

Washington University Law Review

Volume 97 | Issue 2

2019

Exploiting Pre-Existing Beliefs

Ahmed E. Taha

Pepperdine University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Consumer Protection Law Commons](#), [Law and Psychology Commons](#), and the [Marketing Law Commons](#)

Recommended Citation

Ahmed E. Taha, *Exploiting Pre-Existing Beliefs*, 97 WASH. U. L. REV. 607 (2019).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol97/iss2/11

This Commentary is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

EXPLOITING PRE-EXISTING BELIEFS

AHMED E. TAHA *

ABSTRACT

Advertisements and product labels for a wide range of consumer and investment products have highlighted product characteristics that some people erroneously believe make them superior to competitor goods and services. This article argues that these advertisements and labels are deceptive because they imply that those erroneous beliefs are accurate even if they don't mention the erroneous beliefs. Moreover, these advertisements and labels can deceive even those individuals who have no pre-existing beliefs regarding the highlighted characteristics. This deception distorts purchasing and investing decisions, causing consumers and investors financial loss, reduced satisfaction, and sometimes even physical harm. Because these advertisements and labels are used for many different products, they are regulated by a number of federal agencies, whose regulatory approach often requires the advertisement or label to include a disclaimer of the erroneous belief. This article examines the effectiveness of such disclaimers and other possible regulatory approaches. It argues that often a stronger approach is justified: a prohibition against highlighting a product characteristic about which consumers or investors have an erroneous belief.

* Ahmed Taha is a Professor of Law, Pepperdine University School of Law; J.D., Ph.D., Stanford University; B.A., B.S., University of Pennsylvania; ahmed.taha@pepperdine.edu. The author is grateful to Michael Helfand, John Petrocelli, Breagin Riley, and Victoria Schwartz for helpful suggestions.

TABLE OF CONTENTS

INTRODUCTION.....	608
I. ADVERTISEMENTS AND LABELS THAT EXPLOIT PRE-EXISTING BELIEFS ARE DECEPTIVE.....	612
II. EXPLOITING PRE-EXISTING BELIEFS HARMS CONSUMERS, INVESTORS, AND COMPANIES.....	617
III. HOW REGULATORY AGENCIES TREAT EXPLOITATION OF PRE- EXISTING BELIEFS	620
A. <i>SEC Regulation of Mutual Fund Performance Advertisements</i>	622
B. <i>FTC and FDA Standards for Advertisements and Labels of Additive-Free Cigarettes</i>	625
IV. POSSIBLE REGULATORY APPROACHES	629
A. <i>Highlighted Characteristic Relevant Only Because of Erroneous Belief</i>	629
B. <i>Highlighted Characteristic Also Relevant for Legitimate Reason</i>	633
CONCLUSION	635

INTRODUCTION

During the most recent Super Bowl, a humorous but controversial advertisement for Bud Light beer aired for the first time.¹ In the advertisement, a huge barrel of corn syrup is delivered to the fictional Bud Light castle where Bud Light is brewed. However, the delivery is in error because, as the Bud Light King states, “We don’t brew Bud Light with corn syrup.”² When informed that Miller Lite is brewed with corn syrup, the king leads a party on a long journey to take the corn syrup to the Miller Lite castle. Alas, upon arriving, the guard at the entrance of the castle tells them that the corn syrup is not Miller Lite’s; the Miller Lite castle already received its corn syrup shipment that morning. The guard, however, directs the party to the Coors Light castle because Coors Light is also brewed with corn syrup. After another long (and perilous) journey, the party reaches the Coors Light castle where a guard happily accepts the corn syrup from them and says, “To be clear, we brew Coors Light with corn syrup.” The advertisement finishes by showing a glass of Bud Light next to the words

1. David Vinjamuri, *Bud Light’s Super Bowl Ad: Corn Syrup, Ethics and Mistaken Identity*, FORBES (Feb. 6, 2019, 4:08 PM), <https://www.forbes.com/sites/davidvinjamuri/2019/02/06/bud-lights-super-bowl-ad-corn-syrup-ethics-and-mistaken-identity/#33a4bc4f3a39> [https://perma.cc/QM7S-YLUD].

2. The advertisement can be viewed on YouTube. Bud Light, *Bud Light – Special Delivery*, YOUTUBE (Feb. 3, 2019), https://www.youtube.com/watch?v=LkHvj_KEHBk.

“Brewed with no Corn Syrup,” while a voiceover states, “Bud Light. Brewed with no corn syrup.”

The advertisement’s message is not subtle: unlike its competitors, Bud Light is not brewed with corn syrup. Furthermore, the message is unquestionably true; Miller Lite and Coors Light are brewed with corn syrup, but Bud Light is not.³ Yet, the advertisement is controversial because there is no apparent reason why that fact should be relevant to consumers. Beer brewed without corn syrup is no healthier than other beer.⁴ Indeed, Anheuser-Busch, the maker of Bud Light, has been accused of using the advertisement to exploit an erroneous pre-existing belief possessed by some consumers that brewing beer without corn syrup is healthier.⁵ These consumers might be confusing corn syrup with high-fructose corn syrup,⁶ a sweetener that many consumers believe to be unhealthy.⁷ Indeed, Anheuser-Busch’s extensive focus-group testing of the advertisement found that “consumers generally don’t differentiate between high fructose corn syrup and corn syrup, and that it is a major triggering point in choosing brands to purchase, particularly among women.”⁸ In addition, the advertisement is likely exploiting the fact that many consumers don’t know that, even if corn syrup is used in the fermenting process, it will not be present in the finished beer.⁹

The controversy over the Bud Light advertising campaign has received attention in the national news media,¹⁰ and led to at least a postponement of a joint marketing campaign planned by four major beer makers aimed at

3. See Saabira Chaudhuri, *Bud’s Super Bowl Ad Imperils Beer Alliance*, WALL ST. J., Feb. 25, 2019, at A1.

4. Mahita Gajanan, *Bud Light Took a Stance Against Corn Syrup. But Experts Say That Doesn’t Make Beer Better or Healthier*, TIME (Feb. 4, 2019, 7:55 PM), <http://time.com/5520120/bud-light-corn-syrup/> [<https://perma.cc/65T9-TPWR>].

5. Vinjamuri, *supra* note 1.

6. *Id.* (Anup Shah, Vice President of Miller Beers, alleged that Budweiser is “trying to confuse consumers about the difference between high fructose corn syrup and corn syrup”).

7. *Id.* (“It appears . . . that over half of American consumers worry about [high-fructose corn syrup] in their diet.”); Chaudhuri, *supra* note 3, at A1 (“High-fructose corn syrup, used as a sweetener, has attracted negative attention for its role in the national obesity epidemic.”).

8. *Surprising Draft Stats from Super Bowl ’19*, BEER BUS. DAILY, Feb. 7, 2019 (citing Andy Goeler, Anheuser-Busch’s head of marketing for Bud Light).

9. Chaudhuri, *supra* note 3, at A1. Anheuser-Busch has argued that other reasons exist for it to highlight the fact that Bud Light is brewed using rice instead of corn syrup: “namely that consumers may align Bud Light with the ‘farm-to-table’ movement or using a ‘real ingredient versus a syrup.’” *MillerCoors, LLC, v. Anheuser-Busch Cos., LLC*, No. 19-cv-218-wmc, slip op. at 30 n.17 (W.D. Wis. May 24, 2019) (order granting preliminary injunction). However, a court recently concluded that this argument “seems counter to the weight of the evidence as to [Anheuser-Busch’s] intent that associating Miller Lite and Coors Light with corn syrup would motivate consumer’s health concerns with consuming corn syrup or worse, high fructose corn syrup.” *Id.* Section IV.B of the present article discusses possible regulatory approaches when consumers have erroneous pre-existing beliefs about a product characteristic that is also relevant to consumers for another, legitimate reason.

10. See, e.g., Chaudhuri, *supra* note 3; Vinjamuri, *supra* note 1; Gajanan, *supra* note 4.

increasing beer sales overall.¹¹ In addition, MillerCoors, LLC, the maker of Miller Lite and Coors Light beers has sued Anheuser-Busch for false advertising and for federal trademark dilution.¹² Part of the relief sought in the suit is a permanent injunction prohibiting Anheuser-Busch from disseminating any advertising, packaging, or other promotional materials that expressly claim or imply that Coors Light and/or Miller Light “contain corn syrup or high-fructose corn syrup; . . . are ‘made with’ or ‘brewed with corn syrup’ unless also expressly stating that corn syrup is completely converted into alcohol during the brewing process and not present in the final products; and/or . . . are inferior to, or taste worse than, *Bud Light* because they are brewed using corn syrup.”¹³

Advertisements that take advantage of erroneous pre-existing beliefs are not new. For example, in the 1960s and 1970s, aluminum emerged as a suspected cause of Alzheimer’s disease, resulting in concern about consumer products that contained aluminum, such as beverage cans, antiperspirants, and antacids.¹⁴ Although later research showed such concerns were unfounded, the myth that aluminum in consumer products can cause Alzheimer’s still exists.¹⁵ In the 1990s, Smithkline—the manufacturer of Tums antacid—launched a television advertising campaign that highlighted that Tums is “aluminum-free” and that competitor products (such as Roloids, Maalox, and Mylanta) contain aluminum.¹⁶ The advertisement did not mention Alzheimer’s disease nor state any other reason why being aluminum-free is desirable. Nevertheless, Smithkline’s competitors complained to television networks that the advertisement falsely implied that their antacids were harmful.¹⁷ In response to these complaints, Smithkline ultimately changed the advertisements to remove any reference to aluminum.¹⁸

The Bud Light and Tums advertisements are examples of a practice that the Federal Trade Commission has called “exploit[ing] preexisting beliefs.”¹⁹ The present article defines exploiting a pre-existing belief as

11. Chaudhuri, *supra* note 3, at A1.

12. Complaint for Injunctive and Other Relief at 34–36, MillerCoors, LLC v. Anheuser-Busch Cos., LLC, No. 19-cv-218 (W.D. Wis. Mar. 21, 2019).

13. *Id.* at 36.

14. *Myths*, ALZHEIMER’S ASS’N, <https://www.alz.org/alzheimers-dementia/what-is-alzheimers/myths> [<https://perma.cc/7VDA-PD9B>].

15. *Id.*

16. Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 295–96 (2d Cir. 1992).

17. *Id.* at 296.

18. *Id.*

19. See, e.g., Telebrands Corp., TV Savings, LLC, & Ajit Khubani—Commission Opinion and Order to Cease and Desist, No. 9313, Trade Reg. Rep. (CCH) ¶ 15,800, 2005 WL 8011919 (Sept. 19, 2005).

advertising or labeling that highlights a product characteristic that some people erroneously believe makes a consumer or investment product superior to its competitors for a particular reason. Such advertising need not create or explicitly refer to the false belief. For example, the Bud Light advertisement did not state that corn syrup is healthier, and the Tums advertisements did not mention Alzheimer's disease or any other reason why aluminum in antacids is undesirable. Nevertheless, these advertisements were designed to take advantage of many consumers' erroneous pre-existing beliefs about corn syrup and aluminum.

Advertisements and labels that exploit pre-existing beliefs are not uncommon. For example, mutual fund companies routinely advertise the past returns of their highest-performing equity mutual funds because many investors falsely believe that strong past performance is a good predictor of strong future performance. The advertisements do not explicitly claim that this belief is true. In fact, the advertisements are required by the Securities and Exchange Commission to include disclaimers explicitly warning that past results do not guarantee future results and discouraging investors from focusing very heavily on past returns. And yet, these advertisements are effective because many investors still have this false belief.²⁰

Similarly, until very recently, certain cigarette brands were promoted via labels and advertisements that exploited pre-existing beliefs by highlighting the fact that the cigarettes used tobacco that contained no chemical additives. These labels and advertisements did not explicitly claim that the lack of additives made the cigarettes safer than other cigarettes. In fact, they included a disclaimer mandated by the Federal Trade Commission stating that additive-free cigarettes are no safer than other cigarettes. Nevertheless, many smokers still erroneously believe that additive-free cigarettes are safer.²¹

This article argues that advertisements and labels that exploit pre-existing false beliefs are deceptive. The article uses insights from pragmatics, a branch of the field of linguistics, to explain why advertisements and labels that highlight a product characteristic—such as an antacid being aluminum-free or a mutual fund having high past returns—inherently imply that the product is superior to competitor products that don't have the highlighted characteristic.

Importantly, even to people who lack a pre-existing belief, these advertisements and labels falsely imply that the highlighted characteristic makes the product superior. Thus, although these advertisements and labels

20. See *infra* Section III.A.

21. See *infra* Section III.B.

are referred to as exploiting pre-existing beliefs, they are deceptive even to people who lack pre-existing beliefs.

These advertisements and labels harm consumers, investors, and companies. They cause people to falsely believe the product or investment is superior to that offered by competitors and distort people's purchasing and investing decisions. This causes financial loss, reduced satisfaction, and, in some cases, even physical harm. Moreover, the exploitation of pre-existing beliefs causes companies to waste valuable marketing resources developing or combatting deceptive advertisements and labels.

Because this practice has been employed in advertisements and labels for many types of products, a number of federal agencies are involved in its regulation. The regulatory approach has often been to require the advertisement or label to include a disclaimer of the erroneous belief. This article examines the effectiveness of this approach and other possible regulatory approaches, ultimately arguing that often a stronger approach is justified: a prohibition against highlighting a product characteristic about which consumers' have an erroneous belief.

Section I of this article uses insights from pragmatics to explain why advertisements and labels that exploit erroneous pre-existing beliefs are deceptive. Section II describes how consumers, investors, and companies are harmed by this practice. Section III presents two case studies examining how regulatory agencies have regulated these advertisements and labels. In particular, it examines the Securities and Exchange Commission's regulation of equity mutual fund advertisements that present funds' past returns, and the Federal Trade Commission's and Food and Drug Administration's actions regarding advertisements and labels for cigarettes made from tobacco lacking chemical additives. Section IV discusses possible regulatory approaches to advertisements and labels that exploit erroneous pre-existing beliefs and explores when each approach is best.

I. ADVERTISEMENTS AND LABELS THAT EXPLOIT PRE-EXISTING BELIEFS ARE DECEPTIVE

Pragmatics, a branch of the field of linguistics that studies "how language users actually use and interpret words and other signs in communication,"²² explains why advertisements and labels that exploit erroneous pre-existing beliefs are misleading. Scholars in the field recognize that the meaning

22. Harold Anthony Lloyd, *Law's "Way of Words": Pragmatics and Textualist Error*, 49 CREIGHTON L. REV. 221, 225 (2016).

communicated by words can depend on the context in which the words are communicated.²³

One of the most influential theories in pragmatics is Paul Grice's so-called theory of conversation.²⁴ This theory describes how effective communication is achieved in common social situations. The theory posits that, when engaged in conversation, people act cooperatively and accept that statements made in the conversation will be understood in a particular way.²⁵ Specifically, it posits that listeners and speakers will ordinarily understand what is implied by a statement by assuming that the speaker is following what Grice calls the "Cooperative Principle": "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."²⁶

Grice proposed that the Cooperative Principle is manifested in certain maxims that people assume that speakers abide by.²⁷ These maxims fall under one of four categories: Quality, Quantity, Manner, and Relation.²⁸ Among the maxims in each of the categories are:

- Quality: "Try to make your contribution [to the conversation] one that is true."
- Quantity: "Make your contribution as informative as is required (for the current purposes of the exchange)." However, "Do not make your contribution more informative than is required."
- Manner: "Be perspicuous."
- Relation (or Relevance): "Be relevant."²⁹

An example illustrates the importance of the maxim of Relevance in conversation. Imagine that a man leaving a store says to the shopkeeper, "I'm hungry, are there any good restaurants nearby?" and the shopkeeper replies, "There's a good restaurant that's a ten-minute walk from here." Although she did not explicitly say so, the shopkeeper's reply clearly implies that the shopkeeper believes that the restaurant is open now, because

23. John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735, 752–53 (2014); see also LED ZEPPELIN, *Stairway to Heaven*, on LED ZEPPELIN IV (Atlantic Records 1971) ("There's a sign on the wall, but she wants to be sure, 'cause you know sometimes words have two meanings.").

24. Lloyd, *supra* note 22, at 227 ("[M]uch of modern pragmatics began with the discourse analyses of Paul Grice.").

25. PAUL GRICE, *Logic and Conversation*, in *STUDIES IN THE WAY OF WORDS* 22, 26 (1989).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 26–27.

if she knew that the restaurant were closed, then her reply would not be relevant to the conversation. A closed restaurant is useless to a hungry person. In other words, because the man believes that the shopkeeper is abiding by the maxim “Be relevant,” he interprets the shopkeeper’s reply in a way that makes it relevant to the conversation that he initiated.³⁰

Since Grice, scholarship in conversational implicature³¹ generally has taken one of two approaches: “Relevance Theorists, who have attempted to build a theory of pragmatics and implicature on Grice’s maxim of Relevance alone . . . and the work of the Neo-Griceans, who have worked to salvage as much of Grice’s framework as possible.”³² Under both of these approaches, people in conversations are still generally assumed to believe that statements made in a conversation are relevant to that conversation.³³ Thus, it is widely accepted that listeners ordinarily will interpret statements in such a way as to make them relevant to the conversation.

This behavior of listeners also helps explain how people interpret statements made in advertising. Companies design product advertisements and labels to sell the products,³⁴ so consumers likely assume that statements companies choose to make in advertisements and on labels are relevant to that purpose (i.e., to convince consumers to buy the products). Consumers should understand advertising and labels that highlight a particular product characteristic as implying that that product characteristic should make consumers more likely to buy the product. Therefore, if a particular characteristic is highlighted in an advertisement or label, consumers likely

30. This example is similar to one put forward by Grice in which a person tells someone seeking gas that a particular gas station is nearby. *Id.* at 32.

31. “Conversational implicature” is a term introduced by Grice. He used it to refer to what must be assumed that a speaker in conversation sought to convey, if a speaker were to be abiding by the Cooperative Principle. *Id.* at 26.

32. Ohlendorf, *supra* note 23, at 752 n.92.

33. Deirdre Wilson & Dan Sperber, *Relevance Theory*, in *THE HANDBOOK OF PRAGMATICS* 607, 607 (Laurence R. Horn & Gregory Ward eds., 2006) (noting that Relevance Theory “share[s] Grice’s intuition that utterances raise expectations of relevance”); Laurence R. Horn, *Implicature*, in *THE HANDBOOK OF PRAGMATICS* 3, 13 (Laurence R. Horn & Gregory Ward eds., 2006) (a prominent Neo-Gricean proposing replacing Grice’s Quantity, Relevance, and Manner conversational principles with two interrelated principles: the Q Principle (“Say as much as you can, modulo Quality and R”) and the R principle (“Say no more than you must, modulo Q”), and stating that the R principle “collects the Relation maxim” and some of Grice’s other maxims).

34. Ana Gotter, *Product Advertisement vs. Institutional Advertisement: What You Need to Know*, *DISRUPTIVE ADVERT.* (June 20, 2018), <https://www.disruptiveadvertising.com/ppc/e-commerce/product-advertisement-vs-institutional-advertisement/> [<https://perma.cc/LX9D-C3B9>] (“Product advertisements are trying to sell specific products immediately.”); *Importance of Labelling in Marketing*, *PACKAGING - LABELLING*, <https://www.packaging-labelling.com/articles/importance-of-labelling-in-marketing> [<https://perma.cc/2YB8-XSZ8>] (“[Product labeling] plays a key role as a point of sale display in the market shelves.”).

believe that it is implying that the characteristic makes the product superior to competitors' products.³⁵

There is also reason to believe that consumers assume relevance more in advertising and labels than in other contexts. Routine conversations between people—such as that between the patron and the shopkeeper in the earlier example—are essentially costless for the parties to engage in. Someone making an irrelevant statement in a routine conversation wastes time, but little else. In contrast, advertising is expensive,³⁶ and label design, as well as the information provided on a label, is important to consumers.³⁷ Thus, consumers might believe it less plausible that an advertiser would waste funds or valuable label space highlighting a product characteristic that is irrelevant to consumers.

In summary, advertising and labels that highlight a product characteristic imply that the characteristic makes the product superior. If the characteristic does not actually make the product superior, the advertisement is deceptive. Importantly, such advertisements and labels are deceptive even to people who lack a pre-existing belief regarding the characteristic. Pragmatics theory explains why people assume that a highlighted characteristic makes a product superior.³⁸ This explanation does not depend on people having pre-existing beliefs regarding the characteristic's relevance.

For example, consider again a label or advertisement touting that an antacid is “aluminum-free.” The lack of aluminum would only be relevant to a consumer's purchase decision if aluminum is undesirable for some reason. Thus, advertising that an antacid is aluminum-free implies that aluminum in antacid is undesirable. This implication does not depend on the person viewing the advertisement having a pre-existing belief that aluminum is undesirable. Even a consumer who has no pre-existing belief regarding aluminum's desirability—or who even for some reason believes

35. See Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1325–27 (2011) (discussing research that “has confirmed the effectiveness of [advertising] exploiting the expectation of relevance” and discussing cases where courts' reasoning in finding advertisements made false claims have “accord[ed] with the rules of implicature; the ad[s] exploited reasonable consumers' beliefs that information is only provided when relevant”).

36. For example, the cost of running an advertisement in a national magazine is approximately \$250,000, and the cost of running a thirty-second national television advertisement is approximately \$342,000, plus the cost of designing and producing the advertisement. *The Cost of Advertising Nationally Broken Down by Medium*, WEBFX, <https://www.webfx.com/blog/wp-content/uploads/2016/01/cost-of-advertising-nationally-broken-down-by-medium-02.png> [<https://perma.cc/KM24-SSA3>].

37. *Shoppers Reveal the Packaging & Labeling Techniques that Grab Their Attention*, LUMINER CONVERTING GROUP, INC., <https://www.luminer.com/articles/survey-packaging-labeling-grab-shopper-s-attention/> [<https://perma.cc/2N6N-KX8J>] (reporting results of an August 2017 consumer survey showing importance of label design and information included on labels).

38. See *supra* text accompanying notes 22–34.

that aluminum in antacid is desirable—should understand the advertisement as implying that aluminum is undesirable. After all, why else would an advertiser tout that its antacid is “aluminum-free?”

Although the advertisement is misleading to all consumers, it might have a stronger effect on consumers who have a pre-existing belief regarding the highlighted characteristic. Compared to other people, those who have a pre-existing belief might be more likely to understand the advertisement as referring to that specific belief. For example, consider again an advertisement highlighting that a particular antacid is “aluminum-free.” Because the advertisement provides no other reason why aluminum is undesirable, consumers who believe there is a link between aluminum and Alzheimer’s disease will likely assume that the advertisement is referring to that link, as people tend to interpret information in a way that will confirm their pre-existing notions.³⁹ Thus, to those consumers, the advertisement is likely to falsely imply that aluminum can cause Alzheimer’s. A consumer who whole-heartedly held the pre-existing belief will likely feel validated by the advertisement.⁴⁰ A consumer who heard a rumor that aluminum causes Alzheimer’s, yet is not sure that the rumor is true, will likely now feel more confident in that belief.⁴¹

In contrast, consumers who are unaware of the myth that aluminum can cause Alzheimer’s disease would be very unlikely to assume that an advertisement for an aluminum-free antacid was referring to Alzheimer’s. Such consumers might instead simply speculate that the advertisement is implying that the lack of aluminum makes the antacid more effective or have fewer minor side effects. Nevertheless, this might make them more likely to buy the antacid than are consumers who are unaware that it does not contain aluminum.⁴²

39. Stephanie M. Stern, *Outpsyched: The Battle of Expertise in Psychology-Informed Law*, 57 JURIMETRICS 45, 53 (2016) (“An extensive body of research in motivated reasoning shows that we process information in ways that support our goals, including the goal of maintaining preexisting beliefs . . .”).

40. See Kirsten Weir, *Why We Believe Alternative Facts*, 48 MONITOR ON PSYCHOL. 24 (2017), <https://www.apa.org/monitor/2017/05/alternative-facts> [<https://perma.cc/6E9Y-6QHJ>] (quoting Peter Ditto as saying, “Motivated reasoning is a pervasive tendency of human cognition . . . People are capable of being thoughtful and rational, but our wishes, hopes, fears and motivations often tip the scales to make us more likely to accept something as true if it supports what we want to believe.”).

41. See Linda A. Henkel & Mark E. Mattson, *Reading is Believing: The Truth Effect and Source Credibility*, 20 CONSCIOUSNESS & COGNITION 1705, 1705 (2011) (finding that repeated exposure to a statement increases people’s belief in the validity of the statement).

42. Legally, an advertisement can be deceptive regardless of whether consumers are actually deceived by the advertisement or change their purchase behavior in response to it. See, e.g., *F.T.C. v. LoanPointe, LLC*, 525 F. App’x 696, 701 (10th Cir. 2013) (Under § 5 of the FTC Act, “[t]he FTC does not need to prove actual deception, only the likelihood that a consumer . . . acting reasonably under the circumstances, would be deceived”).

For some product characteristics, individuals might be able to infer why the highlighted characteristic is allegedly relevant even if they were previously unaware of that reason. For example, even a person who is unaware that others believe an equity mutual fund's high past returns are a good predictor of high future returns would likely understand a mutual fund advertisement touting a fund's high past returns as implying that the fund is likely to earn high future returns. It is difficult to imagine why else a fund's past returns would be relevant to an investor's decision of whether to invest in a particular mutual fund.

II. EXPLOITING PRE-EXISTING BELIEFS HARMS CONSUMERS, INVESTORS, AND COMPANIES

Advertising and labels play an important role in market economies by providing information about characteristics of available products and investments. This information helps consumers and investors make purchase and investment decisions that maximize their welfare.⁴³ Furthermore, better-informed consumers and investors incentivize firms to compete with each other to provide superior or lower-priced consumer and investment products.⁴⁴

In contrast, deceptive advertising and labels harm the marketplace, consumers, and investors.⁴⁵ Consumers' purchase decisions can be distorted by an advertisement or label that misleads consumers into believing that a particular product characteristic makes a product superior; consumers who are deceived into believing that a more expensive product is more effective or safer might buy that product rather than a cheaper, equally effective and safe alternative. For example, an advertisement that leads consumers to believe that additive-free cigarettes are safer can cause consumers to purchase those cigarettes rather than less expensive ones. For instance, consumers erroneously believe that the relatively expensive American Spirit cigarettes, which use organic and additive-free tobacco, are less harmful than other cigarettes.⁴⁶

More importantly, this erroneous belief might cause people who smoke additive-free cigarettes to reduce their efforts to stop smoking. If people

43. Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492 (1981).

44. *Id.*

45. See *F.T.C. v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. 1985) (“[M]isleading advertising’ does not serve, and, in fact, disservices, th[e] interest” of “consumers and society . . . in the free flow of commercial information.” (first quoting *In re R.M.J.*, 455 U.S. 191, 200 (1982); then quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976))).

46. Anna E. Epperson, Trent O. Johnson, Nina C. Schleicher & Lisa Henriksen, *The Price of Natural American Spirit Relative to Other Cigarette Brands*, NICOTINE & TOBACCO RES. 1, 4 (2019).

think they are smoking cigarettes that are less harmful than regular cigarettes, they have less incentive to quit smoking for health reasons. Indeed, until fairly recently, low-nicotine and low-tar cigarette brands were marketed as being “light,”⁴⁷ and consumers erroneously believed that those brands were safer than other cigarettes,⁴⁸ making people who smoked those brands less likely to quit smoking.⁴⁹

Deceptive advertisements and labels might also cause consumers to buy less effective products.⁵⁰ For example, a label that implies that a particular aluminum-free antacid is safer can cause consumers to buy it rather than a brand that is more effective.

Along the same vein, investors can be harmed by mutual fund advertisements that highlight an equity mutual fund’s high past returns. These advertisements imply that the strong returns are likely to continue.⁵¹ Consequently, these advertisements encourage investors to invest in the advertised funds rather than funds that might be better matched to the investors’ investment objectives and risk tolerances. There is evidence that these advertisements are effective, causing investors to invest in the advertised funds.⁵²

Furthermore, these advertisements can cause investors to invest in funds with higher costs. For example, imagine an advertisement touting that a particular mutual fund has earned 3 percent higher annual returns than its peers. Investors who believe this outperformance is likely to continue will

47. Hilary A. Tindle et al., *Cessation Among Smokers of “Light” Cigarettes: Results from the 2000 National Health Interview Survey*, 96 AM. J. PUB. HEALTH 1498, 1498 (2006). The Tobacco Control Act of 2009 prohibited the use of the terms “light,” “low,” “mild,” and similar descriptors in tobacco product advertising, labels, or labeling without an FDA order allowing the use of such terms. 21 U.S.C. § 387k (2012). I could find no case in which the FDA has granted such an order.

48. C. Keith Haddock et al., *Modified Tobacco Use and Lifestyle Change in Risk-Reducing Beliefs About Smoking*, 27 AM. J. PREVENTIVE MED. 35, 38–39 tbls. 2–3 (2004) (finding over 70% of smokers surveyed believe that low tar/nicotine cigarettes reduce health risks from smoking); Tindle et al., *supra* note 47, at 1498 (discussing research finding that light cigarettes do not reduce risk of tobacco-related disease); *id.* at 1502 (finding that “adoption of light cigarettes to reduce health risks was common, being reported by more than one third of US adults who had ever smoked”).

49. Tindle et al., *supra* note 47, at 1500–02 (finding that “smokers who adopted light cigarettes with the intention of reducing health risks were markedly less likely to subsequently quit smoking” than were other smokers); Haddock et al., *supra* note 48, at 38–40 tbls. 2–3 (noting survey results suggest that “the belief that low[tar/nicotine] cigarettes may substantially lower the risks of tobacco use remains ubiquitous across smoking status and gender and significantly lowers the likelihood of quitting” smoking).

50. See Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 671 (1977).

51. See *infra* Section III.A.

52. Prem C. Jain & Joanna Shuang Wu, *Truth in Mutual Fund Advertising: Evidence on Future Performance and Fund Flows*, 55 J. FIN. 937, 956–57 (2000) (finding that equity mutual funds featured in performance advertisements in *Barron’s* and *Money* magazine garnered 20 percent more flow—the net amount invested in a fund during a particular period—than did similar nonadvertised funds, and that funds that are advertised more often attract more flow).

prefer that fund even if it has a 1 percent higher annual expense ratio than do competitor funds. Indeed, evidence exists that investors choosing among mutual funds give much more weight to the funds' advertised past returns than to the funds' expense ratios, even when those expense ratios are highly salient in the advertisements.⁵³

Unfortunately for these investors, high returns generally do not persist in the long run at least in part because high returns very often are due to luck rather than the fund managers' investing skill.⁵⁴ Low-cost funds (such as index funds), on the other hand, generally continue to have low costs, and thus higher returns in the long run.⁵⁵ Hence, ironically, by encouraging investors to invest in funds with high past returns, these advertisements cause investors to pay less attention to low-cost funds, which are more likely to give them higher future returns.

As previously mentioned, highlighting a characteristic can increase an individual's confidence in a pre-existing belief. However, even if an advertisement or label doesn't increase the strength of a person's belief regarding the characteristic, it might increase the weight that person puts on the characteristic in his or her purchase or investment decisions. For example, investors choosing among mutual funds might weigh several factors, including the funds' risks, investment objectives, costs, and expected returns. An advertisement that highlights a fund's past returns might make the returns more salient, causing investors to put more weight on that factor.⁵⁶ Similarly, consumers choosing among antacids might weigh several factors, such as the antacids' effectiveness, costs, and safety. An "aluminum-free" label might make safety considerations more salient, causing consumers to put more weight on the false, perceived safety considerations.

53. Beth A. Pontari et al., *Regulating Information Disclosure in Mutual Fund Advertising in the United States: Will Consumers Utilize Cost Information?*, 32 J. CONSUMER POL'Y 333, 346, 348 (2009).

54. Laurent Barras et al., *False Discoveries in Mutual Fund Performance: Measuring Luck in Estimated Alphas*, 65 J. FIN. 179, 196–200 (2010); Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, 65 J. FIN. 1915, 1916 (2010). Another reason why high returns generally don't persist in the long run might be the tendency of investors to flock to mutual funds that have had high returns. This behavior causes successful mutual fund managers to have to invest a greater amount of money, making it more difficult to continue to produce higher returns, as larger funds have fewer investment options than smaller funds. See Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Performance Advertising: Inherently and Materially Misleading?*, 46 GA. L. REV. 289, 302–03 (2012) and references cited therein.

55. Mark M. Carhart, *On Persistence in Mutual Fund Performance*, 52 J. FIN. 57, 80 (1997) (finding that expense ratios and portfolio turnover are "significantly and negatively related to performance").

56. People exhibit a salience bias in that they "are likely to focus on information or items that are prominent or salient and ignore those that are less visible." Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 253 (2011).

In addition, the highlighting of the product characteristic might make consumers more likely to find products with that characteristic, increasing the likelihood that they purchase the product because of their erroneous belief. For example, even consumers who erroneously believe that aluminum can cause Alzheimer's disease might buy antacids that they are unaware contain aluminum. Although they could check for aluminum in the Drug Facts—which includes the product ingredients—on the antacid's label before buying the product, many people are unlikely to do so, especially if they are unaware that some antacids contain aluminum.⁵⁷ However, an antacid advertisement or label that highlights the lack of aluminum directs them to a particular brand that is aluminum-free and alerts them to the fact that some antacids contain aluminum, perhaps causing them to start checking for aluminum when choosing an antacid.

A final harm caused by advertisements and labels that falsely imply that a particular characteristic makes a product superior is that they waste companies' resources. Makers of these products spend resources on producing these deceptive advertisements and labels, rather than on improving the quality—or reducing the prices—of their products to compete more effectively. Furthermore, if people are deceived into believing that the products are better than they actually are, these advertisements and labels make it harder for truly better products to distinguish themselves in people's minds. This can force producers of superior products to spend more resources on advertising to convince consumers and investors that their products are better than competitors' products.

III. HOW REGULATORY AGENCIES TREAT EXPLOITATION OF PRE-EXISTING BELIEFS

Part of the mandate of federal agencies tasked with regulating advertising and labeling is to prevent advertisements and labels from being deceptive. For example, Section 5(a) of the Federal Trade Commission Act prohibits “deceptive acts or practices in or affecting commerce” and authorizes the

57. In a poll, 75 percent of consumers stated they “review the ingredients on the labels of [over-the-counter] medicines before using to see if any other medications they may be taking also have those ingredients.” *New US Survey Confirms that US Consumers Correctly Read the Label Before Using an OTC Medicine*, WORLD SELF-MEDICATION INDUSTRY (Oct. 5, 2015), <http://www.wsmi.org/new-us-survey-confirms-that-us-consumers-correctly-read-the-label-before-using-an-otc-medicine/> [https://perma.cc/79LN-JS5P]. However, it is unclear whether as high a proportion would read an antacid label. See *Warning: Aspirin-Containing Antacid Medicines Can Cause Bleeding*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm505110.htm> [https://perma.cc/AP2M-MUB8] (quoting Karen Murry Mahoney, Deputy Director of the Division of Nonprescription Drug Products at FDA, as saying, “Unless people read the Drug Facts label when they’re looking for stomach symptom relief, they might not even think about the possibility that a stomach medicine could contain aspirin”).

Federal Trade Commission (“FTC”) to prevent them.⁵⁸ In enforcing this statute, the FTC and courts have defined deception as a material representation, omission, or practice that is likely to mislead a significant minority of consumers acting reasonably under the circumstances.⁵⁹ A representation can be deceptive even if it is only implied rather than explicit.⁶⁰

Similarly, the general antifraud provisions of the federal securities laws, which the Securities and Exchange Commission (“SEC”) is tasked with enforcing, prohibit the use of materially false or misleading information in selling securities, including mutual funds. Section 17(a)(2) of the Securities Act of 1933 prohibits, in the offer or sale of any security by communication in interstate commerce, “obtain[ing] money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.”⁶¹ Rule 10b-5, promulgated by the SEC under the Securities Exchange Act of 1934, forbids, in connection with the purchase or sale of any security by any means or instrument of interstate commerce or by mail, “mak[ing] any untrue statement of a material fact or . . . omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.”⁶² Furthermore, Section 33(b) of the Investment Company Act of 1940 prohibits in any registration statement or other document transmitted pursuant to the Act “any untrue statement of a material fact” or the omission of “any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading.”⁶³

Relatedly, the federal Food, Drug, and Cosmetic Act gives the Food and Drug Administration (“FDA”) the authority to monitor and regulate the safety of food, drugs, devices, tobacco products, and cosmetics.⁶⁴ The Act forbids misbranding of these products or the sale of such misbranded

58. 15 U.S.C. § 45(a)(2) (2012).

59. *See, e.g.*, *F.T.C. v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 490 (D.C. Cir. 2015); *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164–65 (1984) (discussing the FTC’s Policy Statement on Deception).

60. *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 318–19 (7th Cir. 1992).

61. 15 U.S.C. § 77q(a)(2) (2012).

62. 17 C.F.R. § 240.10b-5(b) (2018).

63. 15 U.S.C. § 80a-33(b) (2012).

64. 21 U.S.C. §§ 371(a), 387a (2012). The Food, Drug, and Cosmetic Act delegates authority to the Secretary of the Department of Health and Human Services through which it is ultimately delegated to the FDA. James T. O’Reilly, 1 *Food & Drug Admin.* § 2.1 (2019).

products.⁶⁵ Included in the definition of misbranding is product labeling that is “false or misleading.”⁶⁶

Thus, federal regulatory agencies have broad authority to prevent deceptive advertisements and labels. The deception can take the form not only of explicitly false statements but also statements that are misleading. Advertisements and labels that exploit erroneous pre-existing beliefs generally take the second form—they include a statement about a product that is true yet misleading because it implies a falsehood.

As will be discussed in Section IV of this article, several possible approaches exist to regulating advertisements and labels that exploit people’s erroneous pre-existing beliefs. The current section, however, first examines the approach taken by the SEC in its regulation of mutual fund performance advertisements and the differing approaches taken by the FTC and FDA regarding the advertisements and labels of cigarettes made from tobacco with no chemical additives.

A. SEC Regulation of Mutual Fund Performance Advertisements

Mutual fund companies regularly use performance advertisements, which present the past returns earned by the advertised funds. For example, almost 42 percent of mutual fund advertisements in *Barron’s* and *Money* magazines over a two-year period mentioned a fund’s high or increasing returns.⁶⁷ An additional 26 percent of the advertisements explicitly discussed a fund’s risk-adjusted returns.⁶⁸ Similarly, past returns were mentioned, on average, in 62 percent of fund advertisements appearing in *Money* magazine over a nine-year period and in 59 percent of fund advertisements appearing in *BusinessWeek* magazine over a ten-year period.⁶⁹

Performance advertisements are especially prevalent when stock market returns in general have been high. For example, there is a very high correlation (greater than 0.7) between the recent performance of the stock market in general and the percentage of equity fund advertisements in *Money* and *BusinessWeek* magazines that present past returns.⁷⁰ This

65. 21 U.S.C. § 331 (2012).

66. 21 U.S.C. § 352(a)(1) (Supp. V Vol. II 2013–2018) (defining misbranded drugs and devices); 21 U.S.C. § 343(a) (2012) (defining misbranded food); 21 U.S.C. § 387c (2012) (defining misbranded tobacco products); 21 U.S.C. § 362(a) (2012) (defining misbranded cosmetics).

67. Bruce A. Huhmann & Nalinaksha Bhattacharyya, *Does Mutual Fund Advertising Provide Necessary Investment Information?*, 23 INT’L J. BANK MARKETING 296, 300, 303 (2005).

68. *Id.*

69. Sendhil Mullainathan, Joshua Schwartzstein & Andrei Shleifer, *Coarse Thinking and Persuasion*, 123 Q. J. ECON. 577, 609 (2008).

70. *Id.* In particular, the correlation of one-quarter-lagged S&P 500 returns with the percentage of equity fund advertisements that presented past fund returns is 0.71 for *Money* and 0.74 for

indicates that fund companies use performance advertisements to highlight funds' past returns when those returns have been high.

In addition, fund companies are especially likely to advertise those funds that have outperformed other funds. For example, a study of equity fund performance advertisements in *Barron's* and *Money* magazines found that the advertised funds outperformed funds with the same investment objective by an average of almost 6 percent over the twelve months prior to the advertisements.⁷¹ Similarly, a study of equity fund performance advertisements in *BusinessWeek* and *Fortune* magazines found that fund companies tend to advertise their best-performing funds.⁷²

Thus, mutual fund companies engage in selective advertising by using performance advertisements primarily for their equity funds with the highest past returns. Fund companies do this to exploit investors' pre-existing belief that strong past returns are a good predictor of strong future returns. Indeed, research has found that investors who have a stronger belief that a fund's high past returns predict high future returns are more likely than other investors to invest in mutual funds with advertised high past returns.⁷³ However, that belief is erroneous; equity funds that have outperformed their peers generally do not continue to do so in the long run.⁷⁴

The SEC closely regulates performance advertisements. Some of this regulation is intended to prevent fund companies from selectively choosing which periods' returns to advertise. For example, a mutual fund company that runs a fund that performed well in 2017—but poorly before and after that—might wish to advertise only the fund's 2017 return. But investors who viewed such an advertisement would be misled if they inferred from

BusinessWeek. *Id.* See also U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-697, MUTUAL FUND ADVERTISING: IMPROVING HOW REGULATORS COMMUNICATE NEW RULE INTERPRETATIONS TO INDUSTRY WOULD FURTHER PROTECT INVESTORS 15 (2011), <http://www.gao.gov/new.items/d11697.pdf> [<https://perma.cc/9PVF-C3SF>] (“[A]gency officials and representatives of mutual fund companies with whom we spoke, as well as some researchers, said that more advertisements showing superior past returns for mutual funds appear after the market has performed well.”).

71. Prem C. Jain & Joanna Shuang Wu, *Truth in Mutual Fund Advertising: Evidence on Future Performance and Fund Flows*, 55 J. FIN. 937, 943–44 (2000). The advertised funds also outperformed other benchmarks, although by less. In particular, they outperformed the S&P 500 by almost 2 percent and had a four-factor alpha of over 1 percent. *Id.* at 943–45. The four-factor alpha is a risk-adjusted measure of a fund's excess return compared to a benchmark index. *Id.* at 944.

72. Jonathan J. Koehler & Molly Mercer, *Selection Neglect in Mutual Fund Advertisements*, 55 MGMT. SCI. 1107, 1109–10 (2009).

73. See Molly Mercer, Alan R. Palmiter & Ahmed E. Taha, *Worthless Warnings? Testing the Effectiveness of Disclaimers in Mutual Fund Advertisements*, 7 J. EMPIRICAL LEGAL STUD. 429, 453–55 (2010) (finding that people were less willing to invest in an advertised mutual fund when the advertisement contained a disclaimer that reduced their belief that high past returns are good predictors of high future returns).

74. Fama & French, *supra* note 54, at 1916; Barras et al., *supra* note 54, at 181; ALEX BRYAN & JAMES LI, MORNINGSTAR MANAGER RESEARCH, PERFORMANCE PERSISTENCE AMONG U.S. MUTUAL FUNDS 14 (2016), <http://www.fwp.partners/wp-content/uploads/2016/09/Performance-Persistence-Morningstar-2016.pdf> [<https://perma.cc/4SM3-R858>].

the 2017 return that the fund usually performs well. Thus, Rule 482, promulgated by the SEC under the Securities Act of 1933, standardizes how past returns in mutual fund performance advertisements may be calculated and presented.⁷⁵ For example, performance advertisements for an equity fund must report the fund's average annual total returns for the last one, five, and ten years.⁷⁶

Ultimately, the SEC's rules restrict fund companies' ability to select which periods' returns to advertise, but do not eliminate it. For example, while Rule 482 requires performance advertisements to present the funds' average annual total returns over the last one, five, and ten years, the advertisements may also include—for any time periods—any other performance measure that “[r]eflects all elements of return,” such as aggregate, average, year-by-year, or other types of total return calculations.⁷⁷ Nevertheless, those returns must supplement, not replace, the required returns, and they may not be presented more prominently than the required returns.⁷⁸

But even performance advertisements that do not selectively choose which years' returns to advertise imply a falsehood that many investors already believe: strong past returns are a good predictor of strong future returns. In some of these advertisements, this implication is not subtle. For example, advertisements that tout funds' “proven” performance can only be understood as implying that they are likely to continue to have strong returns in the future because the funds had high returns in the past.⁷⁹ Moreover, even performance advertisements without such language still inherently imply that the funds' strong performance should continue.

The SEC is aware that investors put great weight on funds' past returns, so the Commission's regulation of performance advertisements attempts to dissuade investors from relying too heavily on those returns. All Rule 482 advertisements, regardless of whether they contain past returns, must include a statement that “advises an investor to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing” and that directs readers to the fund's prospectus

75. 17 C.F.R. § 230.482 (2018). When adopting this rule, the SEC indicated that this requirement was partly intended to limit fund companies' ability to mislead investors by selectively choosing which periods' returns to advertise. Amendments to Investment Company Advertising Rules, 68 Fed. Reg. 57,760, 57,765 (Oct. 6, 2003) (to be codified at 17 C.F.R. pts. 230, 239, 270, and 274).

76. 17 C.F.R. § 230.482(d)(3). If the fund's registration statement has been in effect for less than one, five, or ten years, then the company must instead report the average annual total return since the registration statement has been in effect. *Id.*

77. 17 C.F.R. § 230.482(d)(5).

78. *Id.*

79. See, e.g., Fidelity, Advertisement, *Knowledge is Power*, FORBES, Jan. 28, 2008, at 2–3 (advertisement for five Fidelity funds with table of past returns titled “Proven Performance at Home and Abroad”).

to obtain this and other information about the fund.⁸⁰ In addition, Rule 482 requires performance advertisements to contain a warning that

past performance does not guarantee future results; that the investment return and principal value of an investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less than their original cost; and that current performance may be lower or higher than the performance data quoted.⁸¹

Unfortunately, this warning is too weak. It merely warns that the advertised high past returns do not *guarantee* high future returns, that a fund's returns vary over time, and that an investor can even lose money in a fund. The warning does not inform investors that high past returns are not good predictors of high future returns. In fact, warning that past performance does not "guarantee" future results arguably implies that high past returns are a good predictor of high future returns, just not a guarantee of them.

To test the effectiveness of this SEC-mandated warning, Molly Mercer, Alan Palmiter, and I conducted an experiment.⁸² Participants in the experiment were each shown one version of a fictional equity mutual fund's performance advertisement that was based on an advertisement that had recently appeared in *Money* magazine.⁸³ The versions of the advertisement differed in the strength and prominence of the warning against relying on past returns to predict future returns.⁸⁴

The experiment found that the SEC-mandated warning is completely ineffective. In particular, participants who saw the advertisement with that warning did not have lower expectations regarding the fund's future returns and were not less likely to invest in the fund than were investors who saw a version of the advertisement that lacked any warning at all.⁸⁵

B. FTC and FDA Standards for Advertisements and Labels of Additive-Free Cigarettes

Many smokers erroneously believe that additive-free cigarettes are healthier than other cigarettes.⁸⁶ As a result, some tobacco companies have

80. 17 C.F.R. § 230.482(b)(1).

81. *Id.* § 230.482(b)(3)(i). This exact wording is not required; any warning that "clearly communicates" this information is sufficient. Amendments to Investment Company Advertising Rules, 68 Fed. Reg. 57,760, 57,765 (Oct. 6, 2003) (to be codified at 17 C.F.R. pts. 230, 239, 270, and 274).

82. That experiment is presented in Mercer, Palmiter & Taha, *supra* note 73.

83. *Id.* at 445.

84. *Id.* at 445–46.

85. *Id.* at 449, 453.

86. Sabeeh A. Baig et al., "Organic," "Natural," and "Additive-Free" Cigarettes: Comparing the Effects of Advertising Claims and Disclaimers on Perceptions of Harm, 21 NICOTINE & TOBACCO

marketed cigarettes made from tobacco that lacks chemical additives.⁸⁷ Their advertisements and cigarette package labels deceive consumers into believing that those brands are safer than other cigarette brands.⁸⁸ Indeed, in 1999 and 2000, the FTC filed suit against three companies—Alternative Cigarettes, Inc., R.J. Reynolds Tobacco Company, and Santa Fe Natural Tobacco Company—claiming that their advertisements for their additive-free cigarettes “represented, expressly or by implication, that smoking [the] cigarettes, because they contain no additives, is less hazardous to a smoker’s health than smoking otherwise comparable cigarettes that contain additives.”⁸⁹

Importantly, only one of the advertisements cited in the FTC’s complaints explicitly claimed that additive-free cigarettes might be healthier; one of the Alternative Cigarettes advertisements stated that “Native Americans smoked all natural tobacco without the ills that are associated with smoking today. Could it be that the chemicals and additives cause more health problems than the natural tobacco itself? Much research needs to be done on this subject.”⁹⁰ In fact, the other advertisements

RES. 933, 934 (2019) (“Current research indicates that no cigarettes are safer than any others. However, studies have consistently shown that cigarettes marketed as ‘organic,’ ‘natural,’ or ‘additive-free’ are perceived to be less harmful.” (citation omitted)).

87. Patricia A. McDaniel & Ruth E. Malone, “*I Always Thought They Were All Pure Tobacco*”: *American Smokers’ Perceptions of “Natural” Cigarettes and Tobacco Industry Advertising Strategies*, 16 TOBACCO CONTROL e7, 5–6 (2007).

88. Jennifer L. Pearson et al., *American Spirit Pack Descriptors and Perceptions of Harm: A Crowdsourced Comparison of Modified Packs*, 18 NICOTINE & TOBACCO RES. 1749, 1755 (2016) (finding that the phrase “100% Additive-Free” on the label of a pack of American Spirit cigarettes reduced consumers’ perception of the health risk from smoking the cigarettes); Baig et al., *supra* note 86, at 936 (finding that consumers who viewed a cigarette advertisement believed the cigarettes were less harmful if the advertisement stated the cigarettes used “additive-free” tobacco rather than if it stated that they used “regular” tobacco).

89. Complaint ¶ 5, *In re* R.J. Reynolds Tobacco Co., 128 F.T.C. 262 (Aug. 16, 1999) (No. C-3892), 1999 WL 33913037, at *1. Because Santa Fe’s advertisements referred to their products as “chemical-additive-free” rather than just additive-free, the FTC’s complaint against Santa Fe claimed that the company “represented, expressly or by implication, that smoking [the] cigarettes, because they contain no additives or chemicals, is less hazardous to a smoker’s health than smoking otherwise comparable cigarettes that contain additives or chemicals.” Complaint ¶ 5, *In re* Santa Fe Nat. Tobacco Co., No. 992-3026 (F.T.C. Apr. 27, 2000), 2000 WL 559854, at *1 (emphasis added). Similarly, the advertisements of Alternative Cigarettes specified that its cigarettes contained “no added chemicals, flavorings, [or] preservatives,” so the FTC’s complaint against Alternative Cigarettes claimed that the company “represented, expressly or by implication, that smoking [the] cigarettes, because they contain no additives, chemicals, flavorings or preservatives, is less hazardous to a smoker’s health than smoking otherwise comparable cigarettes that contain additives, chemicals, flavorings or preservatives.” Complaint ¶¶ 5–6, *In re* Alt. Cigarettes, Inc., No. 992-3022 (F.T.C. Apr. 27, 2000), 2000 WL 559811, at *2–4 (emphasis added).

90. Complaint at ex. A, *Alt. Cigarettes, Inc.*, No. 992-3022, 2000 WL 559811, at *5.

contained no health claims, and the advertisements displayed the Surgeon General's standard required health warnings against smoking.⁹¹

Instead of making health claims, most of the advertisements cited in the FTC's complaints claimed that additive-free cigarettes taste better or last longer than other cigarettes. Six of the seven R.J. Reynolds advertisements stated, "No additives are in our tobacco, for true taste," "No additives in our tobacco means true taste, straight up," or had taglines stating: "100% Tobacco True taste" or "New Winston . . . No Additives . . . True Taste."⁹² Likewise, one of the three cited Santa Fe advertisements stated that the advertised cigarettes were "made from 100% chemical-additive-free natural tobacco . . . and nothing else," which results in "great tobacco flavor, with no chemical after taste."⁹³ That advertisement also encouraged consumers to "[d]iscover the slower-burning, longer-lasting, *all-natural* smoking experience."⁹⁴ The remaining cited R.J. Reynolds and Santa Fe advertisements provided no reason why additive-free cigarettes are superior to other cigarettes.⁹⁵

Thus, the FTC cited the advertisements for additive-free cigarettes as implying that these cigarettes were healthier than other cigarettes not only when the advertisements did not explicitly make such a claim, but also even when the advertisements explicitly gave some other, non-health reason for why additive-free cigarettes were superior. The FTC apparently believed that these advertisements still implied that the cigarettes were healthier.

To settle its claims that the advertisements were misleading, the FTC entered into consent decrees with the three companies that required advertisements for their additive-free cigarettes to include a disclaimer that "[n]o additives in our tobacco does NOT mean a safer cigarette."⁹⁶

Nine years later, in 2009, Congress gave the FDA broad new authority over tobacco products by enacting the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act").⁹⁷ Among its provisions

91. Complaint at exs. A–C, *Santa Fe Nat. Tobacco Co.*, No. 992-3026, 2000 WL 559854, at *2; Complaint at exs. A–F, *R.J. Reynolds Tobacco Co.*, 128 F.T.C. 262 (No. C-3892), 1999 WL 33913037, at *2.

92. Complaint at exs. A, C–F, *R.J. Reynolds Tobacco Co.*, 128 F.T.C. 262 (No. C-3892), 1999 WL 33913037, at *2.

93. Complaint at ex. B, *Santa Fe Nat. Tobacco Co.*, No. 992-3026, 2000 WL 559854, at *2.

94. *Id.*

95. Complaint at ex. B, *R.J. Reynolds Tobacco Co.*, 128 F.T.C. 262 (No. C-3892), 1999 WL 33913037, at *2; Complaint at exs. A, C, *Santa Fe Nat. Tobacco Co.*, No. 992-3026, 2000 WL 559854, at *2.

96. Consent Order, *In re Alt. Cigarettes, Inc.*, No. 992-3022, 2000 WL 559811; Consent Order, *Santa Fe Nat. Tobacco Co.*, No. 992-3026, 2000 WL 559854; Consent Order, *R.J. Reynolds Tobacco Co.*, 128 F.T.C. 262 (No. C-3892).

97. Family Smoking Prevention and Tobacco Control Act (TCA), Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in sections of 5, 15, and 21 U.S.C.).

were those giving the FDA the authority to regulate “modified risk tobacco products,” which were defined as including a tobacco product with a

label, labeling, or advertising . . . which represents explicitly or implicitly that—(I) the tobacco product presents a lower risk of tobacco-related disease or is less harmful than one or more other commercially marketed tobacco products; . . . or (III) the tobacco product or its smoke does not contain or is free of a substance.⁹⁸

The statute prohibited the introduction or “deliver[y] for introduction into interstate commerce any modified risk tobacco product” without an FDA order allowing it to be commercially marketed.⁹⁹ It also provided that this order generally is only permitted if the maker of the product can demonstrate the product actually will “(A) significantly reduce harm and the risk of tobacco-related disease to individual tobacco users; and (B) benefit the health of the population as a whole taking into account both users of tobacco products and persons who do not currently use tobacco products.”¹⁰⁰

In August 2015, the FDA sent warning letters to Santa Fe Natural Tobacco Company and ITG Brands, LLC, stating that the product labels of the companies’ Natural American Spirit cigarettes and Winston cigarettes, respectively, violated this statute.¹⁰¹ Specifically, the Natural American Spirit labeling described the cigarettes as “Natural” and “Additive Free” and the Winston labeling described the cigarettes as “Additive Free” without FDA orders permitting such marketing.¹⁰² The letters alleged that this labeling “represents explicitly and/or implicitly that the products or their smoke do not contain or are free of a substance and/or that the products present a lower risk of tobacco-related disease or are less harmful than . . . other commercially marketed tobacco products.”¹⁰³ The letters also recognized that the earlier consent orders that were entered into with the FTC in 2000 permitted the labels as long as they contained the disclosure, discussed above, that no additives doesn’t mean the cigarette is safer.¹⁰⁴

98. 21 U.S.C. § 387k(b)(2)(A) (2012).

99. 21 U.S.C. § 387k(a) (2012).

100. 21 U.S.C. § 387k(g)(1) (2012).

101. FDA Warning Letter to Michael Little, President, Santa Fe Natural Tobacco Company, Inc. (Aug. 27, 2015) [hereinafter Santa Fe Warning Letter], <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/santa-fe-natural-tobacco-company-inc-08272015> [https://perma.cc/3TK9-RV9U]; FDA Warning Letter to David Taylor, Chief Executive Officer, ITG Brands, LLC (Aug. 27, 2015) [hereinafter ITG Brands Warning Letter], <https://www.fda.gov/inspection-s-compliance-enforcement-and-criminal-investigations/warning-letters/itg-brands-llc-475193-08272015> [https://perma.cc/7VRA-58ES].

102. Santa Fe Warning Letter, *supra* note 101; ITG Brands Warning Letter, *supra* note 101.

103. Santa Fe Warning Letter, *supra* note 101; ITG Brands Warning Letter, *supra* note 101.

104. Santa Fe Warning Letter, *supra* note 101; ITG Brands Warning Letter, *supra* note 101.

However, the letters noted that those consent decrees predated the Tobacco Control Act, which gave the FDA authority to regulate tobacco products.¹⁰⁵

In January 2017, Santa Fe Natural Tobacco Company reached an agreement with the FDA, resolving the issues raised in the warning letter.¹⁰⁶

As part of the agreement, the company agreed to remove the terms “Additive Free” and “Natural” from its Natural American Spirit product labels, labeling, advertising, and promotional materials.¹⁰⁷ Similarly, in September 2017, the FTC sent a closeout letter to ITG Brands stating that ITG Brands had sufficiently addressed the issues raised in the FDA’s warning letter.¹⁰⁸

Like the FTC years earlier, the FDA understood labels and advertisements touting cigarettes as being “additive-free” to be falsely representing that they are safer than other cigarettes, even if no health claim is explicitly made. The FDA, however, took a stronger approach than the FTC, prohibiting these labels and advertisements rather than just requiring a disclaimer of the erroneous implication.

IV. POSSIBLE REGULATORY APPROACHES

This article argues that advertisements and labels that exploit erroneous pre-existing beliefs are deceptive. However, there are multiple possible regulatory approaches to this problem. The best approach depends in large part on whether the highlighted characteristic is relevant to consumers or investors only because of the erroneous belief or because of other, legitimate reasons as well.

A. Highlighted Characteristic Relevant Only Because of Erroneous Belief

Some product characteristics that are highlighted in advertisements or on labels would be relevant only to consumers or investors who have erroneous

105. Santa Fe Warning Letter, *supra* note 101; ITG Brands Warning Letter, *supra* note 101.

106. Memorandum of Agreement between FDA and RAI Services Company/Santa Fe Natural Tobacco Company, Inc. (Jan. 19, 2017).

107. *Id.* The agreement, however, permitted the company to continue to use the term “Natural” in its “Natural American Spirit” brand name and trademarks. *Id.*

108. FDA Closeout Letter to David Taylor, Chief Executive Officer, ITG Brands, LLC (Sept. 5, 2017), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/itg-brands-llc-close-out-letter-9517> [<https://perma.cc/M2AL-BVJU>]. The terms of the Santa Fe Natural Tobacco Company’s agreement with the FDA resolving the issues raised in the FDA’s warning letter were made public because the agreement was disclosed in another civil case. *FDA/Santa Fe Natural Tobacco Agreement Fails to Protect the Public from Misleading Claims and Imagery on Natural American Spirit Cigarettes*, CAMPAIGN FOR TOBACCO-FREE KIDS (Mar. 2, 2017), https://www.tobaccofreekids.org/press-releases/2017_03_02_fda [<https://perma.cc/KE9N-NHS5>]. In contrast, how ITG Brands addressed the FDA’s concerns has not been made public, but it is reasonable to speculate that ITG Brands took an approach similar to Santa Fe Natural Tobacco Company’s.

beliefs regarding the characteristics. For example, a particular equity mutual fund's high past returns should be irrelevant to investors unless they erroneously believe that strong past returns are a good predictor of strong future returns.

One regulatory approach would be to require such advertisements or labels to disclaim the erroneous belief. Indeed, the SEC takes such an approach regarding mutual fund performance advertisements. As discussed above, the SEC requires these advertisements to contain a disclaimer informing investors that

past performance does not guarantee future results; that the investment return and principal value of an investment will fluctuate so that an investor's shares, when redeemed, may be worth more or less than their original cost; and that current performance may be lower or higher than the performance data quoted.¹⁰⁹

A good argument exists, however, for a stronger approach: prohibiting the highlighting of such a product characteristic, rather than just requiring a disclaimer of the erroneous belief. People will only consider useful the information that the product has the highlighted characteristic if they hold the erroneous belief regarding the characteristic's relevance, e.g., investors will not care that a particular fund has had high returns unless they believe that high past returns are a good predictor of high future returns. Thus, highlighting such a product characteristic has no purpose except to encourage people to adopt and act upon the erroneous belief. As a result, these advertisements provide no useful information and can cause harm by misleading people and wasting resources.¹¹⁰ Prominent legal scholars have argued that prohibiting certain advertising claims that provide little, if any, value to consumers can be justified.¹¹¹ Because these advertisements can cause harm but provide no benefit, they should be prohibited.

An advantage of prohibiting these advertisements is that an effective disclaimer of the erroneous belief need not be developed. This is beneficial because creating an effective disclaimer can be very difficult. Recall the experiment finding evidence that the current SEC-mandated warning in performance advertisements, which discourages investors from relying on a

109. 17 C.F.R. § 230.482(b)(3)(i) (2018).

110. See *supra* Section II.

111. See, e.g., Beales et al., *supra* note 43, at 496, 534 (“[E]nforcement costs aside—there is no reason not to forbid” claims that “contribute nothing to consumer welfare.” “[I]n some instances the truthful information conveyed by a claim . . . may be of so little value that there is no reason to preserve it by permitting the claim.”); see also Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549, 584 (1991) (noting that “if nothing would be lost by prohibiting . . . a claim, the cost-benefit analysis would almost surely argue in favor of prohibition”).

fund's past returns, is ineffective.¹¹² Although the same experiment also demonstrated that a stronger warning could be effective,¹¹³ there is reason to be skeptical that it would be so in real-world situations. For any disclaimer to be effective, it has to be seen, read, understood, and believed. In that experiment, participants were explicitly asked to read the advertisement and then answer questions about it. People who, in real-life situations, only happen to come across an advertisement in a magazine, for example, might just skim the advertisement and not read a disclaimer in it as closely as participants in the experiment did.¹¹⁴

This conclusion is supported by other research, which demonstrates the difficulty of creating disclaimers that are effective even in experimental settings. For example, as discussed above, until recently, cigarette companies could use advertisements and labels stating that the cigarettes were "additive-free" as long as they also included a short and clear disclaimer that additive-free tobacco does not mean a safer cigarette.¹¹⁵ An experiment found, however, that even when consumers likely focused on the advertisement longer in the experiment than they would in the real world, the disclaimer had only a small effect.¹¹⁶ In other words, the advertising claim that a cigarette was additive-free was "much more potent in the extent to which [it] reduced perceived harm [of the cigarettes] than disclaimers were in undoing this deception."¹¹⁷ Consumers continued to believe erroneously that additive-free cigarettes were safer than regular cigarettes.¹¹⁸

Further, imagine that a disclaimer were created and mandated that actually caused people to completely disregard the advertised product characteristic. Given that advertising is expensive and label space is valuable, it would be irrational for companies to highlight a product characteristic that a disclaimer had convinced people was irrelevant. Thus, advertisers would likely stop advertising the characteristic or devoting label

112. Mercer, Palmiter & Taha, *supra* note 73, at 449, 451–53.

113. *Id.* at 449, 453, 457. That stronger warning stated, "Do not expect the fund's quoted past performance to continue in the future. Studies show that mutual funds that have outperformed their peers in the past generally do not outperform them in the future. Strong past performance is often a matter of chance." *Id.* at 445.

114. See Baig et al., *supra* note 86, at 938 ("We suspect that [compared to the impact of advertising disclaimers in an experimental setting] the relative impact of disclaimers is even weaker in a real-world setting in which people would quickly get the gist of the ad from headlines and through repeated exposures.").

115. See *supra* note 96 and accompanying text.

116. Baig et al., *supra* note 86, at 936, 938.

117. *Id.* at 937.

118. See Gregory S. Carpenter, Rashi Glazer & Kent Nakamoto, *Meaningful Brands from Meaningless Differentiation: The Dependence on Irrelevant Attributes*, 31 J. MARKETING RES. 339, 342–47 (1994) (describing experiments using other products that found that consumers can value irrelevant product attributes even when researchers tell them that those attributes are irrelevant).

space to it anyway. In view of this fact, prohibiting the highlighting of the characteristic would be a more direct way of achieving the same outcome.

One possible objection to prohibiting these advertisements and labels is that it seems inconsistent to prohibit highlighting a product characteristic that is actually legally required to be disclosed elsewhere. For example, food and drug labels are required to list the ingredients of the food or drug.¹¹⁹ Thus, anyone who reads the ingredient list can see that it contains or lacks a particular ingredient. Why then should companies be prohibited from highlighting that fact? Similarly, a mutual fund's prospectus—which must be made available to investors before they invest in the fund—is required to provide the fund's past returns.¹²⁰ Consequently, why should fund companies be prohibited from advertising that same information?

These apparent inconsistencies should not be troublesome, however. An ingredient list on a product label lists all of the product's ingredients, and a mutual fund's prospectus contains detailed information about many aspects of the fund.¹²¹ Consumers and investors who do not read ingredient lists and prospectuses carefully, if at all, might not even notice a particular product characteristic. In contrast, an advertisement or label that touts that the antacid is "aluminum-free" highlights the absence of one ingredient (aluminum), and a mutual fund performance advertisement highlights a fund's high past returns, making these characteristics very difficult to miss.

In addition, it is reasonable to suspect that consumers who read ingredient lists on labels, and investors who read fund prospectuses, are more sophisticated than people who would buy a product after only glancing at its label, or who would invest in a fund after reading little more than a performance advertisement. Thus, consumers who read ingredient lists and investors who read fund prospectuses might need less protection than do people who only become aware of a particular product characteristic because it is highlighted on a label or in an advertisement.

Finally, as discussed above, labels and advertisements that highlight a particular product characteristic imply that that characteristic should be important to a purchase or investment decision.¹²² In contrast, an ingredient list or mutual fund prospectus that contains other information does not

119. INT'L FOOD INFO. COUNCIL (IFIC) & U.S. FOOD & DRUG ADMIN. (FDA), OVERVIEW OF FOOD INGREDIENTS, ADDITIVES & COLORS (Apr. 2010), <https://www.fda.gov/food/ingredientpackaginglabeling/ucm094211.htm> [<https://perma.cc/3SAL-WLDS>] ("Food manufacturers are required to list all ingredients in the food on the label."); 21 C.F.R. § 201.10 (2018) (drug ingredient labeling requirement).

120. See SEC Form N-1A, 11–14, <https://www.sec.gov/about/forms/formn-1a.pdf> [<https://perma.cc/EA3L-K6TC>] (describing the need for a bar chart and table that provide the fund's past annual returns).

121. See *id.* at 1–26 (listing various information required in a fund prospectus).

122. See *supra* Section I.

imply that one particular ingredient or a fund's past returns should be more important to the consumer or investor than are the product's other ingredients or the fund's other characteristics. Thus, a label or advertisement highlighting a particular characteristic probably is more likely to entice people to make purchases or investments based on that highlighted characteristic than is an ingredient list or a prospectus.

B. Highlighted Characteristic Also Relevant for Legitimate Reason

A more complex regulatory issue arises when some consumers or investors have erroneous pre-existing beliefs about a particular product characteristic that is relevant for another, legitimate reason. For example, many consumers erroneously believe that cigarettes that lack chemical additives are safer than other cigarettes.¹²³ However, many of the advertisements for additive-free cigarettes cited in the FTC's complaints claimed that they tasted better and/or lasted longer.¹²⁴ Assuming that such cigarettes actually do taste better and last longer,¹²⁵ being additive-free is a characteristic about which some consumers have incorrect pre-existing beliefs but that is also relevant to some consumers for legitimate reasons.

When some consumers erroneously believe that a product characteristic is relevant for one reason, but the characteristic is truly relevant for other reasons, prohibiting highlighting the characteristic in advertisements or labels can be problematic. Although such a prohibition would likely prevent some consumers from being misled, it also would deprive consumers of useful information.¹²⁶ For example, prohibiting cigarettes from being advertised as being "additive-free" would help prevent consumers from being deceived into buying the advertised cigarettes for health reasons, but it would also harm consumers who correctly believed, or could be convinced, that additive-free cigarettes tasted better or lasted longer.

One possible regulatory approach to address this concern would be to allow the highlighting of the product characteristic, but require the advertisement or label to also disclose the legitimate reason(s) why the highlighted characteristic could be relevant to consumers. For example, an advertisement stating that a particular brand of cigarettes is additive-free could also be required to state that "additive-free cigarettes taste better and

123. See *supra* note 86 and accompanying text.

124. See *supra* notes 92–94 and accompanying text.

125. Although the FTC challenged the claim that additive-free cigarettes were safer, they did not challenge the claims that they tasted better or lasted longer.

126. See Janis K. Pappalardo, *The Role of Consumer Research in Evaluating Deception: An Economist's Perspective*, 65 ANTITRUST L.J. 793, 799 (1997) (arguing that before prohibiting a claim that "is likely to be deceptive and potentially injurious to some consumers, an analyst must also consider whether the same claim might provide valuable information and benefits to other consumers").

last longer than other cigarettes.” In fact, some cigarette manufacturers appear to have been at least partly taking this approach even before the FTC sued them. Recall that none of the R.J. Reynolds or Santa Fe advertisements cited by the FTC claimed that the additive-free cigarettes were healthier, but some of them explicitly stated that “[n]o additives in our tobacco means true taste, straight up”¹²⁷ or encouraged consumers to “[d]iscover the slower-burning, longer-lasting, *all-natural* smoking experience.”¹²⁸

However, this should not be the preferred approach. Although disclosing why a characteristic should truly be relevant to consumers might stop the advertisement from implying that the false belief is correct, it doesn’t cause the advertisement to imply that the false belief is *incorrect*. In other words, the fact that a characteristic makes a product better for one reason doesn’t logically exclude it from making the product better for another reason as well. For example, even if an advertisement for additive-free cigarettes explains that the cigarettes taste better or burn slower than other cigarettes, some consumers might still believe that they also are safer. This might be especially true for consumers who just skim the advertisement and notice that the cigarette is additive-free but do not actually read the disclosure stating why that matters.¹²⁹

Thus, likely a more effective approach to addressing an erroneous belief about the relevance of a product characteristic is to require advertisements or labels highlighting the characteristic to also explicitly disclaim the erroneous belief. Indeed, this appears to be the approach that had been taken by the FTC regarding additive-free cigarettes. Recall that the FTC’s consent decrees with three tobacco companies required that their advertisements and labels for additive-free cigarettes include a disclaimer that “[n]o additives in our tobacco does NOT mean a safer cigarette”¹³⁰ even though the challenged advertisements by two of the companies explicitly claimed only that additive-free cigarettes taste better or last longer. There is no indication that the consent decrees forbade the companies from continuing to claim that additive-free cigarettes are superior for non-health reasons; they were just required to disclaim that the cigarettes were healthier.

As discussed above, however, creating truly effective disclaimers is difficult. Thus, if the likelihood of deception and the harm from being

127. Complaint at exs. A, C–F, *In re R.J. Reynolds Tobacco Co.*, 128 F.T.C. 262 (Aug. 16, 1999) (No. C-3892), 1999 WL 33913037, at *2.

128. Complaint at ex. B, *In re Santa Fe Nat. Tobacco Co.*, No. 992-3026 (F.T.C. Apr. 27, 2000), 2000 WL 559854, at *2.

129. See Baig et al., *supra* note 86, at 938 (suspecting that, in a real-world setting, people get “the gist of [an advertisement] from [the advertisement’s] headlines and through repeated exposures”).

130. Consent Order, *In re Alt. Cigarettes, Inc.*, No. 992-3022, 2000 WL 559811; Consent Order, *Santa Fe Nat. Tobacco Co.*, No. 992-3026, 2000 WL 559854; Consent Order, *R.J. Reynolds Tobacco Co.*, 128 F.T.C. 262 (No. C-3892).

deceived are high compared to the value of the highlighted information in the advertisement, then prohibiting highlighting the characteristic could still make sense. Consequently, the FDA's apparent prohibition on advertising or labeling cigarettes as additive-free might be justified even if this prohibition deprives consumers of the useful information that additive-free cigarettes last longer and/or taste better than other cigarettes.

Further, such a prohibition need not completely deprive consumers of this useful information. For example, brands of additive-free cigarettes could still be advertised as longer-lasting, if that is true. The advertisements, however, would not be permitted to provide the reason that they are longer lasting: they lack chemical additives. Such a limitation, however, might make the advertisements less effective because consumers probably are more likely to believe that the cigarettes are longer-lasting or better-tasting if they are given the reason (i.e., that they are additive-free).¹³¹ Nevertheless, the public health benefit of preventing consumers from being misled about the safety of additive-free cigarettes might justify the loss of this information.

CONCLUSION

Many consumers and investors erroneously believe that certain product characteristics make the products superior. Advertisements and labels that highlight those characteristics exploit those pre-existing beliefs. These advertisements and labels are misleading even if they don't explicitly state that the product characteristics make the products better; the highlighting inherently implies that the characteristics make the products superior. Thus, these advertisements or labels can be deceptive even if they don't mention the pre-existing beliefs. In addition, they can deceive even people who have no prior beliefs regarding the highlighted characteristics.

Several possible regulatory approaches exist regarding these advertisements and labels. The strongest and most effective approach is to prohibit them. This approach is best if no reason exists that the characteristic actually does make the product superior. In that case, the prohibition helps prevent deception while not depriving consumers or investors of useful information.

If, however, there is also a legitimate reason for highlighting the characteristic then a softer regulatory approach might be appropriate. At

131. See Trevor Marchant, *The Most Persuasive Tool in Advertising*, MEDIUM (Oct. 30, 2017), <https://medium.com/@TREVORMARCHANT/the-most-persuasive-tool-in-advertising-3c8eb5a0ce54> [<https://perma.cc/628X-FZ6F>] (emphasizing importance that advertisements explain why the advertised product is superior to competitors' and giving example of a soda advertisement claiming that the soda tastes better *because* it contains 10 percent fruit juice).

least a disclosure of the legitimate reason should be required. Still, a stronger, and likely more effective approach is to require an explicit disclaimer of the false belief. However, creating an effective disclaimer is difficult. Thus, when the likelihood of deception and the harm from being deceived is high relative to the benefit from the highlighted information, prohibiting highlighting the product characteristic might still be justified.