Note

Too Hot to Handle?: Native Advertising and the *Firestone* Dilemma

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"Thou shalt not lie."–*Exodus* 23:1

INTRODUCTION

Native advertising is a type of advertising that assumes the appearance of non-advertising content. Every day almost any person connected to the Internet is likely to consume native advertisements through Instagram posts edited to perfection that conspicuously include specific brands, tweets that rave about how great an item or service is in 280 characters or less, YouTube videos that purport to neutrally show off how cool particular gadgets are, and all kinds of digital and analogue media that note the dazzling wonders of things for sale. In the past two decades native advertising has become both a ubiquitous part of online content consumption[1] and a multi-billion-

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1. *See infra* notes 300–03 and accompanying text (indicating that merely opening a web browser program can expose oneself to native advertising content). And even if a consumer does not experience a native advertisement upon opening a web browser, once the consumer searches on a web crawler, such as Google, they will experience native advertising. *About Native Ads*, GOOGLE: GOOGLE AD MANAGER HELP, https://support.google.com/admanager/answer/6366845 [https://perma.cc/8Y6P-E74N]. In general, native advertising has become an integral part of online advertising across a multitude of online platforms. *See* Demetrius Williams, *Why Native Advertising is Emerging as a Major Worldwide Marketing Trend*, TRANSLATE MEDIA (Nov. 23, 2018), https://www.translatemedia.com/us/blog-usa/native-advertising-emerging-major-worldwide-marketing-trend [https://perma.cc/JY7V-JH7M] (describing the reasons for the rise of native advertising).

dollar portion of the advertising industry.[2] Native advertising has also become a pressing, thorny issue at the intersection of consumer protection law, advertising law, and administrative law because native advertising is *very* deceptive.[3]

While the above definition is helpful and simple, in truth, there is no singular controlling definition of native advertising. Possibly because of the sheer breadth of content that can be natively advertised and formats native advertising can mimic, just defining native advertising has proved to be a battleground all its own.[4] Nonetheless, like all advertising, native advertising seeks to influence people.[5] To that end, all advertisements try to establish positive "feelings, associations and memories in relation to a brand."[6] Traditional advertisements generally utilize media that stand out against the content with which they are paired.[7] Native advertising takes a radically different approach to persuading consumers.[8] It does not stand out—it blends in. The advertisement fits seamlessly into the content already being consumed.[9] Often this is because the native advertising is itself con-

2. While sources differ on the amount spent on native advertising, most sources place the sum in the tens-of-billions. *See* Anocha Aribarg & Eric M. Schwartz, *Native Advertising in Online News: Trade-Offs Among Clicks, Brand Recognition, and Website Trustworthiness*, 57 J. MKTG. RSCH. 20, 20 (2020) (explaining that online advertisers spent forty-four billion dollars on native advertising in 2019).

3. As one pair of researchers put it, "there is growing tension between proponents of native advertisers and those who represent the interests of consumers" because native advertisements often keep the "true nature of an ad a secret." Colin Campbell & Lawrence J. Marks, *Good Native Advertising Isn't a Secret*, 58 BUS. HORIZONS 599, 599 (2015); *see also infra* Part III.C and accompanying notes; *cf.* Matt Carlson, *When News Sites Go Native: Redefining the Advertising–Editorial Divide in Response to Native Advertising*, 16 JOURNALISM 849, 856 (2014) ("Trickery becomes the goal: 'By dressing up as editorial content, advertorials exist primarily to disarm, if not fool, readers and viewers.'").

4. *See infra* notes 33–38 and accompanying text.

5. ERIK DU PLESSIS, THE ADVERTISED MIND 8–9 (2005) (describing the role and purpose of advertising).

6. *Id.* at xiii.

7. *See* Campbell & Marks, *supra* note 3, at 600 (describing traditional advertising as "interruptive").

8. The "non-disruptive" nature of native advertising is a stark departure from the "interruptive" advertisement paradigm. *Id.* This "non-disruptive" format is the hallmark of contemporary native advertising. *Id.* ("A feature common to all forms of native advertising is the format of the communication.").

9. The strength of native advertising can likely be traced back to the blending of native advertising with surrounding non-advertising content. *Id.* As some scholars have noted, "[w]hen in this format, marketing communications are virtually indistinguishable from other online material," and this allows native advertising to become an extension of the consumer's content experience. *Id.*

sumable content.[10] This format gives native advertising the unique power to interact with consumers as if it were unpaid-for content.[11]

Contemporary native advertising's format has profoundly remade the process of persuading consumers to act or believe in a certain way.[12] Consumers simply engage with native advertising more than they engage with traditional advertising.[13] Native advertising's success in persuading consumers to engage with its content is one of the many reasons that native advertising has become the dominant format of advertising online.[14] As a result, there are as many forms of native advertising as there are kinds of content to be mimicked.[15]

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10. *See, e.g.*, *infra* notes 47–51 and accompanying text (detailing examples of native advertising as content). Ryan Reynolds has created a humorous—and very accurate—explanation of how advertising and content can merge. *See* Ryan Reynolds, *Contextual Advertising*, YOUTUBE (Nov. 22, 2019), https://www.youtube.com/watch?v=ymZK54XLXMU (last visited Mar. 12, 2022). In fact, Ryan Reynolds has created an entire slew of native advertisements for various projects and products he is part of, and these videos depict Reynolds satirizing native advertising. *See, e.g.*, Ryan Reynolds, *Ryan Reynolds' Twin Returns | Aviation Gin*, YOUTUBE (June 8, 2018), https://www.youtube.com/watch?v=MgM-ny6Gxvs (last visited Mar. 12, 2022).

11. *Cf.* Campbell & Marks, *supra* note 3, at 600 ("In contrast, native advertising formats are created to be consistent with the online experience a consumer is enjoying.").

12. *Id.* at 601 & fig.1 (indicating consumer trust levels from personal recommendations carry the highest level of trust, which can be imparted by a friend sharing a native advertisement over social media).

13. The difference between native advertising engagement as compared to traditional advertising is stark. Native advertising generates 53% more attention than traditional advertising does and is so engaging that 32% of people would *share* the advertisement with friends. Brittney Ihrig, *8 Native Advertising Statistics That Will Convert You*, APPSAMURAI (Feb. 25, 2020), https://appsamurai.com/8-native-advertising-that-will-convert-you [https://perma.cc/X992-VNVQ]. Overall, Millennials tend to prefer native advertising to traditional advertising. *Cf.* Campbell & Marks, *supra* note 3, at 602 (describing that consumers have negative attitudes about being deceived by native advertising).

14. *See* Ross Benes, *Driven by Social, Native Accounts for Nearly Two-Thirds of Display Ad Spend*, EMARKETER (Apr. 16, 2019), https://www.emarketer.com/content/driven-by-social-native-accounts-for-nearly-two-thirds-of-display-ad-spend [https://perma.cc/D5M8-DLKG] ("[N]ative will soon account for about two-thirds of all US display ad spend, [but] that figure masks the near ubiquity of native ads on social networks."). The dominance of native advertising in online advertising is particularly stark. *See* Ross Benes, *Advertisers Spend More on Native, but Favor the Same Formats*, EMARKETER (Mar. 18, 2019), https://www.emarketer.com/content/advertisers-spend-more-on-native-but-favor-the-same-formats [https://perma.cc/M4Y5-PRK9] ("We forecast that by 2020, 88.8% of native ads in the US will become more mobile, up from 85.2% in 2018. Likewise, 87.7% of native will be purchased programmatically in 2020, up from 86.7% in 2018. The share of native that comes from social will slightly decline from 76.7% in 2018 to 73.5% in 2020.").

15. Campbell & Marks, *supra* note 3, at 600 (describing native advertising as a

Unfortunately, native advertising is exceptionally deceptive.[16] As one expert has bluntly explained, "[native advertising is] all based on the reader or viewer being confused."[17] In fact, recent scholarship indicates that when native advertising is not disclosed as advertising, most consumers mistake native advertising for non-advertising content.[18] Even when disclosed, native advertising is still likely to be highly deceptive without specific disclosure methods.[19]

For this reason, native advertising has become a persistent issue for the Federal Trade Commission (FTC), the government agency empowered to protect consumers against deceptive advertising.[20] To meet its consumer protection goals, the FTC has engaged in a wide array of enforcements, subregulatory guidance, and private sector education efforts to reduce native advertising deception.[21] These efforts have sought to bring native advertising into compliance with a consumer deception rate below 15%—the threshold rate of consumer deception indicating an advertisement is deceptive.[22]

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spectrum of possible advertising methods and formats).

16. *See* sources cited *supra* note 3. This Note will discuss both the native advertising's deceptiveness and the reasons why native advertising is deceptive. *See* discussion *infra* Part II. To be transparent, this Note assumes that deceiving consumers is harmful. While an elongated discussion of the normative ethics of deception is outside the scope of this Note, other authors have questioned both the wisdom of this standard line of thinking and the validity of the FTC's regulation of native advertising generally. *See generally* Zahr K. Said, *Mandated Disclosure in Literary Hybrid Speech*, 88 WASH. L. REV. 419 (2013) (questioning the desirability of advertising disclosure); Anthony B. Ponkivar, *Ever-Blurred Lines: Why Native Advertising Should Not Be Subject to Federal Regulation*, 93 U. N.C. L. REV. 1187 (2015) (arguing against the regulation of native advertisement by the FTC).

17. *See* Fed. Trade Comm'n, *Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising–Part 2*, VIMEO, at 15:02, https://vimeo.com/352324401 (last visited Mar. 12, 2022). That same speaker would go on to say, "Indeed, native advertising is not merely a deception . . . [it is] a racket." *Id.* at 15:39.

18. David A. Hyman, David Franklyn, Calla Yee & Mohammad Rahmati, *Going Native: Can Consumers Recognize Native Advertising? Does It Matter?*, 19 YALE J.L. & TECH. 77, 91–95 & fig.2 (2017).

19. Bartosz W. Wojdynski, *The Deceptiveness of Sponsored News Articles: How Readers Recognize and Perceive Native Advertising*, 60 AM. BEHAVIORAL SCIENTIST 1475, 1479 (2016) (indicating that native advertising does not necessarily activate consumer's advertising schemas to trigger a skeptical reaction to the information presented).

20. 15 U.S.C. § 45(a).

21. See discussion *infra* Part I.B for an in depth history of the FTC's advertising regulation.

22. Sarah Sluis, *FTC: Publishers Will Be Held Responsible for Misleading Native Ads*, ADEXCHANGER (June 3, 2015), https://www.adexchanger.com/publishers/ftc-publishers-will-be-held-responsible-for-misleading-native-ads [https://perma.cc/SD4H-JQEU] (stating that an FTC representative publicly stated that a 15% consumer

To date, none of the FTC's efforts have succeeded. The status quo is lamentable: FTC guidance for advertisers and publishers is unclear, most native advertising fails to include disclosures, and, even when disclosed,[23] native advertising regularly deceives far more than 15% of consumers.[24]

This Note synthesizes a wide variety of scholarship to produce an empirically grounded methodology for native advertising disclosure. In Part I, this Note discusses a concise history of native advertising and gives a concrete example of contemporary native advertising. Part I then examines the growth of contemporary online advertising and the advertising industry's impetus for exponential investment into native advertising. Part I also explores relevant history of the FTC's regulatory authority over advertising and the FTC's use of percentage thresholds to determine advertising deception. Part I then discusses the evolution of the FTC's native advertising regulation. In Part II, this Note explains the current issues exacerbating native advertising deception, accompanied by real world examples. Part II also explains several reasons why these problems have become so rife. In Part III, this Note proposes that the FTC should engage in rulemaking and promulgate a unified disclosure standard for native advertising content. This disclosure rule would require that native advertisers provide three elements for any native advertisement: (1) disclose native advertising using the language "Paid Ad" or "Paid Advertisement," (2) include the brand being sponsored and the identity of the sponsor in the disclosure, and (3) display the two prior disclosure elements clearly and prominently and in close proximity to each other and the advertisement. This approach would not only give regulated parties clear guidance; it would also balance regulated parties' desire for native advertising with minimal restrictions on content creativity while giving consumers the tools needed to identify when they are a target of native advertising.[25]

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deception rate would signify that a native advertisement was deceptive); *see also* Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir. 1973) (holding that a 15%, or even 10%, deception rate for commercials would be sufficient to indicate consumer deception).

23. Hyman et al., *supra* note 18, at 96 tbl.4 (2017).

24. *See generally* Bartosz W. Wojdynski, Nathaniel J. Evans & Mariea Grubbs Hoy, *Measuring Sponsorship Transparency in the Age of Native Advertising*, 52 J. CONSUMER AFFAIRS 115, 117 (2018) (indicating that native advertisements deceive consumers to the point that it is uncertain if consumers can tell the difference between a native advertisement and a non-advertisement).

25. *Contra* Amy Ralph Mudge, *Native Advertising, Influencers, and Endorsements: Where Is the Line Between Integrated Content and Deceptively Formatted Advertising?*, ANTITRUST, Summer 2017, at 80, 83 ("But 'ad' suggests a lack of creative control or

I. NATIVE ADVERTISING: A BRIEF, LONG HISTORY

Though the term native advertising was coined in 2011,[26] native advertising is not new. Native advertising in the United States dates back to the late 1800s—though authors on the subject disagree as to who was the first to utilize native advertising.[27] Early iterations include John Deere's marketing of its product line to customers through its own magazine, The Furrow, in 1895.[28] The proliferation of silent films, radio talk shows, and soap operas in the early and mid-1900s popularized new forms of visual and aural native advertising.[29] Later, during the 1950s, native advertising evolved to fit the explosion of magazine popularity.[30] The 1980s introduced native ad-

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input and conveys that the content was written and directed entirely by the advertiser."). It is important to note that Mudge does not argue this point; she merely points that this is a sentiment felt by advertisers and endorsers—specifically influencers—because "influencers and content creators hate the word 'ad.'" *Id.*

26. Jerrid Grimm, *A Brief History of Native Advertising*, PRESSBOARD (Sept. 17, 2015), https://www.pressboardmedia.com/magazine/a-brief-history-of-native-advertising [https://perma.cc/9CPE-XMJ6] ("'Native advertising' [is] a term first coined by Fred Wilson at the Online Media, Marketing, and Advertising Conference in 2011 . . . .").

27. *Compare id.* ("In fact, the history of America's native advertising dates back to as early as the late 19th century, when John Deere published his magazine 'The Furrow' to promote his products to farmers."), *with* Chad Pollitt, *The World's 1st Known Example of Native Advertising*, NATIVE ADVERT. INST. (Apr. 3, 2017), https://blog.nativeadvertisinginstitute.com/1st-known-example-native-advertising [https://perma.cc/A8B4-J4JD] ("However, the moment [William "Buffalo Bill" Cody] put Sitting Bull . . . on his posters in 1885 he did influencer advertising."), *and "Is That Our Product Placement?": A Brief History of Native Advertising*, DIGIDAY: PAID POST, PULSEPOINT, [hereinafter DIGIDAY] https://digiday.com/sponsored/pulsepointbcs-001-266-628-product-placement-to-paid-posts-a-brief-history-of-native-advertising [https://perma.cc/EJP5-TMHY] ("As Jules Verne wrote his travel epic, 'Around the World in Eighty Days,' he was assailed by transport and shipping companies pleading for mentions in the text[,] . . . . [which] can be read in . . . excerpts from the book published in 1873[.]").

28. *See generally* Grimm, *supra* note 26 (elaborating on the history of native advertising); Kate Gardiner, *The Story Behind 'The Furrow,' the World's Oldest Content Marketing*, CONTENT STRATEGIST (Oct. 3, 2013), https://contently.com/2013/10/03/the-story-behind-the-furrow-2 [https://perma.cc/F58R-GMS8] ("Looking back at our archives, you can see the changes, from an advertorial, to a general agriculture journal with farming hints and reprinted articles that look a lot like the Farmers' Almanac, to today's magazine that tells farmers how to run their businesses[.]" (quoting Neil Dahlstom, John Deere's Manager of Corporate History)).

29. DIGIDAY, *supra* note 27.

30. *Id.* For example, David Ogilvy's "Guinness Guide to Oysters," a single page published to look like an editorial piece, included quick, snappy lines about nine kinds of oysters, with a carefully placed Guinness beer in the bottom right corner. Tim Walters & Robert Rose, *Is Native Advertising the New Black?*, CONTENT MKTG. INST. 3 (2015), https://contentmarketinginstitute.com/wp-content/uploads/2016/02/

vertising in music videos, like *My Adidas* by Run DMC.[31] The 1990s brought native advertising to the Internet era, and native advertising evolved quickly to fit the Internet's multitude of platforms.[32] Fast-forwarding to the present, native advertising has proliferated on the Internet, and is now a largely inescapable feature of Internet usage.

Despite this long history, "native advertising" does not have a stable definition.[33] One private advertising agency has defined native advertising as "a form of paid media where the ad experience follows the natural form and function of the user experience in which it is placed."[34] Some scholars have proposed that native advertising is defined as "textual, pictorial, and/or audiovisual material that supports the aims of an advertiser (and is paid for by the advertiser) while it mimics the format and editorial style of the publisher that carries it."[35] Perhaps most importantly, in its *Native Advertising: A Guide for Businesses*,[36] the FTC has defined Internet-based native advertising as "[advertising] content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online."[37] Regardless of the bevy of definitions, no conclusive definition has emerged to set the boundaries of what is, and is not, native advertising.[38]

AdvanceOHIO_Whitepaper.pdf [https://perma.cc/H4VE-3CAU].

31. DIGIDAY, *supra* note 27. While the popular lore regarding this song holds that the inclusion of Adidas sneakers was not an intentional product placement, that is somewhat questionable considering the song's music video. *Id.*; *see also 14 Examples of Product Placement in Music Videos*, TRENDJACKERS, https://trendjackers.com/14-examples-of-product-placement-in-music-videos [https://perma.cc/H9C4-B59C]. The song's inclusion of the now classic Adidas "Superstar Shoes" in white leather with three black stripes is especially visible at the 2:33 mark where the camera panning places the shoes nearly in the center of the shot. *Id.*

32. DIGIDAY, *supra* note 27.

33. *See* Raul Ferrer Conill, *Camouflaging Church as State*, 17 JOURNALISM STUD. 904, 905 (2016) ("Native advertising is not a term with an established definition.").

34. *Id.* Unfortunately, private advertising agencies have sharply differed on the definition of native advertising. *Compare id.* (indicating Sharethrough defines native advertising as "a form of paid media where the ad experience follows the natural form and function of the user experience in which it is placed" (citation omitted)), *with id.* (indicating Outbrain's definition of native advertising as a "sub-set of the catch-all content marketing, meaning the practice of using content to build trust and engagement with the would-be customer" (citation omitted)).

35. *Id.*

36. *Native Advertising: A Guide for Businesses*, FED. TRADE COMM'N (Dec. 2015) [hereinafter *Native Advertising Guide*], https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses [https://perma.cc/EH7S-ZBMM].

37. *Id.*

38. *See generally* Campbell & Marks, *supra* note 3, at 600 ("Given the growth [of

This Note adopts the FTC's definition of native advertising, but with four alterations to both refine the definition and expand its scope. First, a determination that advertising is native advertising for the purposes of determining liability for deception should only apply to advertisements that one party has paid another party to include among the latter party's otherwise occurrent content.[39] The disclosure requirement and methodology detailed here is not intended to apply to content that a brand may have created and posted to its own platform or has posted to another platform but did not pay that platform to include among other content. Second, this definition is not intended to supersede the FTC's endorsement requirements and is intended only to complement those requirements.[40] Third, to be considered native advertising, the content at issue must either be similar to other, unpaid-for material that immediately surrounds it or be similar in content and format to other unpaid-for content disseminated by a platform. Fourth, this definition is applicable to all forms of native advertising, not just Internet-based native advertising.

A. THE FORMAT AND POPULARITY OF NATIVE ADVERTISING

One likely reason that no single definition of native advertising has become popularly accepted is because so many forms of native advertising exist. While "advertorials"—advertisements covertly disguised as editorials—have long been the posterchild of what a native advertisement looks like, advertorials are only one kind of native advertisement.[41] Other common examples include: search engine result native advertisements, "sponsored" social media posts, in-video advertisement features, and even "in-feed" banner ads.[42] The prolifera-

native advertising] one would expect a clear understanding of native advertising . . . . [T]here is little agreement on the term's definition or meaning.").

39. This does not mean that this Note takes the position that native advertisements that transfer from a platform that has been paid to include the advertisement to a platform that has not been paid need not be disclosed under this definition. The fact that the first platform was paid necessitates disclosure in all other platforms that the advertisement appears on. For a longer discussion on questions of liability for violations of the FTC's native advertising policies and the FTC's general history of liability assignment in the influencer context, see Christopher Terry, Eliezer Joseph Silberberg & Stephen Schmitz, *Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers*, 29 J.L. & POL'Y 406 (2021).

40. *See* 16 C.F.R. § 255.5 (2009) (explaining disclosure requirements for endorsements).

41. *See* Hyman et al., *supra* note 18, at 79 (discussing "advertorials" and their controversial place in modern journalism).

42. *See* Conill, *supra* note 33, at 908 (listing six types of native advertisement formats acknowledged by the Interactive Advertising Bureau); *see also* Brandon R.

tion of Internet content has led to a variety of native advertising formats[43]—and consumers respond differently to each iteration.[44]

Unlike traditional advertisements, which are often jarringly different than the content being consumed, native advertisements communicate their intention without disrupting an online experience.[45] Because native advertising diverges from traditional advertising in persuasive approach, native advertising does not look (or feel) like traditional advertising. The result is that consumers have a difficult time recognizing native advertisements as advertisements.[46]

To concretize native advertising, consider Pickup Music's YouTube video of Beau Diakowicz's song "Foam," entitled *Beau Diakowicz Performs 'Foam' with D'Angelico*.[47] The video features Diakowicz playing the song "Foam" on a D'Angelico guitar in an aesthetically pleasing room.[48] That video looks like content that would otherwise appear on YouTube without sponsorship. The video is also an advertisement for D'Angelico guitars: D'Angelico is mentioned in the title of the video, and the D'Angelico guitar Diakowicz plays is one of the most prominently featured items in the video.[49] A consumer watching the video experiences musical content that they would otherwise find on Pickup Music's channel,[50] but that consumer is also exposed to an advertisement for a guitar company without

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Einstein, *Reading Between the Lines: The Rise of Native Advertising and the FTC's Inability to Regulate It*, 10 BROOK. J. CORP. FIN. & COM. L. 225, 228–30 (2015) (listing popular forms of native advertising).

43. Wojdynski, *supra* note 19, at 2.

44. *Cf.* Einstein, *supra* note 42, at 228–30 (indicating that each format of advertisement is different in kind from another type).

45. *See* Campbell & Marks, *supra* note 3, at 600 ("At a general level, native advertising is a term used to describe a spectrum of new online advertising forms . . . .").

46. *See* Hyman et al., *supra* note 18, at 102–06 (indicating that 22% of consumers could tell the difference between an advertorial and an editorial, but more than 66% of consumers felt they could "easily recognize the difference" between a native advertisement and unpaid for content).

47. Pickup Music, *Beau Diakowicz Performs 'Foam' with D'Angelico*, YOUTUBE (May 29, 2019), https://www.youtube.com/watch?v=D8t03D1eAZo (last visited Mar. 12, 2022).

48. *Id.*

49. *Id.* (noting that the title of the video includes the phrase "with D'Angelico").

50. There are multiple other examples on Pickup Music's page that are nearly identical to the visual aesthetics and sonic style of the *Foam* video. *See, e.g.*, Pickup Music, *Neo-Soul Guitar Kazuki Isogai with Ibanez AZ2204*, YOUTUBE (Feb. 2, 2019), https://www.youtube.com/watch?v=xI3ZBCyl6Ec (last visited Mar. 12, 2022) ("Ibanez and PickUp Music present Kazuki Isogai performing an original riff on an AZ2204-ICM. Kazuki is one of our favorite guitarists so we were super excited to have him perform for us.").

any explicit disclosure that the guitar company has paid for its product placement in the video.[51]

Though this example typifies only one kind of native advertisement, it is highly instructive. Like many contemporary native advertisements, the advertisement is the video's content.[52] Furthermore, the title includes language suggesting that D'Angelico Guitars has sponsored the video, but the title's language obscures the nature of the relationship between Pickup Music and D'Angelico Guitars.[53] And though this not a feature of all native advertisements, Pickup Music's video does not present any false or misleading claim about the guitar itself—in fact, the video does not make any explicit claim at all.[54] At the same time, the video's title tiptoes around disclosing the relationship between Pickup Music, Diakowicz, and D'Angelico, as commercial. The video intentionally fails to let the viewer know that all the parties involved are not there by happenstance, and the relationships between them are not coincidental. Instead, the advertisement sells the guitar without ever saying a word about the guitar's features or its intentional placement, all while looking nearly identical other videos on Pickup Music's YouTube page.[55]

The near identicality of native advertisements to unpaid-for content is largely why native advertising has become a ubiquitous

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51. Other common examples include "promoted" posts on Twitter. These posts often include language that would otherwise appear in an unpaid for tweet but is actually such a paid advertisement. *See, e.g.*, Mike Sievert (@MikeSievert), TWITTER (July 13, 2021, 11:52 AM), https://twitter.com/MikeSievert/status/1414991215309643778 [https://perma.cc/4TZC-M3TM]. Similar paid for content on websites like Pinterest, which push native advertising aesthetic content as if it were unpaid for content. *See Pinterest Ads*, PINTEREST, https://ads.pinterest.com [https://perma.cc/S2SM-HEBT].

52. This Note means by this that there is no separate advertisement which precedes or succeeds the video, like a pre-roll or post-roll advertisement. *See How Video Ads Work*, GOOGLE, https://support.google.com/google-ads/answer/2375464 [https://perma.cc/C3S4-PULZ] (describing that a video ad can appear when a user initiates video play either in the beginning (pre-roll), at points in between (mid-roll), or after (post-roll)). Instead, the video is the advertisement.

53. *See* sources cited *supra* notes 47–50.

54. *Id.*

55. *Id.* This example should not be considered an attempt to shame Pickup Music. There are far more egregious examples of native advertising deception ongoing on YouTube's platform, like hiding disclosures below walls of text (or not having a disclosure at all). *See, e.g.*, Christen Dominique, *FULL COVERAGE GLAM MAKEUP TUTORIAL*, YOUTUBE (Aug. 17, 2016), https://www.youtube.com/watch?v=C1g92Xghz-8 (last visited Mar. 12, 2022) (including a disclosure at the very bottom of the expanded description box stating, "FTC: This is an Ipsy Glambag video," but not presenting that disclosure at any point in the content of the video itself).

part of digital advertising.[56] Advertising agencies have significantly invested in native advertising. In fact, between 2016 and 2020, spending on native advertising increased over 300% in one sector of native advertising alone.[57] While optimistic accounts of the growth of native advertising overshot the actual percentage increase in spending on native advertising,[58] the continued growth of the native advertising market has not slowed down.[59] Native advertising now comprises around 63% to 65% of all display ads bought in the United States.[60] Even the COVID-19 pandemic has not stopped that growth, with 2020 featuring a 5.5% rise in spending on forms of native advertising.[61]

In short, native advertising is a dominant form of advertising right now—especially on the Internet. Native advertising has become the de facto advertising on social media platforms,[62] accounting for roughly three-quarters of all social media advertising spending.[63] Even publishers who have historically been wary of native advertising, such as newspapers and magazines, have come to embrace native advertising as a sorely needed revenue stream.[64] The current

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56. *See* Einstein, *supra* note 42, at 240 ("As advertisers continue to spend billions of dollars on native ad space . . . consumers are looking at native ads 53% more frequently than traditional ads . . . .").

57. *See* Statista Rsch. Dep't, *Native Digital Display Advertising Spending in the United States from 2016 to 2020*, STATISTA (Jan. 14, 2021), https://www.statista.com/statistics/369886/native-ad-spend-usa [https://perma.cc/Z3HP-SAEE] (indicating that spending on $16.68 billion in 2016 on digital display native advertisement spending versus $52.75 billion in 2020 on digital display native advertisement spending).

58. Statistics estimate that $43.9 billion was spent in 2019. *See* Nicole Perrin, *US Native Advertising 2019*, EMARKETER (Mar. 20, 2019), https://www.emarketer.com/content/us-native-advertising-2019 [https://perma.cc/UBR8-L4CK].

59. Ross Benes, *Driven by Social, Native Accounts for Nearly Two-Thirds of Display Ad Spend*, EMARKETER (Apr. 16, 2019) https://www.emarketer.com/content/driven-by-social-native-accounts-for-nearly-two-thirds-of-display-ad-spend [https://perma.cc/D5M8-DLKG] (indicating that native advertising's share in spending on display ads was 65% in 2019, up from 48% in 2016).

60. *Id.*

61. Nicole Perrin, *US Digital Display Advertising 2020*, EMARKETER (Aug. 12, 2020), https://www.emarketer.com/content/us-digital-display-advertising-2020 [https://perma.cc/KN8E-JYQV].

62. *See* Perrin, *supra* note 58 ("Most native ad spending goes toward social networks—especially Facebook.").

63. *Id.*

64. For example, the *New York Times* created its own in-house native advertising team. *See* T BRAND STUDIOS, https://www.tbrandstudio.com [https://perma.cc/J3BC-Q3T8] (describing the *New York Times*' internal native advertising team). Even though native advertising scandals have seriously harmed the

spending trend indicates that it is unlikely that native advertising will go away any time soon.[65]

B. THE FEDERAL TRADE COMMISSION AND ADVERTISING REGULATION

Since passage of the Wheeler-Lea Act,[66] the FTC has been empowered to protect consumers[67] from "unfair or deceptive acts or practices in or affecting commerce."[68] However, Congress has never defined what "deceptive acts or practices" are, and instead effectively endowed the FTC and the courts with the power to determine what constitutes deception.[69]

The FTC has repeatedly asserted that it possesses broad authority to pursue its consumer protection agenda, and federal courts

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image of well-known magazines like *The Atlantic*, content publishers continue to increase their reliance on native advertising as a revenue source. *See* James Fallows, *On The Atlantic's Scientology Ad (and Aftermath)*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-the-atlantics-scientology-ad-and-aftermath/273447 [https://perma.cc/MHQ7-5GTY] (explaining *The Atlantic*'s prior native advertising scandal); Carlson, *supra* note 3, at 857 (2014) (describing native advertising as one of the few revenue "bright spots" of online advertising for publishers).

65. *See* Campbell & Marks, *supra* note 3, at 605 ("[N]ative advertising is here to stay . . . ."); *see also* Walters & Rose, *supra* note 30, at 3 ("Investment in 'native style' advertising . . . is pegged to grow nearly 600% during that five-year period.").

66. Wheeler-Lea Act of 1938 § 3, 15 U.S.C. § 45(a). This provision specifically expanded the statutory delegation of authority of the FTC to encompass regulation of commerce for the purpose of consumer protection. *See* Dale Pollak & Bruce Teichner, Comment, *The Federal Trade Commission's Deception Enforcement Policy*, 35 DEPAUL L. REV. 125, 127 n.13 (1985) ("The FTC Act's proscription against deception is based upon the belief that deceptive acts or practices have the following harmful effects . . . injury to consumers . . . .").

67. Originally, section 5(a) of the Federal Trade Commission Act (FTCA)—which forms the backbone of the FTC's enforcement for deceptive practices—was aimed solely at remedying antitrust violations. *See* Jack E. Karns, *The Federal Trade Commission's Evolving Deception Policy*, 22 U. RICH. L. REV. 399, 399 n.2 (1988) (explaining that an early Supreme Court decision interpreting section 5 deemed it to encompass only competitive practices affecting other businesses); Pollak & Teichner, *supra* note 66, at 126 (referring to the FTCA's origins as an "anti-monopoly law"); *see also* FTC v. Raladam Co., 283 U.S. 643, 653 (1931) (indicating the Supreme Court had previously ruled the FTC lacked statutory authority to regulate deceptive acts or practices affecting consumers). In the early days of the FTC, the Court narrowly construed the FTC's statutory grant of power—the FTC's delegated authority extended only to protect the public from anti-competitive acts by businesses. *See Raladam Co.*, 283 U.S. at 647–48 (noting that the aim of the FTCA is to protect the public "from the evils" resulting from unfair competition).

68. 15 U.S.C. § 45(a)(1).

69. *See, e.g.*, Simeon Mgmt. Corp. v. FTC, 579 F.2d 1137, 1145 (9th Cir. 1978) (indicating that the FTC is more qualified to determine deception than courts).

have generally agreed. Courts have affirmed that the FTC has the authority to determine what constitutes deception[70]—this is especially true in novel legal and factual scenarios.[71] The courts have also affirmed that the FTC has significant flexibility in determining what is and what is not an unfair or deceptive act or practice.[72] Courts have also generally recognized that the FTC is better qualified than the courts to determine what is or is not a deceptive act or practice.[73] Courts also acknowledge that the FTC's determinations of deception should be granted deference.[74] Finally, at least one court has upheld the theory that the FTC was allowed to act against deception to stop deception in its incipiency.[75]

Following from this breadth of power, the FTC has used a wide variety of methods to promote its consumer protection goals, including informal adjudications, promulgated policy papers, published guides, rulemaking, and even creating workshops to indicate what it will classify as a deceptive act or practice.[76]

The FTC's current view of "deception" derives from the agency's *1983 Policy Statement on Deception*.[77] The *1983 Policy Statement* re-

70. *See* Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977) (holding that the FTC has the power to conclude from the advertisements themselves that they had the tendency to deceive consumers).

71. *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385, 386–87 (1965) (stating that the FTC has an influential role in determining how to apply section 5(a) in novel legal circumstances and that the FTC has the authority to determine the meaning of representations in advertisements).

72. *Id.* at 385 (underlining the freedom afforded the FTC when labelling a practice "deceptive").

73. *Compare Simeon Mgmt. Corp.*, 579 F.2d at 1145 (indicating that the FTC is more qualified to determine deception than courts), *with* Standard Oil Co. v. FTC, 577 F.2d 653, 662 (9th Cir. 1978) (refusing to defer to the FTC's decision that an advertisement was deceptive).

74. *See* FTC v. Mary Carter Paint Co., 382 U.S. 46, 48–49 (1965) (stating that FTC findings are to be granted deference by the courts).

75. Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963) ("[I]t is in the public interest to stop any deception at its incipiency.").

76. *See generally infra* Parts I.C–E (explaining some of the approaches the FTC has taken in regulating advertising deception).

77. *See FTC Policy Statement on Deception*, *app. to In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174–84 (1984) [hereinafter *1983 Policy Statement*] (attempting to provide an outline for the enforcement of the FTC's deception mandate). The appended *1983 Policy Statement* generated vigorous dissent from opposing commissioners. *See id.* at 184–98 ("[I] disagree entirely with the legal analysis in the majority opinion."). For a larger-scope explanation of the drama of the FTC's change in policy, see generally Karns, *supra* note 67, at 407–09 (discussing the evolution of the deception standard and Chairman Miller's various failed attempts at codifying the view of the *1983 Policy Statement*). The *1983 Policy Statement* converted the "any tendency" policy—that

quired three elements to find deception. First, "there must be a representation, omission or practice that is likely to mislead the consumer."[78] Second, the FTC stated that it examines the practice "from the perspective of a consumer acting reasonably in the circumstances."[79] Third, "the representation, omission, or practice must be a 'material' one."[80]

1. The Federal Trade Commission's Advertising Review Methodologies

In reviewing advertisements for deception, the FTC has established some general principles. The FTC finds an advertisement de-

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acts or practices with any tendency to deceive consumers were prohibited as deceptive—to a much narrower view. *See* Pollak & Teichner, *supra* note 66, at 126–38 (discussing the "any tendency" standard in depth). *See generally* Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849 (1984) (writing that the authors, both of the remaining pro-consumer protection voices on the Commission at the time of the policy shift, were fearful that the *1983 Policy Statement* would narrow the FTC's ability to regulate in favor of consumer protection).

78. *1983 Policy Statement*, *supra* note 77, at 175.

79. *Id.* This requirement has long been considered the most controversial change that occurred under the Miller FTC—to the point that the dissenting FTC commissioners published a law review article to supplement their dissent to the policy paper. *See generally* Bailey & Pertschuk, *supra* note 77, at 851 (arguing that the new standard may inhibit consistency and predictability). Whether the *1983 Policy Statement*'s changes were based on an honest restatement of FTC deception enforcement precedent is questionable. *Compare In re* Warner-Lambert Co., 86 F.T.C. 1398, 1415 n.4 (1975) (evaluating the advertisement from the perspective of an ordinary consumer), *with* Standard Oil Co. v. FTC, 577 F.2d 653, 657–59 (9th Cir. 1978) (evaluating deception from the perspective of a reasonable consumer). The *1983 Policy Statement* justified this shift on the basis that the FTC had previously raised the level of consumer competency required for a finding of deception. *See In re* Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963) ("An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded."). While scholars have disputed that the FTC had actually required an elevated level of consumer competency prior to the *1983 Policy Statement*—and they are likely correct—by the 1970s, the courts had begun to do so. *Compare* Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942) ("[The Federal Trade Commission Act protects the] ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions."), *with Standard Oil Co.*, 577 F.2d at 657–59 (holding that deception requires consumers to act reasonably).

80. *1983 Policy Statement*, *supra* note 77, at 175. The *1983 Policy Statement* was a decidedly conservative shift in the FTC's deception enforcement regime. *See, e.g.*, *In re* Int'l Harvester Co., 104 F.T.C. 949, 1063 (1984) (indicating that a company's omission of the possibility that oil may explode out of tractor engines and badly burn tractor drivers was insufficient to show deception by material omission because the likelihood of oil explosion was 0.001%).

ceptive when it "materially misleads consumers about its commercial nature."[81] This includes when the formatting of an advertisement causes consumers to be materially misled.[82] When the FTC brings an enforcement action against a party for advertising deception, the FTC reviews the entire advertisement for its net impression.[83] In reviewing the entire advertisement for its net impression, the FTC reviews the "total impression created by the pictures, words and oral representations in the context in which they were used, and in light of the sophistication and understanding of the persons to whom they were directed."[84] And while the FTC has the authority to conclude from the advertisement itself that it has the tendency to deceive consumers,[85] the agency may rely upon outside evidence, such as percentage thresholds of consumers deception, to bolster its findings.[86]

The FTC has also produced guidelines specifically for native advertising. In its *Native Advertising: A Guide for Businesses*, the FTC explained that native advertising must be disclosed clearly and conspicuously[87] when the advertisement would otherwise be deceptive without a disclosure.[88] According to the FTC "an ad is deceptive if it promotes the benefits and attributes of goods and services, but is not readily identifiable to consumers as an ad."[89] The disclosure must also be "clear and prominent."[90] However, when an advertisement is

81. *Native Advertising Guide*, *supra* note 36.

82. *See id.* (noting that the FTC has evaluated whether the format of an ad is deceptive for decades).

83. *See id.* ("In evaluating whether an ad is deceptive, the FTC considers the net impression the ad conveys to consumers.").

84. *In re* Horizon Corp., 97 F.T.C. 464, 674 (1981).

85. Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977).

86. *See* Ivan L. Preston & Jef I. Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising*, 19 J. MARSHALL L. REV. 605, 610–13 (1986) (indicating that the FTC has used outside studies to indicate deception percentage thresholds, but that these findings are not necessary for the FTC to find a violation of section 5(a)).

87. FTC documentation has also used the terminology "clearly and prominently," but the FTC has stated that two are identical. *See .com Disclosures*, FED. TRADE COMM'N (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf [https://perma.cc/KRH9-S7CS] ("Some rules and guides, as well as some FTC cases, use the phrase 'clearly and prominently' instead of 'clearly and conspicuously.' As used in FTC rules, guides, and cases, these two phrases are synonymous.").

88. *Native Advertising Guide*, *supra* note 36.

89. *Id.*

90. *Id.*

"clearly commercial in nature,"[91] no disclosure is necessary.[92] Unfortunately it is unclear what makes an advertisement "clearly commercial in nature" according to the FTC.

2. The Federal Trade Commission's Reliance on Percentages

Throughout its enforcement history, the FTC has decided a number of cases which rely upon statistical thresholds to defend a finding of deception. While the "Commission has never identified a specific minimum percentage of consumers who must be misled . . . to find deception," it has nevertheless utilized statistical thresholds repeatedly.[93] These statistical thresholds have set a percentage that indicates deception.[94]

Over the course of the FTC's eras, these percentages have varied significantly. Some cases have indicated rates as low as 5% deception is sufficient.[95] Still other cases have posited a range of threshold indicators.[96] Generally speaking, the most durable of these percentages has been 15%—the *Firestone* standard.[97]

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91. *Id.*

92. *Id.* One scholar has broken down the FTC's rules more holistically as:

> (1) Unless advertising is clearly recognizable as advertising, it needs to be expressly identified as advertising . . . . (2) Only advertising content that promotes a product or service needs to be identified as advertising . . . . (3) If the content includes merely product placement or inclusion of a product . . . with no mention of features . . . and no endorsement . . . no advertising disclosure is needed.

Mudge, *supra* note 25, at 81. Though Mudge succinctly summed up the FTC's rules, she has also pointed out that "these three 'simple' rules are easy to say" but hard to practically apply. *Id.* The problem of applying the rules to everyday native advertising is that these rules are premised on a "very clear line between advertising . . . and unsponsored content" that does not exist in practice. *Id.* Mudge has also helpfully described the FTC's intent: "[The FTC's intent] is to make sure that any advertising not readily identifiable as advertising [is] explicitly labeled as advertising." *Id.*

93. Bailey & Pertschuk, *supra* note 77, at 890 (indicating numerous decisions relying on statistical evidence).

94. Few, if any, of these cases have stood the test of time—except *Firestone*. For corroboration on this point, see Preston & Richards, *supra* note 86, at 609–13, expanding on the usage of threshold percentages in deciding "how much is enough" deception to find consumer deception, and indicating that only three of the cases remained well accepted by the middle of the 1980s.

95. *See In re* Friedman's-Georgia, Inc., 74 F.T.C. 1056, 1068–71 (1968) (holding that a 5% deception rate, the lowest percentage the FTC has ever held as deceptive, was sufficient to indicate deception).

96. *See, e.g.*, *In re* Bristol-Myers Co., 85 F.T.C. 688, 704, 712 (1975) (finding deception where between 14%, 15%, and 33% of consumers were deceived (or miscomprehended) a commercial).

97. See Preston & Richards, *supra* note 86, at 611 for a brief discussion of the

3. *Firestone* and the Creation of the 15% Consumer Deception Threshold

Firestone Tire & Rubber Co. v. Federal Trade Commission centered around Firestone's "safe tire" advertisement.[98] That advertisement stated, "[w]hen you buy a Firestone tire—no matter how much or how little you pay—you get a safe tire."[99] However, the advertisement also included a disclosure: "[Q]uality control techniques known to the industry cannot insure that each tire produced . . . is absolutely free from any defects . . . ."[100] Despite the disclosure, the FTC held the advertisement was deceptive because the "absolute representation that its tires are 'safe' is false and deceptive on its own admission."[101] The FTC then ordered Firestone to cease "[r]epresenting . . . that every purchaser of tires bearing the brand name . . . is assured of receiving tires free from defects" without "disclosing clearly and conspicuously and in close conjunction with such representation that the safety of any tire is affected."[102]

In affirming the FTC's ruling, the Sixth Circuit went further than the FTC. The *Firestone* court stated that it could know that Firestone's commercial was verifiably deceptive under section 5(a) of the FTCA because of the percentage of consumers who were deceived by the advertisement.[103] The *Firestone* court's reasoning derived from a study by Firestone on the commercial at issue. The results of the study were that 15.3% of viewers who saw the commercial thought it meant that: either "[e]very Firestone tire is absolutely safe no matter how it is used and regardless of the tire inflation pressure and load of the car;" or that "[e]very single Firestone

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three lasting cases: *Rhodes Pharmacal*, *Benrus Watch*, and *Firestone*. *See also* Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 386 (7th Cir. 1953) (9%), *modified sub nom.* FTC v. Rhodes Pharmacal Co., 348 U.S. 940 (1955) (per curiam); *In re* Benrus Watch Co., Inc., 64 F.T.C. 1018, 1044–45 (1964) (14%); Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir. 1973) (10% or 15%). Of all these cases, *Firestone* has remained the most influential and long-lasting. *See* sources cited *infra* note 109.

98. *See Firestone*, 481 F.2d at 247 (outlining stipulations agreed to by the parties relating to the "safe tire" advertisement).

99. *Id.*

100. *Id.*

101. *Id.* In fact, the FTC went on to further state that Firestone's advertising was deceptive because "tires cannot under today's technology be assured of being free of defects" in spite of the fact that Firestone had added a disclosure with very nearly that language. *Id.*

102. *Id.* at 248.

103. *See id.* at 249 (noting the importance of the percentage of consumers deceived in its affirmation).

tire will be absolutely free from any defects."[104] The *Firestone* court then concluded its analysis of the deceptiveness of the advertisement by simply stating that it would "find it hard to overturn the deception findings of the Commission if the ad thus *misled 15% (or 10%) of the buying public*."[105]

4. *Firestone*'s Legacy

While *Firestone* dealt specifically with a commercial about Firestone's tire safety, its quantitative determination remains its lasting effect. Although the FTC's reasoning for enforcing against Firestone was in part because tire safety is intensely important for human safety, that aspect of *Firestone* has not been the case's lasting impact.[106] *Firestone*, the FTC has held,[107] stands for the overall proposition that an advertisement's deception of 15%[108] of viewing consumers is sufficient to indicate that the advertisement is deceptive.[109]

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104. *Id.*

105. *Id.* (emphasis added).

106. *Id.* at 250 ("The particular claim at issue here involves a matter of human safety . . . . Under such circumstances, it is both unfair and deceptive to consumers to make a specific advertising claim without substantial scientific test data to support it.").

107. This is not to say that the FTC has not attempted to curtail *Firestone*'s breadth. For example, in its *1983 Policy Statement*, the FTC cited *Firestone* twice, and the second citation specifically decreased *Firestone*'s precedential reach by stating that "the nature of the claim . . . is relevant." *1983 Policy Statement*, *supra* note 77, at 176 n.7. This was in reference to the fact that *Firestone* was an enforcement that concerned car tire safety. *See Firestone*, 481 F.2d at 250 ("The particular claim at issue here involves a matter of human safety.").

108. *Firestone*'s authority has even bled outside of FTC enforcements and into private rights of action. *See, e.g.*, Suarez Corp. v. U.S. Postal Serv., No. 87–358A, 1987 WL 955751, at *17 (N.D. Ohio, May 29, 1987) (utilizing *Firestone*'s numerical analysis in a suit against the United States Postal Service); Ill. Bell Tel. Co. v. MCI Telecomm. Corp., No. 96 C 2378, 1996 WL 717466, at *9 (N.D. Ill., Dec. 9, 1996) (utilizing *Firestone* analysis for litigation brought under the Lanham Act).

109. *Firestone*, 481 F.2d at 249 (stating that a 15% or even 10% rate of consumer deception is a substantial sum of deceived consumers); *accord In re* Telebrands Corp., 140 F.T.C. 278, 325 (2005) ("Regardless of the reduction in the difference between the test group and control group responses, the ALJ held correctly that as a matter of law the net takeaway—which ranged from 10.5% to 17.3% for all claims except the fat deposit claim—was sufficient to conclude that the challenged claims were communicated."); Equifax Inc. v. FTC, 678 F.2d 1047, 1052 (11th Cir. 1982) ("In [*Firestone*] . . . the FTC found that the petitioner had engaged in deceptive advertisement. Part of the evidence was . . . that 15% of a scientifically selected sample of consumers were misled by the ad in question . . . . [T]he Commission could reasonably infer under these circumstances that the ad was deceptive."); *see also* Sluis, *supra* note 22 (indicating that the FTC has affirmed that a 15% deception rate is sufficient to indicate native advertising deception).

As the FTC indicated in 2015, the agency views native advertising as presumptively[110] deceptive when native advertisements have a rate of consumer deception that surpasses 15%.[111] This means that all advertising, native advertising included, must comply with the *Firestone* standard; otherwise, the FTC has strong reason to consider the native advertising to be deceptive.[112]

C. THE FEDERAL TRADE COMMISSION'S SURPRISINGLY LONG HISTORY OF NATIVE ADVERTISING SUBREGULATORY PROMULGATIONS

Although the first native advertising enforcement by the FTC occurred in 1917,[113] it was not until 1967 and 1968 that the FTC promulgated both a news release and an advisory decision regarding the proliferation of print native advertising.[114]

In 1967, the FTC published a news release intending to speak directly to the proliferation of advertisements that were formatted as articles.[115] Though the FTC did not indicate that any particular advertisement had been brought to its attention,[116] the FTC stated that

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110. Courts have noted, however, that evidence to the contrary may lead courts to not sustain the FTC's finding of deception. *See, e.g.*, *Equifax Inc.*, 678 F.2d at 1052–53 (citing *Firestone*, 481 F.2d at 249) ("The court cautioned, however, that if the evidence had affirmatively shown that consumers were not misled, the court could not routinely accept the Commission's inference.").

111. AdExchanger, *CleanAds I/O 2015 - "The Marketer's Evolving Conversation with Consumers" - Mary K. Engle, US FTC*, YOUTUBE (June 4, 2015), at 31:04 [hereinafter *Engle Speech*], https://www.youtube.com/watch?v=Qvet_4q25x0 (last visited Mar. 12, 2022) (explaining that the FTC would utilize the 15% consumer deception threshold).

112. *See id.* (discussing the 15% consumer deception threshold in the context of native advertising).

113. *See* FTC v. Muenzen Specialty Co., 1 F.T.C. 30, 31–33 (1917) (outlining concerns with the defendant's advertising methods). In *Muenzen Specialty Co.*, the FTC alleged that Muenzen Specialty Company had produced advertisements that it circulated to consumers. *Id.* at 32. Muenzen represented itself as having expert, impartial opinions on vacuum cleaners—instead, its advertisements were meant to recommend some vacuum cleaners while disparaging competitors. *Id.* at 32–33. This case is likely better analogized to endorsement cases, which are outside the purview of the definition of native advertising used here. See *Native Advertising Guide*, *supra* note 36 for the definition of native advertising.

114. It should be noted that neither of these documents mentioned the term "native advertising." *See infra* notes 152–73 and accompanying text.

115. Press Release, Fed. Trade Comm'n, Statement in Regard to Advertisements that Appear in Feature Article Format (Nov. 28, 1967) [hereinafter 1967 News Release], https://www.ftc.gov/system/files/documents/public_statements/1397096/ftc_stmt_re_ads_in_feature_article_format_1967.pdf [https://perma.cc/EQ6H-XQLL].

116. *See id.* (noting the FTC's consideration of "various print media" advertisements). One of the most curious parts of the FTC's 1967 News Release was that it did

it considered the formatting of advertisements as articles deceptive.[117] While the FTC acknowledged that in some cases these "articles" were captioned as such—with either "ADV." or "ADVERTISEMENT" at the top of the article—it was troubled by the fact these advertisements sometimes omitted this disclosure.[118] The FTC felt that because of the formatting of the advertisement, the readers would be unable to recognize that the "article" was in fact an advertisement.[119] More troubling for the FTC was its recognition that because the advertisements so "exactly duplicate" the format of news or feature articles, a disclosure may be "render[ed] . . . meaningless and incapable of curing the deception."[120]

The FTC's first suggestion for advertisers was to desist from this practice entirely because this method of advertising was against the public interest.[121] The FTC stated that not only was the overall formatting of the advertisements objectionable, but certain features of these advertisements—like the use of by-lines and attribution to authors—were particularly objectionable.[122]

However, after acknowledging that these practices were deceptive, the FTC offered advertisers a back door. If advertisers wanted to continue to use this method of advertising, the FTC stated advertisers and publishers should print the word "ADVERTISEMENT" in "close proximity" to the advertisement in a "clear type" that would be

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not disclose what advertisement had prompted it. *Id.* A year later, however, the FTC stated which advertisements exemplified the issue on which the FTC issued its release. *See* No. 191 Advertisements Which Appear in News Format, 73 F.T.C. 1307, 1307–08 (1968) [hereinafter 1968 Advisory Opinion] (indicating that the release was prompted by deceptive advertisements for restaurants in a newspaper).

117. *See* 1967 News Release, *supra* note 115 (cautioning advertisers against certain formatting to avoid misleading readers).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* However, it should be noted that the FTC backed off this statement at the end of the paragraph by stating: "Accordingly, the Commission cautions advertisers to avoid use of such devices in their advertisements, when they may tend to mislead readers." *Id.* Because of the unclarity of this message, the FTC left advertisers wondering whether the practice was entirely objectionable and against "the public interest" because they were always misleading, or only if the FTC would find these forms of advertisement misleading post-facto. *Id.* ("[I]t is in the public interest that . . . advertisers avoid any possible deception by not placing advertisements whose format simulates that of a news or feature article.").

122. *Id.* ("Inclusion in such an advertisement of a by-line, particularly when accompanied by the writer's title (such as 'feature writer' or 'editor'), may also mislead readers as to its nature.").

of "sufficiently large size" for consumers to readily notice.[123] In effect, the FTC stopped just short of strict liability for non-disclosure.[124] While the news release never stated that the FTC would require advertisers utilizing advertisements formatted as news or feature articles to disclose, the FTC's suggestion was clear: disclose the advertisement with the word "ADVERTISEMENT" in close proximity to the advertisement, in clear, sufficiently sized, legible font, or the advertisement might be considered deceptive.[125]

In 1968, the FTC published an advisory opinion related to "[a]dvertisements which appear in news format."[126] That advisory opinion was built upon the FTC's news release a year before.[127] The advisory opinion did not cite the adjudication it referenced,[128] and only stated some of the facts at issue—specifically the release related to a newspaper which advertised for restaurants.[129] The column was written in "narrative form" and gave the name of the chef or head waiter, and explained how the food being advertised was made.[130] The advertisement also used its format to give the reader the (false) impression it was an independent or impartial commentary on the restaurants.[131] The advertisement, in modern terms, was an advertorial.[132]

In interpreting the prior news release, the 1968 advisory opinion strictly construed the requirements for advertising. First, the advisory opinion interpreted the news release as *requiring* a disclosure that the advertisement was an advertisement.[133] Furthermore, the

123. *Id.* The FTC went one step further for longer advertisements, stating that where the advertisement ran longer than one page, advertisers should repeat the disclosure on each page. *Id.*

124. *See id.* (stressing the importance of disclosures for advertisements in the form of news articles).

125. *Id.*

126. 1968 Advisory Opinion, *supra* note 116, at 1307–08.

127. *See id.* ("The Commission rendered an advisory opinion involving the question of whether it is deceptive to publish an advertisement in the format of a news article without disclosing it is an advertisement, as required in the Commission's press release of November 28, 1967.").

128. *Id.* A search of the entire contents of the Federal Trade Commission's volumes did not reveal the case expounded upon by the 1968 advisory opinion.

129. *Id.* at 1307 ("The factual situation presented to the Commission involved the publication of a column in a newspaper which advertised the cuisine facilities of several restaurants.").

130. *Id.*

131. *Id.*

132. *See supra* note 41 and accompanying text.

133. *Id.* ("The Commission rendered an advisory opinion involving the question

advisory opinion indicated that the FTC's 1967 news release held that disclosure of other information which might make the advertisement appear more like an advertisement and less like an impartial review, like the inclusion of food prices or restaurant hours, would not be sufficient.[134] By the text of the 1968 advisory opinion, the FTC's guidance imposed a required disclosure of advertisements as advertisements.[135]

In 1970, the FTC promulgated its *Commission Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising* in response to requests from television advertisers for guidance on disclosures.[136] In its 1970 television statement, the FTC built on its previous two advertising disclosure opinions and increased the stringency of disclosure requirements. The 1970 television statement gave mandatory instructions to television advertisers to disclose their advertisements "clear[ly] and conspicuous[ly]."[137] The FTC, elaborating on what "clear and conspicuous" meant, explained that the agency would evaluate whether commercials were "clear and conspicuous" on the basis of several factors, including: disclosure being presented simultaneously, containing single-shaded letters of "sufficient size," and requiring the disclosure to immediately follow any sales representations.[138] The FTC also stressed that the disclosure would only be satisfactory if the advertisement's intended audience could grasp the "full meaning of [the] disclosure."[139]

The FTC's early guidance has two clear takeaways. First, the FTC's guidance left regulated parties with generally clear guidelines

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of whether it is deceptive to publish an advertisement in the format of a news article without disclosing it is an advertisement, as required in the Commission's press release of November 28, 1967.").

134. *See id.* at 1308 (preferring an explicit disclosure).

135. *Id.* ("[T]he Commission is of the opinion that it will be necessary to clearly and conspicuously disclose it is an advertisement . . . .").

136. *See* Press Release, Fed. Trade Comm'n, Commission Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising (Oct. 21, 1970) [hereinafter 1970 Television Statement], https://www.ftc.gov/news-events/press-releases/1970/10/commission-enforcement-policy-statement-regard-clear-conspicuous [https://perma.cc/68AG-8ET9] (prefacing the guidance with the notion that "questions have been raised" about the meaning of certain terms used by the FTC).

137. *Id.*

138. *Id.*

139. *Id.* This was in line with the prior subregulatory guidance indicating that the FTC would pay close attention to the consumer protection needs of vulnerable populations. *See* 1967 News Release, *supra* note 115 (discussing FTC concern with the public interest).

for disclosure. For example, disclosure would require the word "ad" or "advertisement."[140] Second, the FTC's goals were based almost exclusively on ensuring the consumers had sufficient information to determine whether content was advertising. The FTC's intent to protect consumers from advertising deception overrode aesthetic and persuasive considerations for burgeoning native advertising formats, like infomercials.[141]

D. THE FTC ACKNOWLEDGES NATIVE ADVERTISING AS NATIVE ADVERTISING: CONTEMPORARY SUBREGULATORY PROMULGATIONS

The FTC laid the foundations for its contemporary regulation of native advertising in its *.com Disclosures* guide.[142] Though *.com Disclosures* did not speak to native advertising, it did speak directly to the issue of online advertising disclosure.[143] That guide affirmed the FTC's requirement of "clear and conspicuous" disclosure, the limitations of disclosure's ability to cure misleading impressions, and the necessity of proximity of disclosure to advertisement for online ads.[144] For example, the FTC explicitly stated in *.com Disclosures* that where a disclosure is necessary to prevent deception but the disclosure cannot be clear and conspicuous, then the advertisement should not be released.[145] That guide also gave in-depth explanations for what the FTC would expect from various disclosure methodologies.[146] The FTC gave a clear command to private industry: disclose advertisements clearly, conspicuously, in close proximity to the advertisement, with repetition if needed, and in easily understandable language or risk enforcement actions.[147]

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140. *See supra* notes 123–25 and accompanying text.

141. *See infra* notes 174–82 and accompanying text. Admittedly, this is a simplification of a complex FTC enforcement regime that was not always nearly as clear in practice as it was on paper. However, a discussion of the ins and outs of the FTC's enforcement of infomercials is outside the scope of this Note.

142. *.com Disclosures*, *supra* note 87, at i–iii. The *.com Disclosures* guide was updated in 2013. *Id.* at 1.

143. *See id.* at 5 ("Unique features in online ads . . . may affect how an ad and any required disclosures are evaluated.").

144. *See generally id.* at 4–21 (explaining both the importance and limitations of the disclosure of statements made in advertising).

145. *Id.* at 6.

146. *See, e.g.*, *id.* at 10–11 (discussing hyperlink proximity and other issues relating to off-page disclosure).

147. *Id.* at 1–21 (including statements like "[d]on't hide the ball" in relation to proximity, "[d]on't bury it," in the discussion of prominence, and "[r]epeat disclosures . . . as needed" in discussing the repetition of disclosure). The FTC also explained that the disclosure should match the media—in other words, an audio adver-

However, the FTC was much less clear on what clarity and conspicuity in disclosure would require in concrete cases.[148] Once the FTC delved into the nitty-gritty, the agency fell back on allowing a wide variety of possible disclosure methods, and indicated that the agency would take a granular approach to determining if an advertisement was deceptive.[149] So, while the *.com Disclosures* guidelines were thorough, they did not provide more than a baseline indication of what kinds of disclosure elements the FTC would require in every advertisement.[150] Still, the FTC included a prescient admonition concerning consumer protection: "If there are indications that a significant proportion of reasonable consumers are not noticing or comprehending a necessary disclosure, the disclosure should be improved."[151]

The FTC did not use the terminology of native advertising[152] until its 2015 dual promulgation of its *Enforcement Policy Statement on Deceptively Formatted Advertisements*[153] and its *Native Advertising: A Guide for Businesses*.[154]

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tisement should include an audio disclosure. *Id.* at 20. From an administrative law perspective, the FTC noted that, while guides do not carry the force and effect of law, failure to comply with the guides might result in an enforcement action by the FTC. *Id.* at 2 n.5.

148. *See id.* at 7 ("There is no set formula for a clear and conspicuous disclosure . . . .").

149. *See id.* (listing considerations for evaluating whether a disclosure is clear and conspicuous).

150. *See id.* at 21 (describing that the FTC would use its "traditional criteria" in evaluating online advertising while keeping in mind that "future innovation" may change how online advertising functions).

151. *Id.* at 7.

152. This is particularly notable because the FTC embarked on "Operation Full Disclosure" one year prior to these promulgations. *Operation 'Full Disclosure' Targets More Than 60 National Advertisers*, FED. TRADE COMM'N (Sept. 23, 2014) [hereinafter *Operation Full Disclosure*], https://www.ftc.gov/news-events/press-releases/2014/09/operation-full-disclosure-targets-more-60-national-advertisers [https://perma.cc/7ACR-XB7V]. During the course of Operation Full Disclosure, the FTC sent more than sixty letters to advertisers. *Id.* That operation largely restated what the FTC had already stated in *.com Disclosures*. *See* Lesley Fair, *Full Disclosure*, FED. TRADE COMM'N (Sept. 23, 2014), https://www.ftc.gov/news-events/blogs/business-blog/2014/09/full-disclosure [https://perma.cc/JXN7-25DR] (detailing the "4Ps" of Operation Full Disclosure—"Prominence," "Presentation," "Placement," and "Proximity").

153. *See Enforcement Policy Statement on Deceptively Formatted Advertisements*, FED. TRADE COMM'N 10 (Dec. 22, 2015) [hereinafter *Enforcement Policy Statement*], https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf [https://perma.cc/3HRD-87CW] ("The recent proliferation of natively formatted advertising in digital media has raised questions about whether these advertising formats deceive consumers by blurring the distinc-

In its *Enforcement Policy Statement on Deceptively Formatted Advertisements*, the FTC both reaffirmed and reinterpreted its past precedent. There, the FTC affirmatively recognized the proliferation of native advertising, and acknowledged the deceptiveness of native advertising.[155] The FTC also recognized that native advertising takes many forms, and listed multiple types of common native advertising formats.[156] The *Enforcement Policy Statement* also explained that the FTC had repeatedly required advertisers it had enforced against to include the disclosure language "PAID ADVERTISEMENT," but the *Enforcement Policy Statement* did not indicate the FTC would require this disclosure in all native advertisements.[157] However, unlike past statements that focused solely on consumer protection, the FTC also indicated that it sought to balance the needs of publishers and advertisers with consumer protection.[158]

In *Native Advertising: A Guide for Businesses*, the FTC focused on the issue of contemporary native advertising strategies and provided specific guidance on what the FTC would require for native advertising disclosure. That guide began by explaining it would apply its established advertising consumer protection standards to native advertising.[159] The Guide went on to elaborate three pieces that the FTC found as critical to consumer protection.[160] First, "[a]n advertisement or promotional message shouldn't suggest or imply to consumers that it's anything other than an ad."[161] Second, "[s]ome native ads may be so clearly commercial in nature that they are unlikely to mislead consumers even without a specific disclosure."[162] But, the

tion between advertising and non-commercial content.").

154. *Native Advertising Guide*, *supra* note 36.

155. *See Enforcement Policy Statement*, *supra* note 153, at 1 ("The Commission has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself.").

156. *Id.* at 10.

157. *See id.* at 4, 10 ("Although the particular facts will determine whether an advertisement formatted like the material in which it appears is deceptive, this statement sets forth the factors the Commission will consider in making that determination.").

158. *Id.* at 1–2.

159. *See Native Advertising Guide*, *supra* note 36 ("A basic truth-in-advertising principle is that it's deceptive to mislead consumers about the commercial nature of content.").

160. *Id.*

161. *Id.*

162. *Id.*

FTC noted that in some cases "a disclosure may be necessary to ensure that consumers understand that the content is advertising."[163] Third, "[i]f a disclosure is necessary to prevent deception, the disclosure must be clear and prominent."[164]

The *Native Advertising Guide* also elaborated on seventeen examples of native advertising, and how the FTC would suggest that businesses consider disclosure in those scenarios.[165] The FTC supplemented these examples by iterating factors to consider in native advertising disclosure, such as: (1) the FTC looks at the net impression of the advertising[166]; (2) an increased similarity of native advertisement to the background format makes disclosure more likely to be necessary[167]; and (3) individuals experiencing native advertising may find it from multiple sources, so advertisers should consider how consumers are likely to experience the advertising in choosing to disclose.[168] Most importantly, the FTC underlined that for the Commission, "the watchword is transparency."[169]

In its most recent staff report, *Blurred Lines*, the FTC acknowledged the continued deceptiveness of native advertising, despite its guidance. The report indicated that the FTC had surveyed possible changes to native advertising disclosure.[170] Despite the implemented disclosure improvements, the FTC admitted that a substantial num-

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* ("[A]dvertisers should consider the ad as a whole, and not just focus on individual phrases, statements, or visual elements.").

167. *Id.* ("The more a native ad is similar in format and topic to content on the publisher's site, the more likely that a disclosure will be necessary to prevent deception.").

168. *Id.* ("[I]t is important that advertisers consider the particular circumstances in which native ads are presented to consumers. These circumstances include consumers' ordinary expectations based on their prior experience with the media in which the ads appear, as well as how they consume content in that media.").

169. *Id.*

170. *See* Maureen K. Ohlhausen & Terrell McSweeny, *Blurred Lines: An Exploration of Consumers' Advertising Recognition in the Contexts of Search Engines and Native Advertising*, FED. TRADE COMM'N 1 (Dec. 2017), [hereinafter *Blurred Lines*] https://www.ftc.gov/system/files/documents/reports/blurred-lines-exploration-consumers-advertising-recognition-contexts-search-engines-native/p164504_ftc_staff_report_re_digital_advertising_and_appendices.pdf [https://perma.cc/NP2W-ULUN] ("In particular, the staff was interested in whether making modest changes to the design and wording of disclosures–based on guidance previously issued by the FTC staff and usability and web design principles–could improve consumers' recognition of these ads.").

ber of consumers were still deceived by native advertisements.[171] Regardless of this finding, the FTC indicated it still believed that disclosures consistent with its published guides were sufficient.[172] That report also included a number of suggested augmentations for publishers of native advertisements, but did not indicate that any augmentation would be a future requirement for FTC native advertising compliance.[173]

E. *FIRESTONE* RETURNS TO THE FTC'S NATIVE ADVERTISING GUIDANCE

Though left out of its published subregulatory guidance, the FTC reaffirmed *Firestone*'s application to native advertising at an advertising industry education event.[174] At that event, Mary K. Engle,[175] speaking on behalf of the FTC, reiterated that the FTC would apply its longstanding advertising precedent—such as the FTC's stance that advertisements would be reviewed based upon their net impression, and the use of obfuscating language to confuse consumers would likely be grounds for enforcement—in evaluating native advertising deception.[176] Engle also explained that, in her view, both the creators of native advertisements and the platforms publishing native advertisements could be held liable for advertising deception when the publisher was involved in creating and disseminating deceptive advertisements.[177] Furthermore, Engle explained that while the FTC did not view native advertising as "inherently deceptive," disclosure could not be subtle and would have to be sufficiently clear that a consumer scrolling on social media could easily recognize the nature

171. *Id.* ("Even with the improved disclosures, a significant percentage of participants still did not recognize some ads as ads.").

172. *Id.* ("Overall, the study results suggest that using disclosures that are consistent with FTC staff's guidance can improve the likelihood that consumers will recognize an ad as an ad.").

173. *See generally id.* (listing a number of suggested augmentations for publishers of native advertisements).

174. *Engle Speech*, *supra* note 111, at 30:50–31:55.

175. At that time, Engle was the "Associate Director for Advertising Practices at the U.S. Federal Trade Commission." *Id.* at 00:12–00:20.

176. *Id.* at 13:45–15:05 (discussing net impression), 23:30–25:25 (concerning obfuscating disclosure language).

177. *Id.* at 15:05–21:15. Engle noted that this was solely her view and not the view of the FTC, however, Engle noted that the FTC affirmed this view in an investigation that it ultimately did not pursue to enforcement. *Id.* at 18:05-21–21:15. Pursuant to this investigation, the FTC sent a publisher a closing letter noting that disseminators of advertising and creators of advertisements could both be held liable for deceptive advertising—which would include native advertising. *Id.*

of the advertisement.[178] Engle concluded that the FTC sought to regulate in such a way that native advertising could be engaging and not deceptive for consumers.[179]

After that conclusion, Engle was asked specifically whether the FTC had an "objective definition" of when native advertising would be considered to have deceived a significant number of consumers.[180] Engle responded that FTC enforcement precedent indicated that the FTC would consider a native advertisement to have deceived a significant number of consumers when consumer deception rates surpassed 15%.[181] In other words, Engle affirmed that the FTC would be applying the *Firestone* threshold in its determination of whether native advertising was deceptive.[182]

And while the FTC has declared that "the watchword is transparency,"[183] its subregulatory guidance has tended to work against that goal. The three principles enumerated by the FTC in its *Native Advertising Guide* indicated a clear departure from its prior 1960s and 1970s guidance.[184] Those principles effectively meant that the FTC would not require a disclosure on all advertising. Instead, the FTC would only require disclosure for advertising that is "[not] clearly commercial."[185] Yet, the FTC's guidance about what "clearly commercial" means in practice is unclear.[186] And while the FTC reaffirmed its longstanding precedent that disclosures must be "clear and prominent," the FTC's malleability on when a disclosure would be required at all nullified the value of the "clear and prominent" requirement.[187] Critically, the second principle of the *Native Advertising Guide* more than just undercut the first and third pieces. In giving advertisers and publishers the ability to not disclose native advertising on the basis of a vague notion of "clear[] commercial[ity]," the

178. *Id.* at 21:15–25:25.

179. *Id.* at 25:25–26:37.

180. *Id.* at 30:30–30:50.

181. *Id.* at 30:50–31:55.

182. *Id.* It should be noted that Engle did not use the term *Firestone*. Nonetheless, the 15% standard was established by *Firestone*, and the FTC generally cites to *Firestone* when it asserts a 15% deception rate as evidence of deceptive acts or practices. *See supra* notes 94–109.

183. *See Native Advertising Guide*, *supra* note 36.

184. *See, e.g.*, *id.* (suggesting the use of the word "Ad" but not requiring it, and allowing for variations on that word or other disclosure language in its stead).

185. *Id.*

186. *Id.*

187. *Id.*

second piece opened the door to the lack of transparency that typifies contemporary native advertising.[188]

The FTC's current guidance may appear more flexible, but it has worked against the agency's consumer protection goals. And this fundamental issue is not resolved by the maze of examples the FTC offers in its subregulatory guidance.[189] Furthermore, the rapid evolution of native advertising means that the malleability of the promulgated guidelines leave regulated parties to guess whether the FTC will find the advertisement deceptive.[190] And, inexplicably, the FTC has failed to include *Firestone* in its subregulatory guides. Yet, the FTC publicly reaffirmed its application of the *Firestone* threshold to native advertising six months before the promulgation of the first set of native-advertising-specific guides.[191]

In the past, the FTC's guidance was generally clear, and the agency promulgated requirements that applied to all native advertising.[192] The FTC's contemporary guidance is unclear and does not accomplish the agency's intended goals.[193]

II. NATIVE ADVERTISING FAR SURPASSES THE *FIRESTONE* THRESHOLD

The problem is simple. Native advertising is simultaneously very popular[194] and very deceptive. In fact, substantial numbers of

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188. *Id.* This is, in part, what commentators like Mudge appear to have referenced in explaining that "putting [the FTC's guidance] into practice is not always so easy." Mudge, *supra* note 25, at 81.

189. *See supra* notes 184–88 and accompanying text.

190. *Cf.* Mudge, *supra* note 25, at 81 (indicating that the "very clear line" between sponsored and unsponsored content, under the FTC's current guidance, does not conform to the "shades of grey" encountered in the real world).

191. *Compare Engle Speech*, *supra* note 111, at 30:50–31:55 (indicating that then-Associate Director for Advertising Practices at the US Federal Trade Commission, Mary K. Engle, explained that the FTC's accepted deception threshold for native advertising is 15% at the CleanAds I/O conference on June 3, 2015), *with FTC Issues Enforcement Policy Statement Addressing "Native" Advertising and Deceptively Formatted Advertisements*, FED. TRADE COMM'N (Dec. 22, 2015), https://www.ftc.gov/news-events/press-releases/2015/12/ftc-issues-enforcement-policy-statement-addressing-native [https://perma.cc/HD4W-GDQ4] (indicating that the *Enforcement Policy Statement* was released on Dec. 22, 2015).

192. *Compare* discussion *supra* Part I.C (expounding on the 1960s and 1970s FTC subregulatory guidance), *with* discussion *supra* Part I.D (expounding on the FTC's contemporary subregulatory guidance).

193. *See, e.g.*, *supra* note 190 and accompanying text.

194. *See* Mudge, *supra* note 25, at 80 ("If you have read a magazine or seen a video online in the last five years, then you have likely encountered 'native advertising.'"); Aribarg & Schwartz, *supra* note 2, at 20 (estimating that tens of billions of dol-

consumers, sometimes even majorities, are deceived about whether they are seeing ads or non-ads when consuming native advertising content.[195] In practice, native advertising deception rates are well above the *Firestone* threshold.[196] The FTC has sought to curb native advertising deceptiveness through enforcements and guides, but has transitioned from requiring disclosure to creating an opaque regime where the FTC merely suggests disclosure when the advertisement's commercial nature is ambiguous. Not for lack of trying, the FTC has not succeeded in creating a *Firestone*-compliant native advertising regime. This is for three main reasons: (1) lack of content disclosure, (2) lack of source disclosure, and (3) the sheer deceptiveness of native advertising formatting.

A. NATIVE ADVERTISING NON-DISCLOSURE

A basic problem is that native advertising is not always disclosed. Multiple studies indicate the grim reality that only around one-third of advertisers actually consistently disclose their native advertisements.[197] This is likely due in part to the ambiguity in the FTC's contemporary subregulatory guidance.[198] While FTC guides indicate that native advertisements should include "clear and conspicuous" disclosure when the advertisement does not appear "clearly commercial," the FTC has also stated that when an advertisement is "clearly commercial," it need not be disclosed.[199] Whether or not the FTC's ambiguity on the matter is the main reason for non-

lars are spent on native advertisements each year).

195. *See* Joe Lazauskas, *Fixing Native Ads: What Consumers Want From Publishers, Brands, Facebook, and the FTC*, CONTENTLY 8 (2016), https://the-content-strategist-13.docs.contently.com/v/fixing-sponsored-content-what-consumers-want-from-brands-publishers-and-the-ftc [https://perma.cc/E8VR-LU3F] (finding that 54% of survey respondents felt deceived by native advertising); Wojdynski, *supra* note 19, at 1477 ("[S]everal recent studies have shown that most consumers perceive sponsored articles as journalism, not advertising.").

196. Emily Giller, *Native Advertising: An International Perspective*, DIGITALCOMMONS@UNIVERSITY OF NEBRASKA–LINCOLN 13–14 (Aug. 4, 2016), https://core.ac.uk/download/pdf/188104521.pdf [https://perma.cc/E5NX-TWVR] (indicating that 425 randomly sampled Internet users had a 72.8% likelihood of believing that native advertising material had equal or greater value than non-native advertising material on the same site).

197. *See* Hyman et al., *supra* note 18, at 82 ("Only one-third of publishers were labeling those ads in a way that was consistent with FTC guidelines."); *see also* Lazauskas, *supra* note 195, at 5 (stating that 70% of websites are not in compliance with FTC guidelines).

198. *See supra* Part I.D.

199. *Native Advertising Guide*, *supra* note 36.

disclosure, the unfortunate reality is that too few native ads are disclosed.

Non-disclosure as the default for native advertising is particularly visible in athleisure native advertisements on social media. Athleisure advertisements often prominently feature merchandise for sale—such as clothing or physical fitness supplements—and include a short caption largely unrelated to the product being displayed.[200] For example, Lex Griffin, a fitness influencer, often posts photos of himself wearing Gymshark brand exercise apparel while exercising.[201] Those photos are identical in style to other photos of Griffin that do not include Gymshark brand apparel.[202] The only mention of Gymshark paying for the advertising is in Griffin's Instagram "bio," where Griffin mentions only that he is a Gymshark athlete, which a consumer would not see without following links to Griffin's Instagram page.[203]

While the risk of FTC enforcement might seem like a sufficient threat, advertiser non-disclosure is driven by the equally high reward of not disclosing. Advertisers recognize that consumers are adept at "shutting out" advertisements.[204] This leads to the troubling reality that from the advertiser's perspective, diminishing the likelihood of consumer advertisement recognition is a good thing.[205] If an advertiser can prevent a consumer from knowing that an advertisement is in fact an advertisement, then the advertiser can push con-

200. *See, e.g.*, Lex Griffin (@lex_fitness), INSTAGRAM (July 12, 2021), https://www.instagram.com/p/CRPKwuyAw0z (last visited Mar. 12, 2022) (promoting an athleisure company during the course of a workout video). In some cases, sponsors are mentioned but often are not mentioned with reference to payment or with a revelation that the content is an advertisement for the sponsoring brand. *See* Lex Griffin (@lex_fitness) INSTAGRAM (July 10, 2021), https://www.instagram.com/p/CRJ_We_FUib (last visited Mar. 12, 2022) (mentioning a brand name in the caption while wearing apparel from that brand).

201. Lex Griffin (@lex_fitness), INSTAGRAM, https://www.instagram.com/lex_fitness (last visited Mar. 12, 2022).

202. *Compare* Lex Griffin (@lex_fitness), INSTAGRAM (July 5, 2021), https://www.instagram.com/p/CQ9Q1tbgiBE (last visited Mar. 12, 2022) (depicting Griffin wearing Gymshark apparel while exercising), *with* Lex Griffin (@lex_fitness), INSTAGRAM (June 30, 2020), https://www.instagram.com/p/CCELdWZFr4r (last visited Mar. 12, 2022) (depicting Griffin exercising without identifiable Gymshark apparel).

203. *See* Griffin, *supra* note 201.

204. Margaret C. Campbell, Gina S. Mohr & Peeter W.J. Verlegh, *Can Disclosures Lead Consumers to Resist Covert Persuasion? The Important Roles of Disclosure Timing and Type of Response*, 23 J. CONSUMER PSYCH. 483, 483 (2012).

205. *See* Wojdynski, *supra* note 19, at 1478 ("[W]hen consumers recognize a persuasive attempt, their existing knowledge about persuasion is activated.").

tent without prompting the consumer to be skeptical of the content.[206] This means that advertisers can have their cake and eat it too: native advertisements not only present paid-for material that resembles unpaid-for material, they can also get the consumer to consume the material as if it were impartial as well.[207]

The wholesale lack of disclosure of native advertising is particularly pernicious because consumers generally cannot tell the difference between native advertising and non-advertising content.[208] A recent study indicated that while consumers had an 81% chance of correctly determining that an undisclosed "[r]egular [a]d" was, in fact, an advertisement, undisclosed native advertising had only a 22% recognition rate.[209] So while consumers think that they can tell that a native advertisement is an advertisement without disclosure, nearly eight times out of ten, that assumption is incorrect.

B. SOURCE NON-DISCLOSURE AND AMBIGUOUS SOURCE DISCLOSURE LANGUAGE IN NATIVE ADVERTISING

Lack of disclosure is exacerbated by the variety of native advertising source disclosures and the failure to carry those disclosures over to the content itself.[210] Like its stance on the disclosure that an advertisement is an advertisement, the FTC views itself as indicating that it requires the disclosure of a paying source in an advertisement.[211] While the FTC's requirement for source disclosure is arguably more clear-cut than its requirement for overall disclosure, many

206. *Id.*

207. *See* Joonghwa Lee, Soojung Kim & Chang-Dae Ham, *A Double-Edged Sword? Predicting Consumers' Attitudes Toward and Sharing Intention of Native Advertising on Social Media*, 60 AM. BEHAV. SCIENTIST 1425, 1428 (2016) ("Consumers with lower persuasion knowledge are less likely to effectively process persuasion attempts . . . and more likely to be susceptible to them . . . .").

208. Dan Shewan, *Native Advertising Examples: 5 of the Best (and Worst)*, WORDSTREAM: BLOG (Nov. 21, 2021), https://www.wordstream.com/blog/ws/2014/07/07/native-advertising-examples [https://perma.cc/R7RF-ZHWW] (indicating that almost half of consumers do not know what native advertising is, and that only 51% of those who do are skeptical of native advertising content).

209. Hyman et al., *supra* note 18, at 94 tbl.3.

210. Campbell & Marks, *supra* note 3, at 602.

211. *See Native Advertising Guide*, *supra* note 36 ("Why would it be material to consumers to know the source of the information? Because knowing that something is an ad likely will affect whether consumers choose to interact with it and the weight or credibility consumers give the information it conveys."). The FTC has imposed a regime similar to strict liability in terms of disclosure of payment sources related to endorsements. *See* 16 C.F.R. § 255.5 (2021) (requiring the disclosure of material connections between the endorser and the advertised product's seller when making endorsements).

advertisements often lack overt disclosure language indicating the commerciality of relationship between the advertiser and the advertisement sponsor.[212] And even where source disclosure is included, one study indicated that 44% of consumers are unable to identify the sponsorship of the advertisement.[213] This is likely due to the ambiguous or non-existent source disclosure language used in native advertisements.

The online athletics industry is an exemplar of how businesses often use creative, vague disclosure language while advertising. For example, Dayton O'Donoghue, a promising young hockey player, regularly posts content of herself playing hockey with Bauer hockey equipment.[214] Her recent content often prominently includes Bauer hockey gloves, skates, sticks, and sweaters.[215] Most notably, O'Donoghue's Instagram page features her participating in Bauer's "#EverythingForTheGame" advertising campaign, which highlights inspiring young hockey players from backgrounds that are underrepresented in professional hockey.[216] Though the campaign is compelling, the disclosure is vague, insofar as the advertisement does not indicate the scope of the commercial relationship between Bauer and O'Donoghue. For example, O'Donoghue thanks Bauer for "giving me

212. *See Operation Full Disclosure*, *supra* note 152 (noting that the FTC sent warning letters to twenty of the 100 largest advertising companies for failing to provide "clear and conspicuous" commercial disclosures); Lazauskas, *supra* note 195, at 47 ("[I]t's nearly impossible to find a major publisher or social media platform that labels native ads as advertising."). *But cf.* Wojdynski, *supra* note 19, at 1478–79 (finding that "a majority of consumers do not pay attention to disclosure labels" anyway, which is particularly worrying because "disclosure labels . . . are often the only characteristic that distinguishes [native advertising] from nonpaid content.").

213. Lazauskas, *supra* note 195, at 8.

214. *See* Dayton O'Donoghue (@dayton.od.hocky), INSTAGRAM, https://www.instagram.com/dayton.od.hockey (last visited Mar. 12, 2022).

215. *See*, *e.g.*, Dayton O'Donoghue (@dayton.od.hockey), INSTAGRAM (Jan. 15, 2022), https://www.instagram.com/p/CYw79m2uQXl (last visited Mar. 12, 2022) (depicting O'Donoghue wearing Bauer hockey brand apparel); *see also* Dayton O'Donoghue (@dayton.od.hockey), INSTAGRAM (Jan. 12, 2022), https://www.instagram.com/p/CYo26DYOxdU (last visited Mar. 12, 2022) (depicting O'Donoghue with a Bauer hockey stick and gloves prominently featured)).

216. *See* Dayton O'Donoghue (@dayton.od.hockey), INSTAGRAM (Jan. 20, 2022), https://www.instagram.com/p/CY9QL3-hvpm (last visited Mar. 12, 2022) (displaying a video of O'Donoghue speaking about her experience as a Black female hockey player, where the only mention of Bauer is a brief logo at the end, and some well-timed product placement); Dayton O'Donoghue (@dayton.od.hockey), INSTAGRAM (Dec. 26, 2021), https://www.instagram.com/p/CX83T0jhHWZ (last visited Mar. 12, 2022) (featuring O'Donoghue and other #EverythingForTheGame athletes with the caption, "[i]t's time to make hockey more diverse and inclusive").

the platform to share my journey," not for "sponsoring" her.[217] And Bauer, for its part, claims that it is "an honor to be able to tell [O'Donoghue's] story and help make our game a better place,"[218] without mentioning that it has another motive: selling hockey products. Furthermore, in contrast to Lex Griffin, O'Donoghue does not reference Bauer in her Instagram "bio."[219] Nor does O'Donoghue always tag Bauer in posts featuring Bauer equipment, so much of O'Donoghue's native advertising content for Bauer lacks any disclosure of the paying source at all.[220] The result is that not only is the sponsorship relationship ambiguously disclosed, but the sponsorship disclosure is missing entirely from portions of the native advertising content.[221]

From the perspective of advertisers, not disclosing payment for the native advertisement is a trade-off to limit blowback. Some studies indicate that consumers who recognize they have been deceived may view the brand being advertised in a poorer light, which might deter brands from partnering with advertisers who utilize native advertising.[222] And the same harm may be true for the platform, which

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217. *See* Dayton O'Donoghue (@dayton.od.hockey), INSTAGRAM (Jan. 20, 2022), https://www.instagram.com/p/CY9QL3-hvpm (last visited Mar. 12, 2022) (containing a caption thanking Bauer without disclosing the commercial aspect of the relationship).

218. *See* Bauer (@bauerhockey), Comment to Dayton O'Donoghue (@dayton.od.hockey), INSTAGRAM (Dec. 26, 2021), https://www.instagram.com/p/CX83T0jhHWZ (last visited Mar. 12, 2022).

219. *Compare* O'Donoghue, *supra* note 214 (featuring an Instagram "story" about Bauer, but omitting a reference to the sponsorship from O'Donoghue's "bio") *with* Griffin, *supra* note 202 (containing the quasi-disclosure, in his "bio," that he is a Gymshark athlete).

220. *See* Dayton O'Donoghue (@dayton.od.hockey), INSTAGRAM (Jan. 12, 2022), https://www.instagram.com/p/CYo26DYOxdU (last visited Mar. 12, 2022) (depicting O'Donoghue with a Bauer hockey stick and gloves prominently featured); Dayton O'Donoghue (@dayton.od.hocky), INSTAGRAM (Dec. 31, 2021), https://www.instagram.com/p/CYKfJv0Bjz2 (last visited Mar. 12, 2022) (showing O'Donoghue practicing backyard hockey exercises with Bauer equipment).

221. This author does not intend this paragraph to be read to castigate O'Donoghue or Griffin for any noncompliance with this author's interpretation of Federal Trade Commission guidance. As this Note demonstrates, the Federal Trade Commission's native advertising guidelines are unclear to American lawyers and in need of clarification. Nonetheless, the reality is that the content provided does not include disclosures necessary to clarify that the content being created is native advertising—nor can companies paying for this advertising be the only ones held accountable for the promulgation of deceptive content. *See* Terry, *supra* note 39, at 406–07. Making it easy for creators to know how to comply with the law is central to the purpose of this Note for this very reason.

222. *See* Wodynski, *supra* note 19, at 1488–89 (indicating that consumers may

can suffer from native advertisements, and brands may seek to avoid any bleed-over effect.[223] The possibility of negative attribution to brands and platforms is made more serious by the sheer number of people realizing they have been deceived—in fact, a 2016 report indicated that of those surveyed, 54% of people have felt deceived by native advertising.[224]

Knowing the source paying for the advertisement is critical for consumer's ability to contextualize the information as an attempt at persuasion.[225] As has been stated, consumers who recognize that an advertisement is an advertisement often approach the information with a negative or skeptical attitude.[226] As some scholars have commented, "sponsor identification is an inherent component of advertising," meaning that consumer advertising recognition is impacted by sponsorship recognition.[227] This is, at least in part, for two reasons. First, consumers often recognize advertisements in part by their sponsorship.[228] Second, advertisements derive some of their persuasive power from their publisher.[229] Without a source disclosure, consumers are less likely to recognize an overall disclosure of a native advertisement as a disclosure because they lack critical contextualizing information. And subsequently, a consumer will likely perceive the content as akin to other content from that platform.

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view brands in a poorer light due to deception).

223. *See* Aribarg & Schwartz, *supra* note 2, at 31 (indicating that a key trade-off for publishers was the possible negative effects of native advertising on reader trust).

224. *See* Lazauskas, *supra* note 195, at 8.

225. *See generally* Conill, *supra* note 33, at 911 (indicating that disclosure, generally, is one of the critical ways in which a reader can tell that they are reading a commercial).

226. Lee et al., *supra* note 207, at 1428. However, it should be noted that "positive perception toward the media source may be translated into a more favorable perception of the advertisement and company." Mu Wu, Yan Huang, Ruobing Li, Denise Sevick Bortree, Fan Yang, Anli Xiao & Ruoxu Wang, *A Tale of Two Sources in Native Advertising: Examining the Effects of Source Credibility and Priming on Content, Organizations, and Media Evaluations*, 60 AM. BEHAV. SCIENTIST 1492, 1497 (2016). Otherwise put, the placement of an advertisement on a trustworthy platform can lead to better consumer opinion concerning the brand and information advertised. *See* Aribarg & Schwartz, *supra* note 2, at 28 (indicating that the trustworthiness of a website was depreciated by native advertising, but the trustworthiness of the ad was marginally improved). Though Aribarg and Schwartz's work indicates that there was only a marginal increase in advertisement trustworthiness—at 0.1% improvement—the value of that marginal improvement, in terms of advertising, should not be understated. *Id.* at 21.

227. Wojdynski et al., *supra* note 24, at 117.

228. *Id.*

229. *See, e.g.*, Wu et al., *supra* note 226, at 1497 (indicating the importance of credibility in consumer assessments of information in advertisements).

C. EVEN FTC-COMPLIANT DISCLOSURES FAIL *FIRESTONE*

Unfortunately, even where parties disclose the both the commerciality of native advertising content and the sponsorship of that content, many FTC-compliant disclosure methods fail to meet *Firestone*'s threshold. According to one study, even when disclosed,[230] consumers were able to distinguish a native advertising post from unpaid-for content only 79% of the time when the words "ad" or "paid" were not included.[231] This means that even disclosed native advertisements regularly deceive 21% of consumers, 6% more than the 15% *Firestone* threshold would allow.[232] However, the FTC specifically does not require that either word is included in a disclosure.[233]

The FTC's flexible disclosure language stance is problematic because most disclosures[234] do not meet the *Firestone* threshold.[235] In fact, many platforms use language—like "sponsored"[236]—to disclose advertisements, but this disclosure language only facially appears to

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230. In the Hyman et al. study, fourteen different formulations of disclosure language were tested, including phrases like "Paid Ad," "Ad," "Sponsored," "Brand Voice," and "Partnered Content." *See* Hyman et al., *supra* note 18, at 96 tbl.4.

231. *Id.*; *cf.* Ihrig, *supra* note 13 (indicating that the *New York Times*' article on Wendy's, which included the same disclosure as is featured on all *New York Times* disclosure for native advertising, did not have universal recognition as native advertising).

232. *See supra* Part I.B.3.

233. *See Native Advertising Guide supra* note 36 (listing multiple terms that are likely to be understood as disclosure of commercial advertising, despite the fact that such terminology has not been shown to meet the *Firestone* standard). The FTC has explicitly stated that "[d]isclosures are not effective unless consumers understand them to mean that native ads are commercial advertising." *Id.* However, the FTC's current open-ended disclosure method is unlikely to lead consumers to understand that the disclosure indicates they are consuming advertising.

234. *See* Joe Lazauskas, *3 Ways Brands Can Make Native Advertising More Effective in 2017*, CONTENTLY (Jan. 4, 2017), https://contently.com/2017/01/04/better-native-advertising-2017 [https://perma.cc/ZHX6-CR5G] (stating that advertisers must insist on clear labeling).

235. Though this will be discussed in greater length later, disclosure is generally the FTC's trusty solution for all advertising deception. *See, e.g.*, *Native Advertising Guide*, *supra* note 36.

236. The FTC has specifically stated that advertisers should include disclosures with the words: "Ad, Advertisement, Paid Advertisement, Sponsored Advertising Content, or some variation thereof." *Id.* (internal quotations omitted). The FTC has explained that "[a]dvertisers should not use terms such as Promoted or Promoted Stories, which in this context are at best ambiguous and potentially could mislead consumers that advertising content is endorsed by a publisher site." *Id.* (internal quotations omitted).

relate the commerciality of content.[237] These disclosures fail to indicate the commerciality of the content sufficiently to pass the *Firestone* threshold.[238]

D. THE CURRENT REGIME IS HIGHLY UNLIKELY TO LEAD TO *FIRESTONE* COMPLIANCE

The fact that consumers are still often deceived even when a disclosure is present indicates that the traditional notions of advertising disclosure, and consumer's ability to recognize it, do not translate well to native advertising. Indeed, modern native advertising has created a "media landscape in which one can no longer assume that adults will recognize advertising."[239]

The FTC's contemporary flexibility regarding native advertisement disclosure requirements does not sufficiently address the problem of native advertising deception. Worse, the FTC's current stance undermines its ability to succeed in ensuring *Firestone* compliant native advertising.[240] While the FTC has repeatedly indicated its belief that its current guidance is helpful and sufficient,[241] the current state of native advertising belies this belief.[242] The FTC's guidelines simply do not give consumers the tools to "recognize the native ad as an ad."[243] And, unlike the FTC's 1960s and 1970s guidance, its contemporary guidelines can leave advertisers guessing as to whether they need to disclose native advertising.[244] At best, this leaves advertisers

237. *See* Hyman et al., *supra* note 18, at 82, 96 ("Labels using the word 'sponsored' did less well, with 76%–79% of respondents believing such labels were associated with paid content.").

238. *Id.*

239. Wojdynski et al., *supra* note 24, at 117.

240. Sluis, *supra* note 22 ("'An ad is deceptive if it misleads a significant percentage of consumers,' Engle said . . . . [S]he clarified that usually means 15% of consumers, and sometimes as few as 10% of consumers."); *see also Engle Speech*, *supra* note 111, at 30:50–31:55 (offering the audio of the speech).

241. *Blurred Lines*, *supra* note 170, at 1 ("Overall, the study results suggest that using disclosures that are consistent with FTC staff's guidance can improve the likelihood that consumers will recognize an ad as an ad.").

242. Lazauskas, *supra* note 195, at 8 ("74 percent of respondents believe that including both brand names and logos is the clearest way to label native ads, and half said that native ads should be given a dedicated place on the homepage.").

243. *Native Advertising Guide*, *supra* note 36; *see also* Wojdynski et al., *supra* note 24, at 117 ("[I]t is becoming increasingly clear that consumers often struggle to identify advertising for what it is . . . .").

244. *See generally Native Advertising Guide*, *supra* note 36 (giving examples of aspects of disclosure that the FTC appraises to determine compliance). In particular, the FTC's allowance for nondisclosure of native advertising that is "clearly commercial in nature" has worked against the agency's goals. *Id.*

unclear about what actions are required on their part, and at worst, it gives advertisers an out for their non-disclosure. The FTC's guidelines on native advertising do not accomplish what the agency hopes to accomplish.[245]

It is unlikely that private industry self-regulation will come to consumers' rescue any time soon. Despite the downsides to native advertising, a 2014 study indicated previously that among advertising industry professionals, only 39% stated that they thought native advertising misleads content consumers.[246] In fact, some proponents of native advertising considered its deceptive nature as a positive characteristic, specifically because deception significantly increases the likelihood that the advertisement will not trigger a skeptical response from consumers.[247] Some have even argued that native advertising is not truly deceptive; it is merely a tool for marketers to engage in storytelling in a different format.[248] Others, especially online publications,[249] have accepted native advertising deception as a necessary evil because native advertising is "an economic lifeline for a declining industry."[250] Regardless of the reason, excuse, or ex-

245. Mudge, *supra* note 25, at 80–81 (indicating that the FTC's "three simple rules" outlined in its *Native Advertising Guide* are not so simple and allow for significant ambiguity in disclosure requirements).

246. Demian Farnworth, *Copyblogger's 2014 State of Native Advertising Report*, COPYBLOGGER (Apr. 7, 2014), https://visual.ly/community/Infographics/business/copyblogger%E2%80%99s-2014-state-native-advertising-survey [https://perma.cc/4M56-TUAV] (inaccessible on COPYBLOGGER's own website as of Jan. 25, 2022).

247. Hyman et al., *supra* note 18, at 105.

248. *Id.* at 81 n.24. This argument echoes the American Association of Advertising Agency's published report on televised advertising from the 1980s. Preston & Richards, *supra* note 86, at 607–08. That report argued that advertising deception really was not deception on the part of the advertiser, but simply an indication of miscomprehension on the part of the consumer. *See id.* (discussing the A.A.A.A.'s published report, which stated that miscomprehension on the part of the consumer did not equate to deception on the part of the advertiser). That report stressed that "just because there is a demonstrable degree of miscomprehension associated with a particular advertisement," there was not necessarily deception. *Id.* at 608. Instead, the report posited that miscomprehension reflects the "natural error rate associated with all types of televised communication." *Id.* In justifying native advertising as merely a novel form of storytelling that is misunderstood by consumers, proponents of this argument essentially rely on past, debunked, de-regulatory arguments that place the onus on consumers to understand the material before them without the requisite means (all of which rest in the hands of the advertiser and publisher) to do so. *See id.* at 632 (proposing that the FTC should overlook advertisers' misleading ads only when consumer miscomprehension is "ineradicable").

249. Hyman et al., *supra* note 18, at 80–81.

250. *Id.* at 81.

planation, the result is the same: there is little motivation to change native advertising from the private sector's end.

In the end, consumers are being deceived by a multi-billion-dollar industry. It is impossible to do so much as even open up a browsing window and not experience a native advertisement.[251] Native advertisers continually fail to comply with FTC guidelines. The FTC's subregulatory regime fails to give advertisers and content publishers clear guidance on how and when to disclose. And even when advertisers do disclose, native advertising guidance explicitly does not require that advertisers and publishers give consumers critical information to meet the *Firestone* threshold.[252] The current approach to native advertising regulation and the current approach to consumer protection, despite the FTC's findings, are just not working.

III. TOWARDS COMPLIANCE WITH *FIRESTONE*: INSTITUTING UNIFIED DISCLOSURE STANDARD

Fortunately, solving the issue of native advertising deception is simple: require advertisers and publishers to give consumers the tools needed to recognize native advertising as advertising.[253] The FTC can accomplish this by promulgating an easily met, unified disclosure regime for disclosure of native advertising that is empirically shown to satisfy the *Firestone* percentage via rulemaking.[254] The FTC may also choose to supplement this regime with additional subregulatory guidance.[255] This simple regime would clarify what advertisers and publishers must disclose while giving the FTC ample flexibility to impose supplemental guidelines.

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251. *See infra* notes 300–03.

252. *See Engle Speech, supra* note 111, at 30:50–31:55 (indicating that the FTC's view is that when 15% of consumers are deceived by native advertising, the FTC may enforce against that advertisement under its section 5(a) authority).

253. *Blurred Lines*, *supra* note 170, at 1.

254. See Ian M. Davis, *Resurrecting Magnuson-Moss Rulemaking: The FTC at a Data Security Crossroads*, 69 EMORY L.J. 781, 787–802 (2020), for an explanation of Magnuson-Moss rulemaking. A deeper explanation of the intricacies of Magnuson-Moss rulemaking is outside the scope of this Note. However, a simple explanation of the process is that it is "hybrid rulemaking." *Id.* at 800. This form of rulemaking is generally accepted as more onerous than informal rulemaking and less onerous than formal rulemaking. *Id.* at 800–01.

255. For example, the FTC might supplement its rulemaking with policy guides that discuss desired context specific tools that recent scholarship has shown materially help consumers recognize advertisements in specific native advertising contexts. *See, e.g.*, *Blurred Lines*, *supra* note 170, at 4 (discussing techniques that may improve consumer recognition of advertising).

A. EASILY MET, UNIFIED DISCLOSURE: A THREE ELEMENT FRAMEWORK

Satisfying the disclosure regime requires three elements are met in every native advertisement. First, each native advertisement must include the specific disclosure phrase "Paid Advertisement" or "Paid Ad." Second, each native advertisement must include a disclosure of the sponsor and brand in the advertisement. Third, both the first and second element must be prominently displayed close to each other. A native advertisement with these three elements is likely to meet the *Firestone* threshold.[256]

1. Element One: The Inclusion of Specific Disclosure Language

The first element, the requirement to include the exact language of "Paid Advertisement" or "Paid Ad," comes from scholarly recognition of the importance of overt disclosures.[257] Inclusion of an overt disclosure helps convey the commercial of the content and therefore helps consumer advertisement recognition.[258] One study has indicated that the language of "Paid Ad" had an 89% recognition rate—the highest percentage impact on consumer's ability to recognize an advertisement as advertisement of the group tested.[259] The inclusion of this specific, unsubtle disclosure language counteracts the subtlety and the deceptiveness of native advertising formatting by affirming to the consumer that the content is both paid for and an advertisement.

Though scholarly work indicates that other disclosure language configurations decreased advertising deception below 15%,[260] there is good reason to adopt only one version of disclosure language. Simplifying the wide variety of disclosure language currently used by

256. It should be acknowledged that advertisers who meet each part of the regime proposed here, but fail to meet the *Firestone* threshold, should not be subject to enforcement for that particular advertisement. Instead, cases like these would indicate that similar advertisements may require augmented disclosure requirements going forward.

257. Hyman et al., *supra* note 18, at 96 ("Unsurprisingly, the more overt the label, the higher the percentage of respondents that expected it to be associated with paid content."). This element is a modernization of the FTC's prior requirement that advertisers include the conspicuous placement of the word "ADVERTISING" in native advertisements. *See also* 1968 Advisory Opinion, *supra* note 116, at 1307–08 (requiring the described disclosure); 1967 News Release, *supra* note 115.

258. *See* Campbell & Marks, *supra* note 3, at 600 (contrasting the overtness of sales and promotional messages with native advertising).

259. *See* Hyman et al., *supra* note 18, at 96 tbl.4 (indicating that of the fourteen different iterations of language used, "Paid Ad" led to the least deception).

260. *See id.* (indicating that "Paid Content," and "This content was paid for by" had deception rates of 13% and 14% respectively).

native advertisers and platforms[261] likely helps with consumer advertisement recognition.[262] Furthermore, by requiring disclosure through a standardized phrase for all native advertising, consumers may become more comfortable with identifying content as native advertising.[263] Mandating a single disclosure phrase—in this case "Paid Advertisement" or "Paid Ad"—is likely a crucial first step[264] in instructing consumers to apply their existing knowledge of how to respond to advertisements to native advertising.[265]

Advertisers and platforms might balk at the idea of identifying native advertising blatantly because this could theoretically reduce the persuasive power of native advertising as a whole. However, disclosure is to the benefit of all parties. Disclosure is a valuable prophylactic for advertisement publishers.[266] While it is true that undisclosed native advertising is much more persuasive than traditional advertising,[267] it is also *much* riskier. For example, Lord & Taylor attempted to use native advertising to promote its Paisley Asymmetric Dress.[268] Though the dress sold out, the ensuing FTC investigation and enforcement not only cost Lord & Taylor in the legal world,[269] it caused the company to suffer public embarrassment

261. *See* Conill, *supra* note 33, at 911 (listing various disclosure language used on different platforms).

262. Wojdynski, *supra* note 19, at 1489 (stating that "brands still have reason to be wary of engaging in sponsored content advertising" even if only indirect negative influence on attitude toward brands occurs).

263. *Cf. id.* (indicating that a decrease in perceived deception may occur when consumers become more accustomed to native advertising).

264. While an extended discussion of the constitutionality of compelled speech is, rather unfortunately, outside the scope of this Note, it is readily conceded that this Note's framework is principally dependent on compelling private party speech. Still, as noted in the footnotes in this section, imposing specific compelled speech requirements is likely a foundational change needed to begin a trend of consumer recognition of contemporary native advertising. Therefore, it would likely be counter-productive to allow private parties to present their own evidence of consumer recognition of a particular native advertisement to evade following the framework proposed here.

265. *See* Campbell et al., *supra* note 204, at 483.

266. *See* Aribarg & Schwartz, *supra* note 2, at 31 (indicating that unintentional clicks can generate ill-will from feelings of deception). It should be noted, however, that Aribarg and Schwartz found that advertisement format, as opposed to prominence of disclosure, was the dominant driver of this reaction. *Id.*

267. *See* Campbell & Marks, *supra* note 3, at 601 fig.1 (indicating that most versions of advertisements are lower in consumer trust than editorial content).

268. Complaint at 2, ¶ 5, *In re* Lord & Taylor, LLC, 152 F.T.C. 3181 (2016) (No. C-4576).

269. See Press Release, Fed. Trade Comm'n, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid

across national headlines.[270] While experts disagree over whether consumers convert their feelings of being deceived by native advertisements to negative attitudes of advertisers and publishers,[271] reducing the likelihood of scandal and public embarrassment is likely worth the trade-off.

Overtly disclosing native advertising to consumers likely has affirmative benefits to advertising parties as well.[272] Clearly disclosing native advertising does not necessarily mean that the content is any less persuasive or engaging.[273] Paul Rabil, a professional lacrosse player and Red Bull energy drinks sponsored athlete, exemplifies this point.[274] In November of 2020, Rabil posted a photo of his new Red Bull helmet to Instagram.[275] The photo depicted Rabil holding out the new helmet in front of the camera with a caption explaining that Rabil was celebrating ten years with Red Bull.[276] That photo was a native advertisement—it was identical to other content that would otherwise be available on Instagram and prominently featured Red Bull through an individual that Red Bull pays.[277] The fact that Rabil was clear that he was sponsored by Red Bull did not make the con-

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Instagram Posts by 50 "Fashion Influencers" (Mar. 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through [https://perma.cc/38LQ-2LQE] (detailing the Lord & Taylor enforcement).

270. *See, e.g.*, Nathalie Tadena, *Lord & Taylor Reaches Settlement with FTC Over Native Ad Disclosures*, WALL STREET J. (Mar. 15, 2016), https://www.wsj.com/articles/lord-taylor-reaches-settlement-with-ftc-over-native-ad-disclosures-1458061427 [https://perma.cc/75NT-ZL9H] (discussing the FTC's enforcement against Lord & Taylor).

271. *See* Campbell et al., *supra* note 204, at 485 (indicating that mere disclosure is not necessarily sufficient to prevent deception, instead disclosure should instruct consumers to modify their response to fit the situation).

272. *See* Lazauskas, *supra* note 195, at 33–34, 38–39 (indicating that the native advertisement that was most likely to be understood as an advertisement was still the most likely to be persuasive to focus group members).

273. Campbell & Marks, *supra* note 3, at 604. In fact, "[w]ell-executed native advertising is antithetical to the idea of deception." *Id.*

274. Tracy Ross, *Ahead of the Game: Paul Rabil*, RED BULL: THE RED BULLETIN (July 21, 2020), https://www.redbull.com/us-en/theredbulletin/paul-rabil-ahead-of-the-game [https://perma.cc/673P-RWG2] (showcasing an advertorial for Paul Rabil by Red Bull).

275. *See* Paul Rabil (@paulrabil), INSTAGRAM (Nov. 6, 2020), https://www.instagram.com/p/CHQk_s8h9XZ (last visited Mar. 12, 2022) (explaining in an Instagram post why Rabil's helmet has Red Bull's logo on it).

276. *Id.*

277. *See, e.g.*, Paul Rabil (@paulrabil), INSTAGRAM (May 24, 2021), https://www.instagram.com/p/CPQ29j7BirX (last visited Mar. 12, 2022) (depicting Rabil in a Boston Cannons Major League Lacrosse team jersey).

tent any less consumable, and in fact that photo received more "likes" and consumer interaction than some of Rabil's unsponsored content.[278]—Though Rabil did not disclose his sponsorship through the disclosure methodology this Note suggests,[279] the photo's success highlights that when advertisers overtly disclose their native advertising, they allow their content to speak for itself and allow consumers to knowingly engage with the advertisement's content.[280] The end result is that engaging with consumers honestly is consonant with effective native advertising.

2. Element Two: The Inclusion of Source Disclosure

The second element requires that a company disclose the sponsorship and source of each advertisement and, if applicable, brand name and logo.[281] Sponsorship disclosure is critical to the FTC's stated goal of ensuring that consumers have the ability to "recognize [if] what they're seeing is advertising or not."[282] The FTC has repeatedly held that sponsorship identification should be disclosed.[283] The FTC has also repeatedly affirmed it has the power to compel advertisers to disclose this information.[284] Requiring that advertisers and pub-

278. *Compare* Rabil, *supra* note 275, *with* Paul Rabil (@paulrabil), INSTAGRAM (May 18, 2021), https://www.instagram.com/p/CPBN3Ddhfw7 (last visited Mar. 12, 2022) (showing Rabil shooting on a lacrosse goal).

279. It is important this Note makes clear that Rabil's disclosure technique is insufficient to meet the *Firestone* threshold, and language used to disclose on the front end should always be sufficiently likely to prevent deception. *See* Hyman et al., *supra* note 18, at 96 tbl.4 (indicating that "Sponsored Content" had a deception rate of 24%).

280. *Cf.* Campbell & Marks, *supra* note 3, at 604 (speaking to the importance of consumers actively choosing to remain in contact as part of their feed).

281. This is an augmentation of a standard that the FTC has indicated it holds now. *See, e.g.*, *Native Advertising Guide*, *supra* note 36 (indicating that source information is influential in preventing deception).

282. Wojdynski et al., *supra* note 24, at 132.

283. *See Enforcement Policy Statement*, *supra* note 153, at 1 ("Knowing the source of an advertisement or promotional message typically affects the weight or credibility consumers give it. Such knowledge also may influence whether and to what extent consumers choose to interact with content containing a promotional message.").

284. For example, the FTC has done this in a range of enforcement, as well as in its policy guides. *See id.* ("The Commission has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself."). Furthermore, in contexts like endorsements, the FTC has created strict liability rules for disclosure of material connections. *E.g.*, 16 C.F.R. § 255.5 (2021) (requiring the disclosure of material connections in endorsements).

lishers do so is merely strengthening the current regulatory expectation.[285]

Advertisers and publishers should also want to comply with this element.[286] By disclosing the sponsor or source of native advertising content, consumers know who they are supposed to remember. For advertisers, native advertisements have more pull than other advertisement types, but often fail to lead to greater brand recognition.[287] And that is a serious drawback—an advertisement that does not lead to greater brand recognition is not accomplishing a basic goal of advertising. Supplying brand and sponsorship information in native advertisements likely leads to greater impact on consumers.[288]

Sponsorship transparency simply makes good business sense. When a sponsor fails to disclose the brand being advertised or the advertisement's sponsor, they lose out on the opportunity to tie themselves to the content they put out.[289] For example, in Netflix's native advertisement for the series *Orange Is the New Black* on the *New York Times*' website, a header emblazoned with both the Netflix logo and the *Orange Is the New Black* logo follow the reader as they read the content.[290] At all times the reader is being exposed to quality content and is told which parties are associated with the content.[291] As one set of researchers put it, advertisers and publishers are better off "going above and beyond to make brand names prominent in their disclosures."[292]

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285. *See*, *e.g.*, *Enforcement Policy Statement*, *supra* note 153, at 3 (entitling an entire section on the issue of misrepresentations of advertisement source). This element is also merely requiring regulated parties to follow FTC precedent asserted in the 1967 news release, the 1970 television statement, and reaffirmed in the *Enforcement Policy Statement*. *See supra* Part I.C.

286. Wojdynski et al., *supra* note 24, at 121 (explaining that activation of "advertising-specific schemata" may not occur for individuals consuming native advertising because its novelty).

287. *Cf.* Aribarg & Schwartz, *supra* note 2, at 28 (indicating that brand measurement is positively influenced slightly by native advertising).

288. *Cf.* Wojdynski et al., *supra* note 24, at 121 (stating that native advertising draws more recognition, but not stating that it is clear that brand recognition is improved).

289. *Cf. id.* at 116 (speaking to the popularity of "advergames" which make the use of a brand as the center of the game as an ad in itself).

290. Melanie Deziel, *Women Inmates: Why the Male Model Doesn't Work*, N.Y. TIMES: PAID POST, NETFLIX, https://www.nytimes.com/paidpost/netflix/women-inmates-separate-but-not-equal.html [https://perma.cc/P6NT-QR67].

291. For example, in the Deziel article the text is interspersed with images, a video, and other engaging media that pairs aesthetically with the header containing the logos of the advertiser and brand being advertised. *Id.*

292. Aribarg & Schwartz, *supra* note 2, at 31.

3. Element Three: Combining the First Two Elements in Close Proximity to Each Other and the Advertisement

Finally, the third element requires that both the first and second element are displayed in close proximity to each other. This element also requires that the disclosures are clearly and conspicuously displayed in close proximity to the advertisement itself. The purpose of this element is to require that the information from the prior two elements is easily and obviously accessible to consumers.[293]

The first part of the third element requires that native advertisements are transparent about the content's source and payment for the content. Even modest label changes can materially improve the likelihood of avoiding deception.[294] By placing the acknowledgement of payment next to the paying brand, the disclosure is positioned in such a way that the disclosure can instruct individuals on how to react to what they are looking at.[295] In giving consumers this instruction, the placement increases the contextual information that the consumer has without asking more from the publisher or advertisers. This first piece is entirely to the benefit of the consumer and advertisement transparency, and derives from the FTC's stated philosophy: "the watchword is transparency."[296] It ensures that publishers and advertisers make available a formatting of disclosure that lets consumers know what they are looking at.

The second part of the third element is merely an extension of exactly what the FTC has continually asked advertisers to do since 1967—conspicuously include the necessary disclosure information.[297] Research has indicated that where a distraction separates the advertisement from the disclosure, the disclosure loses its effec-

293. *See .com Disclosures*, *supra* note 87, at 8 ("Proximity increases the likelihood that consumers will see the disclosures and relate it to the relevant claim or product.").

294. *See* Hyman et al., *supra* note 18, at 99.

295. *See* Campbell et al., *supra* note 204, at 484 (indicating that timing of disclosure relative to covert marketing can impact a consumer's ability to modify their response to the advertising).

296. *Native Advertising Guide*, *supra* note 36.

297. *See, e.g.*, 1967 News Release, *supra* note 115 (requesting that the disclosure "ADVERTISEMENT" be placed "in close proximity" to the advertisement itself). The FTC has not wavered on this requirement in the five decades since then—the requirement for the positioning of disclosures in close proximity is the current FTC's guidance on disclosures in native advertising. *See Native Advertising Guide*, *supra* note 36; *.com Disclosures*, *supra* note 87, at 8.

tiveness.[298] Requiring the disclosure to be conspicuous, clear, and in close proximity to the advertisement itself obviates this issue.[299]

Though few examples of this exist in the current state of native advertising, Mozilla's internet browser, Firefox, currently uses this combination of advertisement and source disclosure.[300] When one opens up Mozilla Firefox, suggested websites pop up in arranged tiles. Those tiles include native advertisements that are expressly marked with the words "sponsored" and then list the party sponsoring the content immediately afterwards.[301] These disclosures are inside of the advertisement itself.[302] Mozilla's clear disclosure methodology resulted in a 1000% increase in consumer interaction with native advertising as compared to consumer interaction with non-advertising tiles.[303]

B. SUPPLEMENTAL ADDITIONS TO THE FRAMEWORK

The FTC can, and should, supplement this framework by promulgating further rules, advisory opinions, or policy guidelines. There are ever-emerging forms and permutations of native advertising, and so the disclosure regime may not always translate easily to burgeoning forms of native advertising.[304] Because of the evolving nature of native advertising, the FTC should continue to engage in private industry education and encourage self-regulatory private industry

298. *See* Campbell et al., *supra* note 204, at 485 ("[F]orewarnings do not appear to provide any reduction in attitudinal impact when there is distraction (such as content) between the forewarning and the persuasive message . . . .").

299. *Cf. id.*

300. *See Announcing Firefox Tiles Going Live Today*, MOZILLA: ADVANCING CONTENT BLOG (Nov. 13, 2014), https://blog.mozilla.org/advancingcontent/2014/11/13/announcing-firefox-tiles-going-live-today [https://perma.cc/3XB4-YZZF] (describing the creation of "tiles" Mozilla's web browser based native advertising).

301. *See More Details on Directory Tiles*, MOZILLA: ADVANCING CONTENT BLOG (Feb. 13, 2014), https://blog.mozilla.org/advancingcontent/2014/02/13/more-details-on-directory-tiles [https://perma.cc/236G-E2H2] (explaining how Tiles will disclose advertising information).

302. *Id.*

303. *See A Call for Trust, Transparency and User Control in Advertising*, MOZILLA: ADVANCING CONTENT BLOG (Aug. 21, 2014), https://blog.mozilla.org/advancingcontent/2014/08/21/a-call-for-trust-transparency-and-user-control-in-advertising [https://perma.cc/6H45-8K32] ("Initial user interactions are positive. Users interacted with content labeled as sponsored that we placed in directory tiles 10x [sic] more than Mozilla-based content.").

304. *Cf.* Wojdynski et al., *supra* note 24, at 117 (indicating that a one-size-fits all disclosure regime is likely to be ineffective because of the sheer numerosity of types of native advertising).

trade groups to adopt similar prophylactic measures.[305] There are a number of element augmentations that the FTC could employ to modify the each element depending on the format of the advertisement. These same augmentations could also be undertaken by private self-regulatory groups to maintain advertising transparency.

The first element could be augmented by modifying the amount and prevalence of disclosures. For example, the FTC could ask that for editorial content longer than a page, disclosures are put on each page or at the beginning and end of a document. Research suggests that disclosure before and after advertisements accomplish different goals, and pairing the two may instruct consumers more clearly about the nature of the content being consumed.[306] In a similar vein to a suggestion already posited by the FTC, the FTC could ask that touch or click activated pop-up informational boxes closely accompany the disclosure.[307] These instructions could state what a native advertisement is, how a consumer should understand the advertisement, and why the consumer is seeing the ad.

Furthermore, the FTC could augment the second element by creating guidelines on source transparency. For example, the FTC could require that labels of disclosure and source are color coded and larger compared to the text near them so that they appear more prominently.[308] The FTC could also adopt specific methodologies of testing for source disclosure prominence, and then recommend that self-regulatory groups adopt those same methodologies to ensure that sources are sufficiently disclosed.[309]

Finally, the FTC could augment the third element by recommending that advertisers engage in disclosure proximity analysis which would give the FTC statistics on how consumers physically view a given advertisement. The FTC could recommend that advertisers adopt eye heatmap tests, as the FTC has used in the past, to ensure that disclosures are placed proximate to where the viewer

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305. There are several advertising trade groups, for example, the Interactive Advertising Bureau. *Our Story*, INTERACTIVE ADVERTISING BUREAU, https://www.iab.com/our-story [https://perma.cc/DYF2-XNE9].

306. Campbell et al., *supra* note 204, at 490, 492 (indicating that disclosure prior to an advertisement and after the end of an advertisement accomplish different ends).

307. *Blurred Lines*, *supra* note 170, at 20–21 (explaining that the FTC has postulated the usage of a similar tactic to improve advertisement disclosures).

308. *Id.* at 20 (indicating that the FTC has considered this as a possible change).

309. *See generally* Wojdynski et al., *supra* note 24, at 121–31 (explaining the "Sponsorship Transparency [(ST)] Construct" system of testing sponsorship transparency).

looks.[310] Furthermore, the FTC could create an application, similar to Ian Webster's *AdDetector*, which grades disclosures based upon likeliness to deceive, ensuring that companies can know where they stand in terms of complying with *Firestone*.[311] This application could be open for download and use by regulated parties, and its use could ensure that advertisements remain in compliance—which would have the salutary consequence that the FTC need not exert as many precious resources in gathering information for enforcement actions.

C. DEFENDING THE UNIFIED DISCLOSURE APPROACH

Some scholars are critical of disclosure as a methodology for advertising regulation. At least one scholar has argued that an approach that assigns liability so broadly that the FTC could not effectively enforce its rules would be both onerous and an ineffective preventative measure.[312] Another scholar has taken the position that strict disclosure standards are unnecessary because consumers are wise enough to recognize native advertisements as advertisements.[313] These two counterarguments are not persuasive when viewed in light of the current data on native advertising deception.

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310. *See Blurred Lines*, *supra* note 170, at 21 (indicating the FTC's use of heatmaps regarding disclosure placement next to headlines).

311. *See, e.g.*, Geoff Gasior, *Browser Plugin Identifies Advertorial Content*, TECH REP. (Aug. 21, 2014), https://techreport.com/news/26952/browser-plugin-identifies-advertorial-content [https://perma.cc/T2Y4-S62F] ("Google programmer Ian Webster has created AdDetector, a plugin for Chrome and Firefox that identifies so-called 'native advertising.'"). The way that AdDetector works is brilliant and simple, it simply points out advertisements with a red background and accompanying disclosure that the program indicates that the content is native advertising. *See AdDetector*, IANWW.COM, https://www.ianww.com/ad-detector [https://perma.cc/T9VV-P9JN].

312. *See* Laura E. Bladow, Note, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM & MARY L. REV. 1123, 1159–60 (2018) (voicing the opinion that strict liability in influencer deception enforcement would be too onerous on the agency). It should be noted that Bladow does not argue that a unified disclosure framework is per se untenable. Nonetheless, Bladow's hesitation regarding the imposition of strict liability is relevant for this discussion as an indication that there may be discomfort with instituting a bright-line delineating compliance and non-compliance.

313. *See* Celine Shirooni, Note, *Native Advertising in Social Media: Is the FTC's "Reasonable Consumer" Reasonable*, 56 WASH. U. J.L. & POL'Y 221, 238 (2018) ("A basic (yet faulty) assumption underlies [the belief in the need for greater disclosure] . . . . [T]he consumer of social media in 2018 does not realize social media applications . . . have become a new form of the commercial or infomercial—that the consumer is not 'in on' the secret.").

1. The Disclosure Framework Need Not—And Should Not—Be Onerous or Ineffective

First, the disclosure framework suggested here is no more onerous than the current regime—in fact, it will probably be less so. Simply because a regime is instantiated does not mean that agencies lose their prosecutorial discretion.[314] It is unfair to assume that the FTC will return to its "National Nanny" days merely because it institutes a unified framework delineating bright-line compliance rules for native advertising.[315] Furthermore, instituting this framework for native advertising would be a logical outgrowth of past FTC precedent, as opposed to a departure from that precedent.[316]

This framework is also unlikely to be ineffective merely because the FTC lacks the resources to bring enforcement challenges against every party that violates the rule. First, enforcement is not the only mechanism for achieving compliance. The FTC has been active in educating regulated parties, publishing subregulatory guidance, and pursuing enforcement actions against parties that violate the deception standard regarding native advertising.[317] These multifaceted non-punitive methods are an effective and important alternative to enforcement in achieving compliance. Second, to say that the FTC's inability to enforce this unified rule against all noncompliant parties

314. *See generally* Heckler v. Chaney, 470 U.S. 821 (1985) (standing for the general proposition that agency enforcement inaction is presumptively within the prosecutorial discretion of the agency).

315. *The FTC as National Nanny*, WASH. POST: ARCHIVE (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b [https://perma.cc/FUY2-Q6CM]. As noted in the *Washington Post* article, the "National Nanny" epithet came about after the FTC took a hardline approach to regulating (and even possibly banning) certain kinds of advertising directed at children. *Id.* But the "National Nanny" epithet was really the culmination of years of frustration by commentators whose laissez-faire regulatory ideologies clashed with the FTC's supposedly heavy-handed approach to regulating in favor of consumer protection. *See* Robert A. Sitkol, *1969: The FTC's Mid-Life Crisis and Near-Death Experience*, 29 ANTITRUST 23, 24–25 (2014). Important to note here, is that the author of the *Washington Post* article admits that the government could require warning labels on such advertisements to improve the likelihood that children are not deceived by the advertising. *See The FTC as National Nanny*, *supra*. Furthermore, the "National Nanny" criticism was profoundly incorrect—there is good reason to regulate advertisements to children. *See, e.g.*, Jennifer L. Schmidt, *Blurred Lines: Federal Trade Commission's Differential Responses to Online Advertising and Face to Face Marketing*, 19 J. HIGH TECH. L. 442, 63 (2019) ("Extensive research exists in every discipline regarding the negative outcomes of advertising to children.").

316. *See* discussion *supra* Part I.C.

317. *See* discussion *supra* Part I.

undermines the rule's potency is to claim that fear of enforcement is a non-factor. Agencies need not enforce against every infraction, merely threatening enforcement against regulated parties can be sufficient to clarify the risk of noncompliance for regulated parties.

Furthermore, the disclosure framework described in this Note creates a simple set of required steps that every advertiser must undertake. While these steps cost publishers and advertisers some creative license, the information requirement should not be seen as daunting. The regime requires only three elements. The first is fulfilled by merely pasting pre-selected disclosure language on the advertisement. The second is fulfilled by spelling out the brand and sponsor of the advertisement. The third is fulfilled by conspicuously and clearly including the first two elements close to each other on the advertisement. The cost shifted to advertisers and brands in following this regime is likely to be minimal. And, this regime benefits advertisers and brands by increasing recognition[318] while improving protections for consumers.[319]

2. Unified Disclosure Is Needed Because Consumers Fail to Recognize Native Advertising as Advertising

Furthermore, the view that consumers know that native advertising is advertising when they see it is not simply optimistic, but demonstrably false. Numerous studies indicate that native advertising, even when disclosed, is highly deceptive.[320] The idea that people simply know what they are looking at has unfortunately proven to be incorrect. Of the scholarly literature available, the empirical evidence suggests agreement that native advertising raises significant policy questions relating to consumer deception.[321] The view that consumers can simply see through the deception, without the aid of outside consumer protection requirements, is untenable in the face of the proliferation of data on the matter.

3. Unified Disclosure Is Not and Should Not Be Considered the End of Native Advertising

Perhaps most importantly, however, disclosure as described here is not anathema to good native advertising. In fact, the regime

318. *Cf.* Aribarg & Schwartz, *supra* note 2, at 31.

319. *See, e.g.*, Hyman et al., *supra* note 18, at 96, 99, 101, 104 (indicating the improvement that disclosure makes in consumer ability to perceive native advertising as advertising).

320. *See supra* Part II.

321. *Id.*

described here likely does not even constrain good, or even just average, native advertising. Good native advertising creates engaging content that consumers *want* to see; that is why it is the pinnacle of advertising evolution to date.[322] It does not hide that it is an advertisement—good native advertising is confident in the quality of its content and bold enough to think that people will want to consume it, even though it is an advertisement.[323] When done right, native advertising allows brands, advertisers, sponsors, and publishers to capitalize on the modern social media marketplace by providing content that consumers want to engage with.

But that is only when native advertising is good. There is also a significant amount of mediocre—and even poorly executed—native advertising. The philosophy behind this regime is simply to accomplish what has been stated time and time again by the FTC—to create a system that gives the consumer the tools they need to know that an advertisement is an advertisement. Each of these pieces contributes materially to arming the consumer with the knowledge they need to know that an advertisement is attempting to communicate a message to them. The framework enunciated here is likely to result in deception rates below the *Firestone* standard, all while balancing the revenue needs of advertisers and platforms with the FTC's goal of consumer protection.

CONCLUSION

Native advertising has revolutionized advertising. It has created a persuasive, engaging way to market products to consumers. It is a thriving multi-billion-dollar industry. Despite these positive attributes, native advertising is highly deceptive. So deceptive in fact, that commentators have suggested that we now live in a world where most consumers cannot tell native advertisements apart from non-advertisements.

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322. This Note has discussed two examples of great native advertising campaigns, but many others exist as well. See, for example, PJ Morton, *True Southern Girl (feat. Mia X & Human Jukebox)*, YOUTUBE (Nov. 17, 2017), https://www.youtube.com/watch?v=P0eZ5cnCSzQ (last visited Mar. 12, 2022), which is a spinoff of Morton's song, *New Orleans Girl*. The spinoff song advertised Southern University, a historically black university in Baton Rouge, Louisiana. *See id.* PJ Morton was also clear about his collaboration with Southern University in creating the song. *See* The RLuckett Experience, *PJ Morton Live at the Varsity Theatre–Baton Rouge, LA 12/8/2019*, at 25:39, YOUTUBE (Dec. 12, 2019), https://www.youtube.com/watch?v=UZwmflIILXY (last visited Mar. 12, 2022).

323. *See generally* Campbell & Marks, *supra* note 3, 603–05 (explaining how and why good native advertising need not be deceptive).

As one set of scholars put succinctly, "[d]eception is deception."[324] For all the benefits of native advertising, the current status quo of rampant consumer deception is intolerable. But it does not have to be that way—great native advertising content can, and should, be transparent with consumers about its nature.

While the FTC has long addressed the issue of native advertising deception, the agency's efforts have not created the outcomes it has hoped to achieve. Even with FTC compliant disclosure, native advertisements are still more deceptive than acceptable under *Firestone*. This Note suggests that the FTC remedy the status quo by adopting an easily met, unified disclosure framework for native advertising. Under this framework, the FTC would require advertising disclosure through specific language, sponsorship and brand transparency, and proximity of disclosure of the previous two elements.

In promulgating this framework, the FTC can address the issue of native advertising deception clearly, while balancing both the needs of consumers and businesses. By adopting the empirically backed framework proposed by this Note, native advertising deception will likely fall below the *Firestone* threshold. Native advertising compliance will also be far simpler for advertising parties. And, just as importantly, the framework that this Note proposes is likely to improve the native advertisement environment for consumers, for advertisers, and for brands being advertised.

324. Hyman et al., *supra* note 18, at 105.