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TIKTOK IS NOT YOUR DOCTOR: REPRIORITIZING CONSUMER PROTECTION IN PHARMACEUTICAL ADVERTISEMENT REGULATION

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INTRODUCTION

The years since the onset of Covid-19 have manifested widespread innovation within the current system of health care delivery, spurred in part by the unprecedented changes to the ways in which people live their lives in a post-pandemic world.[1] For some, isolation brought on by Covid-19 lockdowns has magnified the obstacles of day-to-day life, especially in the context of mental health.[2] The time spent isolated has caused more people to seek the answers to questions about their health online.[3] Increasingly, social media has become a primary resource used by many to locate health-related and medical information.[4] Social media has also become a source of comfort for individuals seeking support and validation, with mental health topics in particular attaining a massive level of "virality."[5]

Answering the call of consumer need, telemedicine, or "the use of electronic information and communication technologies to provide and support healthcare when distance separates the participants," has become

1. *See* Tara Jain & Ateev Mehrotra, *Comparison of Direct-to-Consumer Telemedicine Visits with Primary Care Visits*, JAMA NETWORK OPEN (Dec. 8, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2773813 [https://perma.cc/Q25E-N86R] (reporting on the growth of DTC telemedicine during the Covid-19 pandemic); Rahul De' et al., *Impact of Digital Surge During Covid-19 Pandemic: A Viewpoint on Research and Practice*, 55 INT'L J. INFO. MGMT. (2020), https://doi.org/10.1016/j.ijinfomgt.2020.102171 [https://perma.cc/Q9R3-AMNV] (summarizing the impact of lockdowns on internet use, citing an increase of internet usage from 40% to 100% relative to pre-pandemic years).

2. *See* Jessica A. Hohman et al., *Use of Direct-to-Consumer Telemedicine to Access Mental Health Services*, 27 J. GEN. INTERNAL MED. 2759, 2763 (2022) (describing increased demand for mental health care beginning with the Covid-19 pandemic as well as increases in the rates of suicide attempts and overdoses observed in emergency departments).

3. *See* Teagen Nabity-Grover et al., *Inside Out and Outside In: How the COVID-19 Pandemic Affects Self-Disclosure on Social Media*, 55 INT'L J. INFO. MGMT. (2020), https://doi.org/10.1016/j.ijinfomgt.2020.102188 [https://perma.cc/7RDV-LKZH] ("Social media's explosive growth can at least be partially explained by the worldwide social distancing directives and lockdowns. Individuals are compensating for reduced access to their usual support networks by using a range of electronically mediated communication technologies to connect and engage with others.").

4. Andrea M. TenBarge & Jennifer L. Riggins, *Responding to Unsolicited Medical Requests from Health Care Professionals on Pharmaceutical Industry-Owned Social Media Sites: Three Pilot Studies*, 20 J. MED. INTERNET RSCH. 512, 513 (2018) (discussing the growth of social media as a platform for health information, finding that one in three consumers consults social media regarding health information and that social media use is extremely prevalent amongst health care practitioners and pharmaceutical companies).

5. *See, e.g.*, Madalyn Amato, *TikTok is Helping Gen Z with Mental Health. Here's What It Can and Can't Do*, L.A. TIMES (Jan. 5, 2022, 1:58 PM), https://www.latimes.com/lifestyle/story/2022-01-05/those-struggling-with-mental-health-have-found-validation-on-tiktok-heres-how [https://perma.cc/ULD3-AGRS] (reporting on the viral nature of mental health information on social media).

extremely popular.[6] Physicians have long utilized remote means to reach their patients, but the recent growth in consumer demand for online health care delivery has prompted immense development in the separate "direct-to-consumer" (DTC) telemedicine market.[7] The growth of telemedicine has been connected to increased health care accessibility,[8] especially with regard to mental health treatment, for which demand has appeared to outstrip the limited supply of providers.[9] Tech startups capitalizing on this phenomenon have established the fastest-growing DTC telemedicine companies, providing an alternative to traditional (i.e., in person) health care by offering lower-cost and discreet care online.[10] Their success is attributable in part to widespread social media advertisement campaigns,[11] tailored to catch the eye of a public more interested in mental health than ever before[12] and a generation increasingly demanding efficient and convenient care.[13]

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6. See Susan Bollmeier et al., *Direct to Consumer Telemedicine: Is Healthcare From Home Best?*, 117 MO. MED. 303, 303-04 (2020).

7. *Id.*

8. Jain & Mehrotra, *supra* note 1 (indicating that DTC telemedicine appears to have the potential to improve access to health care, particularly with regard to convenience and comfort).

9. Hohman et al., *supra* note 2, at 2759 (citing a "mismatch" in supply and demand for mental health care throughout the pandemic as a catalyst for the emergence of new telehealth platforms).

10. *See* Rolfe Winkler et al., *Startup Cerebral Soared on Easy Adderall Prescriptions. That Was Its Undoing.*, WALL ST. J. (June 8, 2022, 2:57 PM), https://www.wsj.com/amp/articles/cerebral-adderall-adhd-prescribe-11654705250 [https://perma.cc/D6A8-AZS7] (describing the business model of DTC telemedicine company Cerebral, which hit sales of $100 million in 2021); Rolfe Winkler & Joseph Walker, *Startups Make It Easier to Get ADHD Drugs. That Made Some Workers Anxious.*, WALL ST. J. (Mar. 26, 2022, 12:00 AM), https://www.wsj.com/amp/articles/startups-make-it-easier-to-get-adhd-drugs-that-made-some-workers-anxious-11648267205 [https://perma.cc/6G2U-FJNU] (naming companies Cerebral and Done Health as two of the biggest DTC telemedicine companies, harboring tens of thousands of patient-subscribers).

11. *See* Khadeeja Safdar & Andrea Fuller, *Misleading Ads Fueled Rapid Growth of Online Mental Health Companies*, WALL ST. J. (Dec. 27, 2022, 12:14 PM), https://www.wsj.com/amp/articles/telehealth-cerebral-done ads-mental-health-adhd-11672161087 [https://perma.cc/UW4B-GVJL] (detailing the extensive social media campaigns used by direct-to-consumer telemedicine companies).

12. *See* Sarah Fielding, *Social Media Raises Mental Health Awareness but Increases Risk of Flawed Self-Diagnosis*, VERYWELL MIND (Feb. 1, 2022), https://www.verywellmind.com/people-are-using-social-media-to-self-diagnose-5217072 [https://perma.cc/L6WN-8XML] (reporting on the recent growth of mental health discourse online); Olivia Little, *TikTok is Enabling Predatory ADHD Advertisers to Target Young Users*, MEDIAMATTERS (Feb. 8, 2022, 11:52 AM), https://www.mediamatters.org/tiktok/tiktok-enabling-predatory-adhd-advertisers-target-young-users [https://perma.cc/GYV9-4QV7] (suggesting that DTC telemedicine companies are targeting users by utilizing social media trends).

13. *See* Mollie Levy, *Marketing Medicine to Millennials: Preparing Institutions and Regulations for Direct-to-Consumer Healthcare*, 55 CAL. W. L. REV. 521, 521–22 (2019) (indicating that the "emerging, tech-dependent" generation values efficiency and suggesting that "big tech" is poised to target these values through DTC health care, with which regulations have "failed" to keep pace).

The use of social media by DTC telemedicine companies is not a surprising or unprecedented business strategy—direct-to-consumer advertising (DTCA) of pharmaceuticals and other medical products is a massive economic force in the healthcare industry.[14] Traditionally, entities such as pharmaceutical manufacturers, medical providers, and pharmaceutical companies are subject to advertising regulations promulgated by the Food and Drug Administration (FDA).[15] FDA-regulated entities are permitted to advertise directly to consumers subject to compliance with guidelines that require disclosures of certain risk information.[16]

Although FDA guidelines serve to mitigate the persuasive effects of DTCA and promote the dissemination of accurate information to consumers, the regulatory power of the FDA is not limitless.[17] This is because the First Amendment embraces the right of commercial enterprises to advertise.[18] DTCA regulations are crafted carefully in order to avoid impinging on commercial speech rights and causing outcry in the healthcare industry; in this respect, current regulations have established a widely-accepted precedent.[19]

The tremendous success of DTC telehealth startups has cemented their status as formidable competitors to traditionally-recognized health care entities.[20] However, DTC telemedicine companies are not held to

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14. *See* Lisa M. Schwartz & Steven Woloshin, *Medical Marketing in the United States, 1997-2016*, JAMA (Jan. 1, 2019), https://jamanetwork.com/journals/jama/fullarticle/2720029 [https://perma.cc/U86A-U6YD] (indicating that $9.6 billion was spent on DTCA in 2016, $6 billion of which was spent specifically on prescription drug advertising).

15. *See* Yasmin Gagne & Burt Helm, *Buying Prescription Drugs Online Is Easier Than Ever. But There Are Side Effects.*, FAST CO. (Sept. 11, 2019), https://www.fastcompany.com/90396205/buying-prescription-drugs-online-is-easier-than-ever-but-there-are-side-effects [https://perma.cc/ECY6-8PLD]; Jessica Defino, *The Dangerous Side Effect of Digital Wellness*, FASHIONISTA (Mar. 20, 2019), https://fashionista.com/2019/03/digital-health-wellness-companies-government-regulations [https://perma.cc/PEM8-NMWG] (highlighting the practices of direct-to-consumer telemedicine companies advertising direct access to specific prescription drugs).

16. *See generally* John E. Calfee, *Public Policy Issues in Direct-to-Consumer Advertising of Prescription Drugs*, 21 J. PUB. POL'Y & MKTG. 174, 174–75 (2002) (describing current regulatory requirements for direct-to-consumer advertising).

17. *See id.* at 175–78 (explaining that DTCA regulations are limited by the First Amendment, as well as positing that DTCA as regulated by the FDA has proven itself to be a powerful tool in bringing information to consumers).

18. *See* JOHN ABRAMSON, SICKENING: HOW BIG PHARMA BROKE AMERICAN HEALTH CARE AND HOW WE CAN REPAIR IT 214 (2022).

19. *See Calfee*, *supra* note 16, at 175−76; Andrew Andrzejewski, *Direct-to-Consumer Calls to Action: Lowering the Volume of Claims and Disclosures in Prescription Drug Broadcast Advertisements*, 84 BROOK. L. REV. 571, 573 (2019) ("The existence of the FDA's DTC requirements, let alone compliance therewith, depends on a fragile balance between drug manufacturers' ability to challenge them as overly broad speech restrictions and drug manufacturers' interests in FDA regulation.").

20. *See* Safdar & Fuller, *supra* note 11.

commensurate standards when it comes to advertising.[21] Although DTC telemedicine companies market products similar to those promoted by FDA-regulated entities (such as pharmaceutical companies and medical providers), they are not an entity recognized by the Food, Drug, and Cosmetic Act (FDCA).[22] As such, unlike their FDA-regulated counterparts, they are not legally obligated to share any specific risk information with consumers.[23] Strong policy justifications on both sides of the issue—including the free speech rights of advertisers[24] and the public interest in encouraging informed consumers[25]—prompt an examination of the inconsistent regulatory obligations borne by FDA-regulated entities and DTC telemedicine companies, as well as whether this disparity has an effect on consumers' access to information.

This Note will examine DTCA in the context of DTC telemedicine companies, with a focus on the proliferation of such advertisements on social media platforms.[26] Part I discusses the intertwining forces that have led to the prevalence of DTC telehealth advertising on social media.[27] Part II introduces the current regulatory scheme applicable to DTCA, and explains the First Amendment protections afforded to commercial speakers.[28] Part III explores why DTC telemedicine companies are not subject to the regulations applicable to DTCA generally, as well as the implications stemming from the current lack of oversight.[29] Finally, Part IV proposes a solution to address the current regulatory asymmetry while preserving the constitutional rights of advertisers.

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21. Gagne & Helm, *supra* note 15.

22. Defino, *supra* note 15; *see generally* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301−473.

23. Gagne & Helm, *supra* note 15.

24. *See* Erin Lenhardt, *Why So Glum? Toward a Fair Balance of Competitive Interests in Direct-to-Consumer Advertising and the Well-Being of the Mentally Ill Consumers It Targets*, 15 HEALTH MATRIX 165, 174–78 (2005).

25. *See id.* at 166; *see also* ABRAMSON, *supra* note 18, at 213–15 (suggesting that the factual information generally present in DTCA is deficient and arguing that consumers have a right to receive accurate and non-misleading information).

26. *See* Safdar & Fuller, *supra* note 11.

27. *See* Amato, *supra* note 5 (reporting on growing mental health discourse online); Hohman et al., *supra* note 2, at 2763 (explaining the increase in DTC telemedicine use for the provision of mental health services as spurred by the Covid-19 pandemic); Winkler et al., *supra* note 10 (reporting on the direct-to-consumer telemedicine business model); *see also* Polly Mosendz & Caleb Melby, *ADHD Drugs Are Convenient to Get Online. Maybe Too Convenient,* BLOOMBERG (Mar. 11, 2022, 4:00 AM), https://www.bloomberg.com/news/features/2022-03-11/cerebral-app-over-prescribed-adhd-meds-ex-employees-say?sref=nF2P89s4 [https://perma.cc/2KK8-SKW2].

28. *See generally* Calfee, *supra* note 16, at 174–75; Andrzejewski, *supra* note 19, at 578 (explaining the relationship between pharmaceutical marketing and the First Amendment).

29. *See* Gagne & Helm, *supra* note 15.

I. THE GROWTH OF ONLINE HEALTH CARE MARKETING AND DTC TELEMEDICINE

Social media has become an important resource for people seeking health-related information. [30] Sharing information about mental health has gone "viral," with user-created content discussing various mental health topics garnering billions of views.[31] Fueled by this increased interest in mental health, DTC telemedicine companies are becoming increasingly popular.[32] This Section first discusses social media's impact on the dissemination of health information with a focus on mental health awareness. Against this backdrop, this Section subsequently explores the factors that have contributed to the rise of DTC telemedicine. Finally, this Section addresses the benefits and limitations associated with the DTC telehealth model.

A. Social Media's Role in Growing Mental Health Awareness

Unquestionably, social media has become a primary source used by the public to find information.[33] This phenomenon is particularly striking in the realm of health-related information: for example, one study has found that one in three American consumers use social media to find health-related information,[34] a trend only bolstered by the 61% increase in social media use globally since the onset of the Covid-19 pandemic.[35] Some of the most popular ways in which social media is used to engage with health care include: following the social media accounts of health care organizations; seeking out health advice; and searching for information on healthy behaviors.[36] Pages run by entities such as pharmaceutical companies have become ubiquitous, and some pharmaceutical companies have begun to recruit social media personalities with hundreds of thousands of followers

30. Junhan Chen & Yuan Wang, *Social Media Usage for Health Purposes: Systematic Review*, 23 J. MED. INTERNET RSCH. 102, 107 (2021) (naming seeking and sharing health information as among primary uses of social media); *see also* Nabity-Grover et al., *supra* note 3 (indicating that some of the most prevalent social media platforms used to disseminate health information have seen significant growth; for example, Facebook and Instagram have seen a global increase in usage of 40% post-lockdowns, and TikTok use by children has increased by 16%).

31. Amato, *supra* note 5.

32. *See id.*; Hohman et al., *supra* note 2.

33. George Pearson, *Sources on Social Media: Information Context Collapse and Volume of Content as Predictors of Source Blindness*, 23 NEW MEDIA & SOC'Y 1181, 1182 (2021) (noting that 55% of surveyed Americans use social media to get their news, with 28% reporting doing so often).

34. *See* TenBarge & Riggins, *supra* note 4; *see also* Suzanne Zupello, *The Latest Instagram Influencer Frontier? Medical Promotions.*, VOX (Feb. 15, 2019, 8:00 AM), https://www.vox.com/the-goods/2019/2/15/18211007/medical-sponcon-instagram-influencer-pharmaceutical [https://perma.cc/6Y4F-DWWJ].

35. Nabity-Grover et al., *supra* note 3.

36. *See* Chen & Wang, *supra* note 30, at 107.

to promote their products.[37] Such online engagement has elevated the ability to reach consumers on a scale far outpacing traditional methods of DTCA (i.e., print, radio, and television broadcast).[38]

Social media as a health information resource can have immense benefits.[39] Social media has helped users crowdsource information in online communities and has empowered patients in health care decision-making.[40] Additionally, health care research capabilities have expanded as social media facilitates researchers' access to insights on patients' experiences and previously-hard-to-reach populations.[41] Seeking out health information online has become especially popular in the realm of mental health.[42]

Viral social media trends have thrust the online mental health community into the spotlight.[43] Historically, the perceived social stigma associated with mental health has been linked to insufficient knowledge and reluctance to seek out care.[44] However, today's social media users are demonstrating an increased interest in publicly engaging with information about mental health.[45] For example, TikTok videos tagged with #mentalhealth, #adhd and #anxiety have aggregated around 40 billion views.[46] The viral quality of #mentalhealth trends has helped to spread awareness and provide solace to those curious about mental health.[47] Nevertheless, the boundless and virtually instantaneous dissemination of mental health information via social media is not without its risks.[48]

One important aspect of viral mental health discourse is that many of the users posting under mental health hashtags are not medical professionals, but rather individuals sharing symptoms and experiences.[49] Of course, this participation is the crux of the online mental health communities, and increased online discussion may serve to destigmatize the

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37. *See id.* at 108; Zupello, *supra* note 34.

38. Zupello, *supra* note 34; *see also* Meredith B. Rosenthal et al., *Promotion of Prescription Drugs to Consumers*, 346 NEW ENG. J. MED. 498, 500–01 (2002) (discussing traditional methods of DTCA).

39. *See, e.g.*, Chen & Wang, *supra* note 30, at 107 (discussing the growing popularity of online social support in the health care realm); Amato, *supra* note 5.

40. *See* Chen & Wang, *supra* note 30, at 107−08.

41. *See id*. at 106−07.

42. *See* Amato, *supra* note 5.

43. *See* Camille Williams, *TikTok Is My Therapist: The Dangers and Promise of Viral #MentalHealth Videos*, ADDITUDE (Mar. 31, 2022), https://www.additudemag.com/tiktok-adhd-videos-self-diagnosis-support/ [https://perma.cc/WHM7-JUE3].

44. Patrick W. Corrigan et al., *The Impact of Mental Illness Stigma on Seeking and Participating in Mental Health Care*, 15 PSYCH. SCI. IN THE PUB. INT. 37, 40−45 (2014).

45. *See* Amato, *supra* note 5.

46. *See id.*

47. *See id.*

48. *See* Williams, *supra* note 43 (naming the confusion of content creators with medical professionals, the oversimplification of symptoms, and the perpetuation of stereotypes and stigmas as among the risks associated with social media trends related to mental health).

49. *See id.*; *see also* Amato, *supra* note 5.

notion of seeking mental health treatment.[50] However, users are not merely consuming this content; in some circumstances, they may rely on it as accurate medical advice.[51] Finding validation may be a step in the right direction for those with questions about their own mental health—at the same time, professionals worry that users resonating with individuals' experiences online may be led astray.[52]

For some, however, "self-diagnosis" is one of the only readily-available ways in which to address mental health concerns—there are significant obstacles involved in seeking mental health treatment, exacerbated by high costs and provider shortages.[53] However, creators' subjective experiences presented in quick video format have the potential to be inaccurate or oversimplify complex mental health issues.[54] To illustrate, individuals experiencing one mental health condition may (and often do) exhibit overlapping symptoms attributable to multiple conditions, which can affect how such an individual is evaluated and ultimately treated.[55] Social media users untrained in mental health treatment may recognize themselves in a TikTok video outlining a creator's experience with a symptom of a certain condition and "diagnose" themselves accordingly—however, that symptom may be a characteristic of a different condition that is addressed by entirely different therapeutic or pharmacological treatments.[56]

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50. *See* sources cited *supra* note 49; *see also* Claire Henderson et al., *Mental Illness Stigma, Help Seeking, and Public Health Programs*, 103 AM. J. PUB. HEALTH 777, 777 (2013) (discussing the global prevalence of stigma associated with mental health treatment); Lenhardt, *supra* note 24, at 184 (suggesting that DTCA generally may even play a role in the destigmatization of mental health treatment).

51. *See* Williams, *supra* note 43. For example, users have interacted with #adhd videos posted by creators without medical training by posting comments such as "watching this made me think I might have ADHD" and sending private messages seeking medical advice. *Id.*

52. Fielding, *supra* note 12.

53. *See* Hohman et al., *supra* note 2, at 2759. "Self-diagnosis" is defined as "the process of diagnosing or identifying a medical condition in oneself." Stephanie Aboueid et al., *The Use of Artificially Intelligent Self-Diagnosing Digital Platforms by the General Public: Scoping Review,* 7 JMIR MED. INFORMATICS 13455 (2019), at 1.

54. *See* Williams, *supra* note 43.

55. *See* Ali M. Al-Asadi et al., *Multiple Comorbidities of 21 Psychological Disorders and Relationships with Psychosocial Variables: A Study of the Online Assessment and Diagnostic System Within a Web-Based Population*, 17 J. MED. INTERNET RSCH. (2015), https://www.jmir.org/2015/3/e55/ [https://perma.cc/DMV3-99WC] (identifying significant rates of comorbidity amongst patients with mental health disorders, such as major depressive disorder and generalized anxiety disorder).

56. *See, e.g.*, *Anxiety Disorders*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/anxiety/symptoms-causes/syc-20350961 [https://perma.cc/YK3U-Q6P2] (demonstrating that restlessness can be a symptom of an anxiety disorder, which is treated differently than ADHD); *see also* Aboueid et al., *supra* note 53 (positing that the use of the internet as a health information resource increases the risk of detrimental effects to one's health if an individual seeking out health information online is "not [] able to critically analyze the health information and assess the applicability of the information to their case.").

Certainly, proper assessment by a medical professional can correct an inaccurate self-diagnosis, but patients can be influenced (for better or worse) by the information they glean from online content.[57] Professionals have acknowledged that viral mental health discourse on social media has played a part in this phenomenon—as have DTC telemedicine companies.[58] By tailoring advertisements to the very social media platforms where mental health awareness has gone viral, companies offering online mental health services online have zeroed in on a receptive audience.[59]

B. Rise of DTC Telemedicine Companies Offering Mental Health Services

Recent years have demonstrated that the delivery of mental health care via telemedicine is in high demand, as the Covid-19 pandemic saw a simultaneous decline in mental wellness and access to mental health treatment.[60] This popularity has spurred the proliferation of tech startups that establish their own DTC telemedicine companies.[61] DTC telemedicine companies allow patients to submit a request for the treatment of a condition through a website or phone application.[62] Health care providers connected to patients through the DTC telemedicine company will then review the request and pursue further evaluation if necessary, often

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57. *See* Meaghan Warner, *A Challenge with Social Media: Self-Diagnosing Mental Health*, UTHEALTH HOUSTON (Mar. 26, 2021), https://med.uth.edu/psychiatry/2021/03/26/a-challenge-with-social-media-self-diagnosing-mental-health/ [https://perma.cc/SM7S-2V67]; Regan Olsson, *TikTok and the Dangers of Self-Diagnosing Mental Health Disorders*, BANNER HEALTH (Nov. 2, 2021), https://www.bannerhealth.com/healthcareblog/advise-me/tiktok-self-diagnoses-on-the-rise-why-its-harmful [https://perma.cc/X7RV-8DTT].

58. *See* Olsson, *supra* note 57; Winkler et al., *supra* note 10.

59. *See* Louise Matsakis, *Instagram and TikTok Pull Ads from Startup Cerebral Linking ADHD to Obesity*, NBC NEWS (Jan. 27, 2022, 3:33 PM), https://www.nbcnews.com/tech/social-media/instagram-tiktok-cerebral-startup-ads-pulled-rcna13476 [https://perma.cc/9D5S-LK92] (reporting on advertisements by mental health startups tailored to appeal to audiences on TikTok, Instagram, and Facebook); Safdar & Fuller, *supra* note 11.

60. Caitlin Bradford, *Ensuring the Continued Efficacy of Telepsychiatry: Amending the Ryan Haight Act*, 31 ANNALS HEALTH L. ADVANCE DIRECTIVE 115, 116 (2021); *see also* Hohman et al., *supra* note 2, at 2759, 2763.

61. *See* Hohman et al., *supra* note 2, at 2763 (discussing increase in telehealth use for mental health services); Winkler & Walker, *supra* note 10. Although there are a multitude of DTC telemedicine companies offering their products and services in the market, this Note will focus on some of the largest companies most prevalent in the public sphere. Among these companies are organizations such as Cerebral, Done Health, and Hims/Hers. The specific offerings amongst these companies vary; however, their business consists primarily of subscribing patients interested in connecting with prescribers. *See generally* sources cited *supra* note 10; Safdar & Fuller, *supra* note 11; Seth Joseph, *Hims & Hers' New Path For Growth Comes From The Heart*, FORBES (July 31, 2023, 12:38 PM), https://www.forbes.com/sites/sethjoseph/2023/07/31/hims--hers-new-path-for-growth-comes-from-the-heart/?sh=628a1d43773f [https://perma.cc/GG8D-D6K2].

62. *See* Jain & Mehrotra, *supra* note 1.

culminating in the prescription of medication.[63] DTC telemedicine companies have engaged in treating a wide variety of conditions ranging from skincare to sexual performance, with some offering talk therapy and prescriptions for psychiatric disorders.[64] The range of treatments offered expanded significantly with the suspension of the in-person evaluation requirement of the Ryan Haight Act during the Covid-19 public health emergency, which permitted providers to prescribe controlled substances subsequent to a synchronous audio-visual evaluation.[65] The ability to prescribe controlled substances without the previously-required in-office visit cracked open a lucrative market for DTC telemedicine companies, as they were able to see patients reporting symptoms generally treatable by controlled substance medication.[66]

Many of these DTC telemedicine companies target specific conditions rather than provide overall primary care.[67] Seeking out DTC care separately for specific conditions can result in an incomplete patient-provider relationship relative to the holistic evaluation of primary care, as well as a lack of coordination with a patient's primary care physician (if a patient has one).[68] However, the ability to receive lower-cost treatment for specific conditions is an important method by which necessary care can reach populations experiencing barriers to access, particularly for those who cannot afford the care provided by a primary care physician.[69] Despite somewhat of a departure from the traditional health care delivery model, DTC telemedicine is on the rise, with 2020 estimates positing that it will become an $86.7 billion-dollar industry by 2023.[70] As the "online"

63. *Id.*

64. *See* Bollmeier et al., *supra* note 6, at 305 (listing a variety of DTC telemedicine companies along with the services they provide); *see also* Kristina L. Bitzer, *Online and Off-Label: Closing the Regulatory Gap in Online Direct-To-Consumer Drug Promotion and Prescribing*, 42 N. ILL. U. L. REV. 164, 175 (2021).

65. *See* Bradford, *supra* note 60, at 118−19.

66. *See* Winkler et al., *supra* note 10.

67. *See* Bitzer, *supra* note 64, at 173−75.

68. *See* Bollmeier et al., *supra* note 6, at 303−04; Gagne & Helm, *supra* note 15.

69. *See* Hohman et al., *supra* note 2, at 2763−64; *see also* David M. Levine et al., *Characteristics of Americans with Primary Care and Changes Over Time, 2002-2015*, 180 J. AM. MED. ASS'N INTERNAL MED. 463, 466 (2019) (indicating that financial barriers may contribute to a decline in the number of Americans with a primary care physician); Jain & Mehrotra, *supra* note 1.

70. Bollmeier et al., *supra* note 6, at 304. Since the time of this writing, it is worth noting that the global telemedicine market has surpassed expectations. In 2022, the industry was valued at $87.41 billion dollars, and is projected to grow to $286.22 billion by 2030. *Telemedicine Market Size, Share & COVID-19 Impact Analysis, By Type (Products and Services), By Modality (Store-and-forward (Asynchronous), Real-time (Synchronous), and Others), By Application (Teleradiology, Telepathology, Teledermatology, Telecardiology, Telepsychiatry, and Others), By End-User (Healthcare Facilities, Homecare, and Others), and Regional Forecast, 2023-2030,* FORTUNE BUS. INSIGHTS (Jul. 2023), https://www.fortunebusinessinsights.com/industry-reports/telemedicine-market-101067 [https://perma.cc/Q7AX-64M3]. Although projections amongst analysts vary depending on the scope of businesses considered to be part of the telemedicine industry, it is indisputable that the DTC

generation reaches adulthood, it has become clear that they increasingly value cost-effectiveness, efficiency, and convenience, and the telehealth boom has demonstrated the health care industry's willingness to deliver.[71]

Increased demand for virtual mental health care delivery has been bolstered not only by the public's evolving perception of what health care should look like, but also by increases in the rates of reported symptoms associated with common mental health conditions.[72] According to the Centers for Disease Control and Prevention, approximately 27.3% of American adults surveyed experienced symptoms of anxiety or depression as of July 2023, up from 10.8% in 2019.[73] Moreover, a May 2022 survey reported that the amount of Americans taking prescription medication for their mental health has increased by more than 7% since 2019.[74] Indeed, 84% of psychiatrists surveyed by the American Psychiatric Association reported seeing new patients via telehealth over the course of the pandemic.[75] Whether this rise is attributable to actual growth in the incidence of symptoms or increased access to mental health care knowledge and treatment, it is clear that recent conditions have been optimal for the DTC telemedicine industry to thrive.[76]

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telemedicine industry continues to grow rapidly. *See Direct To Consumer Telehealth Services Market Size, Share, Growth, And Industry Analysis By Type (Web-Based, Cloud-Based, On Premise) By Application (Hospital, Acute Care Applications, Home Health, Consumer Applications), Regional Insights, and Forecast From 2022 To 2030,* BUS. RSCH. INSIGHTS (July 17, 2023), https://www.businessresearchinsights.com/market-reports/direct-to-consumer-telehealth-services-market-101284 [https://perma.cc/6BN3-2BMV].

71. *See* Levy, *supra* note 13, at 521–22; *see also* Bitzer, *supra* note 64, at 174–75.

72. *See* Hohman et al., *supra* note 2, at 2763 (noting an increase in the demand for mental health care and growing reports of anxiety or depression symptoms since the onset of the Covid-19 pandemic); *see also* Tori DeAngelis, *Depression and Anxiety Escalate During COVID*, 52 MONITOR ON PSYCH. 88, 88 (2021) (finding that, among American adults, rates of anxiety and depression were reported to be approximately four times higher in 2020 and 2021 as compared to surveys taken in 2019).

73. *See Anxiety and Depression: Household Pulse Survey*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 28, 2023), https://www.cdc.gov/nchs/covid19/pulse/mental-health.htm [https://perma.cc/RGE9-SWLD].

74. In 2019, 15.8% of American adults reported taking prescription medication for their mental health. As of the most recent survey taken by the CDC (conducted in May 2022), 23.1% of American adults reported taking prescription medication within the past four weeks. *See Mental Health Care: Household Pulse Survey,* CTRS. FOR DISEASE CONTROL AND PREVENTION (July 20, 2022), https://www.cdc.gov/nchs/covid19/pulse/mental-health-care.htm [https://perma.cc/44DJ-UA8H].

75. *Psychiatrists Use of Telepsychiatry During COVID-19 Public Health Emergency*, AM. PSYCHIATRIC ASS'N (July 2021), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/Telepsychiatry/APA-Telehealth-Survey-2020.pdf [https://perma.cc/C6X2-FFFG].

76. *See* Gagne & Helm, *supra* note 15.

C. The Direct-to-Consumer Telemedicine Business Model

As DTC telemedicine grows, studies have demonstrated that the DTC model can result in positive outcomes for individuals seeking mental health care.[77] Notable advantages include increased accessibility, lower costs, high patient satisfaction, and increased health care provider availability.[78] Driven by the growing recognition of DTC telemedicine as a viable (and lucrative) method of health care delivery, tech startups funded by millions of investor dollars have become the biggest and fastest-growing telehealth companies.[79] However, these tech startups are not technically health care providers.[80] Rather, most characterize themselves as "platforms" that connect patients with prescribers.[81] In order to connect patients with appropriate prescribers, many DTC companies allow patients to select the prescription for which they would like to be seen at sign-up, somewhat reversing the traditional method of evaluating a patient's needs in order to decide which prescription is appropriate (if at all).[82] Although the prescribers are licensed medical professionals, DTC platforms themselves do not assume responsibility for the patient-provider relationship or the quality of care received.[83]

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77. *See* Hohman et al., *supra* note 2, at 2763−64.

78. *See id.*; *see also* Jain & Mehrotra, *supra* note 1 (finding that the direct-to-consumer model may have positive effects on accommodation barriers (for example, the inability to find a time that works with an in-person provider) and acceptability barriers (for example, discomfort regarding in-person assessments of sexual health)).

79. Gagne & Helm, *supra* note 15; *see* Winkler & Walker, *supra* note 10. See sources cited *supra* note 61 for a description of the largest DTC telemedicine companies discussed in this Note.

80. Gagne & Helm, *supra* note 15.

81. *See id.*; Defino, *supra* note 15.

82. Bitzer, *supra* note 64, at 175−76; Gagne & Helm, *supra* note 15.

83. Gagne & Helm, *supra* note 15. Generally, DTC telemedicine companies tend to explicitly deny that they are responsible for the provision of medical care, that they are to be considered health care providers, and that they engage in the practice of medicine. For example,

> Cerebral does not provide medical services . . . The Medical Groups and the Providers, and not Cerebral, are responsible for the quality and appropriateness of the care they render to you on the Platform . . . By accepting these Terms of Use, you acknowledge and agree that Cerebral is not a health care provider and that by using the Services, you are not entering into a doctor-patient or other health care provider-patient relationship with Cerebral.

Terms and Conditions of Use, CEREBRAL (Feb. 15, 2023), https://cerebral.com/terms-and-conditions#0 [https://perma.cc/6T99-TUSV]. DTC telemedicine company Done similarly disclaims liability for the provision of medical care—Done's terms and conditions read:

> Done does not engage in the practice of medicine or mental health care. The Medical Groups and the physicians and other licensed health professionals are solely responsible for the delivery of healthcare

Recent circumstances have prompted skeptics to take a closer look at the business practices of the most popular DTC telehealth startups.[84] In April 2022, a former executive at Cerebral (reportedly the largest telemedicine company in the world) filed a wrongful termination lawsuit against the company, claiming that he was terminated for resisting a customer-retention proposal premised on prescribing controlled substance stimulants to 100% of attention-deficit hyperactivity disorder (ADHD) patients.[85] The following May, Cerebral halted the prescription of controlled substances to patients in response to a subpoena by federal prosecutors investigating possible violations of the Controlled Substances Act. Subsequently, large companies like CVS and Walmart stopped filling prescriptions for controlled substances submitted by Cerebral and a similar telehealth provider called Done.[86]

Although the relaxation of federal regulations regarding virtual controlled substance prescription rendered Cerebral and other DTC telemedicine companies' actions technically legal, former employees and health care practitioners have expressed concern about the ability of telehealth startups to balance profitability with the best interests of patients.[87] The rollback of controlled substance regulations expanded DTC prescribing capabilities massively, and the ability to sell a wider variety of more expensive prescriptions was a draw for investors.[88] For example, expanding care to conditions treatable by controlled substances increased sales at Cerebral to a projection of $100 million and came to comprise about one-fifth of its business.[89] Meanwhile, prescribers at prominent DTC telemedicine companies reported feeling overwhelmed by vast caseloads

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> services to patients through Done's Service . . . Parties other than Done, including . . . the Medical Group's clinicians, may provide services and medication directly to you with the support of the Service (collectively, "Third-Parties"). Your use of any Third-Party services and any interactions with Third-Parties, including . . . delivery of goods or services . . . are solely between you and such Third-Parties.

Terms and Conditions, DONE (Sept. 19, 2022), https://donehealth.notion.site/donehealth/Terms-and-Conditions-d4698dc31794415cafe5b7498d47bf92 [https://perma.cc/W5CM-NAUK]; *see also, e.g.*, *Terms and Conditions*, Hims & Hers (Jul. 27, 2023), https://www.forhers.com/terms-and-conditions ("[The Providers are] solely responsible for directing the medical care . . . they provide to you . . . Hims & Hers is not a healthcare provider . . . by using the Service, you are not entering into a . . . provider-patient relationship with Hims & Hers.") [https://perma.cc/D3S3-S9CL].

84. *See* Winkler et al., *supra* note 10.

85. *See id.*; *see also* Safdar & Fuller, *supra* note 11.

86. Ananya M. Rajesh et al., *Walmart, CVS to Halt Filling Prescriptions for Controlled Substances by Cerebral, Done*, REUTERS (May 26, 2022, 6:12 PM), https://www.reuters.com/business/healthcare-pharmaceuticals/walmart-cvs-halt-filling-prescriptions-controlled-substances-by-cerebral-done-2022-05-26/ [https://perma.cc/4RSG-BJBM].

87. Mosendz & Melby, *supra* note 27.

88. Winkler et al., *supra* note 10.

89. *Id.*

and as though the 30-minute initial diagnostic visits (the standard at many DTC telemedicine companies) were insufficient timeframes in which to complete a holistic diagnosis.[90] Others reported feeling as though the needs of their patients were not being met by the DTC model, particularly in cases involving addiction or comorbid mental health conditions.[91]

DTC telemedicine continues to grow, due in large part to widespread online advertising campaigns.[92] DTC telemedicine companies focus their marketing efforts on social media advertisements, departing from traditional methods of DTCA.[93] Online advertisement spending by DTC telemedicine companies totaled $100 million in 2021—a tenfold increase from the year before.[94] Some of these advertisements feature the promotion of pills or medication specifically, while others simply encourage users to sign up for a diagnostic visit.[95] Others appeal especially to younger social media audiences by incorporating viral trends into their marketing materials.[96] Although some startups have faced reprimands for violations of social media platform guidelines that prohibit "harmful ads" and "misleading health claims," for the most part, social media DTCA by telemedicine companies continues to flourish with minimal regulation.[97]

II. THE REGULATORY AND CONSTITUTIONAL FRAMEWORK GOVERNING ADVERTISING REGULATIONS

Generally, advertisements promoting medical products or pharmaceuticals are subject to risk disclosure requirements mandated by the FDA.[98] Even though DTC telemedicine companies promote pharmaceuticals and medical products like FDA-regulated entities do, they are not an entity contemplated by the Federal Food, Drug, and Cosmetic Act (FDCA).[99] Instead, DTC telemedicine companies are governed by the regulations applicable to commercial advertisers in general, promulgated by the Federal Trade Commission (FTC).[100] The extent to which these agencies may regulate commercial speech is limited by the First

90. Mosendz & Melby, *supra* note 27; Winkler & Walker, *supra* note 10.

91. Mosendz & Melby, *supra* note 27. Comorbidity refers to a co-occurrence of factors or conditions that may exacerbate symptoms or make treating a certain condition more complicated. *See* Al-Asadi et al., *supra* note 55.

92. *See* Safdar & Fuller, *supra* note 11.

93. *See* Rosenthal et al., *supra* note 38, at 500–01 (discussing traditional methods of DTCA, such as print and television).

94. Safdar & Fuller, *supra* note 11.

95. *See* Defino, *supra* note 15; Little, *supra* note 12.

96. Little, *supra* note 12; Mosendz & Melby, *supra* note 27.

97. *See* Matsakis, *supra* note 59; Safdar & Fuller, *supra* note 11.

98. *See* Andrzejewski, *supra* note 19, at 575.

99. *See* Bitzer, *supra* note 64, at 177–86; *see also* Defino, *supra* note 15. *See generally* 21 U.S.C. §§ 301–399.

100. Gagne & Helm, *supra* note 15.

Amendment.[101] This Section first explains the current state of DTCA regulations, as well as some of the challenges associated with regulating social media advertisements. This Section then introduces the constitutional principles that apply to proposed government action affecting commercial speech.

A. Direct-to-Consumer Pharmaceutical Advertising Under the FDA

Although at first glance DTC telemedicine startups might appear to fall within the ambit of FDA rules, they avoid classification as an FDA-regulated entity by calling themselves "platforms" or "facilitators."[102] Under the FDCA, the FDA is generally responsible for most other promotions of prescription drugs, and thus has authority over the marketing efforts of entities such as online pharmacies, pharmaceutical companies, and medical providers.[103]

DTCA for prescription drugs was first permitted in the United States in 1985,[104] accompanied by significant controversy.[105] While some felt this change would promote patient participation in medical care, physicians and insurers opposed what they felt would bring about inappropriate prescribing and consumer preference for expensive name-brand drugs.[106] Despite such criticism, DTCA has become a mainstay in the pharmaceutical industry—an industry that spent $30 billion on marketing in 2016 alone.[107] Notably, the United States is one of only two countries (the other being New Zealand)[108] that permits DTCA of pharmaceuticals.[109] Although Canada and the European Union have considered following the United States' lead, concerns about unnecessary prescriptions, distorted drug information, and increased expenditures have kept most countries from permitting DTCA.[110]

DTCA permits companies to market prescription drugs directly to the public, often through television, print, or the internet.[111] While DTCA has played a role in increasing accessibility to prescription drug

101. Andrzejewski, *supra* note 19, at 578.

102. Gagne & Helm, *supra* note 15; *see also* Bitzer, *supra* note 64, at 177−86.

103. *See* Defino, *supra* note 15; *see also* 21 U.S.C. §§ 301–399.

104. Andrzejewski, *supra* note 19, at 575.

105. *See* Levy, *supra* note 13, at 533.

106. Calfee, *supra* note 16, at 176–77.

107. Defino, *supra* note 15.

108. *See* ABRAMSON, *supra* note 18, at 214 (explaining the stricter requirements of New Zealand's DTCA regulatory scheme).

109. Levy, *supra* note 13, at 534.

110. *See* Calfee, *supra* note 16, at 176; Deborah Gleeson & David B. Menkes, *Trade Agreements and Direct-to-Consumer Advertising of Pharmaceuticals*, 7 INT'L J. HEALTH POL'Y & MGMT. 98, 98 (2017).

111. Taylor Giancarlo, *Pharmaceutical Advertising Disclosures: Is Less Really More?*, 22 QUINNIPIAC HEALTH L.J. 449, 457 (2019).

information[112] and has empowered patients to take charge of their health,[113] medical providers and other related entities have expressed concerns about the effects of DTCA on the physician-patient relationship and its potential influence on a public untrained in medicine.[114]

When the FDA first permitted DTCA in 1985, DTCA was required to abide by the same requirements that pharmaceutical advertisements first complied with in marketing to physicians—the advertisement must contain a "fair balance" of the benefits and risks of taking the medication.[115] In response to the surge in DTCA, the FDA enacted additional guidelines requiring DTCA to display or speak aloud a "major statement" that delineated the drug's side effects, risks, and contraindications.[116] Additionally, DTCA must make "adequate provision" to communicate all material information about the drug by either providing a "brief summary" of risks in print advertisements or by directing patients to places where they can get more information (such as a phone number, website, doctor's visit, or additional printed resources).[117]

DTCA of pharmaceuticals is split into three types, all of which must meet different requirements.[118] First, *product claim* advertisements are those which "name a drug and discuss its benefits and risks."[119] Product claim advertisements must not be misleading, and must present information in a "balanced fashion."[120] An advertisement might be false or misleading if it fails to present a "fair balance between information relating to side effects and contraindications [relative to the] effectiveness of the drug" or if it "fails to reveal facts material in the light of its representations . . . or with

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112. *Id.*

113. Lenhardt, *supra* note 24, at 184 (noting an FDA survey that suggested DTCA promotes patient autonomy).

114. *See* Bitzer, *supra* note 64, at 179−80; *see also* Gagne & Helm, *supra* note 15.

115. Andrzejewski, *supra* note 19, at 575.

116. *See* Levy, *supra* note 13, at 534; Bitzer, *supra* note 64, at 180. The FDA uses the terms "side effects" and "risks" somewhat interchangeably, defining them simply as "what can go wrong when [a] drug is used." *Drug Advertising: A Glossary of Terms*, FDA (Jan. 19, 2020), https://www.fda.gov/drugs/prescription-drug-advertising/drug-advertising-glossary-terms#top [https://perma.cc/5BDK-JH6R]. The "risks/side effects" the FDA asks drug manufacturers to disclose include: specifying which groups of patients are advised against use of the drug; serious or commonly-occurring side effects; side effects seen in special populations (such as the pregnant or elderly); and the chances that the drug can cause abuse, dependence, or withdrawal effects. *Id.* The term "contraindications" refers to a more specific aspect of pharmacological risk-benefit analysis; that is, the patient-specific conditions or factors that make it inadvisable to pursue a certain course of treatment or take a certain medication. *See* Robert J. David, *Professional Liability*, LA. B.J. 403, 403 (2002); *Contraindications,* MEDLINEPLUS, https://medlineplus.gov/ency/article/002314.htm [https://perma.cc/LAQ7-2EPJ]. For example, taking two medications together can cause an adverse drug reaction that neither would cause on their own. *See Contraindications, supra*.

117. Bitzer, *supra* note 64, at 180–81; Andrzejewski, *supra* note 19, at 575–76.

118. *See* Giancarlo, *supra* note 111, at 457–58.

119. *Basics of Drug Ads*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/drugs/prescription-drug-advertising/basics-drug-ads [https://perma.cc/9YTJ-FHQM].

120. *Id.*

respect to consequences that may result from the use of the drug as recommended or suggested in the advertisement."[121] Product claim advertisements must contain: (1) the brand and generic names of the drug, (2) at least one FDA-approved use for the drug, and (3) the most significant risks of the drug.[122] Depending on whether the advertisement is printed or broadcast, the advertisement must also meet the "brief summary" or "major statement" and "adequate provision" requirements provided by the FDA.[123]

The second type of advertisement is a *reminder* advertisement—reminder advertisements merely name the drug but may not contain or suggest information about the drug's uses, benefits, or risks.[124] Prescription drugs with serious risks (or what is called a "boxed warning") may not be advertised in this way.[125]

The third type of advertisement is a *help-seeking* advertisement.[126] Help-seeking advertisements encourage people with specific conditions or symptoms to speak with their doctor and do not name a specific drug.[127] These advertisements are *not* considered to be pharmaceutical advertisements and are thus regulated by the FTC instead.[128] In all cases, the FDA does not permit the advertisement of pharmaceuticals for "off-label" uses (uses that treat a condition for which the drug has not been FDA approved), finding that such advertisements may be false or misleading.[129]

FDA regulation of DTCA has some important limits. First, the FDA may not mandate prior approval of advertisements unless an advertiser has violated certain FDA rules in the past.[130] Rather, pharmaceutical companies can submit their advertisements for prior review and receive "recommendations" from the FDA, or simply release their advertisements to the public and wait for FDA action (if any).[131] If an advertisement is noncompliant with FDA guidelines, the FDA may either put pressure on the advertiser through warning letters or bad press, or they

121. FDA Prescription Drug Advertisements, 21 C.F.R. § 202.1(e)(5) (2022).

122. *Basics of Drug Ads*, *supra* note 119.

123. *Id.*

124. *Id.*

125. *Id.* "Boxed warnings" or "black box warnings" are included in the prescribing information for drugs "that have special problems, particularly ones that may lead to death or serious injury." *See Drug Advertising: A Glossary of Terms, supra* note 116.

126. *Basics of Drug Ads*, *supra* note 119.

127. *Id.*

128. *Id.*

129. *See* ABRAMSON, *supra* note 18, at 20, 34–36; *see also* Bitzer, *supra* note 64, at 188. See *Sertraline for Premature Ejaculation*, HIMS, https://www.forhims.com/premature-ejaculation/sertraline-for-pe [https://perma.cc/5LR3-V9MR], for an example of an "off-label" advertisement.

130. Andrzejewski, *supra* note 19, at 577. Usually, violations sufficient to trigger mandatory prior approval of pharmaceutical advertisements by the FDA consist of the failure to disclose a recent drug approval date or the primary risks of taking the drug. *Id.*

131. *See id.*

may condition drug approval on compliance with advertising guidelines.[132] Thus, much of the compliance with DTCA guidelines is voluntary, as pharmaceutical companies want to ensure that their medications receive FDA approval.[133]

Secondly, FDA regulation of DTCA has failed to keep up with the fast-paced technological revolution of health care marketing.[134] The dawn of the internet has permitted advertisements similar to print and broadcast to be disseminated at a breakneck pace, and technological advancements have brought about new interactive mediums (for example, mobile health apps) that pose novel marketing concerns.[135] Social media has also become a powerful platform for DTCA, enabling advertisers to reach wider audiences than ever before.[136] Companies have also begun paying influential social media users to promote products to their followers online—a particularly subtle yet persuasive form of advertising.[137] These rapidly-evolving technological advancements have presented an obstacle to the development of FDA guidelines that are tailored to the Internet.[138]

Primarily, FDA evaluation of internet DTCA is based on ensuring that advertisements "fair[ly] balance" information about the benefits and risks of a drug.[139] As explained previously, evaluations for compliance with FDA DTCA regulations are generally conducted on a *post hoc* basis.[140] In an attempt to keep up with the times, the FDA has provided guidance documents for regulated entities that illustrate best practices for DTCA—for example, one such document encourages advertisers using social media platforms that have character space limitations to disclose the risks and benefits of a drug in comparable "content and prominence" and provide

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132. *Id.* at 577−78.

133. *Id.* at 578.

134. *See* Levy, *supra* note 13, at 535 (discussing the evolution of FDA guidelines and suggesting they have not kept up with the times).

135. *See* Bitzer, *supra* note 64, at 172−77 (describing the recent rise of DTCA in the context of telemedicine); *see also* U.S. Food & Drug Admin., Guidance for Industry: Fulfilling Regulatory Requirements for Postmarketing Submissions of Interactive Promotional Media for Prescription Human and Animal Drugs and Biologics 6 (2014), https://www.fda.gov/media/87685/download [https://perma.cc/4WSM-VPCH] (providing guidance and definitions with regard to interactive online DTCA); Levy, *supra* note 13, at 538 (discussing the "mHealth Boom").

136. *See* Safdar & Fuller, *supra* note 11.

137. Zuppello, *supra* note 34.

138. *See* Bitzer, *supra* note 64, at 181 ("FDA regulation . . . has not kept up with rapid advancements in technology and prolific internet usage . . . While the FDA previously planned on developing internet-specific guidelines, it suspended the project, citing an inability to keep up with rapid technological developments.").

139. *Id.* at 179.

140. *See* Giancarlo, *supra* note 111, at 462; Lenhardt, *supra* note 24, at 167; *see also* Andrzejewski, *supra* note 19, at 577–78 (noting the prohibition on mandatory prior approval and describing the subsequent enforcement action the FDA *may* take, such as issuing warnings or placing conditions on the drug approval process).

links to further information.[141] However, these guidance documents are not legally binding and serve primarily as recommendations.[142]

Although attempting to regulate social media DTCA has proven challenging, the FDA "fair balance" requirement provides a minimum standard that holds pharmacies, drug manufacturers, and medical providers accountable.[143] Despite the fact that DTC telemedicine startups are often promoting comparable products and services, their resistance to classification as one of the aforementioned entities leaves them in regulatory limbo.[144] As such, DTC telemedicine companies have been able to promote their products unhindered by FDA requirements demanding the balanced presentation of risk-benefit information.[145] Although DTC telemedicine companies are technically governed by FTC advertising standards, both the FDA and FTC rely primarily on social media users to report noncompliant advertisements for enforcement and do not pre-approve promotional materials.[146] This regulatory asymmetry has permitted DTC telemedicine startups' advertisements to proliferate largely unchecked relative to their FDA-regulated counterparts.[147]

B. Commercial Speech According to the First Amendment

Pharmaceutical companies, as purveyors of commercial speech, are entitled to a certain level of First Amendment protection.[148] Although the protection of commercial speech has been justified in the name of consumers' access to information and the stimulation of a competitive market, this protection has its limitations.[149] The level of protection varies based on whether the government action in question either *restricts* or

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141. U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: INTERNET/SOCIAL MEDIA PLATFORMS WITH CHARACTER SPACE LIMITATIONS—PRESENTING RISK AND BENEFIT INFORMATION FOR PRESCRIPTION DRUGS AND MEDICAL DEVICES 4 (2014), https://www.fda.gov/media/88551/download [https://perma.cc/CK45-6RPN]; *see also, e.g.*, U.S. FOOD & DRUG ADMIN., INTERNET/SOCIAL MEDIA PLATFORMS—CORRECTING INDEPENDENT THIRD-PARTY MISINFORMATION ABOUT PRESCRIPTION DRUGS AND MEDICAL DEVICES: GUIDANCE FOR INDUSTRY (2014), https://www.fda.gov/media/88545/download [https://perma.cc/V8W4-BN4W].

142. *See* Giancarlo, *supra* note 111, at 461.

143. *See id.* at 460; *see also* Defino, *supra* note 15 (noting that "guidelines for medical services that don't fit into the pre-recognized categories of drug manufacturer, pharmacy, or medical provider are pretty much non-existent").

144. Gagne & Helm, *supra* note 15.

145. *See id.*; *see also* Bitzer, *supra* note 64, at 182–83.

146. Zupello, *supra* note 34.

147. *See* Safdar & Fuller, *supra* note 11.

148. Andrzejewski, *supra* note 19, at 578; *see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

149. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765; *see also* Matthew W. J. Ryder, *Prescription Drug Labels: Compelled Commercial Speech and its Effect on Public Health Concerning Prescription Drugs and the Opioid Crisis*, 66 WAYNE L. REV. 661, 668 (2021).

compels commercial speech in some manner.[150] Restrictions of commercial speech are less likely to withstand constitutional challenge, and pharmaceutical companies have successfully invalidated some FDA advertising rules.[151] However, "compelled commercial speech" is subject to a more lenient standard of review, and challenges to disclosure requirements imposed on companies have been upheld by the courts.[152] Given the longstanding authority of the government to require certain disclosures in DTCA, it is likely that imposing analogous requirements on DTC telemedicine advertisements would be justified by existing commercial speech jurisprudence.[153]

Government regulations that impose a ban on commercial speech are subject to intermediate scrutiny according to the four-part test articulated by the Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.*[154] First, a court must determine whether the speech (1) "concern[s] lawful activity and [is not] misleading," and (2) "whether the asserted governmental interest to be served by the restriction on commercial speech is substantial."[155] If both questions are answered in the affirmative, then the Court asks (3) "whether the regulation directly advances the governmental interest asserted" and is (4) "not more extensive than is necessary to serve that interest."[156] Subsequent jurisprudence demonstrates how government entities face specific challenges in overcoming the fourth prong of the test, finding that statutes are not sufficiently tailored to promote governmental interests without impinging on First Amendment protections.[157]

However, government compulsion of commercial speech—such as in the disclosure of information to consumers—is held to a rational basis standard of review.[158] In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the Supreme Court held that governmental action compelling the disclosure of "purely factual and uncontroversial information" that "reasonably related to the State's interest in preventing

150. *See* Alexis Mason, *Compelled Commercial Disclosures: Zauderer's Application to Non-Misleading Commercial Speech*, 72 U. MIAMI L. REV. 1193, 1196–97 (2018).

151. Andrzejewski, *supra* note 19, at 578–80; *see* Thompson v. W. States Med. Ctr., 535 U.S. 357, 374–77 (2002).

152. Mason, *supra* note 150, at 1197; *see* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

153. *See generally* Calfee, *supra* note 16, at 174−76.

154. Mason, *supra* note 150, at 1196–97; *see* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–66 (1980).

155. *Central Hudson*, 447 U.S. at 567.

156. *Id.*

157. *See* Andrzejewski, *supra* note 19, at 580; *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011) (demonstrating the reluctance of the Court to find statutes sufficiently narrowly tailored).

158. Mason, *supra* note 150, at 1197.

deception of consumers" is constitutionally permissible, so long as it is not unduly burdensome.[159]

Because this Note proposes a *compelled* disclosure of information by DTC telemedicine companies, the rule in *Zauderer* would likely govern any hypothetical constitutional challenge.[160] Unlike *restrictions* on commercial speech that trigger intermediate scrutiny under *Central Hudson*,[161] mandating disclosures similar to those required by the FDA is equivalent to compelled commercial speech, subject only to rational basis review.[162] The well-established practice of requiring pharmaceutical companies to disclose material risk information in order to protect consumers[163] supports the argument that requiring the same of DTC telemedicine companies is not likely to constitute an undue infringement on commercial free speech rights.[164]

III. IGNORING UNREGULATED DTCA ON SOCIAL MEDIA CAN HAVE CONSEQUENCES

Even traditional (i.e., regulated) DTCA has demonstrated an observable influence on consumer decision-making.[165] Yet, DTC telemedicine companies promoting the same products are free of the obligation to "fairly balance" their advertisements, maximizing their persuasive potential.[166] This Section first discusses why DTC telemedicine companies are not governed by FDA regulations and illustrates how this has led to inconsistent advertising rules. This Section also explores business practices of major DTC telemedicine companies and explains how failure to

159. *Zauderer*, 471 U.S. at 651.

160. *Id.*

161. *Central Hudson*, 447 U.S. at 567.

162. *Zauderer*, 471 U.S. at 650–51; *see also* Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881, 883 (2022) (naming requirements imposed on pharmaceutical companies as among instances of compelled commercial speech). *But see* Mason, *supra* note 150, at 1197–98 (referring to Supreme Court decisions indicating *Central Hudson* intermediate scrutiny may be invoked when compelled disclosures are not shown to be reasonably related to the deception of consumers); In re R.M.J., 455 U.S. 191, 205–07 (1982).

163. *See* Kevin M. Fain & G. Caleb Alexander, *Mind the Gap: Understanding the Effects of Pharmaceutical Direct to Consumer Advertising*, 52 MED. CARE 291, 291 (2014).

164. *See Zauderer*, 471 U.S. at 651 (stating that compelled commercial speech is constitutionally permissible if it is reasonably related to the prevention of consumer deception and is not unduly burdensome—given that FDA regulation of DTC advertising has long been approved for serving this very purpose, it is likely that compelling risk information disclosure of DTC telemedicine company advertisers is similarly permissible).

165. *See* Lenhardt, *supra* note 24, at 186−87.

166. *See* Bitzer, *supra* note 64, at 179−80 (explaining that the FDA requires "fair[ly] balanced" advertisements because in the absence of risk information, patients can be misled to believe that an advertised product is "overwhelmingly" beneficial with little associated risk).

regulate their marketing practices can thwart the ideals of consumer protection underlying DTCA regulations.

A. DTC Telemedicine Companies are Not Subject to FDA Regulations

Avoiding classification as a medical provider, drug manufacturer, or pharmacy permits DTC telemedicine companies to stay out of reach of FDA regulation.[167] This regulatory side-step is not necessarily surreptitious. For example, in response to backlash regarding a social media advertisement by one of the largest DTC telemedicine companies, the company's brand lead admitted that while certain entities (such as drug manufacturers, medical providers, and pharmacies) must comply with "different requirements," telemedicine platforms are merely subject to the "content requirements for media platforms we utilize."[168] Moreover, DTC telemedicine companies' terms and conditions often explicitly deny that they are medical providers, asserting thereby that such companies are not responsible for the provision of medical services.[169] It would certainly be wise for any potential customer to read the fine print, but for those who do not, the purported distinction between DTC telemedicine companies and bona-fide medical or pharmaceutical providers is not obvious. For example, TikToks distributed by DTC telemedicine companies advertise mental health "treatment" and "management," "prescription [] meds & care online," and "healthcare that feels like self-care."[170]

Although they market substantially the same products as drug manufacturers, pharmacies, and health care providers, DTC telemedicine companies are not required to abide by their rules.[171] Instead, they are subject only to the advertising regulations promulgated by the FTC, applicable to all consumer advertising.[172] The Federal Trade Commission Act, as enforced by the FTC, aims to prevent "deceptive" practices—i.e., advertisements that are likely to "mislead consumers" and "affect [their] behavior or decisions about the product or service."[173] Although the FTC has ostensibly attempted to keep pace with online advertising, the issue has been primarily addressed through the creation of instructive guidance

167. *See* Gagne & Helm, *supra* note 15; *see also* Bitzer, *supra* note 64, at 177–78.

168. Defino, *supra* note 15.

169. *See* discussion *supra* note 83.

170. *See* Little, *supra* note 12 (pointing out advertisements put out by Done and Cerebral); *see also* HERS, https://www.forhers.com/ [https://perma.cc/SGT2-F5BH].

171. *See* Gagne & Helm, *supra* note 15.

172. *See id.*

173. *Advertising and Marketing on the Internet: Rules of the Road*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/bus28-rulesroad-2023_508.pdf [https://perma.cc/5VXD-5WNP].

documents that are not legally binding.[174] Moreover, the FTC likely does not have the resources to supervise the innumerable posts on social media platforms and does not purport to do so—instead, the agency relies on consumers to report non-compliant advertisements.[175] DTC telemedicine companies have not avoided scrutiny entirely, as the FTC commenced investigation of some company practices related to DTC telemedicine in June of 2022.[176] However, on the whole, DTC telemedicine company advertisements (such as those featuring prescription drugs and promoting off-label use of prescription medications, both of which are tactics prohibited to FDA-regulated entities) continue to proliferate.[177]

Despite the FTC's technical authority to regulate, the current scheme does not appear to stand much in the way of DTC telemedicine companies' ability to advertise.[178] Given the substantial similarity between the services advertised by DTC telehealth startups and FDA-regulated entities, it stands to reason that confusion regarding regulatory authority may contribute to the prevalence of potentially misleading telehealth advertisements.[179] Moreover, relying on consumers for enforcement is likely ineffective, as the difference between an unregulated telehealth company and an FDA-regulated entity is not obvious on the face of an advertisement for telehealth services or prescription drugs.[180]

B. Unregulated DTCA is Inconsistent With Consumer Protection

The reach of DTC telemedicine startup advertising is vast, particularly given the focus on using Facebook, Instagram, and TikTok as platforms for marketing.[181] In 2021, Facebook harbored over 233 million American users, while approximately 160 million and 87 million American

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174. Zuppello, *supra* note 34; *see .com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FED. TRADE COMM'N (Mar. 2013), https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf [https://perma.cc/55MY-CBYG].

175. *See* Zuppello, *supra* note 34.

176. Rolfe Winkler & Khadeeja Safdar, *Mental-Health Startup Cerebral Investigated by FTC,* WALL. ST. J. (June 14, 2022), https://www.wsj.com/articles/ftc-launches-probe-of-cerebrals-business-practices-11655241983 [https://perma.cc/4NG2-QJPD] (reporting on an FTC investigation of a DTC telemedicine company for potential violations of the prohibition against deceptive and unfair practices).

177. *See* Safdar & Fuller, *supra* note 11 (describing the results of an analysis indicating that more than 2,100 DTC telemedicine company ads citing the benefits of prescription drugs without the risks, promoting off-label use, or featuring unspecified-source testimonials were present on Facebook and Instagram alone in October and November of 2022).

178. *See id.* (noting that social media advertisement spending by telehealth startups has increased tenfold between 2020 and 2021, culminating in $100 million spent by just 18 companies).

179. *See id.* ("[R]egulators haven't kept pace with the fast-growing telehealth industry. 'It's not clear who is regulating what' . . . .").

180. *See* Zuppello, *supra* note 34.

181. *See* Safdar & Fuller, *supra* note 11.

users were present on Instagram and TikTok, respectively.[182] Massive social media trends on the topic of mental health have cultivated a particularly sympathetic audience.[183] However, the catchy and buzzword-laden messages that make DTC telemedicine startup advertisements so persuasive have led some to wonder whether consumers are being adequately informed.[184] As demonstrated in Section III.A, *supra*, these advertisements not only lay outside the reach of FDA rules requiring a "fair balance" of benefit-risk information,[185] they have also managed to proliferate in spite of social media platform guidelines, such as those prohibiting the dissemination of medical misinformation.[186] The ability of DTC telemedicine companies to advertise unhindered by the risk requirements demanded of their FDA-regulated counterparts has given them a competitive edge—while pharmaceutical companies' ability to persuade consumers is somewhat dulled by the requirement to present the applicable risks of a product alongside the benefits,[187] DTC telemedicine companies are free to portray certain conditions or promote certain prescriptions in the most attractive light possible.[188]

DTC telemedicine marketing generally promotes the idea that DTC telemedicine is easy and efficient, which has proven itself to be a big draw to the online consumer.[189] When coupled with the unblemished presentation of certain conditions and prescriptions, this marketing strategy can generate expectations in consumers that may impact the care they eventually receive.[190] These expectations are facilitated by the general model of DTC telemedicine companies' patient intake—that is, permitting a user to fill out

182. *See* Schwartz & Woloshin, *supra* note 14.

183. *See* Amato, *supra* note 5 (noting that as of January 2022, #mentalhealth has accumulated over 20 billion views, while #anxiety and #adhd have garnered 11 billion and 9 billion, respectively).

184. *See* Little, *supra* note 12; *see also* Williams, *supra* note 43.

185. Bitzer, *supra* note 64, at 183.

186. Although medical misinformation is a salient example of potentially-violated social media rules in this context, many of these advertisements likely do not rise to the level of medical misinformation, despite concerns raised by experts. However, some advertisements have been sanctioned as harboring harmful content in general. *See* Little, *supra* note 12; *see also Community Guidelines*, TIKTOK, https://www.tiktok.com/community-guidelines?lang=en [https://perma.cc/5MD8-3GRM]; *Misinformation: Policy Details*, META, https://transparency.fb.com/policies/community-standards/misinformation/ [https://perma.cc/W3E3-LM87].

187. *See* Andrzejewski, *supra* note 19, at 572, 585 (suggesting that risk disclosure requirements have reduced comprehension of pharmaceutical advertisements and diminished consumer faith in DTCA as a vehicle to communicate drug risks and benefits).

188. *See* Defino, *supra* note 15; Little, *supra* note 12; *see also* Magdalene Taylor, *The Questionable Motives Behind All Those ADHD Ads on TikTok*, MEL MAGAZINE (May 2022), https://melmagazine.com/en-us/story/cerebral-done-ads-tiktok-instagram [https://perma.cc/6T5T-JR4L] (all displaying examples of DTC telemedicine advertisements that market the treatment of certain conditions or promote certain prescriptions without acknowledgment of any associated risks).

189. *See* Bitzer, *supra* note 64, at 174; Levy, *supra* note 13, at 521−22.

190. *See* Safdar & Fuller, *supra* note 11.

a questionnaire naming a particular condition or selecting a specific prescription that is subsequently evaluated by a health care practitioner.[191] Buoyed by the claims of the DTC telemedicine company's advertisements, patients have been reported as expecting prescriptions[192] despite non-disclosure of the associated risks of requested medications.[193]

Prescribers at DTC telemedicine companies are often sought separately from primary care providers.[194] Thus, DTC prescribers attempting to diagnose a condition often rely primarily on patients' self-reported symptoms without the benefit of reference to past medical histories.[195] Lack of access to a complete medical history can result in consequences like missed pre-existing conditions, addiction histories and drug-drug interactions.[196] This is not necessarily unique to the DTC model, as initial visits with doctors in-person are not always accompanied by requests for past medical records.[197] However, the online format's limitations preclude other informative opportunities to assess a patient that are present in-person, such as physical examinations or observations of general demeanor. [198] Limited opportunities for observation can make it easier for patients with deceptive intentions to misrepresent their medical histories, which can result in misdiagnosis or inappropriate prescribing.[199] In fact, incident reports related to one DTC telemedicine company from June 2022 revealed that patients with a history of addiction were given

191. *See* Bitzer, *supra* note 64, at 175−76.

192. *See* Winkler et al., *supra* note 10; *see also* Winkler & Walker, *supra* note 10 (quoting a former nurse practitioner at Cerebral who stated that "patients clamored for medication . . . [a]ll day every day, people were demanding Adderall.")

193. *See, e.g.*, *Premature Ejaculation Treatment*, HIMS, https://www.forhims.com/premature-ejaculation [https://perma.cc/88DM-X43D] ("Sertraline is a daily pill that can increase time to climax by up to 400% (seriously) and help keep you prepared for intimacy on your schedule. Being ready to go at any time? Hot."). In order to see any mention of the risks of suicidal ideation when taking Sertraline, a small link at the bottom of the page must be clicked labeled "Important safety information."

194. *See* Gagne & Helm, *supra* note 15 (noting that only 45% of Americans ages 18-to-29 have a primary care physician); Bollmeier et al., *supra* note 6, at 304 (finding that patients using multiple providers often have incomplete medication and medical histories).

195. *See* Bollmeier et al., *supra* note 6, at 304.

196. *See id.*; *see also* Shelby Livingston & Blake Dodge, *2,000 leaked documents and employees say Silicon Valley healthcare startup Cerebral harmed hundreds of patients and prescribed serious medication with abandon*, INSIDER (June 28, 2022, 3:06 PM), https://www.businessinsider.com/cerebral-leaked-documents-suggest-patient-harm-2022-6 (reporting on instances of addictive substances being prescribed to customers with histories of drug abuse) [https://perma.cc/EWD8-AZWH].

197. Bollmeier et al., *supra* note 6, at 303−04.

198. Bitzer, *supra* note 64, at 193−94.

199. *See, e.g.*, Livingston & Dodge, *supra* note 196 (reporting on patients with histories of substance abuse receiving prescriptions for addictive drugs); Winkler et al., *supra* note 10 ("Another Cerebral nurse practitioner said she saw a patient who answered all the questions correctly to suggest he had ADHD. At the end of the appointment he said he had lied about having ADHD and instead liked to crush and snort Adderall tablets.").

prescriptions for addictive drugs, while others were prescribed potentially fatal drug combinations.[200]

That is not to say that concerns lie primarily with patients who aim to deceive, as most often that is not the case—however, the DTC intake format similarly limits the ability to correct diagnoses for patients that report symptoms based on inaccurate or mistaken information.[201] Patients that resonate with DTC telemedicine advertisements portraying a certain condition might be unintentionally primed to believe that they have that condition, prompting them to request a prescription and report symptoms accordingly.[202] Symptoms tend to overlap across different mental health conditions and many such conditions are associated with significant rates of comorbidity.[203] Consequently, a patient that is predisposed to focus on a specific prescription request might be unaware that they harbor markers of other conditions and fail to convey them to their prescriber.[204] The trouble is not necessarily with self-diagnosis itself—rather, it can be one of the few methods by which one with difficulty accessing health care can address their mental health concerns.[205] However, when DTC telemedicine companies advertise by purporting to share the symptoms of certain conditions with consumers, they do so by glossing over the inherent complexities of diagnosis made more difficult by the remote DTC model.

DTC telemedicine companies have also experienced high provider turnover due to the high patient workload inherent to the model, which has proved a hindrance to the comprehensive care often advertised.[206] Practitioners have reported discomfort with treating patients in crisis that required more comprehensive care than could be offered online.[207] Thus, some patients may experience inconsistent access to care, and the associated prescriber reassignments can result in patients going weeks without access to medication or help from a provider.[208]

Despite the concerns shared by patients and providers, DTC telemedicine has become mainstream, due in part to the marketing strategies that attract patients with promises of ease and efficiency without acknowledgement of the model's inherent limitations.[209] Scrutiny of these

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200. Livingston & Dodge, *supra* note 196.

201. *See* Fielding, *supra* note 12.

202. *See* Olsson, *supra* note 57 ("[Online mental health videos] create[] this horoscope type of effect. People see enough of these videos, they start to relate to any number of the potential symptoms and even begin to present with some of the same symptoms."); Bitzer, *supra* note 64, at 175−76.

203. Al-Asadi et al., *supra* note 55.

204. *See* Fielding, *supra* note 12.

205. *See* Hohman et al., *supra* note 2, at 2759 (discussing barriers to mental health care access).

206. Mosendz & Melby, *supra* note 27; Safdar & Fuller, *supra* note 11.

207. Mosendz & Melby, *supra* note 27.

208. *Id.* (alleging that Cerebral went as far as having prescribers operate under the pseudonym "Eileen Davis," maintaining the façade of a consistent care team).

209. *See* Winkler & Walker, *supra* note 10.

strategies suggests that DTC telemedicine companies' efforts are focused on a particularly vulnerable demographic—minors.[210] Children are especially susceptible to persuasive advertising and are increasingly spending time on the internet without adult supervision and guidance;[211] moreover, online platforms have not been completely successful in ensuring content potentially harmful to children does not reach their social media feeds.[212] Psychiatrists have noted a rise in teenagers and young adults reporting to facilities with mental health concerns, and an increase of self-diagnosis with conditions such as ADHD, obsessive compulsive disorder, dissociative identity disorder, autism, and Tourette's syndrome.[213]

One potential explanation for this increase might be growing mental health awareness on social media, which has made the idea of mental health care more accessible to the average consumer.[214] However, the acute susceptibility of young people to persuasive advertising can potentially create a "horoscope effect," leading suggestible viewers to believe they have the conditions portrayed in posts online and sometimes even begin presenting new symptoms.[215] DTC telehealth advertisements appear to encourage this very phenomenon.[216] By referencing popular TikTok dance trends,[217] using aesthetically-pleasing packaging,[218] and invoking symptoms as applicable to common struggles as they are to mental health conditions,[219] DTC telemedicine companies have successfully centered their advertising model on appealing to the online generation. Of course, ease of access to mental health information may have led some individuals to seek needed treatment when they otherwise might not

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210. *See* Little, *supra* note 12; *see also* Taylor, *supra* note 188.

211. *See* Melissa Dittmann, *Protecting Children from Advertising*, 35 MONITOR ON PSYCH. 58 (2004), https://www.apa.org/monitor/jun04/protecting.html [https://perma.cc/7Q6C-BC34]; Nabity-Grover et al., *supra* note 3 (reporting an increase in global social media usage of 61% starting at the onset of the pandemic, with TikTok use in particular increasing by 13% amongst children ages 4-15).

212. *See* Ian McKay, *Up in Smoke: Why Regulating Social Media Like Big Tobacco Won't Work (Yet!)*, 97 NOTRE DAME L. REV. 1669, 1675–79; *see also Kids Online During COVID: Child Safety in an Increasingly Digital Age: Virtual Hearing Before the Subcomm. on Consumer Protection and Com. of the Comm. on Energy and Com.*, 117th Cong. 2 (2021) (statement of Hon. Jan Schakowsky, Rep. from III.).

213. *See* Fielding, *supra* note 12; Olsson, *supra* note 57.

214. *See* Olsson, *supra* note 57.

215. *See id.*; Fielding, *supra* note 12 (discussing the increased incidence of patients asking about conditions they saw on TikTok).

216. *See* Little, *supra* note 12.

217. *See id.*

218. *See* Defino, *supra* note 15.

219. *See* Taylor, *supra* note 188 (reporting on a Done advertisement that named adolescent drug use, bad grades, and relationship problems as potential reasons to seek out their ADHD treatment services); *see also @DoneADHD*, INSTAGRAM, https://www.instagram.com/reel/CnXxGaiLZj-/?igshid=MDM4ZDc5MmU= (last visited July 29, 2023) (suggesting that a pile of clean clothes left in one's bedroom is a symptom of ADHD).

have.[220] However, DTC telemedicine advertisements need only disclose the *benefits* of their services when they convey such information.[221] In traditional DTCA, the disclosure of risk information is meant to be conspicuous, with information often emphasized in print or spoken aloud when broadcasted.[222] In comparison, DTC telemedicine advertisements of the same products may imply to the consumer that there are no risks at all.[223] In theory, a fair balance of risk-benefit information from a DTC telemedicine company may prompt disclosure of the extent to which the company has the capacity to treat conditions of varying severity, or the addictive or psychoactive effects of certain prescriptions.[224] DTC telemedicine companies are able to advertise without making such information readily available, potentially leading consumers to underestimate the risks that can accompany online mental health care or prescription drug use.[225]

Whether these observations reflect systemic problems in the tech takeover of mental health care or the "startup pains" [226] accompanying any attempt to revolutionize medicine, it is certain that the inherent risks associated with the practice are not evident from DTC telemedicine company advertisements. Even though proper medical assessment can ameliorate concerns that patients are being influenced to seek unnecessary treatment, the fact remains that the marketing output of DTC telemedicine companies does not reflect the true nature of their offerings when not balanced by material risk information.[227]

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220. *See* Fielding, *supra* note 12.

221. Gagne & Helm, *supra* note 15.

222. *See* Giancarlo, *supra* note 111, at 459−60.

223. *See* Defino, *supra* note 15.

224. *See* Livingston & Dodge, *supra* note 196; *see also Sertraline for Premature Ejaculation*, *supra* note 129 (failing to obviously disclose the off-label danger of taking Sertraline; namely, the potential for suicidal thoughts); *Get Escitalopram (Lexapro) Online for Depression and Anxiety*, CEREBRAL https://cerebral.com/prescription-medication /escitalopram-lexapro [https://perma.cc/5384-SYWQ] (depicting a DTC telemedicine company's advertisement promoting Lexapro for anxiety purposes, without any mention of its black box warning).

225. *See* Defino, *supra* note 15. Although such risks are often disclosed in DTC telemedicine companies' terms and conditions, *see* discussion *supra* note 83, such information is not nearly as clear and accessible to the average consumer as advertising materials tend to be. DTC telemedicine advertisements reach millions of viewers; however, studies have shown that up to 91% of American adults—and 97% of Americans ages 18-34—accept legal terms and conditions without reading them. *See* Safdar & Fuller, *supra* note 11; Caroline Cakebread, *You're not alone, no one reads terms of service agreements,* INSIDER (Nov. 15, 2017, 6:30 AM), https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11?r=US&IR=T.

226. *See* Livingston & Dodge, *supra* note 196.

227. *See* Williams, *supra* note 43; Warner, *supra* note 57; *see also* Lenhardt, *supra* note 24, at 187 (reporting that even in the case of regulated or "traditional" DTCA, around 75% of surveyed physicians felt as though DTCA "cause[d] patients to overestimate the efficacy of the drugs advertised.").

While FDA-regulated entities must disclose the major risks associated with the advertised product or service,[228] DTC telemedicine companies advertise comprehensive "treatment plans,"[229] "management" of certain conditions,[230] and the provision of black-box warning prescription drugs, unbound by disclosure requirements.[231] These advertisements are virtually indistinguishable from health care providers and pharmaceutical companies in their offerings by purporting to offer complete mental health care or safe access to medication.[232] However, existing outside the reach of the rules unquestionably gives DTC telemedicine companies the upper hand on their FDA-regulated counterparts.[233] The discrepancy is even more troubling when one considers that, despite marketing health care services in much the same language, DTC telemedicine companies expressly disclaim liability for the provision of health care services or the existence of physician-patient relationships.[234] In other words, the gap in regulatory authority allows DTC telemedicine companies to maintain a resemblance to trusted FDA-regulated entities in every material way, without assuming responsibility for patient care (much less making that clear in their marketing materials).[235] Somewhat ironically, this suggests that the very information that would permit a consumer to ascertain whether a certain advertisement is "deceptive" and seek out the only recourse available—that is, a report to the FTC[236]—is not readily accessible without outside research or firsthand experience as a paying customer.

Although some of the issues associated with the marketing of online mental health treatment are phenomena of the digital age,[237] others are analogous to the criticisms directed at DTC advertising of pharmaceuticals as a whole. While pharmaceutical DTC advertising has an undeniable benefit in that it educates and empowers consumers in medical decision-making, it is also true that pharmaceutical companies' motivations

228. Fain & Alexander, *supra* note 163, at 291.

229. CEREBRAL, https://cerebral.com/ [https://perma.cc/95DV-45ZQ].

230. Little, *supra* note 12. Notably, Done does not offer any type of counseling or therapy, considered to be an important aspect of the effective ADHD "management" they advertise. *See Frequently Asked Questions: Do You Offer Therapy or Cognitive Behavioral Therapy (CBT)?*, DONE (May 3, 2023), https://www.donefirst.com/faq/services [https://perma.cc/2QK4-U8CE]; *Adult Attention-Deficit/Hyperactivity Disorder (ADHD)*, MAYO CLINIC (Jan. 25, 2023), https://www.mayoclinic.org/diseases-conditions/adult-adhd/diagnosis-treatment/drc-20350883 [https://perma.cc/KPN6-XHFW].

231. Bitzer, *supra* note 64, at 191−92.

232. CEREBRAL, *supra* note 229; DONE, https://www.donefirst.com/ [https://perma.cc/79XM-S82B] (advertising an ongoing care plan); HERS, https://www.forhers.com/ [https://perma.cc/5E5M-J2L5] (claiming that "Hers is *healthcare* that feels like self-care") (emphasis added).

233. *See* Gagne & Helm, *supra* note 15.

234. *See id.*; Defino, *supra* note 15; *see also* discussion *supra* note 83.

235. *See* Gagne & Helm, *supra* note 15.

236. *See id.*; *see also* Zupello, *supra* note 34.

237. *See* Fielding, *supra* note 12; *see also* Williams, *supra* note 43.

are not solely altruistic.[238] Rather than share purely educational information with consumers, advertisements are designed to persuade and effect sales.[239] It has been suggested that DTCA (as basic marketing strategy would dictate) targets the populations most receptive or vulnerable to its message—for example, increased DTCA efforts have been connected with substantial increases in the sales of certain medications.[240] However, pharmaceutical companies are subject, at the very least, to FDA requirements obligating such companies to share important health information in a balanced manner and take some responsibility for consumer health.[241] In contrast, DTC telemedicine startups are able to advertise with an eye toward maximum profits[242] without regard to the interests of the very consumers that the FDCA was enacted to protect.[243] As a consequence, DTC telehealth startups have capitalized on increased consumer interest in mental health treatment by targeting populations receptive to pharmaceutical DTCA,[244] yet are not required to comply with the regulations that aim to place at least some focus on consumer health in similar industries.

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238. *See* ABRAMSON, *supra* note 18, at 164 ("…the primary offering in the market for prescription drugs is not a material product. Rather, pharmaceutical manufacturers market *beliefs* about their drugs to the medical community (and to the public through advertising and public relations efforts), beliefs designed to maximize their sales."); *see also* Lenhardt, *supra* note 24, at 183−86.

239. *See* Lenhardt, *supra* note 24, at 186; *see also* Andrzejewski, *supra* note 19, at 584 ("By virtue of their dual purpose to inform and persuade consumers, DTC advertisements do not exclusively appeal to 'rational consideration of medical costs and benefits.' A focus on optimal outcomes, however, 'can distort and inflate consumers' expectations about what prescription drugs can accomplish.'").

240. Lenhardt, *supra* note 24, at 186−87; *see also* ABRAMSON, *supra* note 18, at 134 (arguing that DTCA is used to "exploit consumers' . . . vulnerability to commercial marketing ploys . . . [by] creating branding campaigns directed at both consumers and prescribers that are carefully designed to establish an emotional connection to specific products.").

241. Fain & Alexander, *supra* note 163, at 291; *see also* Chris Kolmar, *26 Incredible US Pharmaceutical Statistics [2022]: Facts, Data, Trends, and More*, ZIPPIA (Sep. 25, 2022), https://www.zippia.com/advice/us-pharmaceutical-statistics/ [https://perma.cc/AX8X-L839] (noting that the U.S. pharmaceutical industry brought in $550 billion in revenue in 2022).

242. *See* Gagne & Helm, *supra* note 15.

243. *See* Lenhardt, *supra* note 24, at 167.

244. *See* Amato, *supra* note 5; *see also* Winkler et al., *supra* note 10 (indicating that Cerebral focused their business model and marketing practices on attracting "profitable" ADHD patients with controlled substance prescriptions and that clinicians were even asked to prescribe stimulants to 100% of their non-comorbid ADHD patients); Taylor, *supra* note 188 (displaying an ad for Done that encouraged people who have struggled with drug addiction in the past to seek ADHD treatment, for which the company offers addictive stimulant medication).

IV. "FAIR BALANCE": LEGISLATIVE SOLUTIONS THAT PASS CONSTITUTIONAL SCRUTINY

Using current FDA DTCA provisions as a model, this Note argues that applying similar standards to DTC telehealth companies' advertising is not only appropriate, but crucial to combating consumer deception in light of regulations that have failed to remain up-to-date with the rapidly-growing telemedicine industry. First, the services and products offered by FDA-regulated entities and telehealth startups are sufficiently analogous to justify applying a requirement of "fairly balanced" disclosures to DTC telehealth advertising.[245] Moreover, requiring such disclosures is not likely to run afoul of the First Amendment, given that compelled disclosures need only pass rational basis review per the *Zauderer* standard.[246]

A. Bringing DTC Telemedicine Companies Within the Ambit of FDA Regulation

As it stands, DTC telemedicine companies are outside the reach of FDA regulation despite promoting substantially the same products as entities under FDA authority—namely, medical treatments and prescription drugs.[247] As such, the current framework provides a fitting model for the potential regulation of DTC telemedicine advertising if brought under the authority of the FDA through appropriate legislation.

As delineated in Section II.A, *supra*, the FDA separates drug advertisements into three primary categories—two of which are regulated by the FDA directly and subject to the "fair balance" requirement, and one of which is subject to the FTC's general prohibitions against unfair or deceptive advertising.[248]

Product claim advertisements—those that name a drug and discuss its uses, benefits, and risks—must contain the name of the drug, its FDA approved use, and the most significant associated risks.[249] Print advertisements (i.e., a written social media post) must include a "brief summary" that includes such risks, and broadcast advertisements (such as a TikTok video or Instagram reel) must include a spoken "major statement"

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245. *See* Andrzejewski, *supra* note 19, at 575; *see also supra* Section III.A.

246. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985); Mason, *supra* note 150, at 1197.

247. *See* Bitzer, *supra* note 64, at 177−86; Gagne & Helm, *supra* note 15; *see also Conditions We Treat,* CEREBRAL, https://cerebral.com/conditions-we-treat [https://perma.cc/T37T-DKV7]; Defino, *supra* note 15 (displaying an advertisement by Hers for Propranolol, a prescription drug); *DoneADHD*, INSTAGRAM, https://instagram.com/doneadhd?igshid=MDM4ZDc5MmU= (last visited July 29, 2023) (advertising the service as "prescription medication" with "continuous care").

248. *Basics of Drug Ads*, *supra* note 119; *Advertising and Marketing on the Internet: Rules of the Road*, *supra* note 173.

249. *Basics of Drug Ads*, *supra* note 119.

of the drug's most important risks as well as "adequate provision" of *all* the risks associated with the drug or links to sources regarding prescribing information.[250] Importantly, the FDCA prohibits product claim advertisements promoting the "off-label" use of a drug, as this may be considered "false, lacking in fair balance, or otherwise misleading."[251]

Reminder advertisements—those that name a drug but do not name or imply its use—need not necessarily contain the amount of risk information that a product claim advertisement does.[252] However, reminder ads are not permitted for medications with serious risks or "boxed warnings."[253] Both print reminder and product claim advertisements must contain a statement encouraging the consumer to report any negative side effects they experience with that medication.[254]

Help-seeking advertisements—those that describe a condition but do not name a specific drug—are not considered drug ads and are thus regulated by the FTC.[255] While the FTC does prohibit advertisements that are "deceptive" and "unfair," the agency's ability to enforce its rules is limited primarily by reliance on consumer reports of violations.[256]

DTC telemedicine companies have disseminated product claim advertisements that would likely be violative of the FDCA if such advertisements were subject to the FDCA's requirements. For example, a written social media advertisement by one prominent DTC telehealth startup featured the name and image of the drug Propanolol, accompanied by the following text: "Nervous about your big date? Propanolol can help stop your shaky voice, sweating, and racing heart beat. No in-person doctor visits, just an online consultation and delivery can be right to the door. Restrictions apply. See website for full details."[257] This post is definitionally a print product claim advertisement; however, exemption from FDA rules meant the advertisement was not obligated to state that the only FDA-approved use of the drug is to treat high blood pressure,[258] not to mention that an FDA-regulated entity would not be permitted to advertise an "off-label" use in this manner whatsoever.[259] On top of promoting an "off-label" use, the advertisement does not contain a "brief summary" of the risks associated with Propanolol use, nor acknowledge that there are any

250. *Id.*
251. 21 C.F.R. § 202(e)(6)(i) (2022); *see also* Bitzer, *supra* note 64, at 188.
252. *Basics of Drug Ads*, *supra* note 119.
253. *Id.*
254. *Id.*
255. *Id.*
256. Zupello, *supra* note 34.
257. Defino, *supra* note 15.
258. *See id.*
259. *See* Bitzer, *supra* note 64, at 188; *see also Sertraline for Premature Ejaculation*, *supra* note 129 (demonstrating another advertisement for an off-label use).

risks at all.[260] In light of the policy justifications underlying FDA requirements to disclose material prescription drug information,[261] it follows that DTC telemedicine companies promoting the same prescription medications should have to abide by the same rules.

Unlike FDA-regulated entities promoting the same medications, DTC telemedicine advertisements that name specific drugs in print need not encourage consumers to report negative side effects to the FDA, much less mention those side effects.[262] Much like the aforementioned advertisement for Propanolol, online marketing of the drug Sertraline by another popular DTC telemedicine company promotes an off-label use (treating premature ejaculation) without mention of the associated risks absent an inclination to follow an inconspicuous link.[263] Other DTC telemedicine advertisements have marketed the prescription drug Lexapro for anxiety without mentioning the risks of taking the drug.[264] However, both Sertraline and Lexapro carry "black box warnings," meaning that one of their most significant side effects is an increased risk of suicidal thoughts and behavior.[265] Certainly, this is material risk information that should be disclosed to consumers, and if regulated by the FDA, these advertisements would at the very least be required to contain a "brief summary" of such risks in a "clear" and "conspicuous" manner in balance to these medications' potential benefits.[266] Given the identical nature of these advertisements to FDA-regulated product claim advertisements, similar treatment of the two in order to protect consumers from being misled by incomplete information may be justified.

Other advertisements distributed by DTC telemedicine startups would likely fall into the category of "help-seeking" advertisements regulated by the FTC, which prohibits "unfair or deceptive acts or practices

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260. *See* Defino, *supra* note 15; *Propranolol (Oral Route)*, MAYO CLINIC (June 1, 2023), https://www.mayoclinic.org/drugs-supplements/propranolol-oral-route/side-effects/drg-20071164?p=1 [https://perma.cc/H2B2-7EXC] (delineating the potentially severe side effects and drug interactions that may occur when taking Propranolol).

261. *See* Andrzejewski, *supra* note 19, at 573–76.

262. *See Basics of Drug Ads*, *supra* note 119; *see also* Defino, *supra* note 15 (indicating the manner in which DTC telemedicine companies have been able to avoid providing risk and prescribing information).

263. *See* Defino, *supra* note 15; *Sertraline for Premature Ejaculation*, *supra* note 129.

264. HERS, *Generic for Lexapro Escitalopram*, https://www.forhers.com/psychiatry/escitalopram [https://perma.cc/8NVL-KQBV].

265. *See Highlights of Prescribing Information for Zoloft*, FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/019839S74S86S87_20990S35S44S45lbl.pdf [https://perma.cc/DYJ6-SNNY] (detailing the prescribing information for Sertraline Hydrochloride/Zoloft); *Highlights of Prescribing Information for Lexapro*, FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2017/021323s047lbl.pdf [https://perma.cc/D7MG-HNMU] (same for Escitalopram Oxalate/Lexapro).

266. *See* Andrzejewski, *supra* note 19, at 575.

in or affecting commerce."[267] Advertisements are "deceptive" if they are likely to "mislead consumers" or "affect…decisions about [a] product or service," and "unfair" if they are likely to cause injury that is "substantial," "not outweighed by other benefits," and "not reasonably avoidable."[268]

The massive success that DTC telemedicine startups have enjoyed may suggest that their marketing tactics have "affect[ed] decisions" about their services.[269] While attracting customers to one's business is the goal of marketing (and thus not problematic in and of itself), consumers' decisions have been affected in the sense that they buy into the companies' messaging without seeing material information related to the medical treatments and drugs being sold.[270] To illustrate, advertisements that appear to equate everyday experiences[271] to conditions often treated by medication attract consumers with the implication of a simple prescription solution.[272] This messaging has the potential to mislead consumers, as it fails to acknowledge material information such as the complexity of diagnosis, the risks and side effects associated with the drugs most often prescribed for the condition being treated, or the actual extent to which the company can provide comprehensive mental health care.[273] Whether bringing customers onboard in this way is likely to cause unfair injury that is "substantial" or "not outweighed by the benefits"[274] is dependent on a case-by-case basis with regard to an individual's experience with a certain treatment. However, whether such is "reasonably avoidable" by consumers is

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267. *Basics of Drug Ads*, *supra* note 119; *see* Little, *supra* note 12 (documenting ADHD advertisements by Cerebral and Done that name the condition but do not recommend specific drugs); Taylor, *supra* note 188 (same); *see also* 15 U.S.C. § 45.

268. *Advertising and Marketing on the Internet: Rules of the Road*, *supra* note 173.

269. Winkler & Walker, *supra* note 10 (detailing the success of companies such as Cerebral and Done); Gagne & Helm, *supra* note 15 (discussing the success of DTC telemedicine companies generally).

270. *See* Lenhardt, *supra* note 24, at 186 (explaining the persuasive strategies employed in DTCA).

271. *See* Taylor, *supra* note 188 (containing an advertisement by Done attributing relationship problems and drug use in adolescence to ADHD, often treated by DTC telehealth startups through addictive stimulant prescriptions); *DoneADHD*, *supra* note 219 (correlating a messy room with having ADHD).

272. Winkler et al., *supra* note 10 (indicating that customers are "primed" to expect prescriptions by DTC telemedicine companies' marketing tactics as well as the inclination of Cerebral in particular to specifically prescribe stimulant medication for purposes of profit).

273. *See* FDA, *supra* note 265 (detailing the risk of suicidal ideation, amongst other things, associated with Sertraline and Lexapro, both prescribed by DTC telemedicine companies); FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2007/011522s040lbl.pdf (warning of the potential for abuse associated with commonly-prescribed ADHD stimulant Adderall) [https://perma.cc/ZE7G-4T9Q]; Livingston & Dodge, *supra* note 196 (describing the issues Cerebral faced with overworked staff unprepared to handle complex mental health conditions and the consequences of patients getting inconsistent care). *See generally Advertising and Marketing on the Internet: Rules of the Road*, *supra* note 173.

274. *Advertising and Marketing on the Internet: Rules of the Road*, *supra* note 173.

observable across the board, irrespective of the level of injury (or lack thereof) that may occur.[275]

For starters, the information a consumer might need to weigh the risks and benefits of subscribing to a DTC telemedicine startup is not readily ascertainable from many DTC companies' marketing practices.[276] Moreover, the ability of a physician to holistically evaluate a patient and decide whether a certain course of treatment is appropriate[277] is arguably hindered by current DTC telemedicine business practices.[278] Of course, the telehealth model's ability to provide treatment more efficiently than traditional care has lowered costs and encouraged some individuals to seek mental health care for the first time.[279] However, company cultures that appear to emphasize increasing prescription rates have left some prescribers feeling as though they are unable to comprehensively evaluate patients within the current framework.[280] The internal pressure to fulfill the promises contained in advertisements may impede prescribers' ability to act as "gatekeeper" and prevent the potential for injury from inappropriate prescribing.[281] In fact, it has been suggested that patient demands for

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275. *See id.*

276. *See, e.g.*, Little, *supra* note 12; *see also* ABRAMSON, *supra* note 18, at 214–15 (arguing that DTCA generally fails to disclose material facts regarding certain products in favor of marketing tactics that appeal to consumers' emotions, resulting in products' efficacies being over-emphasized to the point of being misleading).

277. *See* Lenhardt, *supra* note 24, at 185.

278. *See* Rosenthal et al., *supra* note 38, at 498 (citing a survey that indicated, even before the advent of modern telemedicine and online DTCA, that 71% of family doctors felt DTCA "pressures physicians into prescribing drugs they would not otherwise prescribe"); *see also* Winkler et al., *supra* note 10; Livingston & Dodge, *supra* note 196; Mosendz & Melby, *supra* note 27 (all describing practitioner concerns with regard to the time and information provided when evaluating patients).

279. *See* Hohman et al., *supra* note 2, at 2764 (noting the results of a survey indicating that 40% of DTC telemedicine patients seeking mental health treatment reported they would have not sought treatment if not for the ability to do so online); *see also* Bitzer, *supra* note 64, at 169−70 (naming rural access to health care, support of the elderly, and alleviation of the psychiatrist/mental health treatment center shortage as among the demonstrated advantages of the expansion of telehealth).

280. *See* Winkler & Walker, *supra* note 10 (reporting that a 2022 Cerebral audit revealed that the company's internal quality team told prescribers that only around 52% of ADHD patients without comorbid disorders received "appropriate treatment"—that is, "amphetamine-derived medications"—and suggested that the clinicians re-evaluate their judgment regarding certain patients' prescriptions; notably, providers at Done also felt "strongly encouraged" to prescribe stimulants); *see also* Winkler et al., *supra* note 10 (reporting on Cerebral's business model, centered around attracting patients with conditions requiring stimulant medication); Livingston & Dodge, *supra* note 196 (detailing the reports by prescribers claiming that resources are insufficient to handle complex patients).

281. *See* Lenhardt, *supra* note 24, at 185, 188 (citing a study by the Henry J. Kaiser Family Foundation supporting the notion that DTCA may influence improper prescribing); *see also* Winkler & Walker, *supra* note 10 (sharing the report of a former Cerebral practitioner who was so overwhelmed by requests for Adderall prescriptions that she refused to treat patients that requested controlled substances, many of whom were persuaded to believe that they had ADHD by TikTok ads, as well as reports that patients at Done

specific prescriptions are considered the "most serious hindrance" to proper prescribing.[282] While the efficacy of the model has played a pivotal role in improving access to health care, [283] it is also inherently limited, as demonstrated by reports of brief appointments mandated by company policies and concerns regarding the inability to provide patients experiencing symptoms with the requisite level of care.[284] Consumers are led to expect the quick and easy solutions depicted in the advertisements, unaware of the model's limitations because the advertisements fail to acknowledge that there are any limitations at all.[285] Thus, the potential for injury caused by these limitations is not "reasonably avoidable" by the consumer, particularly when prescribers' capacity to correct misperceptions conveyed by their companies' advertisements through comprehensive evaluation is hindered by corporate pressure to treat as many patients as efficiently as possible.[286]

While demonstrating help-seeking advertisements' potential to be misleading is relevant to illustrating the concerns associated with the current unchecked marketing practices of DTC telemedicine companies, it is important to note that applying FDA DTCA regulations to these companies will not necessarily spur FTC regulatory action.[287] The purview of the FTC is much wider than that of the FDA[288] and reliance on social media users to report violations has not resulted in enforcement action with regard to the vast majority of DTC telemedicine advertisements.[289]

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transferred providers multiple times and received medication refills without provision for video follow up).

282. *See* sources cited *supra* note 281.

283. *See* Hohman et al., *supra* note 2, at 2763−64.

284. *See* Winkler & Walker, *supra* note 10; Livingston & Dodge, *supra* note 196; Mosendz & Melby, *supra* note 27.

285. *See* Winkler et al., *supra* note 10; Safdar & Fuller, *supra* note 11.

286. *See* Lenhardt, *supra* note 24, at 188 ("Where a doctor has understandable financial concerns about acquiring and maintaining patient relationships, s/he may not be the buffer once hoped for between biased information in DTCA and the self-prescription of drugs."); *see also* Winkler & Walker, *supra* note 10 (describing company pressures to prescribe certain medications specifically during appointments); ABRAMSON, *supra* note 18, at 142 (arguing that "pharmaceutical firms influence the behavior of health-care professionals. No longer the learned intermediaries our patients expect us to be, we have unwittingly become 'unlearned' intermediaries, serving the drug companies' financial interests rather than our own patients' medical needs.").

287. *See* ABRAMSON, *supra* note 18, at 215 (describing the methods by which DTCA information is manipulated and framed in order to overestimate the efficacy of certain treatments and arguing that such tactics are misleading); *see also Basics of Drug Ads, supra* note 119.

288. *Compare* 15 U.S.C. § 45(a)(1) (outlining the statutory authority of the FTCA, affecting commerce generally), *with Basics of Drug Ads, supra* note 119 (explaining that any advertisement that does not name a specific drug treatment likely lies outside the regulatory authority of the FDA).

289. *See* Zuppello, *supra* note 34; *see also* Gagne & Helm, *supra* note 15 (describing a lack of regulatory action by both the FDA and FTC in this regard); ABRAMSON, *supra* note 18, at 214–15 (describing the shortfalls of the current DTCA regulatory scheme).

However, legislation recognizing DTC telemedicine companies as FDA-regulated entities would be a substantial step toward ensuring consumers have the information they need to make material health decisions for several reasons.

First, bringing DTC telemedicine companies into the FDA regulatory scheme will require all advertisements mentioning prescription drugs to abide by the "fair balance" rule, by requiring a "brief summary," "major statement," or "adequate provision" of risk information when applicable depending on the advertising medium.[290] Second, recognizing DTC telemedicine companies as an FDA-regulated entity may have the effect of encouraging compliance with FDA regulations before the need for review occurs, similar to the manner in which currently-regulated entities are incentivized to comply voluntarily.[291] Third, the existing FDA framework has set a precedent for demanding certain disclosures of the DTC advertisers within their purview, suggesting that imposing the same requirements on DTC telemedicine companies is not constitutionally aberrant.[292] Finally, requiring DTC telemedicine companies to disclose information in a balanced manner may have the effect of making such advertising more costly, narrowing the wide profit margins to be found in unregulated DTCA and diminishing its influence over consumers' perceptions of health information overall.[293]

B. Constitutionally Permissible Compelled Disclaimers

Requiring DTC telemedicine companies to abide by the same disclosure requirements as FDA regulated entities—that is, requiring that they be neither "false" nor "misleading" by providing for "adequate provision" of material risk information associated with the product in a "fair[ly] balanced" manner[294]—is akin to a compelled disclosure of

290. *See generally Basics of Drug Ads, supra* note 119; *see also* Calfee, *supra* note 16, at 174−75 (explaining FDA DTCA requirements and suggesting they are most effective with regard to prescription drug advertisements, because the claims contained therein are compared to the drug's labeling, which is stringently regulated by the FDA).

291. *See* Calfee, *supra* note 16, at 175−76 (explaining that the relationship between pharmaceutical companies and the FDA is generally cooperative and potential conflicts are often resolved through voluntary action).

292. *See id.* (describing the essentially unchallenged stature of FDA DTCA regulatory action, as well as how such regulation is affected by First Amendment jurisprudence); *see also* MICHAEL J. GEARHART, THE POWER OF PRECEDENT 3 (Oxford University Press 2008) (positing that nonjudicial precedent, such as established norms and longstanding practices, have a substantial influence on constitutionality).

293. *See* ABRAMSON, *supra* note 18, at 171−79 (suggesting that a lack of a requirement for data transparency from drug companies permits them to exaggerate the safety and efficacy of their products in the studies they sponsor, making marketing efforts extremely profitable; analogously, requiring marketing to disclose information free of commercial bias dampens its persuasive effect, ostensibly rendering it less profitable).

294. *Basics of Drug Ads*, *supra* note 119; Andrzejewski, *supra* note 19, at 575.

information or disclaimer as opposed to a restriction on speech. As such, any potential constitutional hurdle to requiring similar disclosure by DTC telemedicine companies will likely be governed by the rule in *Zauderer*.[295]

Under *Zauderer*, requiring a disclaimer of "purely factual and uncontroversial information" will not run afoul of the First Amendment so long as it is "reasonably related to the State's interest in preventing deception of consumers" and is not "unduly burdensome."[296] Over the years, courts have grappled with interpreting the cited state interests and the "purely factual and uncontroversial" aspect of the test.[297] While some courts have allowed compelled commercial speech to survive constitutional scrutiny irrespective of whether it cures the deception of consumers, others have suggested that any compelled speech *must* be related to that specific interest.[298] A lack of consensus on the meaning of the "factual and uncontroversial" standard has also produced varied results.[299]

What constitutes factual and uncontroversial information under *Zauderer* has been somewhat open to interpretation.[300] In *R.J. Reynolds Tobacco Company v. United States Food and Drug Administration*, a district court held that attempts by the FDA to require tobacco producers to include graphic images demonstrating the potential consequences of tobacco use would not pass constitutional scrutiny, as the images were intended to provoke an emotional response and were thus not "purely factual."[301] Most recently, in *National Institute of Family & Life Advocates v. Becerra* (hereinafter *NIFLA*), the Supreme Court disapproved of a

295. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

296. *Id.*

297. Mason, *supra* note 150, at 1225–26.

298. *Compare* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 557 (6th Cir. 2012) (noting "that the First Amendment is satisfied 'by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose'" even if a disclosure does not "prevent consumer deception per se"), New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114, 136 (2d Cir. 2009) (upholding disclosure requirements regarding calories as reasonably related to a goal of reducing obesity), *and* Am. Meat Inst. v. U.S. Dept. of Agric., 760 F.3d 18, 20 (D.C. Cir. 2014) (holding that the standard reaches beyond issues of consumer deception), *with* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 230–31 (2010), Dwyer v. Cappell, 762 F.3d 275, 282 (3d Cir. 2014), *and* Greater Baltimore Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore, 721 F.3d 264, 283 (4th Cir. 2013). *See also* Mason, *supra* note 150, at 1125–26 (citing cases supporting both interpretations).

299. *See* Chen, *supra* note 162, at 897–99 (2022) (explaining the rationale of National Institute of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018), a decision that has implications for future interpretations of the 'purely factual and uncontroversial' prong of the compelled commercial speech test).

300. *See* Peter Bozzo, *The Treachery of Images: Reinterpreting Compelled Commercial-Speech Doctrine*, 66 DEPAUL L. REV. 965, 970 (2017) (questioning the characterization of graphic imagery within box warnings of the actual consequences of tobacco use as information that was not "purely factual and uncontroversial"); *see also* Zauderer v. Office of Disciplinary Couns., 471 U.S. 626, 651 (1985).

301. 845 F. Supp. 2d 266, 272−73 (D.D.C. 2012); *see also* Bozzo, *supra* note 300, at 971.

California law that imposed notice requirements on facilities providing pregnancy-related services depending on their licensure status.[302] The law required facilities to display notices either directing patients to public programs that provide family-planning services or disclose the lack of licensed medical providers at their facility.[303] The Court found that even under *Zauderer*, the state had provided only hypothetical justifications for unduly burdening protected commercial speech.[304] Yet, the Court decided that *Zauderer* did not apply anyway, because the disclosure requirements advertised state abortion services and abortion is "anything but an 'uncontroversial' topic."[305]

The cases thus raise questions about the scope of the *Zauderer* test, as there arises dissonance between the applications of a "factual" and an "uncontroversial" standard.[306] Something that is factual or true may be deemed controversial simply because it involves controversial subject matter; arguably, endless aspects of government action may be controversial to some.[307] Moreover, whether something is a fact in the first place can be contested based on different interpretations of scientific evidence or even ideological conflicts.[308] The notion that scientific facts supported by evidence are inherently controversial has become increasingly prevalent in the United States' polarized political climate, as demonstrated most recently by ideological opposition to Covid-19 mask mandates.[309] The idea that the validity of a disclosure requirement might hinge on a subjective determination as to whether the relevant *topic* is publicly controversial—as opposed to the fact contained in the disclosure itself—could result in rulings at odds with First Amendment interests in the free flow of information and enlightened public decision-making.[310]

When applying the state-interests prong of the *Zauderer* test to the hypothetical compulsion of risk disclosures from DTC telemedicine companies, the circumstances indicate such action would likely be

302. 138 S. Ct. 2361, 2365−68 (2018).

303. *Id.*

304. *Id.* at 2377.

305. *Id.* at 2372.

306. *See* Chen, *supra* note 162, at 898.

307. *See id.*; *see also* Levy, *supra* note 13, at 533−34 (discussing the controversial nature of DTCA).

308. *See* Chen, *supra* note 162, at 884.

309. *See id.*; *see also* Scott Bomboy, *The Constitutional Issues Related to Covid-19 Mask Mandates,* NAT'L CONST. CTR.: CONST. DAILY BLOG (Aug. 13, 2021), https://constitutioncenter.org/blog/the-constitutional-issues-related-to-covid-19-mask-mandates [http://perma.cc/RWR5-HHR3] (reporting on free exercise and personal freedom challenges to mask mandates).

310. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976) (noting that the "free flow of commercial information is indispensable"); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018) (declaring that factual information disseminated with regard to abortion is controversial and as such is not subject to the *Zauderer* standard).

considered "reasonably related to the State's interest in preventing deception of consumers."[311] The long-established authority of the FDA to require DTCA disclosures in the interest of preventing the deception of consumers suggests that compelled disclosures applicable to entities that similarly promote the use of prescription drugs are not patently unreasonable.[312] Seeing as DTC telemedicine companies also engage in the promotion of prescription drug use,[313] the state interest that is "reasonably related" to preventing the deception of consumers is the very same interest that justifies FDA requirements mandating a "fair balance" of benefit and risk information in advertising.[314] Even under the stricter interpretation of *Zauderer* that requires the state interest to *necessarily* be the prevention of consumer deception,[315] holding DTC telemedicine companies to FDA standards will likely withstand scrutiny because the state interest furthered is the protection of consumers from the potentially misleading promotion of pharmaceutical products and services.

Moreover, disclosure of such information by DTC consumer telemedicine companies is ostensibly no more "burdensome" than the "fairly balanced" risk-benefit requirements imposed on prescription drug advertisements already within the ambit of FDA regulation.[316] DTC telemedicine companies' entrance into the health care mainstream has demonstrated their ability to make use of the rapidly-evolving platforms made available by social media.[317] DTC telemedicine companies' willingness to utilize the power of social media to its fullest extent has paid off, exemplified by the fact that the mediums available to online DTC advertisers have transcended some of the limitations associated with traditional marketing.[318] While a print advertisement or television commercial can only be so long, the ability to link users to additional information online and disseminate material without expensive obligations to traditional broadcasters suggests that requiring additional disclosures in

311. Zauderer v. Office of Disciplinary Couns., 471 U.S. 626, 651 (1985).

312. *See generally* Andrzejewski, *supra* note 19, at 575−77 (describing the history of FDA direct-to-consumer advertisement regulation).

313. *See* Gagne & Helm, *supra* note 15 (detailing the promotion of prescription drugs by direct-to-consumer telemedicine companies); Defino, *supra* note 15 (same).

314. *Zauderer*, 471 U.S. at 651; Andrzejewski, *supra* note 19, at 575.

315. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 230–31 (2010); Dwyer v. Cappell, 762 F.3d 275, 282 (3d Cir. 2014); Greater Baltimore Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore, 721 F.3d 264, 283 (4th Cir. 2013).

316. *See Zauderer*, 471 U.S. at 651; *see also* Andrzejewski, *supra* note 19, at 575–76 (detailing the longstanding "fair balance" requirements imposed by the PDA on pharmaceutical companies).

317. *See* Winkler et al., *supra* note 10; Safdar & Fuller, *supra* note 11.

318. *See* Rosenthal et al., *supra* note 38, at 500−01 (explaining print and television advertisements in the context of traditional DTCA); *see also* Levy, *supra* note 13, at 530−31 (describing the qualities of online marketing that have helped online health care companies surpass traditional competitors generally).

online DTCA is feasible.[319] The expansive capabilities of online DTCA already in widespread use, such as long-form video social media posts and interactive media, offer DTC telemedicine companies significant means by which to include pertinent information without substantially hindering current practices.[320]

Finally, requiring DTC telemedicine companies to disclose information akin to what is already demanded of FDA-regulated entities may fairly be considered the permissible compulsion of "purely factual and uncontroversial information."[321] DTCA has certainly been associated with controversy, but this controversy is more so related to the propriety of DTCA itself, not the idea of requiring factual disclosures in pharmaceutical advertising.[322] Although *NIFLA* suggests that the contentious nature of a certain topic can affect the validity of a government-mandated disclosure, the Court's ruling explicitly disputed that it intended to call into question "the legality of health and safety warnings long considered permissible."[323] Unlike the hotly contested subject of abortion considered in *NIFLA*, the ability of the government to regulate prescription drug advertising has long been an accepted facet of the law.[324] This longstanding precedent indicates that government-mandated risk disclosures are inherently *non*-controversial; thus, a finding precluding the validity of applying disclosure requirements to DTC telemedicine companies by invoking *NIFLA* would necessarily be based on the controversy of DTCA regulations *as applied* to these companies.[325] Interpreting *NIFLA* in this way could open the door for any regulated entity to render disclosure requirements controversial by

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319. *See* Bitzer, *supra* note 64, at 179 (discussing the use of links in DTCA by DTC telemedicine companies); FULFILLING REGULATORY REQUIREMENTS, *supra* note 135 (same); *see also* Ben Adams, *AbbVie Takes 2022 TV Drug Ad Spending Crown with Rinvoq, Knocking Last Year's Winner Dupixent into 2nd Place*, FIERCE PHARMA, (Jan 12, 2023, 9:15 AM), https://www.fiercepharma.com/marketing/abbvie-takes-2022-tv-drug-ad-spending-crown-rinvoq-knocking-last-years-winner-dupixent [http://perma.cc/8HSW-EPTR] (evincing the high cost of TV ad spending, with one pharmaceutical company spending $315.8 million on TV advertisements for just one drug).

320. *See* Little, *supra* note 12 (describing direct-to-consumer telemedicine companies' use of video advertisements); FULFILLING REGULATORY REQUIREMENTS, *supra* note 135 ("Although some interactive promotional media are substantially similar in presentation and content to certain traditional promotional media, such as print media, FDA recognizes that in other cases they possess certain unique technological features and offer novel presentation and content features.").

321. *See Zauderer*, 471 U.S. at 651.

322. *See* Levy, *supra* note 13, at 533−34 (describing the controversy accompanying direct-to-consumer advertising); *see also* Calfee, *supra* note 16, at 175−77 (explaining that while the idea of DTCA has spurred contentious debate, mandating risk disclosures in the context of pharmaceuticals is a widely accepted practice).

323. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2376 (2018)

324. *See* Calfee, *supra* note 16 at 175–76 (noting that despite "considerable discussion and analysis" prompted by direct-to-consumer advertising, FDA advertising is "essentially never challenged in court by pharmaceutical firms"); *see also Becerra,* 138 S. Ct. at 2372.

325. *See* Calfee, *supra* note 16 at 175–76. *See generally Becerra,* 138 S. Ct. at 2372.

disputing them, thus triggering heightened scrutiny and precluding the application of *Zauderer*.[326] The modern prevalence of compelled disclosures as a consumer protection mechanism counsels against a finding that the Court intended to abrogate the applicability of rational basis review by allowing challengers to place the facts disclosed into controversy themselves.[327] FDA rules contemplate the disclosure of factual information supported by scientific evidence,[328]and given that *NIFLA*'s holding does not seem to extend to practices as axiomatic as the disclosure of factual health information, applying FDA advertisement requirements to DTC telemedicine companies is more akin to the compulsion of "purely factual and uncontroversial" speech permitted by *Zauderer*.[329]

Thus, examination of compelled commercial speech jurisprudence indicates that mandating risk disclosure requirements from DTC telemedicine companies is not necessarily precluded by the First Amendment. Applying the rule in *Zauderer* to a hypothetical commercial speech challenge suggests that the elements needed to survive rational basis scrutiny are satisfied. Because mandating the disclosure of truthful risk-benefit information is related to preventing consumer deception and is not likely to be patently burdensome nor regarded as inherently controversial, requiring DTC telemedicine companies to disclose "fairly balanced" information is not likely to violate the constitutional rights afforded to commercial speakers.[330]

CONCLUSION

Although discussion over DTCA has persisted over the decades,[331] social media's capacity to connect advertisers to consumers in increasingly persuasive[332] and personalized[333] ways have reinvigorated the debate.

326. Chen, *supra* note 162, at 898–900; *see also Zauderer*, 471 U.S. at 651. *See generally Becerra,* 138 S. Ct. at 2372.

327. *See* Chen, *supra* note 162, at 894−95. Compelled regulatory disclosures are considered by some to be "ubiquit[ous]" in American government today. *Id.* at 893; *see also id.* at 894–95 (citing numerous industries in which compelled disclosures are prevalent). Some of the most obvious examples of the ubiquitous nature of compelled disclosures include tobacco health warnings and nutritional information included on food product packaging. *Id.*

328. *The Bad Ad Program*, FDA, https://www.fda.gov/drugs/office-prescription-drug-promotion/bad-ad-program [http://perma.cc/Y7ZH-T7X9] (listing the requirements that promoters of prescription drugs must comply with).

329. *Compare Becerra,* 138 S. Ct. at 2372, *with Zauderer*, 471 U.S. at 651.

330. *Zauderer*, 471 U.S. at 651; *see also* Giancarlo, *supra* note 111, at 459–60 (illustrating how current FDA regulations are intended to serve the purpose of combating misleading or deceptive advertising); Bitzer, *supra* note 64, at 173–77 (detailing the extensive marketing capabilities of DTC telemedicine advertisers); Calfee, *supra* note 16, at 175–76 (explaining the long-standing and largely unchallenged history of DTCA regulations).

331. *See* Calfee, *supra* note 16, at 175−76; Andrzejewski, *supra* note 19, at 580.

332. *See* Defino, supra note 15.

DTCA can reach consumers more efficiently than ever before and the exponential growth of the channels available to advertisers has amplified both the virtues and the shortcomings of our federal regulatory scheme.[334] Reasonable minds may differ as to whether DTCA is the answer to consumer empowerment or the harbinger of consumer deception. Nevertheless, it makes sense to ask that *all* advertisers of prescription drugs and medical treatments abide by the same well-established requirements that FDA-regulated entities already do.[335]

The current DTCA regulatory framework has demonstrated that the presentation of important health information to consumers and the creation of lucrative advertising campaigns are not mutually exclusive.[336] This framework has managed to strike a balance between the First Amendment right to advertise in the pursuit of financial gain and the public interest in the free flow of health care information.[337] Given that healthcare-related social media advertising has become an extremely pervasive and predominant force,[338] the regulatory scheme's failure to keep up with the times appears to be a massive oversight, repugnant to the very purpose of DTCA guidelines.[339] If consumer protection is the goal, allowing some of the most profitable and influential entities in the health care industry to advertise unchecked seems patently inconsistent.[340] Failing to recognize this inconsistency has granted telehealth startups free reign to communicate that

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333. *See* Todd Feathers et al., *"Out of Control": Dozens of Telehealth Startups Sent Sensitive Health Information to Big Tech Companies*, THE MARKUP (Dec. 22, 2022, 4:07 PM), https://themarkup.org/privacy/2022/12/13/out-of-control-dozens-of-telehealth-startups-sent-sensitive-health-information-to-big-tech-companies [https://perma.cc/8A57-8T96] (reporting on how telehealth startups have allegedly shared health data with social media giants such as TikTok and Meta, using the information to specifically target advertisements to particular users).

334. *Compare* Giancarlo, *supra* note 111, at 457 (noting the public's increased access to prescription drug information), *with* Safdar & Fuller, *supra* note 11 (arguing that the regulatory "gray area" has led to misleading information in DTCA online).

335. *See generally* Calfee, *supra* note 16, at 174−75.

336. *See* Schwartz & Woloshin, *supra* note 14 (detailing the exponential growth of DTCA ad spending throughout the past decade).

337. *See* Calfee, *supra* note 16, at 176 ("[N]ondeceptive DTC advertisements (the only kind that FDA regulations permit) are protected by the First Amendment."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976) (naming the free flow of commercial information as among the justifications for commercial speech protections).

338. *See* Safdar & Fuller, *supra* note 11 (explaining that alongside the $100 million spent on digital advertising by telehealth startups generally, $23 million was spent advertising on TikTok—over half of which was spent by Cerebral alone, putting the telehealth startup only behind HBO and Amazon in terms of advertising efforts).

339. *See* Andrzejewski, *supra* note 19, at 575 (explaining that efforts to adapt pharmaceutical advertising to the consumer market led to new draft guidelines, premised on the idea that consumers untrained in medicine and potentially vulnerable to deception might require a different approach than that taken when advertising to physicians).

340. *See id.*; *see generally* Winkler et al., *supra* note 10; Gagne & Helm, *supra* note 15 (documenting the growth of the multi-billion-dollar DTC telemedicine industry).

which is most favorable to their bottom line,[341] to the detriment of the public's interest in obtaining the information necessary to make informed health care decisions.[342]

341. *See generally* Safdar & Fuller, *supra* note 11; Defino, *supra* note 15; Little, *supra* note 12; Taylor, *supra* note 188 (all reporting on DTC telemedicine startup advertising tactics).

342. *See* ABRAMSON, *supra* note 18, at 215 ("In this country, drug companies have the right to bombard us with as many advertisements as they want to pay for. But the public ought to have the right to demand that ads contain accurate and relevant information instead of compelling but unsubstantiated emotional impressions.").