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FCC BROADBAND “NUTRITION” LABEL FINAL RULE DOESN'T PUT TO REST FIRST AMENDMENT CONCERNS

by Jeremy J. Broggi

The holidays are finally here, and health-conscious consumers enjoying seasonal treats may be looking more closely than ever at the FDA-mandated “Nutrition Facts” label that appears on packaged foods. Not to be outdone by its sister federal agency, the Federal Communications Commission released a [final rule](#) requiring broadband Internet service providers to display, in the form of “a nutrition-like label,”¹ certain information regarding broadband Internet access service plans. Specifically, the rule will require providers to disclose information about broadband prices, introductory rates, data allowances, and broadband speeds, and to include links to more detailed information about their network management practices and privacy policies.

When the FCC proposed its labeling requirement earlier this year, [these pages urged the agency](#) to focus on crafting a final rule that comports with the First Amendment. The FCC [acknowledged that request](#) and, in the final rule, devotes 20 paragraphs to free speech. However, its analysis is unsatisfying in several respects.

As a general matter, the Supreme Court reviews compelled disclosure requirements under “strict scrutiny.”² But the Supreme Court has sometimes applied a more deferential standard to laws that require persons to disclose factual, noncontroversial information in their “commercial speech.” Under that lower standard, the government must prove that its disclosure requirement advances a sufficiently important interest and is “purely factual,” “uncontroversial,” and “not unjustified or unduly burdensome.”³

Applying the lower standard to itself, the FCC claims that “[a]ll the disclosures compelled by the rules involve ‘only factual and uncontroversial information.’”⁴ Elsewhere in the rule, however, the FCC acknowledges significant disagreement in the administrative record with respect to the content of the disclosure labels, suggesting their content may be controversial and not purely factual.

For example, the FCC rule requires broadband labels to display the base monthly “retail” price for standalone broadband “before applying any discounts such as those for paperless billing, automatic payment (autopay), or any other discounts.”⁵ It is not clear from the order, however,

¹ *Empowering Broadband Consumers Through Transparency*, Report & Order & Further Notice of Proposed Rulemaking, CG Docket No. 22-2, ¶ 130 (Nov. 17, 2022) (FCC 22-86).

² See, e.g., *Natl. Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

³ *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985).

⁴ *Empowering Broadband Consumers Through Transparency*, ¶ 124.

⁵ *Id.* at ¶ 27.

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how close that price, as described, will be to the amount consumers actually pay. Indeed, some commenters argued that the FCC's definition of the "retail" price could itself be confusing or potentially misleading, and the agency issued a further notice seeking comment on these issues.⁶ This is an area of potential vulnerability for the agency as courts have struck down disclosure regimes where regulators require companies to disclose prices that may be different from the prices consumers actually pay.⁷

The FCC also claims that its mandate is not unjustified or unduly burdensome. As [explained in a prior post](#), unlike the packaged foods context, broadband Internet access service is not sold in a box with room for an unobtrusive label. Accordingly, the FCC sought comment on how broadband Internet service providers should be required to display the labels at various points of sale.

In the final rule, the FCC determined that broadband service providers must display the government label "on the provider's primary advertising web page that identifies the plans available to the consumer."⁸ The agency specified that this page must display "the actual label" and "not simply an icon or a link to the label."⁹ With respect to offline sales channels, the FCC determined that providers should either make the label available in hard copy or direct the consumer to the specific web page on which the label appears by, for example, "providing Internet access in the retail location or giving the customer a card with the printed URL or a QR code."¹⁰ Finally, the FCC determined that providers must offer online account portals so that existing customers may easily access the government labels after purchase, as well as maintain an archive of past labels.¹¹

The FCC's decision to rely on websites for display of the labels raises a potentially novel application of certain well-established First Amendment principles. In prior cases involving compelled commercial disclosures, courts have invalidated as overly burdensome requirements that affected monthly billing envelopes,¹² advertising campaigns,¹³ and brick-and-mortar service locations.¹⁴ In such cases, courts have found compulsory display of a government message unconstitutional where it overwhelms or conflicts with the private speaker's own message, or otherwise chills protected speech.

In the order, the FCC does not discuss these cases but appears to have tried to work around them by expressly declining to require broadband labels in monthly bills, in mass marketing communications, and at certain retail locations.¹⁵ But there is no principled reason why courts should not apply the holdings from cases involving other mediums to web-based disclosures.

Indeed, seemingly credible record evidence showed that the labeling requirement could lead to overcrowded web pages, especially when the pages are viewed on mobile devices. And though

⁶ *Id.* ¶¶ 135–36.

⁷ See, e.g., *Merck & Co. v. United States Dep't of Health & Hum. Servs.*, 962 F.3d 531 (D.C. Cir. 2020).

⁸ *Empowering Broadband Consumers Through Transparency*, ¶ 90.

⁹ *Id.* at ¶ 91.

¹⁰ *Id.* at ¶ 95.

¹¹ *Id.* at ¶¶ 97–104.

¹² *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1 (1986).

¹³ See, e.g., *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749 (9th Cir. 2019).

¹⁴ *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018).

¹⁵ *Empowering Broadband Consumers Through Transparency*, ¶¶ 89 ("Broadband labels do not need to be included on mass marketing channels"), 95 ("We find that requiring providers to make the label available in hard copy [at company retail locations] may be unnecessarily burdensome to some providers."), 98 ("We decline ... to require ISPs to display the label on a consumer's monthly bill."), 130 ("our requirement ... is less intrusive than the alternative of, for example, requiring that all the information be listed in a consumer's bill for service").

the FCC discounted that evidence,¹⁶ the agency did not dispute industry comments that showed compulsory display of government labels without using links could occupy half the webpage on which they appear and render industry messages “difficult for consumers to read.”¹⁷ The risk that mandatory labels will crowd out, diminish, or change the content of protected communications on these websites raises serious First Amendment concerns.

For now, it remains to be seen whether any of the potentially affected parties will challenge the disclosure rule in court. Acquiescence to a new regulation, of course, does not mean it is constitutional. Other labeling regimes have been subject to extensive litigation and, as Chief Justice Warren eloquently explained, the fact “[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”¹⁸ The FCC should use the further notice of proposed rulemaking issued with its final rule to consider how it can reduce burdens on speech.

¹⁶ See *Empowering Broadband Consumers Through Transparency*, ¶ 93 & n.208.

¹⁷ Letter from Industry Associations to FCC re *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2 (Nov. 8, 2022).

¹⁸ *Powell v. McCormack*, 395 U.S. 486, 546–47 (1969).