

A PICTURE IS WORTH A THOUSAND MATERIAL-CONNECTION DISCLOSURES: ENDORSEERS, INSTAGRAM, AND THE FEDERAL TRADE COMMISSION'S ENDORSEMENT GUIDES

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ABSTRACT

With the spread of social-media advertising, the Federal Trade Commission (FTC) has made many attempts to regulate the burgeoning field. However, the complexity of social media makes it difficult to regulate without violating the First Amendment. This difficulty is especially true for Instagram, a social-media platform where pictures—a form of speech protected by the First Amendment—are the primary focal point. This Note argues that the FTC's material-connection disclosure requirement potentially violates the First Amendment as it applies to Instagram advertisements. Instead of focusing on audience perception when determining whether an endorser must include a material-connection disclosure, the FTC should instead consider the poster's intent in sharing an Instagram post to prevent any chilling of speech or violations of posters' First Amendment rights.

INTRODUCTION

By all accounts, 2016 was a banner year for Toronto Blue Jays pitcher Marcus Stroman. On March 23, he was named the Blue Jays' opening day starting pitcher.¹ And when the Blue Jays faced a win-or-

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1. Gregor Chisholm, *Stroman Gets Opening Day Assignment*, MLB.COM (Mar. 23, 2016), <http://m.mlb.com/news/article/168651082/blue-jays-marcus-stroman-starting-opening-day> [<https://perma.cc/47U9-WWEH>].

go-home wild-card game, they turned to Stroman as their starter.² They won.³

The Duke graduate is also a popular social-media presence, especially on Instagram. He currently has 413,000 followers and posts photographs almost daily.⁴ Many of these photos include products from the sponsors he interacts with in his role as a professional baseball player and business owner.⁵ For example, in a photograph of Stroman pitching, he has tagged⁶ the Instagram accounts of Major League Baseball, the Toronto Blue Jays, New Era Caps, Nike, and the Jordan Brand.⁷ An everyday viewer would likely see this photo as a depiction of the exciting things happening in Stroman's life. But according to the Federal Trade Commission (FTC), this photograph might violate the Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides), depending on Stroman's relationship with the various organizations he has tagged.

In 2015, Instagram surpassed Twitter with 400 million active monthly users.⁸ Its popularity makes it a natural choice for businesses looking for new ways to market their products.⁹ Indeed, Instagram's advertising revenue for 2017 is projected to reach \$3.6 billion.¹⁰ The proliferation of advertising through social-media sites, such as

2. Robert Macleod, *In Jays' Wild-Card Game, It's Marcus Stroman Who Will Get Crucial Start*, GLOBE & MAIL (Oct. 3, 2016, 4:09 PM), <http://www.theglobeandmail.com/sports/baseball/marcus-stroman-to-start-al-wild-card-game-for-blue-jays/article32216712> [<https://perma.cc/AP5G-4YQW>].

3. Tyler Kepner, *Edwin Encarnacion's Homer Lifts Blue Jays Past Orioles in A.L. Wild-Card Game*, N.Y. TIMES (Oct. 4, 2016), <http://www.nytimes.com/2016/10/05/sports/baseball/toronto-blue-jays-baltimore-orioles-al-wild-card.html> [<https://perma.cc/GWE7-8CFP>].

4. Marcus Stroman (@mstrooo6), INSTAGRAM, <https://www.instagram.com/mstrooo6> [<https://perma.cc/5NSR-3P7L>].

5. *Id.*

6. A user "tags" a photograph when she links her photograph to another user's profile to indicate that the other user is a subject of the picture. See *How Do I Tag People in My Photo?*, INSTAGRAM, <https://help.instagram.com/174635396025538?helpref=search&sr=3&query=tag> [<https://perma.cc/BK9B-VXGZ>].

7. Stroman, *supra* note 4.

8. Arjun Kharpal, *Facebook's Instagram Hits 400M Users, Beats Twitter*, CNBC (Sept. 23, 2015, 5:58 AM), <http://www.cnbc.com/2015/09/23/instagram-hits-400-million-users-beating-twitter.html> [<https://perma.cc/JGD4-2N2E>].

9. *Id.*

10. Naomi Gray, *Eyes Are on Instagram as Facebook Reports 4Q16 Earnings*, MARKET REALIST (Jan. 30, 2017, 2:50 PM), <http://marketrealist.com/2017/01/eyes-instagram-facebook-reports-earnings> [<https://perma.cc/HL4Y-4D6X>].

Instagram, has caused the FTC to revise its advertising regulations.¹¹ The agency did so in 2009, updating its Endorsement Guides for the first time in almost thirty years to reflect the changes in the field.¹² More recently, in 2015, the FTC created a “What People Are Asking” page (WPAA page) to provide more guidance as to how the Endorsement Guides affect social-media posting.¹³

These updates represent the FTC’s attempts to keep up with social media as it became more prevalent in the advertising world.¹⁴ However, this Note argues that as it pertains to social media—and, more specifically, to Instagram—the FTC has overstepped its bounds in regulation.

The First Amendment protects speech from governmental regulation based on “its message, its ideas, its subject matter, or its content.”¹⁵ But the Supreme Court has recognized that the Constitution provides “lesser protection” for commercial speech than other types of speech.¹⁶ The FTC’s authority to regulate advertisements stems from this lesser protection.¹⁷ In attempting to regulate the use of celebrity endorsements on social media, however,

11. Julie Brill, *Social Networks and the Law: Keynote: Privacy & Consumer Protection in Social Media*, 90 N.C. L. REV. 1295, 1305 (2012).

12. Press Release, Fed. Trade Comm’n, FTC Publishes Final Guides Governing Endorsements, Testimonials, (Oct. 5, 2009), <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials> [<https://perma.cc/Q7H8-UBBP>].

13. Martin Beck, *FTC Puts Social Media Marketers on Notice with Updated Disclosure Guidelines*, MARKETING LAND (June 12, 2015, 1:56 PM), <http://marketingland.com/ftc-puts-social-media-marketers-on-notice-with-updated-disclosure-guidelines-132017> [<https://perma.cc/5FTM-NWQQ>].

14. Brill, *supra* note 11, at 1305.

15. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

16. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980). Part II.D more thoroughly fleshes out the differences between commercial and noncommercial speech, but commercial speech, in essence, is speech that proposes a commercial transaction. *Id.* at 562.

17. See Fed. Trade Comm’n, Comments of the Staff of the Bureau of Economics, the Bureau of Consumer Protection, and the Office of Policy Planning *In re* Request for Comment on First Amendment Issues Before the Food and Drug Administration, at 3 (Sept. 13, 2002), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf [<https://perma.cc/L347-QBU3>] (“[T]he First Amendment commercial speech doctrine is fully compatible with our vigorous consumer protection program The FTC’s postmarket review of advertising claims and application of tailored remedies in advertising cases curb deception without overly restricting truthful commercial speech, thus promoting the goals embodied in the First Amendment.”).

the FTC makes a number of assumptions about what constitutes commercial speech.

The Endorsement Guides require an endorser to disclose her relationship with a company whenever she posts about that company's products.¹⁸ Yet the FTC does not provide clear guidance about what makes a post on Instagram an endorsement. Instead, the agency suggests that when it comes to pictures, an endorsement is anything that might convey to an audience that a poster approves of a product.¹⁹ In providing such flimsy guidance to endorsers that does not comport with the Supreme Court's definition of commercial speech, the FTC crosses the line from regulating commercial speech to regulating noncommercial speech, which it cannot do without satisfying strict scrutiny.²⁰

This Note delineates the definition of commercial speech and the government's power to regulate it, and then argues that the FTC has overstepped its bounds. Part I discusses Instagram as a social-media platform and the proliferation of visual marketing on social media. It examines the FTC's attempts to regulate endorsements in the social-media realm, and it focuses on the agency's requirement that endorsers indicate when there is a material connection between the speaker and a company. Part II explores the history of commercial speech and the First Amendment. Part III analyzes the FTC's attempts to regulate celebrity endorsements on Instagram; it contends that the material-connection disclosure requirement may chill speech on Instagram. Part IV suggests that, instead of focusing on the audience's interpretation of Instagram posts, the FTC should focus on the poster's intent in posting the image to avoid chilling core expressive speech, which is essential to protecting First Amendment freedoms.

I. SOCIAL MEDIA AS AN ADVERTISING FORCE AND THE FTC'S ATTEMPTS TO REIN IT IN

With social media becoming a dominant force in the advertising world, the FTC has made numerous attempts to regulate the new platforms, both by updating previous regulations and by providing

18. 16 C.F.R. § 255.5 (2016).

19. FED. TRADE COMM'N, *THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING* 7 (2015).

20. *See Carey v. Brown*, 447 U.S. 455, 461–62 (1980) (explaining that government regulation that discriminates among speech-related activities in a public forum must be “finely tailored to serve substantial state interests”).

additional guidance outside of those regulations. This Part provides an overview of the development of endorsements on social media and the FTC's attempts to regulate them. Part I.A discusses the history of endorsements and the use of social media as an advertising platform, focusing specifically on Instagram. Part I.B then discusses the FTC's continued attempts to regulate endorsements, concentrating on the Endorsement Guides as well as additional guidance the agency has provided to address social media.

A. *The Proliferation of Visual Marketing in Social Media*

The use of endorsements in advertisements is nothing new, with modern testimonials dating as far back as World War I.²¹ During this time, testimonials were most often used in the patent-medicine industry, though they became more prevalent in other areas during the 1920s.²² Early testimonials usually took the form of print advertisements commenting on the effectiveness of a product.²³ These advertisements used “ordinary” people rather than celebrities.²⁴ It was not until the mid-seventies—with the proliferation of television—that celebrities got involved, often in commercials.²⁵

Testimonials were initially met with skepticism.²⁶ Consumers wanted to know how authentic an endorser's support for a product was, believing that celebrities were insincere in providing positive commentary about a product.²⁷ Today, however, that hesitancy to trust celebrities may have dissipated. A 2012 study on the effect of celebrity endorsements in golf-ball sales shows that such advertising has had positive effects on the sales of a product.²⁸ The study found that Tiger Woods' endorsements for Nike golf balls from 2000 to 2010 helped Nike earn \$176 million in extra revenue.²⁹ The economic success of celebrity endorsements justifies companies' attempts to find new channels to disseminate them.

21. KERRY SEGRAVE, *ENDORSEMENTS IN ADVERTISING: A SOCIAL HISTORY* 1 (2005).

22. *Id.* at 13–14.

23. *Id.* at 28.

24. *Id.*

25. *Id.* at 109.

26. *Id.* at 190.

27. *Id.*

28. Kevin YC Chung, Timothy P. Derdenger & Kannan Srinivasan, *Economic Value of Celebrity Endorsements: Tiger Woods' Impact on Sales of Nike Golf Balls*, 32 *MARKETING SCI.* 271, 271 (2013).

29. *Id.* at 290.

Instagram is a social-media platform that was created in October of 2010.³⁰ Its users are limited to sharing photographs and videos on the platform rather than building a full online profile with personal information, like on Facebook, or sharing short bursts of text, like on Twitter.³¹ These images are usually accompanied by text commentary describing the photograph, although it is not required.³² After taking a photo, users can choose a filter to change the look of the image and can also tag individuals to indicate their presence in the photograph.³³ Clicking on the tag sends a viewer to the profile of the tagged user.³⁴ Users can follow other profiles whose photographs populate the user's feed whenever they post.³⁵ A follower can also like and make comments on other posters' photos.³⁶ As of December 2016, Instagram had more than 600 million monthly users, with 100 million added since June of 2016.³⁷

In 2013, Instagram announced that it would start allowing businesses to advertise.³⁸ Companies can now provide photographs that show up on users' feeds whether or not the user follows the brand.³⁹ Although these photographs look similar to other Instagram posts, they have the word "Sponsored" printed in the upper left-hand corner. Users can hide the photos from their newsfeed if they choose.⁴⁰ This form of advertising appears to be effective. Instagram users are fifty-eight times more likely to engage with in-platform ads on

30. Geoff Desreumaux, *The Complete History of Instagram*, WERSM (Jan. 3, 2014), <http://wersm.com/the-complete-history-of-instagram> [<https://perma.cc/XFB8-NY4L>].

31. FACEBOOK, <http://www.facebook.com> [<https://perma.cc/HPE6-MJSM>]; TWITTER, <http://www.twitter.com> [<https://perma.cc/Y76W-TGMJ>]. It is worth noting that Facebook owns Instagram. *The Facebook Companies*, FACEBOOK: HELP CENTER, <https://www.facebook.com/help/111814505650678> [<https://perma.cc/DHQ2-75P5>].

32. Stephanie Buck, *The Beginner's Guide to Instagram*, MASHABLE (May 29, 2012), <http://mashable.com/2012/05/29/instagram-for-beginners/#1NGgV6XL28qJ> [<https://perma.cc/N52U-XU39>].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *600 Million and Counting*, INSTAGRAM (Dec. 15, 2016), <http://blog.instagram.com/post/154506585127/161215-600million> [<https://perma.cc/KF6M-QECL>].

38. *Instagram as a Growing Business*, INSTAGRAM (Oct. 3, 2013), <http://blog.instagram.com/post/63017560810/instagramasagrowingbusiness> [<https://perma.cc/6GCU-MBMB>].

39. *Id.*

40. *Id.*

Instagram than are Facebook users and 120 times more likely than are Twitter users.⁴¹

Celebrities also endorse products on their personal Instagram feeds. These endorsers often take photos with, or of, a product and post them on their newsfeeds with a comment about the product, a tag that leads to the manufacturer's profile, or both.⁴² Celebrity profiles usually have millions of followers, so brands have an incentive to use celebrities as spokespeople.⁴³ Indeed, celebrity endorsers have used Instagram to promote everything from teeth-whitening products to hazelnut spread.⁴⁴

Generally, audiences are more receptive to noncommercial sources than advertising messages.⁴⁵ Marketers have, therefore, looked to nontraditional ways to build connections with audiences.⁴⁶ The emotional connection a celebrity can create with the consumer, and thus the brand, on her personal Instagram feed makes the platform a natural choice for marketers.⁴⁷

Celebrities are not the only ones who can benefit from endorsement deals on Instagram.⁴⁸ Other users with a large number of followers can also charge companies to share photographs of products

41. James Mortimer, *Paid Social: Guide to Advertising on Instagram*, ICROSSING (Apr. 9, 2015), <http://www.icrossing.com/uk/ideas/paid-social-guide-advertising-on-instagram> [<https://perma.cc/UC5S-QSBU>].

42. Kara Brown, *Here's How Much Celebrities Make in the Instagram Product Placement Machine*, JEZEBEL (Jan. 19, 2016, 2:10 PM), <http://jezebel.com/heres-how-much-celebrities-make-in-the-instagram-produc-1740632946> [<https://perma.cc/8MXD-79QN>].

43. Jordan Bishop, *These Are the 10 Most Followed People on Instagram*, FORBES (Dec. 4, 2016, 2:16 AM), <http://www.forbes.com/sites/bishopjordan/2016/12/04/most-followed-instagram/#414461b73084> [<https://perma.cc/B8H5-CXJV>]. As of December 2016, Selena Gomez was the most followed celebrity on Instagram with more than 103 million followers. *Id.*

44. See Kara Brown, *The Big Bad World of Products Celebrities Promote on Instagram*, JEZEBEL (July 21, 2015, 11:30 AM), <http://jezebel.com/the-big-bad-world-of-products-celebrities-promote-on-in-1710470780> [<https://perma.cc/WJL9-AMLU>] (providing examples of products frequently promoted by celebrities).

45. Margaret C. Campbell, Gina S. Mohr & Peeter W.J. Verlegh, *Can Disclosures Lead Consumers to Resist Covert Persuasion? The Important Roles of Disclosure Timing and Type of Response*, 23 J. CONSUMER PSYCHOL. 483, 483 (2013).

46. *Id.*

47. See Julie Creswell, *Nothing Sells Like Celebrity*, N.Y. TIMES (June 22, 2008), <http://www.nytimes.com/2008/06/22/business/media/22celeb.html> [<https://perma.cc/7TLY-59JE>] (discussing the importance of building connections between brands and the celebrities they use in advertising).

48. Michael Zhang, *Top Instagram Users Making Thousands Per Photo by Promoting Products*, PETAPIXEL (Mar. 6, 2015), <http://petapixel.com/2015/03/06/top-instagram-users-making-thousands-per-photo-by-promoting-products> [<https://perma.cc/K8TE-MDNG>].

or services.⁴⁹ In some instances, these people have made thousands of dollars by, or have received expensive merchandise for, posting photographs of these products.⁵⁰ For example, Nikoletta Csanyi, a banking consultant, won a Mercedes CLA after participating in a contest in which she used the car for a road trip to Washington, D.C.⁵¹ During the trip, she was required to post photos on Instagram, tagging Mercedes' Instagram page and using the hashtag "#ClataketheWheel."⁵² A digital marketing manager at Mercedes explained that these kinds of users, known as "social media influencers," are "more approachable," whereas celebrities are "just not relatable."⁵³

These organic interactions between a company and potential consumers are known as "native advertising."⁵⁴ Native advertising is a form of advertising that mirrors the format in which it is displayed.⁵⁵ Examples of this type of advertising can be found on the popular website BuzzFeed.⁵⁶ HBO, for example, created a BuzzFeed article entitled "10 Feelings All NYC Girls Have at Least Once" to promote its popular show *Girls*.⁵⁷ Although the page featured the same popular GIFs⁵⁸ and commentary that BuzzFeed is known for, the post led with the tagline, "Let's be real, ladies: We all share the same hardships. Make sure to tune in to the season 3 premiere of *Girls* at 10 p.m. Sunday, January 12 on HBO."⁵⁹

49. *Id.*

50. *Id.*

51. Katherine Rosman, *Your Instagram Picture, Worth a Thousand Ads*, N.Y. TIMES (Oct. 15, 2014), <http://www.nytimes.com/2014/10/16/fashion/your-instagram-picture-worth-a-thousand-ads.html> [<https://perma.cc/C795-WWHG>].

52. *Id.*

53. *Id.*

54. Misha Talavera, *10 Reasons Why Influencer Marketing Is the Next Big Thing*, SOCIALTIMES (July 14, 2015, 2:00 PM), <http://www.adweek.com/socialtimes/10-reasons-why-influencer-marketing-is-the-next-big-thing/623407> [<https://perma.cc/PT46-HRXG>].

55. 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/E558-JKJP>].

56. See BUZZFEED, <http://www.buzzfeed.com> [<https://perma.cc/23MA-QHBE>].

57. See HBO, *10 Feelings All NYC Girls Have at Least Once*, BUZZFEED (Jan. 6, 2014, 9:04 AM), https://www.buzzfeed.com/h2/osmo/hbo/10-feelings-all-nyc-girls-have-at-least-once?b=1&utm_term=.xoxl7MeBN#.cy80k7316 [<https://perma.cc/94NA-D7DB>].

58. GIF, or "Graphics Interchange Format," is a short, looping video image. Olivier Laurent, *How the GIF Is Taking Over the World*, TIME (Mar. 30, 2016), <http://time.com/4275521/gif-photography> [<https://perma.cc/LBW8-Y22K>].

59. HBO, *supra* note 57.

On Instagram, native advertising manifests as a photograph on an individual's feed that looks similar to the surrounding photographs without a "Sponsored" tag. For example, former Olympic gymnast Shawn Johnson often shares photos of herself making and eating peanut-butter-and-jelly sandwiches to promote Smucker's, a sponsor of the 2016 U.S. Olympic team.⁶⁰ These new developments in social-media advertising have caused the FTC to step in as a regulator.⁶¹

B. The FTC's Regulation of Endorsements and New Media

The FTC has made many attempts to regulate endorsements in new media, by first updating its Endorsement Guides and later creating a WPAA page to clarify the updates.

1. *The Endorsement Guides.* The FTC was established in 1914 through the Federal Trade Commission Act (Act).⁶² The agency is "empowered and directed to . . . prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."⁶³ The Act defines an unfair act or practice as one that "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."⁶⁴

The FTC first promulgated the Endorsement Guides in 1975.⁶⁵ Importantly, they define an endorsement as "any advertising message . . . that *consumers are likely to believe* reflects the opinions, beliefs,

60. Shawn Johnson (@shawnjohnson), INSTAGRAM, <https://www.instagram.com/p/BGwv2FFg3sq/?hl=en&taken-by=shawnjohnson> [<https://perma.cc/PW48-3MAG>]; see also J.M. Smucker Co., *Smucker Partners with Seven Team USA Athletes for the Rio 2016 Olympic Games*, PR NEWswire (Apr. 26, 2016, 8:13 AM), <http://www.prnewswire.com/news-releases/smucker-partners-with-seven-team-usa-athletes-for-the-rio-2016-olympic-games-300257493.html> [<https://perma.cc/U3PH-8NHA>] (discussing the brand's partnerships with different Team USA members for its advertising campaign).

61. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,125 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255) (explaining that the Endorsement Guides were updated in response to questions "about how to distinguish between [user-generated] communications that are considered 'endorsements' within the meaning of the [Endorsement] Guides and those that are not").

62. 15 U.S.C. § 41 (2012).

63. *Id.* § 45(a)(2).

64. *Id.* § 45(n).

65. J. THOMAS ROSCH, FED. TRADE COMM'N, ENDORSEMENTS AND TESTIMONIALS GUIDES 1 (2009).

findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”⁶⁶ An endorser is defined as any individual, group, or institution whose “opinions, beliefs, findings, or experiences” the message seems to reflect.⁶⁷

The revised Endorsement Guides require celebrity endorsers to disclose any “material connections” they have with a company when posting about a product.⁶⁸ A material connection exists when there is a relationship “between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.”⁶⁹ The FTC explains that the audience has a right to know when a material connection exists.⁷⁰ Though not exhaustive, some of the factors the FTC considers when determining whether there is a material connection include

whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received.⁷¹

In promulgating the Endorsement Guides, the FTC expressed that disclosure by the endorser is particularly important for new media.⁷² Unlike in traditional media, endorsers using new media have the burden to disclose their connection with the advertiser because they are often the ones in control of disseminating the endorsement.⁷³ Both the advertiser and the endorser may be held liable for a statement or omission in an advertisement using new media.⁷⁴

When determining if a material-connection disclosure is required, the question is “whether or not the nature of that medium is such that

66. 16 C.F.R. § 255.0(b) (2016) (emphasis added).

67. *Id.*

68. *Id.* § 255.5.

69. *Id.*

70. *Id.*

71. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

72. *Id.* at 53,134.

73. *Id.* at 53,133–34.

74. *Id.* at 53,135. The FTC has indicated that it will focus its actions on advertisers rather than individual endorsers unless it is “appropriate in certain circumstances,” without providing guidance about what those circumstances are. FED. TRADE COMM’N, *supra* note 19, at 3.

consumers are likely to recognize the statement as an advertisement.”⁷⁵ The Endorsement Guides do not say that all user-generated new-media posts are endorsements if they discuss a product or an experience with a product.⁷⁶ Instead, when defining an endorsement in new media, the FTC asks “whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser and therefore an ‘advertising message.’”⁷⁷ The FTC specifically examines the relationship between the speaker and the advertiser.⁷⁸ If the speaker acts independently, then the statement is not an endorsement.⁷⁹ But if the speaker acts on behalf of an agent or advertiser, then the statement is an endorsement.⁸⁰

Example 8 of the Endorsement Guides clarifies what may count as a new-media endorsement.⁸¹ The example discusses a blogger who wrote positively about a brand of dog food on her blog.⁸² If the blogger bought the product herself and then posted about it, the post would not be an endorsement.⁸³ If she received the dog food for free because of an online coupon, the post would also not be an endorsement.⁸⁴ But if she received the product for free after joining a marketing program that provides her with various products to review, the post would be an endorsement.⁸⁵

The FTC, in the initial proposed rule, explains that the Endorsement Guides “interpret laws administered by the Commission, and are thus advisory in nature.”⁸⁶ To bring an action against a party that has violated the Endorsement Guides, the FTC must show that the party’s acts were deceptive, as required by section 5 of the Act.⁸⁷

75. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. at 53,134.

76. *Id.* at 53,125.

77. *Id.* at 53,126.

78. *Id.*

79. *Id.*

80. *Id.*

81. 16 C.F.R. § 255.0 (2016).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72,374, 72,375 (proposed Nov. 28, 2008) (to be codified at 16 C.F.R. pt. 255).

87. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,140 n. 105 (Oct. 15, 2008) (“In any [FTC] proceeding, the Commission would

If the FTC finds that a party has violated the material-connection disclosure requirement, the agency will initiate an investigation.⁸⁸ The FTC will then draft a complaint and a proposed settlement agreement or consent order if it believes it has enough information to take legal action.⁸⁹ Generally, the FTC seeks to settle with companies rather than go to court.⁹⁰ But if the parties do not agree to settle, then the FTC can bring either an administrative action or a federal court action.⁹¹

2. *Further Clarification by the FTC.* The FTC created a WPAA page in 2015,⁹² responding to a number of questions posed by “advertisers, ad agencies, bloggers, and others.”⁹³ Many of the questions referred to the connection between the Endorsement Guides and social media, specifically sites like Twitter, Facebook, and YouTube.⁹⁴ The document explicitly states that the Endorsement Guides apply to social media because “[t]ruth in advertising is important in all media, whether they have been around for decades . . . or are relatively new.”⁹⁵

On this page, the FTC provides three points that are important for potential Instagram endorsers. First, in responding to whether a social-media post needs a positive message to be an endorsement, the FTC explains that posting a picture by itself can be an endorsement if the post is sponsored by the company marketing the product and it expresses that the poster “like[s] and approve[s] of the product.”⁹⁶ Moreover, if the picture conveys that message and the poster has a

have the burden of proving that a particular use of an endorsement or testimonial was deceptive.”).

88. Christie Grymes Thompson, *FTC Consumer Protection Investigations and Enforcement 2* (Practical Law, 2014), http://www.kelleydrye.com/publications/articles/1797/_res/id=Files/index=0/1797.pdf [https://perma.cc/3SG3-Z44E].

89. *Id.* at 3.

90. *Id.*

91. The Ninth Circuit addressed, but did not definitively answer, the question of the Endorsement Guides’ interpretive force in *FTC v. Garvey*. *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004). The court explained that the Endorsement Guides are not entitled deference by the courts as “an agency pronouncement,” but they are “entitled to respect,” as indicated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Garvey*, 383 F.3d at 903. Still, the court declined to determine how much deference to give the Endorsement Guides. *Id.* at 903–04.

92. FED. TRADE COMM’N, *supra* note 19, at 2.

93. *Id.*

94. *Id.* at 7.

95. *Id.* at 3.

96. *Id.* at 7.

relationship with the company that produces the product, then the FTC considers it an endorsement.⁹⁷

The second point concerns how endorsers should disclose their material connection with the company providing the product. The Endorsement Guides express that the FTC's main focus is ensuring that consumers are aware of the connections between endorsers and advertisers.⁹⁸ The FTC explains that it is "obvious" that someone evaluating the endorsement would want to know about the connection.⁹⁹ But the FTC does not require specific language for providing this disclosure. It is concerned with "effective communication," regardless of its form.¹⁰⁰ The FTC offers examples such as "Company X gave me this product to try," or in the case of a Twitter post—which limits the number of characters a poster may use—the FTC suggests that a simple "#ad" will suffice.¹⁰¹ But the FTC explains that an endorser is not required to list everything he or she receives from the company. Rather, the disclosure must represent that the endorser has a material connection to the company.¹⁰²

The final point discusses how frequently an endorser must disclose the material connection. Because of the high volume of new social-media content, the FTC suggests that celebrities disclose frequently enough that new followers will be informed of the material connection.¹⁰³ The FTC "recommend[s] disclosure" in most instances when a celebrity shares information about a product he or she endorses, as the celebrity's new followers may be unaware of the material connection.¹⁰⁴

II. THE HISTORY OF COMMERCIAL SPEECH AND THE FIRST AMENDMENT

Core expressive speech and commercial speech are subject to different forms of protection under the First Amendment. One of the constitutional rationales for the First Amendment is to prevent

97. *Id.*

98. *Id.* at 3.

99. *Id.* at 2.

100. *Id.* at 10.

101. *Id.*

102. *See id.* (listing examples of disclosures that show the endorser's material connection to the company).

103. *Id.* at 7.

104. *Id.*

“chilling” speech—that is, scaring people into not speaking because of fear of liability.¹⁰⁵ There is a constitutional interest in providing robust freedom of speech to allow a broad variety of viewpoints, known as the “marketplace of ideas.”¹⁰⁶ Any regulation that limits speech prevents the dissemination of ideas and concepts.

Part II.A discusses how the Court generally defines core expressive speech. Part II.B explains the government’s ability to regulate core expressive speech. Part II.C defines commercial speech, and Part II.D discusses the government’s ability to regulate it. Part II.E discusses when the government can require disclosures.

A. *Defining Core Expressive Speech*

The First Amendment prohibits Congress from making any law “abridging the freedom of speech.”¹⁰⁷ Most people think of speech as oral or written, but conduct can also be speech.¹⁰⁸ If conduct is “inherently expressive,” then it is speech.¹⁰⁹ Conduct that incorporates both speech and nonspeech elements allows for government regulation if the regulation furthers a “sufficiently important governmental interest.”¹¹⁰ Photographs are also generally considered speech for First Amendment purposes, as are books and movies.¹¹¹

105. See *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (“[C]onstitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”).

106. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” (first citing *Associated Press v. United States*, 326 U.S. 1, 20, (1945); then citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); and then citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

107. U.S. CONST. amend. I.

108. See *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 65–66 (2006) (“[W]e rejected the view that ‘conduct can be labeled “speech” whenever the person engaging in the conduct intends thereby to express an idea,’ [rather] we have extended First Amendment protection only to conduct that is inherently expressive.”).

109. *Id.* Inherently expressive conduct is that which portrays a message without requiring additional speech to explain the message. *Id.* at 66.

110. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

111. See *Kaplan v. California*, 413 U.S. 115, 119 (1973) (“The Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books.”).

B. *Regulating Core Expressive Speech*

If the government attempts to regulate the content of core expressive speech, strict scrutiny applies.¹¹² The only free-speech limits on photographs from a regulatory context apply when they fall into the category of obscenity, which is exempted from the First Amendment.¹¹³ The same scrutiny applies when the government compels speech.¹¹⁴ Because the Supreme Court has established that speech should be “uninhibited, robust, and wide-open,”¹¹⁵ strict scrutiny is quite difficult for the government to overcome. Regulations of core expressive speech, therefore, tend to fail under this scrutiny.¹¹⁶

When determining if a regulation concerning speech can withstand strict scrutiny, the first step is to determine if the government’s interest is compelling.¹¹⁷ Although the Court has never explicitly defined what makes an interest compelling, it has found compelling interests in some free-speech cases, including combatting terrorism and ensuring that people who have historically been subject to discrimination can live wherever they wish.¹¹⁸

Even if the government has a compelling interest, the regulation must be narrowly tailored to that interest.¹¹⁹ The regulation must also not be overbroad: it cannot restrict more speech than necessary to advance the interest.¹²⁰ In other words, the regulation must be the least restrictive alternative, meaning there are no other means that will serve

112. *See Texas v. Johnson*, 491 U.S. 397, 412 (1989) (explaining that a restriction preventing expression based on the message it conveys is subject to strict scrutiny).

113. *See Roth v. United States*, 354 U.S. 476, 485 (1957) (“[O]bscenity is not within the area of constitutionally protected speech or press.”).

114. *See United States v. United Foods*, 533 U.S. 405, 410–11 (2001) (explaining that the First Amendment “may prevent the government from compelling individuals to express certain views” and that such regulations are subject to strict scrutiny).

115. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

116. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) (explaining that strict scrutiny “call[s] into play a strong presumption against constitutionality”).

117. *See Carey v. Brown*, 447 U.S. 455, 461–62 (“When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.”).

118. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28–29 (2010); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

119. *Carey*, 447 U.S. at 461–62.

120. *See First Nat’l Bank v. Bellotti*, 435 U.S. 765, 794 (1978) (holding that a statute forbidding certain bank and corporate expenditures that influenced certain referendum proposals violated the First Amendment because it was overinclusive by prohibiting shareholder-authorized proposals).

the interest the same way while restricting less speech.¹²¹ Additionally, the regulation must not be underinclusive.¹²² It must cover all speech implicated by the interest.¹²³

C. *Defining Commercial Speech*

The Supreme Court has found that commercial speech warrants less protection than other types of speech.¹²⁴ But determining what constitutes commercial speech is difficult.¹²⁵ The Court defined commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.¹²⁶ In that case, a Virginia law prevented pharmacists from advertising or promoting the price of pharmaceutical drugs.¹²⁷ Advertisers contended that the law violated the First Amendment's free-speech clause.¹²⁸ The Court first determined if the speech solely proposed a commercial transaction, being "so removed from any exposition of ideas" and "from truth, science, morality, and arts in general . . . that it lacks all protection."¹²⁹ It ultimately struck down the law and held that paid advertisements and speech that solely proposed commercial transactions retained some First Amendment protection.¹³⁰ The Court explained that there was less concern about chilling speech in the commercial context because for-profit companies would continue to produce commercial speech to help their businesses.¹³¹ But the Court did not indicate that the government needed to choose what kind of commercial speech was appropriate for

121. *See* *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (holding that the Child Online Protection Act was invalid under the First Amendment because there were "plausible, less restrictive alternatives to the statute").

122. *See* *Carey*, 447 U.S. at 471 (finding that a regulation was invalid because it only banned labor picketing, instead of all picketing, that inhibited residential privacy).

123. *Id.*

124. *See* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[W]e . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.").

125. *See* Erin Bernstein & Theresa J. Lee, *Where the Consumer Is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 56–60 (explaining the difficulties in determining what constitutes commercial speech).

126. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

127. *Id.* at 752.

128. *Id.* at 754.

129. *Id.* at 762 (citations omitted).

130. *Id.* at 761–62.

131. *Id.* at 772 n.24.

consumers.¹³² Instead, it focused on consumers' ability to decipher a variety of commercial information and favored more speech over less.¹³³

Seven years later, in *Bolger v. Youngs Drug Products Corp.*,¹³⁴ the Court provided a clearer definition of commercial speech.¹³⁵ The challenged statute prohibited mailing unsolicited advertisements for contraceptives.¹³⁶ In considering a set of pamphlets, the Court provided three characteristics that define commercial speech.¹³⁷ It said that the pamphlets: (1) were conceded to be advertisements, (2) referenced a specific product, and (3) had an economic motive.¹³⁸ Although the Court noted that no factor singularly defined the pamphlets as commercial speech, the three together provided strong support for the conclusion that the pamphlets were commercial speech subject to less First Amendment protection.¹³⁹

Virginia State Board of Pharmacy and *Bolger* together provide a definition of commercial speech that includes: (1) speech that does nothing more than propose a commercial transaction and (2) speech that the speaker concedes to be an advertisement, references a specific product, and is disseminated for an economic motivation. The Court has largely left the question of what constitutes commercial speech alone since *Bolger*.¹⁴⁰

The Court's definition of commercial speech is admittedly narrow.¹⁴¹ Although the Court has not answered whether the commercial-speech doctrine applies to social media, at least one lower court has. In *Bihari v. Gross*,¹⁴² the court, analyzing a trademark claim, concluded that a website that steered potential consumers to a

132. *Id.* at 769–70.

133. *Id.* at 770.

134. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

135. *Id.* at 66–68.

136. *Id.* at 61.

137. *Id.* at 66–67.

138. *Id.* at 67.

139. *Id.* at 68.

140. *But see Nike, Inc. v. Kasky*, 539 U.S. 654, 667 (2003) (Breyer, J., dissenting from denial of cert.) (suggesting that commercial speech that is blended with issues of public importance may warrant different First Amendment protections than when applied to commercial speech by itself).

141. *See Bernstein & Lee, supra* note 125, at 41 (“Current commercial speech doctrine takes a relatively limited view as to what constitutes a commercial transaction.”).

142. *Bihari v. Gross*, 119 F. Supp. 2d 309 (S.D.N.Y. 2000).

different competitor's site constituted commercial speech.¹⁴³ Specifically, the court explained that, although solely using one's name on the internet is not per se commercial use, posting hyperlinks to other websites that promote commercial services makes those links commercial speech as they are "conduit[s]" for potential consumers.¹⁴⁴

D. Regulating Commercial Speech: The Central Hudson Test

The Supreme Court provided the test for determining whether commercial-speech regulations violate the First Amendment in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹⁴⁵ There, the New York Public Service Commission ordered New York electric utilities companies to stop producing advertising that promoted the use of electricity.¹⁴⁶ The initial rationale for this regulation was to prevent overuse of fuel sources during a shortage.¹⁴⁷ However, the regulation stayed in place after the shortage was over.¹⁴⁸ The regulation divided advertising into promotional, informational, and institutional categories.¹⁴⁹ Promotional advertising induced people to buy utility services.¹⁵⁰ Institutional and informational advertising did not promote sales.¹⁵¹ To try to conserve energy, the government specifically banned promotional advertising.¹⁵²

To determine whether the regulation violated the First Amendment, the Court asked whether the commercial speech relates to unlawful or misleading activity.¹⁵³ If the speech is not unlawful or misleading, the government has less regulatory power and the regulation is subject to a three-factor test.¹⁵⁴ The regulation is only valid if: (1) there is a substantial government interest, (2) the regulation directly advances that interest, and (3) the regulation does not govern more speech than necessary.¹⁵⁵

143. *Id.* at 318.

144. *Id.*

145. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

146. *Id.* at 558.

147. *Id.* at 559.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 564.

154. *Id.*

155. *Id.*

The Court expressed the importance of balancing the interest in protecting consumers from false information with accepting “incomplete” information in advertising because “the First Amendment presumes that some accurate information is better than no information at all.”¹⁵⁶ Any regulation-suppressing information, even advertising, reduces information that consumers can use to make decisions, which “defeats the purpose of the First Amendment.”¹⁵⁷

The Court emphasized the high burden of proof that befalls regulators attempting to regulate this speech.¹⁵⁸ Regulators cannot guess how commercial speech might harm a consumer.¹⁵⁹ Instead, the regulator “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁶⁰ No case explains the standard for determining these harms. Although a regulator may not need an excessive amount of background information to show these harms, the Court requires at least “studies and anecdotes” delineating the harms.¹⁶¹

E. Commercial Speech and Compelled Disclosures

The Supreme Court has also discussed the government’s ability to require commercial disclosures. In *Zauderer v. Office of Disciplinary Counsel*,¹⁶² Ohio required attorneys to disclose information about their fee arrangements. The Court determined that the regulation was constitutional, holding that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”¹⁶³ However, the Court cautioned that disclosure requirements that were

156. *Id.* at 561–62.

157. *Id.* at 567.

158. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 646 (1985) (“Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”).

159. *See Adam Thierer, Advertising, Commercial Speech, and First Amendment Parity*, 5 CHARLESTON L. REV. 503, 512 (2011) (“[R]estrictions on commercial speech must be grounded in a substantive, empirical showing of harm, not merely conjectural harms such as claims of ‘annoyance’ or ‘unease.’”).

160. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

161. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995).

162. *Zauderer*, 471 U.S. at 657.

163. *Id.* at 651.

“unjustified or unduly burdensome” would potentially violate the First Amendment if they chilled core expressive speech.¹⁶⁴

Later, in *Riley v. National Federation of the Blind*,¹⁶⁵ the Court examined whether commercial speech had limited protections if it was presented within noncommercial speech.¹⁶⁶ Although the Court did not answer whether the speech was commercial, it explained that speech does not “retain[] its commercial character when it is inextricably intertwined with [core expressive] speech.”¹⁶⁷ Instead, the amount of scrutiny applied to intertwined speech depends on “the nature of the speech taken as a whole and the effect of the compelled statement thereon.”¹⁶⁸ The challenged regulation warranted strict scrutiny because attempting to parcel out commercial and noncommercial speech “would be both artificial and impractical.”¹⁶⁹

III. THE FTC’S EFFORTS TO REGULATE INSTAGRAM ADVERTISING

As the advertising landscape changes, commercial speech becomes harder to define. The initial definition of commercial speech—speech that does no more than “propose a commercial transaction”—is unclear when applied to social media.¹⁷⁰ Social media is a realm in which the lines between advertisement and entertainment blur. The FTC has recognized this change and has attempted to respond to it, explaining that consumer-generated media has changed the way that advertising messages are disseminated.¹⁷¹ That change is the agency’s rationale for strengthening its material-connection disclosure requirements.¹⁷² But due to the blurring between commercial and noncommercial speech, FTC regulations aimed at endorsers may regulate both types of speech, meaning the regulations potentially violate the First Amendment.

164. *Id.*

165. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781 (1988).

166. *Id.* at 795–96.

167. *Id.* at 796.

168. *Id.*

169. *Id.*

170. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

171. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,134 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

172. *See id.* (discussing the reasoning behind changes to the disclosure requirements).

The FTC's requirement that endorsers indicate their postings are advertisements is a speech compulsion.¹⁷³ If the Instagram posts are commercial speech, then the agency's material-disclosure regulation is subject to the *Central Hudson* test.¹⁷⁴ If they are not commercial, however, they are subject to strict scrutiny, which is much harder to overcome.¹⁷⁵ Recall that commercial speech, as defined in *Virginia State Board of Pharmacy*, is speech that proposes a commercial transaction.¹⁷⁶ Additionally, under *Bolger* commercial speech exists if the speaker concedes it is an advertisement, the speech references a specific product, and the speech is economically motivated.¹⁷⁷

Although chilling speech may not be as problematic in the traditional advertising context, social-media advertising mixes commercial and core expressive speech. Unlike in *Virginia State Board of Pharmacy*, the commercial entity does not distribute the commercial speech itself; rather, it speaks through a person whose social-media presence is not limited to commercial activity. Posters disseminate these messages on their own, which makes distinguishing endorsements from nonendorsements all the more important in the First Amendment context. As written, the FTC's regulation has the potential to limit not only the speech of the commercial speaker but also the private individual's core expressive speech.

The FTC's current material-disclosure regulations on Instagram highlight this concern. To combat this potential issue, the FTC should more readily define what it is regulating on Instagram to prevent the chilling effect that the Endorsement Guides may have on noncommercial speech.

Part III.A provides an overview of a recent case involving Instagram endorsements and whether the Instagram posts in question are commercial speech. Part III.B discusses additional examples provided by the Endorsement Guides and how the commercial-speech test applies in these contexts. Part III.C suggests that the material-connection disclosure requirement can chill core expressive speech.

173. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely *and the right to refrain from speaking at all.*” (emphasis added)).

174. For further discussion, see *supra* Part II.D.

175. For further discussion, see *supra* Part II.C.

176. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

177. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

Finally, Section D discusses whether or not the FTC's requirements would pass strict scrutiny if the regulation were challenged.

A. *Follow the FTC on Instagram: The Lord & Taylor Case*

The FTC has already applied the Endorsement Guides to fashion retailer Lord & Taylor's recent marketing efforts on Instagram, a regulatory move that indicates the FTC assumed that the company's Instagram posts were commercial.

In March of 2015, Lord & Taylor launched a new women's fashion collection entitled "Design Lab."¹⁷⁸ To help promote the collection, the store sent a dress, known as the "Paisley Asymmetrical Dress," to fifty Instagram users.¹⁷⁹ These users were known fashion bloggers and social-media influencers who shared daily pictures of their outfits and fashion inspiration on their Instagram feeds.¹⁸⁰ The users were paid to post a photograph of them wearing the dress, styling it in whatever way they chose.¹⁸¹ They were also expected to tag the "@lordandtaylor" Instagram handle and use the hashtag "#DesignLab" in the caption of the photo.¹⁸² The campaign was successful, reaching 11.4 million Instagram users and resulting in 328,000 visits to the brand's page.¹⁸³ The dress sold out within days.¹⁸⁴ The FTC undermined that success by bringing an action against Lord & Taylor for, among other things, misrepresentations about the Instagram postings.¹⁸⁵

The complaint alleged that Lord & Taylor "represented, directly or indirectly, expressly or by implication, that the 50 Instagram images and captions reflected the independent statements of impartial fashion influencers."¹⁸⁶ The FTC claimed not only that Lord & Taylor sent the dress to and compensated the posters but also that the store

178. David Griner, *Lord & Taylor Got 50 Instagrammers to Wear the Same Dress, Which Promptly Sold Out: Flooding Fashion Feeds Pays Off*, ADWEEK (Mar. 31, 2015, 5:44 PM), <http://www.adweek.com/news/advertising-branding/lord-taylor-got-50-instagrammers-wear-same-dress-which-promptly-sold-out-163791> [<https://perma.cc/Y2AZ-V6JC>].

179. Complaint at 2, *In re* Lord & Taylor, LLC, No. C-4576 (FTC May 20, 2016), File No. 152-3181, <https://www.ftc.gov/system/files/documents/cases/160523lordtaylormcpt.pdf> [<https://perma.cc/65QY-QFJV>].

180. For an example of a fashion blogger, see Wendy Nguyen (@wendyslookbook), INSTAGRAM, <https://www.instagram.com/wendyslookbook> [<https://perma.cc/JL9V-J2N6>].

181. Complaint, *supra* note 179, at 2.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 3.

186. *Id.*

preapproved the posts, ensuring that both the hashtag and Lord & Taylor's Instagram handle were appropriate.¹⁸⁷ Additionally, Lord & Taylor made some "stylistic edits" to the users' proposed captions.¹⁸⁸ According to the FTC, the problem with this marketing technique was that none of the posts included disclosures of the material connection between Lord & Taylor and the posters.¹⁸⁹ There was no mention that the users received the dress for free, that Lord & Taylor paid the posters to post the pictures, or that the posts were part of an advertising campaign.¹⁹⁰ Therefore, the FTC charged Lord & Taylor with committing a deceptive practice by not sharing facts that would be material to consumers deciding to purchase the dress,¹⁹¹ in violation of § 5(a) of the FTC Act.¹⁹²

Lord & Taylor ultimately settled the case with the FTC in March 2016.¹⁹³ In addition to disclosing material connections and ceasing to misrepresent paid sponsors as independent consumers, the company must also participate in a monitoring program that allows the FTC to review any promotional materials or advertisements that use endorsements to ensure they are in accordance with legal requirements.¹⁹⁴ It does not appear that any action was brought against any individual who participated in the campaign.

It is questionable whether the Instagram postings made by the fashion bloggers constitute commercial speech. The photographs had the dress—styled as the poster desired—in a location chosen by the poster. These photographs alone, without the accompanying description, could express a variety of things, from enjoying a sunny day to highlighting the shoes the poster was wearing. In the descriptions of the photographs, only one actually referenced a price

187. *Id.* at 2.

188. *Id.*

189. *Id.* at 3.

190. *Id.* at 2.

191. *Id.* at 3.

192. *See id.* The complaint specifically alleges that Lord & Taylor participated in "unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act." *Id.*

193. *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers,"* FED. TRADE COMM'N (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> [<https://perma.cc/55N9-VPS2>].

194. Decision and Order, *In re* Lord & Taylor, LLC, No. C-4576 (FTC May 20, 2016), File No. 152-3181, <https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf> [<https://perma.cc/2GW6-QVUT>].

or how to “get the look” pictured.¹⁹⁵ The others expressed that the posters liked the dress and that it was a part of the Design Lab collection. Additionally, they tagged the Lord & Taylor Instagram account.¹⁹⁶

Applying *Virginia State Board of Pharmacy*’s commercial-speech definition, it is hard to say that these photographs and descriptions propose a commercial transaction. The basic premise of Instagram is to allow posters to share photographs and descriptions.¹⁹⁷ If solely providing photographs of products with a description of that product were enough to make them commercial speech, then many of the photographs on Instagram could be commercial. For example, someone posting a picture and description of a fancy dinner at a restaurant is not, by itself, commercial speech. In *Virginia State Board of Pharmacy*, the banned materials discussed the items and their prices.¹⁹⁸ Although explicit discussion of prices may not be necessary to promote a commercial transaction,¹⁹⁹ an Instagram user posting a photograph of an item and tagging the profile of the store where it can be purchased similarly does not necessarily suggest a commercial transaction. Traditional advertisements can consist of only a picture of the product without any discussion of the price. But Instagram users post pictures, like the ones the FTC addressed in the Lord & Taylor case, every day, regardless of whether they have a commercial agreement. Therefore, on Instagram, merely posting a picture of someone wearing a product is not necessarily enough to propose a commercial transaction.

A viewer who clicks the photo’s tag of the Lord & Taylor Instagram is not able to purchase anything.²⁰⁰ Rather, she is sent to another feed with other pictures of items available at the store.²⁰¹ Some, but not all, of the pictures have descriptions indicating that the photographed item can be purchased by clicking another link in the

195. See Exhibit A at 5, *In re Lord & Taylor, LLC*, No. C-4576 (FTC May 20, 2016), File No. 152-3181, <https://www.ftc.gov/system/files/documents/cases/160523lordtaylorexhibit-a.pdf> [<https://perma.cc/588S-C2R2>] (providing a link for followers to “shop [the] exact look”).

196. *Id.*

197. For further discussion of how Instagram works, see *supra* Part I.A.

198. *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 752 (1976).

199. Indeed, in *Virginia State Board of Pharmacy* the Court held that speech communicating “prescription drug price information” was protected by the First Amendment. *Id.* at 770.

200. Lord & Taylor (@lordandtaylor), INSTAGRAM, <https://www.instagram.com/lordandtaylor> [<https://perma.cc/U2LJ-KFQU>].

201. *Id.*

biography section of the Lord & Taylor Instagram account.²⁰² That link sends the viewer to yet another page where she must first identify the picture of the item that she wants to purchase, then click on the item in that photograph to be sent to the Lord & Taylor website, where she can ultimately order the item.²⁰³ This tangential connection requires multiple steps to finally reach a proposed transaction; such a connection should not allow regulators to regulate each step of the connection as commercial speech.

It is true that the dress subsequently sold out after the posts were disseminated, but neither case that defines commercial speech requires analyzing the effects of the speech. Instead, the focus is on what the posts themselves propose. Solely looking at a photograph of a dress and knowing who manufactured the dress does not itself propose buying the dress, especially in the context of Instagram, in which these posts occur often.

In *Bihari*, the district court suggested that the links automatically make the posts commercial, but the question of how far that connection should extend remains.²⁰⁴ Linking to a profile where someone can buy something may be a commercial connection, but linking to a profile that includes photographs of puppies, a woman taking a bath, and a New York skyline—among images of products you can purchase by visiting an additional website—calls into question the commerciality of the profile as a whole.²⁰⁵

Riley also held that regulating commercial speech intertwined with noncommercial speech would subject the regulation to strict scrutiny.²⁰⁶ In regulating Instagram, as seen by these posts, it may be difficult to extricate the commercial aspects from the noncommercial aspects of the photographs and comments. It is unclear what makes these photographs commercial: whether it is the tag of the Lord & Taylor profile, the hashtags in the comment, or the presence of the dress in the photograph. Individually, each component could be considered

202. See, e.g., Lord & Taylor (@lordandtaylor), *Grey Skies, Grey Shoes*, INSTAGRAM, <https://www.instagram.com/p/BLhGLB0Dmic/?taken-by=lordandtaylor> [<https://perma.cc/J4WP-AEWV>] (featuring a photograph of grey shoes posted on October 13, 2016, with a caption directing viewers to “shop link in bio”).

203. Lord & Taylor, LIKE 2 BUY, <http://like2b.uy/lordandtaylor> [<https://perma.cc/2TMY-PJH4>].

204. *Bihari v. Gross*, 119 F. Supp. 2d 309, 318 (S.D.N.Y. 2000).

205. See Lord & Taylor, *supra* note 200 (displaying photos of puppies, bathtubs, and skylines amongst other, more clothing-focused posts).

206. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

noncommercial, but together, they may propose a commercial transaction.

Importantly, Lord & Taylor had a large hand in what the posters' commentary contained, making sure to check that the comments were adequate. This heavy-handedness may make the speech seem more commercial, and it weighs in favor of the *Bolger* consideration of producing the work based on an economic motivation.²⁰⁷ Considering those factors together, as *Bolger* did, these posts could be commercial speech subject to fewer First Amendment protections.

B. *The Endorsement Guides' Example*

An additional analysis relates Instagram endorsements to traditional ones. The Endorsement Guides provide a prime example; they discuss a tennis player who appears on a talk show to talk about a recent surgery.²⁰⁸ If her contract with the surgical practice requires her to speak publicly, then the FTC says she is required to disclose any material connection she has with the company.²⁰⁹ The example later mentions, however, that if she was contractually obligated to wear clothing provided by an athletic-wear company for public appearances and did so during that interview, she would not be required to mention having a material connection with that company.²¹⁰ In the second instance, she is not making any representation about the clothes.²¹¹

Considering the tennis-player example as it applies to the athletic-wear company, wearing the clothes on a television program without referencing the company in the interview is probably not commercial speech. It would be hard to determine that wearing clothes on television in that context would be speech at all because it is not inherently expressive, as is required by *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*²¹² But—as indicated by the WPAAs page—if the tennis player were to take a screenshot of the interview, post it on her Instagram account, and tag the athletic-wear company's account in the photo, she would have to disclose her material connection to the company because her followers could see it

207. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983).

208. 16 C.F.R. § 255.5 ex. 3 (2016).

209. *Id.*

210. *Id.*

211. *Id.*

212. See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (“[W]e have extended First Amendment protection only to conduct that is inherently expressive.”).

as an endorsement. The comment and photograph placed the post into the category of speech, but the tagging of the athletic-wear company should not automatically change core expressive speech into commercial speech.

The FTC overextends the commercial-speech doctrine by allowing a simple tag to transform core expressive speech into commercial speech. Tagging a photograph does not actively provide a manner through which a consumer can buy a product. Rather, it solely references the manufacturer of a product, which is not commercial speech by itself. Otherwise, particularly when it comes to celebrities, a wide variety of speech would be swept into the definition. For example, celebrities often discuss their dress designers on the red carpet. Based on the FTC's rationale as it applies to tagging photographs, such an interview would be considered commercial speech if an actress received the dress for free and she was paid to mention it. Although the red carpet provides an opportunity for a designer to get his or her product recognized, that does not automatically make wearing and talking about the dress speech that proposes a commercial transaction.

The FTC does not attempt to regulate all photographs of people wearing clothing bearing recognizable logos. However, following the FTC's logic that posters only need to portray a positive message about a product to be an endorsement, a high-profile athlete dressed in an athletic-wear brand could cause a viewer to connect the brand to the athlete's success. An athlete endorses a product—identifiable by an insignia—when he wears it, which is why companies pay a lot to sponsor athletes.²¹³ Yet it is absurd to expect an athlete to make a disclaimer that he was paid to wear his sponsor-provided shoes whenever he stepped onto a football field. Such a requirement would change the way games are broadcasted. In the same way, as it relates to Instagram, it would make little sense to require celebrities or paid influencers to label each photograph that contains a product with a material-connection disclosure when most of the posts are expressions of their everyday lives.

Adding a hashtag or tagging a company in the photograph is the same thing as having a celebrity wear clothing with an identifiable logo. Just as a spectator recognizes the Nike logo on Marcus Stroman's jersey while watching a game, an Instagram viewer recognizes a

213. See Darren Rovell, *LeBron James Signs Lifetime Nike Deal*, ESPN (Dec. 8, 2015), http://espn.go.com/nba/story/_id/14314807/lebron-james-signs-life-deal-nike [<https://perma.cc/K7BU-MJLD>] (discussing the value of shoe deals with professional athletes).

hashtag or profile tag in a photograph. The mere presence of a brand-identifying feature should not be enough to require a disclosure, like how the FTC does not require athletes to disclose that they are paid to wear clothing provided by sponsors when they play in a televised sport.

C. The FTC's Material-Disclosure Requirements Can Chill Speech

Because it is difficult to determine whether an Instagram picture is commercial speech, the FTC's material-disclosure requirement can chill speech. Marcus Stroman's Instagram is an apt example.

Naturally, the brands Stroman associates with are reflected on his Instagram account.²¹⁴ The account includes photographs of Stroman playing baseball, attending concerts, and spending time with family.²¹⁵ Still, almost every photograph he posts tags at least one sponsor.²¹⁶ Some photos may be paid for by sponsors, and some may not. Similar to the Lord & Taylor case, Stroman likely has not paid for this clothing or gear, but almost none of the posts have captions discussing the clothing.²¹⁷ If the agency considers the photos to be Stroman acting on behalf of his sponsors as part of an overall marketing campaign, then—based on the FTC's definition of an endorsement—these posts would be endorsements subject to regulation.²¹⁸ But the FTC has also said that if the audience thinks Stroman is portraying a positive message in his post about a product, then that would be an endorsement.²¹⁹

Applying the regulation based on audience interpretation would make the regulation overbroad. The commercial-speech test does not include audience response as a factor in determining if speech is commercial. An audience may interpret a post to be an endorsement even if it is not commercial speech under the Supreme Court's test. Requiring an endorser to provide a disclosure whenever the audience

214. See Stroman, *supra* note 4.

215. *Id.*

216. *Id.*

217. *Id.*

218. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,125–26 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255) (summarizing the “fundamental question” on endorsement as whether the speaker is “acting on behalf of the advertiser or its agent, such that the speaker’s statement is an ‘endorsement’ that is part of an overall marketing campaign”).

219. See FED. TRADE COMM’N, *supra* note 19, at 7 (“Simply posting a picture of a product in social media . . . could convey that you like and approve of the product. If it does, it’s an endorsement.”).

might think the post is an endorsement means that the regulation will potentially cover noncommercial speech.

Bolger required the combination of all three characteristics to determine if the pamphlets constituted commercial speech; having one characteristic was not enough.²²⁰ Maybe if Stroman has a contract requiring him to post photographs of products that his sponsors review, then that would constitute commercial speech. If there is not a contract, simply tagging the photographs with company profiles and having sponsorship connections with the brands represented should not be enough to constitute commercial speech. Based on the logic of the FTC's guidance, however, the FTC could prosecute Stroman and his sponsors for each post if Stroman does not disclose his material connection to the brands. This threat of liability could prevent Stroman from posting anything that the FTC could perceive to be an endorsement without a material-connection disclosure.

The FTC recognizes that using a standard based on how consumers perceive the relationship between an endorser and a producer can be “tricky,” so it recommends that endorsers err on the safe side of the regulation and disclose the connection whenever they speak about a product.²²¹ Yet there are times when an endorser may speak about a product in a way that might not warrant disclosure. In response, people may choose not to post at all for fear of regulation. The Court addressed this concern in *Zauderer*,²²² holding that disclosure requirements were acceptable if they were “reasonably related to the State’s interest in preventing deception of consumers.”²²³ But the Court explained that “unjustified” disclosure requirements could potentially violate the First Amendment if they chill protected commercial speech.²²⁴ Encouraging disclosure just in case there might be a material connection is not reasonable, and likely will chill core expressive speech for fear of regulation.

220. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1982).

221. FED. TRADE COMM’N, *supra* note 19, at 7.

222. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

223. *Id.* at 651.

224. *Id.* For a discussion of the Court’s concerns with regulations chilling speech, see *supra* notes 163–64 and accompanying text.

D. Do the FTC's Regulations Pass Strict Scrutiny?

The FTC says that its material-disclosure requirement is designed to protect consumers.²²⁵ In the realm of new media, the FTC is concerned with ensuring that consumers can recognize when postings are sponsored speech.²²⁶ Although this is a valid interest, it is not clear that such an interest will be compelling, especially compared to other interests that the Court has historically found compelling.²²⁷ Even if the interest is compelling, the FTC's definition of speech from an audience viewpoint is overinclusive because it potentially includes speech that is not commercial under Supreme Court precedent. Additionally, the Court has disfavored paternalistic attempts to protect consumers from the possibility of receiving misleading information and has favored allowing more commercial speech.²²⁸ This concern is appropriate as one considers the FTC's attempts to explain why and how photographs should be regulated.

The FTC's main concern in ensuring that audiences can recognize endorsements on social media is similar to the issue the Court addressed in *Virginia State Board of Pharmacy*.²²⁹ There it rejected the state's argument that consumers would be allured by the more expensive advertising and duped into making inappropriate choices in selecting pharmaceutical drugs.²³⁰ The Court believed that consumers could make their own choices without the state protecting them.²³¹

In the Instagram context, potential consumers can decide whether to purchase a product based on a photograph shared by a poster. They do not have to click on the myriad links required to purchase the

225. *About the FTC*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/PHR5-GF52>] (“[Our mission is to] prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.”).

226. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,134 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255); FED. TRADE COMM'N, *supra* note 19, at 7 (“If your audience thinks that what you say or otherwise communicate about a product reflects your opinions or beliefs about the product, and you have a relationship with the company marketing the product, it's an endorsement subject to the FTC Act.”).

227. For a discussion of the interests the Court has considered compelling, see *supra* note 118 and accompanying text.

228. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769–70 (1976).

229. *Id.* at 770.

230. *Id.*

231. *Id.*

product. Granted, no one who views an advertisement must purchase the item. However, the FTC's unclear definition of an endorsement may prevent Instagram users from speaking even core expressive speech.

IV. THE FTC SHOULD CLARIFY ITS DEFINITION OF ENDORSEMENT BY FOCUSING ON SPEAKER INTENT

The FTC provides a definition of endorsement that is overbroad and may chill speech. Instead of focusing on what a consumer might perceive to be an endorsement, the FTC should examine the poster's intent to determine what constitutes an Instagram endorsement. There are some instances when the intent is clear.²³² An Instagram poster who encourages viewers to purchase a product subject to a contract requiring her to do so would constitute an endorsement. This post would fall into the category of commercial speech because it proposes a commercial transaction and would likely be conceded to be an advertisement.²³³ However, merely tagging a company in a photograph of a product that a poster is wearing does not necessarily show the same intent if the poster does not tell viewers how to buy the product. Additionally, making a positive statement about a product, even if a company pays a user to do so, does not necessarily propose a commercial transaction.

Focusing on the poster's intent rather than the speech's content allows the FTC to avoid First Amendment concerns about regulating noncommercial speech. Although it has become more commercialized, posting on social-media sites is still inherently personal. Users—specifically, potential endorsers—frequently post on Instagram.²³⁴ An intent requirement will ensure that posters know which posts are subject to FTC regulation and should include a disclosure.

232. See Brown, *supra* note 42 (providing examples of celebrity endorsements on Instagram and how much the celebrities are paid).

233. See Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 754–55 (2010) (arguing that “a disclosure requirement focused on the potential for deception and distortion of consumer decisions based on the economic relationship between the underlying advertiser and the speaker is consistent with the justification for commercial speech doctrine”).

234. See Sydney Parker, *A Long List of Instagram Statistics that Marketers Need to Know*, HOOTSUITE (Nov. 3, 2016), <https://blog.hootsuite.com/instagram-statistics> [<https://perma.cc/LF3R-ZFM3>] (indicating that Instagram users share 95 million photos and videos per day on average).

Instituting an intent requirement to determine if speech is an endorsement would also ensure that the FTC regulates potentially harmful speech without sweeping in other speech that a speaker has the right to post without regulation. With an intent requirement, the FTC will only require disclosure for speech that is actually commercial, rather than potentially enveloping core expressive speech. Commercial speech is speech that proposes a commercial transaction.²³⁵ Looking to the intent of the speaker in the regulation clarifies whether the speech proposes a commercial transaction, preventing the FTC from potentially determining that speech is commercial when it is not.

Additionally, *Bolger* held that a concession that the speech is an advertisement is a factor in determining if speech is commercial.²³⁶ If the speaker's intent is to post something to advertise a product, then the requirement is fulfilled. Furthermore, if the FTC examined a contract to determine that intent, that contract would likely provide evidence of economic motivation and refer to a specific product, which are the considerations *Bolger* says a court should consider.²³⁷ Focusing on intent allows speakers to recognize whether their speech requires a disclosure. This approach thus alleviates the concern that an Instagram poster will not post for fear of unexpected regulation.

Intent can be viewed objectively or subjectively. This Note proposes a subjective intent requirement that is determined case by case. Such a requirement provides posters with notice about which posts are subject to FTC regulation. In determining the intent of the speakers, the FTC can examine many of the characteristics that it did in the *Lord & Taylor* case. First, it can examine any contractual obligations the poster may have to the company in making any posts. The FTC should only regulate posts created as a result of these agreements. The FTC can also look to the commentary provided by the poster in relation to the photograph. Posts that indicate that the audience should purchase the photographed item or how to purchase the item would be commercial speech. The FTC already said that it looks to the factual circumstances of each case before making a ruling, so this analysis should not provide any additional work for the agency.²³⁸

235. *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

236. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

237. *Id.*

238. *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255). The Endorsement Guides

It is possible that subjective intent allows posters to claim that they never intended to post anything as an advertisement. But objective indicators—like a contract that requires a certain number of Instagram posts or that requires posters to provide a link for purchase—can evince subjective intent.

An objective intent requirement could provide the same concerns that arise with the FTC's current interpretation of endorsements: it prevents the poster from having notice of what can be regulated. If a poster is subject to regulation whenever the FTC can objectively determine the speaker's intent was to endorse a product, those standards are not likely to be clear enough to assure the poster of when she will be subject to regulation. An objective intent requirement may work, but only if it has criteria that specifically applies the commercial-speech doctrine to ensure that it was not overbroad.

Applying the subjective intent standard to the Lord & Taylor case, the Instagram post—in which the user provided the viewers with a link to a website that told viewers how to acquire the dress—showed the poster's intent to propose a commercial transaction. If the FTC were to attempt to hold her or Lord & Taylor liable for not providing a material disclosure, the charges would comport to the commercial-speech doctrine and the intent of the speaker would be clear. But for the posts that did not contain commercial speech, the FTC should look to the intent of the posters and Lord & Taylor, elucidated by evidence like whether there was a contract or agreement that required the posters to encourage consumers to purchase the dress.

The speaker's intent answers the question of whether the speech proposes a commercial transaction, while also indicating whether the speaker concedes that the speech is an advertisement. Additionally, any contract could result in the poster being paid for the post, indicating that the post was made for an economic reason. Focusing on speaker intent also limits the potential for chilling speech because an Instagram poster will know whether she posts an image in response to an agreement to promote a product for sale or as a part of her daily

explain that the circumstances that would determine whether or not a statement is an endorsement include but are not limited to

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

Id.

life. Finally, a subjective intent requirement also eliminates the confusing and impractical expectation that a poster must decipher all possible responses that an audience may have to the post.

Instagram posts that share a product without promoting its purchase look more like a product placement than an advertisement. In its WPAA page, the FTC states that product placements do not require a disclosure that they were paid for by an advertiser.²³⁹ The page defines product placements as “merely showing products or brands in third-party entertainment or news content.”²⁴⁰

The FTC’s definition of product placement is similar to the context in which the Lord & Taylor dress and many of the posts on Stroman’s Instagram page were shared. These photographs explicitly showed the product in the context of third-party entertainment, by viewing an image on an Instagram feed. In situations when the poster shares a photograph of an item, but the poster does not intend to propose a commercial transaction, the FTC should view the photograph as a product placement and not require a disclosure that there is a material relationship.

There will always be potential difficulties in determining intent. However, the interest in protecting the freedom of speech should outweigh these challenges. Some situations indicate a speaker’s intent to promote a commercial transaction. When it is not clear that a speaker intended to promote a transaction, she should not be held liable.

Ultimately, by shifting the focus from the audience’s perception to the speaker’s intent, the FTC will ensure that its regulations actively apply to commercial speech while continuing to ensure consumer safety. Courts have emphasized the importance of protecting regulators from chilling speech. By allowing speakers to recognize that their intent—rather than the response of an unknown audience—determines the nature of the speech, Instagram posters will be free to share speech without concern of potential FTC regulation.

CONCLUSION

Advertising has changed drastically since the FTC’s establishment over a century ago. Though social media has changed the advertising

239. See FED. TRADE COMM’N, *supra* note 19, at 8 (“FTC staff has expressed the opinion that under the FTC Act, product placement . . . doesn’t require a disclosure that the placement was paid-for by the advertiser.”).

240. *Id.*

landscape, it has also complicated the FTC's ability to regulate endorsements. The FTC has crossed the line from regulating commercial speech to regulating noncommercial speech. Instead of focusing on whether the speech itself promotes a commercial transaction, the FTC has focused on the audience's response to a photograph, which has led to a potential chilling of speech amongst celebrities and social influencers.

To prevent this chilling of speech, the FTC should shift its focus from the audience's perception to the speaker's intent. Such a shift will allow the agency to regulate speech that proposes a commercial transaction, rather than sweeping in noncommercial speech as well. Emphasizing the speaker's intent also provides a bright line for Instagram users who may have concerns about whether their speech is considered commercial under the current regime. The FTC must recognize that its focus on audience perception paternalistically overreaches in a way that stifles First Amendment freedom of expression. Focusing on the speaker's intent will allow the agency to prevent the limitation of personal freedoms.