming the American Principles Fund (“APF”) as a political advertisement sponsor.<sup>91</sup> The complainants urged that KGW could have easily accessed the Federal Election Commission’s (“FEC”) online records and quickly determined that nearly 99 percent of APF’s funding came from Sean Fieler, the founder and one of three self-described “leaders” of the group.<sup>92</sup> That would have indicated that Fieler was the true sponsor to identify in the advertisement.

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amount of money into the election in support of candidate Terry McAuliffe. *Id.* at 8. Even if not for this report, the complaint argued the station’s employees should have consulted with its sister publication, *Politico*, which had reported at length on Steyer and NextGen based on the “extensive behind-the-scenes access” its reporters had to “Steyer’s shadow campaign.” *Id.* *Politico*’s reports had acknowledged Steyer as the sole funder of NextGen. *Id.* at 8–9. By the plain language in the regulations, the complainants urged that WJLA had failed to make reasonably diligent efforts to obtain information from its employees (in this instance, the news reporters) to make an adequate sponsorship announcement. *Id.*

90. The complainants urged that even a simple web search would have satisfied the “reasonable diligence” requirement and yielded the information necessary to make the proper sponsorship announcement identifying Steyer. *Id.* at 9.

91. *Complaint of Campaign Legal Center et al. v. Sander Media, LLC, Licensee of KGW*, at 6–7, INST. FOR PUB. REPRESENTATION, <http://instituteforpublicrepresentation.org/wp-content/uploads/2014/07/KGW-Complaint-Final.pdf>, archived at <http://perma.cc/5XKP-WJZJ>. KGW aired the advertisement in question on multiple occasions in May 2014. *Id.* The advertisement criticized Oregon Republican senatorial candidate Monica Wehby for her stance on abortion and healthcare, and it urged voters to support candidate Jason Conger in the Republican primary. *Id.* at 5–6. As it turned out, Wehby won the Republican nomination over Conger but lost in the senatorial race to the incumbent candidate. Jeff Mapes, *Jeff Merkley Defeats Monica Wehby in U.S. Senate Race: Oregon Election Results 2014*, THE OREGONIAN (Nov. 4, 2014, 11:14 PM), [http://www.oregonlive.com/mapes/index.ssf/2014/11/jeff\\_merkley\\_leads\\_monica\\_wehb.html](http://www.oregonlive.com/mapes/index.ssf/2014/11/jeff_merkley_leads_monica_wehb.html), archived at <http://perma.cc/Y4BT-4F7E>.

92. *Complaint of Campaign Legal Center et al. v. Sander Media, LLC, Licensee of KGW*, *supra* note 91, at 7–9. The complainants argued that KGW failed to make reasonably diligent efforts to discern the identity of the sponsor from those “with whom it [dealt] directly in connection,” as required by the Communications Act and the FCC’s regulations. *Id.* at 8 (quoting 47 U.S.C. § 317(c)); see also *supra* note 39 and accompanying text. Even if APF had not cooperated in revealing Fieler as the true sponsor, the complainants believed that KGW still had the duty and ability to determine his role in the organization. *Complaint of Campaign Legal Center et al. v. Sander Media, LLC, Licensee of KGW*, *supra* note 91, at 8. Specifically, the complainants argued that a simple search of the FEC’s online database yielded information indicating that Fieler provided 98.6 percent of the funding for APF (approximately \$700,000) in the year leading up to the airing of the advertisement in May 2014. *Id.* at 7–8. Moreover, even if KGW did not search the FEC’s website and relied instead on a Google word search, the complainants claimed it was “widely reported and readily discernible” that Fieler funded APF virtually entirely on his own. *Id.* The American Principles website even described Fieler as “Chairman,” and depicted two other individuals on the “leadership team.” *Id.* at 4–5. Based on all of this information, the complainants surmised that “APF would not be running any ads without Fieler’s money, and he remains free to stop supporting APF if it ran ads contrary to his interests. APF, in effect, acts as Fieler’s political advertising arm.” *Id.* at 7. In sum, the complaint asserted that Fieler had financial and editorial control over APF.

The FCC refused to initiate enforcement action in both complaints. In a single letter to the complainants, the Commission explained that the stations did not have “credible evidence casting into doubt” the sponsors’ identities.<sup>93</sup> The FCC’s sole explanation quoted *Trumper Communications* that only “credible, unrefuted evidence” of a third party as the true sponsor would be sufficient to require broadcasters to name someone other than the apparent sponsor.<sup>94</sup> The lack of clarity is especially stark because the Commission answered both complaints with one letter, ignoring the fact that they posed two vastly different factual scenarios.<sup>95</sup> The Commission indicated that it reached a decision by balancing the reasonable diligence obligations with “the sensitive First Amendment interests present.”<sup>96</sup> But it gave no further explanation of the nature of the First Amendment interests, nor did it indicate how the balancing process played out.<sup>97</sup> The letter concluded by noting that the Commission’s “approach might have been different” if the complainants had contacted the stations first and provided evidence identifying the true sponsors.<sup>98</sup> The implications of this most recent decision reaches broadcasters, voters, special interest groups, and the FCC itself.

#### A. *Implications for Broadcasters*

For broadcasters, little has changed since *Loveday* and *Trumper Communications*, and the duties imposed by the law may have in fact diminished even further. While the FCC’s letter is brief, it speaks volumes

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93. Letter from Robert L. Baker, Assistant Chief, Policy Division of Media Bureau, Fed. Comm’n’s Comm’n, to Andrew Jay Schwartzman, Attorney, Inst. for Pub. Representation (Sept. 2, 2014), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-14-1267A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1267A1.pdf).

94. *Id.* (quoting *Trumper Commc’n’s of Portland*, 11 F.C.C. Rcd. 20415 (1996)).

95. In fact, while the Commission’s letter generally references both complaints, it never makes specific mention of the allegations against KGW. *See id.*

96. *Id.*

97. *Id.* While the Commission makes no explanation of the First Amendment interests in this letter, the Sixth Circuit included a discussion of its concerns in its *Loveday* opinion. *Loveday v. FCC*, 707 F.2d 1443, 1458–59 (D.C. Cir. 1983). The court cited precedent indicating that broadcast speech receives the most limited First Amendment protection because the use of broadcasting facilities is not equally available to all members of the public, and so the area is subject to government regulation. *Id.* at 1458. Nevertheless, the lack of First Amendment protection was the relic of a time with far fewer broadcasting facilities; because television and radio stations have proliferated in recent decades, the court surmised the protection for broadcast speech “may well expand.” *Id.* at 1459. Given this development, “the law’s attempt to discover the true utterers of political messages becomes so intrusive and burdensome that it threatens to silence or make ineffective the speech” and intrudes on the First Amendment. *Id.* Importantly, the court wrote that in order to interpret the law as requiring broadcasters to “affirmatively seek out true sponsors,” it would require clear legislative intent from Congress indicating the law was intended to have that effect. *Id.*

98. Letter from Robert L. Baker, *supra* note 93.

about the agency's stance on what it expects of broadcasters in "fully and fairly" disclosing the identities of sponsors—it effectively expects nothing. First, the WJLA example is telling.<sup>99</sup> As *Trumper* suggested, WJLA would not be required to further investigate if NextGen made assurances that it was the true sponsor.<sup>100</sup> But the Commission went a step beyond *Trumper* and further gutted the reasonable diligence requirement by refusing to even penalize the station for failure to communicate with its own employees who obviously had knowledge of the true identity of the sponsor because of their news stories.<sup>101</sup> Second, the FCC's resolution of the allegations against KGW further relieves broadcasters of any duty to determine the true sponsor of an advertisement. *Trumper* suggested broadcasters had no duty to look beyond apparent sponsor assurances, except in cases with strong circumstantial evidence of financial and editorial control by a third party.<sup>102</sup> In KGW, both of those factors appear to be present,<sup>103</sup> as they were in *Trumper*, but the FCC reaches differing decisions in the two cases and gives no explanation. The KGW decision apparently removes the *Trumper* exception, and broadcasters now seem to have no duty whatsoever to seek out true sponsors in any case. Further, the FCC's decision here highlights that the burden of diligence that exists now falls on interested third parties looking to expose hidden sponsors in political advertisements.<sup>104</sup>

### B. Implications for Voters

For voters, the implications are sobering. The 2016 elections are nearly certain to prompt record expenditures on political advertising, just as they have in each of the recent elections.<sup>105</sup> Now, perhaps more than ever

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99. See *supra* note 89 and accompanying text.

100. See generally *Trumper Commc'n's of Portland*, 11 F.C.C. Rcd. 20415 (1996).

101. See Communications Act of 1934, 47 U.S.C. § 317(c) (2014); 47 C.F.R. § 73.1212(b) (2016).

102. See *Trumper Commc'n's of Portland*, 11 F.C.C. Rcd. at 20417.

103. See *supra* note 92 and accompanying text.

104. See *supra* note 70 and accompanying text. *Trumper* explains that broadcasters must be "furnished with" credible and unrefuted evidence before being required to change sponsorship announcements. They have no obligation to seek this information of their own accord. *Trumper Commc'n's of Portland*, 11 F.C.C. Rcd. at 20417.

This is welcome news for broadcasters. Broadcasters remain free to accept lucrative payments for airtime from political groups without having to ask any questions. See, e.g., Joseph Tanfani, *Surge in Midterm Election Campaign Spending a Boon for TV Broadcasters*, L.A. TIMES (Oct. 28, 2014, 5:00 AM), <http://www.latimes.com/business/la-fi-tv-campaign-ads-20141028-story.html#page=1>, archived at <http://perma.cc/V3CL-55TL>. Election years can mean an increase of up to thirty percent in revenues for broadcasters, and the surge in spending has even required some stations to change their sales practices to accommodate the booming demand for airtime. *Id.*

105. *Heated Battle for U.S. Senate Draws Deluge of Outside Group Ads*, *supra* note 80.

because of the sheer amount of political advertising, it is vital that voters know the source of persuasion when they are bombarded by political advertisements on television, the radio, and the Internet. The influence of persuasive and perhaps misleading advertisements aired by special interest groups and wealthy individuals, like Steyer and Fieler, is certain to remain steady and may well grow commensurate with campaign spending by outside sources. Even further, those voters with the least political knowledge, and thus those most vulnerable to political misinformation, are at the greatest risk of being affected by the misleading advertisements. If the FCC persists in refusing enforcement, the onus for creating change lies elsewhere. Broadcasters profit too greatly from political advertisement revenues to initiate change.<sup>106</sup> Congress, too, is unlikely to act.<sup>107</sup> There is little incentive for lawmakers to change the regulations to reveal money from special interest groups in political advertising because the very election of those lawmakers may depend on such contributions.<sup>108</sup> Consequently, only interested third parties, like the complainants in *Loveday*, *Trumper*, and the 2014 complaints, remain to shed light on the hidden sponsors of political advertisements. Relying on these groups for enforcement of the regulations is unlikely to yield results, and any results that do emerge are likely to be inconsistent at best. But it is more likely to yield no result at all, as it did in the 2014 complaints. Ultimately, the result may be a misinformed or misled electorate.

### C. Implications for Special Interest Groups

This is, of course, welcome news for special interest groups and PACs aiming to anonymously persuade voters. A growing amount of attention has turned to the amount of “dark money,” or corporate and special

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106. See Tanfani, *supra* note 104; see also, e.g., Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 77 Fed. Reg. 27,631 (May 11, 2012) (discussing the agency’s 2012 revisions to the political file requirement in the sponsorship identification regulations and repeatedly taking note of the National Association for Broadcasters’ objections to increasing burdens on broadcasters related to political advertisement).

107. See *supra* note 97. The appellate court in *Loveday* suggested that Congressional action was necessary in order for courts to interpret the regulations as requiring broadcasters to investigate beyond assurances from apparent sponsors to determine if a third party is the true sponsor. *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983).

108. In this sense, misidentified donors in political advertisements differ from undisclosed sponsorships in the payola scandal—the only other instance in which Congress has intervened to strengthen sponsorship identification requirements. In the latter, the group most seriously affected by the crackdown or change in law was the record stations and the disc jockeys, not lawmakers. See *supra* Part III.B.

interest funding, that has poured into recent elections.<sup>109</sup> That kind of public attention on the misleading and arguably unethical tactic may bode ill for those special interest groups in the long term, but it seems highly unlikely that the FCC will be instrumental in ending the practice.<sup>110</sup> If any such change is to occur, Congress is the most likely source of reform, just as it was in the payola scandal.<sup>111</sup> Again, the chance of Congressional action seems dim.

#### *D. Implications for the FCC*

Lastly, because of the 2014 decisions, the FCC is likely to see continued complaints by interested third parties seeking to enforce the regulations. The Commission has made clear that it does not require broadcasters to undertake any investigation of their own in satisfying the reasonable diligence requirement.<sup>112</sup> It has left open, however, the possibility that other interested parties may be able to trigger a change in sponsorship announcements by directly presenting evidence to broadcasters that a third party is the true sponsor.<sup>113</sup> Nevertheless, it is unclear when and what kind of evidence must be presented in order to trigger a broadcaster to change a sponsorship announcement, or to trigger the FCC to enforce its regulations.<sup>114</sup> Because the agency has provided minimal guidance, it is likely that similar complaints will continue to be filed by interested parties looking to enforce the regulations.<sup>115</sup> Based on

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109. See Confessore, *supra* note 81.

110. Groups that fall into that category—those looking to covertly persuade the public through political advertisements—may be more common than the average viewer suspects. See, e.g., Kroll, *supra* note 81.

111. In a sense, the media hype surrounding the influx of dark money parallels the media hype in the early 1950s about payola practices. See *supra* Part III.B. In both instances, the maligned practices (payment to disc jockeys and obscuring identities of political donors) are well documented by the press. But in both instances, the FCC enforcement efforts (or lack thereof) do nothing to strengthen or reinforce the regulations. However, unlike the payola scandal, it is not clear that the rising expenditure on political advertising and the role of dark money groups will prompt Congressional investigation and action as payola did in 1960. Moreover, Congress itself has a vested stake in the practices of dark money groups, but this was not the case with payola.

112. See *supra* notes 93–98 and accompanying text.

113. See *supra* note 94 and accompanying text.

114. Despite the insinuation in the 2014 letter, it also remains unclear whether complainants can ever successfully trigger enforcement if they approach the Commission before the broadcasters. See *supra* notes 89–90 and accompanying text.

115. Harry Cole, *Issue-Oriented Spots: Who's the REAL Sponsor?*, COMMLAWBLOG (Sept. 4, 2014), <http://www.commlawblog.com/2014/09/articles/broadcast/issue-oriented-spots-whos-the-real-sponsor/>, archived at <http://perma.cc/73XX-B3PV>; see also Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, 77 Fed. Reg. 27,631

historical precedent, this may prompt greater clarification from the FCC on its own, lead complainants to appeal in civil court, and/or become the source of media attention. If none of the above takes place, both complainants and viewers will remain at a disadvantage.<sup>116</sup>

## VI. CONCLUSION

The area of sponsorship identification law has been developing since 1934, but the FCC has effectively stripped the regulations of all meaning at a time when the service they provide for the public is most crucial. After revisions of the Communications Act and the FCC's regulations in 1963 and 1975, the law left little room for broadcasters to turn a blind eye to advertisement sponsors who sought to air their paid content anonymously. These victories for keeping viewers informed were short lived. Since 1975, the interpretation and enforcement of the regulations by the FCC and federal courts have left broadcasters with minimal duties and viewers with little protection against those “glossy and sometimes wildly misleading ads.”<sup>117</sup> In a sense, the duties of broadcasters have returned to what they were at the time the Radio Act of 1927 was passed: the only guarantee that comes with sponsored political content is that the broadcaster will identify that it is sponsored.

Political campaigns in the twenty-first century are the most expensive in history, and wealthy individuals and special interest groups are among those endeavoring to affect election outcomes. In the realm of political advertisement, that sometimes means expending large sums of money through innocuously-named intermediaries to buy airspace and seek to persuade the public. That tactic has proven effective in persuading voters, and there is ample reason to believe that special interest groups will continue to utilize it. The FCC's interpretation of sponsorship identification laws does little to counteract this purposefully misleading advertising, and the agency's approach to enforcement serves the goals of those seeking to obscure their involvement in campaigning for certain candidates.

If the Commission centered its interpretation on the plain language of the laws and regulations, sponsorship identification would be successful in achieving its purpose. Identifying the true sponsors behind political

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(May 11, 2012) (describing the FCC's discussion of the comments received in relation to the 2012 revisions).

116. See generally Levi, *supra* note 82.

117. Press Release, Michael J. Copps, *supra* note 1.

advertisements would mean providing voters with information about who seeks to persuade them and why. Armed with that information, voters are better able to evaluate the contents of a message, to understand advertisers' agendas, to exercise the option to resist or embrace the persuasive effect of repeated advertising, and to consider the truthfulness or validity of negative attack advertisements. But the FCC has not based its interpretation on the plain language of the law, and it has instead chosen to gut the law of all meaning. This choice defeats the very purpose of sponsorship identification law, and it only ensures a higher likelihood that voters arrive at the ballot box misinformed.

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\* J.D. (2016), Washington University School of Law; B.S. (2012), Northwestern University. I thank my colleagues on the *Washington University Law Review*, particularly Steve Alagna, Gursharon Shergill, Galen Spielman, and Kam Ammari, for their insight and enthusiasm in editing this Note. I also thank my parents for—among countless other things—their unwavering support and encouragement.