CONSUMER SPEECH AND THE CONSTITUTIONAL LIMITS OF FTC REGULATIONS OF "NEW MEDIA"

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I. INTRODUCTION

As an increasingly essential and pervasive instrument of both communication and commerce, the internet naturally functions as a valuable vehicle for innovative advertising

and marketing. Accordingly, the Federal Trade Commission, interested in ensuring that consumer protections against unfair and deceptive commercial practices extend to activities on the internet,[1] updated its Guides Concerning the Use of Endorsements and Testimonials in Advertising in December 2009 to adapt to innovative uses of the internet for marketing and advertising purposes.[2]

Compliance with the amended Endorsement Guidelines requires that endorsements of goods or services communicated through weblogs ("blogs"),[3] online message boards,[4] and other online social media,[5] such as websites like Facebook and Twitter, include a disclosure of "material" relationships between the endorser and the producer, if any exist.[6] The amendments resolve any uncertainty regarding the FTC's intended application of the Endorsement Guidelines to online communications, which may have arisen from the fact that the FTC generally does not consider the guidelines applicable to reviews made through "traditional media."[7] The FTC acknowledges that its policy disparately

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[1] *See* Federal Trade Commission Act, 15 U.S.C. § 45 (2010).

[2] *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2009) [hereinafter "Endorsement Guidelines"]; 74 Fed. Reg. 53,124 (Oct. 15, 2009).

[3] 16 C.F.R. § 255.5, Example 7 (2009).

[4] 16 C.F.R. § 255.5, Example 8 (2009).

[5] 16 C.F.R. § 255.5, Example 3 (2009).

[6] 16 C.F.R. § 255.5 (2009). The FTC also amended other provisions of the Endorsement Guidelines. *See* § 255.0–4. Perhaps most significant of these were its amendments to provisions regulating consumer testimonials in advertisements. *See* § 255.2; Eric S. Nguyen, *Weight Loss Testimonials: A Critique of Potential FTC Restrictions on Diet Advertising*, 63 FOOD & DRUG L.J. 493, 494 (2008) (arguing that the amendments to the provisions covering consumer testimonials in advertisements are unconstitutionally overbroad).

[7] 74 Fed. Reg. 53, 124, 136 (Oct. 15, 2009).

treats endorsements conveyed through traditional and new media.[8]

The new regulations have spawned considerable debate in both journalistic and blogging circles as to their propriety and legality.[9] Unsurprisingly, the reaction from bloggers and other users of online communicative fora has been, unsurprisingly, mostly negative.[10] To mitigate the discord, the FTC has since insisted that, although the regulations have broad application, the FTC's enforcement efforts will be narrow.[11] The agency will not focus on each of the millions of personal blogs, Twitter feeds, and Facebook profiles in existence.[12] Uncomforted by the agency's assurances, Professor Ann Althouse has countered, "No, no, no.

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[8] *Id.*

[9] *Compare* Editorial, *Truth in Advertising, Offline or Online*, N.Y. TIMES, Oct. 12, 2009 (finding the revisions reasonable), *and* David Coursey, *Yes, Even You May Be Covered by the FTC's "Paid Endorser" Rule*, PC WORLD, Oct. 06, 2009, http://www.pcworld.com/businesscenter/article/173175/yes_even_you_may_be_covered_by_ftc_%20paid_endorser_rule.html?loomia_ow=t0:s0:a38:g26:r1:c0.000480:b28135130:z0 (arguing that the Endorsement Guidelines are appropriate, though insufficient to protect consumers), *with* Gordon Crovitz, *Bloggers Mugged by Regulators*, WALL ST. J., Dec. 2, 2009 (concluding that such "analog-era regulations" are unsuitable for application to the internet), Jack Shafer, *The FTC's Mad Power Grab*, SLATE, Oct. 7, 2009, http://www.slate.com/id/2231808/pagenum/all/ (regarding the FTC's efforts as "preposterous"), Markos Moulitsas, *FTC Idiocy*, DAILY KOS (Oct. 13, 2009, 5:30:09 PM) (believing "stupidity" underlies the FTC's revisions of the guidelines), *and* Walter Olson, *Breadth of FTC Blogger Regs*, OVERLAWYERED (Oct. 13, 2009), http://overlawyered.com/2009/10/breadth-of-ftc-blogger-regs/ (lambasting the FTC and arguing that the regulation has such pernicious aspects as "overbreadth, *de minimis* triviality, chilling effects [on speech], [and] selective enforcement").

[10] Jonathan H. Adler, *Who Sent You That Book? Did You Pay for It?*, THE VOLOKH CONSPIRACY (Oct. 8, 2009, 4:40 PM), http://volokh.com/2009/10/08/who-sent-you-that-book-did-you-pay-for-it/.

[11] *See* Caroline McCarthy, *Yes, New FTC Guidelines Extend to Facebook Fan Pages*, CNET NEWS (Oct. 5, 2009, 4:51 PM), http://news.cnet.com/8301-13577_3-10368064-36.html.

[12] *Id.*

Overbreath *itself* is a problem. And *so is selective enforcement.*"[13]

This Note argues that while the Endorsement Guidelines address a compelling state interest in protecting consumers by limiting deceptive speech in the marketplace, the revisions will unconstitutionally chill protected speech. Nevertheless, a modest narrowing of the regulation's scope could legally effectuate much of the FTC's desirable objective. Part II of this Note discusses Section 255.5's requirement that endorsements include disclosures of various blogger-producer relationships.[14] Part III considers the first issue of the constitutional analysis: whether the "commercial speech" doctrine or standard First Amendment principles apply. The section illustrates various applications of the Endorsement Guidelines to both commercial and noncommercial speech in order to demonstrate the contours of the regulation and the inapplicability of the commercial speech doctrine to this analysis. Part IV evaluates the regulation under a strict scrutiny analysis. Because the regulation attaches a disclosure requirement to noncommercial speech, the proper standard of review of the regulation is strict scrutiny. It argues that the Endorsement Guidelines fail strict scrutiny analysis because they will chill protected speech and because their simultaneous overbreadth and underinclusiveness render them insufficiently tailored to the government's interest. Finally, Part V proposes an alternative rule that would allow the FTC to target much of the material it finds objectionable without impermissibly burdening protected speech.

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[13] Ann Althouse, *The FTC Going After Bloggers and Social Media*, ALTHOUSE (Oct. 6, 2009, 8:46AM), http://althouse.blogspot.com/2009/10/ftc-going-after-bloggers-and-social.html.

[14] This Note uses the term "blogger" to refer to an individual who conveys a message through any of the internet's myriad communicative fora, including, but not limited to, blogs, message boards, and social networking sites.

II. BACKGROUND

The Federal Trade Commission ("FTC") Act empowers the FTC to enforce laws proscribing unfair and deceptive methods of trade.[15] The Endorsement Guidelines constitute an administrative interpretation of the laws the agency is charged with enforcing.[16] The principal changes relevant to this Note are the addition of four examples[17] and the revision of one,[18] which together demonstrate the FTC's intention to apply the Endorsement Guidelines to online communications. The text of the Endorsement Guidelines otherwise remains largely unchanged from the 1980 edition.[19] The remedies available to the FTC for violations of the regulation include fines of up to $16,000.[20]

The Endorsement Guidelines require that in any endorsement in which "there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.... clearly and conspicuously."[21] The Endorsement Guidelines define an endorsement as "any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser."[22] In evaluating an endorsement's risk of

[15] 15 U.S.C. § 45 (2006).

[16] 16 C.F.R § 255.0 (2009).

[17] Endorsement Guidelines, 74 Fed. Reg. 53,124,135 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255) (adding examples 7–9 to Section 255.5); *id.* at 136 (adding example 8 to Section 255.0).

[18] *Id.* at 137 (revising example 3 of Section 255.5 by including a new hypothetical scenario).

[19] *See id.* at 53, 136–37 (enumerating the amendments made to each section of the Endorsement Guidelines).

[20] Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98 (2009).

[21] 16 C.F.R § 255.5 (2009).

[22] 16 C.F.R § 255.0 (2009).

deception, the FTC examines the speech from the perspective of the reasonable consumer.[23]

Both the endorser and the producer of the endorsed product may be liable under the Endorsement Guidelines for missing or inadequate disclosure of information that might affect the credence an individual gives to an endorsement.[24] The regulation places a duty on the producer to take affirmative steps to ensure that a possible endorser complies with the regulation.[25] Such steps might include advising a potential endorser of his disclosure obligations[26] or monitoring a possible endorser's statements.[27] Both the endorsing blogger and the producer may be liable for the endorser's failure to adequately disclose a material relationship even if the producer has no control over the content of any endorsement or the existence of an endorsement in the first place.[28]

The determinations of whether given speech is an endorsement and whether a producer-endorser relationship is one that might materially affect the weight of an endorsement will be made on a case-by-case basis.[29] Although these are technically two distinct inquiries, the determination that an endorsement exists generally will compel the conclusion that material connections between the producer and the endorser exist and must be disclosed.[30] The FTC has indicated that it will be guided by the question of whether the speech appears "sponsored" by the producer,[31]

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[23] FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

[24] 16 C.F.R. § 255.1(d) (2009); *see also* § 255.5.

[25] Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124,135 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

[26] *Id.*

[27] *Id.* at 135–36.

[28] *Id.* at 134.

[29] *Id.*

[30] *Id.*

[31] *Id.*

and that it will consider various factors in determining whether disclosure is required, including, but not limited to, the following:

> whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received.[32]

The FTC emphasizes that it is particularly concerned about situations in which a blogger receives free products from one or more producers on multiple occasions, although the receipt of a single item of substantial value may also constitute a material relationship.[33]

Liability for failure to comply with Section 255.5 "may depend on the particular medium used to disseminate that endorsement."[34] Specifically, the amendments indicate that Section 255.5 will apply to consumer speech in blogs,[35] internet message boards,[36] and other online social media.[37] However, the FTC does not consider reviews of goods or services "published in traditional media," such as by an employee of a "newspaper, magazine, or television or radio station" to constitute endorsements for the purposes of the regulation.[38]

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[32] *Id.* at 53, 126.

[33] *Id.* at 53, 134.

[34] *Id.* at 53, 137.

[35] 16 C.F.R. § 255.5, Example 7 (2009).

[36] 16 C.F.R. § 255.5, Example 8 (2009).

[37] 16 C.F.R. § 255.5, Example 3 (2009).

[38] *Id.*

Although the Endorsement Guidelines have broad application, the FTC insists that its enforcement efforts will be very narrow.[39]

III. APPLICATIONS OF ENDORSEMENT GUIDELINES TO SPEECH

Central to this Note's analysis, though not necessarily imperative to this its conclusion,[40] is the fact that the Endorsement Guidelines burden both commercial and noncommercial speech. Because of their burden on noncommercial speech, the regulations are constitutional only if they withstand the rigors of strict scrutiny analysis.[41] This section demonstrates that the regulation burdens noncommercial speech in addition to its commercial target. Subsection A explains the Supreme Court's definition of commercial speech and how the Court determines when the more deferential commercial speech doctrine applies. Subsection B discusses the new and revised Examples provided under the Endorsement Guidelines and identifies when the types of speech implicated are commercial or noncommercial. In order to help further shape the contours of the Endorsement Guidelines, Subsection C examines additional, plausible applications of the Endorsement Guidelines to commercial and noncommercial forms of speech beyond those proffered by the FTC's new and revised Examples.

A. Defining "Commercial Speech"

The Supreme Court's opinions have provided a less-than-precise guide for classifying speech as either commercial or

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[39] *See* Caroline McCarthy, *Yes, New FTC Guidelines Extend to Facebook Fan Pages*, CNET NEWS (Oct. 5, 2009, 4:51 PM), http://news.cnet.com/8301-13577_3-10368064-36.html.

[40] Even purely commercial speech receives meaningful constitutional protection. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 588–89 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 761–62 (1976).

[41] *See infra* Part IV.

noncommercial.[42] The Court has even declared that the distinction may be one of mere intuition.[43]

The Court first attempted a definition of commercial speech in *Virginia Board*.[44] In striking down a Virginia ban on the advertisement of prices by pharmacists, the Court, in *Virginia Board*, defined commercial speech as speech that "does no more than propose a commercial transaction."[45] In so doing, the Court affirmed that commercial speech does not necessarily include speech that costs money to produce, whose production is solely motivated by a profit interest, or which involves a solicitation to purchase or otherwise to pay or contribute money.[46] However, it concluded that the speech before it, pure price advertising, constituted commercial speech.[47]

Subsequently, in *Central Hudson*, the Court articulated a seemingly broader definition of commercial speech: "expression related solely to the economic interests of the speaker and its audience."[48] Such a definition seems plainly overinclusive, though.[49] For example, speech by workers regarding a labor dispute almost certainly would fall within

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[42] *See* Jonathan Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, CATO INST. POL'Y ANALYSIS No. 161 (1991) (offering examples of speech that could plausibly be characterized as either commercial or noncommercial); Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1117–22 (1991) (advocating repeal of the current commercial/noncommercial analysis and substituting for it a framework that principally considers the impact of a regulation on speech and the regulation's policy rationales).

[43] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978) (stressing that the difference is one of "common-sense").

[44] *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

[45] *Id.*

[46] *Id.* at 761.

[47] *Id.* at 760–61.

[48] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[49] *Id.* at 580 (Stevens, J., concurring) ("[T]he Court's . . . definition of commercial speech is unquestionably too broad.").

this definition, but this is a fully protected form of speech.[50] Moreover, to the extent that consumer welfare is considered an "economic interest," much speech that could be defined as "consumer speech" would fall within this definition as well.[51]

The Court revisited its formulation of the definition of commercial speech in *Bolger v. Youngs Drug Products Corp.*[52] There, the Court invalidated a statute that proscribed the mailing of unsolicited advertisements for contraceptives.[53] A manufacturer of contraceptives prepared and sought to distribute two "informational pamphlets" addressing issues such as venereal disease, sexual reproduction, and family planning.[54] One brochure discussed the manufacturer's products specifically, while another emphasized the merits of condoms generally, a good in whose sales the manufacturer enjoyed a substantial market power.[55] The Court classified the materials as commercial speech, stating that:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. The combination of *all* these characteristics, however, provides strong support for

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[50] *See, e.g.*, Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 336 (1968).

[51] Although one may characterize consumer welfare as not a strictly financial interest, and therefore arguably not an "economic" one, economists generally equate the value of consumer utility—the satisfaction consumers derive from consuming various goods or services—with the purely pecuniary measurement of a producer's profits. *See, e.g.*, DON E. WALDMAN & ELIZABETH J. JENSEN, INDUSTRIAL ORGANIZATION: THEORY AND PRACTICE 34 (3d ed. 2001).

[52] 463 U.S. 60 (1983).

[53] *Id.* at 75.

[54] *Id.* at 67–68.

[55] *Id.* at 67 n.13.

> the . . . conclusion that the informational pamphlets are properly characterized as commercial speech.[56]

The Court indicated that if the manufacturer desired to comment directly on important issues such as venereal disease and safety, it could do so with "the full panoply of protections available [to it]" in a separate communication.[57] It could not, however, augment the First Amendment security of its commercial speech by juxtaposing it with otherwise noncommercial speech where the circumstances did not require their coincidence.[58]

Given the analysis in *Bolger* and the Court's designation of speech as fully protected in other circumstances where the speech was likely compelled by a naked self-interest in profit maximization,[59] the narrower articulation in *Virginia Board* appears to be the actual definition of commerciality that guides.[60]

Furthermore, where a message must necessarily contain both commercial and noncommercial elements, the communication receives the same constitutional protection as purely noncommercial expressions.[61] In *Riley*, the Court

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[56] *Id.* at 66–67 (emphasis in original).

[57] *Id.* at 68.

[58] *Id.*; *accord* Bd. of Tr. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 474 (1989) (refusing to characterize promotional speeches at a "Tupperware party" as noncommercial merely because the promotional speeches also included information regarding home economics, the inclusion of which "[n]o law of man or of nature" required for the sale of Tupperware); *cf.* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781 (1988) ([W]here . . . the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase.).

[59] *See generally* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (holding unconstitutional certain restrictions on individual corporate expenditures in political campaigns); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (invalidating a statute that disallowed corporations from making expenditures to advocate against the adoption of a progressive individual income tax); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

[60] KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 912 (16th ed. 2007).

[61] *Riley*, 487 U.S. at 786.

defined solicitations for charitable contributions by professional fundraisers as noncommercial speech because the nature of a professional fundraiser's solicitation, though potentially "purely commercial" at times, may also be "inextricably intertwined with otherwise fully protected speech."[62] Unlike the speech at issue in *Bolger* and *Fox*, where, as here, a speaker cannot dissociate "the component parts of a single speech . . . applying one test to one phrase and another test to another phrase," the Court examines the speech under principles applicable to fully protected speech.[63]

Lastly, *N.Y. Times v. Sullivan* demonstrates that otherwise protected noncommercial speech does not lose its protections or noncommercial character merely because it was produced in the form of a paid advertisement.[64] Accordingly, a consumer's endorsement of a good or service that takes a noncommercial form is not rendered commercial speech purely by virtue of material connections the endorser may have with the producer.

B. Applications in the Endorsement Guidelines

The FTC observes that it could reasonably apply Section 255.5 to define a range of combinations of relationships and speech that would trigger the disclosure requirement.[65] Accordingly, the FTC has appended Examples to Sections 255.5 and 255.0 (relating to what constitutes an "endorsement") to clarify at least some of the circumstances in which the Endorsement Guidelines demand disclosure of a producer-blogger relationship in a consumer's endorsement. The following Examples provided by the FTC demonstrate

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[62] *Id.* at 796.

[63] *Id.*

[64] N.Y. Times v. Sullivan, 376 U.S. 254, 266 (1964).

[65] *See* 73 Fed. Reg. 53, 124, 126 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255) (noting that much gray area exists, in which presumably the Endorsement Guidelines could be reasonably interpreted as requiring disclosure, between the two ends of the spectrum of the consumer who merely praises a product purchased with his own money and the consumer who is paid specifically to review a product favorably).

that the regulations apply to both commercial and noncommercial speech.

1. Financially Motivated Endorsers

In one scenario,[66] a professional tennis player has successful laser eye surgery, which improves her athletic performance. The tennis player enters a contractual agreement with the health clinic, under which the clinic compensates her for speaking publicly about her surgery. On a social networking website through which the athlete communicates with her fans, she lauds the results of her surgery, mentioning the clinic by name. Since consumers might not know or realize that the health clinic compensates her for the explicit purpose of promoting its product, and since such knowledge might affect the weight of her endorsement, her contractual relationship with the clinic must be disclosed.[67]

The tennis player's endorsement in this example would likely be categorized as commercial speech. All three considerations motivating the Court's holding in *Bolger* appear to be present, lending "strong support" to the conclusion that the speech is commercial.

2. Independent Reviewers

In another example,[68] a college student renowned for his expertise in video games maintains a personal blog in which he discusses his gaming experiences. The blog is a popular online destination for consumers who seek his opinions regarding software and hardware. A manufacturer of video game systems sends the student a free copy of its latest system and requests that he write about the system in his blog. After evaluating the system, the student writes a favorable review in his blog. Under the Endorsement Guidelines, the student's review constitutes an endorsement,

[66] 16 C.F.R. § 255.5, Example 3 (2009).

[67] *Id.*

[68] 16 C.F.R. § 255.5, Example 7 (2009).

and his relationship to the manufacturer was material because consumers who knew that the student received the system for free might alter the credibility they afforded his judgment. Accordingly, the student must disclose that he received the system for free, and that the producer requested that he comment on the product in his blog.[69] Furthermore, the manufacturer should advise the student of his disclosure obligations and monitor the student's communications to ensure compliance with the Endorsement Guidelines.[70]

Whether the gamer's review amounts to commercial speech turns on both the nature of his review and the varying weights of his incentives. A simple recommendation by the gamer to his readers that they buy the manufacturer's product, without more, presumably constitutes commercial speech, as it does no more than propose a commercial transaction. However, an exhaustive review of the product, which creates a favorable impression of the system overall, or which concludes that readers should purchase the system, does much more than merely propose a transaction to the blogger's readers, such that it would amount to noncommercial speech. A thorough review reduces costly market uncertainty by providing valuable information about the product's characteristics, which different consumers presumably value differently.[71] Moreover, even though the gamer's recommendation that readers purchase the product could amount to commercial speech in isolation, given that it is customary that reviews of products intertwine both objective and subjective assessments of the product, the

[69] *Id.*

[70] *Id.*

[71] Suppose the blog entry was highly favorable toward the graphics of video games played on the system and merely favorable toward the speed with which the system processed information and performed users' commands. If one consumer valued the speed of gameplay substantially more than the game's visual effects, the impact of the otherwise favorable endorsement might, in fact, be negative or neutral to that consumer. Thus, the value of this "favorable" endorsement—favorable from a neutral, indifferent baseline—may lie more in the information conveyed than in the gamer's seal of approval.

entire review would likely be treated as noncommercial speech, as was the case with the solicitations in *Riley*.

Additionally, irrespective of content, if the gamer lacks an economic incentive to offer a favorable review of the product, the review will be noncommercial speech.[72] On the one hand, the gamer has received something of value from the manufacturer. He might anticipate that a positive review of the product, honest or not, will increase the probability that the manufacturer will send him future goods, as doing so may cause the manufacturer to believe that the gamer is relatively favorably disposed to its products. Nevertheless, the reviewer is not obligated to provide a favorable review or even to review the product at all. Indeed, a dishonest review jeopardizes the gamer's credibility, reputation, readership, and perhaps personal satisfaction from his hobby or business of providing information to consumers of technology products.[73] At best, then, the gamer's incentives are unclear. However, the long-term effect of propounding dishonest reviews, if detected or sensed, would be to erode the gamer's honest reputation—the very asset that elicited the free trial products in the first place.

3. Employee Endorsements

A third example involves an employee of a company that manufactures handheld devices that play digital music ("mp3 players").[74] The employee frequents an online message board on which individuals discuss mp3 players and

[72] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

[73] The greater and more valuable to the reviewer each of these competing values is, the less likely he will be to write a dishonestly favorable review of the producer's goods. Indeed, to the extent he would be motivated by the receipt of free trial products, the gamer would presumably recognize that his name had achieved such renown that he attracted free products without amounting to dishonesty. Moreover, dishonest reviews that undermine the gamer's credibility and readership will decrease the value of a favorable review from the gamer to *other* producers. This, in turn, reduces the likelihood that other manufacturers will send the gamer free products.

[74] 16 C.F.R. § 255.5, Example 8 (2009).

music downloading technologies. When the employee posts messages lauding his employer's product, he must disclose his employment with the company in order to comply with the Endorsement Guidelines.[75] There is no indication in the Example that the employee must receive any direct financial benefit from such endorsements. The employer may also be liable for the unqualified endorsement if it had not taken adequate steps to ensure against such violations of the Endorsement Guidelines.[76] As with the gamer in the prior example, depending on the specific content of the employee's comments, this could constitute a regulation of either commercial or noncommercial speech.

The noncommercial character of many communications that may be described as employee endorsements is perhaps more readily apparent when considering the same activity by an individual employed in a different industry. Consider, for example, a low-level employee of the New York Yankees. The employee has been a fan of the Yankees since before his employment with the club. He visits an online message board on which individuals discuss professional baseball, and frequently posts messages extolling the virtues of the Yankees. In the messages he discusses, among other things, his preference for attending Yankees games in person and the merits of the YES television network. His blind loyalty to the team prohibits him from ever commenting unfavorably upon the Yankees. The messages are entirely motivated by the satisfaction he derives from expressing his support for the team with which he has long aligned himself as a fan. His speech is compelled by the mere pleasure of expressing his thoughts on a matter of personal interest. As such, financial motives do not underlie the employee's praises, and the purpose and effects of such messages extend well beyond a mere proposal to enter into a transaction, and into the realm of the core expressive speech protected by the First Amendment.

[75] *Id.*

[76] *Id.*

However, absent a disclosure of his employment with the team, the employee would have violated the Endorsement Guidelines for which financial liability could attach in any such endorsement. The Endorsement Guidelines seemingly operate, as demonstrated by Example 8, as a clear imposition on noncommercial speech whenever an individual speaks laudably of his employer's products or services without a financial incentive to do so.

4. Online Marketing Organizations

In yet another scenario, a person joins an online marketing organization, which has certain sponsoring advertisers.[77] Whenever the individual discusses a given advertiser's products with his friends, he is compensated with points. The individual may redeem accumulated points for prizes, such as concert tickets or electronics. The Endorsement Guidelines require that he disclose his relationship with the sponsoring advertisers in his endorsements.[78]

Forms of this arrangement can involve the intertwined speech addressed in *Riley*. Suppose it is the case that when an individual in this marketing network mentions an advertiser's product, the speech adopts a commercial component. Whenever, then, the substantive message conveyed is actually noncommercial, the noncommercial and commercial components of the speech become inextricably intertwined. A noncommercial message regarding an advertiser's product could not be conveyed without simultaneously assuming a commercial attribute because the mere mentioning of the product attaches a commercial component to the expression. Accordingly, like the solicitations in *Riley*, this communication should be examined as if it were entirely noncommercial.

[77] 16 C.F.R. § 255.5, Example 3 (2009).

[78] *Id.*

5. Consumer Endorsements

The FTC also illustrates circumstances in which a consumer's praise of a product would not compel disclosures.[79] The Endorsement Guidelines do not require an individual who is merely a customer of a producer or product to disclose any information when praising that producer or product in a personal blog.[80]

However, there are certain consumer-producer relationships in which a reader's knowledge of the relationship might materially affect the weight given to an endorsement by the consumer. In particular, where certain goods or services are not universally available for purchase, such that the existence of a consumer-producer relationship may signal some characteristic of the consumer or producer, knowledge of an endorser's history of consumption might materially affect the weight of his endorsement in the mind of the reasonable consumer.

Consumption of higher education effectively demonstrates this scenario. To the extent that a university's quality of education, admissions selectivity, general prestige, or other characteristics tend to be perceived as signals of the abilities of the school's graduates, knowledge that an endorser attended the school being praised might affect the weight given to any endorsement. A reader might plausibly consider with greater skepticism the suggestion that

[79] *See* 16 C.F.R. § 255.0, Example 8 (2009).

[80] *See id.* Furthermore, if the frequency or quantity of a customer's purchases prompts the store's computer to automatically generate a coupon allowing the customer to receive a product for free during that purchase, the customer need not disclose his good fortune in an online communication. *Id.* This Example seems to establish the principle that where a consumer receives a product for free or at a discount through a process universally available to consumers, receipt of such a benefit does not require disclosure if the consumer subsequently praises the producer or the product itself. The scenario would be different, however, if the consumer received the product as part of a marketing program through which he periodically received free products, and about which he could write a review if he so chose. *See* 16 C.F.R. § 255.0, Example 8 (2009). In such a case, he would need to disclose that he received the product for free. *Id.*

Harvard College offers a superior academic product to Dartmouth College if the reader knew that the endorsing blogger attended Harvard as an undergraduate student.[81] The same skepticism is unlikely to attach to the endorsement of a consumer in a typical consumer-producer relationship because the same signal is not usually present.

It is unclear whether the Endorsement Guidelines would require disclosure of an alumnus-university relationship in an endorsement of the institution, given its resemblance to the consumer-producer relationship in the Example. Nevertheless, the principles embodied in the text of the regulation seem to clearly embrace the alumnus-university relationship and other similar relationships in which a consumer-producer relationship confers a "material" signal. Furthermore, as with those of the Yankees employee, many endorsements of a school by an alumnus may be entirely noncommercial and compelled solely by the mere sensation of expression and personal affinity for the school or its various products.[82]

C. Other Applications to Noncommercial Speech

This Section briefly considers additional situations in which the Endorsement Guidelines reasonably could, and likely would, be read to require disclosures in expressions of perhaps even more benign forms of noncommercial speech. Burdening speech in these contexts creates particularly jarring consequences.

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[81] *But see Best Colleges 2011: Undergraduate Teaching at National Universities*, U.S. NEWS & WORLD REPORT, Aug. 17, 2010 (concluding that Dartmouth College offers the nation's best undergraduate instruction), *available at* http://colleges.usnews.rankingsandreviews.com/best-colleges/national-ut-rank.

[82] Imagine, for example, an endorsement that read, "I had forgotten how beautiful Dartmouth is in the autumn: mountains painted red, yellow, and green; brisk, pure air; New England architecture touched with green copper roofs. Such an idyllic setting. This is truly the perfect place to study any subject at any level."

1. Targeted Advertising

Targeted online advertising is an arrangement whereby an individual who maintains a website, such as a blog, may include visible advertisements whose advertiser and message are partly a function of the content produced on the site. The algorithms that generate the advertisements that appear to consumers often consider the content on the website and the characteristics of the website visitor (such as IP location and previous internet browsing history, as evidenced by internet cookies), among other variables.[83] In the typical model, the advertiser only pays, and the website hosting the advertisement only earns revenue, when readers click on the advertisement.

For example, suppose a blog has adopted such an advertising model and an advertiser, say New York-Presbyterian Hospital, has, unbeknownst to the blogger, subscribed to the service of having its advertisement relate to the content of the blog entry in which it appears. If the blogger mentions his treatment at New York-Presbyterian in a personal blog post, an advertisement for the hospital may be generated. The blogger would receive revenues whenever a reader clicked on the advertisement. If the blogger favorably commented upon his experience with the hospital, this would likely constitute an endorsement.[84]

Since the blogger receives revenues whenever readers select the hospital's ads, he would likely have a material connection, as interpreted by the FTC, to New York-Presbyterian Hospital or any other advertiser whose advertisements happen to appear on his website. As a result, any noncommercial or commercial speech that praises a specific product under this common model could require disclosure under the Endorsement Guidelines.[85] Financial liability could attach for failure to do so. Yet, because of the

[83] *See generally About the Ad Auction*, GOOGLE ADSENSE (Nov. 5, 2010), https://www.google.com/adsense/support/bin/answer.py?hl=en&answer=160525#2.

[84] *See* 16 C.F.R. § 255.5, Example 7 (2009).

[85] *See, e.g.*, 16 C.F.R. § 255.5, Example 3, 8 (2009).

opacity of typical algorithmic formulas and the fact that the advertisements often vary by the unique characteristics of each visitor to the blog, the blogger using such a scheme often will never know ex ante what advertisements his messages will generate. Given the unknown financial effects of any given message, it is difficult to imagine how these schemes could affect speech incentives. Nevertheless, under the Endorsement Guidelines, speech here would be burdened even though no incentive to endorse any specific product exists.[86]

2. Anonymous Reviews and a Producer's Other Products

Consider, too, the situation of a dentist who regularly receives free samples of dental products from producers A, B, and C and, unbeknownst to the producers, anonymously maintains a blog about dentistry in which he declares in all honesty, "I have inspected these three products, and I think brand A's toothpaste is the best of these three brands in every way. The toothpaste produced by brands B and C are just mediocre, while A's is outstanding." Absent a disclosure of his relationship to the producer, he will presumably have violated the Endorsement Guidelines. Even if the dentist only disseminated the message to his family, friends, and acquaintances through his private profile on a social networking site, he may still have violated the regulations.[87] Furthermore, if, in an unrelated transaction, the dentist purchased shampoo also produced by brand A and truthfully endorsed the product's efficacy at cleaning his hair on an anonymous personal blog, he would likely have violated the

[86] Recall that speech does not lose its constitutionally protected status merely because it is produced in conjunction with paid advertising. N.Y. Times v. Sullivan, 376 U.S. 254, 266 (1964).

[87] As a practical matter, the FTC would have much difficulty enforcing the regulation in this scenario, particularly if the dentist's message were visible only by those to whom he provided access. Nevertheless, the Endorsement Guidelines would proscribe the dentist's unqualified endorsement of producer A.

Endorsement Guidelines.[88] The FTC may seek to impose a fine for such a violation.[89]

3. Privacy Interests and Other Material Relationships

Although the Examples provided by the FTC all present endorser-producer relationships of a purely "economic" or "business" nature (employee-employer, consumer-producer, compensated endorser-advertiser), nothing in the language of the regulation or the Federal Register notice compels the conclusion that Section 255.5 applies only to such business relationships. Knowledge of a social (or perhaps "intellectual")[90] relationship between an endorser and a producer may more likely weigh on the endorser's credibility. Audiences may also less frequently know or reasonably expect that certain social relationships exist.

Given the complexity of interpersonal relationships, accurate disclosure of the nature of such relationships would presumably entail more than merely affixing to them a routine label devoid of nuance. Indeed, even those within the relationship may not be able to choose among the commonly available titles.[91] Likewise, business relationships may be highly intricate. Sufficiently describing both social and business relationships in a way that would allow readers to properly evaluate all speech incentives and ascertain the speaker's veracity may not be realistic.

Finally, and perhaps most significantly, disclosing the nature of most social and many business relationships may

[88] His relationship to the producer would be unchanged. His connection to the producer would be material given the regularity with which he receives free dental products.

[89] *See* FTC Act, 15 U.S.C. § 45(m) (2006).

[90] "Intellectual relationship" is used here to refer to a situation in which a review of a work is colored by the reviewer's ideological predilections, empirical presumptions, academic background, or personal values.

[91] This contemplates the fairly common dilemma that exists when an individual is uncertain whether the person he or she has been dating may properly be termed his or her "girlfriend" or "boyfriend."

substantially impose on the parties' interests in privacy. Forced disclosure of such relationships would doubtless have a chilling effect on speech touching on these relationships.

IV. FIRST AMENDMENT ANALYSIS

Because the Endorsement Guidelines burden both commercial and noncommercial speech and impose a disclosure requirement, the proper standard of review is strict scrutiny. The regulation fails under such an examination because it is simultaneously overbroad and underinclusive, and because it will likely chill protected noncommercial and commercial speech.

A. Standard of Review

In recent decades, the Court has developed a doctrine that accords a degree of First Amendment protection to commercial speech,[92] the potency of which ostensibly equals the "intermediate scrutiny" test applied in other areas of constitutional law.[93] However, this doctrine only applies in situations involving government circumscription of "purely commercial speech."[94] Standard First Amendment principles apply wherever a government regulation simultaneously embraces both commercial and noncommercial speech.[95]

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[92] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–66 (1980) (formulating a four-part test for evaluating regulations of commercial speech); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763 (1976) (observing that an individual's interest in freely flowing commercial information may be more acute than his interest in receiving information on the most contentious contemporary political debate); Bigelow v. Virginia, 421 U.S. 809, 818 (1975) ("speech is not stripped of First Amendment protection merely because it appears as [a commercial advertisement]").

[93] *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

[94] Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 788 (1988); Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

[95] *See, e.g.*, Erie v. Pap's A.M., 529 U.S. 277, 283 (2000) (evaluating a ban on public nudity under principles governing content-neutral impositions on free speech); Reno v. ACLU, 521 U.S. 844, 845 (1997) (applying strict scrutiny to a statute prohibiting transmission via the

Accordingly, since the Endorsement Guidelines also circumscribe noncommercial speech,[96] the commercial speech doctrine does not apply, and the Endorsement Guidelines must instead be analyzed under standard First Amendment principles.

Mandating disclosure of information as a condition of engaging in speech "necessarily alters the content of the speech," rendering the regulation of noncommercial speech content-based and compelling a strict scrutiny analysis.[97] Strict scrutiny analysis, in turn, requires "the most exacting scrutiny."[98] Specifically, the government must show that "the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[99] Furthermore, "with rare exceptions," content-based regulations of speech "of private citizens on private property

internet of "indecent" or certain "patently offensive" images, speech, and other communications, regardless of whether the communications were commercial or noncommercial in character); *Riley*, 487 U.S. at 795 (rejecting the government's assertion that commercial speech doctrine ought to be applied in evaluating a regulation of charitable solicitations, because such solicitations may involve both commercial and noncommercial speech).

[96] *See supra* Part III.

[97] *See Riley*, 487 U.S. at 795. In *Riley*, the Court held unconstitutional a North Carolina statute requiring that professional fundraisers disclose to potential donors the percentage of charitable contributions collected during the preceding year that the soliciting fundraiser had actually distributed to charity. Finding that the solicitations of charitable donations may incorporate "a variety of speech interests" that receive First Amendment protection, including both commercial and noncommercial, the Court rejected North Carolina's assertion that the case called for application of the *Central Hudson* commercial speech test. *Id.* at 795–98. The Court instead characterized the government's disclosure requirement as compelled speech. *Id.* at 797. Concluding that this disclosure requirement was unduly burdensome and not narrowly tailored to the state's interest of well-informed charitable contributors, the Court held the statute unconstitutional. *Id.* at 798.

[98] Texas v. Johnson, 491 U.S. 397, 412 (1989).

[99] Burson v. Freeman, 504 U.S. 191, 198 (1992); *accord* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

or in a traditional public forum [are] presumptively impermissible, and this presumption is a very strong one."[100]

Although practical and symbolic differences may exist between government policies that compel speech and those that compel silence, *Tornillo* established the principle that, "in the context of protected speech, the difference is without constitutional significance."[101] Nevertheless, the Court has recognized that disclosure requirements may "trench much more narrowly on [a speaker's constitutional] interests than . . . flat prohibitions on speech."[102] Indeed, although it has struck down disclosure requirements in other contexts,[103] the Court has regularly permitted both disclosure requirements and disclaimers in political advertisements.[104] However, the Court has cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."[105]

B. The FTC's Interest

The FTC has declared that the Endorsement Guidelines serve the government's interest in preventing deceptive advertising.[106] False and deceptive advertisements do not usefully contribute to the marketplace; rather, they tend to

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[100] Ladue v. Gilleo, 512 U.S. 43, 50 (1994) (O'Connor, J., concurring); *accord* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115–16 (1991).

[101] Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 796 (1988); *accord* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

[102] Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

[103] *See, e.g.*, *Riley*, 487 U.S. at 796 (invalidating disclosure requirement imposed upon solicitations for charitable contributions).

[104] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 80–84 (1976); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913–14 (2010).

[105] *Zauderer*, 471 U.S. at 651.

[106] 74 Fed. Reg. 53,124, 53,134 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

divert markets from their efficient ideal.[107] Although the Supreme Court has never decided a First Amendment case concerning false or deceptive advertising,[108] it has repeatedly asserted that the state has a cogent interest in ensuring that commercial information flows "cleanly as well as freely."[109] The government may constitutionally prohibit such forms of advertising outright.[110] Accordingly, to the extent that a disclosure requirement would accomplish the government's goal of eliminating deceptive commercial information, the Court would likely find the FTC's asserted objective sufficiently compelling to examine how tailored the regulation is to the objective of preventing deception.

C. Tailoring

The Endorsement Guidelines are insufficiently tailored because they are simultaneously overbroad and underinclusive. They will also likely chill both protected noncommercial and commercial speech.

1. Underinclusiveness

One theory that the FTC advances of the harm to consumers that would result from the absence of disclosure requirements is that individuals may be predisposed to exaggerate the benefits of free products, such that any endorsement an individual makes regarding a product he has received for free could deceive his audience unless a qualifying notice is included.[111] Assuming this theory were correct, the Endorsement Guidelines fail to capture plenty of instances of such speech. The regulation only requires

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[107] Dennis Crouch, *The Social Welfare of Advertising to Children*, 9 U. CHI. L. SCH. ROUNDTABLE 179, 188 n.70 (2002).

[108] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1095 (3d ed. 2006).

[109] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 (1976).

[110] *See id.* at 771–72.

[111] 74 Fed. Reg. 53,124, 53,127 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

disclosure of the receipt of free products in scenarios in which an endorser received the discount directly from the producer or otherwise had a material connection to the producer. Disclosure is not mandated when an endorser does not have a material connection to a producer, but where he nevertheless derives the benefits of the endorsed product at no direct, out-of-pocket expense, even though the same alleged predisposition to exaggerate would exist in such a scenario.[112]

The Endorsement Guidelines are also arguably further underinclusive because they do not generally apply to reviews disseminated through "traditional media."[113] A movie critic regularly views films for free before the general public can watch them at all. Fashion magazines often receive clothing of substantial value for free from clothing designers in the designer's hope that they will be reviewed or featured in various articles or photographs. The same incentives to deceive presumably exist regardless of the medium through which a message is transmitted.[114] This

[112] For example, suppose a person ate dinner with his parents at an expensive restaurant to which he had no material connection. Suppose further that when the meal ended, his parents paid the bill. According to the FTC's theory, he would be predisposed to exaggerate the benefits of his meal, thereby potentially deceiving consumers. Nevertheless, because of the absence of a material connection to the producer, the Endorsement Guidelines would not require disclosure. The FTC could seek to require disclosure of having received a product for free if the risk of exaggeration were truly a serious concern.

[113] *See supra* Part II.

[114] Arguably, assuming journalists generally command more credibility and have broader readership than ordinary bloggers, the perils of deception are even stronger in reviews published in traditional media. Nevertheless, the same author would face different disclosure requirements simply as a function of the medium of transmission: if an author sought to publish the review on his widely read blog, he would face a disclosure requirement, but he would not face such a requirement if he sought to publish the same review in a newspaper. The FTC may argue that various institutional protections exist in most traditional media outlets, justifying their receipt of more lenient treatment under the Endorsement Guidelines. Since most traditional outlets function as organizations with editorial oversight of written content and maintain an

disparate treatment of similarly-situated reviewers in traditional and new media both undermines the strength of the FTC's asserted interest in disclosure and undermines the precision of the regulation's tailoring to the agency's objective of mitigating deception wherever incentives to deceive exist.[115]

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interest in preserving a reputation for honesty and impartiality, this model may correct or mitigate the incentives to deceive that an individual writer may possess. Nevertheless, editorial oversight and organizational structure do not eliminate the incentives the FTC finds objectionable. They merely shift them from the individual writer to management. Compare a fashion magazine that receives free clothing from designers in the designers' hope of receiving a favorable review or a feature in the magazine to the video game expert who receives free games and gaming consoles from producers similarly hopeful of a favorable review or feature. The magazine as an entity arguably has the same incentives that the aforementioned video game blogger has. Because the magazine may distribute the clothing to its employees, the magazine has received a valuable product for free. Like the fashion magazine, the renowned video game expert has an interest in the value of his reputation. Assuming the FTC's contention is correct that it will be in the best interest of the blogger to more generously color his reviews of producers who send free products in order to hopefully encourage producers to send him additional free products in the future—even at the expense of incurring reputational harm—so, too, the magazine would be better off if it offered more generous reviews for designers who send the magazine free clothing, even if it meant the magazine might impair its reputation among customers. Although the editorial oversight and organizational structure of the magazine add a layer between the objectionable incentive and the writer, the management of a profit-maximizing fashion magazine may nevertheless have an incentive to encourage or insist that reviewers generate reviews in a generous light of products the publication received for free. The structural oversight of traditional media does not destroy the objectionable incentives. Rather, it merely shifts them within the levels of the operation.

[115] *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 195 (1999) (holding unconstitutional a generalized ban on casino advertising because it exempted advertising by casinos operated by Native American tribes, which "distinguishe[d] among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all"); Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 495 (1997) (Souter, J., dissenting) (believing a compelled advertising program for 25 listed fruits, nuts, vegetables, and eggs, but not for any other agricultural commodity,

2. Overbreadth

The FTC also asserts that the failure to disclose a material relationship would be deceptive because studies the agency has conducted demonstrate that some consumers "reasonably give more weight to statements that sponsored consumers make about their opinions or experiences with a product based on their assumed independence from the marketer" than they do with knowledge of the absence of independence.[116]

The Endorsement Guidelines hit beyond their mark, though, as they circumscribe speech even where an endorser is not incentivized to provide a dishonestly favorable review.[117] The costs imposed on producers to monitor the speech of perhaps thousands of possible endorsers seem excessive relative to the benefits, causing considerable inefficiencies.[118] Moreover, although the disclosure of material connections would generate information relevant to ascertaining the endorser's veracity, it would presumably admit considerably prejudicial information as well. To the

was "so random and so randomly implemented . . . as to unsettle any inference that the Government's asserted interest is either substantial or even real").

[116] 74 Fed. Reg. 53,124, 53,134 n.86 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

[117] *See supra* Part III.B–C.

[118] Suppose every employee endorsement prompts one consumer, who would not have otherwise purchased an employer's product, to purchase that product. Suppose further that the endorsement was dishonest and the purchase would not have occurred if the endorsement included a disclosure of the material connections between the employer and the employee. Assume the societal harm is the expense incurred by the consumer that it would not have otherwise incurred (the net economic harm is actually the price to the consumer minus the producer's profits). For the sake of simplicity, assume the consumer derives no utility from consuming the product. Suppose the price to consumers of each item is $10. If the average cost of preventing one false endorsement by monitoring—both the financial costs of the employer's monitoring efforts and perhaps the psychological costs to employees of employer intrusion into their personal lives—exceeds $10, then the regime will be inefficient and socially wasteful.

extent that even reasonable consumers cannot or do not ignore prejudicial information, they are apt to excessively devalue the weight of any endorsement, which would undermine the FTC's objective of creating well-informed markets.

3. Chilling Effects on Protected Speech

In addition to affecting more and less speech than the FTC has an interest in altering, the Endorsement Guidelines also have the almost certain consequence of unconstitutionally chilling protected noncommercial speech. This would most likely occur in situations where the speaker's preferred forum for expression precludes disclosure, where disclosure would fundamentally change the effect of speech, where speakers would be required to disclose the existence or details of interpersonal or sensitive business relationships, and where employees censor their speech because employers have been forced to monitor their employees' activities on social media.

Where the desired format or forum for conveying a message would not allow for disclosure, such speech would be wholly proscribed.[119] Facebook's "like" application offers a popular vehicle by which users may express support for an individual, an organization, a cause, an article, a photograph, an idea, or ostensibly anything a user may wish to support. Through the application, a user typically indicates that he "likes" something by selecting an icon reading "like" that then attaches to the thing he wishes to support. Selecting the icon generates an automated message that is conveyed to other users noting the user's endorsement of the product. This very popular application does not allow a user the opportunity to qualify his endorsement with a disclaimer. Therefore, an individual

[119] *See* Schneider v. New Jersey, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."); *accord* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 n.15 (1976).

could not comply with the Endorsement Guidelines and indicate that he likes some group or individual whenever he has a material connection to the entity he would like to support. The regulations thus proscribe a highly popular form of commercial and noncommercial communication.

The Endorsement Guidelines would also chill many messages conveyed through Twitter's famously limited messaging format. Users of Twitter express themselves to other users in messages of 140 textual characters or less. Conveying the desired message and fully disclosing a material endorser-producer relationship will often not be possible under such constraints. Any disclosure would undermine the already limited ability to convey a message intelligibly. Adhering to the Endorsement Guidelines to convey even noncommercial speech or truthful, nondeceptive commercial speech on Twitter and Facebook would in many cases require foregoing the speech entirely. Not only are these fora often the preferred mechanism for communicating with all or many of one's friends and family, they often may also be the only practical means for one to do so.

Even where the format permits disclosure, it may well be the case that adherence to the disclosure requirement would be too onerous to continue with the qualified speech. Full disclosure may require a gross incursion into individual privacy or secretive commercial relationships. For example, at the extreme, it is difficult to imagine that many people would be willing to engage in speech that would require disclosure of an extramarital affair. Requiring public disclosure and inviting public discussion of other aspects of interpersonal relationships may likewise chill copious speech. Moreover, if the speaker and his audience considered the speaker's substantive message to be wholly expressive and noncommercial, even if related to a commercial product,[120] adhering to the disclosure requirements of a commercial regulation may leave an awkward impression on the reader and undermine the

[120] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983) (asserting that speech that merely relates to a commercial product is not commercial speech).

desired effect of the expression. The speaker may plausibly forego conveying the desired message if complying with an FTC disclosure requirement would render his speech no longer cool, funny, or witty. Additionally, that bloggers have reacted so irately suggests a widespread fear of the FTC's wrath that may—reasonably or otherwise—discourage much speech.

Lastly, the Endorsement Guidelines impose nontrivial self-enforcement requirements on producers to inform possible endorsers of their disclosure obligations and to subsequently monitor those endorsers to ensure compliance.[121] The Endorsement Guidelines evidently contemplate that a commercial entity will advise all individuals with whom the entity has a material relationship of their obligations under the Endorsement Guidelines and then monitor their activities for compliance. If compliance with the Endorsement Guidelines actually requires—or is interpreted by employers as requiring—employer monitoring of the personal communications of employees over their private online social spaces, employees will undoubtedly alter or forego copious forms of speech that are under the specter of their employer's surveillance.

V. PROPOSING A CONSTITUTIONAL ALTERNATIVE

The FTC could largely achieve its objectives without constitutional objection if (1) the FTC limited the scope of the Endorsement Guidelines to commercial speech, excluding noncommercial endorsements; (2) the regulation only mandated disclosure of information sufficient to gauge the weight of an individual's endorsement if the speaker were economically motivated to endorse a product or producer; and (3) employers were not required to monitor the private activities of their employees on online social media.

Under this proposal, the FTC would still be able to reach the speech that is most disruptive and distortive of the marketplace. Those with a direct financial incentive to

[121] *See* 16 C.F.R. § 255.5, Example 7 (2009).

speak favorably about a product or a producer would clearly need to disclose the existence of such an incentive. A direct financial incentive to endorse a product is an economic motivation to endorse the product. In order to trigger the disclosure requirement under this proposal, a fact-finder would not need to conclude that an economic motivation was a "but for" cause of an endorsement. The fact-finder would simply need to conclude that any such motivation existed at all. Accordingly, those who have contractually arranged to promote a product would need to disclose that relationship.[122]

Meanwhile, under this proposal, the mother of a musician could still "like" her son's band on Facebook without impunity. She would not need to forego that speech entirely because her communicative method of choice did not allow her to qualify her fondness for her son's band. Similarly, blogs that employ targeted advertising schemes would not need to conspicuously display a warning to the site's visitors that the ads displayed are in part determined by the content on the blog, so long as the ads generated by scheme are sufficiently variable or unknown to the blogger ex ante that they could not incentivize him to endorse any specific product. Under this framework, the FTC could still argue that those who favorably review free products have an economic motivation for doing so, such that they must disclose their cost-free receipt of the products. This Note argues in Section III that those reviewers, especially those about which the FTC is most concerned, do not have an incentive to produce a false endorsement. The Commission or a court applying the proposed Endorsement Guidelines could reasonably find either way.

This proposal eliminates the most pernicious effects of the regulation. Concerns about incursions into individual privacy would not persist if consumers were only required to disclose the "economic motivations" for speech rather than various social or other interpersonal relationships of interest to a reader. Additionally, the circumscription and ostensible proscription of noncommercial speech would not result from

[122] *See* 16 C.F.R. § 255.5, Example 3 (2009).

a regulation crafted as such. The only speech that this proposal would affect is deceptive commercial speech, which the FTC may permissibly ban anyway.[123] The removal of employer monitoring of communications intended by employees for friends and family likewise eliminates the consequence of employee self-censorship of all sorts of speech. Additionally, the awkward, potentially chilling, byproduct of conforming noncommercial speech to a regulation of commerce would not be present, tautologically, if the only speech burdened by the regulation were commercial in nature. Finally, as a matter of equitable policy, commercial speakers would arguably be better able to anticipate that their speech will be subject to regulation than noncommercial speakers.

One shortcoming of this proposal is that it adds a degree of ambiguity to the Endorsement Guidelines by overlapping the regulation with the commercial speech doctrine. The line the Supreme Court has drawn between noncommercial and commercial speech is not a bright one. Tying the regulation to the Court's delineation might reduce some of the efficacy of the Endorsement Guidelines, through which the FTC sought to reduce uncertainty to consumers and businesses. The resultant ambiguity, however, would only be of a type that at which the Supreme Court has found sufficiently tolerable.[124]

The circumstances in which an endorser is "economically motivated" to endorse a product may also be unclear. This Note argues in Part III that the anonymous dentist and video game expert do not have an incentive to favorably review a product, but rather that the weight of their incentives encourages them to maintain the value of their reputation and to produce accurate information for their readers. The FTC seems to view both parties as having a motivation to generate favorable reviews either in the hope that such reviews will prompt more free products or out of gratitude for the receipt of the free products. Whether a

[123] *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24.

[124] *See, e.g.*, *Bolger*, 463 U.S. at 66–67.

speaker is, in fact, economically motivated to produce an endorsement may not always be obvious, particularly where the endorser has competing incentives. This Note's recommendation to change the standard for disclosure arguably reduces that uncertainty, though. Whether a producer-endorser relationship is sufficiently "material" is a mixed question of law and fact,[125] involving subjective determinations. Whether a person was "economically motivated" to endorse the product is purely a question of fact—the endorser's relationship to the producer either did or did not render him more inclined to favorably review a producer—although individuals may reasonably disagree about which way the evidence points.

The FTC may also be concerned that this proposal would not allow it to target all speech to which it objects. The proposal would still require consumers to disclose all economic motivations for any speech that does not have redeeming noncommercial virtues. For example, under the current Endorsement Guidelines, the mother of a member of a musical group would be liable if she indicates on her Facebook profile that she "likes" her son's band because she has a material relationship to the band and Facebook does not allow users to qualify their affinities through that application. Under this Note's proposal, the FTC could not target the mother where the motivation for her speech was a mother's usual profusion of love and support for her child. The FTC may find this activity objectionable, but this proscription of seemingly benign, if not desirable, noncommercial speech could doubtfully pass strict scrutiny.

However, identical speech produced by different actors or spoken with different motivations can receive disparate constitutional classifications and treatment. The existence of an "economic motivation" for speech can convert otherwise noncommercial speech into commercial speech.[126] Therefore,

[125] *See* United States v. Schiff, 602 F.3d 152, 171 (3d Cir. 2010).

[126] *Bolger*, 463 U.S. at 66–67. Similarly, this proposal likely would also permit the low-level Yankees employee to laud the Yankees' YES television package on an internet discussion forum for allowing him to follow the Yankees better than he ever could previously without disclosing

if the mother discussed above were also the band's manager or her son's agent, under both this Note's proposal and the current FTC Endorsement Guidelines, she would need to forego that speech entirely. Her endorsement would amount to commercial speech that economic considerations incentivized her to produce. Such deceptive speech may be wholly proscribed.[127] Similarly, a customer of an online clothing retailer would almost certainly be engaging in commercial speech when the retailer offered its customers free shipping in conjunction with a transaction if they agreed to formally "like" the clothing brand on Facebook, and the customer did so. If, however, the customer decided to "like" the designer without being incentivized with free shipping, that speech would be protected noncommercial speech.

Concededly, it may be difficult for the FTC to discern the motivations of customers who "like" certain producers if the agency were to focus on the activities of individual users. Nevertheless, the agency could be clued to the existence of economic motivations of consumers by atypical growth in popularity of a producer's Facebook page.[128] Where the page of a producer receives an anomalous spike in popularity, such circumstances may prompt the FTC to investigate whether the producer has financially incentivized consumers to endorse it. Furthermore, many producers advertise the

to other readers his employment with the team. *See generally* Section III.B.3. However, an economic motive would clearly exist if an owner or an executive of the Yankees engaged in the same speech, thereby simultaneously rendering the speech commercial and triggering the disclosure requirement. Liability would attach to endorsements of a team by such owners or executives without a concurrent disclosure of their affiliations to the organization.

[127] *See Va. State Bd. of Pharmacy*, 425 U.S. at 771–72.

[128] A now defunct, parallel application to Facebook's "like" application was the "fan" application, by which users could declare they were "fans" of various entities, causes, or events. Endorsements conveyed through the "fan" application may also clue the FTC to economically motivated speech by the nature of the endorsed industry. Where it would arguably be contrary to common vernacular for an individual to assert that he is "a fan" of a certain type of producer or product—for example, a grocery store—the agency may have reason to investigate the motivations of those endorsements.

availability of such deals on their websites. Public advertisements would be a smoking gun for enforcement officials.

Lastly, the FTC need not limit its investigative focus to those circumstances where clues suggest that an economic incentive may have motivated an endorsement. Scrutinizing endorsers with material relationships to the producers that they endorse may often prove fruitful in beginning the investigation of those who endorsed a producer and were economically motivated to do so.

VI. CONCLUSION

Undoubtedly, commercial harms occur over the internet just as they do through other mediums of exchange and communication, and the FTC's efforts to curb and prevent abuses are important and commendable. As presently constructed, however, the Endorsement Guidelines fail to achieve the FTC's objectives without imposing substantial burdens on constitutionally protected noncommercial and commercial speech. The regulation's simultaneous overbreadth and underinclusiveness make it difficult to argue that it is so narrowly drawn that it should survive the most exacting scrutiny. The current requirement would effectively chill much protected speech by imposing upon personal and business privacy, precluding benign messages in the media that do not allow qualifying disclosure notices, awkwardly altering speech, and provoking employees to censor speech under the watchful eye of their employers. Reconstructing the Endorsement Guidelines so that they encompass only economically motivated commercial speech and remove the mandate of employer oversight of private employee communications, however, would cover the vast majority of the material the FTC finds objectionable while eliminating virtually all of the concerns about the regulation's constitutionality.