2017

Refining Advertising Regulation

David Adam Friedman

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation

Friedman, David Adam, "Refining Advertising Regulation" (2017). *Connecticut Law Review*. 361.
https://opencommons.uconn.edu/law_review/361

CONNECTICUT LAW REVIEW

VOLUME 49

FEBRUARY 2017

NUMBER 3

Article

Refining Advertising Regulation

DAVID ADAM FRIEDMAN

Why did the Federal Trade Commission (FTC) aggressively pursue Volkswagen's claims about "clean-diesel" technology, while ignoring widespread practices like deceptive discount pricing? Why did the FTC offer formal guidance to industry about "native advertising," but only casual guidance to consumers about widely-used, peer-review aggregators like Yelp and Fandango?

For decades, the FTC has only loosely employed a cost-benefit-analysis approach toward prioritizing enforcement of advertising regulation. I contend that federal regulators can best refine enforcement priorities by looking to the information economics literature for an established framework for classifying advertising claims. This Article shows that classifying advertising into search claims, experience claims, and credence claims offers a structure for more rigorous cost-benefit analysis of enforcement opportunities. Expressly incorporating this search-experience-credence claim framework into regulatory decision making and prioritization will lead to improved stewardship of FTC resources.

ARTICLE CONTENTS

INTRODUCTION	839
I. CATEGORIZING SEARCH, EXPERIENCE, AND CREDENCE CLAIMS	841
A. FLESHING OUT THE SEC FRAMEWORK.....	843
B. REGULATORY ENGAGEMENT WITH ADVERTISING CLAIMS	853
II. THE FTC FOCUS ON CREDENCE CLAIMS: EMPIRICAL SUPPORT	858
A. SEARCH CLAIM ENFORCEMENT EXAMPLES	860
B. EXPERIENCE CLAIM ENFORCEMENT EXAMPLES	862
C. BLENDED EXPERIENCE-CREDENCE CLAIM ENFORCEMENT EXAMPLES.....	863
D. CREDENCE-CLAIM ENFORCEMENT EXAMPLES.....	864
III. REFINING FTC ADVERTISING ENFORCEMENT	865
A. ADDRESSING FICTITIOUS PRICING.....	866
B. ADDRESSING PEER INFORMATION BROKERS.....	870
C. ADDRESSING NATIVE ADVERTISING	876
IV. ADVANCING THE COST-BENEFIT APPROACH TO ADVERTISING REGULATION.....	879
A. FOUNDATIONS OF MODERN ADVERTISING-REGULATION THEORY	880
B. APPLICATION OF COST-BENEFIT ANALYSIS	881
C. INCORPORATING THE SEC FRAMEWORK.....	888
CONCLUSION	890

Refining Advertising Regulation

DAVID ADAM FRIEDMAN*

INTRODUCTION

Volkswagen's promotion of "clean diesel" automotive technology presented a false advertising claim of potentially historic proportions.¹ The German automaker's false advertisement about a tangible, professionally-testable product feature like emission levels offers an obvious opportunity for regulatory enforcement. Several authorities, including the Federal Trade Commission (FTC), promptly opened investigations into the automaker's trade practices, and Volkswagen settled quickly at great expense.²

In contrast, for the past fifty years, the FTC has declined to pursue false price-discounting claims,³ even though these claims share a commonality with the Volkswagen clean-diesel claim. Consumer verification of both claims proves costly and impractical. Deceptive advertising of retail prices—broadly labeled "fictitious pricing"⁴—decreases welfare in the same manner as "fictitious" clean-diesel advertising. Consumers buy the "wrong" goods at the "wrong" prices.⁵ The FTC recently devoted regulatory attention to "native advertising"⁶ but only gave lip service to potential problems relating to peer-information brokers like Yelp and Fandango.⁷ Why does the FTC scrutinize some practices more than others? Can regulators improve the

* Associate Professor of Law, Willamette University. B.A., J.D., Yale University.

¹ See Jad Mouawad & Sydney Ember, *VW's Pitch to Americans Relied on Fun and Fantasy*, N.Y. TIMES, Sept. 2, 2015, at B1 (discussing the millions of cars sold by Volkswagen based on false reports of their emissions test performance). The nitrogen-oxide emissions from these supposedly "clean" vehicles exceeded the regulatory limit by a factor of forty. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Sept. 25, 2015), <http://www.bbc.com/news/business-34324772> [<https://perma.cc/7EAS-96YD>].

² See *infra* Section I.A.3 for a discussion of the Volkswagen controversy.

³ See David Adam Friedman, *Reconsidering Fictitious Pricing*, 100 MINN. L. REV. 921, 937–52 (2016) [hereinafter Friedman, *Fictitious Pricing*] (describing history of FTC approach to fictitious pricing); Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 663–67 (1977) (explaining the rationale for abandoning enforcement of fictitious pricing in the 1970s).

⁴ The FTC affixed this label to these practices in their guidelines. See Guides Against Deceptive Pricing, 16 C.F.R. § 233 (2016).

⁵ See *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008) (holding that accurate pricing requires truth in the market about product qualities).

⁶ "Native advertising" describes commercial messaging that matches the non-commercial context within which it appears; an advertisement that appears to look like a news article in a magazine, for example. See *infra* Section III.C.

⁷ See *infra* Section III.B.

prioritization of enforcement of advertising regulation?

In this Article, I demonstrate that the FTC can refine the approach toward advertising regulation by applying an established tool from the information-economics literature, the search-experience-credence (SEC) framework. Application of the SEC framework promotes different enforcement priorities. For example, the SEC framework strongly suggests that regulators should take fictitious pricing as seriously as “clean-diesel” claims. The SEC framework also reveals that the practices of the newly-emerged peer-information-brokerage industry require a more nuanced scrutiny than traditional advertiser-promoted consumer-testimonial endorsements. Similarly, the SEC framework offers a needed roadmap for enforcing the native advertising guidelines released in 2015.⁸

The SEC framework provides a helpful and orderly structure for categorizing all advertising claims.⁹ SEC claims refer to the categories of “search” claims, “experience” claims, and “credence” claims.¹⁰ Search claims should require lower regulatory scrutiny because they describe basic offering attributes like price, product category, and location of sale.¹¹ Search claims enable sellers to inform buyers about how to find an offering by communicating this basic information—information easily verified by consumers.

Experience claims, in contrast, must be verified after purchase.¹² Experience claims warrant more regulatory scrutiny than search claims because the consumer still bears the cost of testing the integrity of an experience claim. Consumers can more readily correct experience claims for low-price offerings by declining to repurchase, but they still absorb the loss from the initial purchase.

Credence claims describe advertiser communications that prove prohibitively costly or conceptually impossible for the consumer to verify, even post-purchase.¹³ Examples of credence claims include, “Volkswagen

⁸ See FED. TRADE COMM’N, NATIVE ADVERTISING: A GUIDE FOR BUSINESSES (2015), <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> [<https://perma.cc/PR5F-QBHM>]. The FTC defines “native advertising” as “content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online.” *Id.*

⁹ See Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 730 (1974) [hereinafter Nelson, *Advertising*] (describing search qualities and experience qualities as distinct categories of advertising claims); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312–14, 327 (1970) [hereinafter Nelson, *Information*] (distinguishing the search category of advertising claims, where consumers gather product information through simple inspection, from the experience category, where consumers purchase products as costs permit and use the products to determine their quality). Phillip Nelson’s framework provided the foundation for the SEC framework in the 1970s. See *infra* Section I.

¹⁰ See *infra* Section I.A.

¹¹ See *infra* Section I.A.2.

¹² See *id.*

¹³ See *infra* Section I.A.3.

has ushered in a new era of clean diesel with this automobile”¹⁴ and “These sweaters are 50% off.”

Integrating the broader SEC framework into enforcement policy would help the FTC improve the efficacy of consumer-protection enforcement. The FTC’s Office of Inspector General has already encouraged the Commission to develop a “more structured methodology” and a “more formal process . . . for optimiz[ing] the pursuit of its consumer protection mission.”¹⁵ The SEC framework offers structure for just such an optimization methodology, as I will demonstrate throughout this Article.

Adding the SEC framework to the enforcement calculation would refine and improve FTC resource allocation without presenting a jarring departure from current practices. According to my content analysis of FTC actions, the FTC already prioritizes credence claims, so formalizing this extra layer of rigor offers a significant but pragmatic policy change.

In Section I, I describe the SEC framework for categorizing advertising claims and assess the cost-benefit implications for addressing each category of SEC claim. Each category of claim invites a different approach to regulatory intervention. In Section II, I show the empirical results of my content analysis of FTC advertising enforcement actions showing that the most commonly-enforced claims already fall into the credence and “experience-credence” categories. However, a systematic application of the SEC approach would optimize enforcement both in novel and established enforcement areas. Section III analyzes three case studies to illustrate how this approach would change enforcement priorities. I analyze discount pricing, aggregated peer-to-peer reviews, and native advertising to show how the SEC framework provides more structure to the process of sorting enforcement priorities. A recounting of FTC policy development in Section IV provides context to show that incorporating the SEC framework would elegantly follow the FTC’s established approach toward prioritizing advertising enforcement. Finally, I conclude that the SEC framework would add rigor to the FTC process.

I. CATEGORIZING SEARCH, EXPERIENCE, AND CREDENCE CLAIMS

Shortly in the wake of George Stigler’s landmark work on information economics,¹⁶ Phillip Nelson sparked a new line of scholarship focusing on

¹⁴ See *id.*

¹⁵ FED. TRADE COMM’N OFFICE OF INSPECTOR GEN., EVALUATION OF THE FEDERAL TRADE COMMISSION’S BUREAU OF CONSUMER PROTECTION RESOURCES, OIG EVALUATION REPORT NO. 14-003 13 (Oct. 2, 2014), [hereinafter OIG Evaluation Report] <https://www.ftc.gov/system/files/document/s/reports/evaluation-ftc-bureau-consumer-protection-resources/2015evaluationftcbcpreport.pdf> [<https://perma.cc/X6AM-TJNB>].

¹⁶ George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961). Stigler reclaimed the role of information out of the “slum dwelling” of economics and into the mainstream of the field. *Id.* at 213. He explained the role advertising and information play in the variation of commodity prices.

the nature of consumer information gathering. Nelson identified and described two primary attributes of products that consumers use for transactional decision making—search and experience.¹⁷ A few years later, Michael Darby and Edi Karni introduced the concept of credence attributes, supplementing Nelson's framework.¹⁸

Advertisers make claims that contain SEC attributes.¹⁹ They inject these claims into the market to yield transactional decisions favorable to themselves.²⁰ Some claims give basic data to consumers, such as where a product can be found or the simple price point. Others convey what consumers should expect to experience from use of the offering. Nelson's delineation of the difference between search and experience serves as a platform for refining priorities for federal regulation of advertising claims.²¹

The concept of sorting advertising claims into search, experience, and credence categories evolved since Nelson's initial efforts.²² Below, I discuss the evolution of these SEC categories, using examples to show how consumers and regulators interact with each type of claim, ultimately building toward the prescription that the FTC should formally put the SEC

Traditional economic models expected the price for a commodity to be uniform within the market, with allowances for transportation costs. Stigler demonstrated that information and search costs for goods can also drive price differentiation for a given commodity. *Id.* at 219. For a closely related piece, also part of the canon, see George Stigler, *Information in the Labor Market*, 70 J. POL. ECON. 94, 94, 96–97 (1962) (explaining wage dispersion as an information problem, resulting from both imperfect employee knowledge of fluctuating “wage offers” and low returns to incremental search).

¹⁷ Nelson deemed certain “goods” as “search” goods or “experience” goods based on their dominant attributes. See Nelson, *Information*, *supra* note 9, at 312. Nelson further contended that “limitations of consumer information about quality have profound effects upon the market structure of consumer goods.” *Id.* at 311; see Nelson, *Advertising*, *supra* note 9, at 732 (“Experience-claim advertising signals to consumers low-content information, but also signals that the seller advertises and that ‘the more a brand advertises, the more likely it is to be a better buy.’”); see also Phillip Nelson, *The Economic Consequences of Advertising*, 48 J. BUS. 213 (1975) [hereinafter Nelson, *Economic Consequences*]. Nelson implicitly permits addition of “credence” claims and associated resource challenges in addressing the credence category: “[S]uppose that there are goods whose utility consumers cannot learn of through experience In this case, producers are prevented from [false labeling] by laws prohibiting fraud. But since scarce resources are used to enforce these laws, it never pays the government to wipe out fraud entirely.” Nelson, *Economic Consequences*, *supra*, at 215.

¹⁸ Contemporaneously with Nelson's work, Michael R. Darby and Edi Karni distinguished the concept of credence qualities and credence “goods.” See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–72 (1973).

¹⁹ Claims often span categories, as my primary research shows. See *infra* Section II.

²⁰ See Nelson, *Advertising*, *supra* note 9, at 729 (“The producer in his advertising is not interested directly in providing information for consumers. He is interested in selling more of his product.”).

²¹ Gary T. Ford et al., *An Empirical Test of the Search, Experience and Credence Attributes Framework*, 15 ADVANCES IN CONSUMER RES. 239 (1988), <http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=6817> [<https://perma.cc/E2E6-FTX6>] (“[I]n the past, researchers have often referred to ‘goods’ or ‘attributes’ of goods as having either search, experience or credence qualities. More appropriately, the focus must be on the advertising claim, rather than the attribute of the product.”). I embrace the approach of Ford et al., focusing on SEC in the context of describing advertising claims rather than SEC as describing categories of goods.

²² See Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 FLA. L. REV. 487, 498–501 (1993) (summarizing the structure of search, experience, and credence claims).

framework to use. I describe the evolution of the SEC framework in Section I.A. In Section I.B, I use hypotheticals to show how consumers, advertisers, and regulators engage with each type of SEC advertising claim.

A. *Fleshing out the SEC Framework*

Nelson focused on the market dynamics that follow when consumer acquisition costs for different types of information diverge.²³ He noted that the “most obvious procedure available to the consumer in obtaining information about price or quality is *search*.”²⁴ Given the obviousness, primacy, and accessibility of search claims in the market, the consumer costs to access search information are generally the lowest of the SEC trio. Nelson described search in terms of “inspection”—advertised search claims would present information that consumers could obtain and verify through actual inspection prior to a purchase decision.²⁵ Searches for “quality” require the consumer to experience usage after purchase, so I address “experience”-based claims as a separate category.²⁶ Price, product availability, and general category of offering (e.g., a television, a floor wax, a dessert topping) typify primary search claim characteristics.

Price claims generate more complications than other types of search claims,²⁷ so I focus there, before discussing experience and credence claims. I contend that the dynamics of price advertising provide a compelling example of how the FTC should use the SEC framework to refine the approach toward enforcement of advertising regulation.

1. *Search*

Nelson’s early construct promoted the basic premise that consumers search for information about both price and quality.²⁸ Price, as a general matter, proves comparatively inexpensive for consumers to find,²⁹ and simple for advertisers to transmit. When retailers advertise price straightforwardly or in good faith,³⁰ a cursory consumer inspection of price

²³ Nelson, *Information*, *supra* note 9, at 311–12.

²⁴ *Id.* at 312.

²⁵ *Id.*

²⁶ See *id.* (discussing consumer evaluation of product quality through experience as distinct from other methods of search).

²⁷ Although advertisers can still exploit the consumer’s search for “availability” through bait-and-switch tactics. See David Adam Friedman, *Explaining “Bait-and-Switch” Regulation*, 4 WM. & MARY BUS. L. REV. 575, 586–88 (2013) [hereinafter Friedman, *Bait-and-Switch*].

²⁸ See Nelson, *Information*, *supra* note 9, at 311–12 (discussing the effects of the costs of quality information and price information on consumer search behavior).

²⁹ “A consumer can search for quality as well as price. A consumer trying on a dress differs from a consumer determining the price of a dress only because the time required to try on a dress is longer.” *Id.* at 312.

³⁰ “Fictitious pricing” requires a deviation from a “good faith” standard. “The advertiser should be especially careful, however, [when promoting a discount from a prior price], that the [prior] price is one

yields an accurate conception of price.

However, where retailers muddy price signals through bundled offerings³¹ or through discount advertising,³² the inspection and verification costs about the context of the price claim may be high enough to warrant placing these claims in the credence category—a departure from the established view. Such a re-categorization would reinforce the premise that higher regulatory scrutiny should be directed toward such practices. The SEC framework would reveal this point to regulators with more clarity.

As I have explored elsewhere, pricing items as “free” proves deceptive if the seller conditions provision of the free item on the purchase of a non-free item without adequate disclosure.³³ The potential for confusion resides in the consumer’s initial attraction to the “free” good. For example, the offer of a “free” smartphone, provided only upon entering into a two-year service contract with a wireless carrier, could lawfully obscure the true cost of the elements of the bundle. If the disclosure is unclear or inconspicuous, the “free” advertising tactic proves unlawful. FTC guidelines require clear and conspicuous disclosures of any conditional commitment attached to a free item.³⁴ Through this regulation, the FTC implicitly recognizes that verification of this type of search claim requires extra investigation by consumers.

Price claims, if facially simple, provide little room for deception, especially if the seller makes no further claim about the nature of the price. The relative purity of this type of search claim does not demand high regulatory scrutiny. However, when advertisers manipulate the shopping process through claims about free offers, discounts, comparative pricing, or having “the lowest price,” the claim warrants more regulatory scrutiny. These claims are not price claims *per se*; they are claims about the nature of the price. Though price may offer a primary example of a search claim, a claim about the price proves costlier for consumers to verify.

2. Experience

Generally, acquiring information about “quality” of offerings proves

at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith.” Guides Against Deceptive Pricing, 16 C.F.R. § 233.1(b) (2016).

³¹ See David Adam Friedman, *Free Offers: A New Look*, 38 N.M. L. REV. 49, 73–75 (2008) [hereinafter Friedman, *Free Offers*] (discussing consumer perception and misperception of the value of bundles of free goods and services).

³² See Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Informative or Deceptive?*, 11 J. PUB. POL’Y & MARKETING 52, 54–56 (1992) (documenting meta-analysis of welfare losses resulting from discount-price advertising offered in bad faith).

³³ See Friedman, *Free Offers*, *supra* note 31, at 49, 54–56 (discussing the FTC Guidelines for disclosure of conditions on free offers).

³⁴ FTC Guide Concerning Use of the Word “Free” and Similar Representations, 16. C.F.R. § 251.1(c) (2016).

costlier for consumers than price, requiring consumer “experience” for verification.³⁵ Experiencing an offering takes time and effort. Further, consumers risk full absorption of the cost of a disappointing experience,³⁶ both the endurance of the negative experience and the economic loss.

Consumers expect the experiential outcome from a transaction to carry some degree of uncertainty.³⁷ The purchase of a cinderblock might yield a narrower band of experience expectation than the purchase of a meal at a new restaurant. Advertisers, aware that this uncertainty could prove to “make or break” a transaction, often make advance claims about experience—claims that can be verified by consumers only after the fact or by advance sampling.

Compared to search claims, consumers may accord more varied weight to an array of advertised experience claims. Buying a movie ticket, for example, creates certain narrower, more definitive experiential expectations—the time the movie will start, the availability of a seat, and that the movie will feature the actors on the billing. However, consumers would likely have more skepticism toward less definitive experiential claims made by the stars of the show that the film will entertain. Consumers likely know that movies vary from their advertised expectation.

A cinderblock, on the other hand, which retails for roughly one dollar, offers fewer advertised experience claims because usage will not yield much incremental actionable information. In contrast, a restaurant’s website may show pictures of the interior atmosphere and depictions of dishes. A potential diner may also encounter other sources of experiential information, notably peer reviews and neutral critiques. Rather than engaging in the expensive process of self-inspection, or post-purchase experiential claim evaluation, the consumer can “borrow” experience from peers to evaluate claims prior to purchase. This information lowers inspection costs.

To illustrate consumer experience and quality assessment, Nelson presented the example of shopping for a high-priced, “big-ticket” article of clothing—a dress.³⁸ Inspection of a dress may require trying on the dress to determine whether the item’s value matches the price.³⁹ Searching for quality requires more time for items that run in variation and require individual reconciliations of taste; where items resemble commodities, quality requires less experience for verification.⁴⁰ This time investment presents a necessary path for obtaining the information to enable a purchasing decision.⁴¹ The additional cost of inspection carries a return on

³⁵ Nelson, *Information*, *supra* note 9, at 312.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 314.

⁴¹ See *id.* at 312 (providing examples of goods that the customer would prefer to evaluate by

the investment, mitigating risk of the purchase by reducing information asymmetry, and smoothing out any so-called “lemons” problems.⁴²

The inspection opportunity might not always yield an adequate prospective return on investment and, thus, may not always be availed. Time scarcity may discourage the rational consumer from obtaining useful “quality” information about a purchase. Nelson provides the example of choosing a brand of a can of tuna fish.⁴³ The can has a low-ticket price, rendering a thorough quality-sampling search of all available brands inefficient.⁴⁴ Nelson noted that the low value of a unit of canned tuna fish presumably preempts the emergence of free-market tuna fish sampling enterprises or tuna fish consumer publications.⁴⁵

Nelson surmised that consumers would engage “experience” through the shopping process.⁴⁶ For example, they would purchase a brand of tuna fish, evaluate and “experience” the offering, and subsequently purchase other brands until arriving at the one that either best meets their tastes or matches the experience claim that drew initial interest⁴⁷—at least until the costs of further sampling outweighed the perceived benefits.

In contrast, shopping for higher-priced, personal items—like dresses or automobiles—may warrant repeated testing or sampling prior to purchase. Clothing retailers add social value, in part, by enabling consumers to inspect a varied stock of dresses for sale and by providing a space to see which ones feel and look the best. If a retailer makes “experience” a cost-effective way for the consumer to gather information, the retailer becomes a more efficient venue for a transaction. “Brick-and-mortar” clothing retailers exist in part because they play a valued role in enabling consumers to shop with the benefit of experience.

Returning to the tuna fish example, advertisers make express, verifiable claims about canned tuna. One tuna-fish manufacturer claims that canned

purchase rather than by search).

⁴² See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 490 (1970) (positing that asymmetry of information among buyers and sellers can lead to market failure).

⁴³ Nelson, *Information*, *supra* note 9, at 312.

⁴⁴ *Id.*

⁴⁵ See *id.* (“At the low price of experience, there is insufficient demand for specialized establishments selling tastes of various brands of tuna fish.”). In contrast, consider a big-ticket item, the automobile. The proliferation of automotive comparison publications and websites presents, perhaps, a reflection of both the expense and value of experiential sampling. These publications enable consumers to narrow down the number of automobiles for test-drive—a time-intensive inspection process. See, e.g., CAR & DRIVER, <http://www.caranddriver.com> [<https://perma.cc/6SGH-JAQQ>] (last visited Sept. 21, 2016); EDMUNDS, <http://www.edmunds.com> [<https://perma.cc/C7C4-MFSQ>] (last visited Sept. 21, 2016); MOTOR TREND, <http://www.motortrend.com> [<https://perma.cc/9YYA-FBSP>] (last visited Sept. 21, 2016).

⁴⁶ See Nelson, *Information*, *supra* note 9, at 314.

⁴⁷ See *id.* at 312.

tuna of their brand has a “flavor of the sea.”⁴⁸ The only means of testing this claim would be to taste the tuna itself. If the consumer believed that the claim did not match the taste, the consumer could elect the next time to purchase a different brand, a different product category entirely, or nothing at all. But the consumer would absorb several costs—the potentially unpleasant taste of the failed experience, the time invested in sampling, and the cost of the consumed item. Even pursuing a refund or return for such a low-ticket item may prove more expensive than any benefit.

Compared with straightforwardly advertised search claims, the need for regulatory intervention for bad-faith experience claims ranks higher, as a general proposition. The risk is greater where a consumer may be deceived into absorbing a loss. For this reason, big-ticket items may need enhanced scrutiny. Regulators should enhance their monitoring as to “borrowed” peer experience claims, for example, in the form of paying third parties to post fraudulent peer reviews.⁴⁹ In an instant case, consumers run a greater risk of trusting fraudulent peer reviews and making suboptimal transaction decisions. As a broader concern, if peer experience claims elude appropriate policing, consumers may begin to discount them, rendering a potentially rich source of quality information less useful and trustworthy. If the cost of inspection rises, the transactional process becomes less efficient.

Even if experience claims prove false, consumers can more typically correct them after the experience, although sometimes at a cost. With credence claims, however, consumers lack that easier ability to self-correct, rendering credence claims the highest regulatory concern of the three.

3. *Separating Credence from Experience*

In 1973, Michael Darby and Edy Karni “distinguish[ed] a third class of properties which [they] term[ed] ‘credence’ qualities. Credence qualities are those which . . . cannot be evaluated in normal use. Instead the assessment of their value requires additional costly information.”⁵⁰ Consumer inspection and post-experience evaluation cannot easily nor readily verify or discredit credence claims.

Darby and Karni offered a few examples of credence claims, the most salient relating to repair services for consumer goods. “A consumer cannot fully evaluate the repair of a malfunctioning durable good . . . since he is unfamiliar with the intricacies and peculiarities of the particular machine.”⁵¹

⁴⁸ E.g., *Wild Planet Wild Skipjack Light Tuna, 5-oz. Cans (Count of 12)*, AMAZON, <http://www.amazon.com/Wild-Planet-Skipjack-Light-5-oz/dp/B001SB8AZC?th=1> [<https://perma.cc/4GRF-FTXZ>] (last visited Sept. 21, 2016).

⁴⁹ The FTC recently revised guidance that restricts the nature of peer endorsements, but it has yet to enforce the revisions to this guidance. See FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2016).

⁵⁰ Darby & Karni, *supra* note 18, at 68–69.

⁵¹ *Id.* at 69.

Take the case of a mechanic selling an automobile maintenance procedure to a consumer.⁵² The mechanic may claim that a flush of coolant fluid will prevent highway breakdowns, but the information that the instant circumstance requires a coolant flush is difficult (not impossible, but difficult) to gather through search or experience. Even if neutral recommendations advise that a flush is unnecessary, the car owner may not be able to assess the benefits of a flush (or the risks of not purchasing the flush) for that particular car. If the consumer purchases the flush, and the automobile does not break down, even after the fact, the owner cannot discern whether the coolant flush prevented a breakdown or mitigated such risk.

Credence claims, as my own content analysis reveals, receive more enforcement attention from federal regulators. A recent example of a classic false-credence claim prosecution involved mass-market “quackery” that hearkened back to nineteenth-century medicine shows.⁵³ In *FTC v. QT, Inc.*,⁵⁴ the Seventh Circuit affirmed an FTC order against the manufacturer of a cure-all product, Q-Ray Ionized Bracelets.⁵⁵ The manufacturer claimed that this “test-proven”⁵⁶ metal jewelry would alleviate pain by emitting ionized “Q-Rays,”⁵⁷ but the Commission determined that the only available scientific support showed that the bracelets merely yielded a placebo effect.⁵⁸ Judge Frank Easterbrook found claims of Q-Ray’s “test-proven” product efficacy misleading because supporting scientific evidence proved insufficient.⁵⁹ In *QT*, “almost everything that defendants [had] said about the [Q-Ray] bracelet [was] false.”⁶⁰

Judge Easterbrook expounded upon the social harm that results from such false credence-claim advertising.⁶¹ He conceded that many enjoy a placebo effect from products such as the Q-Ray Bracelet and may not feel harmed by the bogus claim.⁶² Experiencing a placebo effect may stop the consumer, a willing and hopeful believer, from even attempting to verify the

⁵² *Id.*

⁵³ Judge Easterbrook heard echoes of these peddlers of yore but did not take the analogy quite as far. “Far better a placebo that causes no harm (the Q-Ray Ionized Bracelet is inert) than the sort of nostrums peddled from the back of a wagon 100 years ago and based on alcohol, opium, and wormwood.” *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008); see ANN ANDERSON, *SNAKE OIL, HUSTLERS AND HAMBONES: THE AMERICAN MEDICINE SHOW 1–2, 7* (2000) (describing the influence of English quacks of the American medicine show).

⁵⁴ 512 F.3d at 858.

⁵⁵ *Id.* at 859.

⁵⁶ *Id.* at 860.

⁵⁷ *Id.* (positing that the trial court found that “there are no such things” as “Q-Rays”).

⁵⁸ *Id.* at 862–63.

⁵⁹ *Id.* at 862.

⁶⁰ *Id.* at 860.

⁶¹ *Id.* at 863.

⁶² *Id.* at 862–63.

efficacy of the bracelet. Even the consumer wishing to verify efficacy requires access to scientific testing, which consumers typically lack. As Easterbrook concluded:

Why pay \$200 for a Q-Ray Ionized Bracelet when you can get relief from an aspirin tablet that costs 1¢? Some painful conditions do not respond to analgesics (or the stronger drugs in the pharmacopeia) or to surgery, but it does not follow that a placebo at any price is better. Deceit such as the tall tales . . . about the Q-Ray Ionized Bracelet will lead some consumers to avoid treatments that cost less and do more; the lies will lead others to pay too much for pain relief or otherwise interfere with the matching of remedies to medical conditions Doctor Dulcamara was a charlatan who harmed most of his customers even though Nemorino gets the girl at the end of Donizetti's *L'elisir d'amore*.⁶³

An operatic reference aside, Easterbrook describes the essence of the resource misallocation that results from a transaction rooted in a false credence claim. "One important reason for requiring truth is so that competition in the market will lead to appropriate prices. Selling brass as gold harms consumers independent of any effect on pain."⁶⁴ In other words, false credence claims preempt efficient transactions, yielding market failure, thus reducing social welfare. Honest sellers lose business and fade from the market, unless the credence claims can be countered or regulators intervene.

As noted, the recent Volkswagen scandal offers a stark example of a false credence claim. As part of a broad scheme, Volkswagen ran a widespread advertising campaign to promote the low-emissions virtues of its new diesel models.⁶⁵ In sum, the manufacturer claimed that these diesel models were "fun, quiet, efficient and, most critically . . . clean. In essence, Volkswagen told drivers they could have their cake and eat it."⁶⁶ These claims allegedly enabled the company to charge consumers a substantial premium for these models.⁶⁷ Volkswagen marketed the advantages of Clean Diesel technology with this narrative: "Stinky, smoky, and sluggish. Those old diesel realities no longer apply. Enter TDI Clean Diesel. Ultra-low-sulfur fuel, direct injection technology, and extreme efficiency. We've ushered in a new era of diesel."⁶⁸

⁶³ *Id.* at 863.

⁶⁴ *Id.*

⁶⁵ Mouawad & Ember, *supra* note 1.

⁶⁶ *Id.*

⁶⁷ Complaint at 2–3, *Fiol v. Volkswagen Grp. of Am., Inc.*, No. 13-cv-3072-EMC (N.D. Cal. Sept. 18, 2015).

⁶⁸ *TDI® Clean Diesel*, VOLKSWAGEN (July 5, 2015, 1:25 PM), <http://www.vw.com/features/clean-diesel/> [<https://web.archive.org/web/20150529074022/>].

Volkswagen's claims allegedly reflected willful behavior. Unlike many credence claims which may simply lack support, the company expended great effort to obstruct consumer and regulatory verification of the claim.⁶⁹ Only advanced testing performed by the non-profit International Council on Clean Transportation (ICCT) formed the basis for concluding that Volkswagen employed a "defeat device" to defeat routine emissions testing.⁷⁰ The ICCT provided damning evidence to the Environmental Protection Agency (EPA) and the California Air Resources Board.⁷¹ The EPA then fully uncovered Volkswagen's elaborate scheme to program vehicles' computer systems to defeat emissions tests.⁷²

Instead of "ushering in a new era of diesel," Volkswagen ushered in an era of self-inflicted nightmarish public relations,⁷³ damage to its brand,⁷⁴ hundreds of class actions to defend,⁷⁵ and a monstrous financial burden⁷⁶ deemed an "[e]xistential [t]hreat"⁷⁷ to the company. Despite multi-agency attention and the private lawsuits, United States Senator Bill Nelson urged the FTC to pursue the underlying deceptive advertising practices, noting that "Congress did not contemplate a bystander role for the agency in the face of

⁶⁹ Jeffrey Liker, *Assessing the Sins of Volkswagen, Toyota, and General Motors*, HARV. BUS. REV. (Sept. 24, 2015), <https://hbr.org/2015/09/assessing-the-sins-of-volkswagen-toyota-and-general-motors> [<https://perma.cc/A3NA-EREU>] ("[T]he company's engineers intentionally added software designed to allow its diesel engines to evade emissions standards and then, in normal driving, emit 40 times the acceptable levels. This was a deliberate, and quite ingenious, way to break the law and avoid detection.").

⁷⁰ Harry Kretschmer, *The Man Who Discovered the Volkswagen Emissions Scandal*, BBC (Oct. 13, 2015), <http://www.bbc.com/news/business-34519184> [<https://perma.cc/WC78-9ESB>].

⁷¹ *Id.*

⁷² Hotten, *supra* note 1 (explaining that the nitrogen-oxide emissions from these vehicles exceeded the regulatory limit by a factor of forty).

⁷³ See Tonya Garcia, *Volkswagen's PR Response Made Problems Worse, Experts Say*, MARKETWATCH (Sept. 25, 2015), <http://www.marketwatch.com/story/volkswagens-pr-response-made-problems-worse-experts-say-2015-09-25> [<https://perma.cc/29VV-7K9Z>] (discussing how Volkswagen's slow and subtle response to the scandal made a bad situation worse).

⁷⁴ See William Boston, *Volkswagen Seeks to Rebuild Trust with U.S. Initiative*, WALL ST. J. (Nov. 8, 2015), <http://www.wsj.com/articles/volkswagen-seeks-to-rebuild-trust-with-u-s-initiative-1446995472> [<https://perma.cc/EM6L-CYRP>] (discussing Volkswagen's struggle to regain control of its message).

⁷⁵ See Alison Frankel, *In VW Class Actions, Three Trial Judges Are Raring to Go*, REUTERS (Nov. 5, 2015), <http://blogs.reuters.com/alison-frankel/2015/11/05/in-vw-class-actions-three-trial-judges-are-raring-to-go/> [<https://perma.cc/A4N5-XFVT>] (noting that, as of November 5, 2015, consumers had filed approximately 350 class actions against Volkswagen with courts sorting out the multi-district litigation challenges).

⁷⁶ See Alanna Petroff, *Volkswagen Scandal May Cost Up to \$87 Billion*, CNN (Oct. 2, 2015), <http://money.cnn.com/2015/10/02/news/companies/volkswagen-scandal-bp-credit-suisse/> [<https://perma.cc/ZD5F-LB6X>] (explaining that the financial impact may exceed that of the Deepwater Horizon disaster to BP).

⁷⁷ Patrick Donahue, *Volkswagen Chief Warns on Existential Threat of Cheating Scandal*, BLOOMBERG (Oct. 4, 2015), <http://www.bloomberg.com/news/articles/2015-10-04/volkswagen-chief-warns-of-existential-threat-of-cheating-scandal> [<https://perma.cc/8E4Y-9F3P>].

galling and unmitigated consumer deception.”⁷⁸

On October 2015, the FTC acknowledged commencement of an investigation into Volkswagen’s practices, in coordination with the Department of Justice (DOJ) and the EPA.⁷⁹ The FTC filed a complaint against Volkswagen in March 2016⁸⁰ and, along with California, reached a broad, historic settlement⁸¹ that could ultimately require the company to spend \$14.7 billion.⁸²

Consumers, especially after successful testing through state emissions tests, would have no reason to doubt Volkswagen’s clean diesel claim, and consumers might have expected regulators to verify such a claim.⁸³ The Volkswagen example shows that consumers standing alone would have great difficulty detecting false credence claims, justifying a higher level of regulatory scrutiny. (But for the engineer at ICCT, Volkswagen may never have been caught or would have been caught much later.) Consumers have little incentive and lack the ability to police these sorts of credence claims; regulators, however, have much more facility.

A systemic, deliberate focus on credence claims could help the FTC approach enforcement with a more defined structure and more efficiency and effectiveness. Troublesome credence claims typically evoke instances like the Q-Ray, Clean Diesel, or the classic medicine show—claims that draw attention because consumers have difficulty verifying the claims, leading to resource misallocations like Judge Easterbrook described.⁸⁴ Other credence claims that might prove impossible or impractical to verify include origin of a product or its sourcing (e.g., “Made in America,” or “This is the product of recycled materials”).

Refining enforcement by classifying deceptive-discounting cases as

⁷⁸ Press Release, U.S. Senate Comm. Commerce, Sci., & Transp., Lawmaker Wants Feds to Investigate Volkswagen Marketing (Sept. 22, 2015), <http://www.commerce.senate.gov/public/index.cfm/pressreleases?ID=A04FC141-A8A4-4B7D-B19B-3C33C97A899E> [<https://perma.cc/P5ZV-YFPL>].

⁷⁹ David McLaughlin & Alan Katz, *Volkswagen's Advertising of Rigged Diesels Probed by FTC*, BLOOMBERG (Oct. 14, 2015), <http://www.bloomberg.com/news/articles/2015-10-14/volkswagen-s-advertising-of-rigged-diesels-probed-by-ftc> [<https://perma.cc/57T5-NJBB>].

⁸⁰ Complaint for Permanent Injunction & Other Equitable Relief at 1, *FTC v. Volkswagen Grp. of Am.*, 2016 WL 1221625 (N.D. Cal. Mar. 29, 2016).

⁸¹ Partial Stipulated Order for Permanent Injunction & Monetary Judgment at 11, *In re Volkswagen Clean Diesel Practices*, No. 3:15-md-2672 (N.D. Cal. Jun. 28, 2016); Bill Chappell, *Volkswagen Will Pay U.S. Diesel Car Owners Up to \$10 Billion*, NPR (June 28, 2016, 11:04 AM), <http://www.npr.org/sections/thetwo-way/2016/06/28/483785166/volkswagen-will-pay-u-s-diesel-car-owners-up-to-10-billion> [<https://perma.cc/6WNA-FGDP>].

⁸² Press Release, Fed. Trade Comm’n, Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles (June 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating> [<https://perma.cc/T8QB-FPUY>].

⁸³ See Kretschmer, *supra* note 70 (explaining that Volkswagen deceived a large group of technically skilled regulators until one engineer at the ICCT became curious).

⁸⁴ *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008); Darby & Karni, *supra* note 18, at 68–72.

credence claims would demonstrate use of the SEC framework to provide structure and more efficiency to federal enforcement. Easterbrook's concern about market disruption from a credence claim representing "brass as gold" should also logically hold for a price that is falsely represented as lower than a defined benchmark.⁸⁵ Since 1969, the FTC has not accorded pricing credence claims an appropriate level of concern.⁸⁶ Though not as spectacular as Volkswagen, deceptions of the same nature take place every day, in the form of deceptive retail pricing, and the FTC has decidedly taken a "bystander role," to use Senator Nelson's words.⁸⁷

4. *The Overlap Between Experience and Credence.*

Claims occasionally overlap SEC categories, and my content analysis of FTC enforcement in Section II reveals as much. As Darby and Karni explained, "The line between experience and credence qualities of a good may not be always sharp, particularly if the quality will be discerned in use, but only after the lapse of a considerable period of time."⁸⁸

For example, a face-cream manufacturer's claim that the product will prevent future wrinkles will not reveal efficacy until time passes. Such claims, if false, prove harmful due to the cost of the failed experience—in the form of losses from repeated purchases and the delay in use of other potentially effective products during the evaluation period. Efficacy may be difficult to verify over the longer period of time, even if no wrinkles appear. The consumer may never know whether wrinkles would have appeared in the absence of using the face cream. This type of claim offers *some* ability to verify, but not complete ability, rendering it a hybrid.

In sum, sorting advertising claims into the SEC categories brings rigor to regulatory prioritization. On a broad level, monitoring search claims offers a low return on intervention costs because consumers can police their search. Experience claims present different levels of concern, depending on the nature of the offering. If the cost of a negative experience proves high, more monitoring and enforcement of the claims should follow. Some deceptive experience claims can prove costly and unavoidable to consumers. The return on regulatory intervention would be higher. Credence claims

⁸⁵ *QT, Inc.*, 512 F.3d at 863.

⁸⁶ See generally Friedman, *Fictitious Pricing*, *supra* note 3, at 937–41, 952–56 (exploring history and deficiencies in FTC approach to pricing claims). States have occasionally accorded due concern to pricing-credence claims, however. See *id.* at 924, n.16. A recent example came in December 2016, when the Los Angeles, California city attorney sued four national retailers for alleging they used "false reference pricing" to mislead consumers. *Los Angeles City Attorney Mike Feuer Sues Four Major National Retailers, Alleging False Reference Pricing*; J.C. Penney, Kohl's, Macy's and Sears Allegedly Misled Customers With Pricing Schemes to Increase Sales, L.A. CITY ATTORNEY (December 8, 2016), <http://www.lacityattorney.org/single-post/2016/12/08/Los-Angeles-City-Attorney-Mike-Feuer-Sues-Four-Major-National-Retailers-Alleging-False-Reference-Pricing-JC-Penney-Kohl%E2%80%99s-Macy%E2%80%99s-and-Sears-Allegedly-Misled-Customers-With-Pricing-Schemes-to-Increase-Sales> [<https://perma.cc/6TJS-LWA3>].

⁸⁷ U.S. Senate Comm. Commerce, Sci., & Transp., *supra* note 78.

⁸⁸ Darby & Karni, *supra* note 18, at 69.

render consumers more vulnerable and potentially lead to market failure, justifying a higher level of resource allocation.

Defining the categories—and determining which claims belong in which category—helps refine the cost-benefit analysis of regulatory intervention in deceptive advertising. In the next section, I offer more examples of SEC claims and how regulators should address them.

B. *Regulatory Engagement with Advertising Claims*

As noted above, sellers can simultaneously make multiple SEC claims about a single offering. In refining enforcement, regulators should engage these claims in a nuanced way in order to establish a more effective prioritization scheme and optimize enforcement. To clarify further the differences between the types of SEC claims embedded within an offering and how regulators should address them, in this Section, I present three examples of different offerings: a low-ticket item, a high-ticket item, and a medium-ticket item with an advertised sale price.

Consider the following illustration related to the purchase of pork products from the hypothetical “Acme Pork Farms” pork-chop producer.⁸⁹ Table 1 shows that when buying a simple pork chop at the supermarket, consumers may confront all three SEC claims.

Table 1- Acme Pork Chop

Search claims	The category: “pork chop,” the Acme brand, the price, weight, and visible fat (as shown through the packaging).
Experience claims	A label on the package: “Tastes flavorful and succulent!”
Credence claims	Origin: “Acme only sources from humane farms.”

Each of these claims engages shoppers in a different way. Consumers can easily compare price and fattiness against other pork products in the meat bin. At the supermarket, the costs of verifying and inspecting search claims are low. Competitors and regulators might be concerned with brand counterfeiting, which would interfere with search, but that concern only matters for consumers if the brand signals value or a certain quality.⁹⁰ With

⁸⁹ Esben Sloth Andersen et al., *The Evolution of Credence Goods in Customer Markets: Exchanging ‘Pigs in Pokes,’* at 3 (ResearchGate, Working Paper, 1998), https://www.researchgate.net/publication/267402623_The_evolution_of_credence_goods_in_customer_markets_exchanging_pigs_in_pokes [https://perma.cc/H6ZD-R78P].

⁹⁰ Other products, like premium-brand fashion items, prove more susceptible to counterfeiting. However, premium fashion brands may not choose to police this problem. See Jonathan M. Barnett, Essay, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property,*

minimal effort, consumers can resolve any disparity between these search claims and the actual offering characteristics prior to a purchase. The need for regulatory monitoring and intervention would be low.

Shoppers can buy the Acme pork chop and determine through experience whether the chops were as “flavorful” or “succulent” as advertised. If they were decidedly not, shoppers could decline to repeat this purchase and, if motivated, could share their experience with others. Though the consumer would surrender the initial expenditure on the pork chops and endure a subpar meal, the consumer loss would likely be small. Regulators could deprioritize their concerns about the flavor-succulence claims, deferring to consumers to react to the claim and correct the market. Also of note, if the consumer wished to invest in advance investigation of the pork-chop experience, peer reviews might be one touch of a smartphone away. But the smaller the ticket, the smaller the potential payoff from any advance time investment.

With respect to credence, some consumers might either pay a premium for or switch to humane-sourced Acme pork because they want to uphold a moral point of view,⁹¹ or because “humane” might be a stand-in for overall quality.⁹² Consumers are ill-equipped, however, to assess whether the offering fulfills a “humane” claim. Humanely produced pork products might not taste distinguishably different from those generated by the cruelest, lawful means of production. Consumers cannot detect this problem through search or through consumption experience. A test could be performed through third-party certification (which would presumably have been on the label, effectively rendering it a credence claim *about* a credence claim) or through an expensive private investigation of the slaughterhouse. Regulators, who have both access and expertise, may be best positioned to evaluate the “humane-farm” sourcing claim.⁹³

The “inhumane” (but humane-*claiming*) pork producer might have an edge over the honest, humane producer in the form of lower processing costs

and the Incentive Thesis, 91 VA. L. REV. 1381, 1381–82 (2012) (describing how, even without robust enforcement of intellectual property rights, the fashion industry sustains robust investment in new product development). However, some evidence exists that consumers are rarely deceived by this type of counterfeiting. *Id.* at 1383.

⁹¹ See Craig J. Thompson & Gokcen Coskuner-Balli, *Countervailing Market Responses to Corporate Co-optation and the Ideological Recruitment of Consumption Communities*, 34 J. CONS. RES. 135 (2007) (describing how a consumer’s visceral sense of personal commitment and moral conviction reinforces the credibility of an unconventional pricing structure).

⁹² See *Humane Eating*, HUMANE SOC’Y, <http://www.humanesociety.org/issues/eating/> [<https://perma.cc/Y366-HPUE>] (last visited Sept. 30, 2016) (espousing the view that humane consumption is generally healthier).

⁹³ The FTC came to this conclusion about misleading environmental attribute claims (“greenwashing”) and tightened guidance in 2012. See Press Release, Fed. Trade Comm’n, FTC Issues Revised “Green Guides” (Oct. 1, 2012), <https://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-revised-green-guides> [<https://perma.cc/6E4Q-KRSD>].

that could translate into higher margins, lower prices, or both. In addition to consumers being misled, systemic resource misallocation results, as honest competitors struggle.

Consumers cannot easily correct for this type of information problem. Competitors could challenge each other's claims, either through rebuttals or counterclaims in the market or private lawsuits,⁹⁴ but such efforts might prove expensive and a plaintiff might be capturing a benefit for all competitors while bearing the cost alone. With this sort of credence claim, regulators must intervene because they are the only players positioned to correct the market.

The net benefit of monitoring and enforcing credence claims weighs more heavily than the benefit of enforcing search claims and low-ticket, verifiable experience claims. Though, of course, all credence claims vary and must in turn be weighed against each other to determine regulatory priority.

A *high-ticket* item, *less-frequently* purchased, also can carry multiple SEC claims and surface enforcement priorities. Consider the hypothetical example of the purchase of an expensive kitchen appliance, an "Acme Refrigerator," in Table 2.⁹⁵

Table 2- Acme Refrigerator

Search claims	Category: "Refrigerator," Acme brand, price, warranty, and visible features (size, compartments, ice dispenser).
Experience	Acme refrigerators labeled "efficient and durable."
Credence	Acme refrigerators are "hand-inspected before leaving factory" and "Acme refrigerators are Swiss-engineered."

In this example, search claims remain straightforward. A consumer can easily inspect the visible features of the refrigerator and verify the search claims. For a big-ticket, long-term purchase, a consumer might find a greater return to time investment in incremental shopping.

For an item like a refrigerator, however, experience claims might prove tougher for the consumer to verify than in the pork hypothetical. If the pork tastes awful, the low-cost expenditure can be written off easily. For a refrigerator, once purchased, delivered, and installed, and after limited-warranty expiration, the cost of a failed experience weighs heavier.

Although "experience" claims related to efficiency could be verified by "borrowed" experience from peer or third-party reviews, or energy

⁹⁴ B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 258 F.3d 578, 582 (7th Cir. 2001) (affirming judgment where a small retailer failed to prove a competitor's fictitious comparative pricing).

⁹⁵ Nelson cites appliances as an example. Nelson, *Information*, *supra* note 9, at 312.

regulators, consumers might find “durability” difficult to verify. An experience claim of durability beyond warranty takes years to evaluate and consumers cannot practically correct the claim in a timely way with a refusal to repurchase.⁹⁶ The consumer lacks the ability, and generally the knowledge, to inspect the refrigerator’s inner mechanics to assess long-term durability, and also the consumer likely will not find it worthwhile to hire a professional appliance mechanic to disassemble and inspect the item.

The refrigerator credence claims have similarities to the pork claims. The consumers seeking Swiss design or hand-inspection might find these attributes material to their purchase but impossible to verify personally. The typical consumer would, at the very least, need to recruit someone to visit the factory or design center. Realistically, only regulators (or well-informed plaintiffs’ attorneys during discovery) could have the ability to verify and correct a false claim here, as was the case with Volkswagen. These credence examples *may* prove more market-distortive in the cost-benefit analysis than the experience claim, but only a well-developed analytical framework would compel that rigorous evaluation. That evaluation would yield a set of enforcement priorities.

To demonstrate that price can be a credence claim, as well as a search claim, compare this example of an offering made in the Acme Clothing Store for an Acme Coat illustrated in Table 3.

Table 3

Search claims	Acme brand, price, and visible features (color, fabric, cut, size). Price tag: 50% off [originally \$120]
Experience	Acme coats keep the wearer warm and are durable.
Credence	Acme coats are “Made in America.”

With search, the consumer can readily inspect the coat and try it on to see if the color and cut pleases and if the fabric has the right texture. Some of the experience attributes can be tested by trying on the coat to feel the weight and inspect the workmanship of the sewing up close. Some experience claims can be “borrowed” from peers through online product reviews.

With respect to “Made in America” claims, Congress amended the FTC

⁹⁶ Even a professional third-party review of a new product could not offer completely reliable information about performance in the long term. Differentiations in automobile reliability ratings from the methodologies of J.D. Power and Consumer Reports demonstrate the challenges of predicting future performance even for well-established models of automobiles. See Cheryl Jensen, *Why Consumer Reports and J.D. Power are so Different*, N.Y. TIMES (Oct. 30, 2012), <http://wheels.blogs.nytimes.com/2012/10/30/why-consumer-reports-and-j-d-power-are-so-different/> [https://perma.cc/RPV6-5JAF].

Act to address origin claims,⁹⁷ which would likely not have been necessary (though still politically expedient) if origin was verifiable by consumers. A consumer would need to investigate a manufacturer's supply chain to confirm this claim, or would need to rely on regulators, whistleblowers, or perhaps even investigative journalists to prove or disprove origin.⁹⁸

The price claim starkly differs from other plain search claims in this illustration. If the price had been purely displayed as \$60, rather than as a 50% discount from \$120, the price claim would fall into the category of a straightforward search claim. The representation of the absolute price enables comparison and assessment of the exchange.

However, when presented as a discount, price takes on the characteristics of a credence claim. Discounts imply bargains. The time and effort required for tracking the price history of an impulse purchase, to see if the item had been offered at a value twice that of the price offered in the instant case, proves expensive to acquire and verify. The sheer magnitude of the claim about price may induce the consumer to rely on it.

What is the harm to the consumer from buying at a falsely-advertised discount? At first blush, the answer might appear to be none, given that the consumer paid an absolute price at the cash register, rendering expectation damages a curious remedy.⁹⁹

If the deceit induces a transaction, a socially destructive dynamic emerges. The advertised price discount may induce the consumer into thinking that he has found a "bargain," and he may stop shopping sooner.¹⁰⁰ Buyers have finite time for shopping, and when they come across what appears to be a bargain, evidence shows that the returns from additional price search appear to the consumer to be too low to justify shopping further.¹⁰¹ This sort of price information, if true, would produce a more efficient transactional process.

However, if the advertised discount induces discontinuation of shopping based on a false former price, the search may be stunted prematurely. This leads to a market failure much like the one of which Judge Easterbrook warned, where the market does not yield "appropriate prices."¹⁰² If the consumer believes that he has struck a bargain at \$60 because of its falsely advertised presentation as a discount, this fictitious pricing will, according

⁹⁷ See 15 U.S.C. § 45a (2012) (granting the FTC permission to regulate origin claims of products with a "Made in the U.S.A." or "Made in America" label, or the equivalent thereof).

⁹⁸ For an example of a successful origin claim public action, see *Kwikset Corp. v. Sup. Ct.*, 246 P.3d 877, 901 (Cal. 2011) (finding that a plaintiff had standing to challenge Kwikset's label claim that its locksets were of domestic origin).

⁹⁹ For a discussion of the role of expectation damages in fictitious-pricing cases and how they vary by state, compare *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013), with *Kim v. Carter's Inc.*, 598 F.3d 362, 365–66 (7th Cir. 2010).

¹⁰⁰ See Grewal & Compeau, *supra* note 32, at 55 ("[T]he higher the overall perception of value, the greater the willingness to buy and the lower the likelihood of additional price search.").

¹⁰¹ *Id.*

¹⁰² *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008).

to the consensus of the literature, lead to welfare reduction.

A market failure can be prevented with an artful market intervention, but with fictitious pricing, the FTC has long decided not to intervene to correct this information problem. From a cost-benefit perspective, ordinary search claims should not be a high priority because they will self-correct. A buyer can spot certain characteristics of the coat and the market can sort out any mismatching claims easily.

Ordinarily, price falls into this search category—but when price incorporates a discount with reference to a prior price, it no longer should. Generally, a buyer has to approach an advertised prior-reference-point discount like a credence claim. Buyers have no readily available way of knowing whether the claim about the price was made in good faith. Verifying a prior-reference-point claim cannot be done through pure experience, unless the consumer invests in tracking the price of the specific item at a specific retailer to see if future discount claims are accurate. The cost of experiential investigation, at best, appears to be a low-return time investment.

Categorizing advertised discount-pricing claims as *credence* claims, distinguished from straightforward, verifiable “search” claims, reflects the distinction between the advertising messages. This recategorization also clarifies why the FTC should shift priorities to scrutinize prior-reference-point discount advertising generally.

Over the past thirty years, the FTC has deliberately shifted toward applying cost-benefit analysis to prioritizing deceptive advertising enforcement.¹⁰³ Removing discount-pricing claims from the search category and placing them in the credence category—where they belong—justifies the elevation of regulatory scrutiny. The cost-benefit approach can be enhanced not only by applying the SEC framework but also by revisiting old conclusions about the true nature of traditional claims.

If the FTC treats discount-price claims like credence claims, that policy posture will lead to more scrutiny of discounting practices. In Section II, I sample recent FTC enforcement actions, showing that the FTC generally focuses enforcement on credence claims. By discussing the FTC actions within the context of the SEC framework, I show how further structuring and formalization of cost-benefit analysis can lead to more efficient stewardship of enforcement resources.

II. THE FTC FOCUS ON CREDENCE CLAIMS: EMPIRICAL SUPPORT

An analysis of recent FTC deceptive-advertising enforcement actions reveals that the FTC currently focuses on enforcement of credence claims. Though the FTC actively enforces all three types of SEC claims, the most

¹⁰³ See *infra* Section IV.B.

common claims enforced fall into the credence category, or straddle the enforcement and credence categories.¹⁰⁴ As such, a more targeted, deliberate, and formal emphasis on categorizing and monitoring credence claims would leverage a familiar baseline for structured enforcement.

In 1974, Nelson examined which types of advertising claims the FTC enforced, sorting them by the original two categories of product attributes he devised—search and experience.¹⁰⁵ His conclusion, based on a data set of fifty-eight FTC enforcement actions sourced from the *Federal Trade Commission Reporter*, revealed that the FTC focused exclusively on experience claims, as he then defined them.¹⁰⁶ Because credence claims and experience claims often overlap, it is likely that if one were to sort out Nelson’s non-search claims, many of them would be categorized as credence.

To explore whether the FTC’s enforcement priorities remained stable since Nelson’s approach over forty years ago,¹⁰⁷ I sorted through all of the FTC enforcement actions between July 1, 2014 and June 30, 2015 to characterize the types of claims the FTC pursued.¹⁰⁸ This recent profile of federal enforcement reveals that today the FTC focuses on credence claims and especially claims that span experience and credence. A number of claims, as I show in Table 4, fell into both experience and credence, but nearly two-thirds of the claims that the FTC pursued had a credence characteristic.

Table 4: Federal Trade Commission Advertising Activity (July 2014 – June 2015) by Claim Type

Type of Claim	Number Identified
Search (only)	5
Search and Experience	2
Experience (only)	7
Experience and Credence	15
Credence (only)	9

This examination also reflects that the FTC enforces advertising claims sparingly and selectively. During this one-year time period, I counted a mere

¹⁰⁴ See *infra* Table 4.

¹⁰⁵ Nelson, *Advertising*, *supra* note 9, at 750.

¹⁰⁶ *Id.*

¹⁰⁷ Note that Nelson studied enforcement actions from 1965, which stretched back before the FTC enacted the economic-analysis reforms I describe in detail in Section IV. See *id.*

¹⁰⁸ I searched the Federal Trade Commission Reporter in Westlaw from the period of July 1, 2014, through June 30, 2015, using “advertising” as the primary filter. I included all advertising claims that the FTC confronted during this period, including complaints and orders, and investigations concluding with no-action letters. If the claims at issue appeared as part of multiple filings, I consolidated them and only counted them once. The database created to capture and code this data is on file with the author.

thirty-eight pure, separate, discernable instances of federal advertising-claims-enforcement activity. Given that total domestic advertising spending likely exceeded \$180 billion for 2015,¹⁰⁹ this number of FTC actions appears modest, even accounting for any state-level regulation, private civil actions, and other interventions. Because regulatory resources are limited, informed rebalancing of federal enforcement efforts against information activity of that value could have substantial impact. A tightened, orderly framework, expressly employed and properly implemented, would assist the FTC in guiding efforts toward the areas of greatest social concern. Put simply, the FTC could get more “bang for its buck.”

Exploring actual examples of recent federal advertising enforcement shows how the FTC, in essence, already uses the SEC framework—but does so without the formal structure that would enable superior resource stewardship. Of course, fictitious-pricing cases are conspicuously absent from this data set. Enforcement of fictitious-pricing cases as credence claims would, however, fit the types of cases that the FTC focuses on today, thus providing one example of how a deliberate application of the SEC framework could build on and improve the Commission’s current approach.

A. Search Claim Enforcement Examples

Advertisers have a lower incentive to invest in disseminating questionable search claims because consumers can surface any facial disparities either pre-purchase or at the point of purchase. Natural consumer empowerment at this stage should, as a matter of policy, lead regulators away from scrutinizing search claims toward other types of claims that involve less transparency. However, as Nelson notes, even within the provision of search information, “[m]isleading advertising will still exist.”¹¹⁰

Due to the readily verifiable nature of the claims and the costs of misleading claims, “consumers can have some confidence that the advertising of search qualities bears a close relation to the truth.”¹¹¹ This is not to say that consumers believe that all search claims are credible, but they have more confidence in these claims as opposed to experience and credence claims.¹¹²

Consistent with this supposition, the FTC sparingly enforces actions where search claims form the basis of the claim in controversy. However, some search claims can still deceive consumers. Recent actions show that the FTC pursues cases of complex pricing misrepresentation involving big-

¹⁰⁹ *Total US Ad Spending to See Largest Increase Since 2004*, EMARKETER (July 2, 2014), <http://www.emarketer.com/Article/Total-US-Ad-Spending-See-Largest-Increase-Since-2004/1010982> [<https://perma.cc/Z8NR-E9AA>].

¹¹⁰ Nelson, *Advertising*, *supra* note 9, at 730.

¹¹¹ *Id.*

¹¹² *Id.*

ticket items like automobiles¹¹³ and associated big-ticket lending and financing.¹¹⁴ One of these prosecutions involved an auto dealership's practice of advertising prices that the dealership would not honor, a classic disruption of the search process.¹¹⁵

Nonetheless, some of these pricing claims, particularly the ones involving complex payment plans for automobiles that misrepresent consumer savings, might also be appropriately classifiable (secondarily) as experience or credence claims. If consumers took the time to measure their savings on these advertised financing plans, they could correct subsequent transactions based on experience, although concededly only after incurring a large expense. Given that some consumers may not have the incentive or the ability to verify the claim, even at the time of entering the payment plan, the claim may have credence characteristics. Put simply, some consumers may make the deal and simply move forward, realizing that undoing the deal would prove difficult anyway.

With respect to basic deceptive-pricing claims, especially claims of the sort that might serve to lure a customer into a car dealership, and ultimately a sale, on false pretenses, the search category likely still matches. Intervention can be justified, even in the low-scrutiny, search-claim sphere, because behavioral consumer biases are exploited to lure in the consumer, leading to suboptimal transactions that reduce welfare.¹¹⁶ The consumer may be lured in by the attractive financing offer and may continue with the complex transaction because of the perception that they have already invested time into the deal and into the relationship with the salesperson. Consumer innumeracy presents another opportunity for sellers to exploit search.¹¹⁷

Concededly, the regulatory cost-benefit calculus might not operate simply on addressing the specific price-advertising method. The FTC, in this case, may have viewed this matter as an effort to regulate a specific industry practice, the automobile-dealer industry, rather than addressing a retail pricing practice across the entire retail market.

The FTC *should* have a lower level of concern about search claims because markets can more readily police search claims. Experience claims offer a different array of problems for the FTC. Though pricing, particularly

¹¹³ For pricing-related complaints and orders against automobile dealers, see *TT of Longwood, Inc.*, 2015 WL 1518895 (F.T.C. Mar. 27, 2015); *City Nissan, Inc.*, 159 F.T.C. 1760 (2015); *Jim Burke Auto., Inc.*, 159 F.T.C. 1793 (2015).

¹¹⁴ For complaints and orders related to financing representations, see *Matt Blatt Inc.*, 2015 WL 1518892 (F.T.C. Mar. 26, 2015); *Nat'l Payment Network, Inc.*, 159 F.T.C. 1718 (2015).

¹¹⁵ *TC Dealership, L.P.*, 2015 WL 4035223 (F.T.C. June 29, 2015).

¹¹⁶ See Friedman, *Bait-and-Switch*, *supra* note 27, at 586–89 (explaining how the sunk-cost fallacy conjured by bait-and-switch tactics will lead consumers to make inefficient choices, and how bait-and-switch, if left unchecked, drives honest players from the market).

¹¹⁷ See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 676–77, 711–14, 721–22 (2011) (discussing the barrier presented by consumer innumeracy in generating successful mandatory disclosure laws).

of a long-term retail contract, can have experiential dimensions, in practice, search should generally provide the instant ability to obtain this information up front.

B. *Experience Claim Enforcement Examples*

Nelson observed that compared to search characteristics, consumers lacked the instant ability to assess experience characteristics. In 1974, when Nelson wrote about the experience attribute, which encompassed what Darby and Karni would later call credence, he noted that consumers would have to purchase and use a product at least once in order to assess the accuracy of a claim.¹¹⁸ The primary correction mechanism for consumers for a false or deceptive experience claim would be to return the item, if possible, or simply not to purchase it again. Information might stream to other buyers and competitors to devalue an overinflated claim, devaluing the incentive for the seller to continue to invest in the claim.

In recent years, the FTC has demonstrated heightened concern about experience claims. For example, the FTC tightened guidance on the use of testimonial endorsements¹¹⁹ and has required product reviewers to disclose whether they received the reviewed offering for free in exchange for the publicity.¹²⁰ Independent peer-to-peer reviews, if negative, function as negative experience claims, powerful to the point where they have become the subject of defamation suits.¹²¹ These suits have even warranted the reviewing platform Yelp to lobby for legislative protection (in the form of anti-SLAPP laws) to shield users from such actions.¹²²

During the period I examined, consistent with these concerns about experience claims, the FTC enforced actions against those offering deceptive “borrowed experience” claims, including falsely generated online reviews that appeared to be from peers¹²³ and peer reviews generated

¹¹⁸ Nelson, *Advertising*, *supra* note 9, at 730.

¹¹⁹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

¹²⁰ 16 C.F.R. §§ 255.1(d), 255.5 (2015).

¹²¹ See e.g., *Hassell v. Bird*, 247 Cal. App. 4th 1336 (2016), *pet. for rev. granted*, 381 P.3d 231 (Cal. 2016) (defamation case brought by attorney against client for client’s derogatory remarks in Yelp review, along with an order to Yelp to remove review); *Seaton v. TripAdvisor, LLC*, 728 F.3d 592 (6th Cir. 2013) (resort owner unsuccessfully sued TripAdvisor for defamation). TripAdvisor put the resort on a list: “Dirtiest Hotels—United States,” accompanied by a reviewer’s picture of a torn bedspread with the quote, “There was dirt at least 1/2” thick in the bathtub, which was filled with lots of dark hair.”) *Id.* at 598-99.

¹²² Angus Loten, *Yelp Reviews Brew a Fight over Free Speech vs. Fairness*, WALL ST. J. (Apr. 2, 2014), <http://www.wsj.com/articles/SB10001424052702303847804579477633444768964> [https://perma.cc/FWG7-F9DF].

¹²³ *Sony Comput. Entm’t Am. LLC*, 159 F.T.C. 1127 (2015); *Deutsch LA, Inc.*, 159 F.T.C. 1163, 1168–70 (2015); see Lesley Fair, *Game Over: FTC Challenges Sony’s Claims for PlayStation Vita and Tweets by Deutsch LA*, FED. TRADE COMM’N BUS. BLOG (Nov. 25, 2014), <https://www.ftc.gov/news-events/blogs/business-blog/2014/11/game-over-ftc-challenges-sonys-claims-playstation-vita>

through undisclosed incentives.¹²⁴ The fact that advertisers will go to some length to influence, or even manufacture, peer endorsements speaks to their power. Extra credibility attaches to an experience claim when a similarly situated, neutral consumer delivers the message. The FTC, by taking action and promulgating stricter guidelines in this area, has signaled that the benefits of intervention in this zone exceed the costs.

Though I have discussed the power of the “borrowed” experience, direct experience appears to be addressed more frequently, but typically in conjunction with a credence claim. The line between an experience claim and a credence claim depends on the ease of consumer verification. If a degree of reasonable investigation can verify a claim, an element of the “experience” claim is present. But if a claim proves excessively prohibitive, highly improbable, or even impossible to verify, the claim looks more like a credence claim. Occasionally, this line blurs, or the line’s blurry definition may depend on a range of consumer appetites for investing in verification of the claim.

C. *Blended Experience-Credence Claim Enforcement Examples*

Some claims inherently belong in both categories of experience and credence because the claim might prove partially verifiable. For a recent enforcement example, consider a claim that a substance will repel lice from human hair,¹²⁵ which might be verifiable through experience if a consumer finds himself free of lice after using the product. Certainly, if lice persisted, the experience claim would be disproven. However, if lice never returned, it might prove difficult for the consumer to definitively verify whether the product delivered that experience or whether the lice would have stayed away anyway. This “lice repellence” claim projects into the future, surfacing the “credence” attributes of the claim.

The FTC recently addressed other claims similar to the lice-repellence claim, including blended experience-credence claims involving weight-loss products,¹²⁶ including caffeine-laced weight-loss “pants”¹²⁷ and memory-enhancement supplements.¹²⁸

As my analysis of recent FTC enforcement demonstrates, nearly half of all actions straddle both experience and credence claims.¹²⁹ For another

[<https://perma.cc/5PBX-HZ7F>] (“[Deutsch] had employees post rave tweets about the PS Vita without disclosing their connection to Deutsch or Sony.”).

¹²⁴ Amerifreight, Inc., 159 F.T.C. 1626 (2015).

¹²⁵ Lornamead, Inc., 2014 WL 4740172 (F.T.C. Sept. 16, 2014).

¹²⁶ John Matthew Dwyer III, 2014 WL 5474620 (F.T.C. Oct. 22, 2014); Fed. Trade Comm’n, Opinion Letter on FTC v. Genesis Today, Inc. (Jan. 27, 2015), 2015 WL 399862 (statement of Chairwoman Edith Ramirez, Comm’r Julie Brill, and Comm’r Terrell McSweeney).

¹²⁷ Wacoal Am., Inc., 2014 WL 5906525 (F.T.C. Nov. 6, 2014); Norm Thompson Outfitters, Inc., 2014 WL 5906524 (F.T.C. Nov. 6, 2014).

¹²⁸ I-Health, Inc., 2014 WL 4252391 (F.T.C. Aug. 21, 2014).

¹²⁹ See *supra* Table 4.

example, consider consumer assessment of the efficacy of a nutritional supplement. Consumer verification of efficacy proves difficult, especially if the consumer has made other concurrent dietary or nutritional changes. Some consumers might test the experience claim of a supplement by looking for reliable peer reviews or even receiving third-party advice from a medical professional, but consumers implicitly weigh their personal time and financial investment against the uncertainty about the utility of any information they might obtain. Consumers who transact without the practical ability or intent to evaluate the experience essentially rely on the credence claim. The costlier the test, the more likely that the claim has the attribute of credence.

Blended experience-credence claims add another layer of nuance to the task of sharpening the underlying cost-benefit-driven approach toward prioritizing enforcement. The critical factor becomes the anticipated level of the consumer's experience assessment.

D. *Credence-Claim Enforcement Examples*

Advertisers make credence claims ostensibly because they believe they will generate sales, but some contention about this conclusion has surfaced. For example, Lillian BeVier argued that consumers would not trust credence claims or experience claims because of their non-verifiability.¹³⁰ Therefore, BeVier concluded, the "rational advertiser" would avoid "wast[ing] resources making direct, inherently unbelievable quality claims at all—either true or false."¹³¹ Roger Schechter responded, however, that if consumers put any weight behind these credence claims at all, advertisers would invest behind them and "ultimately . . . exaggerate them."¹³² Lee Goldman concurred with Schechter, observing that "many advertisements contain credence claims[,] which consumers do not test."¹³³ Nevertheless, as BeVier (somewhat) acknowledged,¹³⁴ advertisers do invest in credence claims, and as my content analysis shows next, they abound in the market.

My sample shows that the FTC actively investigates pure credence claims, consistent with the FTC's focus on blended claims. "Product-content" claims present a classic example of a credence claim of concern for the FTC. In fact, the Commission investigated credence claims about the

¹³⁰ Lillian R. BeVier, *Competitor Suits for False Advertising under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 10, 12–13 (1992).

¹³¹ *Id.* at 13.

¹³² Roger E. Schechter, *Additional Pieces of the Deception Puzzle: Some Reactions to Professor BeVier*, 78 VA. L. REV. 57, 76 (1992).

¹³³ Goldman, *supra* note 22, at 498.

¹³⁴ BeVier, *supra* note 130, at 13 n.39.

amount of recycled content in plastic products.¹³⁵ Consumers would have difficulty verifying such claims unless they had a clear view of the sourcing and manufacturing process. Regulators have more power and resources to investigate these claims or compel the advertisers to substantiate them.

Deceptive product origin claims fall into this credence category. Not surprisingly, the FTC promulgated an enforcement policy directed toward this specific credence-claim problem.¹³⁶ Consumers cannot readily verify where items were sourced or assembled. Private certification of origin also proves imperfect.¹³⁷ Just as in difficult-to-verify content claims (e.g., the recycled plastic claims), regulators similarly must intervene to enable consumers to receive the benefit of the bargain and to protect integrity of markets.

In another instance, the FTC declined to take action but expressed concerns about renewable-energy sourcing claims from an electricity producer.¹³⁸ Such claims prove highly technical and difficult to verify. In this matter, a citizen petition generated with the guidance of a law-school clinic brought the problem to the FTC's attention,¹³⁹ but without the activism of outside organizers, some claims might not even surface for scrutiny.

Over the past half century, the FTC's approach toward advertising regulation, first slowly and then suddenly, lurched from one of lethargy and an absence of discipline to one formally requiring economic analysis.¹⁴⁰ As consumer markets evolve and regulator resources remain constrained, an innovative extension of the cost-benefit approach that incorporates the SEC approach would add rigor to the regulatory prioritization scheme. Credence claims would likely receive priority.

As I have shown, the basis already exists for using the SEC framework in a more formal way. If applied with deliberation and rigor, the framework can enable regulators to sort out which types of claims warrant more scrutiny. Having established this broader, contextual foundation, in Section III, I discuss specific areas where the FTC might change enforcement practices if SEC-driven analysis is deployed.

III. REFINING FTC ADVERTISING ENFORCEMENT

In this Section, I present three problems that the FTC confronts to show

¹³⁵ Engineered Plastic Sys., LLC, 2014 WL 4651909 (F.T.C. Aug. 20, 2014); Am. Plastic Lumber, Inc., 2014 WL 3752645 (F.T.C. Jul. 24, 2014).

¹³⁶ See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63756, 63766–67 (F.T.C. Dec. 2, 1997) (outlining the FTC enforcement policy that a product must be “all or virtually all” made in the United States to substantiate an unqualified “Made in the USA” claim).

¹³⁷ See Made in the USA Brand, LLC, 2014 WL 6682518 (F.T.C. Nov. 10, 2014) (taking action against the use of the “Made in the USA” certification mark in promotion materials for numerous products that were revealed to contain a significant amount of imported content).

¹³⁸ Fed. Trade Comm’n, Opinion Letter on Green Mountain Power Corp., 2015 WL 628252, at *1 (F.T.C. Feb. 5, 2015).

¹³⁹ *Id.*

¹⁴⁰ See *infra* notes 230–31 and accompanying text.

how the SEC framework may explain current enforcement patterns and guide future enforcement patterns. In Section III.A, I show in more detail that fictitious pricing should be viewed as a credence claim, rather than a search claim, and elevated to the priority of other credence claims, like “clean diesel.” In Section III.B, I suggest that regulators should scrutinize peer information brokers (PIBs) like Yelp to preserve the benefits of this fairly new flood of experience claims while also recognizing the potential for PIBs to distort the presentation of this information. Although the proliferation of peer-supplied market information has high social value, any distortions of experience claims by PIBs prove difficult for consumers to self-correct. Finally, In Section III.C, I contend that the FTC’s recent focus on native advertising should focus less on curative disclaimers and more on the actual content within the claims.

A. Addressing Fictitious Pricing

Regulators have historically treated price-advertising claims like search claims, warranting low regulatory scrutiny.¹⁴¹ Regulators should, however, treat them like credence claims.¹⁴² The vast bulk of the information-economics literature warns against interference with price advertising, particularly restrictions on advertised discounts.¹⁴³ Restrictions on advertising tend to impede competition, leading to higher prices.¹⁴⁴ Price advertising, unimpeded, appears to lead to more transparency and easier search, resulting in lower prices.

Not all price advertising leads to more transparency and easier search. Price advertising only constitutes a true search claim if the advertising

¹⁴¹ Pitofsky, *supra* note 3, at 687–88 (suggesting that regulators’ reliance on the notion that individual consumers or competitors in the industry can seek their own remedy in court is mistaken). Nearly a generation later, Pitofsky reiterated similar concerns. See Robert Pitofsky et al., *Pricing Laws Are No Bargain for Consumers*, 18 ANTITRUST 62, 64 (2004) (stating that the FTC has stopped enforcing its Pricing Guides and advocating for the FTC to abandon the Guides and for states to repeal their deceptive-pricing statutes and regulations).

¹⁴² See Goldman, *supra* note 22, at 499 (mentioning the value of price discounting information to consumers).

¹⁴³ See Friedman, *Fictitious Pricing*, *supra* note 3, at 953–56 (discussing former FTC Commissioner Robert Pitofsky’s repeated rationale for deprioritizing fictitious-pricing enforcement).

¹⁴⁴ For some landmark studies, see, e.g., JOHN F. CADY, RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS 20 (1976); ALEX MAURIZI & THOM KELLY, PRICES AND CONSUMER INFORMATION: THE BENEFITS FROM POSTING RETAIL GASOLINE PRICES 49 (1978); Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337, 337 (1972); C. Robert Clark, *Advertising Restrictions and Competition in the Children’s Breakfast Cereal Industry*, 50 J.L. & ECON. 757, 759–60 (2007); Jeffrey Milyo & Joel Waldfogel, *The Effect of Price Advertising on Prices: Evidence in the Wake of 44 Liquormart*, 89 AM. ECON. REV. 1081, 1081 (1999); John R. Schroeter et al., *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 36 J. INDUS. ECON. 49, 49 (1987); see also J. Howard Beales et al., *In Defense of the Pfizer Factors*, in JAMES CAMPBELL COOPER, THE REGULATORY REVOLUTION AT THE FTC 86–87 (2013) (discussing how advertising reduces prices).

plainly presents a price. Price advertising, however, can contain a difficult-to-verify claim *about* the price. For example, these claims can warrant that a price has been discounted from a former price,¹⁴⁵ from a competitor price,¹⁴⁶ or as a “factory” price compared with a full retail price.¹⁴⁷ Verifying claims about the nature and context of an advertised price proves challenging and costly. Consumers accordingly treat the advertised discount or comparison as a signal to stop investing time in incremental price shopping,¹⁴⁸ which generates the type of price confusion, resource mismatch and welfare loss that concerned Judge Easterbrook in the credence-focused *QT* case.¹⁴⁹

These pricing claims belong in the credence category, just like clean-diesel automobile emissions claims or ionized-bracelet claims. In these cases, consumer claim-verification costs constitute the obstacle to a market solution. Similarly, regulators should grant these types of pricing claims high levels of concern. Appropriately categorizing these claims as credence would lead regulators to scrutinize the claims, ultimately optimizing regulatory resources.

For decades, the FTC has labeled these price-advertising practices as deceptive, putting advertisers on notice. For example, the Guides Against Deceptive Pricing warn that if “an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction—the ‘bargain’ being advertised is a false one.”¹⁵⁰ The information economics scholarship presents a strong consensus that social harm results from regulatory tolerance of such practices.¹⁵¹ Buyers accept discounting claims and apparently do not research whether the advertiser made them in good faith.

The FTC has not enforced this type of claim as a basis for a deceptive-practices action since the 1960s.¹⁵² At the state regulatory level,¹⁵³ and in

¹⁴⁵ For FTC guidance about former price comparisons, see 16 C.F.R. § 233.1 (2016).

¹⁴⁶ See 16 C.F.R. § 233.2 (2016) (describing a commonly used form of bargain advertising as offering goods at lower prices than a competitor).

¹⁴⁷ The FTC addresses this practice among other similar miscellaneous tactics. See 16 C.F.R. § 233.5 (2016).

¹⁴⁸ See Mark Armstrong & Yongmin Chen, *Discount Pricing*, 605 UNIV. OF OXFORD DEP’T OF ECON. 1, 25 (Dept. of Econ., Discussion Paper Series No. 1471-0498, 2012), <http://www.economics.ox.ac.uk/materials/papers/5819/paper605.pdf> [<https://perma.cc/P4F4-U2L7>].

¹⁴⁹ *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008).

¹⁵⁰ 16 C.F.R. § 233.1(a) (2016).

¹⁵¹ See, e.g., Grewal & Compeau, *supra* note 32, at 56 (analyzing a comprehensive meta-analysis of welfare losses resulting from discount-price advertising offered in bad faith).

¹⁵² The last sighting of the term “fictitious” pricing in an FTC order appeared in 1970, resulting from a complaint filed the previous year. See *Hollywood Credit Clothing Co.*, 77 F.T.C. 1594, 1604–05 (1970); Friedman, *Fictitious Pricing*, *supra* note 3, at 922 n.6.

¹⁵³ See, e.g., *People v. Overstock.com, Inc.*, No. RG10546833, 2014 WL 657516, at *32, *39 (Cal. Super. Ct. Feb. 5, 2014) (finding Overstock.com in violation of California Fair Advertising Law, ultimately resulting in a \$6.8 million judgment); Assurance of Discontinuance Pursuant to New York

private civil actions, deceptive discount-pricing claims have been pursued recently with mixed results.¹⁵⁴ Though California law offers consumer plaintiffs a clear statutory path for pleading harm,¹⁵⁵ Illinois, for example, does not.¹⁵⁶ States and private actors cannot address all extant fictitious-pricing problems. As a result, the expansive national and regional presence of many retailers may drive the need for federal solutions.

Lawmakers have taken note. In 2014, members of Congress attempted to draw the FTC's attention to fictitious-pricing practices at so-called "factory outlets."¹⁵⁷ The FTC's only visible public response to this concern

Executive Law § 63(15) *In re Michaels Stores, Inc.* (2011) (on file with author) (consent decree between retailer and New York Attorney General and Michaels Stores concerning misleading sales promotions); Assurance of Discontinuance Pursuant to New York Executive Law § 63, Subdivision 15, Op. Att'y Gen. N.Y. 5 (2004) (consent decree between retailer and the New York Attorney General that includes a mandate for the retailer to comply with the FTC Guides on Prior-Reference Pricing); Press Release, Office of the Dist. Attorney, Santa Clara Cty., Overstock Must Pay \$6.8 million for Deceptive Comparison Pricing (Feb. 20, 2014), https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NRA2014/Overstock_Must_Pay_6-8-Million_Dollars.aspx [<https://perma.cc/3NLV-QXHU>].

¹⁵⁴ *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1101–02 (9th Cir. 2013), provides a high-profile example of plaintiff success in fictitious pricing litigation, driven by unique features in California's Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 (West 2016) and Fair Advertising Law, CAL. BUS. & PROF. CODE §§ 17200, 17500–09 (West 2015). Ongoing and recent litigation has produced or pointed toward mixed results. *See, e.g.*, Fourth Amended Complaint, Spann v. JC Penney Corp., No. 12-cv-00215, 2014 WL 10123337 (C.D. Cal. Mar. 5, 2014) (settlement terms call for JC Penney to set aside \$50 million for a class); *see also* Shaulis v. Nordstrom, Inc., No. 15-10326, 2015 WL 4886080 (D. Mass. Aug. 14, 2015) (notice of appeal filed); Rubenstein v. Neiman Marcus Grp. L.L.C., No. CV 14-07155, 2015 WL 1841254, at *6 (C.D. Cal. Mar. 2, 2015); Second Amended Complaint, Branca v. Nordstrom, Inc., 2015 WL 224229 (S.D. Cal. May 6, 2015) (No. 3:14-cv-2062); First Amended Complaint, Gattinella v. Michael Kors, Inc., 2014 WL 4419081 (S.D.N.Y. Sept. 2, 2014) (No. 1:14-cv-5731) (seeking monetary damages for deceptive and misleading labeling on products sold at Michael Kors Outlet Stores); Kat Greene, *Michael Kors Pays \$4.9M to End Outlet Price Class Action*, LAW360 (June 12, 2015, 7:33 PM) <http://www.law360.com/articles/667560/michael-kors-pays-4-9m-to-end-outlet-price-class-action> [<https://perma.cc/Z599-LMAW>] (reporting that Michael Kors settled the Gattinella case for \$4.9 million in June 2015); Korri Kezar, *J.C. Penney Allots \$50 million to Settle Class Action Lawsuit*, DALLAS BUS. J. (Nov. 11, 2015, 11:52 AM) <http://www.bizjournals.com/dallas/news/2015/11/11/j-c-penney-allots-50-million-to-settle-class.html>.

¹⁵⁵ *See* Kwikset Corp. v. Super. Ct., 246 P.3d 877, 885–86 (Cal. 2011) (noting the “innumerable ways” consumers could show injury from unfair competition under California’s Unfair Competition Law).

¹⁵⁶ The Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA), 815 ILL. COMP. STAT. 505 / 1–12 (2015), requires demonstration of a pecuniary harm, which plaintiffs in these cases have struggled to prove. *See, e.g.*, *Kim v. Carter's Inc.*, 598 F.3d 362, 365 (7th Cir. 2010) (“A private party . . . must show ‘actual damage’ in order to maintain an action under the ICFA.”) (citation omitted); *Camasta v. Jos. A. Bank Clothiers, Inc.* No. 12-C-7782, 2013 WL 3866507, at *5 (N.D. Ill. July 25, 2013) (finding no pecuniary injury to satisfy ICFA). In Illinois, 815 ILL. COMP. STAT. 505 / 10(a) refers to “actual harm” in the statute, but *Mulligan v. QVC* equates actual harm to “pecuniary harm” in its interpretation. *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1197 (Ill. App. Ct. 2008). The 7th Circuit cited that *Mulligan* opinion and applied that standard in *Kim*, 598 F.3d at 365–66 (“The actual damage element of a private ICFA action requires that the plaintiff suffer ‘actual pecuniary loss.’”).

¹⁵⁷ *See* Letter from Sheldon Whitehouse, U.S. Senator, to Edith Ramirez, Chairwoman, Fed. Trade Comm’n (Jan. 30, 2014), <http://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers> [<https://perma.cc/Z2TU-G9XB>] (asking for a federal investigation into misleading pricing at outlet stores across the United States).

was this post by a consumer-education specialist on the FTC consumer information blog:

Well, even though I write about consumer issues every day, I have to admit that I was clueless that much of the merchandise sold at outlet stores is manufactured exclusively for them, and may be of lesser quality than the merchandise sold at non-outlet retail locations. The industry says it's responding to customer demand for merchandise that's similar to what's sold in the regular retail stores, but at a lower price point. Just as long as you know that, you can make sure you're satisfied with the price you're paying for what you're getting.¹⁵⁸

This official blog post demonstrates that these types of price advertising claims have credence characteristics. The employee concedes that she, a consumer information specialist who “writes about consumer issues every day,” did not, until recently, know about the practice, let alone personally verify claims.

This blog post failed to transmit the fact that these practices had been deemed and remained unlawful. The Commission counsels retailers not to advertise sales “at ‘factory’ prices when they are not selling at the prices paid by those purchasing directly from the manufacturer . . . [or] offer seconds or imperfect or irregular merchandise at a reduced price without disclosing that the higher comparative price refers to the price of the merchandise if perfect.”¹⁵⁹ Through this blog post, the FTC offered consumers “*caveat emptor*” advice, leaving private civil actions, which may prove daunting in some states,¹⁶⁰ as the sole corrective *national* enforcement mechanism for this high-growth zone¹⁶¹ of fictitious pricing.¹⁶²

In terms of cost-benefit analysis, pursuit of fictitious-pricing actions has a potential return akin to enforcement of a credence claim, rather than a plain

¹⁵⁸ Colleen Tressler, *Outlet Shopping: Getting Your Money's Worth*, FED. TRADE. COMM'N CONSUMER INFORMATION (Mar. 20, 2014), <http://www.consumer.ftc.gov/blog/outlet-shopping-getting-your-moneys-worth> [<https://perma.cc/W3D6-Y4UP>].

¹⁵⁹ Miscellaneous Price Comparisons, 16 C.F.R. § 233.5 (2016).

¹⁶⁰ ICFA, for example, requires demonstration of a pecuniary harm, which plaintiffs in these cases have struggled to prove. *See, e.g., Kim*, 598 F.3d at 365 (“A private party . . . must show ‘actual damage’ in order to maintain an action under the ICFA.”); *Camasta v. Jos. A. Bank Clothiers, Inc.*, No. 12-C-7782, slip op. at 5 (N.D. Ill. July 25, 2013) (finding no pecuniary injury to satisfy ICFA); *see also* 815 ILL. COMP. STAT. 505 / 10a (2007).

¹⁶¹ *See* Suzanne Kapner, *Retailers' Lines Blur on Outlet Stores*, WALL ST. J. (Oct. 12, 2014), <http://online.wsj.com/articles/retailers-lines-blur-on-outlet-stores-1413159747> [<https://perma.cc/QUC6-9URR>] (describing the rising share of outlets in the retail sales channel).

¹⁶² *See, e.g.,* Second Amended Complaint, *Malik v. Saks Fifth Ave. LLC*, No. 2:14-cv-07600, 2014 WL 7405526, at ¶ 48 (C.D. Cal. Dec. 2, 2014) (alleging, in part that advertised outlet prices were not marked down from prices at the mainline retail store—because outlet products were never sold at the mainline store); Complaint, *Rubenstein v. Gap, Inc.*, No. BC555010, 2014 WL 4063639, at ¶ 15 (Cal. Super. Ct. Aug. 18, 2014) (alleging in part that outlets sell lower quality goods under a regular label).

search claim. A fictitious-pricing claim obscures pricing, separating the practice from the kind of basic price advertising that scholars have identified as lowering prices through competition.

B. *Addressing Peer Information Brokers*

Consumers have long used third-party-experience claims to support transaction decisions. As Nelson noted in 1974, “Prior to sampling, a consumer can obtain information from relatives and friends, consumer magazines, or even from advertising. The consumer has to decide whether he will use this prior information as a guide to his sampling”¹⁶³ Technology has enabled consumers to access a flood of peer-based experience information. Consumers can now incorporate peer reviews through peer-information-brokerage (PIB) platforms before they transact. In essence, consumers can borrow the experiences of others and apply them beforehand, rather than evaluating a transaction afterward, reducing the likelihood that the first test of a seller experience claim leads to disappointment.

1. *The Power of Peer Information.*

Sellers have long employed the technique of presenting “peer” or “consumer” endorsements to bolster advertising efficacy,¹⁶⁴ but peer information amassed and presented through the filter of PIBs raises new and different concerns.¹⁶⁵ Peer endorsements are powerful tools.¹⁶⁶ They typically reflect “experience” information when presented by the seller, and the consumer can “borrow” that experience information for making a transactional decision. “WeightGuard has made a difference. I have lost

¹⁶³ Nelson, *Information*, *supra* note 9, at 312.

¹⁶⁴ See, e.g., David Adam Friedman, *Debiasing Advertising: Balancing Risk, Hope, and Social Welfare*, 19 J.L. POL’Y 539, 577–79 (2011) (discussing the successful, but now infamous, “Jared” advertising campaign for Subway).

¹⁶⁵ See, e.g., *Levitt v. Yelp, Inc.*, 765 F.3d 1123, 1134 (9th Cir. 2014) (assessing the validity of algorithms that drive presentation of reviews, and concluding that Yelp had the right to withhold positive consumer reviews and sequence the reviews without facing potential liability for “extortion”).

¹⁶⁶ A decade ago, the FTC commissioned two studies that demonstrated the strong influence peer endorsements (“testimonials”) have on consumers. See MANOJ HASTAK & MICHAEL B. MAZIS, EFFECTS OF CONSUMER TESTIMONIALS IN WEIGHT LOSS, DIETARY SUPPLEMENT AND BUSINESS OPPORTUNITY ADVERTISEMENTS 12–13 (2004) [hereinafter HASTAK & MAZIS, CONSUMER TESTIMONIALS IN WEIGHT LOSS], <https://www.ftc.gov/system/files/documents/reports/effects-consumer-testimonials-weight-loss-dietary-supplement-business-opportunity-advertisements/report.pdf> [<https://perma.cc/THY3-VDV2>] (summarizing the influential effect testimonials have on consumers); see MANOJ HASTAK & MICHAEL B. MAZIS, THE EFFECT OF CONSUMER TESTIMONIALS AND DISCLOSURES ON AD COMMUNICATION FOR A DIETARY SUPPLEMENT 9 (2003) [hereinafter HASTAK & MAZIS, CONSUMER TESTIMONIALS], <https://www.ftc.gov/system/files/documents/reports/effect-consumer-testimonials-disclosures-ad-communication-dietary-supplement-endorsement-booklet/030920consumerreport.pdf> [<https://perma.cc/D5VF-DTTY>] (discussing the effects of testimonials to communicate product efficacy to consumers).

weight in the short time since I started,” reflects the words of a typical peer endorsement.¹⁶⁷

Consumers have difficulty evaluating the truthfulness of the peer- or celebrity-usage experience and often embrace positive outlier endorsements as representative, typical outcomes.¹⁶⁸ If the endorsement contains an experience claim, the consumer may be more apt to try the offering than without the endorsement. If an endorsement also contains a credence claim, the consumer must leap through two high-cost verification hurdles. Consider a celebrity endorsement. If a company hires Gwyneth Paltrow to report that using a kale-based soap made her feel more energetic, consumers would have to verify that (a) Paltrow used the soap and the soap made her feel that way, and (b) the soap enhanced energy levels. Because of the power of these endorsements and the difficulty of consumer verification, the FTC cautions advertisers not to induce unrealistic consumer expectations through the peer endorsement or “testimonial” technique.¹⁶⁹

However, if a neutral, soap-themed, PIB website presents reviews from fifty kale-soap users, the aggregate information carries different qualities. The most informative but inexpensive way to gather information about a product’s quality might be to gather the sum total and range of unbiased experiences. Nelson suggested that the experience of “relatives and friends” would have high credibility—in part because the consumer can have confidence that the product review would be neutral and in part because consumers know the tastes of their known peers and can adjust a review for

¹⁶⁷ HASTAK & MAZIS, CONSUMER TESTIMONIALS IN WEIGHT LOSS, *supra* note 166, at 2.

¹⁶⁸ See Ahmed E. Taha, *Selling the Outlier*, 41 J. CORP. L. 459, 461 (2016) (describing the power of peer endorsements and the problem with outlier experiences); HASTAK & MAZIS, CONSUMER TESTIMONIALS IN WEIGHT LOSS, *supra* note 166; HASTAK & MAZIS, CONSUMER TESTIMONIALS, *supra* note 166.

¹⁶⁹ The FTC Guides warn advertisers that the consumer endorsement should be representative of “what consumers will generally achieve” through product use. See 16 C.F.R. § 255.2(b).

those tastes.¹⁷⁰ PIBs, ranging from Yelp¹⁷¹ and Angie's List¹⁷² to solo bloggers,¹⁷³ have amplified consumer information sharing well beyond "relatives and friends." Thus, their role in the dissemination of "experience" information warrants attention.¹⁷⁴ Because of the power of experience, any distortions in the peer-information-brokerage process should confront regulatory scrutiny, just as they would if made directly through advertisers.¹⁷⁵

2. Addressing New Concerns About Presentation of Peer Information

Over the past decade, PIBs have enabled consumers to share an

¹⁷⁰ Hence the emergence of services like Angie's List and Nextdoor.com. See Shawn Graham, *Who are the People in Your Neighborhood? Nextdoor.com Wants You to Know*, FAST CO. (Oct. 26, 2011), <http://www.fastcompany.com/1790798/who-are-people-your-neighborhood-nextdoorcom-wants-you-know> [https://perma.cc/6URX-6P2C] ("Think of Nextdoor.com as Facebook meets craigslist meets eVite meets Yelp meets Angie's List.").

¹⁷¹ For example, Yelp maintained over seventy-one million reviews and had hosted 135 million monthly unique visitors by the end of 2014. See YELP INC., *Annual Report (Form 10-K)*, 1, 42 (2015), <http://www.yelp-ir.com/phoenix.zhtml?c=250809&p=irol-sec> [https://perma.cc/5MCU-W5HR] (showing the website received 77,628 desktop unique visitors and 57,770 mobile web unique visitors in 2014). Additional PIBs include, among others, TripAdvisor, Angie's List, Citysearch, OpenTable, YP.com, and Zagat, according to a Nielsen study commissioned by Yelp. See Migs Bassig, *Nielsen Study Says Yelp is Most Influential, Most Trustworthy, and Highest-Quality Review Site*, REVIEW TRACKERS (July 12, 2014), <http://www.reviewtrackers.com/nielsen-study-yelp-influential-trustworthy-highest-quality-review-site> [https://perma.cc/A6W8-M8XZ] ("Yelp emerges as the most influential, most trustworthy, and highest-quality review site, ranking above sites like TripAdvisor, Angie's List, Citysearch, OpenTable, YP.com, and Zagat.").

¹⁷² Angie's List, a subscription service for sharing detailed information about service providers, had over three-million paid subscribers at the end of 2014. See *Angie's List Provides Year-end Subscriber Numbers*, SEEKING ALPHA (Jan. 14, 2015), <http://seekingalpha.com/article/2818976-update-angies-list-provides-year-end-subscriber-numbers> [https://perma.cc/7HGC-237D] ("Angie's List finishes 2014 with 3,041,651 members.").

¹⁷³ See Pradnya Joshi, *Harnessing the Power of the Mom Blogger*, N.Y. TIMES (Mar. 14, 2011), http://www.nytimes.com/2011/03/15/business/media/15adco.html?_r=0 [https://perma.cc/7N24-6TVF] (discussing how "marketers have been increasingly harnessing the power of mothers online to reach their audiences for products.").

¹⁷⁴ See Nelson, *Advertising*, *supra* note 9, at 747 ("Instead [the consumer] sometimes uses the guidance of relatives and friends. Hence, that information must sometimes be better information. The more consumers use relatives and friends, the less they respond to advertising.").

¹⁷⁵ See, e.g., Fed. Trade Comm'n, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255.0(e) ex. 8 (2009) (discussing "[a] consumer who regularly purchases a particular brand of dog food [and] decides one day to purchase a new, more expensive brand made by the same manufacturer"); *id.* § 255.1 ex. 5 (2009) (describing "[a] skin care products advertiser [who] participates in a blog advertising service"); *id.* § 255.2 ex. 7 (2009) (illustrating "[a]n advertisement for a recently released motion picture [that] shows three individuals coming out of a theater, each of whom gives a positive statement about the movie"); Rolf Winkler, *Yelp Says FTC Won't Act on Complaints About Its Reviews*, WALL. ST. J. (Jan. 6, 2015, 4:27 PM), <http://blogs.wsj.com/digits/2015/01/06/yelp-says-ftc-wont-act-on-complaints-about-its-reviews/> [https://perma.cc/7WQV-XVZL] (discussing how the FTC "examined the software [Yelp] uses to manage consumer reviews on its site and how Yelp ensures that salespeople can't manipulate reviews.").

unprecedented amount of experiential information.¹⁷⁶ In the realm of experience claims, innovations over the last decade in information sharing have brought new benefits and concerns. Information brokers like Yelp offer the opportunity for consumers to freely access or borrow peer experience.¹⁷⁷

The FTC guidance on consumer endorsements warns *advertisers* about using peer endorsements deceptively, in a manner that might exaggerate the effect of experience claims.¹⁷⁸ Even in the more recent 2009 review of this guidance, the FTC did not address endorsements presented through PIBs.¹⁷⁹ The FTC has spoken informally about enforcement and PIBs in the media.¹⁸⁰ Mary K. Engle, Associate Director of the Division of Advertising Practices, recently said,

User ratings [and reviews] would be material to consumers, so they have to be truthful and non-misleading . . . whether it's a movie, a vacation purchase, electronics, . . . [y]ou go online to see what other consumers are saying [W]e're looking at issues where those reviews aren't what they purport to be.¹⁸¹

PIBs offer an aura of neutrality that enhances the power and credibility of the information they relay. This power should invite scrutiny of the purity of the experience information the PIBs relay. When PIBs simultaneously play the role of *seller*, questions arise about the integrity of their aggregated

¹⁷⁶ For usage data on Yelp, in particular, see *Annual Report (Form 10-K)*, *supra* note 159, at 44–45 (discussing the site's “[t]raffic,” “[u]ser [e]ngagement,” and “[i]ncreasing [m]obile [u]sage”).

¹⁷⁷ I focus more on Yelp because the public company has been a leading niche player in this space. See *id.* at 44 (discussing Yelp's revenues and stating that “[e]ach day, millions of consumers use [Yelp's] platform to find and interact with local businesses”).

¹⁷⁸ See 16 C.F.R. § 255.2(b) (2009) (“If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.”).

¹⁷⁹ See *id.* § 255.2 (all guidance and examples focused on advertiser). The FTC did address integrity of stand-alone peer endorsements on blogs, a concern rooted in that then-emergent medium of expression. See e.g., *id.* § 255.0 ex. 8 (2009) (describing “[a] consumer who regularly purchases a particular brand of dog food [and] decides one day to purchase a new, more expensive brand made by the same manufacturer.”); *id.* § 255.1 ex. 5 (2009) (depicting “[a] skin care products advertiser [who] participates in a blog advertising service”); *id.* at § 255.5 ex. 7 (2009) (illustrating “a college student who has earned a reputation as a video game expert [and] maintains a personal weblog or ‘blog’ where he posts entries about his gaming experiences.”); see also *FTC Publishes Final Guides Governing Endorsements, Testimonials*, FED. TRADE COMM’N (Oct. 5, 2009), <http://www.ftc.gov/opa/2009/10/endortest.shtml> [<https://perma.cc/DRW8-J9N5>] (noting that the notice “address[es] endorsements by consumers, experts, organizations, and celebrities, as well as the disclosure of important connections between advertisers and endorsers.”).

¹⁸⁰ Even without promulgated guidance, the FTC Act permits broad enforcement discretion. See 15 U.S.C. § 45(b)–(c) (2006) (describing the FTC's enforcement authority).

¹⁸¹ Walt Hickey, *Be Suspicious of Online Reviews, Especially Fandango*, FIVETHIRTYEIGHT (Oct. 15, 2015), <http://fivethirtyeight.com/features/fandango-movies-ratings/> [<https://perma.cc/AE8H-R7MY>].

peer experiences.

For example, Fandango, operating in the motion-picture industry, brokers movie ticket sales while also presenting aggregated movie reviews.¹⁸² As one analysis demonstrated, until recently, Fandango's reviews skewed more favorably toward all movies, due in part to their methodology for rounding ratings.¹⁸³ Movie ratings aggregated by other movie PIBs, specifically, the non-ticket-sales-dependent Metacritic, IMDb, and Rotten Tomatoes, most often ranked movies significantly lower than Fandango.¹⁸⁴

The business model behind presentation of review information should tip off regulators that elevated scrutiny might be in order. Consumers put experience claims to use, and any deliberate contamination of any seemingly neutral data should receive scrutiny. A conflict of interest inherent in the stewardship of such data should raise flags for regulators.

However, regulation may not be as necessary as it might be for credence claims. Just as with experience claims generally, if a PIB produces information that proves inconsistent with subsequent tested experiences, the PIB should theoretically lose credibility with consumers and the PIB will either adapt or suffer consequences. Consistent with this need to preserve credibility, PIBs have developed sophisticated algorithms¹⁸⁵ and even "sting operations"¹⁸⁶ to weed out suspicious reviews.

Complications emerge in this increasingly important space that can interfere with a natural market solution, however. Advertising-supported PIBs face the challenge of presenting commercial messages in a way that does not distort the neutrality offered on the platform. Advertising presented by a business in conjunction with consumer reviews can potentially distort the whole of the impression made on consumers.¹⁸⁷

Regulators should take note that PIBs have the ability to tinker lawfully

¹⁸² See *id.* ("Fandango has an immediate interest in your desire to see a movie: The company sells tickets directly to consumers.").

¹⁸³ See *id.* (noting that "Fandango's star rating was higher than the IMDb rating 79 percent of the time . . . the Metacritic user score 86 percent of the time . . . and the Rotten Tomatoes user score 74 percent of the time," and reasoning that the discrepancy arose from the fact that "Fandango rounded the 'ratingValue' up . . . [and] . . . doesn't round a rating down when we'd mathematically expect that").

¹⁸⁴ See *id.*

¹⁸⁵ A civil action where the plaintiff questioned the "accuracy and efficacy" of Yelp's algorithm for reviews describes Yelp's use of a review filter. See *Demetriades v. Yelp, Inc.*, 175 Cal. Rptr. 3d 131, 134 (Cal. Ct. App. 2014) (holding that "the commercial speech exemption . . . applies to Yelp's statements concerning the accuracy and efficacy of its review filter").

¹⁸⁶ See David Streitfeld, *Buy Reviews on Yelp, Get Black Mark*, N.Y. TIMES (Oct. 18, 2012), www.nytimes.com/2012/10/18/technology/yelp-tries-to-halt-deceptive-reviews.html [<https://perma.cc/GL7M-GFRE>] (discussing the "sting operation" Yelp set up "to catch" other "companies trying to manipulate their results").

¹⁸⁷ With consumer endorsements, generally, the FTC has implied that it will consider the whole of the impression of the advertising to discern deceptiveness. See 16 C.F.R. § 255.2(b) n.105 (2009) (warning that disclaimers alone about typicality of results may not change an ad's overall impression).

with the purity of experience information. A recent Ninth Circuit decision revealed that Yelp could lawfully present selective experience information, though the company had not done so.¹⁸⁸ According to the court, a PIB has the right to withhold reviews arbitrarily¹⁸⁹ and sell advertising¹⁹⁰ that could distort the presentation of supposedly neutral information. However, the fact that Yelp has chosen a purer path than the one permitted likely reveals that Yelp recognizes the centrality of neutrality to its business model. Room exists, however, for other PIBs to take another course—and businesses and consumers appear to have little direct recourse in that event. Regulators would have to absorb any slack.

The different business models operating in this sector serve different purposes and continue to evolve. Angie's List, a PIB focused on localized household services, derives thirty percent of revenue from consumer subscriptions.¹⁹¹ Expertise-information providers like Consumer Reports, a nonprofit,¹⁹² and Edmunds.com¹⁹³ (automobiles) help consumers sort through the comparative process for goods, offering professional assessment of experience claims. The vibrant competition for information may de-escalate the need for intervention.

Given the high profile of PIBs, experience information abounds in the market like never before, in addition to the experience claims made directly by advertisers. As Nelson observed, the views of “relatives and neighbors” have credibility—and technology has enabled this collective circle of friends and neighbors to expand dramatically.¹⁹⁴ Though the FTC should more lightly monitor experience claims than credence claims, the integrity of PIBs should receive scrutiny if uncorrected market distortions emerge. Though

¹⁸⁸ See *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1133 (9th Cir. 2014) (holding, in part, that Yelp had the right to withhold positive consumer reviews and sequence the reviews without facing potential liability for “extortion”).

¹⁸⁹ *Id.* at 1134.

¹⁹⁰ See Trefis Team, *Bull, Bear and Base Case Scenarios for Yelp*, FORBES (Dec. 15, 2015, 8:42 AM), <http://www.forbes.com/sites/greatspeculations/2015/12/15/bull-bear-and-base-case-scenarios-for-yelp/> [<https://perma.cc/ATD4-8QP4>] (describing Yelp's advertising business model).

¹⁹¹ Angie's List also sells advertising, but only to businesses above a certain review level. Consumer Reports raised serious questions about the integrity of Angie's List, raising questions about the impact of advertising on neutrality. Maggie McGrath, *Why Consumer Reports Says You Can't Trust Angie's List*, FORBES (Sept. 18, 2013, 4:10 PM), <http://www.forbes.com/sites/maggiemcgrath/2013/09/18/why-consumer-reports-says-you-cant-trust-angies-list/#65632ee5579b>.

¹⁹² See Jim Guest, *From Our President*, CONSUMER REPORTS (Jan. 2012), <http://www.consumerreports.org/cro/magazine/2012/01/from-our-president/index.htm> [<https://perma.cc/6DM9-W7D9>] (discussing the company's official name change).

¹⁹³ See *About Us*, EDMUNDS, www.edmunds.com/about/ (discussing the company's business model).

¹⁹⁴ Nelson, *Advertising*, *supra* note 9, at 747; see also Derek Smith, *Yelp and the Rise of Consumer Reviews*, SOC. MEDIA TODAY (May 2, 2014), <http://www.socialmediatoday.com/content/yelp-and-the-rise-consumer-reviews> [<https://perma.cc/6D2H-7E2G>] (discussing the drastic increase in PIB sources over the last decade).

businesses complain about PIB impurities,¹⁹⁵ consumers may find more difficulty in discerning and addressing systemic problems.

Regulators should also take care to ensure that any actions taken with respect to PIBs do not unduly slow the valuable flow of information they channel into the consumer marketplace. In the end, due to the ultimate (though limited) ability for consumers to pass judgment on experience claims and correct course, experience claims should generally draw fewer resources from regulators than credence claims.

C. Addressing Native Advertising

The SEC framework can also refine enforcement priorities within the context of addressing other identified problematic market behaviors like “native advertising.” Native advertising describes advertising “content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online.”¹⁹⁶ The concerns about native advertising center on consumer confusion about the origin and credibility of a commercial message.¹⁹⁷

In late 2015, the FTC addressed “native advertising” practices, promulgating the Enforcement Policy Statement on Deceptively Formatted Advertisements.¹⁹⁸ The FTC guides by stating that “[m]isleading claims about the nature or source of advertising are likely material . . . when an ad misleads consumers about a material fact.”¹⁹⁹ Though native advertising may contend for the concern of the moment, underlying substantive advertising claims remain the same. Different types of substantive claims should generate different levels of concern. The SEC framework can offer guidance to the FTC for how to prioritize enforcement within this zone.²⁰⁰

¹⁹⁵ See, e.g., *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1126–27 (9th Cir. 2014) (noting the four plaintiffs were suing Yelp! Inc. for extortion, claiming Yelp! Inc. manipulated user reviews and penned negative reviews of their businesses); *Demetriades v. Yelp, Inc.*, 175 Cal. Rptr. 3d 131, 135–36 (Cal. Ct. App. 2014) (describing plaintiff’s claim that Yelp misled plaintiff to believe user reviews passed a filter that gave consumer trust-worthy reviews).

¹⁹⁶ *Native Advertising: A Guide for Businesses*, FED. TRADE COMM’N [hereinafter *FTC NATIVE ADVERTISING*], <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> [https://perma.cc/6JXK-Z3P5] (last visited Dec. 2015).

¹⁹⁷ See *id.* (explaining that content of “native advertising” is similar to that of many other forms of marketing).

¹⁹⁸ FED. TRADE COMM’N, *ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS 1* (2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf [https://perma.cc/H78T-FNW4].

¹⁹⁹ *Id.* at 14; see also *id.* at 14 n.65 (“A claim is considered material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.”) (quoting *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) (internal quotation omitted)).

²⁰⁰ See Sydney Ember, *F.T.C. Guidelines on Native Ads Aim to Prevent Deception*, N.Y. TIMES (Dec. 22, 2015), http://www.nytimes.com/2015/12/23/business/media/ftc-issues-guidelines-for-native-ads.html?_r=1 [https://perma.cc/G279-GXT8] (advancing the concern that FTC guidelines could be ineffective due to their unenforceable nature).

Concerns about native advertising divide into concerns about disruption of “search” and puffed-up elevation of substance. For example, “search” disruption in native advertising appears under the guise of “misleading door openers” when advertisers use a non-commercial pretext to lure the consumer to view an offering.²⁰¹ The FTC provides the following illustration of a door opener that would be deceptive without additional disclosure:

On the Newsby [news] site, these [third-party advertiser] links are formatted to look like news headlines and are grouped together in a box with headings like “More Content for You,” or “From Around the Web.” One of the headlines appearing in the box is . . . “Running Gear Up: Mistakes to Avoid.” The headline . . . appears next to a photo of a runner. In addition to other training suggestions, the article recommends Winged Mercury shoes for injury prevention. The similarity of the Winged Mercury ad’s format [and accompanying heading language] to the type of headlines Newsby publishes . . . is likely to lead consumers to believe it is an independent news story, and not from the sponsoring advertiser.²⁰²

Modern, *digital* door openers can slightly disrupt the search process by steering consumers into corners that they might not otherwise visit. These digital door openers stand apart from the content of the underlying claim. Once brought to a digital destination through a tricky “door opener,” the consumer can assess the claim like any other claim, and regulators can assess the content. Some door openers might lead to a scam, others might lead to a shoe advertiser’s experience-credence claim about injury prevention, as in the example above. Others might lead to a simple search claim for running shoes for a set price. The cost-benefit-driven application of the SEC framework would lead to closer scrutiny of the “Winged Mercury” injury-prevention claim than the “set price” claim. In other words, the SEC framework should guide regulators back to examining content.

The FTC indicated that digital news sites, social media, and interactive gaming provided the primary homes for “misleading door openers.”²⁰³ In this digital world, consumers can close the “open door” more easily (with a click) than a door in the physical world. The “misleading *digital* door opener” inflicts a mild search disruption, easily corrected.

The ease of correction should deprioritize concerns about this aspect of native advertising. The basis for the portion of the Policy Statement about misleading door openers references a physical “door opener” case from the

²⁰¹ FED. TRADE COMM’N, *supra* note 198, at 7.

²⁰² FTC NATIVE ADVERTISING, *supra* note 196.

²⁰³ *Id.*

1970s.²⁰⁴ That case involved door-to-door encyclopedia salespeople misrepresenting themselves as researchers or bearers of prizes in order to “get in the door.”²⁰⁵ Reversing this type of door opener requires removing a salesperson from a home, which stands apart from an easily-corrected click. This encyclopedia case addressed a high-pressure sales practice, not a substantive problem with a claim.²⁰⁶ The SEC framework enables regulators to break down which parts of a tactic should be of concern—if this component of native advertising concerns “search,” regulators should direct resources toward higher-priority concerns.

In contrast, native advertisements that masquerade as straight news reports²⁰⁷ and native sponsored endorsements that appear neutral²⁰⁸ should receive significantly higher scrutiny than “misleading-door-opener tactics.” An advertisement that looks like a news article distorts and exaggerates the status of both credence and experience claims. By intertwining reporting with advertising, a news organization can lend strong authority to a claim.²⁰⁹ Though consumers may find it difficult to test a credence claim, if the claim appears at a glance to come from a respected source, consumers may more likely view the claim as verified. An experience claim may benefit from similar illusory support. These tactics serve to bolster unduly the credibility of the underlying claims, not merely lead the consumer to the claim.²¹⁰

In sum, native advertising presents a general concern for regulators, but the SEC framework aids in dissecting which components warrant more attention. A credence claim made in the context of news reporting should receive more scrutiny than if made in a neutral context. An experience claim relayed daily by a radio talk show host might warrant more scrutiny than a credence claim made in a Superbowl advertisement.²¹¹ The misleading door opener may not present the real problem.

²⁰⁴ See FED. TRADE COMM’N, *supra* note 198, at 7 (citing *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 966–67 (7th Cir. 1979)).

²⁰⁵ *Encyclopaedia Britannica*, 605 F.2d at 967–69.

²⁰⁶ *Id.* at 967.

²⁰⁷ See FED. TRADE COMM’N, *supra* note 198, at 3 (discussing how ads could be potentially misleading by posing as news stories).

²⁰⁸ See *id.* at 9 (describing deceptive endorsements that do not disclose a sponsoring advertiser).

²⁰⁹ See Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 746–47 (2010) (“Consumers trust commercial messages less than noncommercial ones . . . hidden relationships may give advertisers excessive credibility by using apparently independent sources to confirm the advertiser’s message.”).

²¹⁰ Note that concerns about this practice have also emerged with respect to the integrity of the news media. See Lili Levi, *A “Faustian Pact”? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 702–04 (2015) (offering potential solutions to protect the integrity of the press).

²¹¹ These tactics often constitute endorsements. An ad copy read aloud by radio hosts or sports announcers can induce highly effective results because listeners might pay more attention or attach more credibility to the message. Nitasha Tiku, *On-Air Endorsements: The Radio Pitch Makes a Comeback*, INC. (June 1, 2010), <http://www.inc.com/magazine/20100601/on-air-endorsements.html> [<https://perma.cc/6YXV-PPXD>].

Search, experience, and credence claims can be sorted out and analyzed in a diverse array of contexts. The three major examples discussed in Section III—fictitious pricing, peer-information brokerage, and native advertising—all show how regulators can put the SEC framework to use as an analytical tool to guide priorities more efficiently. In Section IV, I show how the cost-benefit approach to advertising regulation has deep roots and that incorporation of the SEC framework into the formal analytic process may enable the FTC to generate a higher return from limited Commission resources.

IV. ADVANCING THE COST-BENEFIT APPROACH TO ADVERTISING REGULATION

Federal advertising regulation enforcement policy rests with the FTC's Bureau of Consumer Protection (BCP).²¹² In 2014, FTC's Office of Inspector General (OIG) favorably evaluated the BCP's stewardship of resources.²¹³ The OIG did, however, recommend that the BCP develop more formal, structured, defined enforcement approaches to further optimize the general pursuit of consumer protection:

[The BCP should consider] a more structured methodology for . . . consumer protection enforcement A more formal process to evaluate the universe of consumer complaints using defined factors, such as estimated consumer harm or economic impact, with assigned weights for each factor, would provide a greater assurance that . . . [the BCP] . . . will optimize the pursuit of its consumer protection mission.²¹⁴

The SEC framework would provide a “structured methodology” to enable the BCP to optimize further the “pursuit of its consumer protection mission.”²¹⁵ With respect to regulatory intervention, the FTC already takes an “economic” approach toward prioritizing enforcement.²¹⁶ As such, the Commission must deploy limited resources toward the actions that will maximize welfare. The SEC framework can bring more rigor to that economic impact calculation, leading to greater social benefit.

In this Section of the Article, I show how a formal incorporation of the SEC framework would offer a historically consistent advancement toward improving the rigor of cost-benefit analysis. In Section IV.A, I situate my

²¹² *Division of Advertising Practices*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices> [https://perma.cc/767J-FHJU].

²¹³ OIG Evaluation Report, *supra* note 15, at *i*.

²¹⁴ *Id.* at ii.

²¹⁵ *Id.*

²¹⁶ See *infra* Section IV.A–B (discussing the foundation and eventual implementation of the economic approach).

proposal within the basic foundational literature about modern advertising regulation. In Section IV.B, I discuss the historic emergence of the FTC's cost-benefit approach and the FTC's formalization of this approach in the 1980s. Finally, In Section IV.C, I show that adoption of the SEC framework would constitute a natural addition to the FTC's approach and would further the efficacy of advertising regulation.

A. *Foundations of Modern Advertising-Regulation Theory*

The deceptive-advertising literature suggests an economically driven enforcement approach, an approach that the SEC framework should further support. Just as the FTC started to embrace cost-benefit-driven regulation during the 1980s, Howard Beales, Richard Craswell, Steven Salop, and others suggested integrating economic analysis into policy making.²¹⁷ These scholarly contributions offered a foundation to support the FTC's efforts in that decade to define "deceptive" and "unfair" practices with more precision.

In a landmark 1981 article, written just before the FTC issued key policy statements on deception and unfairness, Beales, Craswell, and Salop addressed the regulatory challenge of applying overly broad standards labeled "reasonable," "deceptive," and "unfair."²¹⁸ The authors conceded that devising "hard-and-fast rules"²¹⁹ based on these concepts proved difficult, but they argued convincingly that more rigor and structure could be brought into standards.²²⁰ Beales et al. made several policy recommendations, among them that completely false claims may be banned²²¹ and that "the merits of any action depend crucially on the balance of costs and benefits of the remedy being considered."²²²

The authors proposed a number of innovative suggestions for deployments of cost-benefit analysis. For example, they contended that

²¹⁷ Though not a complete literature survey, a few pieces (mainly the work of Richard Craswell) represent the core of the durable scholarship in this area. See, e.g., Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. ECON. 491, 533–34 (1981) (recommending a cost and benefit approach to consumer regulation); Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565 (2006) [hereinafter Craswell, *Taking Information Seriously*] (presenting the costs and benefits of prohibiting false and misleading statements); Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549, 551, 562–602 (1991) [hereinafter Craswell, *Regulating Deceptive Advertising*] (replying to critiques of the author's economic approach theory); Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 123–27 (1981) [hereinafter Craswell, *Identification*] (describing the FTC's approach to defining "unfairness" with respect to unsubstantiated advertising claims and the question about allocating risk of harm to consumers).

²¹⁸ Beales et al., *supra* note 217, at 531–32.

²¹⁹ *Id.* at 532.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 533.

mandating more disclosure to clarify claims would prove more efficient than outright bans on certain claims.²²³ Beales et al. also made other efficiency-related suggestions about *who* should make disclosures and test claims.²²⁴ Finally, they concluded that “the most efficient remedies will usually be those which do no more than necessary to correct the market failure directly.”²²⁵

A few years later, as the FTC advertising regulators took a formal turn toward economically driven decision making, Craswell reiterated his “suggest[ion] that the laws against deceptive advertising could best be understood as applying a form of cost-benefit analysis to the interpretation of advertisements.”²²⁶ As such, Craswell recommended that regulators look at each case individually, assess the “total injury”²²⁷ that an advertisement could inflict and whether the advertiser could have affirmatively taken steps to prevent consumer injury.²²⁸ Craswell analogized this approach to the “Learned Hand test.”²²⁹ This version of the test would offer an economic standard for deception, factoring in the potential magnitude for consumer harm and the ease of the ability for advertisers to prevent harm.²³⁰

The 1980s literature set the intellectual groundwork for development of more precise enforcement policies. Next, in Part B, I describe at some length how the FTC used cost-benefit analysis to develop policy statements on unfairness, deception, and advertising substantiation. In Part C, I show how incorporation of the SEC framework would naturally progress from the patterns of FTC history.

B. Application of Cost-Benefit Analysis

Over the past five decades, the FTC moved from an inept and lethargic enforcement regime²³¹ toward one that used more rigorous analysis.²³²

²²³ *Id.* at 534–35. The concept of mandatory disclosure has generated recent critiques in some circles. See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014) (suggesting that the benefits of mandated disclosure are minor and have significant social costs such as undercutting better regulation); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 737–42 (2011) (documenting several areas in which mandated disclosures are inadequate solutions).

²²⁴ Beales et al., *supra* note 217, at 535–37.

²²⁵ *Id.* at 537.

²²⁶ Craswell, *Regulating Deceptive Advertising*, *supra* note 217, at 550.

²²⁷ *Id.* at 552.

²²⁸ *Id.* at 552–53.

²²⁹ *Id.* at 552.

²³⁰ The “Learned Hand test” emerged from Judge Hand’s famous use of cost-benefit analysis in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

²³¹ An outside assessment in 1969 criticized the agency for “lethargy among the legal staff, political favoritism, inept management, and a poorly functioning monitoring system.” DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER PROTECTION AND THE LAW § 8:2 (2015).

²³² This transition toward an embrace of applied microeconomics began in the 1970s. See Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and*

Turning away from a focus on the deficient morality of certain advertising practices,²³³ the FTC moved toward an economically driven enforcement approach, inquiring of the net impact of market conduct²³⁴ on consumers and competition.²³⁵

1. *Origins of the Economically-Driven Approach*

The modern, cost-benefit driven approach to advertising regulation emerged from a swift and comprehensive institutional reform of the FTC nearly a half-century ago. First, a “wild and wooly group of students known as ‘Nader’s Raiders’”²³⁶ launched their own investigation of the FTC and berated the Commission for focusing on trivial abuses at the expense of more serious fraud.²³⁷ The Raiders criticized the agency for “lethargy among the legal staff, political favoritism, inept management, and a poorly functioning monitoring system.”²³⁸

The Raiders’ blistering critique of the FTC’s overall competence left the

Administrative Pragmatism, 72 ANTITRUST L.J. 911, 922–23 (2005) (giving an account of how the FTC straddled an economic approach and a consumer-movement driven “David and Goliath” approach toward regulation in that era).

²³³ The Cigarette Rule embodied the previous FTC approach. See Statement of Basis and Purpose for Unfair or Deceptive Advertising and Labeling of Cigarettes, 29 FED. REG. 8324, 8355 (July 2, 1964) (to be codified at 16 C.F.R. pt. 408) [hereinafter Cigarette Rule]. Of the three prongs to the Cigarette Rule, which guided the determination of “unfairness,” the second required consideration of “whether [the practice was] immoral, unethical, oppressive, or unscrupulous[.]” *Id.* at 8355. The Supreme Court referenced this standard. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972).

²³⁴ See, e.g., Neil W. Averitt, *The Meaning of “Unfair Acts or Practices” in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 247–50 (1981) (discussing the 1980 Unfairness Statement “general balancing test” and its limitations).

²³⁵ See Letter from the Fed. Trade Comm’n to Hon. Wendell Ford and John Danforth, Comm. on Com., Sci., and Transp., Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction (Dec. 17, 1980) [hereinafter 1980 Unfairness Statement], reprinted in *Int’l Harvester Co.*, 104 F.T.C. 949, 1070–76 (1984). Congress ultimately incorporated the cost-benefit approach into 15 U.S.C. § 45(n) (2012). In 1994, Congress largely codified the former by adding FTC Act Section 5(n):

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause (1) substantial injury to consumers which is (2) not reasonably avoidable by consumers themselves and (3) *not outweighed by countervailing benefits to consumers or to competition*. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

Id. (emphasis added). For a scathing critique of the implementation of this approach, see Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1937 (2000) (noting the “illusion of precision” and lack of utility of the unfairness standard).

²³⁶ PRIDGEN & ALDERMAN, *supra* note 221, § 8.2.

²³⁷ *Id.*

²³⁸ *Id.*

agency “deeply shaken”²³⁹ and subject to more formal inspection.²⁴⁰ After the Nader Report, President Richard Nixon asked the American Bar Association (ABA) to “undertake a professional appraisal of the present efforts of the [FTC] in the field of consumer protection . . . [and] make recommendations for the future activities . . . of the [FTC].”²⁴¹

The subsequent 1969 ABA Report bluntly attacked the competence of agency personnel, singling out the problem of resource misallocation for consumer protection.²⁴² This problem reflected concerns about the failure to use a structured economic approach.²⁴³ Writing separately in the ABA Report, Richard Posner, looking at the budget the FTC “expended in the area of fraudulent and unfair marketing practices,”²⁴⁴ concluded that in “tilting at windmills,” the Commission “bought precious little consumer protection.”²⁴⁵

President Nixon charged his new FTC chairman with reorganizing the Commission “to initiate a new era of vigorous action” to protect the consumer.²⁴⁶ “[S]ound economic analysis” would prove central to setting the priorities of the Bureau of Consumer Protection, a newly established FTC division.²⁴⁷ The FTC intended to deploy such analysis in advertising regulation, but nearly another decade would pass before this analytical ethos took hold. The concerns of regulators at that formative time still echo in current policy.

2. Early Implementation of Economic Analysis

Before the mid-1970s, the FTC “solicited very little economic advice on consumer protection policy,” and it even took some time after the reforms for economic analysis to be implemented in the consumer sphere.²⁴⁸ Prior to 1974, FTC economists spent virtually all of their time on antitrust and competition matters and devoted no significant resources to advertising or consumer-protection issues.²⁴⁹ Some staff economists allocated attention to

²³⁹ REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 93 (1969), reprinted in 1 J. REPRINTS FOR ANTITRUST L. & ECON. 885 (1969).

²⁴⁰ *Id.* (noting that the FTC faced great scrutiny after the Nader report).

²⁴¹ *Id.* at 86.

²⁴² *Id.* at 34.

²⁴³ *Id.* at 71–72.

²⁴⁴ In addition to the private sector’s compliance and litigation expenditures rising. *Id.* at 113.

²⁴⁵ *Id.*

²⁴⁶ Edward F. Cox, *Reinvigorating the FTC: The Nader Report and the Rise of Consumer Advocacy*, 72 ANTITRUST L.J. 899, 906 (2005) (internal quotation omitted).

²⁴⁷ *Id.*

²⁴⁸ See Darlene Brannigan Smith, *The Economics of Information: An Empirical Approach to Nelson’s Search-Experience Framework*, 9 J. PUB. POL’Y & MARKETING 111, 111 (1990) (discussing the FTC’s cautious approach to consumer protection regulation).

²⁴⁹ Pauline M. Ippolito, *Consumer Protection Economics: A Selective Survey*, in BUREAU OF ECON., FED. TRADE COMM’N, EMPIRICAL APPROACHES TO CONSUMER PROTECTION ECONOMICS 1 (Pauline M.

consumer protection by the mid-1970s, but the FTC assigned no full-time economist resources to advertising until 1978.²⁵⁰ Prior to this era, consumer protection and advertising deception “were apparently judged to be issues that would not benefit from an economic perspective.”²⁵¹

The early transition toward using economic analysis to prioritize advertising enforcement can be viewed through the account of former FTC Chairman Robert Pitofsky, regarded by one of his successors as the “Founding Father” of the “modern Federal Trade Commission.”²⁵² In 1977, Pitofsky provided the deepest, publicly available, nearly contemporaneous insight into the early implementation of the cost-benefit analysis approach.²⁵³

Pitofsky framed priorities along the lines of addressing market failures,²⁵⁴ an approach that by definition invited economic analysis. With respect to advertising, he challenged the notion that private actors alone would solve deceptive advertising problems through market mechanisms, noting that “in the scores of proceedings in which the FTC successfully challenged the truth of major advertising themes, there was not a single instance in which rivals . . . expose[d] deceptions.”²⁵⁵ Pitofsky expressed certainty that retail markets, if left unfettered, would fail to produce sufficient and accurate information, yielding market failures.

Pitofsky used the language of economics to summarize his view of the proper regulatory approach toward protecting consumers from deceptive advertising:

[Regulation of advertising] should not be a broad, theoretical effort to achieve Truth, but rather a practical enterprise to ensure the existence of reliable data which in turn will facilitate an efficient and reliable competitive market process. . . . [W]here consumers are fully capable, through common sense or simple observation, of protecting their interests against advertising exaggerations or distortions, there would

Ippolito & David T. Scheffman eds., 1984), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.230.9664&rep=rep1&type=pdf#page=7>.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See Timothy J. Muris, *Robert Pitofsky: Public Servant and Scholar*, 52 CASE W. RES. L. REV. 25, 25 (2001) (illustrating Pitofsky’s role in shifting the focus of the FTC toward consumer protection).

²⁵³ See Pitofsky, *supra* note 3 (discussing the economic and legal justifications for regulation of advertising).

²⁵⁴ See *id.* at 663–67 (exploring the causes of the advertising market failure). Market failure describes a circumstance where “consumers lack information about the quality or nature of a product, and therefore cannot make utility-maximizing purchasing decisions Government intervention . . . may then be desirable.” ROBERT S. PINDYCK & DANIEL L. RUBENFELD, *MICROECONOMICS* 290 (2d ed. 1992).

²⁵⁵ Pitofsky, *supra* note 3, at 667. Rivals seldom challenge each other on fictitious-pricing grounds. See Friedman, *supra* note 3, at 944–47 (discussing the difficulties plaintiffs face in such actions).

be no reason for the law to intervene.²⁵⁶

Pitofsky essentially called for a data-driven, cost-benefit approach toward prioritizing intervention. His version of that analysis emphasized intervention when consumers could not “protect[] their interests . . . through common sense or simple observation.”²⁵⁷ This proposal foreshadowed the approach that would emerge in subsequent years.

Incorporating the SEC framework would mesh with Pitofsky’s 1977 assessment. Search claims require less intervention because consumer “common sense” and “simple observation” corrects most search problems. As discussed extensively *supra*, credence claims may not be easily corrected through such basic methods.

3. Policy Statements and the Formalization of Economic Analysis

The current FTC approach to enforcement finds roots in the statutory mandate to prosecute those engaging unfair and deceptive practices per Section 5 of the FTC Act.²⁵⁸ The FTC Act declares unlawful, “[u]nfair methods of competition in or affecting commerce, and *unfair or deceptive* acts or practices in or affecting commerce.”²⁵⁹ Though advertising practices can be regulated either through “unfairness” or “deception,” the FTC has prosecuted most advertising cases through the “deception” standard.²⁶⁰ The “deception” standard differs from the “unfairness” standard, and both standards evolved separately.

Though the “unfairness” and “deception” standards are not twins, they developed with a common purpose. The FTC promulgated what became known as the Cigarette Rule in 1964, setting the “unfairness” standard for the next sixteen years.²⁶¹ This rule framed regulation of trade practices more in moral terms rather than economic terms,²⁶² embodying the approach of the time. Ultimately, the FTC changed course and replaced the Cigarette

²⁵⁶ Pitofsky, *supra* note 3, at 671.

²⁵⁷ *Id.*

²⁵⁸ See JOSHUA D. WRIGHT, COMM’R, FED. TRADE. COMM’N, THE ECONOMICS OF DIGITAL CONSUMER PROTECTION: ONE COMMISSIONER’S VIEW 3–7 (2014), http://www.ftc.gov/system/files/documents/public_statements/573061/010731techfreedom.pdf (providing an overview of the FTC’s unfairness standard).

²⁵⁹ 15 U.S.C. § 45(a)(1) (1982) (emphasis added).

²⁶⁰ Though the “disjunctive phrase ‘unfair or deceptive’ clearly suggests” that the FTC can pursue advertisers on unfairness *per se*, the FTC has not pursued that path, instead pursuing the deception angle. JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES & MATERIALS 67 (2007). The FTC also prosecutes deceptive pricing under section 12 of the FTC Act, but this section is targeted at advertising of food, drugs, devices, services, and cosmetics. See 15 U.S.C. § 52 (2012).

²⁶¹ Cigarette Rule, *supra* note 223, at 8,325; see also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (further legitimizing the authority of the FTC to regulate unfair or deceptive acts or practices).

²⁶² One of the prongs of the test addressed “immoral, unethical, oppressive, or unscrupulous” behavior. Cigarette Rule, *supra* note 223, at 8,355.

Rule with an economic approach that would prevail for both “unfairness” and “deception.”

a. Addressing “Unfairness” and “Deception”

The FTC replaced the Cigarette Rule,²⁶³ adopting the Policy Statement on Unfairness, in 1980.²⁶⁴ Upon adoption, the Commission began to approach enforcement of “unfair” practices under Section 5 of the FTC Act using economics-driven, cost-benefit criteria.²⁶⁵ In 1994, Congress amended Section 5 to reflect the 1980 Policy Statement, directing the FTC to pursue enforcement only where the targeted behavior “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not *outweighed* by countervailing benefits to consumers or to competition.”²⁶⁶

The FTC’s approach to “deception” proves paramount to understanding the underlying approach to all federal advertising regulation.²⁶⁷ In 1983, a divided FTC adopted the “Policy Statement on Deception.”²⁶⁸ The 1983 Policy Statement listed three elements that “undergird all deception cases:”²⁶⁹ (1) “[T]here must be a representation, omission or practice that is likely to mislead the consumer,”²⁷⁰ (2) the practice at issue must be examined from the standpoint of a “consumer acting reasonably in the circumstances,” and (3) the “representation, omission, or practice” at issue in the first prong must be “material.”²⁷¹

Although these standards do provide some criterion for regulators and advertisers, they do not provide substantial guidance for prioritization. The FTC could use these standards as an implicit prioritization filter, but in terms of assessing the costs and benefits of intervention, the Policy Statement on Deception offers weaker structuring principles.²⁷²

However, the contemporaneously adopted 1984 Policy Statement Regarding Advertising Substantiation (the 1984 Substantiation Policy

²⁶³ Mathew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 343–44 (2008).

²⁶⁴ 1980 Unfairness Statement, *supra* note 245, at 1070–76 (1984).

²⁶⁵ See *id.* at 1073–74 (explaining the FTC’s policy for determining when consumer injury is “unfair”).

²⁶⁶ 15 U.S.C. § 45(n) (1994) (emphasis added); Wright, *supra* note 248, at 5–6.

²⁶⁷ See PRIDGEN & ALDERMAN, *supra* note 236, § 11:1 (illustrating the primacy of deception in advertising regulation).

²⁶⁸ Letter from the Fed. Trade Comm’n to Hon. John D. Dingell, Chairman, Comm. on Energy and Commerce (Oct. 14, 1983), *reprinted in* Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984).

²⁶⁹ *Id.* at 175.

²⁷⁰ *Id.*

²⁷¹ *Id.* Materiality and “consumer injury” are likely if the practice leads the consumer to “[choose] differently but for the deception.” *Id.* at 175–76. In some cases, materiality can be presumed, though other cases may require presentation of evidence. *Id.* at 176.

²⁷² See *id.* at 174.

Statement)²⁷³ provided more directed guidance, reflecting “the direct influence of the economics of information on advertising regulation.”²⁷⁴ The cost-benefit spirit of the approach to “unfairness” meshes with the FTC’s specific policy toward advertising substantiation, even though the FTC’s “deception” policy—the foundation for addressing advertising problems—does not expressly invite a head-on economics approach.

b. Addressing Advertising Substantiation

The 1984 Substantiation Policy Statement reinforced the FTC’s “commitment to the underlying legal requirement of advertising substantiation—that advertisers . . . have a reasonable basis for advertising claims before they are disseminated.”²⁷⁵ Specifically, the FTC emphasized, “that advertisers [must] substantiate express and implied claims,²⁷⁶ however conveyed, that make objective assertions” with respect to an offering.²⁷⁷

The FTC warned that objective claims would trigger more scrutiny about substantiation because such claims “represent explicitly or by implication that the advertiser has a reasonable basis supporting these claims.”²⁷⁸ Consumers expect advertisers to have such substantiation and “would be less likely to rely on claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true.”²⁷⁹ If an advertiser does not possess or rely on substantiation that would support such a “reasonable basis for objective claims,” the advertiser’s actions would “constitute[] an unfair and deceptive act or practice in violation of Section 5 of the [FTC] Act.”²⁸⁰

Determining whether substantiation supports a “reasonable basis” for making a claim requires FTC assessment of “a number of factors relevant to the benefits and costs of substantiating a particular claim,” just as the Commission would in any “unfairness analysis.”²⁸¹ The factors considered include: “[T]he type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is

²⁷³ This Statement was appended to *Thompson Medical Co.*, 104 F.T.C. 648 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986).

²⁷⁴ *Smith*, *supra* note 248, at 111.

²⁷⁵ *Thompson Medical Co.*, 104 F.T.C. at 839.

²⁷⁶ The FTC does hold advertisers responsible for implied claims resulting from “reasonable” interpretations of advertising. “Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims.” *Id.*

²⁷⁷ *Id.* (describing the FTC’s position that advertisers must substantiate all claims and make objective assertions regarding offers).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

reasonable.”²⁸²

This policy rests on the well-founded assumption that “consumers expect less substantiation for easily verifiable claims.”²⁸³ The Policy Statement on Advertising Substantiation deprioritizes scrutiny of the “easily verifiable claims” that would likely fall into “search” claims.²⁸⁴ This cost-benefit approach leads to higher scrutiny of other claims.²⁸⁵

The Advertising Substantiation policy implicitly leads to a slightly higher level of scrutiny for experience claims (“substantiation”) than for search claims. For offerings purchased and experienced repeatedly, consumers can police experience claims at the mere cost of a failed sampling,²⁸⁶ but for high-ticket offerings like appliances, or the fruits of a particular college’s education, such claims are not as easy to verify.

Credence claims that consumers would find difficult or expensive to verify need further sorting by risk of generating market failure. This policy indicates that objective claims require substantiation. Credence advertising would require less regulatory attention if objective claims are muted.²⁸⁷ Consumers may take expressions of opinion or claims about intangible attributes lightly because “consumers . . . recognize . . . hyperbole” and will accordingly be skeptical, thus obviating a high-priority need for regulatory intervention.²⁸⁸

Generally, however, with objective credence claims, the highest level of scrutiny should be applied, given that they are more likely to mislead than a search or experience claim. The economics of intervention are favorable. As noted in the fictitious-pricing discussion, how regulators classify claims matters. Pricing claims, if unverifiable, should be treated accordingly, and should require substantiation. Deploying and integrating the SEC framework in the approach toward advertising advances the economic approach that the FTC embarked upon in 1969 and accelerated in the 1980s.

C. *Incorporating the SEC Framework*

Regulators should use the SEC framework to refine further the cost-benefit approach prescribed by scholars and later adopted by the FTC. The Commission certainly achieved enormous advances since the early 1980s, but room for improvement exists. The OIG noted that a more structured methodology and more formal evaluation process of complaints would

²⁸² *Id.*

²⁸³ Smith, *supra* note 248, at 111.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 111–12.

²⁸⁶ See *id.* at 111 (noting how higher scrutiny of experience claims can result in consumers policing these claims).

²⁸⁷ *Id.* at 113 (describing how credence claims would require less attention if the ability to verify the claims was easier).

²⁸⁸ *Id.* at 121.

optimize resource deployment.²⁸⁹ Notably, the OIG recommended establishing a weighted system of factors for measuring consumer harm and economic impact.²⁹⁰ The OIG offered no public recommendations for developing such a system, presumably leaving the details to the Commission.

The SEC framework would provide a robust, accepted starting point for the FTC to refine and evaluate enforcement priorities. Assessing advertising claims and market information problems through the lens of search, experience, and credence would enable more precision in “weighting” the potential for consumer harm, in particular. In 1991, Richard Craswell further explained his landmark 1985 endorsement of a cost-benefit approach toward advertising regulation,²⁹¹ emphasizing the necessity to organize any economically driven advertisement to focus on the consumer’s interests: “The actual effects of advertising on consumers should be more important than the match between the advertising and some idealized definition of truth The actual effects of advertising on consumers are just what cost-benefit analysis seeks to illuminate.”²⁹² My proposal aims to incorporate the spirit of the consumer’s experiential perspective—through the lens of how consumers interact with search, experience, and credence claims—into the cost-benefit equation. Craswell contended that “[t]he regulation of deceptive advertising is best viewed as a pragmatic exercise whose purpose is to make advertising as useful as possible for consumers.”²⁹³ Using the SEC framework furthers that pragmatic exercise by honoring the centrality of the consumer’s engagement with commercial information.

As I have shown through examples, priorities will likely change with respect to advertising enforcement if viewed through the lens of SEC. Fictitious pricing could arguably receive credence-claim treatment, warranting more weight in the “consumer harm” calculation. Peer-information brokers would face scrutiny as experience-claim “wholesalers.” Regulators would dissect native advertising to separate “misleading-door-opener” problems from weightier concerns about undue elevation of substantive claims. Of course, regulators might assess these problems differently, but adopting the SEC framework will promote a robust efficiency analysis.

Other considerations should, of course, factor into an analytically rigorous enforcement-prioritization scheme. Certainly, no panacea exists. For example, private false-advertising actions brought by competitors under

²⁸⁹ OIG EVALUATION REPORT, *supra* note 15, at ii.

²⁹⁰ *Id.*

²⁹¹ See Craswell, *Regulating Deceptive Advertising*, *supra* note 217, at 565–66 (promoting the role of cost-benefit analysis in advertising regulation).

²⁹² *Id.* at 551.

²⁹³ *Id.*

Section 43(A)(1)(B) of the Lanham Act²⁹⁴ might reveal a zone where private actors address informational problems, displacing a need for public intervention.²⁹⁵ An ongoing assessment of the impact of such activity would need to mesh with an SEC-driven prioritization scheme. That would be just one example of many.

In sum, putting the SEC framework in place would provide the FTC with a structure for a consistent, continuous, inclusive assessment of advertising regulation priorities.

CONCLUSION

The search-experience-credence framework offers a well-developed tool for analyzing advertising that regulators can readily deploy to add rigor and consistency to enforcement priorities. This approach to analyzing advertising content can help regulators assess newly emerging areas to determine which types of actions to bring, and it reassess old problems. Having a rigorous framework in place would help the FTC assess innovations and the challenges associated with them, as demonstrated in the peer-information brokerage sector. Even within supposedly novel areas, like native advertising where the FTC has signaled that higher scrutiny will soon follow, certain claims might take priority over others when evaluated through the lens of the SEC framework.

As the FTC takes on rapidly changing delivery of advertising information, a reliable anchor for systematically assessing new problems, and reevaluating old ones, would refine and improve the Commission's efficiency and efficacy. Though dazzling problems like Volkswagen clean-diesel claims receive extensive media and regulatory attention,²⁹⁶ the SEC framework informs regulators that lower-profile problems like fictitious pricing, for example, also deserve attention for reducing welfare. A more rigorous system will remove some of the dazzle from the enforcement-decision equation and reorganize priorities on a cost-benefit basis, perhaps satisfying the suggestion from the OIG.

²⁹⁴ 15 U.S.C. § 1125(a)(1)(B) (2012).

²⁹⁵ For a brief overview of the history of the Lanham Act and a discussion of the deficiencies in its interpretation, see Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1309–12, 1384 (2011). In a sharp turn, the Supreme Court recently expanded standing for false-advertising plaintiffs under the Lanham Act and time will tell how that impacts advertising and markets. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).

²⁹⁶ Perhaps because Volkswagen recalled eleven-million automobiles worldwide, five-hundred-thousand in the United States alone. See Jeff S. Bartlett & Michelle Naranjo, *Guide to the Volkswagen Emissions Recall*, CONSUMER REP. (July 25, 2016), <http://www.consumerreports.org/cro/cars/guide-to-the-volkswagen-dieseltgate-emissions-recall-> [<https://perma.cc/WPM4-8M7A>].