NAB SUBMISSIONS TO ICASA ON THE DRAFT REGULATIONS AND CODE OF ADVERTISING PRACTICE SETTING OUT THE STANDARDS, PRACTICE AND PROHIBITIONS IN ADVERTISING, SPONSORSHIPS AND FORMS OF COMMERCIAL PROMOTION BY RADIO AND TELEVISION BROADCASTING SERVICE LICENCEES

03 APRIL 2009
1. INTRODUCTION

1.1. On 13 February 2009, the Authority published in notice number 172 of 2009, government gazette number 31903 (the notice), a notice of its intention to make regulations and Code of Advertising Practice setting out the standards, practice and prohibitions in advertising, sponsorships and other forms of commercial prohibition by radio and television broadcasting service licencees (the draft regulations).

1.2. The draft regulations are made in terms of section 4 read with section 55(1)(2)(3) and section 95 of the Electronic Communications Act 36 of 2005 (the EC Act). The draft regulations are open for public comment, and the closing date for the submission of written representations is 3 April 2009.

1.3. The National Association of Broadcasters (the NAB) thanks the Authority for the opportunity to make its written submission on the draft regulations. The NAB would like to be given the opportunity to make further representations and participate in oral hearings called by the authority in respect of the draft regulations.

1.4. The NAB is the leading representative of South Africa's broadcasting industry. It aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB members include:

1.4.1. the three television channels and eighteen radio stations of the public broadcaster, the South African Broadcasting Corporation (the SABC);

1.4.2. all the licensed commercial broadcasters in both radio and television;

1.4.3. both the common carrier and the selective and preferential carrier licensed signal distributors; and

1.4.4. over thirty community radio services and a single community television service.

2. THE PROVISIONS OF THE EC ACT

2.1. The notice stipulates that the draft regulations are promulgated in terms of section 4 read with section 55(1)(2)(3) and section 95 of the Electronic Communications Act 34 of 2005 (the EC Act). In this section the NAB will scrutinise the cited sections of the EC Act.
2.2. Section 95 of the EC Act

2.2.1. Section 95 of the EC Act stipulates as follows:

“Within twenty-four months of the coming into force of this Act, the Authority may, if the Authority considers it necessary, repeal or amend the regulations made under-

Section 119A of the Postal Office Act 1958
(a) The Telecommunications Act
(b) The IBA Act
(c) The Radio Act 1952
(d) The Sentech Act

Which were in force immediately prior to the commencement of this Act.

2.2.2. In 1999, the Authority published in government gazette 19922 the Independent Broadcasting Authority Advertising Infomercials and Programme Sponsorship in respect of Broadcasting Activities Regulations 1999 (the 1999 regulations). These regulations were published, in terms of section 78(1) of the Independent Broadcasting Authority Act 153 of 1993, (the IBA Act).

2.2.3. Section 95 of the EC Act gives the Authority the discretion to amend or repeal existing regulations if the Authority considers it necessary to do so. In this process, the Authority is seeking to amend the 1999 regulations. Prior to doing so, the Authority ought to apply its mind and establish a need for the existing regulations to be amended. In our view, the 1999 regulations are workable, and require little, if no amending at all.

2.2.4. The draft regulations that seek to repeal the 1999 regulations are referred to as the draft regulations and code of Advertising Practice setting out the standards, practice and prohibitions in advertising, sponsorships and other forms of commercial promotion by radio and television broadcasting service licencees.
2.2.5. However, the NAB perceives the current process as problematic, and not amounting to an amendment as contemplated in section 95 of the EC Act. In the current process, the Authority is not only seeking to amend the 1999 regulations, but is in addition introducing a code. The title of the draft regulations deviates substantially from the title of the 1999 regulation. In addition, as opposed to the 1999 regulations, the scope of the draft regulations has been increased, to cover “other forms of commercial promotion by radio and television broadcasting licencees”

2.2.6. The inclusion of “other forms of commercial promotions by radio and television broadcasting licencees”, in the title of the draft regulations is problematic, as it is open-ended, and unduly widens the Authority’s powers to areas outside the Authority’s mandate. As such the NAB recommends that the phrase be deleted from the title of the draft regulations.

2.2.7. Consequently, the NAB is of the view that the current process does not conform to the provisions of section 95 of the EC Act, as it amounts to an introduction of a code, rather than an amendment of existing regulations.

2.3. Section 55 of the EC Act

2.3.1. Section 55 of the EC Act stipulates as follows:

(1) all broadcasting service licencees must adhere to the Code of Advertising Practice...as from time to time determined and administered by the Advertising Standards Authority of South Africa (ASASA) [our emphasis].

(2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licencees who are not members of the ASASA [our emphasis], in accordance with section 17C of the ICASA Act.

(3) Where a broadcasting licencee, irrespective of whether or not he or she is a member of the said ASASA, is found to have breached
the Code, such broadcasting licencee must be dealt with in accordance with the applicable provisions of the ICASA Act.

2.3.1.1 Section 55(1)

2.3.1.1.1 The EC Act recognises the existence of the Advertising Standards Authority of South Africa (ASA). ASA is a self-regulatory, independent body set up and funded by the marketing communication industry. The ASA aims at ensuring that its self-regulatory systems work in the public interest\(^1\). Being an independent body, the ASA should operate free from interference of any body, including government.

2.3.1.1.2 The ASA has jurisdiction over advertising practices. The ASA administers a code of conduct for Advertising (the ASA code), and regulates the advertising industry. In addition, ASA has disciplinary mechanisms in place set out by the ASA code. All of the NAB members are members of ASA, hence they fall under the jurisdiction of ASA. Inevitably section 55(1) requires all broadcasting licensees to adhere to the ASA code regardless of their membership and affiliation, as a result, hence everyone falls under the jurisdiction of the ASA Code.

2.3.1.1.3 Furthermore, the provisions of section 55 of the EC Act do not envisage the existence of any other code apart from the ASA code, nor does it, in its provisions, direct the Authority to formulate regulations or code in respect of advertising practices. Instead, the EC Act enjoins all broadcasting licensees to adhere to the ASA code.

2.3.1.1.4 Consequently, by attempting to promulgate a code for advertising practices, the Authority is encroaching on the

\(^1\) The Advertising Standards Authority Code of Advertising Practice 2008, at page xvii
jurisdiction of the ASA, and is as a result acting *ultra vires* its powers.

2.3.1.5 Broadcasting service licencees have internal policies aimed at ensuring that advertisements with content inappropriate to children, or not aimed at children is scheduled responsibly on times when children are not viewing. In addition, these policies outline censoring procedures to be followed on advertisements. If an advert is found to be problematic, and in violation of the ASA codes, it is referred back to the advertising agency and/or the ASA for changes, to align it to the acceptable standards set by the ASA code. Consequently, broadcasting service licencees cannot unilaterally change advertising content as they hold no rights to that content.

### 2.3.2 Section 55 (2) (3)

2.3.2.1 The NAB welcomes the provisions of section 55(2) and (3), to the extent that they conform to the object of the EC Act. However, the NAB is of the view that these provisions have a potential of yielding undesired consequences if applied literally.

2.3.2.2 As already stated, the ASA has its own disciplinary mechanisms in place which have proved to be effective over the years. As a result by empowering the Complaints and Compliance Committee (CCC) to adjudicate on complaints concerning the breach of the ASA Codes, the CCC will be encroaching on the jurisdiction of ASA. In our view the provisions of section 55(2)(3). They create double jeopardy on broadcasting service licencees, as broadcasting licencees will be tried twice for the same infringement.
2.3.3 Section 4 of the EC Act

2.3.3.1 Having looked into the provisions of section 55, the question to be asked is whether ICASA has the power to make regulations on advertising practices in terms of section 4 of the EC Act.

2.3.3.2 Section 4 of the EC Act empowers the Authority to make regulations with regard to any matter which in terms of the EC Act or related legislation must or may be prescribed governed or determined by regulation.

2.3.3.3 In our opinion ICASA’s attempt to promulgate a code in respect of advertising practices is not within the scope set by section 4 of the EC Act. The ASA already has a code in place which regulates advertising practices and is recognized by the EC Act.

2.3.3.4 ICASA has no jurisdiction to regulate on issues pertaining to advertising practices, as by so doing, the Authority would be acting *ultra-vires* its powers. Similarly, the Authority’s jurisdiction does not extend to marketers and advertising agencies that hold the creative rights and copyright to advertising content. The draft Code seeks to transfer those rights to broadcasting services and hold broadcasting services responsible for advertising content. Not only is this outside of the jurisdiction of the Authority but also impedes the rights of marketers and agencies. Copyright and ownership of advertisements is the property of marketers and agencies involved, and broadcasters cannot be held accountable or be required to effectively censor advertising.

2.3.3.5 Section 4 of the EC Act gives the Authority the discretion on whether to formulate regulations or not. This is evident from the use of the word *may* in the section. In our view,
the 1999 Regulations are sufficient in their current form, and do not need to be augmented by a code, which the Authority is seeking to introduce in this process.

3. COMMENT ON THE PROVISIONS OF THE DRAFT REGULATIONS

3.1 ANNEXURE A

3.1.1 Application

3.1.1.1 The NAB is concerned about the provisions of regulation 3 of the draft regulations, which outline the application of the draft regulations. In terms of regulation 3, the draft regulations apply to all broadcasting service licencees who provide a television and sound broadcasting service. In this regard, the scope of the draft regulations has been increased to apply with uniformity to all broadcasting licencees, without taking into account the disparities that exist between television and radio broadcasting services, and the different circumstances they operate under.

3.1.1.2 The NAB is opposed to this inclusion, and recommends that the provisions of regulation 2 outlining the application of the 1999 regulations be applicable in this instance. To this end, the provisions of regulation 2 of the 1999 regulations provide as follows:

“These regulations are binding on every broadcaster who provides a television broadcasting service and, to the extent that they are applicable, taking into account the nature of sound broadcasting service and the nature of the obligations imposed by these regulations, on every broadcaster who provides a sound broadcasting service”

The provisions of regulation 2, of the 1999 regulations take into account the disparities that exist between television and sound broadcasting services. The regulation does not provide a blanket application of the regulations on

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2 Page 54 of the 1999 Regulations
both television and sound broadcasting services. In our view this approach is workable, and should be adopted in the draft regulations.

3.2 Placement and duration of advertisements

3.2.1 Draft regulation 5 (1)

3.2.1.1 The provisions of draft regulation 5 were not included in the 1999 regulations, as they formed part of the licence conditions of licencees, and were only applicable to television broadcasting service licencees. However, draft regulation 5(1) has turned out to be more onerous on broadcasting licencees than previously, as it applies to all broadcasting licencees.

3.2.1.2 The NAB submits that scheduling, programming and allocation of advertising slots in television broadcasting services is not the same as in sound broadcasting services. As a result, by imposing similar limitations on both television and sound broadcasting services will result undesired consequences.

3.2.1.3 The NAB reiterates the submission it made earlier that the Authority should differentiate between television and sound broadcasting licencees when imposing obligations.

3.3 Draft regulation 5(2), 5(3), 5(4) and 5(5)

3.3.1 Taking into account the submission made under draft regulation 5(1) above, the NAB views the provisions of draft regulations 5(3),5(4) and 5(5) as repetitious, and should as a result be deleted from the draft regulations, as draft regulation 5(1) and 5(2) adequately captures the issues.

3.4 Draft regulation 5(6), 5(9) and 5(10)

3.4.1 These regulations aim to prescribe to broadcasting service licencees the number of advertising interruptions per scheduled programme, depending
on the length and nature of the programme.

3.4.2 The NAB submits that these regulations are too prescriptive as they will interfere with the programming and scheduling practices of broadcasting services. It is the NAB’s view that these regulations will amount to interference in the commercial activities and independence of broadcasting services. They will, furthermore, not allow broadcasting services any flexibility in scheduling, neither will they allow broadcasting services to make any changes should viewers or listeners show low tolerance for the Authority’s prescribed scheduling of advertising.

3.4.3 The NAB submits that draft regulation 5(2) read in conjunction with draft regulation 6(1)(b) provides broadcasting services with set limits on the amount of advertising that is allowed, as well clear requirements as to when such advertising should be scheduled.

3.4.4 The NAB therefore urges the Authority to remove draft regulations 5(6), 5(8) and 5(10) as they are too prescriptive and allows no flexibility in scheduling. The NAB views draft regulations 5(2) and 6(1)(b) as sufficient to meet the Authority’s requirements.

3.5 Identification of advertisements

3.5.1 The provision of draft regulation 6(1)(a) are problematic. The provisions of this draft regulation seem to limit interruptions by advertising blocks to sports programmes or the coverage of events.

3.5.2 This therefore seems to imply that other programmes may not be interrupted by advertising at all, and this is viewed as being prescriptive. Furthermore, this seems to contradict the provisions of regulation 6(1)(b) which allows for advertising interruptions during natural breaks in all programming.

3.5.3 The NAB suggests that the Authority clarifies this contradiction and remove the prescriptive stipulations of draft regulation 9(1) (a).
3.6 Programme sponsorship

3.6.1 Draft regulation 9(1) of the draft regulations requires broadcasters to furnish the Authority with copies of sponsorship contracts concluded by broadcasters.

3.6.2 The NAB is of the view that this provision should be removed from the draft regulations, as it amounts to undue interference in the commercial activities of licencees, and is in contravention with the objects of the EC Act\(^3\).

3.7 ANNEXURE B

3.7.1 In terms of section 3 of the Notice, the Authority intends submitting annexure B of the draft regulations to ASA for inclusion in the ASA code of Advertising. Annexure B is intended to form a supplementary code, which ASA will administer on behalf of ICASA. As stated in the preceding sections of this submission, promulgating two codes side by side will be prejudicial and create confusion on the industry as a whole. Furthermore, the Authority has no jurisdiction over advertising practices, and will therefore be acting *ultra vires* its powers by so doing.

3.7.2 It would seem that a great number of the provisions of annexure B are a duplicate of the existing provisions of the ASA code, while other provisions in the annexure, are pending amendments to be made by the ASA on its codes. This however does not give the Authority the power to enforce its own code.

3.7.3 In terms of the ASA code, stakeholders and interested parties are welcome to suggest or recommend amendments to the ASA Code. The incorporation of these amendments into the ASA code is within the exclusive jurisdiction of the ASA, and is done in accordance with the provisions of the ASA code.

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\(^3\) Section 2(y) of the EC Act.
3.7.4 The NAB recommends that in view of the fact that the Authority sees a need to regulate advertising content; the Authority should use these avenues available to suggest amendments to the ASA Code. We also suggest that the Authority work closely with the ASA in ensuring that the interests of the broadcasting industry are catered for.

3.7.5 The NAB submits that this will also assist in creating a synergy and reaching a common understanding of the application of section 55(2) and (3) of the EC Act.

4 CONCLUSION

4.1 In conclusion, the NAB would like to make the points following to the attention of ICASA:

4.1.1 The current process does not conform to the provision of section 95 of the EC Act as it does not constitute an amendment of existing regulations, but amounts to the introduction of a code.

4.1.2 The Authority does not have jurisdiction to regulate over advertising practices, therefore lacks the power to promulgate a code for advertising. As such the power conferred by section 4 of the EC Act on the Authority to make regulations where it deems necessary does not extend to advertising practices. As such, the Authority should utilize the already available avenues set by the ASA code to protect the interest of the broadcasting industry.

4.1.3 The ASA has the sole jurisdiction to regulate over advertising practices, and administer a code for advertising practices. Similarly, the ASA solely has the role of adjudicating complaints alleged breaches of the ASA code.

4.2 The NAB thanks the Authority for making its written submission, and believe the submissions made will add value to this process.