Comment on Putting Disclosure to the Test

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There is a considerable research literature in both economics and marketing about disclosure and its effects. Although there may be differences between "real world" and digital disclosures, sound digital disclosure policy must take into account the lessons learned from the extensive research and experience with disclosures in conventional media. This comment highlights key results from that literature, within the framework of FTC law and policy. Rather than presenting a particular research result, it presents an overview of a considerable body of empirical work regarding effective disclosures.[2]

Evaluating disclosures requires identifying the purpose of the disclosures. Some disclosures are intended to reduce the extent to which consumers might take away a misleading message from a marketing communication. Other disclosures are intended to provide additional information that may be useful to some consumers in making purchasing decisions. Still other "disclosures" are entirely voluntary, intended to provide information about particular product characteristics. Whatever the reason for disclosures, they must be used selectively.

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[1] I have worked and written about the economics of advertising from both an economic and a marketing perspective throughout my career, both at the FTC (as staff economist, Assistant to the Director, Associate Director for Policy and Evaluation, and Director of the Bureau of Consumer Protection), and as an academic interested in the economics of information and consumer protection policy. My experience in, among other things, the development of the Deception Policy Statement, along with my experience in applying that policy as Director of BCP, gives me a unique ability to put this research in the framework of FTC consumer protection policy. I thank the Association of National Advertisers and the Digital Advertising Alliance for their financial support of this comment.

[2] For a discussion of the limits of disclosure policies in a number of different contexts see Clifford Winston, The Efficacy of Information Policy: A Review of Archon Fung, Mary Graham, and David Weil's Full Disclosure: The Perils and Promise of Transparency, 46 J. ECON. LITERATURE 704, 706 (2008).

1. Disclosures to prevent deception

Perhaps the most common uses of disclosures is to prevent deception. Such disclosures may result from FTC or court orders to disclose certain information, or they may result from seller efforts to qualify a claim that might otherwise be misleading.

When disclosures are intended to prevent deceptive messages, they are successful if they reduce the takeaway of a potentially deceptive message to a level that is no longer actionable. This assessment necessarily involves both the original message and the disclosure – "the entire mosaic . . . rather than each tile separately."[3] The issue is the meaning of the combination of the message and the disclosure to ordinary consumers. Because the message is an integrated whole, the two components cannot meaningfully be separated.

Evaluation of a potentially deceptive message must also consider the entire course of dealing, because information available at a different point in the decision making process may prevent the potential adverse consequences of a claim that, in isolation, might be considered misleading. As noted in the Deception Policy Statement, Moreover, "…the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond."[4] The question of *when* to disclose is only relevant if some disclosure is necessary, but it is a separate question from the need for disclosure.[5]

Although there are useful proxies for the likelihood that consumers will notice and comprehend a disclosure, the question is ultimately an empirical one – how many consumers are

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[3] FTC v. Sterling Drug, 317 F.2d 669 (2nd Cir. 1963).

[4] FTC, *Policy Statement on Deception* (1983), appended to Cliffdale Assoc., Inc., 103 F.T.C. 110, 174 (1984), at n. 31.

[5] See William L. Wilkie, Affirmative Disclosure at the FTC: Communication Decisions, 6 Journal of Public Policy & Marketing 33 (1987).

still misled, despite the presence of a disclosure? Disclosures that do not meaningfully reduce the fraction of consumers who are misled by truthful claims impose costs, without offsetting benefits to consumers.

There is a strong argument for testing, but it is not testing of a disclosure per se, and it is not testing by the seller. Rather, the *Commission* should be testing, in circumstances in which the meaning of a communication is not straightforward or clear cut. In particular, when a disclosure is present that, if seen and understood, would be sufficient to prevent a misleading conclusion, it is the Commission's burden to establish that the message as a whole is deceptive. Unless there is an alternative disclosure that significantly reduces the fraction of consumers who are misled, there is no basis for finding that truthful claims about information important to consumer choices are deceptive. By definition, doing so would suppress, rather than enhance, the information available to consumers.

Both because of the inherent ambiguities in communication, particularly mass communication, and because of measurement problems, empirical assessment of whether a message with or without a disclosure is misleading should compare the message to some control. It is the difference between the test message and the control that is the appropriate measure of the extent to which the communication is misleading. That is, testing requires identification of a non-deceptive alternative to the communication.

In part, the need for a control arises because any communication is subject to misinterpretation. If enough recipients hear or read the message, a minority will likely believe something other than what the speaker intended or what most consumers heard. Moreover, that minority understanding of the message may be completely wrong. This is an inherent problem of all communication and is particularly problematic for marketing messages, which are almost always brief and presented in times and places where consumers may not pay full attention. Marketers frequently devote significant resources to ensure that their advertising conveys the intended message, but however straightforward the message and however careful the execution, some consumers are likely to misinterpret it. In academic studies of brief communications, 20 to 30 percent of the audience misunderstood some aspect of both advertising and editorial content.[6]

If this background noise surrounding any communication is the basis for a finding of deception, or of inadequate disclosure, consumers who understand the message correctly are deprived of information. Particularly when the Commission relies on a "substantial minority" to find a message deceptive, it may be a significant majority of recipients who are deprived of information. Controls avoid this problem, because they allow the subtraction of background noise.

Controls can also avoid the problem of preexisting beliefs. For example, consumers who believe, for whatever reason, that vitamin C reduces the risk of colds may play back a "claim" that a product reduces the risk of colds even though a communication does nothing more than identify the product's vitamin C content. Preexisting beliefs most likely account for the findings in the FTC's Generic Copy Test of Food Health Claims in Advertising. The study used control ads for a hypothetical soup that contained no mention of sodium content. Nonetheless, almost 40% of respondents reported that the ad said something about sodium. Similarly, between 40

[6] Regarding televised messages, see Jacob Jacoby et al., *Miscomprehension of Televised Communications* 64 (1980). Regarding print communications, see Jacob Jacoby and Wayne D. Hoyer, *The Comprehension and Miscomprehension of Print Communications* (1987). Both studies compare advertisements with excerpts of editorial content designed to be roughly equal in length, and find no significant differences in the extent of miscomprehension.

and 50% of respondents shown a control ad for a hypothetical cheese that said nothing about saturated fat reported that the ad said something about saturated fat content.[7]

Another important reason for controls is that the process of measurement itself creates noise, potential pitfalls that are well documented in the literature. For example, question wording can influence responses in one direction or another. There may be biases in who is willing to participate in survey research on a particular topic that affect the overall measurement of understanding. Consumers may give the answer to a survey question that they think the interviewer wants to hear, or they may give what they think is a socially acceptable answer, or they may simply guess at the answer or say "yes" with little regard to the question that was actually asked. The order in which questions are asked can also influence the results.[8]

A control group is the widely recognized method to screen out both background noise and the measurement errors inherent in the survey process.[9] When survey participants are randomly assigned to see either a "test" communication that is allegedly deceptive, or a "control" ad with any deceptive elements removed or adequately clarified, the difference between the test group and the control group is a reliable measure of the influence of the advertisement on the message consumers received.

Although the control message should be a less deceptive alternative, an empirical assessment must also consider the ability of the message to convey the truthful claim that a disclosure seeks to qualify. Prohibiting truthful claims when there is no effective way to prevent some consumers

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[7] Federal Trade Commission, Joint Report of the Bureaus of Economics and Consumer Protection, Generic Copy Test of Food Health Claims in Advertising, November 1998, at Figure 7 (soup) and 8 (cheese).

[8] *See* Shari S. Diamond, *Reference Guide on Survey Research,* Section IV, *available at* https://bulk.resource.org/courts.gov/fjc/sciam.8.sur_res.pdf.

[9] *Id*. See especially Section IV F, If the Survey Was Designed to Test a Causal Proposition, Did the Survey Include an Appropriate Control Group or Question? at 256.

from taking away a misleading impression deprives other consumers of useful information, and is unlikely to improve consumer welfare.

Finally, disclosures should be evaluated from the perspective of the target audience of the message itself. When a message targets a particular group, the relevant population is members of that group. Disclosures to correct messages that target children, for example, should be evaluated to determine how well they reduce misleading messages to children. This basic principle has long been recognized. The Deception Policy Statement, for example, provides that "when representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group."[10]

By the same token, messages targeting a general audience should be evaluated against the same general audience. The issue is the intended audience, rather than the actual audience, because any mass audience contains numerous identifiable subgroups who may interpret the message and understand a disclosure differently.[11] Children, for example, are almost always present in a general audience, but it is unreasonable, and constitutionally impermissible, to seek to reduce an adult audience to only hearing messages that are fit for children. Thus, a disclosure appropriately targeted to the audience as a whole should be judged based on whether it reduces the risk of deception in that audience as a whole, not in any particular subgroup.

When disclosures are intended to prevent deception, but may or may not be sufficient to do so, it is the Commission that should be testing before it challenges the communication in the first

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[10] Deception Policy Statement at note 20.

[11] Because specialized groups may be hard to reach, an advertiser seeking to reach a particular subset will frequently employ media vehicles with broader audiences. If the intended audience is a particular subset, then the relevant question is the meaning of the message to that group.

place. There are, of course, easy cases of practically invisible disclosures that do not require testing to conclude that they do not prevent deception. But where there is ambiguity about the effectiveness of a disclosure, the Commission's burden of showing deception argues strongly that it should be testing, whether the potential respondent has done so or not.

2. Mandatory disclosures to provide additional information

An omission of material information is deceptive if the information is necessary to correct a misimpression that the message, in the absence of the disclosure, would otherwise convey.[12] That is, the omission must be an omission of information that is material in light of the representations made. In the absence of representations that create the need for the information, the failure to disclose the information is not deceptive.

By contrast, pure omissions arise when a seller is silent "in circumstances that do not give any particular meaning to his silence."[13] The variety of information that might be considered material by some significant number of consumers is virtually limitless, ranging from the sources of raw materials, to the labor conditions under which a product was produced, to the impact of the product on global warming. Because it is not possible to disclose all information that might be of interest to particular consumers, a more nuanced screen to determine whether disclosure is necessary is required.

The Commission's unfairness analysis provides that screen, and in *International Harvester*, the Commission held that pure omissions must be analyzed under an unfairness theory, not

[12] Deception Policy Statement, note 4.

[13] *International Harvester*, 104 F.T.C. 949, 1059 (1984).

deception.[14] The unfairness analysis is essentially a cost-benefit test, requiring an assessment of whether the benefits of the information to consumers are worth the costs of providing it.

Thus, the failure to provide that information may be an unfair practice, and disclosure to provide that information may be appropriate. For example, unfairness is the key rationale for the Commission's R-value rule, which requires sellers of insulation to disclose a standardized measure of insulating ability.[15] It is also typical of many disclosures required by other agencies, such as the FDA's nutrition labeling requirements, fuel economy disclosure requirements at the point of sale, or disclosure of the terms of financing pursuant to the Truth in Lending Act. Depending on the claims made, these disclosures may also serve to prevent deception, but they are often required even if the seller does not make a claim at all.

Disclosures intended to provide additional information must be evaluated by a different standard. Inevitably, some consumers will have little or no interest in all or part of the information that is disclosed, and will simply ignore it. Many consumers, for example, may choose a car without regard to its gas mileage, choose a food without regard to its nutritional value, or choose a loan based on one element of the TIL disclosures without considering others. Without knowledge of how many consumers are interested in the information, there is little basis for determining whether "enough" consumers understand the message.

Changes in behavior, or the lack of such changes, are unreliable guides, because they may indicate either that the disclosure was unnecessary in the first place – and the requirement should

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[14] *Id.*

[15] Statement of Basis and Purpose, R-Value Rule, 44 Federal Register 50,242 (1979).

be terminated – or that the disclosure does not communicate effectively.[16] Instead, the standard for such disclosures should be that the information is readily available and understandable to those who are interested. Assessments of communication effectiveness, however, must also allow for the possibility that the disclosure fails to communicate because consumers are simply not interested in the information the disclosure provides.

An important consideration in designing disclosures to enhance the available information is where and when to disclose.[17] Ideally, the information should be available at the time and in the place where the interested consumer is most likely to need the information. If many consumers are likely to make purchase decisions based on advertising alone, disclosure in advertising may be necessary and appropriate. Often, information is more useful if it is provided somewhere other than in advertising. The details of a nutrition label, for example, may be useful at the point of sale, but it is highly unlikely that consumers will remember that same information if it is provided in advertising, which is generally remote in both time and space from the actual choice. The proper way to open a tractor's gas tank to avoid the risk of fuel geysering (the issue in the International Harvester case) may best be provided in the owner's manual, where consumers are most likely to look for information when the issue arises. Evaluation of disclosures should consider the entire information environment, rather than considering one part of that environment in isolation. The goal is to make certain that important information is available

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16 If the Commission wishes to argue that the lack of behavioral changes demonstrates ineffective communication, it should be expected to document the existence of a more effective disclosure that *does* affect behavior.

17 See William L. Wilkie, Affirmative Disclosure at the FTC: Communication Decisions, 6 Journal of Public Policy & Marketing 33 (1987).

before a decision is made,[18] rather than providing information at one particular point in time. Proper placement of a disclosure is likely one of the key choices in designing such requirements.

The Commission has clearly recognized the advantages of providing information in places other than advertising. It terminated a proposed rule that would have required detailed disclosures of nutritional information in advertising, stating that advertising "is not, cannot, and should not be the sole source of information on food and nutrition." [19] Its original Guides for the Advertising of Warranties and Guarantees, adopted in 1960, required advertisements that mentioned a warranty to include all material limitations on the warranty. The result was little advertising of warranties, which led the Commission to simplify the requirement to allow for a disclosure to "see our warranty where you shop."[20] Like warranty terms, the need to disclose "all material terms and conditions" about nearly any product may make providing information in advertising very difficult, if not impossible. Similarly, the FTC's .com Disclosure guides recognize the difficulties of providing too much information in an advertisement itself. They note that "Hyperlinked disclosures may be particularly useful if the disclosure is lengthy or if it needs to be repeated," and provide that "if the details about the additional fees are too complex to describe adjacent to the price claim, those details may be provided by using a hyperlink."[21] Relatively simple information can often be provided in conjunction with a claim that triggers the

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[18] Some disclosures may seek to provide information about how best to use the product, rather than its merits. In such cases, as with the fuel geysering example, post purchase disclosure may be the best place to provide information.

[19] 45 Federal Register 23705 (1980).

[20] 50 Federal Register 18470 (May 1, 1985).

[21] FTC, .com Disclosures, March 2013, at 10.

need for the information, but additional information available on demand may be appropriate when the information is more complex.

Introducing disclosures to provide additional information is akin to introducing a new product in the marketplace. As sellers often discover to their chagrin, consumers may express great interest in a product feature in surveys, but ignore that feature in their market decisions. Thus, most new products fail.[22] Even when products are successful, some consumers are early adopters; others wait to see the experience of others in determining whether the product is right for them. Marketers, of course, seek to accelerate this process of diffusion as much as possible, but use of even the most successful new product is likely to build gradually over time.

Introducing a new information product is no different. Some consumers, likely those most interested in the information, will make use of it immediately. For others, however, it may take time to recognize the availability or relevance of the information, or to incorporate it into decision making. A disclosure is not a failure simply because not everyone uses it immediately, particularly when some unknown fraction of consumers may consider the information unimportant or irrelevant to their choice. Instead, use of a disclosure is likely to grow over time, as more consumers learn of its existence and understand its relevance.[23]

One common tradeoff in designing disclosures to provide additional information is the choice between standardization and customization. A standardized disclosure format facilitates comparisons across alternative suppliers, because all sellers provide the same information in the same way. When the same required, standardized message is provided repeatedly, however, it

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22 Joan Schneider and Julie Hall, Why Most Product Launches Fail, Harvard Business Review, April, 2011.

23 These same considerations are relevant to voluntary disclosures as well, discussed in more detail below.

may be subject to wearout – after repeated exposure to an identical message, consumers may simply tune it out.[24] Disclosures that allow sellers to choose how best to provide information are less subject to this phenomenon, because different sellers will execute the disclosure differently, and may change their execution over time. The result is more novelty in the presentation of the message, which increases the likelihood of attracting and holding the consumer's attention. Moreover, allowing flexibility also allows sellers to adapt more rapidly to changing consumer interests in the marketplace. Particularly where technology or business practices are changing rapidly, an attempt to standardize disclosures is likely to impede information about innovative offerings that do not fit the pre-conceived standardized format.

When information is provided, consumers may not understand the message of a disclosure in the way that is intended, or they may assign more significance to the fact of the disclosure than the information itself would warrant. Lawyers, economists, and technologists are often not highly skilled in crafting effective marketing communications. When consumers misunderstand the disclosure or its significance, the result may be worse decisions, not better ones.

Examples of such disclosures are numerous. A study of college student's perceptions tested comprehension of three credit card disclosures, scoring one point for each disclosure that was correctly understood. Across a variety of conditions, the maximum total score was 1.71, implying that the average college student did not comprehend slightly more than one of the disclosures.[25] Similarly, an experimental study of mutual fund cost disclosures concluded that

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24 See e.g. Frank M. Bass et al., Wearout Effects of Different Advertising Themes: A Dynamic Bayesian Model of the Advertising-Sales Relationship, 26 Marketing Science 179 (2007).

25 Veronica Thomas, Kendra Fowler, Richard H. Kolbe, The Implications of the FTC's Clear and Conspicuous Standards for the Communication of Credit Card Information to Young Consumers, 16 Journal of Financial Services Marketing 195 (2011), at Table 6.

"cost information supplied in the ads appears to be either ignored or misunderstood."[26] An experimental study of disclosures of the "yield spread premium" in mortgage transactions found that the disclosure reduced the ability of consumers to identify the lowest cost mortgage.[27]

The fact that disclosures intended to provide additional information may fail, or even make things worse, is a strong argument for testing them. Testing, however, should occur before the requirement is imposed, and should be done by whatever agency is proposing to require the disclosure. It is only by careful testing in advance that an agency can have confidence that a regulatory requirement for disclosure will improve consumer welfare.

3. Voluntary disclosures

Most seller-provided information is not legally required. Instead, the seller chooses to provide information because they believe consumers will find it useful in making a decision about whether to purchase their product. Similarly, they may choose to highlight certain details of a more complex document such as a warranty to emphasize features that consumers are particularly likely to consider important. For example, sellers may emphasize warranty duration or the extent of coverage without providing information about other details of the warranty. This type of information disclosure can be thought of as voluntary disclosure.

Frequently, the impact of information in the marketplace comes from the fact that some sellers see competitive advantage in promoting a particular product characteristic. It is easy to

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[26] Beth A. Pontari, Andrea J. S. Stanaland, Tom Smythe, Regulating Information Disclosure in Mutual Fund Advertising in the United States: Will Consumers Utilize Cost Information?, 32 J. Consum. Policy 333 (2009).

[27] Bureau of Economics Staff Report, James M. Lacko and Janis K. Pappalardo, The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment (2004), available at https://www.ftc.gov/sites/default/files/documents/reports/effect-mortgage-broker-compensation-disclosures-consumers-and-competition-controlled-experiment/030123mortgagefullrpt.pdf.

locate "kosher" hot dogs, for example, not because some sellers must disclose they are not kosher, but rather because other sellers choose to promote that product characteristic. Advertising addressing the health benefits of diets higher in fiber[28] and lower in fat[29] led to significant changes in consumption, even though fat content was frequently disclosed on nutrition labels before such advertising was widespread. Increasing competition among cell phone providers in the late 1980s led to simpler pricing plans because sellers had an incentive to promote such plans.[30] More recently, sellers have promoted wireless service and television programming packages emphasizing the lack of any long term commitment to a service as a reason to choose their alternative over competing providers.

Like any other communication, these voluntary disclosures must comply with the law prohibiting unfair or deceptive practices. Because the disclosures are not required (or not required by the FTC), there is no basis for the FTC to impose any additional requirements on them. The possibility that there might be some other format or some other way to provide the information is not a basis for regulating it, even if the Commission thinks the alternative is better. Certainly, the burden of testing to prove there is a better alternative should fall on the Commission, since the seller is free to provide no information at all. Testing requirements may produce precisely that result.

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28 Pauline Ippolito & Alan Mathios, Health Claims in Advertising and Labeling: A Study of the Cereal Market, FTC Staff Report (1989), *available at* http://www.ftc.gov/be/econrpt/232187.pdf.

29 Pauline Ippolito & Alan Mathios, Information and Advertising Policy: A Study of Fat and Cholesterol Consumption in the United States, 1977–1990, FTC Staff Report (1996), available at http://www.ftc.gov/be/consumerbehavior/docs/reports/IppolitoMathios96_fat_long.pdf.

30 Miravete, E. (2007), "The Doubtful Profitability of Foggy Pricing," http://www.eco.utexas.edu/facstaff/Miravete/papers/EJM-Foggy.pdf

Sellers generally have the right incentives to highlight the information that is most interesting and important to consumers, because that is the information most likely to lead consumers to purchase their product. Similarly, competing sellers have clear incentives to point out additional features that others lack or problems with competitive offerings. Of course, all sellers must avoid unfair or deceptive practices. Consistent with that requirement, each seller may identify and promote only certain features, but the combination of information from numerous sellers enables consumers to identify the offerings that best satisfy their preferences. Consumers' choices, in turn, drive sellers both to provide the information consumers value, and the product changes they would prefer. Rather than regulation, consumer preferences as revealed in markets drive this process.

4. Disclosures must be selective.

The array of information that may be relevant to consumer decisions in the marketplace is virtually limitless. Because disseminating and using information are costly activities, it will not be worthwhile for any consumer to have complete information. All disclosures have costs, because they use time and/or space that could be devoted to some other message. In purely monetary terms, those costs can be substantial. Each second of required disclosure in the average 30 second prime time broadcast ad in 2014 cost over $3,700.[31] More importantly, excessive disclosures may impair the effective availability of information to consumers. Determining which information is important enough to disclose must consider these costs.

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[31] Advertising Age, "What it Costs," April 6, 2015, available at http://adage.com/article/news/costs-ad-prices-tv-mobile-billboards/297928/. The rationale for estimating disclosure costs based on the time or space consumed is explored more fully in Beales, Craswell, and Salop, The Efficient Regulation of Consumer Information, 24 Journal of Law and Economics 491 (1981).

One factor influencing the cost of using information is the total amount of information provided. When only a little information is provided, it is relatively easy for consumers to understand and digest the information and its implications. As more information is provided, however, it can become more difficult to locate the items that are most important to the consumer. This phenomenon, known as information overload,[32] may lead consumers to choose not to read a longer disclosure because it is more difficult to identify the particular information the consumer is seeking. The result may be that providing more information may leave consumers less well informed. Information overload is particularly important in advertising, where time and space are severely limited and excessive disclosures may reduce the ability to convey truthful information to consumers.

Even consumers who see and understand the information must remember it until it is needed. The limitations of working memory, however, have long been recognized: consumers can typically remember only a small number of items in short term memory.[33] Longer and more complicated messages also increase the likelihood of errors in remembering or understanding the message. These problems are particularly acute in television advertising, where consumers cannot look back to reexamine the disclosure more carefully. They led the FTC staff to recommend in a policy review session that "broadcast disclosures should be simple, serving primarily to motivate information search at the point of sale."[34] Moreover, excessive

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[32] See Joseph P. Mulholland, "Summary Report on the FTC Behavioral Economics Conference," February 10, 2009; J. Rudd, "The Consumer Information Overload Controversy and Public Policy," 2 *Policy Studies Review*, 465 (1983).

[33] George A. Miller, The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information, 63 The Psychological Review 81 (1956).

[34] FTC Policy Review Session, Consumer Information Remedies, June 1,, 1979, at 315.

information may lead consumers to simply ignore detailed disclosures.[35] Even if they pay attention, they may mistakenly think they have all the information they need to decide about a transaction. In either case, the result of requiring more information in advertising may be consumers who have less information available when they actually make a choice.

Disclosure requirements may also change the types of information that sellers seek to provide, leading them to not talk about the issue at all. If mentioning some product characteristic requires extensive disclosures, sellers may choose to talk about something else entirely. For example, even after the FDA allowed direct-to-consumer advertising of prescription drugs in 1985, the requirements to disclose risks effectively precluded television advertising until the agency issued guidance explicitly allowing such advertising in 1997.[36] Similarly, and FTC study of health claims in magazine advertising from 1977 through 1997 found that regulatory requirements sharply reduced health claims until the FDA and the FTC clarified that advertisements need not include complete information about the claim.[37] Because sellers can choose among numerous potential messages, excessive disclosure requirements for one item of information may simply lead advertisers to talk about something else. The result is that fewer consumers find out about the claim in the first place.

One method of reducing the information processing costs to consumers from using disclosures is to disclose in the form of a graphic icon or a seal of approval. An icon may seek to

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35 The fact that consumers frequently seek to simplify decisions, rather than explore the possibilities in more depth, is extensively detailed in Omri Ben-Shahar and Carl E. Schneider, More Than You Ever Wanted to Know: The Failure of Mandated Disclosure (Princeton University Press, 2014).

36 62 Federal Register 43171 (1997).

37 Pauline Ippolito and Janice Pappalardo, Advertising Nutrition & Health: Evidence from Food Advertising, 1977–1997 (2002), Bureau of Economics Staff Report, *available at* https://www.ftc.gov/reports/advertising-nutrition-health-evidence-food-advertising-1977-1997.

convey information directly, like the skull and crossbones symbol on a poisonous product or the stick figure in a "yield" triangle instead of a statement that drivers should "yield to pedestrians"). Separate and apart from its use for disclosure purposes, an icon may also function similarly to a brand name, providing a convenient summary of a much more complex body of information without the need to explore the details behind it. Thus, the icon or seal can provide an easy to recognize summary for a substantially greater amount of information. The Underwriter's Laboratory seal, numerous "green" certification programs, and a wide variety of other information provision efforts operate through this approach to simplifying the consumer's search for information.[38]

When an icon or seal is first introduced, consumers are unlikely to be aware of its meaning or significance. Like required disclosures of additional information discussed above, an icon or seal program is the introduction of a new information product in the market, and will likely diffuse gradually as does use of any new product. With repeated exposure, consumers are likely to learn more about the seal or icon and what it signifies.

A good example of growing recognition of an information product over time is the Environmental Protection Agency's Energy Star program. The program offers an Energy Star label to products that meet identified standards. Created in 1992, the program was originally designed to identify energy efficient computer systems for office use, but it has expanded to include more than 60 product categories. Awareness of the Energy Star label was initially relatively low, with only 30% of consumers able to identify the label in 1999. By 2005, more

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[38] The Digital Advertising Alliance's AdChoices Icon program provides a good example of the informational use of an icon, serving as a gateway to transparency into data-related marketplace practices. By clicking on the DAA's AdChoices Icon, consumers obtain information about the companies providing ads based on their interests, and access to control mechanisms for such advertising. See www.youradchoices.com.

than 60% of consumers knew about the labeling program.[39] Today, EPA claims awareness of the label as a symbol of energy efficiency is 85%.[40] Sales of Energy Star compliant products followed a similar course. In 2000, just over half a billion units of Energy Star products were sold; by 2005, sales were over 1.5 billion units, and in 2014 sales exceeded 5 billion units.[41]

The pattern of low initial use followed by more rapid growth is typical of successful new product introductions.[42] Over the period the program has been in place, interest in energy efficiency has likely grown, both because of increased concern about global warming and because of increases in energy prices, which has likely increased consumer interest in and attention to the label. Nonetheless, consumer interest is an essential prerequisite for any information product – information that is of no interest to consumers will not be used.

There is always additional information that could be useful to consumers. Requiring too much information, however, may effectively prohibit providing *any* information. To communicate effectively, and to improve consumer choices, disclosure requirements must be selective. Selectivity requires careful attention to the likely benefits and costs of each particular disclosure. It also requires recognition that benefits likely decline, and costs likely increase, as the total amount of information disclosed increases.

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[39] Anthony G. Murray and Bradford F. Mills, "Read the label! Energy Star appliance label awareness and uptake among U.S. Consumers," 33 Energy Economics 1103 (2011).

[40] https://www.energystar.gov/about.

[41] Environmental Protection Agency, Office of Atmospheric Programs, Climate Protection Partnerships, 2014 Annual Report, available at https://www.energystar.gov/index.cfm?fuseaction=home.downloadfile&file=F84267790DF5B5F22EB9D715BC7BEC4F2E6F21C078AD0D8DB716916D20CB04C3778CC40ABE8B9DBF508BE77DAD9A753D5EAA2CFC510D5530702AC176F23ACA67F51939211384A8256F097182F6234B80CC51C3BB639D51552DAB56D4A545B4EC53D43B64196F8F7FE093570A4C7476ED22773C44FA903C1B5E4F84E320CDD804D64177F879DB51749912AADAEDD84199&app_code=publications&env_name=other.

[42] *See e.g.* C. Van den Bulte and Yogesh V. Joshi, New Product Diffusion with Influentials and Imitators, 26 Marketing Science 400 (2007).

5. Summary

Disclosures to correct otherwise misleading claims must be evaluated in context – do they reduce the takeaway of a potentially deceptive message? It is the Commission that should test to determine whether there is in fact deception when the adequacy of a disclosure is in doubt, because it is the Commission's burden to show that a communication is deceptive.

Disclosures that simply seek to provide additional information to consumers should be evaluated on the ability of consumers who are interested to locate the information. Not all consumers will be interested, which will reduce the apparent effectiveness of the disclosures. Disclosure strategies must also consider the most appropriate time and place to provide information. Because consumers may misunderstand any disclosure or may assign it more significance than they should, testing is appropriate, and generally necessary. Testing should be conducted by the government, before any disclosure requirement is imposed.

Purely voluntary disclosures are not legally required. There is therefore no basis for imposing any requirements on their "effectiveness," as long as the disclosure itself is not unfair or deceptive. When voluntary disclosures use icons or seals, they may simplify communications for consumers. Consumer understanding of an icon, however, depends on repeated exposure, and is likely to increase over time.

All disclosures must be selective. Because reading, understanding, and utilizing information are all costly activities, there *is* such a thing as too much information. Excessive amounts of information may reduce consumers' willingness to use information, and may reduce sellers' incentives to provide information that is useful and important to consumers.