Correcting Corrective Advertising: A Tool to Address Harm Caused by Dishonest Advertisers

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Businesses have incentives to lie to us—everyday consumers. By making their offerings appear more attractive than they actually are, false advertisers are able to gain an unfair advantage in the marketplace at the expense of consumers and competitors. Although legal and reputational risks accompany the benefits of engaging in such behavior, these risks are not as detrimental as one might intuit.

When the government takes action for false advertising, the false advertiser is likely to receive little punishment—often, no more than an order to stop making that false claim and to pay a penalty. In other words, the business must stop lying but does not need to tell its customers that they were lied to. Without more, in the usual case, a business can continue profiting from consumers whose purchasing decisions remain based on the discontinued claim. Accordingly, businesses considering false advertising have little to worry about on the "risk" side of the equation and a lot to gain on the "benefit" side.

Recognizing that ending a false claim does not end its harm, the Federal Trade Commission (FTC) has innovated remedies beyond simple fines and cease and desists. This Note focuses on the corrective advertising remedy, arguing that it has the potential to be a valuable consumer protection tool to correct harm and deter bad behavior. However, because the remedy is used rarely and unpredictably, its efficacy is compromised.

This Note examines the remedy's history and the reasons behind its infrequent use. Because administrative efficiency concerns currently limit the remedy's efficacy, the Note proposes strategies to make the remedy more efficient. Especially in light of AMG Capital Management v. FTC*, a 2021 Supreme Court decision that severely impacts the FTC's ability to obtain traditionally pursued equitable monetary relief for consumers, the FTC stands to benefit from refining its injunctive relief toolkit, including corrective advertising.*

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INTRODUCTION

In 2020, the Federal Trade Commission (FTC) filed a complaint in a federal district court against prison phone plan providers, alleging that the companies were falsely advertising "unlimited minutes for inmate calling plans that, in reality, did not provide a single minute of talk time."[1] The complaint alleged that, since at least 2016, the companies had falsely advertised "nonexistent calling plans" to the friends and families of incarcerated individuals.[2] Several impacted customers described their experiences and difficulties, including unsuccessful attempts to obtain refunds after learning that the plans they received were nothing like what they were promised.[3] Specifically, customers were misled into believing that the companies were affiliated with reputable service providers and that the plans would be compatible with the particular facilities that the customers wished to call into.[4]

In its complaint, the FTC emphasized the scam's impact on consumers.[5] In total, the companies' false claims resulted in more than one million dollars being taken from misled customers and "triggered hundreds of consumer complaints to the FTC, the Better Business Bureau, and other entities."[6] The FTC observed that "[b]ecause a disproportionate number of incarcerated individuals are from communities of color or lower-income communities, many of the consumers harmed by [the companies'] practices are likely from these communities."[7] Further, the COVID-19 pandemic made consumers more vulnerable to the companies' scheme due to their increased reliance on telecommunication to stay in touch with incarcerated loved ones.[8]

On October 14, 2021, one year after the complaint's filing, the court approved a settlement between the FTC and the companies.[9] The settlement required that the companies not only cease their deceptive acts but also correct their claims and notify past and future consumers of the prior falsities via all consumer-facing websites controlled by the companies *and* via direct emails to a list of consumers determined by the FTC.[10] The settlement specified the exact language and form of the corrections, and it required that the corrective measures last two years from the date of the order.[11]

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[1] Press Release, FTC, FTC Stops Deceptive Prison Calling Scheme, Requires Operator to Notify Consumers About Unlawful Conduct as Part of Settlement (Oct. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-stops-deceptive-prison-calling-scheme-requires-operator-notify-consumers-about-unlawful-conduct [https://perma.cc/G5ME-KFC6].

[2] Complaint for Permanent Injunction & Other Equitable Relief at 4, FTC v. Disruption Theory LLC, No. 20-cv-06919 (N.D. Cal. Oct. 5, 2020).

[3] *See generally* Appendix of Exhibits in Support of Plaintiff's Ex Parte Motion for Temporary Restraining Order with Asset Freeze & Other Equitable Relief, & Order to Show Cause Why a Preliminary Injunction Should Not Issue, Volume 1 (PX01 to PX10), *Disruption Theory LLC*, No. 20-cv-06919 (compiling declarations and attachments of ten affected customers, totaling 176 pages).

[4] *See, e.g.*, *id.* at 15, 35.

[5] Complaint for Permanent Injunction & Other Equitable Relief, *supra* note 2.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Stipulated Settlement Agreement & Order for Permanent Injunction at 1, *Disruption Theory LLC*, No. 20-cv-06919; *Disruption Theory LLC (Inmate Call)*, FTC, https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3156-disruption-theory-llc-inmate-call [https://perma.cc/DCV5-2DQF] (Oct. 15, 2021).

[10] Stipulated Settlement Agreement & Order for Permanent Injunction, *supra* note 9, at 4–5.

[11] *Id.*

Though laudable,[12] the FTC's decision in this case to require corrective advertising is peculiar because the FTC rarely exercises this remedy.[13] The seminal corrective advertising case took place in 1977, which both confirmed the FTC's authority to pursue this injunctive remedy and solidified the legal standard necessary for the FTC to impose it.[14] Since then, the FTC has only required corrective advertising a few times.[15]

This is not because false advertising is uncommon or unimportant. To the contrary, in 2022, the FTC initiated approximately forty advertising and marketing cases,[16] which does not account for numerous false advertising disputes arising under state statutes, private state and federal causes of action, and industries' self-regulation. The Better Business Bureau reviewed 261 advertising cases in 2022 across its four advertising programs.[17] And, false advertising generates immense amounts of harm worldwide, especially in today's digital environment.[18] Given the frequency of false advertising disputes and the infrequency of corrective advertising orders, it seems that the FTC does not pursue corrective advertising with the same frequency, aggression, or success as its other remedies for false advertising violations.[19]

The FTC has broad discretion to impose remedies, which range from fines to injunctions to equitable monetary relief for harmed consumers.[20] In 2021, however, the Supreme Court's *AMG Capital Management* opinion limited the FTC's use of its preferred legal pathway for securing equitable monetary relief, such as restitution and disgorgement, for consumers.[21] As a result, the

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[12] *See* Jeff Greenbaum, *If You Advertise "Unlimited," It Had Better Be "Unlimited,"* FRANKFURT KURNIT KLEIN & SELZ PC (Oct. 17, 2020), https://advertisinglaw.fkks.com/post/102giez/if-you-advertise-unlimited-it-had-better-be-unlimited [https://perma.cc/VWF7-SFYC] ("Here, the FTC took action to protect a vulnerable community that hasn't been a big focus of consumer protection action in the past -- prison inmates and their families and friends.").

[13] *See* Press Release, FTC, Doan's Pills Must Run Corrective Advertising: FTC Ads Claiming Doan's Is Superior in Treating Back Pain Were Unsubstantiated (May 27, 1999), https://www.ftc.gov/news-events/news/press-releases/1999/05/doans-pills-must-run-corrective-advertising-ftc-ads-claiming-doans-superior-treating-back-pain-were [https://perma.cc/9DRL-2SGS] (referencing "only [one] other adjudicated case in the last 25 years in which the Commission ha[d] ordered corrective advertising" as of 1999).

[14] Warner-Lambert Co. v. FTC, 562 F.2d 749, 749, 762 (D.C. Cir. 1977).

[15] *Infra* Section II.A.

[16] *Cases Tagged with Advertising and Marketing*, FTC, https://www.ftc.gov/enforcement/cases-proceedings/terms/1405?page=0 [https://perma.cc/WYA7-MFRZ] (last visited Oct. 2, 2023).

[17] BETTER BUS. BUREAU, NATIONAL ADVERTISING DIVISION 2022 ANNUAL REPORT 13 (2023), https://assets.bbbprograms.org/docs/default-source/nad/nad_annualreport_2022.pdf?sfvrsn=d4c58159_3 [https://perma.cc/D8S8-445A].

[18] *See* Nicole Perrin, *Digital Ad Fraud 2019*, INSIDER INTEL. (Feb. 6, 2019), https://www.insiderintelligence.com/content/digital-ad-fraud-2019 (estimating that digital advertising fraud imposes billions of dollars of costs on the global marketplace).

[19] The FTC has demonstrated a tendency to pursue simple cease and desists. *See, e.g.*, Press Release, FTC, FTC Sends Cease and Desist Demands to 10 Companies Suspected of Making Diabetes Treatment Claims Without the Required Scientific Evidence (Sept. 9, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-sends-cease-desist-demands-10-companies-suspected-making-diabetes-treatment-claims-without [https://perma.cc/N7VN-RAVN].

[20] *See* LESLEY FAIR, FTC, FEDERAL TRADE COMMISSION ADVERTISING ENFORCEMENT 1–11 (2008), https://www.ftc.gov/sites/default/files/attachments/training-materials/enforcement.pdf [https://perma.cc/ZVD3-YJTZ].

[21] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1343 (2021) ("Section 13(b) [of the FTC Act] does not authorize the Commission to seek, or a court to award, equitable monetary relief such as restitution or disgorgement."); *see* Press Release, Rebecca Kelly Slaughter, Acting Chairwoman, FTC, Statement on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC (Apr. 22, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us-supreme-court-

FTC has been forced to explore new means of securing that end, with some of these new avenues taking much longer or requiring enhanced participation from state agencies.[22] Now that ex post recovery is less convenient and thus provides less of a deterrent threat to prospective false advertisers, the FTC should take steps to optimize its injunctive toolkit, which is far less susceptible to invalidation.

Corrective advertising is a form of "fencing-in"—a remedy "broader in scope than the conduct that is declared unlawful" and "designed to prevent future unlawful conduct."[23] The Supreme Court has confirmed the validity of such remedies and warned businesses that "those caught violating the [FTC] Act must expect some fencing in."[24] Accordingly, if pursued effectively, corrective advertising can serve two purposes: (1) preventing ongoing harm by correcting false beliefs, and (2) deterring false advertising, which will in turn lead to fewer false beliefs.

Recognizing that administrative inefficiencies currently limit the remedy's value, this Note proposes strategies to make the remedy more practicable and efficient. The argument is organized as follows: Part I describes the regulatory framework and legal standard surrounding corrective advertising as a remedy for false advertising. Part II discusses the few cases in which corrective advertising has been pursued by the FTC and other entities. Part III explores reasons for the remedy's infrequent usage and examines its efficacy. Part IV proposes strategies to address the remedy's current administrative shortfalls and strengthen its role in achieving consumer protection aims. A brief conclusion follows.

I. THE FTC, FALSE ADVERTISING, AND THE CORRECTIVE ADVERTISING REMEDY

Though this Note focuses on the FTC's role in advertising regulation, it is helpful to contextualize the broader framework within which the corrective advertising remedy sits. Advertising's regulatory landscape comprises the federal government, state attorneys general, and

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ruling-amg-capital [https://perma.cc/J2Y3-YXAU] ("With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole."). At a national advertising conference, one FTC official remarked:

> [O]ur agency suffered a major setback when the Supreme Court, in the *AMG* decision, stripped us of our ability to recover redress for consumers through Section 13(b) of the FTC Act. It is difficult to overstate the impact this has had. For decades, the Bureau of Consumer Protection had relied on Section 13(b) in the overwhelming majority of its cases. In fact, in the four years before *AMG* was decided, the Commission used the authority to return more than $11 billion to consumers.

Samuel Levine, Dir., Bureau of Consumer Prot., FTC, Remarks at the National Advertising Division Annual Conference 2022: The Next Era of Ad Law (Sept. 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks_of_samuel_levine_at_nad_2022.pdf [https://perma.cc/3Z5B-CW4Y].

[22] *See* F. Phillip Hosp V, *The FTC Adopts New Strategy to Obtain Monetary Relief in California After the Supreme Court's Ruling in* AMG Capital, FOLEY & LARDNER LLP (Sept. 28, 2022), https://www.foley.com/en/insights/publications/2022/09/ftc-new-strategy-monetary-relief-california [https://perma.cc/A3SH-PRYV]; AMG v. FTC*: US Supreme Court Severely Limits FTC's Ability to Seek Monetary Relief*, COOLEY LLP (Apr. 29, 2021), https://www.cooley.com/news/insight/2021/2021-04-29-amg-v-ftc [https://perma.cc/W3ZM-MBHP].

[23] Opinion of the Commission, at 2 n.3, Telebrands Corp., No. 9313 (F.T.C. Sept. 19, 2005), https://www.ftc.gov/sites/default/files/documents/cases/2005/09/050923opinion.pdf [https://perma.cc/BZ5Q-7LG2] (first citing FTC v. Colgate-Palmolive Co., 380 U.S. 374, 395 (1965); and then citing Kraft, Inc. v. FTC, 970 F.2d 311, 326 (7th Cir. 1992)).

[24] FTC v. Nat'l Lead Co., 352 U.S. 419, 431 (1957).

private claims. Self-regulatory bodies, namely the Better Business Bureau, also serve an important role.

Although the corrective advertising remedy is not explicitly outlined in legislation or Title 16 of the Code of Federal Regulations, it stems from the FTC Act's grant of broad discretion to the FTC to devise injunctive remedial measures.[25] Courts have also exercised authority to order corrective advertising as a remedy under the Lanham Act.[26] In 1977, the remedy, its constitutionality, and its legal standard were discussed in depth by the District of Columbia Circuit in *Warner-Lambert Co. v. FTC*,[27] now known as the remedy's seminal case.

A. REGULATORY LANDSCAPE: FTC, "LITTLE FTC ACTS," AND SELF-REGULATION

The FTC is the primary governmental authority overseeing marketing and advertising practices in the United States. Under Section 5 of the FTC Act, the FTC possesses investigative and enforcement authority "to prevent . . . unfair or deceptive acts or practices in or affecting commerce."[28] Further, Section 13 permits the FTC to seek an array of injunctive relief and other equitable remedies from federal courts.[29] The FTC can pursue its consumer protection mission through administrative proceedings under its own adjudicative authority or judicial proceedings in the courts.[30] Section 6 of the FTC Act also provides rulemaking authority.[31]

Additionally, harmed consumers and competitors are able to bring claims against false advertisers under Section 43 of the Lanham Act.[32] In addressing such claims, some courts have considered corrective advertising as a remedy, in addition to damages.[33]

Beyond federal law, many states have passed consumer protection legislation. Because these laws frequently mirror the "unfair or deceptive acts or practices" language of the FTC Act, these laws are sometimes referred to as "UDAP statutes" or "Little FTC Acts."[34] One such example is California's Unfair Competition Law, which allows private parties and prosecutors to pursue injunctions and restitution in court.[35] Notably, UDAP statutes differ across states with respect to the scope of prohibited practices, the elements of a valid claim, and the methods of enforcement.[36] These differences create a state-by-state consumer protection patchwork.

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[25] *See* 15 U.S.C. § 45(a)(2).

[26] *See* Lanham Act, 15 U.S.C. § 1125(a); *see, e.g.*, Rhone-Poulenc Rorer Pharms., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 516 (8th Cir. 1996).

[27] 562 F.2d 749, 749 (D.C. Cir. 1977).

[28] 15 U.S.C. § 45(a)(2).

[29] 15 U.S.C. § 53.

[30] *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/2BUU-GY5M].

[31] 15 U.S.C. § 46(g).

[32] Lanham Act, 15 U.S.C. § 1125(a).

[33] *See, e.g.*, Merck Eprova AG v. Gnosis S.P.A., 760 F.3d 247, 264–65 (2d Cir. 2014).

[34] *See* Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 373–74 (1990).

[35] CAL. BUS. & PROF. CODE §§ 17200, 17535; Shannon Dudic & Alexander Wolf, *California's False Advertising Law: Overview*, THOMSON REUTERS PRAC. L., https://uk.practicallaw.thomsonreuters.com/w-021-5935?documentSection=co_anchor_a425989 (last visited Oct. 4, 2023).

[36] ANNE P. CAIOLA & PAUL F. WOODY, A.B.A., ADVERTISING ISSUES FOR FRANCHISE SYSTEMS: FROM "A" CUSTOMER TO PROSPECTIVE "ZEES" 7–8 (2022), https://www.greensfelder.com/media/publication/745_W20%20-%20Advertising%20For%20Franchise%20Systems%20_4881-8264-2749.1_.pdf [https://perma.cc/P7AR-S9KW].

The Better Business Bureau (BBB), a nonprofit organization, provides a unique form of advertising oversight, supplementing the legislative, administrative, and judicial avenues described thus far.[37] In 1971, the BBB established the National Advertising Division (NAD) and National Advertising Review Board (NARB) to review "truth-in-advertising challenges from businesses, trade associations, consumers, or on its own initiative."[38] NAD and NARB have independent procedures in place to investigate the truthfulness of advertising claims and counsel businesses on compliance, which includes correcting false advertisements.[39] NARB serves as a forum for businesses to "appeal" decisions from NAD.[40] In the rare event that a business fails to respond or declines to comply, the case can be referred to the FTC.[41] NAD and NARB are highly effective and respected in the advertising trade;[42] in 2021, NAD and NARB reviewed 149 cases and 18 appeals respectively,[43] and referred 60% fewer cases to the FTC than in the previous year.[44]

B. THE CORRECTIVE ADVERTISING REMEDY AND *WARNER-LAMBERT* STANDARD

As outlined above, corrective advertising is not stated within legislation as a possible remedy. Originally, the FTC's traditional remedy for advertising violations was a cease and desist order,[45] and courts were deferential to the FTC's "wide discretion" in fashioning this kind of equitable injunctive relief.[46] It was not until a 1968 investigation, sparked by a group of law students at George Washington University, that the FTC devised the corrective advertising remedy.[47] The student group, calling themselves Students Opposing Unfair Practices (SOUP), voiced their concerns regarding a Campbell's Chicken & Stars Soup campaign in which the advertisers used

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[37] *See* BETTER BUS. BUREAU, https://www.bbb.org/ [https://perma.cc/REJ2-9CTG] (last visited Oct. 4, 2023); *Frequently Asked Questions About the Better Business Bureau*, BETTER BUS. BUREAU, https://www.bbb.org/all/faq [https://perma.cc/A6J7-ELAF] (last visited Oct. 4, 2023).

[38] *National Advertising Division*, BETTER BUS. BUREAU, https://bbbprograms.org/programs/all-programs/national-advertising-division [https://perma.cc/FK2P-V7DN] (last visited Oct. 4, 2023); *see National Advertising Review Board*, BETTER BUS. BUREAU, https://bbbprograms.org/programs/all-programs/national-advertising-review-board [https://perma.cc/EB97-5M57] (last visited Oct. 4, 2023).

[39] *See* BETTER BUS. BUREAU, THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION 10–28 (2023), https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/bbb-national-programs/procedures/nad_narbprocedures_current.pdf [https://perma.cc/4T5J-PB3S].

[40] *National Advertising Review Board*, BETTER BUS. BUREAU, https://bbbprograms.org/programs/all-programs/national-advertising-review-board [https://perma.cc/EB97-5M57] (last visited Sept. 15, 2023).

[41] *See* BETTER BUS. BUREAU, *supra* note 39, at 22, 28.

[42] *See* Terri Seligman & Hannah Taylor, *Navigating the National Advertising Division*, LANDSLIDE MAG. (Mar.–Apr. 2019), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/navigating-national-advertising-division/ [https://perma.cc/ZAD8-F24J] (describing NAD as "robust," "vigorous," "sophisticated," and "successful[]").

[43] BETTER BUS. BUREAU, NATIONAL ADVERTISING DIVISION 2021 ANNUAL REPORT 13 (2022), https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/nad/nad_annualreport_2021_digital_periodical-report.pdf [https://perma.cc/E3RC-KCQU].

[44] *Id.* at 9.

[45] *See* Note, *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374, 374 (1971).

[46] *See* Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965).

[47] *See History of Advertising: No 163: Campbell's Marbles*, CAMPAIGN US (Feb. 25, 2016), https://www.campaignlive.com/article/history-advertising-no-163-campbells-marbles/1384734 [hereinafter *History of Advertising*].

hidden marbles to prop up the soup's solid ingredients for photography.[48] Although the FTC eventually dismissed its complaint in 1972 and did not require corrective advertising, "the concept had been born."[49]

In 1977, the D.C. Circuit issued its opinion in *Warner-Lambert Co. v. FTC*,[50] a case concerning false claims about Listerine's health benefits, which has since become the seminal corrective advertising case.[51] The case found its way to the D.C. Circuit five years after the FTC commenced an administrative proceeding, alleging that Warner-Lambert falsely advertised that Listerine could prevent and cure the common cold.[52] An administrative law judge sustained the FTC's allegations, and the company appealed to the Commission.[53] The Commission affirmed the decision and issued an order requiring corrective advertising.[54] The company sought review of the order before the D.C. Circuit, tasking the court with determining whether corrective advertising was appropriate.[55]

The *Warner-Lambert* court held that the remedy was a valid exercise of the FTC's authority based on legislative, constitutional, and precedential arguments.[56] In addition to confirming the remedy's validity, the opinion established the standard to be used in determining whether an order requiring corrective advertising is appropriate.[57] The remedy is appropriate if the following two factual inquiries are answered in the affirmative: "(1) did [the company's] advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about the product? and (2) would this belief linger on after the false advertising ceases?"[58]

After determining that the facts satisfied the standard for corrective advertising as a remedy, the court turned its attention to the specific disclosure imposed by the FTC.[59] The court upheld the portion of the disclosure correcting the prior false claim but struck the introductory language, "[c]ontrary to prior advertising," noting that this preamble was merely "confessional" and intended to "humiliate the advertiser."[60] The court explained that a preamble serving such a purpose might only "be called for in an egregious case of deliberate deception."[61]

Lastly, the court upheld the corrective advertising requirement's duration.[62] Because the company's false claims spanned one hundred years, the court found it reasonable for the company to expend ten million dollars (the average annual advertising spend for Listerine) on corrective advertisements.[63] By tying the duration requirement to a dollar amount rather than a fixed period of time, the court ensured that the company could not shirk responsibility by simply "cut[ting]

[48] *Id.*; Campbell Soup Co., 77 F.T.C. 664, 665 (1970).
[49] *History of Advertising*, *supra* note 47.
[50] 562 F.2d 749, 764 (D.C. Cir. 1977).
[51] *Id.* at 752–53.
[52] *Id.* at 752.
[53] *Id.*
[54] *Id.* at 752–53.
[55] *Id.* at 752.
[56] *Id.* at 756–61.
[57] *Id.* at 762.
[58] *Id.*
[59] *Id.* The FTC ordered a disclosure stating, "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." *Id.* at 763.
[60] *Id.* at 763.
[61] *Id.*
[62] *Id.* at 763–64.
[63] *Id.*

back its Listerine advertising."[64] Reducing or ceasing advertising would simply elongate the duty to disclose.[65]

The court's analysis indicates that orders requiring corrective advertising should be reserved for particularly serious advertising violations[66] and be no broader than necessary[67] to counteract the false claims at issue.

II. *WARNER-LAMBERT*'S CONSIDERATIONS APPLIED TO SUBSEQUENT CASES

While the FTC is the primary entity seeking corrective advertising, the various forms of advertising regulation also result in private parties and federal entities, namely the Department of Justice (DOJ), pursuing the remedy. Section II.A discusses the FTC's traditional uses of the remedy, which have been generally successful but infrequently pursued. Section II.B identifies circumstances in which the DOJ and private parties have pursued—and struggled to secure—the remedy.

A. THE FTC'S (SUCCESSFUL) PURSUIT OF CORRECTIVE ADVERTISING

Since its 1968 inception, the corrective advertising remedy has been rarely and unpredictably used. When the remedy was initially discussed in the context of the 1968 Campbell's Soup case, the FTC pursued it frequently in "rapid succession."[68] Even in corrective advertising's early stages, the presence of "residual effects," such as "continued reliance by consumers on false information . . . as a result of a successful deceptive campaign," was a key factor in determining whether corrective advertising was appropriate.[69] This consideration resembled the eventual *Warner-Lambert* standard's second prong—the inquiry into lingering beliefs.[70]

The first case to reach a resolution was a 1971 consent order requiring ITT Continental Baking (ITT) to correct deceptive claims about the nutritional value of Profile Bread.[71] As in *Warner-Lambert*, the duration of the corrective advertising requirement was expressed in terms of ITT's media budget.[72] ITT did not need to disclose that the FTC had found the previous claims deceptive,[73] but ITT did need the FTC's approval on the advertising "manner."[74]

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[64] *Id.* at 764.

[65] *Id.*

[66] *See id.* at 763 (assessing "the need for corrective advertising in this case").

[67] *See id.* at 764 (assessing whether the order was "reasonably related to the violation").

[68] Harold H. Kassarjian, Cynthia J. Carlson & Paula E. Rosin, *A Corrective Advertising Study*, 2 ADVANCES IN CONSUMER RSCH. 631, 631 (1975) (listing "Firestone Tires, Hi-C Fruit Drink, Domino Sugar, Wonder Bread, and Standard Oil's Chevron F-310" as examples of FTC requests for corrective advertising).

[69] Note, *supra* note 45, at 377–78.

[70] *Warner-Lambert Co.*, 562 F.2d at 762.

[71] Note, *supra* note 45, at 376–77 (citing Decision & Order, ITT Cont'l Baking Co., No. 2-2015 (F.T.C. Aug. 17, 1971)).

[72] *Id.*

[73] *Id.*; *but cf.* Carole Shifrin, *STP to Pay $700,000 for Its Ad Claims*, WASH. POST (Feb. 10, 1978), https://www.washingtonpost.com/archive/business/1978/02/10/stp-to-pay-700000-for-its-ad-claims/ac96ce33-aec4-49df-8a70-ba6611c9457f/ (describing a 1976 corrective advertising order against STP Corporation for false claims about its motor oil additive, where STP was required to admit that "prior statements were made in violation of law"). For the text of STP's corrective notice, which acknowledges the FTC's involvement, see Kenneth L. Bernhardt, Thomas C. Kinnear & Michael B. Mazis, *A Field Study of Corrective Advertising Effectiveness*, 5 J. PUB. POL'Y & MKTG. 146, 148 (1986).

[74] Note, *supra* note 45, at 377. The text of ITT's corrective advertisement:

A few years later, in 1977, *Warner-Lambert* solidified the two-question standard followed by the FTC and courts to date. Twenty years then passed before the FTC next litigated corrective advertising. During that twenty-year gap in litigation, the FTC issued only two consent orders requiring corrective advertising: (1) to Unocal Corporation, regarding gasoline performance and octane levels; and (2) to Eggland's Best, regarding the health benefits of their eggs.[75]

In the FTC's first corrective advertising litigation since *Warner-Lambert*,[76] the agency filed suit against Novartis Corporation, which had made false claims about the efficacy of Doan's over-the-counter painkillers.[77] The case reached the D.C. Circuit in a similar manner to *Warner-Lambert*—an administrative proceeding was initiated within the FTC, and the company appealed in federal court two years later.[78] Interestingly, the administrative law judge ruled that the company had deceptively advertised but ruled against corrective advertising because it would have been too "drastic."[79] Both the company and the FTC appealed; the company challenged the "deceptiveness" ruling, and the FTC pressed for corrective advertising.[80] The Commission affirmed the ruling of deceptiveness and reversed in favor of corrective advertising, finding that the *Warner-Lambert* standard was met.[81] The company then appealed the deceptiveness ruling and corrective advertising order to the D.C. Circuit.[82]

The *Novartis* court affirmed, indicating that its approval of the corrective advertising order heavily hinged on testimony from the FTC's expert witness.[83] Citing studies conducted both before and after the campaign in question, the court ruled that the standard's first prong—whether the campaign played a substantial role in creating a false belief about the superiority of Doan's pills—was satisfied.[84] With respect to the second prong's inquiry into lingering beliefs, the court ruled that the deceptive advertisements' effects were likely to linger, based on a study of consumers six months after Novartis ceased the advertisements.[85] The court then succinctly rejected Novartis's contention that the corrective advertising requirement was "overly broad," noting that the *Warner-*

> Hi, (Celebrity's Name), for Profile Bread. Like all mothers, I'm concerned about nutrition and balanced meals. So, I'd like to clear up any misunderstanding you may have about Profile Bread from its advertising or even its name.
>
> Does Profile have fewer calories than other breads? No. Profile has about the same per ounce as other breads. To be exact, Profile has seven fewer calories per slice. That's because Profile is sliced thinner. But eating Profile will not cause you to lose weight. A reduction of 7 calories is insignificant. It's total calories and balanced nutrition that count. And Profile can help you achieve a balanced meal because it provides protein and B vitamins as well as other nutrients.
>
> How does my family feel about Profile? Well—my husband likes Profile toast; the children love Profile sandwiches and I prefer Profile to any other bread. So you see, at our house, delicious taste makes Profile a family affair.

Id. at 377, n.20.

[75] Unocal Corp., 117 F.T.C. 500, 500 (1994); Eggland's Best, Inc., 118 F.T.C. 340, 340 (1994).

[76] Sheila F. Anthony, Former Comm'r, FTC, Remarks Before the American Law Institute-American Bar Association (ALI-ABA) Product Distribution and Marketing Meeting (Mar. 10, 2000), https://www.ftc.gov/news-events/news/speeches/advertising-unfair-competition [https://perma.cc/RA9L-D7DM] ("Last May [1999], the Commission issued its opinion in the first litigated corrective advertising case in 20 years.").

[77] Novartis Corp. v. FTC, 223 F.3d 783, 785 (D.C. Cir. 2000).

[78] *Id.* at 785–86.

[79] *Id.* at 786.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 787–88.

[84] *Id.* at 788.

[85] *Id.*

Lambert standard was satisfied and the order narrowly sought to prevent further "misleading and deceptive advertising."[86]

B. NON-FTC (LESS SUCCESSFUL) PURSUITS OF CORRECTIVE ADVERTISING

In contrast to the FTC's actions in courts, non-FTC pursuits of corrective advertising are often hindered by courts. In a series of racketeering-focused cases against Philip Morris, along with several other "Big Tobacco" defendants, the DOJ's attempts to impose corrective advertisements were challenged by additional litigation over the course of more than fifteen years.[87] The defendants were able to gradually "weaken" their corrective advertising orders through a series of appeals, prolonging the gap between their false claims and corrective actions.[88] The weakened remedies—scheduled to take effect in July 2023—will not be implemented until years after the harms they were meant to address began.[89]

In a private claim regarding consumer confusion under the Lanham Act, the U.S. District Court for the District of Oregon acknowledged its authority to grant corrective advertising as a remedy, but denied corrective advertising in the particular circumstances.[90] The court noted that the remedy was not necessary, given that the plaintiff failed to establish that (1) "a large audience actually viewed" the defendant's advertisements; and (2) consumers "continue[d] to be actually deceived."[91]

C. IMPLICATIONS OF A STRONG FTC TRACK RECORD

Across corrective advertising disputes spanning over fifty years, including the 2021 "inmate calling plans" settlement,[92] one of the only disagreements between a court and the FTC concerned the "confessional preamble" in the *Warner-Lambert* case.[93] This observation suggests either or both of the following: (1) the FTC has been careful to impose the remedy only when certainly justifiable, and (2) courts are highly deferential to the FTC's corrective advertising determinations.

If the first holds true—the FTC orders the remedy only when it knows it has a winning case in federal court—there exists a strong possibility that the remedy is underutilized and could play a

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[86] *Id.* at 789.

[87] United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 1, 628 (D.D.C. 2006), *aff'd in part, vacated in part per curiam*, 566 F.3d 1095, 1095 (D.C. Cir. 2009), *cert. denied*, 561 U.S. 1025, 1025 (2010), *clarification granted*, 778 F. Supp. 2d 8, 9 (D.D.C. 2011), *order modified*, No. 99-CV-2496 (PLF), 2022 WL 17452863, at *1 (D.D.C. Dec. 6, 2022).

[88] *See id.*; *U.S. Racketeering Verdict: Big Tobacco Guilty as Charged*, CAMPAIGN FOR TOBACCO-FREE KIDS (June 27, 2023), https://www.tobaccofreekids.org/what-we-do/industry-watch/doj [https://perma.cc/B8S5-FNRN].

[89] Press Release, DOJ, Court Issues Order Requiring Cigarette Companies to Post Corrective Statements; Resolves Historic RICO Tobacco Litigation (Dec. 6, 2022), https://www.justice.gov/opa/pr/court-issues-order-requiring-cigarette-companies-post-corrective-statements-resolves-historic [https://perma.cc/2RHP-22VR]; *Retailers Required to Post Tobacco Industry "Corrective Statements" at the Point of Sale*, COUNTERTOBACCO.ORG (Dec. 14, 2022), https://countertobacco.org/retailers-required-to-post-tobacco-industry-corrective-statements-at-the-point-of-sale/ [https://perma.cc/7E7W-H88T].

[90] Healthport Corp. v. Tanita Corp. of Am., 563 F. Supp. 2d 1169, 1182 (D. Or. 2008), *aff'd*, 324 F. App'x 921, 922 (Fed. Cir. 2009).

[91] *Id.*

[92] *See supra* Introduction.

[93] Warner-Lambert Co. v. FTC, 562 F.2d 749, 763 (D.C. Cir. 1977) (affirming corrective advertising order and language but eliminating the preamble, "[c]ontrary to prior advertising").

larger role in combating false advertising harms. If the second is true—the *Warner-Lambert* inquiry is favorable to the FTC in these sorts of cases—an increased use of the remedy could play a larger role in deterring bad actors, given that these actors will recognize ex ante that a corrective advertising order likely would follow. Accordingly, it seems strange that the FTC does not order this remedy more frequently.

III. REASONS FOR INFREQUENT USE: EFFECTIVENESS AND EFFICIENCY CONSIDERATIONS

The FTC has pursued corrective advertising only a handful of times since the remedy was first considered fifty years ago. Given corrective advertising's fundamental principle—that false claims can cause harm that lingers beyond the claims themselves, as well as the FTC's success in gaining courts' approval, one would expect the FTC to employ the remedy more frequently and consistently. Two factors can help to explain this oddity: (1) the remedy might not effectively correct consumer beliefs in practice; and (2) administrative efficiency considerations might discourage FTC staff from pursuing this remedy. On balance, as discussed below, studies tend to substantiate the merits of corrective advertising; the primary issue that detracts from the remedy's value in practice is rooted in administrative costs.

A. THE REMEDY'S EFFECTIVENESS

One potential reason for corrective advertising not being the FTC's go-to remedy is that the merits of corrective advertising are disputed. Broadly, there are numerous criticisms of disclosure-based regulatory solutions.[94] Corrective advertising arguably falls within this category.[95] Criticisms include the likelihood of information overload[96] and the risk of deceptive disclosures.[97]

With respect to corrective advertising specifically, a number of studies suggest that the remedy is effective. A 2015 study in the direct-to-consumer prescription drug space found that exposure to both a false advertisement and a corrective advertisement led to decreased belief in the false advertisement.[98] In a 1972 study prompted by the FTC's novel pursuit of corrective advertising, exposure to a brand's advertisement resulted in only a "*slightly* favorable attitude toward the brand," while exposure to a corrective advertisement resulted in a "*significantly* less favorable

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[94] KATHERINE PORTER, MODERN CONSUMER LAW 8–9 (2016).

[95] *See Warner-Lambert Co.*, 562 F.2d at 759 ("[T]he concept is well established. It is simply that under certain circumstances an advertiser may be required to make affirmative disclosure of unfavorable facts."); *Advertising FAQ's: A Guide for Small Business*, FTC, https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business [https://perma.cc/M8PN-GYRC] (last visited Sept. 16, 2023) (grouping together "[c]orrective advertising, disclosures and other informational remedies").

[96] *See* Paul D. Adams, Stefan Hunt, Christopher Palmer & Redis Zaliauskas, *Testing the Effectiveness of Consumer Financial Disclosure: Experimental Evidence from Savings Accounts* 26 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25718, 2019), https://www.nber.org/system/files/working_papers/w25718/w25718.pdf [https://perma.cc/T3YZ-MZX6] ("[Consumers'] inattention is a fundamental barrier to disclosure usefulness."); Joost Impink, Mari Paananen & Annelies Renders, *Regulation-Induced Disclosures: Evidence of Information Overload?*, 58 ABACUS 432, 459 (2022) (concluding that even "analysts are affected by more regulation-induced disclosures and that this is due to information overload").

[97] *See* ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 7 (2007) (explaining that conflicting interests can lead to "incomplete, inaccurate, obsolete, confusing, or distorted" disclosures).

[98] Kathryn J. Aikin, Kevin R. Betts, Amie C. O'Donoghue, Douglas J. Rupert, Philip K. Lee, Jacqueline B. Amoozegar & Brian G. Southwell, *Correction of Overstatement and Omission in Direct-to-Consumer Prescription Drug Advertising*, 65 J. COMMC'N 596, 612 (2015).

attitude."[99] In other words, advertisements that negated the claims of the regular advertisements were more influential on participants' perceptions than the regular advertisements themselves.

On the other hand, some scholars suggest that research on this topic is inconclusive, given that such research often involves laboratory settings and "forced exposure" to advertisements, rather than real-life, "naturalistic" conditions.[100] Evaluating corrective advertising is further complicated by the finding that media publicity and resulting word-of-mouth communications are "prevalent mechanisms" that impact consumers' perceptions and beliefs.[101]

Additionally, the 1972 study found that the corrective advertisements' "sources"—a government agency, a consumer organization, the brand itself, or the brand's competitor—did not have differing impacts on participants' attitudes towards the brand.[102] Although the government agency and consumer organization were expected to be perceived as more truthful and less biased when countering the brand's claims, no specific source's counters were more effective than the others.[103] Accordingly, the government's interest in making companies include confessional preambles[104] might be misguided if humiliating the company, rather than simply correcting beliefs, is the motivating factor.[105]

A separate issue impacting the remedy's effectiveness is the temporal gap between the false and corrective advertisements, arising from the lengthy nature of the necessary legal proceedings.[106] As evidenced by the "truth" campaign and the remedy's implementation in the tobacco industry—including in the *Philip Morris* litigation discussed above—the large-scale corrective advertising requirements turned out to be far less impactful than intended.[107] Because several years elapsed between the false claims and the corrections, consumers' beliefs had been set in stone and the corrective advertising reignited the previous false narratives.[108] Long gaps of this nature are a recurring theme in false advertising disputes across multiple industries and continue to compromise the remedy's efficacy.[109]

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[99] H. Keith Hunt, *Source Effects, Message Effects, and General Effects in Counteradvertising*, *in* PROCS. OF THE THIRD ANN. CONF. OF THE ASS'N FOR CONSUMER RSCH 370, 373 (M. Venkatesan ed., 1972) (emphasis added).

[100] Bernhardt et al., *supra* note 73, at 146. This "naturalistic" study, nonetheless, finds that corrective advertising campaigns did impact the "[i]ntent to [p]urchase" the product in question. *Id.* at 154.

[101] Tyzoon T. Tyebjee, *The Role of Publicity in FTC Corrective Advertising Remedies*, 1 J. MKTG. & PUB. POL'Y 111, 111 (1982).

[102] Hunt, *supra* note 99, at 370, 374.

[103] *Id.* at 371, 374.

[104] *See supra* text accompanying notes 60–61.

[105] *See* Hunt, *supra* note 99, at 373–74, 376 ("Being required to admit in one's own ad that previous ad claims had been false caused a substantial drop in the perceived truthfulness of the corrective advertiser.").

[106] *See* Matthew C. Farrelly, Cheryl G. Healton, Kevin C. Davis, Peter Messeri, James C. Hersey & M. Lyndon Haviland, *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 AM. J. PUB. HEALTH 901, 901 (2002) (explaining that the American Legacy Foundation's "truth" campaign increased anti-tobacco attitudes, while Philip Morris's "Think. Don't Smoke." campaign in response to corrective advertising orders cultivated more favorable attitudes towards tobacco); Conversation with David Vladeck, Former Dir., Bureau of Consumer Prot., FTC, in Washington, D.C. (Dec. 2, 2022) (on file with author).

[107] Christopher Berry, Scot Burton, Jeremy Kees & J. Craig Andrews, *A Longitudinal Assessment of Corrective Advertising Mandated in* United States v. Philip Morris USA, Inc., 171 J. BUS. ETHICS 757, 757 (2021).

[108] *See* Conversation with David Vladeck, *supra* note 106.

[109] *Id.* On the other hand, anti-tobacco campaigns such as Florida's "truth" campaign, prove beneficial in the short-term. David F. Sly, Richard S. Hopkins, Edward Trapido & Sarah Ray, *Influence of a Counteradvertising Media Campaign on Initiation of Smoking: The Florida "Truth" Campaign*, 91 AM. J. PUB. HEALTH 233, 236 (2001). This suggests that time might truly be of the essence when considering corrective advertisements to combat false beliefs.

B. THE FTC'S EFFICIENCY CONSIDERATIONS

Relatedly, the FTC has limited resources available for undertaking such extensive administrative procedures, all of which are ultimately subject to the judicial system's lengthy procedures, as well.[110] The corrective advertising remedy requires not only the usual litigation procedures leading up to the issuance of an order but also the development of an individualized program for each particular case.[111] A proper program must specify the content and form of the corrective advertisements and must be narrowly tailored to address the harm alleged.[112] Further, the FTC must specify the channels through which the advertisement must be distributed, the duration for which the advertisement must be run, and necessary advertising expenditures.[113] And, the FTC must establish protocols on a case-by-case basis to continue monitoring companies' compliance and to address any violations in the future.[114] Each component becomes more difficult to optimize as the temporal gap grows.[115]

Given the administrative demands of this remedy, it is plausible that the costs of pursuing the remedy exceed the benefits. The unclear effectiveness of corrective advertisements and the impending inefficiencies involved in pursuing the remedy might make this remedy less attractive to the FTC from the get-go, regardless of whether an order would be affirmed by a federal court. Understandably, then, the FTC's staff might conclude that the tradeoffs associated with pursuing corrective advertising—namely, reduced time to allocate to other cases requiring attention—are not justified. It is quite possible that infrequently pursuing corrective advertising allows the FTC to address a greater volume of consumer protection harm on balance.

IV. PROPOSALS FOR AN OPTIMAL CORRECTIVE ADVERTISING FRAMEWORK

Given the merits of corrective advertising and the administrative costs associated with it, this Note now offers specific proposals that can improve the FTC's regulation of false advertising. Re-emphasizing *AMG Capital*'s[116] limitation of the FTC's preferred route to equitable monetary relief—which once provided valuable ex ante deterrence and ex post relief—this Note argues that strengthening the corrective advertising remedy's use is a valuable step toward strengthening the FTC's injunctive toolkit.

The corrective advertising remedy serves two goals: (1) discontinuing ongoing harm to consumers from uncorrected false beliefs, and (2) deterring false advertising, leading to fewer false beliefs being created. To achieve the first, the FTC must be able to effectively design its corrective

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[110] *See* PORTER, *supra* note 94, at 37.

[111] *See, e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749, 762–64 (D.C. Cir. 1977) (assessing the appropriateness of the corrective advertising remedy, in addition to the disclosure's specific language, duration, and budget).

[112] *See, e.g.*, *id.* at 763.

[113] *See, e.g.*, *id.* at 763–64.

[114] *See* Conversation with David Vladeck, *supra* note 106.

In 1995, STP Corporation violated the 1976 FTC order discussed above, *supra* note 73, by making new false claims. This resulted in "the third largest sum ever obtained by the FTC for a consumer protection order violation," as of 1995. Press Release, FTC, STP Corporation, and Its Parent Corporation, First Brands Corporation, Pay $888,000 Civil Penalty to Settle FTC Charges (Dec. 1, 1995), https://www.ftc.gov/news-events/news/press-releases/1995/12/stp-corporation-its-parent-corporation-first-brands-corporation-pay-888000-civil-penalty-settle-ftc [https://perma.cc/Y8X9-TYQY]. This illustrates the possibility of corrective advertising orders generating additional monitoring and enforcement work for the FTC ex post.

[115] *See* Conversation with David Vladeck, *supra* note 106.

[116] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1343 (2021).

advertising programs and litigate its orders. To achieve the second, the FTC must be able to efficiently pursue the remedy, or at least credibly threaten to pursue it, so that advertisers anticipate a corrective advertising order if they make false claims. Complying with a corrective advertising order can be detrimental to an advertiser's reputation and bottom line—and therefore serve a deterrent purpose ex ante—but only if the advertiser believes the remedy is meaningfully on the table.

Accordingly, the proposals below identify steps that the FTC should take to make the remedy more effective and administratively efficient, thereby making it more likely to be pursued—or at least more credibly threatened in a settlement negotiation. These proposals involve creating presumptions in favor of pursuing the remedy, identifying scenarios in which the remedy should be particularly considered, leveraging rulemaking authority, and predetermining the remedy's "next best alternative."

A. VIEWING THE *WARNER-LAMBERT* STANDARD AS A DECISION-MAKING TOOL

Although the *Warner-Lambert* inquiry itself is a standard for judicial review of FTC-ordered corrective advertising, the FTC should also consider the inquiry to be instructive for *when* to order the remedy. Accordingly, the FTC should develop a presumption towards ordering the remedy whenever a false advertising issue satisfies both prongs of *Warner-Lambert*.[117]

Once the FTC determines that a business has engaged in false advertising, the FTC should determine whether the *Warner-Lambert* standard might be satisfied.[118] If so, the FTC should initially investigate further to get closer to making this determination. If the investigation is promising, the remedy should be raised in a letter or complaint and discussed seriously in settlement discussions. If, instead, it becomes clear that the remedy will not be defensible, the FTC can rebut the presumption and pursue its other traditional strategies. Frivolous pursuits of the remedy—that is, unyielding deference to the presumption—would, of course, be inefficient and detract from its credibility and deterrence-value. After all, it is the agency's duty to exercise sound discretion in undertaking enforcement actions.[119]

Although adopting a rebuttable presumption might sound simplistic, the study of behavioral economics strongly substantiates that modifying presumptions—or "defaults"—can influence behavior.[120] Because the analysis in Part II suggests that this remedy is not at the forefront of FTC attorneys' minds, this presumption is likely to be impactful. Requiring FTC attorneys to pause and think twice before forgoing the corrective advertising remedy would ensure that the remedy is fully considered and only forgone when decidedly unsuitable.

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[117] *See Warner-Lambert Co.*, 562 F.2d at 762.

[118] *See id.*

[119] 5 U.S.C. § 701; Heckler v. Chaney, 470 U.S. 821, 831 (1985).

[120] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 177–82 (2008) (describing how changing default options for organ donation registration can increase opt-ins without stripping opportunities to opt out); *id.* at 71 ("[G]overnments can use th[is] power of social influence to promote many good . . . causes."); Shai Davidai, Thomas Gilovich & Lee D. Ross, *The Meaning of Default Options for Potential Organ Donors*, 109 PROCS. NAT'L ACAD. SCIS. U.S. AM. 15201, 15201 (2012) (discussing the "impact of default options" in "public policy").

B. DEFINING CORRECTIVE ADVERTISING'S FUNDAMENTAL USE CASES

Given that the inquiry is comprised of only two prongs, it is likely that the presumption will be triggered in many cases. Therefore, if adopting a presumption is impractical, the FTC should devise additional prongs, which must be satisfied before triggering the need to heavily consider corrective advertising; whenever a case satisfies the two *Warner-Lambert* prongs and these additional prongs, the presumption discussed above will be triggered.[121] These additional prongs would function as elements, criteria, or hurdles that a case must satisfy before warranting the expenditure of resources in exploring the remedy, allowing for the presumption to be triggered in a narrower slice of cases, but ensuring that the remedy receives full consideration in those cases.

Given that the FTC does not pursue the remedy frequently, the FTC likely already considers a number of factors beyond the two *Warner-Lambert* questions when strategizing its actions.[122] Predetermining hurdles will make the FTC's decision-making process more efficient and predictable; this would function as a commitment device—a way to make it easier and more likely for the FTC to make the right decision.[123]

These hurdles should concern the false advertisements' (1) target audience; (2) surrounding circumstances; and (3) substance. The current body of FTC corrective advertising orders is instructive in this regard. Based on precedents and statements, the FTC should consider ordering the remedy especially in cases that (1) target vulnerable populations;[124] (2) take place during economic downturns;[125] or (3) involve claims relating to science, health, or other forms of specialized knowledge that average consumers are not capable of verifying for themselves.[126]

The FTC has a strong track record of winning court approval of corrective advertising orders, especially in cases concerning these particular factors. Accordingly, using these criteria will allow the FTC to reach a decision regarding the remedy more easily, which would alleviate some of the efficiency-related burdens that the remedy imposes. Further, identifying circumstances that warrant corrective advertising more than others could put businesses on notice and allow the remedy to develop predictably.

C. LEVERAGING THE FTC'S RULEMAKING AUTHORITY TO ENHANCE EFFICIENCY

The FTC also stands to benefit from leveraging its rulemaking authority,[127] in both providing notice to market participants and streamlining internal mechanisms.[128] A benefit of publishing rule statements on the FTC's remedies is that businesses will be able to adapt their practices to comply, which in turn can likely reduce the volume of complaints and investigations.

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[121] *See Warner-Lambert Co.*, 562 F.2d at 762.

[122] *See id.*

[123] Todd Rogers, Katherine L. Milkman & Kevin G. Volpp, *Commitment Devices: Using Initiatives to Change Behavior*, 311 JAMA 2065, 2065–66 (2014) (describing commitment devices in the context of personal health-related decision-making).

[124] *See supra* Introduction (as pursued in *Disruption Theory*, defendants targeted communities of color and lower-income individuals); Complaint for Permanent Injunction & Other Equitable Relief, *supra* note 2.

[125] *See* Complaint for Permanent Injunction & Other Equitable Relief, *supra* note 2 (defendants leveraged increased reliance on telecommunication amid pandemic).

[126] *See supra* text accompanying notes 75–86 (as pursued in *Novartis*, 223 F.3d 783, 785 (D.C. Cir. 2000), *Warner-Lambert Co.*, 562 F.2d at 752, and *Eggland's Best*, 118 F.T.C. 340, 340 (1994)).

[127] 15 U.S.C. § 46(g).

[128] Agencies can create and supplement their own procedures via rules. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978); 5 U.S.C. § 553.

More important, however, is rulemaking's ability to address the FTC's internal efficiency considerations.[129] Many corrective advertising campaigns have lost their potency because of the temporal gap that results from lengthy internal decision-making and litigation; for example, in the tobacco advertising cases, more than fifteen years elapsed while the defendants meticulously appealed, delayed, and weakened their corrective advertising orders.[130]

Accordingly, the FTC should codify decision-making processes that otherwise require considerable resources on a case-by-case basis.[131] In particular, the FTC should standardize procedures relating to corrective advertisements' form, content, duration, channels, budget, and others. Doing so would serve three aims: (1) to prevent judges and defendants from complicating the legal proceedings; (2) to eliminate the need for FTC staff to devise entirely new programs on a case-by-case basis, which currently takes time away from other important pursuits and also deters the FTC from pursuing this remedy at the outset; and (3) to put advertisers on notice.

A likely counterargument to this proposal is that codifications would be improper given that case-by-case determinations are necessary in this area of the law; it would follow that the rules would constrain the FTC's discretion down the road. In response, this Note suggests that the particular language of such rules—and fashioning them as frameworks or guidelines to be applied to the unique facts of the dispute at hand—can help the FTC navigate this valid concern. Grids and "guidelines" are common across administrative agencies.[132]

These codifications must be adaptable to a broad set of facts; the U.S. Small Business Administration's regulations serve as a helpful example, listing the relevant "characteristics" and identifying an array of "standards" tailored to NAICS (industry) codes.[133] For example, a codification of a budget-related topic might take the following form: the required budget for a corrective campaign is to be a function of the company's average annual advertising budget, the deceptive campaign's budget, and the estimated number of customers affected by the deceptive campaign. Predetermining such factors, as well as their individual weights, would prevent the FTC from expending resources to reinvent the wheel for each case, while providing a flexible framework that is applicable across cases. Similarly, a codification of a form-related concern might indicate that the medium of the corrective advertising disclosure is to match the medium of the deceptive claim unless that medium is no longer the best way to reach those who would have seen the deceptive campaign. This also provides the requisite flexibility while simplifying the case-by-case logistics.

Another strong counterargument to this proposition is that rulemaking would be a lengthy endeavor—adopting by reference all the pitfalls of pursuing legislative change. In response to this counter, the FTC could achieve to some degree its purposes of providing notice and streamlining logistics by including these considerations in a guidance document or training manual published on the site. The FTC also has a blog targeting business owners[134] that could be used to publish

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[129] *See supra* Section III.B.

[130] *See, e.g.*, United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 1 (D.D.C. 2006), *aff'd in part, vacated in part per curiam*, 566 F.3d 1095, 1095 (D.C. Cir. 2009), *cert. denied*, 561 U.S. 1025, 1025 (2010*), clarification granted*, 778 F. Supp. 2d 8, 9 (D.D.C. 2011), *order modified*, No. 99-CV-2496 (PLF), 2022 WL 17452863, at *1 (D.D.C. Dec. 6, 2022).

[131] *See supra* text accompanying notes 110–15.

[132] *See, e.g.*, Heckler v. Campbell, 461 U.S. 458, 458 (1983).

[133] 13 C.F.R. §§ 121.102, 121.201 (2023).

[134] *Business Blog*: *Business Guidance*, FTC, https://www.ftc.gov/business-guidance/blog [https://perma.cc/D4CT-QY2Q] (last visited Sept. 17, 2023).

these considerations. This strategy could serve similar goals, as long as the content is sourced from FTC attorneys and those attorneys are aware of how the content is being published.

Either codification or publication of this nature would make more efficient the process of designing a corrective advertising program. The "cost" of pursuing the remedy—in the FTC's cost-benefit analysis—would therefore be reduced, and the remedy might be more often explored as a result.

D. THE NEXT BEST ALTERNATIVE: IMMEDIATE, AFFIRMATIVE DISCLOSURES (WHEN DROPPING A CORRECTIVE ADVERTISING DEMAND)

Even if the FTC were to adopt the three proposals above, the corrective advertising remedy would not always be effective, as the facts might simply not satisfy *Warner-Lambert*.[135] It might be truly impractical to pursue a certain advertiser, or the harm created by the false advertisement might not be substantial—even if the company did play a substantial role in creating a false belief. In these false advertising situations, the corrective advertising remedy is simply not the right remedy, and the FTC must pursue another avenue. But in cases that are somewhere on the fence, in terms of whether the remedy is achievable or even worth pursuing, the FTC's settlement strategy becomes important.

Because defendants are unlikely to consider a settlement that requires corrective advertising attractive, the FTC must navigate its negotiations and proceedings strategically. This Note has argued that a credible threat of imposing corrective advertising is likely to serve as a powerful bargaining chip for the FTC, especially given the costs imposed on defendants and the remedy's track record in court. If the FTC were to adopt the above proposals, corrective advertising will be more manageable from a practical standpoint for the FTC, and therefore will be more credible as a threat.

However, in the cases where the FTC decides to drop its demand for corrective advertising, it should be sure to pursue its next best course of action rather than merely issue a cease and desist order.[136] This Note suggests that disclosures resembling those required in two 1999 settlements—*MET-Rx USA* and *AST Nutritional Concepts & Research*,[137] which were efficiently finalized while the original claims were still being executed—are the next best alternative. The requirements of these settlements focused on disclosing the products' risks through advertising, labeling, and other promotional materials.[138] The settlement order also provided abbreviated disclosures for television and radio advertisements.[139]

These would leverage the temporal value of the anti-tobacco companion efforts (such as the "truth" campaigns, rather than Philip Morris's own corrective advertisements), the deterrence

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[135] *See* 562 F.2d 749, 762 (D.C. Cir. 1977).

[136] *See supra* Introduction.

[137] *See* Press Release, FTC, Androgen Supplement Marketers to Settle FTC Charges (Nov. 16, 1999), https://www.ftc.gov/news-events/news/press-releases/1999/11/androgen-supplement-marketers-settle-ftc-charges [https://perma.cc/2BHG-2L55]; *see generally* Stipulated Final Order for Permanent Injunction & Other Equitable Relief, FTC v. MET-RX USA, Inc., No. 99-cv-01407 (C.D. Cal. Nov. 15, 1999), https://www.ftc.gov/legal-library/browse/cases-proceedings/992-3180-met-rx-usa-inc-et-al [https://perma.cc/RP4V-FG8K]; Stipulated Final Order for Permanent Injunction, FTC v. AST Nutritional Concepts & Rsch., Inc., No. 99-cv-2197 (D. Colo. Nov. 15, 1999), https://www.ftc.gov/legal-library/browse/cases-proceedings/992-3179-ast-nutritional-concepts-research-inc-et-al [https://perma.cc/RH6X-8F77].

[138] Press Release, *supra* note 137.

[139] *Id.*

value of potential humiliation and costs, and the ex post harm-reduction value by affirmatively combating false beliefs. Settling for such a remedy, if corrective advertising is not practical in a particular proceeding, would combat some of the complications that often dilute consumer protection attempts.

CONCLUSION

False advertising is an important, frequent problem that arises from opportunistic behavior, and harms the entire marketplace. If made easier to implement—through presumptions, representative use cases, strategic rulemaking, and next best alternatives—the corrective advertising remedy has the potential to be extremely valuable in consumer protection law.

Now is an especially important time for the FTC to refine corrective advertising and other injunctive remedies, as the FTC seeks to maintain its ability to deter bad behavior and obtain consumer relief in the aftermath of *AMG Capital*. A more frequent and predictable implementation of corrective advertising can help consumers rest assured, knowing that if they were lied to, they will find out.