

THOUGHT EXPERIMENT: WOULD CONGRESSIONAL SHORT BILL TITLES SURVIVE FTC SCRUTINY?

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ABSTRACT

Many of those close to the Congressional legislative process seem to view the short titles of bills as “branding” rather than official legal instruments. In fact, this may be one of the reasons that some short titles for bills and laws have become tendentious and overly aspirational. This is problematic for such titles, as they are formally recognized by their inscription into federal law, and thus transcend their “branding” purposes, thereby putting the legal status of short titles in an awkward juxtaposition. By stripping away all of the current legal barriers that would technically negate such a prospect, this Article considers whether contemporary short bills titles would pass the U.S. Federal Trade

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Commission's ("FTC") deceptive practice scrutiny. Relying on three main pieces of evidence (the FTC Policy Statement on Deception, the FTC Enforcement Policy Statement on Food Advertising, and the landmark Kraft, Inc. v. FTC decision), this Article demonstrates that many congressional short titles do employ deceptive advertising practices and would be actionable under FTC standards.

I. INTRODUCTION

As people progress throughout their day, they are knowingly and unknowingly engulfed in a myriad of rules, regulations, and laws from a number of law-making institutions at many levels. It just so happens that mailing a letter, swiping a credit card, depositing a monthly pay check, dropping the children off at school, logging into an email account, or just picking up groceries for the week, among a multitude of other daily activities, are actions that are directly or indirectly legislated by federal, state and local governments. Many of these legislated functions are government services (i.e. postal, educational, etc.), while others are regulations of one sort or another (food and drug labeling, financial regulation, etc.).

Most federal laws and regulations have one distinct origin: the United States Congress. It is here that legislators propose bills that they try to sell not only to one another, but also to organizations, interest groups, journalists, and perhaps most importantly, the American public, so that such measures will pass. And federal bills are unregulated in terms of what lawmakers choose to name their bills while legislators are in the midst of 'selling' these proposals.¹ No matter what members of Congress end up naming legislation, one thing is certain: the impact that federal law has on the American public is immense. Not enforcing any type of official guidelines or recommendations for accurately carrying out one of the most basic legislative functions—inscribing short bill titles—seems inadequate and potentially damaging to U.S. consumers (including citizens that encounter and interact with these laws). Though it likely would never happen, we thought it would be interesting to consider whether many current short bill titles would pass U.S. Federal

¹ See generally, OFFICE OF THE LEGIS. COUNSEL, U.S. H.R., 104TH CONG., HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, §321(a) (1995), <http://www.house.gov/legcoun/pdf/draftstyle.pdf>. (*The Manual provides little in the way of recommendations for short titles. What it does suggest, however, is to keep such titles short. However, these recommendations are not compulsory, and are rarely followed.*)

Trade Commission (“FTC” or the “Commission”) scrutiny in terms of deceptive advertising practices. Since Congress provides no standards for such titles in terms of deception, we thought we would look to another source, the FTC. This Article will first provide some background about bill titles in the U.S. Congress and explain the problem of tendentious, misleading and deceptive titles more thoroughly by using a few specific bills as case studies. The Article then investigates how FTC standards might apply when assessing such legislative titles by examining the FTC Policy Statement on Deception, the Enforcement Policy Statement on Food Advertising, and the landmark *Kraft, Inc. v. FTC* decision. Ultimately, it finds that the myriad of tendentious and promotional congressional short titles would be problematic under many of these commercial standards.

II. PROBLEMATIC CONGRESSIONAL TITLES

Legislating in the United States Congress can be an entertaining affair. This statement is particularly true in relation to some of the short bill titles inscribed on official congressional statutes. Throughout the years these titles have become increasingly evocative (USA PATRIOT Act of 2001² and Helping Families Save Their Homes Act of 2009³), humorous (CAN SPAM Act⁴ and Credit CARD Act⁵), and all-encompassing (Comprehensive Crime Control Act of 1984,⁶ No Child Left Behind Act of 2001⁷). Essentially, they have become an endless game for legislators, as the more evocative or memorable the short title, the better.⁸ Some acts can provide us with a sense of CALM,⁹ remind us

² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

³ Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632.

⁴ Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003 Pub. L. No. 108-187, 117 Stat. 2699 (2003).

⁵ Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009). Located inside the acronym of that Act are the words “accountability” and “responsibility,” two words that contrast mightily with the notion of credit, and especially credit cards, making the moniker quite humorous.

⁶ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984). (codified as amended in scattered sections of 28 U.S.C.).

⁷ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001).

⁸ Walter J. Oleszek, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS, 93 (8th Ed. 2011); *See generally*, R. Douglas Arnold, THE LOGIC OF CONGRESSIONAL ACTION (1990); (forthcoming) Brian Christopher Jones, *Processes, Standards & Politics: Drafting Short*

that America COMPETES¹⁰ or PROTECT[s] Our Children¹¹ and provides research for PREEMIE[s],¹² or announces that it is okay to drink SAFETEA.¹³

It appears, based on interviews discussed below, as if no matter how outlandish or evocative a short title may be, if the bill is approved by both chambers and signed by the President, the short title is inscribed as federal law. Therefore, the political branding devices that Congressional members use when bills are traveling through the legislative process are making their way into U.S. law. This provides a strange juxtaposition for such titles, as they are employed to serve two very different purposes: first, as branding devices in the legislative process; and second, as elements of statutory law. It may come as no surprise that many individuals close to the legislative process view them as branding devices rather than law.

This perspective was confirmed when co-author Jones performed interviews with a number of Congressional staffers and other political insiders on the status of short bill titles.¹⁴ Common reactions included: that they were merely “branding;”¹⁵ served a “branding purpose;”¹⁶ were useful “from a branding perspective;”¹⁷ were used for “press reasons or marketing reasons;”¹⁸ were “marketing strateg[ies];”¹⁹ and that some members would “put a little more effort into coming up with a clever

Titles in the Westminster Parliament, Scottish Parliament and US Congress 25(1) FLA. J. INT'L L. (2013).

⁹ Commercial Advertisement Loudness Mitigation (CALM) Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010).

¹⁰ America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Act, Pub. L. No. 110-69, 121 Stat. 572 (2007).

¹¹ Providing Resources, Officers, and Technology to Eradicate Cyber Threats to (PROTECT) Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (2008).

¹² Prematurity Research Expansion and Education for Mothers who Deliver Infants Early (PREEMIE) Act, Pub. L. No. 109-450, 120 Stat. 3341 (2006).

¹³ Safe, Accountable, Flexible, Efficient Transportation Equity (SAFETEA) Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005). One can see from the actual short title, but not the acronym, that the Act has nothing to do with the tea beverage.

¹⁴ Confidential Interviews conducted with U.S. Congressional staffers and members of the American media in Washington, D.C. (2009).

¹⁵ Confidential Interview with Cong. Staffer 6, U.S. Cong., in D.C. (Oct. 21, 2009).

¹⁶ Confidential Interview with Cong. Staffer 3, U.S. Cong., in D.C. (Oct. 26, 2009).

¹⁷ *Id.*

¹⁸ Confidential Interview with Cong. Staffer 5, U.S. Cong., in D.C. (Oct. 22, 2009).

¹⁹ Confidential Interview with Member of the Media, in the U.S. (Oct. 22, 2009).

short title, or . . . brand-worthy short title” if they deem it necessary.²⁰ Others noted that “there’s so much more that you can do with a name now,”²¹ while another staffer said that short titles came down to “member style.”²² Thus, those close to the legislative process seemed to view such devices merely as branding instruments, similar to how products are marketed in the business world, employing witty catch-phrases and slogans in order to tempt customers to purchase them. As with any branding tactic, short titles also then become powerful tools to sell proposed legislation. For example, who would not want to vote for a law that “leaves no child behind,” “saves homes,” or “protects consumers?”²³ In turn, who would not want to make gains against rivals and defeat opposing party members who vote against, for example, “saving homes?”²⁴

For the purpose of the current Article, we will accept that short titles are a form of legislative branding, and may not necessarily be held to the accuracy standards of most legal and statutory language. Therefore, in a sense short titles are the advertising for a particular law, just as the branding of a product is used in the advertising for that product. Below, we explore what is and what is not lawful in regard to advertising, and specifically, deceptive advertising, in order to provide a rare but essential insight into the ethics of bill naming. However, to demonstrate the scale of the problem, this piece first delves into some notorious bills, their accompanying short titles, and their overall effectiveness.

Unfortunately, there are many examples of problematic legislation (to be discussed) not fulfilling the lofty aspirations declared in the short title. These titles usually make heroic assumptions about what the proposals will accomplish, thus misleading and deceiving those who encounter the legislation. Legislators may vote for a proposal based in part on its title, particularly given the length of many proposed bills, or because they fear the political consequences of opposing a bill whose

²⁰ *Id.*

²¹ Confidential Interview with Cong. Staffer 5, *supra* note 18.

²² Confidential Interview with Cong. Staffer 4, U.S. Cong., in D.C. (Oct. 26, 2009).

²³ See e.g. No Child Left Behind Act, *supra* note 7; Helping Families Save Their Homes Act, Pub. L. No. 111-22, 123 Stat. 1362; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

²⁴ Arguably, gains against rivals could potentially be achieved even if the reason opponents voted against the positively-sounding legislation was due to a belief that the proposed legislation would not in fact achieve its ‘branded’ ends.

short title carries voter appeal.²⁵ Similarly, members of the public likely have even less opportunity or inclination to digest the legislation in depth, and yet may make election decisions based in part on how their representatives vote. Below are a few examples of prominent Congressional acts that certainly did not do what they said on the surface, and may be problematic from the FTC's viewpoint.

A. *No Child Left Behind Act 2001*

With one of the most infamous bill names in recent American history, the No Child Left Behind Act was enacted in January 2002.²⁶ The misleading nature of the name is facially apparent: education is a human endeavor, and thus will never be flawless in operation. Therefore, to suggest that no child will be left behind because of a federal education policy is an outlandish and absurdly misleading statement. Nevertheless, it remains law, even though President Obama and U.S. Education Secretary Arne Duncan have spoken on numerous occasions about overhauling it.²⁷

Some may see the title as a symbolic slogan not meant to be taken literally, while others expressly use the title as an accepted educational doctrine. For example, a 2005 Department of Education report to Congress stresses that the law "raises expectations for States, local educational agencies, and schools,"²⁸ and the report boldly declares that "[e]very child *can* learn. Every child *must* learn. And thanks to NCLB, every child *will* learn".²⁹ Thus, the inflammatory and misleading

²⁵ Brian Christopher Jones, *Drafting Proper Short Titles: Do States Have the Answer?*, 23(2) STAN. L. & POL'Y REV. 455-76 (2012). (noting that politicians and staffers admit that short titles can affect whether or not a bill becomes a law). See also Brian Christopher Jones, *Processes, Standards and Politics: Drafting Short Titles in the Westminster Parliament, Scottish Parliament and US Congress*, 25(1) FLA. J. INT'L L. (forthcoming 2013) (A Congressman admits that he "get[s] hurt politically" every time he votes against a bill with an evocative short title.).

²⁶ No Child Left Behind Act, 20 U.S.C. §§ 6301-7941 (2006).

²⁷ *Weekly Address: President Obama to Send Updated Elementary and Secondary Education Act Blueprint to Congress on Monday*, WHITE HOUSE BLOG (Mar. 13, 2010, 6:00 AM), <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-send-updated-elementary-and-secondary-education-act->; See also Arne Duncan, *Escaping the constraints of "No Child Left Behind,"* WASH. POST (Jan. 7, 2012), http://www.washingtonpost.com/opinions/escaping-the-constraints-of-no-child-left-behind/2012/01/06/gIQAYmqpfP_story.html.

²⁸ U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND ACT ANN. REP. 1 (2005), available at <http://www2.ed.gov/about/reports/annual/nclb/nclbrpt2005.pdf> (emphasis in original).

²⁹ *Id.* (emphasis added).

language throughout the report complements the title of the legislation as the statements located in the document traverse the barrier from being symbolic political rhetoric into genuine expectation.

Not only has the lofty standard set by the title and by the enhanced governmental expectations failed, but the results have been catastrophically inadequate. For example, a 2011 report to Congress by Education Secretary Duncan, which includes the 2008-09 data, notes that in more than 50 percent of states, the percentage of fourth-grade student proficiency compared to eighth-grade proficiency was higher for both mathematics and reading/language arts—for mathematics this was true for 89 percent of states, while for reading/language arts it was true for 53 percent of states.³⁰ And these results were observed approximately seven years after the Act was passed.

An examination of state-level statistics regarding these two markers for high school students produced some ominous performances in terms of proficiency: District of Columbia (43 percent - Math); New Hampshire (32 percent - Math); Maine (42 percent - Math); Hawaii (34 percent - Math); Washington (41 percent - Math); Rhode Island (27 percent - Math); Kentucky (41 percent - Reading); California (54 percent - Reading); Michigan (50 percent - Reading); Minnesota (41 percent - Reading); New Mexico (35 percent - Reading).³¹ However, there are many examples of states doing quite well: Alabama (85 percent - Math); Maryland (85 percent - Math); Nebraska (90 - Math); Virginia (91 percent - Math); New York (89 percent - Reading); South Carolina (87 percent - Reading); and Ohio (81 percent - Reading).³² The District of Columbia reports that at the end of the 2009-2010 school-year, only fifteen out of 195 public schools hit their “Adequate Yearly Progress” (AYP) goals, or 8 percent of schools.³³ Also, many states remain *under 50 percent* in terms of science proficiency for elementary school, middle school and high school students.³⁴ Overall, these results sharply contrast with expectations. While some states are doing well in proficiency for mathematics or reading/language, many still drastically

³⁰ U.S. DEP’T OF EDUC., NO CHILD LEFT BEHIND ACT ANN. REP. FOR SCH. YEAR 2008-09 1, 10 (2011), available at www2.ed.gov/about/reports/annual/eseareport2008-2009.doc.

³¹ *Id.* at 12.

³² *Id.*

³³ U.S. DEP’T OF EDUC., NO CHILD LEFT BEHIND ACT ANN. REP. FOR SCH. YEAR 2009-10 48 (2012), available at www2.ed.gov/about/reports/annual/esea-report-2009-2010.doc.

³⁴ *Id.* at 25.

under-perform, and thus do not live up to either the symbolic or literal essence of the law.

This is clear evidence that over a decade after NCLB was passed, children are still being left behind at very high rates. But this analysis is not an outright condemnation of the Act itself, as surely an education policy that mandates many changes, and must be funded to achieve success, could still do so if implemented correctly. Indeed, many schools are improving each year.³⁵ This is, however, a condemnation of the title of the Act. Contrary to the 2005 U.S. Department of Education report, the basic premise of “every child *will* learn”³⁶ is outlandish to suggest, as such an outcome is plainly not feasible in any regard. At this point, the Act’s title would certainly fail a *prima facie* test on any level—and perhaps disastrously so.

B. Prison Rape Elimination Act of 2003

The Prison Rape Elimination Act was signed by President George W. Bush on September 4, 2003,³⁷ and also set quite a high standard through its short title. Though it uses the word “elimination,” neither the word nor any reference to eliminating prison rape, was used in President Bush’s signing statement about the legislation.³⁸ A 2006 statement on the Act by the National Institute of Justice (NIJ), the branch primarily responsible for researching the topic, did not mention “elimination” either; instead, the NIJ noted that the Act may “sharply reduce”

³⁵ ANN. REP. FOR SCHOOL YEAR 2008-09, *supra* note 30, at 44-45, available at www.ed.gov/about/reports/annual/eseareport2008-2009.doc.

³⁶ ANN. REP. 1 *supra* note 30, available at <http://www2.ed.gov/about/reports/annual/nclb/nclbrpt2005.pdf>.

³⁷ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003).

³⁸ George W. Bush, *Statement on Prison Rape Elimination Act*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Sept. 23, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/09/20030904-9.html>. Although he did use the signing statement to verify that the Executive Branch would not be handing much information over to the Prison Rape Commission, he noted in his second paragraph that “Section 7(h) of the Act purports to grant to the Commission a right of access to any Federal department or agency information it considers necessary to carry out its duties, and section 7(k)(3) provides for release of information to the public. The executive branch shall construe sections 7(h) and 7(k)(3) in a manner consistent with the President’s constitutional authority to withhold information when its disclosure could impair deliberative processes of the Executive or the performance of the Executive’s constitutional duties and, to the extent possible, in a manner consistent with Federal statutes protecting sensitive information from disclosure.”

institutional sexual violence by making the issue a “high priority.”³⁹ Even the long title of the bill, which is supposed to accurately describe the proposal,⁴⁰ did not mention eliminating or even sharply reducing prison rape, as it states:

An Act to provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape.⁴¹

It could be that the word was used because the primary purpose of the Act was to “establish a zero-tolerance standard for the incidence of prison rape. . . in the United States,”⁴² a similar standard to the NCLB measure discussed above.

The implications of the Act’s title are quite apparent: it seeks to eliminate rape in all American correctional facilities. Though not mentioned in the title, jails and other local and state correctional institutions are included.⁴³ At the time of passage, Congress conservatively estimated⁴⁴ that nearly 13 percent (or over 200,000) of current inmates had been sexually assaulted at least once, and close to one million inmates had been assaulted in the past twenty years.⁴⁵ It also noted that juveniles housed in adult facilities are five times more likely to get sexually assaulted than when housed in juvenile facilities, and there is increased risk for sexual assault in the first forty-eight hours of a juvenile’s incarceration.⁴⁶

Though the bill had worthy aspirations, to date it has hardly eliminated or even “sharply reduced” sexual victimization in American’s prisons and jails. For example, by 2006 reports of incidents by correctional authorities were up from 2.46 in 2004 to 2.91 inmates per 1,000 inmates.⁴⁷ The total number of allegations by correctional

³⁹ *NIJ’s Response to the Prison Rape Elimination Act*, NAT’L INST. OF JUSTICE (Feb. 2006), <https://www.ncjrs.gov/pdffiles1/nij/213137.pdf>.

⁴⁰ HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE, *supra* note 1, §32, 1(a).

⁴¹ 42 U.S.C. §§ 15601-15609 (2006).

⁴² 42 U.S.C. § 15602(1) (2006).

⁴³ *Id.* § 15601 (3).

⁴⁴ By their own admission, *Id.* § 15601(2).

⁴⁵ *Id.* § 15601 (2).

⁴⁶ *Id.* § 15601(4).

⁴⁷ ALLEN J. BECK, PAIGE M. HARRISON & DEVON B. ADAMS, U.S. BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, NCJ 218914, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 3 (2006), available at

authorities in adult correctional facilities has steadily risen each year, from 6,241 in 2005, to 6,528 in 2006⁴⁸ to 7,374 in 2007, and 7,444 in 2008.⁴⁹ A 2010 report on sexual victimization in prisons estimates that 88,500 current inmates in prisons and jails across the country had been sexually victimized; 4.4 percent of prison inmates and 3.1 percent of jail inmates had been victimized in the past twelve months.⁵⁰ The prison number seems to be holding steady, as the figure was 4.5% in 2007.⁵¹ However, the most shocking numbers come from youth facilities, where an estimated 12 percent of youth in 2008-09 were victimized by either another youth or a facility staff member.⁵²

Many of the provisions of the Prison Rape Elimination Act⁵³ present genuinely purposeful efforts on the part of the government to reduce the phenomenon: § 15603 directs the Bureau of Justice Statistics (BJS) to carry out annual reports on prison rape; § 15604 implements a National Institute of Corrections clearinghouse to provide information and training to correctional authorities on prison rape; § 15605 authorizes appropriations to correctional facilities for the protection of inmates; § 15606 establishes the (more appropriately named) National Prison Rape Reduction Commission; § 15607 directs the Attorney General to issue national standards on prison rape reduction within one year after receiving the report from the Commission; and § 15608 prohibits facilities that have not adopted the national standards from receiving any federal grants.

<http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf>.

⁴⁸ *Id.* at 2.

⁴⁹ U.S. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, NCJ 234183, PREA DATA COLLECTION ACTIVITIES 2 (2011), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2198>.

⁵⁰ ALLEN J. BECK & PAIGE M. HARRISON, U.S. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2008-09, at 5 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

⁵¹ ALLEN J. BECK & PAIGE M. HARRISON, U.S. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007, at 2 (2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svfpri07.pdf>.

⁵² ALLEN J. BECK, U.S. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PREA DATA COLLECTION ACTIVITIES, 2011, at 1 (2011), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdca11.pdf>.

⁵³ 42 U.S.C. §§ 15601-15609.

The main question for this endeavor is why such misleading language was needed for a piece of legislation that was unanimously supported in both the House and Senate.⁵⁴ The evidence presented above clearly illustrates that the Act has not even come close to “eliminating” sexual assault in America’s correctional facilities. If the drafters wanted to be more accurate with their aspirations for the bill, the more tempered word “reduction” could have been used (and has been used in other short titles,⁵⁵ the naming of the National Prison Rape Reduction Commission, and also by other official governmental agencies in reference to PREA, such as the NIJ.)⁵⁶ By using “elimination,” Congress explicitly and needlessly misled those who encountered the Act, be they lawmakers or members of the public. Additionally, the short title sets a lofty standard for the bill that is likely to never be achieved, thus making those who enacted the measure or are working to implement the law look foolhardy and ineffective.

C. Other Problematic Examples

Other examples of problematic bill titles are easily found throughout history. For example, the Comprehensive Crime Control Act of 1984 was an omnibus measure that included many smaller acts, all leveled at decreasing (or “comprehensively controlling”) crime, and especially violent crime and drug crime.⁵⁷ The smaller acts located inside the proposal included certain measures (among others: the Armed Career Criminal Act of 1984, the Aircraft Sabotage Act, the Bail Reform Act of 1984, the Dangerous Drug Diversion Control Act of 1984, the Insanity Defense Reform Act of 1984, the National Narcotics Act of 1984, the Missing Children’s Act, the Sentencing Reform Act of

⁵⁴ Bill Summary & Status – 108th Congress (2003-2004) – S.1435 – Major Congressional Actions, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01435:@@@R>.

⁵⁵ See, e.g., Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as 44 U.S.C. §§ 3501 *et seq.* (2006)); Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, 118 Stat. 2327 (codified as amended in scattered sections of 42 U.S.C.).

⁵⁶ See Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601-15609 (2006)); *NIJ’s Response to the Prison Rape Elimination Act*, CORR. TODAY, Feb. 2006, at 60, available at <https://www.ncjrs.gov/pdffiles1/nij/213137.pdf> (explaining that the act calls for, *inter alia*, standards to reduce prison rape and stating that the Act may help to “sharply reduce” the negative consequences of prison rape).

⁵⁷ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.).

1984, and the Victims of Crime Act of 1984.⁵⁸ Though it was named so, the Comprehensive Crime Control Act certainly failed to comprehensively control crime, and particularly violent crime, which rose to historically high levels in the early 1990s.⁵⁹ Additionally, the percentage of drug related homicides rose to 7.4 percent in 1989, which was the highest level in the past twenty years.⁶⁰

Another somewhat quirky but relevant example is the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN SPAM) Act,⁶¹ which was passed in 2003 in an attempt to regulate commercial email, especially bulk email. However, as the Bureau of Consumer Protection points out, the Act regulates not just spam, or bulk, email, but all commercial email.⁶² Some insiders have dubbed this law the “You Can Spam Act,”⁶³ as it essentially allows companies to send out bulk email, or spam, if it meets a certain criteria. Given the name of the Act, the first two criteria the law sets in place are slightly ironic:

(1) Don’t use false or misleading header information. Your “From,” “To,” “Reply-To,” and routing information – including the originating domain name and email address – must be accurate and identify the person or business who initiated the message. (2) Don’t use deceptive subject lines. The subject line must accurately reflect the content of the message.⁶⁴

By naming the Act as if they were eliminating spam when they were essentially enabling it, Congress created further confusion. Additionally, the fact that the Act is so stringent with false or misleading header information and deceptive subject lines is preposterous given the deceptive name of the law.

⁵⁸ Bill Summary & Status – 98th Congress (1983-1984) – H.J.RES.648 - Titles, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d098:HJ00648:@@@T> (last visited Aug. 24, 2012).

⁵⁹ *Key Facts At A Glance*, OFF. OF JUST. PROGRAMS (last modified Sept. 1, 2012), <http://bjs.ojp.usdoj.gov/content/glance/cv2.cfm>.

⁶⁰ *Drug And Crime Facts*, OFF. OF JUST. PROGRAMS (last modified Sept. 1, 2012), <http://bjs.ojp.usdoj.gov/content/duc/duc.cfm#drug-related>.

⁶¹ CAN-SPAM Act of 2003, *supra* note 4.

⁶² *The CAN-SPAM Act: A Compliance Guide for Business*, FED. TRADE COMM’N. Sept. 2009), <http://business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business>.

⁶³ See Amit Asaravala, *With This Law, You Can Spam*, WIRED (Jan. 23, 2004), <http://www.wired.com/techbiz/media/news/2004/01/62020>.

⁶⁴ FED. TRADE COMM’N, *supra* note 62.

III. BARRIERS TO REGULATION OF SHORT BILL TITLES

Lest one seem hopelessly naïve, before beginning a discussion of how the FTC might analyze short bill titles, it is worth discussing why FTC regulation of short bill titles under current law is unlikely. The FTC was established in 1914 by the Federal Trade Commission Act, and its duties include preventing “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. . . .”⁶⁵ There are two significant barriers to FTC enforcement against short bill titles. First, the FTC has jurisdiction only over commercial advertising and regulation of non-commercial speech, such as political speech, which might raise First Amendment issues. Second, the FTC has been reluctant to take action against product brand names as opposed to product claims. We discuss each below.

Speech, in its many forms, is protected in the United States under the First Amendment. The Supreme Court has long held that noncommercial speech – speech that does not relate to a commercial transaction – is subject generally only to “reasonable time, place and manner” restrictions and is virtually immune from content restriction – with, for example, “yelling fire in a crowded theatre” and the notoriously difficult to prove libel standard being two of the better known exceptions.⁶⁶ Commercial speech, however, is entitled to less constitutional protection, as Justice Stevens writes, “few of us would march our sons and daughters off to war to preserve the citizens right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”⁶⁷ The Supreme Court, in *Bolger v. Youngs Drug Products Corp.*⁶⁸ established a four-pronged test for determining whether the speech at issue was commercial. These prongs are whether the speech:

- Proposes a commercial transaction
- Refers to a specific product
- Has an economic motivation; or
- Is otherwise conceded by the defendant to be an advertisement.

⁶⁵ 15 U.S.C.A. § 45 (West 2006).

⁶⁶ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁶⁷ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

⁶⁸ *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983).

However, all four elements need not be present in order for the speech to be classified as commercial.⁶⁹

Consistent with this Supreme Court precedent, the FTC has long held that its jurisdiction over false or misleading practices is confined to commercial speech. In the “Mr. Fit” case⁷⁰ the FTC challenged an advertisement by the RJ Reynolds Tobacco Company (“RJR”). In the advertisement, RJR published the results of a recent lifestyle health study which followed the residents of Framingham, Massachusetts, over the course of many years. According to RJR, the study purported to cast doubt on the alleged link between smoking and heart disease.⁷¹ The FTC filed an administrative complaint, claiming that the advertisement was false and misleading.⁷² RJR defended by claiming that the speech was on a matter of public interest and was noncommercial speech protected under the First Amendment.⁷³ In a lengthy opinion, the FTC overturned the initial decision of the administrative law judge granting RJR’s Motion to Dismiss and found that, accepting the allegations of the complaint as true, the speech was, in fact, commercial, relying upon the fact that the advertisement referred to a specific product, discussed a specific product attribute (safety of the product), that it was disseminated through a payment and that RJR had a direct sales-related motive for disseminating the advertisement.⁷⁴

More recently, it appears that as consumers become increasingly concerned about the social responsibility of companies that they financially support, an increasing amount of companies have engaged in corporate image advertising—touting, among other things, their commitment to the environment, further blurring the lines between commercial and fully protected speech. For example, in response, at least one FTC Commissioner has suggested that the Commission lacks jurisdiction over these ads as noncommercial speech.⁷⁵

⁶⁹ See *Id.* at 68 n.14 (“nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial”).

⁷⁰ In re R.J. Reynolds Tobacco Co., 111 FTC 539 (Fed. Trade Comm’n. 1988) (Mr. Fit refers to the name of the study – “Multiple Risk Factor Intervention Trial.”).

⁷¹ *Id.* at 540.

⁷² *Id.*

⁷³ *Id.* at 541.

⁷⁴ *Id.* at 547.

⁷⁵ J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Remarks before the NAD Annual Conference 2008: What’s New in Comparative Advertising, Claim Support and Self-Regulation, at 6 (Sept. 23, 2008), <http://www.ftc.gov/speeches/rosch/080923Rosch->

So where does this leave short bill titles? Clearly, they are not traditional commercial speech where a company seeks to sell a product or service to a customer.⁷⁶ There is, of course, some element of commerce involved. Some legislation, such as the NAFTA Implementation Act,⁷⁷ regulates commercial transactions. In addition, the passage or support of legislation can be a powerful fund-raising tool which, like a commercial transaction, takes money directly out of the pockets of consumers or corporations and thus relates to commerce. However, the same could be said for many charities or other non-profits, whose speech would almost certainly be entitled to full First Amendment protection. Other indicia of commercial speech, such as the proposition of a commercial transaction and a reference to a product are also missing. In summary, even if the FTC sought to assert jurisdiction over short bill titles, it seems unlikely that it could do so constitutionally.⁷⁸

The second issue relates to the FTC's (and federal courts') reluctance to regulate product names as opposed to product claims. In other words, the titles of bills would not typically be regulated; rather, the FTC and courts would look more toward what people said about the bills. This reluctance stems in part from the tremendous good will and intellectual property protection often associated with trade names.⁷⁹ As a

NADSpeech.pdf.

⁷⁶ See *Bolger*, 463 U.S. 66 (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) ("core notion" of commercial speech is proposing a commercial transaction.).

⁷⁷ North American Free Trade Agreement Implementation (NAFTA) Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

⁷⁸ However, legislation was recently introduced that seeks to regulate political speech. A hearing on S. 994, the Deceptive Practices and Voter Intimidation Prevention Act of 2011, was held on June 26, 2012 in the Senate Judiciary Committee. The bill "amends the Revised Statutes and federal criminal law to prohibit any person, whether acting under color of law or otherwise, from knowingly misleading voters regarding: (1) the time or place of holding any federal election, (2) the qualifications for or restrictions on voter eligibility for any such election, or (3) an endorsement," and, among other things, would establish a private right of action for any person affected by such deception. *Summary of Deceptive Practices and Voter Intimidation Prevention Act of 2011*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01994:@@D&summ2=m&> (last visited Aug. 24, 2012). However, S. 994 has not traveled any further in the legislative process, and the bill seems likely never to make it out of the committee stage and might well be held unconstitutional were it ever to become law.

⁷⁹ See *Fed. Trade Comm'n. v. Royal Milling Co.*, 288 U.S. 212, 217 (1933) (reasoning that trademarks constitute valuable assets and their destruction should not be ordered if the same result can be achieved through less drastic means).

result, in the famous “Aspercreme” case⁸⁰ the FTC found that advertisements for Aspercreme were misleading because they implied that the product contained aspirin. Although the FTC did not enjoin use of the name, it did require that a disclaimer appear stating that the product did not contain aspirin.⁸¹ In addition, because product advertising is so commonplace, ensuring that claims in advertising are truthful likely more than compensates for, and perhaps helps clarify, any misperceptions that may derive from a product’s name.⁸²

In the context of legislation, regulating the name of a bill’s short title seems less daunting than doing the same for a product. First, there is not the same financial investment in good will and intellectual property protection for a bill; however, it may be the case that people have become familiar with a particular title so there is at least some potential for confusion if a short title were changed.⁸³ Second, the use of disclaimers do not appear to be particularly helpful for bills, especially because short titles are most frequently mentioned in the press, and because they have long titles, which typically describe the function of the bills in more detail. It is difficult to imagine the *New York Times* reporting on the No Child Left Behind Act and noting in a disclaimer that “some children will actually be left behind,” nor would there be any means of requiring it. Finally, and most importantly, in many cases the short bill title *is* the “claim” (e.g. the elimination of prison rape, or the comprehensive control of crime).⁸⁴ There is not a widespread advertising claim associated with particular legislation that might help clarify what would otherwise be a deceptive title. However, the deceptive advertising standards developed by the FTC are discussed in detail below. In summary, the FTC’s traditional reluctance to order trade name deletion seems less likely under the second issue.⁸⁵

⁸⁰ In re Thompson Med. Co., 104 F.T.C. 648 (Fed. Trade Comm’n 1984).

⁸¹ *Id.* at 842-843.

⁸² *See Id.* § 5, ¶ 3,103.

⁸³ However, short bill titles often change when travelling between the House and Senate. Also, all bills originating in Congress receive an official number, and thus a change in the short title would be easily noted if an individual could locate the bill number.

⁸⁴ *See, e.g.*, Prison Rape Elimination Act of 2003, 42 U.S.C.A. § 15601.

⁸⁵ There is also the issue of the speech and debate clause. Traditionally the speech and debate clause provides immunity for statements made on the floor of the House or the Senate. This would presumably extend to the names given to legislation. However, the constitutional protection of the speech and debate clause has been held not to extend to congressional press releases. *See Hutchinson v. Proxmire*, 443 U.S. 111, 133 (U.S. 1979). Such releases are fairly commonplace with regard to legislation and would invariably

IV. WHICH FTC STANDARDS ARE APPLICABLE?

A. FTC Policy Statement on Deception

In 1983, following numerous Commission and court decisions, the FTC took the view that nowhere was there “a single definitive statement of the Commission’s view of its authority” in terms of deception, and thus issued such a policy statement.⁸⁶ In defining deception that is legally actionable, the FTC included three requirements, as outlined by the sub-heading sections of the policy statement:

- There Must Be A Representation, Omission, Or Practice That Is Likely To Mislead The Consumer;
- The Act Or Practice Must Be Considered From The Perspective Of The Reasonable Consumer; and
- The Representation, Omission Or Practice Must Be Material.⁸⁷

These requirements shall now be analyzed.

In explaining the first element, the FTC notes that “the issue is whether the act or practice is likely to mislead, rather than whether it causes actual deceptions.”⁸⁸ In one case, a product erroneously conveyed that it was proven to be superior to other products, a statement that the FTC subsequently regarded as deceptive.⁸⁹ In reaching this decision, the FTC noted that “the important consideration is the net impression conveyed to the public.”⁹⁰ The fact that an omission occurred does not mean that the FTC is obligated to pursue a claim, as sometimes there must be specific evidence on consumer expectations; if this is not available, then the FTC may not pursue the case.⁹¹ For example, bait-and-switch offers may be invalid based on whether there was a bona fide offer,⁹² an implication that a product is fit for the purposes that it is

include the short bill title. Thus, under *Hutchinson* they may be challengeable.

⁸⁶ Letter from James C. Miller, Chairman, FTC, to John D. Dingell, Chairman, House Comm. on Energy and Commerce, FTC Policy Statement on Deception, (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> (last visited Aug. 24, 2012) [hereinafter FTC Letter/Policy Statement on Deception].

⁸⁷ *Id.* at pts. 2, 3, 4.

⁸⁸ *Id.* at pt. 2, para.1.

⁸⁹ *Id.* at n.7 (citing *In re Am. Home Prods. Corp.*, 98 F.T.C. 136, 374 (1981), aff’d, 695 F.2d 681, 688 (3d Cir. 1982)).

⁹⁰ *Id.*

⁹¹ *Id.* at n.13 (citing *Leonard F. Porter, Inc.*, 88 F.T.C. 546, 626 (1976)).

⁹² FTC Letter/Policy Statement on Deception. pt. 2, para. 5.

being sold,⁹³ or concerns when marketing inaccurate or incomplete information.⁹⁴ Under this standard, short titles are likely representations that at least have the potential to mislead voters and elected officials as to the purpose and effect of the legislation.

The second requirement is that the act or practice must be considered from the perspective of the reasonable consumer. The FTC states that “a material practice that misleads a significant minority of reasonable consumers is deceptive,”⁹⁵ and that “the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.”⁹⁶ The FTC notes, however, that companies are not responsible for every outlandish response a particular advertisement may provoke, and that there are always likely to be a select few who misunderstand even a reasonable representation.⁹⁷ The FTC also notes that when “determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace.”⁹⁸ However, the FTC states that if advertisements are addressed to particular groups in society (i.e. children or elderly, etc.), then the test of whether an advertisement is deceptive is judged from the perspective of a reasonable member of that group.⁹⁹ Perhaps most appropriate to short bill titles, the FTC states that “depending on the circumstances, *accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline.*”¹⁰⁰ False headlines can be remedied in the body of the text or in the fine print, but there are exceptions depending on how outlandish the headline is.¹⁰¹

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at n.20.

⁹⁶ *Id.* at pt. 3, para. 1.

⁹⁷ *Id.* at pt. 3, para. 2; *see also* Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963).

⁹⁸ FTC Letter/Policy Statement on Deception, at pt. 3, para. 4.

⁹⁹ *Id.* at pt. 3, para. 5.

¹⁰⁰ *Id.* at pt. 3, para 11. (emphasis added); *see also* In re *Litton Indus., Inc.*, 97 F.T.C. 1, 71 n.6 (1981), *aff'd as modified*, 676 F.2d 364 (9th Cir. 1982) (stating disclosures presented in fine print were not sufficient to remedy a deceptive headline).

¹⁰¹ *Id.* at pt. 3, para. 10-11 (citing In re *Giant Food, Inc.*, 61 F.T.C. 326, 348 (1962) (stating disclaimers contained in fine print may fail to correct a wrong impression which is deceptive as those reading ads may not take time to read them); cf. *Beneficial Corp. v. FTC*, 542 F.2d 611, 618 (3d Cir. 1976) (reversing FTC Commission’s finding that deception resulting from a slogan used by a company could not be remedied with any qualifying

Interestingly, the FTC “generally will not bring advertising cases based on subjective claims (taste, feel, appearance, smell) or on correctly stated opinion claims.”¹⁰² Most tendentious short titles produce claims that are neither subjective nor opinion-based (i.e. eliminating prison rape or comprehensively controlling crime). Additionally, it points out that “obviously exaggerated or puffing representations” usually are not pursued.¹⁰³ Yet the FTC does add a caveat, noting that if consumers believe the claims to be real, then they indeed are actionable.¹⁰⁴ The FTC asserts that it evaluates claims very closely before proceeding, and that normal market rules (i.e. sellers wanting repeat customers) often discourages deceptive practices.¹⁰⁵ Outrageous claims made in short titles which have not fulfilled their lofty promises (see above) have not encouraged lawmakers to temper the language in such titles. Thus, congressional short titles have only become more outlandish throughout the years.

The third element is that “representation, omission or practice must be a material one for deception to occur.”¹⁰⁶ To explain this standard, the FTC notes that “a ‘material’ misrepresentation or practice is one which is likely to affect a consumer’s choice of or conduct regarding a product. If inaccurate or omitted information is material, injury is likely to be found.”¹⁰⁷ In other words, material information is of the type that is important to consumers.

In terms of the legislative process, the main material misrepresentation or practice would likely originate from those voting for such measures: whether a particular title would make lawmakers support or oppose a bill, either because they do not take the time to fully digest and understand the text of the bill, or because they have done so but fear the political consequences of opposing it.¹⁰⁸ The FTC does note that “[d]epending on the facts, information pertaining to the central characteristics of the product or service will be presumed material,”

language)).

¹⁰² *Id.* at pt. 3, para. 13.

¹⁰³ FTC Letter/Policy Statement on Deception, at pt. 3, para. 14.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at pt. 3 para. 16.

¹⁰⁶ *Id.* at pt. 4, para. 1.

¹⁰⁷ *Id.* at pt. 2, para. 5. (citing *In re Volkswagen of Am.*, 99 F.T.C. 446 (1982); *Federal Trade Comm’n v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

¹⁰⁸ Jones, *supra* note 25 (noting how one lawmaker explains that he “get[s] hurt politically” every time he votes against a law with an evocative, popular title).

including the “safety” or “efficacy” of said products.¹⁰⁹ This could have significant implications for many short titles which advocate that they are “effective”, “efficient,” and “responsible” or attempt to prescribe “protection” of certain groups or “prevention” of certain offenses.¹¹⁰ Indeed, it was already revealed in an earlier article by Jones that a majority of interviewees believed short bill titles affected a measure’s chances of becoming law.¹¹¹ When examining legislation, others could also have material grounds against misleading or deceptive bill titles. Special interest groups, NGOs, journalists, and most importantly, voters, all have an interest in such matters. Such groups or individuals may decide to support or oppose a particular law because of claims made in short bill titles, particularly claims to protect children, prevent certain offenses, halt spam from entering email inboxes, and comprehensively control crime, as these are honorable goals. Many of these laws are championed on campaign trails to demonstrate to voters that they have been working on societal problems, or conversely, to demonstrate that certain individuals did not support a particular law.¹¹² If these short bill titles are misleading or deceptive, as to misrepresent the laws, then these short bill titles are material, because they falsely express what the law actually intends to do and/or did.

¹⁰⁹ FTC Letter/Policy Statement on Deception, at pt. 4, para. 3 (citing *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 456 (1972), *aff’d*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973); *In re J.B. Williams Co.*, 68 F.T.C. 481, 546 (1965), *aff’d*, 381 F.2d 884 (6th Cir. 1967)).

¹¹⁰ *See, e.g.*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144; Judicial Disclosure Responsibility Act, Pub. L. No. 110-24, 121 Stat. 100; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; Joshua Omvig Veterans Suicide Prevention Act, Pub. L. No. 110-110, 121 Stat. 1031.

¹¹¹ *See* Jones, *supra* note 25.

¹¹² OBAMA/BIDEN CAMPAIGN WEBSITE, www.barackobama.com. Though it is also coined “Obamacare” the President’s official campaign website repeatedly talks about the Affordable Care Act. *Issues – Healthcare – Barack Obama*, <http://www.barackobama.com/health-care?source=primary-nav>. Also, the website disparages the No Child Left Behind law. *Issues – Healthcare – Barack Obama*, <http://www.barackobama.com/education?source=primary-nav>.

B. FTC Enforcement Policy Statement on Food Advertising

Almost ten years after their policy statement on deception, the FTC issued a complimentary “Enforcement Policy Statement on Food Advertising,”¹¹³ which focused on the nutrient and health content claims of foods.¹¹³ The Commission notes that this statement also complemented the Nutrition and Labeling Education Act of 1990 (“NLEA”)¹¹⁴ and the subsequent Food and Drug Administration’s (“FDA”) food labeling regulations in accordance with the NLEA.¹¹⁵ As previously discussed, short bill titles are often claims in themselves, as they purport to contain certain characteristics (i.e. responsibility, accountability, etc.), or they express certain actions the legislation is going to accomplish (i.e. the protection of certain people or prevention or elimination of certain activities). Indeed, as noted above, many of these explicit and implied claims never come close to fruition. By analyzing the FTC’s policy statement on food advertising, a better understanding is developed of whether the claims made on the short titles of bills would pass an FTC deception analysis.

In deciding whether a food advertisement is deceptive, the FTC first looks at both the express and implied claims contained within the advertisement, both of which are important for short titles.¹¹⁶ Express claims are perhaps most relevant to short bill titles, as “an express claim directly makes a representation.”¹¹⁷ Tendentious and misleading bill titles often do this: to use an example from above, the Prison Rape Elimination Act states that prison rape will be eliminated with passage of the Act. Thus, if certain express claims are being made in short titles rather than describing the legislation in question, they would be subject to an FTC deception analysis, consisting of the factors listed in the above deception policy statement. The FTC also notes that omitting certain material statements may be deceptive and that “deception can occur through omission of information that is necessary to prevent an

¹¹³ FED. TRADE COMM’N. ENFORCEMENT POLICY STATEMENT ON FOOD ADVERTISING (1994), <http://www.ftc.gov/bcp/policystmt/ad-food.shtml#3>.

¹¹⁴ Nutrition Labeling Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990).

¹¹⁵ See generally 21 C.F.R. § 101.13.

¹¹⁶ FTC ENFORCEMENT POLICY STATEMENT, *supra* note 113, “Legal Framework for Commission” at para. 3.

¹¹⁷ *Id.*

affirmative representation from being misleading.”¹¹⁸

Short titles tend to make heroic claims without mentioning that such claims are aspirational. The Prison Rape Elimination Act example used above is a good test case for this standard. If the title read “Examining Prison Rape to Enhance Inmate Protection Act,” it may well have passed a deceptive analysis test, as the title fully acknowledges the aspirational essence of the legislation. However, the simple title “Prison Rape Elimination Act” expressly states that prison rape will be eliminated with passage of the Act, without noting the legislation’s aspirational character. Conversely, a properly labeled example is the North American Free Trade Agreement Implementation Act.¹¹⁹ Though the bill was controversial, the short title is descriptive and expresses the main objective of the Act in a reasonable manner.

The FTC also notes that objective claims should be supported by valid evidence, stating that it is deceptive “to make an express or implied nutrition or health benefit claim for a food unless, at the time the claim is made, the advertiser possesses and relies upon a reasonable basis substantiating the claim.”¹²⁰ A reasonable basis claim is usually supported by competent and reliable evidence,¹²¹ which the FTC has more thoroughly described as,

tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.¹²²

Congressional bills are not subject to any reasonable basis standard; this is true even when short titles express outlandish claims, such as the elimination of prison rape with overcrowded prisons and over two million people behind bars, or the canning of spam in a digital age that thrives on email and Internet marketing.

¹¹⁸ *Id.* at para.4.

¹¹⁹ NAFTA, *supra* note 77.

¹²⁰ FTC ENFORCEMENT POLICY STATEMENT, *supra* note 113, para. 5 (citing *In re Thompson Med. Co.*, 104 F.T.C. at 839).

¹²¹ FTC ENFORCEMENT POLICY STATEMENT, *supra* note 113, para. 6 (noting that the “substantiation must also be examined in the context of the entire body of relevant evidence, particularly if it produces results that are contrary to that body of evidence.”).

¹²² FTC ENFORCEMENT POLICY STATEMENT, *supra* note 113, pt. 4(A), para. 5 (citing *Gracewood Fruit Co.*, FTC No. C-3470 (Oct. 29, 1993) (consent order); *Pompeian, Inc.*, FTC No. C-3402 (Oct. 27, 1992) (consent order)).

C. Kraft, Inc. v. Federal Trade Commission

The Seventh Circuit Court of Appeals' decision in *Kraft, Inc. v. Federal Trade Commission* is meaningful because it relies on many anti-trust, trade and constitutional law factors to determine whether the advertising in question was indeed deceptive. It stands as the barometer by which advertisements are judged for actionable causes by the FTC. It also describes how the FTC should go about deeming an advertisement deceptive, explains why misleading commercial speech is not protected under the Constitution, and renders what is material in such cases.¹²³ These areas will be analyzed in turn.

First, the court reiterated the premise of the U.S. Federal Trade Commission Act, which "makes it unlawful to engage in unfair or deceptive commercial practices, 15 U.S.C. § 45, or to induce consumers to purchase certain products through advertising that is misleading in a material respect," and acknowledged that the FTC is given the authority to regulate such matters.¹²⁴ The *Kraft* decision also noted that,

In *FTC v. Colgate-Palmolive Co.*,¹²⁵ the Supreme Court held that while the words "deceptive advertising" set forth a legal standard that derives its final meaning from judicial construction, an FTC finding is "to be given great weight by reviewing courts" because it "rests so heavily on inference and pragmatic judgment" and in light of the frequency with which the Commission handles these cases.¹²⁶

Furthermore, in terms of facial validity regarding deceptive advertising, the FTC can rely on its own judgment in terms of what cases to pursue, and does not have to conduct surveys in order to determine that a commercial has a tendency to mislead.¹²⁷

Next, when discussing commercial speech, the U.S. Supreme Court has recognized that while commercial speech is protected by the United States Constitution, "false, deceptive, or misleading advertising" does not serve the public interest and thus "remains subject to restraint."¹²⁸ Further, the *Kraft* court recognized that "Kraft's [F]irst [A]mendment challenge is doomed by the Supreme Court's holding in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,"

¹²³ *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992).

¹²⁴ *Id.* (citing 15 U.S.C. §§ 45, 52, 55).

¹²⁵ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

¹²⁶ *Kraft, Inc.*, 970 F.2d at 316 (citing *Colgate-Palmolive Co.*, 380 U.S. at 385).

¹²⁷ *Id.* at 319 (citing *Colgate-Palmolive Co.*, 380 U.S. at 392).

¹²⁸ *In re R.M.J.*, 455 U.S. 191, 200 (1982).

which established that no [F]irst [A]mendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence.”¹²⁹ Reminiscent of the problematic bill title examples, were it not for the fact that, as discussed above, they may be deemed non-commercial speech, these facially apparent implied claims would likely fall within the ambit of *Zauderer*. The court further noted that “commercial speech is less susceptible to the chilling effect of regulation than other, more traditionally recognized forms of speech, such as political discourse,” primarily because it is motivated by profit.¹³⁰

Finally, in regard to materiality, the court noted that “[a] claim is considered material if it ‘involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.’”¹³¹ The Commission is entitled to apply, within reason, a presumption of materiality,¹³² and it does so with three types of claims:

- (1) express claims;
- (2) implied claims where there is evidence that the seller intended to make the claim; and
- (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned.¹³³

Notably, the court recognizes the FTC’s guidance that a claim is material if it is “likely to affect the consumer’s conduct or decision with regard to a product.”¹³⁴

However, the court also notes that “restrictions on potentially misleading speech, by contrast, can be no ‘broader than reasonably necessary to prevent the [deception]’ and may not categorically prohibit such speech if less restrictive alternatives are available.”¹³⁵ This seems

¹²⁹ *Kraft, Inc.*, 970 F.2d at 321 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 652-53 (1985)).

¹³⁰ *Id.* (relying on *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 n.22 (1984)).

¹³¹ *Id.* at 322 (citing *In re Cliffdale Assocs.*, 103 F.T.C. 110, 165 (Fed. Trade Comm’n 1984); FTC Policy Statement, 103 F.T.C. at 175, 182) (as appended to *In re Cliffdale Assocs.*).

¹³² *Id.* (citing *Colgate-Palmolive, Co.*, 380 U.S. at 392).

¹³³ *Id.* (citing *In re Thompson Medical Co.*, 104 F.T.C. 648, 816-17 (1984); FTC Policy Statement, 103 F.T.C. at 182-83 (as appended to *In re Cliffdale Assocs.*)).

¹³⁴ *Kraft, Inc.*, 970 F.2d at 323-4 (citing FTC Policy Statement, 103 F.T.C. at 175) (as appended to *In re Cliffdale Assocs.*).

¹³⁵ *Id.* at 107-108 (citing *In re R.M.J.*, 455 U.S. at 203).

like a healthy modern standard, especially when it comes to the titles of bills. It would be one thing to restrict the historically interesting and wildly imaginative art of political sloganeering, but it is quite another to deceptively label a proposed bill as effective; protective of a certain segment of society; or suggesting marked improvement in a policy area, simply because a lawmaker wants the bill to pass and become law.

The title of this Article asks whether congressional short titles would survive FTC scrutiny. As seen above, if many of these titles were conceptualized as branding under advertising principles, they would be subject to a long list of rules and regulations established under both case law and FTC deceptive practice principles. Many congressional bill titles in the United States would likely be subject to legal action, as they qualify under all three elements. Also, the bills would meet the requirements of material grounds set forth at both the legislative and the general public or societal levels.

V. CONCLUSION

An interesting FTC Business Guide Alert came in October of 2001, shortly after the 9/11 terrorist attacks.¹³⁶ It noted that after the attacks, “consumers are more sensitive to ‘Made in USA’ claims and more interested in buying American-made goods.”¹³⁷ The alert mainly reminded businesses of the FTC’s “all or virtually all” standard¹³⁸ and provided links to relevant websites for more information. But while companies and products were rigorously subjected to the FTC standard, that same month Congress was busy¹³⁹ enacting the USA PATRIOT Act, whose name was not subject to any standard whatsoever — not even a

¹³⁶ FTC, BUSINESS ALERT: SELLING ‘AMERICAN MADE’ PRODUCTS? WHAT BUSINESSES NEED TO KNOW ABOUT MAKING MADE IN USA CLAIMS, (2001), <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt101.pdf>.

¹³⁷ *Id.*

¹³⁸ FTC, ENFORCEMENT POLICY STATEMENT ON U.S. ORIGIN CLAIMS (1997), <http://www.ftc.gov/os/1997/12/epsmadeusa.htm> (“A product that is all or virtually all made in the United States will ordinarily be one in which all significant parts and processing that go into the product are of U.S. origin.”).

¹³⁹ Well, maybe they were not all too busy. The bill was introduced in the House on October 23rd and passed on the 24th. The bill then passed the Senate on the 25th, and was sent to the President that same day. See Bill Summary & Statutes, Major Congressional Actions, H.R. 3162, 107th Cong. (2001-2001), <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@@R> (see the congressional timeline for the bill in the section entitled, “Major Actions.”).

qualifying one.¹⁴⁰

Although the Act contained many contentious measures related to civil liberties, some of which were challenged in court,¹⁴¹ Congress was allowed to unequivocally stamp the measure as inherently American by using “USA” in the title, and also deem it “patriotic,” thus inscribing the choice of controversial evocative wording into the statute books. It seems noticeably ironic and deeply incongruous that products in the USA are so heavily regulated that consumer watchdog agencies, such as the FTC, strictly enforce “Made in the USA” labeling restrictions – even on small, harmless products –¹⁴² but a massive federal law that affects millions of citizens and a wide range of governmental operations is not subject to any type of binding constitutional regulation as to how it is officially labeled.

Similar to how there is no particular “bright line” test for a “Made in the USA” label for products, there is no corresponding rule for misleading, tendentious, and/or evocative short titles. Given the current state of tendentious and, at times, outlandish congressional short titles, it seems that *some standard must be implemented* to which such titles should strive to achieve. Yet in this regard, the United States federal government has failed mightily. Is it not a tautology that the governments and institutions that regulate deceptive advertising must hold themselves accountable to the same standards by which they judge others? We believe this proposition to be highly equitable.

Eventually, it must be determined what legal status legislative short titles possess in Congress. Either they represent the full force of law that they are usually inscribed with in the congressional record, and thus should be subject to the technical accuracy and formal, descriptive language of the law; or, as many of the above interviewees suggested, and which this article has taken into consideration, they are branding elements, and therefore should be subject to a form of regulations similar to those governing deceptive advertising practices. While the First Amendment may make it difficult for the FTC to exert jurisdiction over such matters, some form of scrutiny could still be adopted. For

¹⁴⁰ USA PATRIOT Act, *supra* note 2.

¹⁴¹ Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. 2004); Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

¹⁴² See Press Release, FTC, Wire Manufacturer and its Distributor and a Cosmetics Co. Agree to Settle Charges of Making Misleading “Made in the USA” Claims (Sept. 13, 1999) <http://www.ftc.gov/opa/1999/09/wirephysform.shtm>.

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example, review and approval by a bipartisan committee or watchdog group should be considered. If it is determined that short titles are part of the traditionally legal aspects of legislation, then such titles need rules and recommendations as to what are proper and improper short titles, and these must be defined in either the congressional rules, and/or through other legal devices, such as official acts. If it is determined that short titles are 'branding' instruments, then such titles should unequivocally not appear on official documents as they are traveling through the legislative process or after they are enacted, and should be subjected to the same deceptive advertising standards by which most every other entity is governed.