

2-2021

To Win Friends and Influence People: Regulation and Enforcement of Influencer Marketing After Ten Years of the Endorsement Guides

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Recommended Citation

Craig C. Carpenter and Mark Bonin II, To Win Friends and Influence People: Regulation and Enforcement of Influencer Marketing After Ten Years of the Endorsement Guides, 23 *Vanderbilt Journal of Entertainment and Technology Law* 253 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss2/1>

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To Win Friends and Influence People: Regulation and Enforcement of Influencer Marketing After Ten Years of the Endorsement Guides

Craig C. Carpenter & Mark Bonin II*

ABSTRACT

For the last ten years, social media influencer marketing has been regulated by the Federal Trade Commission (FTC) under the FTC’s Section 5 “unfair practices” authority, guided by the Endorsement Guides, a “best practices” document published by the FTC. This is a fairly “light” regulatory scheme where violators typically enter no-money, no-fault consent decrees and generally undertake to do a better job following the Endorsement Guides in the future. During this time, the practice has flourished, and companies are spending significant portions of their marketing budgets on social media influencer advertising. Recently, the FTC has submitted proposals for increased enforcement and penalties in this space based on a belief that misinformation is plaguing the internet.

This Article reviews the history of influencer marketing and examines the current regulatory regime. This Article contends that the current regime, while not perfect, is preferable to a strict rule-based approach with substantial penalties due to the evolving nature of social media and consumer perception in this area.

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I. INTRODUCTION

“In the future, everyone will be world-famous for 15 minutes.”
—Andy Warhol¹

Social media has forever changed digital advertising. Because people are spending less and less time watching live television and reading print media in favor of spending more time on their smartphones, brands have been forced to find new ways to connect with consumers. To do this, brands frequently turn to individual social media users who can push brand messaging to their followers. Typically, influencer-sponsored brand messages are more authentic than traditional advertising because they connect with targeted demographics on a more personal level.

Increased brand interest in influencer marketing is also creating a viable occupation for entrepreneurial millennials and zoomers. Gone are the days when only celebrities and professional athletes received endorsement deals. Boosted by influencer platforms like RewardStyle² and influencer agencies like the Influencer Marketing Agency³ and Viral Nation,⁴ otherwise “regular” people can use social media

1. Quote widely attributed to Andy Warhol. See, e.g., Tony Bravo, ‘World-famous for 15 minutes’: How Andy Warhol Predicted the Cult of Personality and Social Media Age, SAN FRANCISCO CHRONICLE DATEBOOK (May 13, 2019), <https://datebook.sfchronicle.com/art-exhibits/world-famous-for-15-minutes-how-andy-warhol-predicted-the-social-media-age-and-cult-of-personality> (last visited Jan. 29, 2021).

2. REWARDSTYLE, <https://rewardstyle.com/> [<https://perma.cc/22YP-JETP>] (last visited Dec. 4, 2020). RewardStyle is a Dallas-based company that aids influencers in managing and monetizing content. See *id.*

3. INFLUENCER MKTG. AGENCY, <https://imagency.com/about> [<https://perma.cc/82DQ-2PJV>] (last visited Dec. 4, 2020).

4. VIRAL NATION, <https://viralnation.com/> [<https://perma.cc/CB4Z-Y5F6>] (last visited Dec. 4, 2020); see Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of an Influencer Agency Explains*, VOX (Nov. 28, 2018, 6:00 PM), <https://www.vox.com/the->

platforms to fund their creative endeavors and earn income. While not all social media users have the voice or reach to lure brand sponsorships, even social media users who have just a few thousand followers⁵—a relatively small audience by industry standards—can turn their platforms into lucrative brand partnerships by leveraging a particular type of content or audience of followers.⁶

In 2009, influencer marketing was fringe enough to avoid heavy legal scrutiny. As a result, the practice proliferated. When used appropriately, the benefits were three-fold: (1) brands were able to connect targeted content with the desired demographic; (2) digital entrepreneurs were able to fund content and creativity; and (3) consumers received more information on products and brands that might be of interest. As this practice grew in prominence, however, the Federal Trade Commission (FTC) took notice.⁷

As the primary US regulator of advertising practices, the FTC's foray into social media marketing was inevitable. Over the last few years, the FTC has provided numerous guidance documents on this subject, including seminal guidance in the Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides).⁸ Fortunately for brands and influencers, the Endorsement Guides are not binding law. Consequently, the FTC's enforcement authority and available penalties⁹ for first-time offenders are

goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube [https://perma.cc/C92G-3M5Z].

5. See Kaya Ismail, *Social Media Influencers: Mega, Macro, Micro or Nano*, CMSWIRE (Dec. 10, 2018), <https://www.cmswire.com/digital-marketing/social-media-influencers-mega-macro-micro-or-nano/> [https://perma.cc/6CX6-3PHR]. Individuals that possess between one thousand to one hundred thousand followers or subscribers and are typically regarded as experts in their respective niches are often titled "Micro Influencers." *Id.*

6. See Barrett Wissman, *Micro-Influencers: The Marketing Force of the Future?*, FORBES (Mar. 2, 2018, 9:52 AM), <https://www.forbes.com/sites/barrettwissman/2018/03/02/micro-influencers-the-marketing-force-of-the-future/#52e10df86707> [https://perma.cc/5SEX-G63X]; Danny Parisi, *11 Honoré Embraces Micro-Influencers*, GLOSSY (Aug. 28, 2020), <https://www.glossy.co/fashion/amid-budget-cuts-11-honore-embraces-micro-influencers> [https://perma.cc/Q69G-3CLH].

7. FED. TRADE COMM'N, COMM'N FILE NO. P204500, STATEMENT OF COMMISSIONER ROHIT CHOPRA REGARDING THE ENDORSEMENT GUIDES REVIEW 2–3 (2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf [https://perma.cc/2W58-Y8SK].

8. FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2020).

9. *Advertisement Endorsements*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements> [https://perma.cc/6833-U5M8] (last visited Dec. 4, 2020) ("there are no civil penalties associated with [the endorsement guides]. But if advertisers don't follow the guides, the FTC may decide to investigate whether the practices are unfair or deceptive under the FTC Act."); *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N

minimal.¹⁰ Although the Endorsement Guides lack the punitive punch of other FTC enforcement subjects,¹¹ these Guides are pivotal given the need for flexibility vis-à-vis ever-changing technology.

Recently, despite brands' and influencers' growing comfort and understanding of the existing regulatory framework, the FTC abruptly sought to change the rules of the game and raise the stakes. On February 12, 2020, the FTC requested comments to a proposal that enhances its enforcement authority over influencer marketing and increases the penalties.¹² This proposal was accompanied by a statement from FTC Commissioner Rohit Chopra that was highly critical of the current influencer marketing enforcement regimes.¹³ Chopra argues that “[f]ake accounts, fake likes, fake followers, and fake reviews are now polluting the digital economy, making it difficult for families and small businesses looking for truthful information.”¹⁴ The request for comments to the proposal was unanimously approved by the FTC.¹⁵ One of the primary goals of the proposal is to “determine whether to create new requirements for social media platforms and advertisers and *whether to activate civil penalty liability*,”¹⁶ essentially seeking to end the light-handed regulatory approach that has governed under the Endorsement Guides.

This Article examines the proliferation of social media influencer marketing and the FTC's response. Instead of increasing regulation and penalties, as proposed in the FTC's February 12, 2020, proposal and statement, this Article suggests that the risk of social media influencer marketing misleading or deceiving consumers is minimal and generally outweighed by the benefits of the practice as a

(Oct. 2019) [hereinafter *FTC Investigative, Law Enforcement, and Rulemaking Authority*], <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/7SGD-Y5ZS>].

10. Cf. 15 U.S.C. §§ 45(m)(1)(A), 53, 57(b) (authorizing the FTC to commence civil suits for unfair methods of competition, false advertising, and deceptive acts).

11. See *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/SGU9-UZEJ>] (last updated Aug. 27, 2020); *Enforcement*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement> [<https://perma.cc/2FTK-YKS6>] (last visited Dec. 4, 2020) (“The FTC administers a wide variety of laws and regulations, including the Federal Trade Commission Act, Telemarketing Sale Rule, Identity Theft Act, Fair Credit Reporting Act, and Clayton Act. In total, the Commission has enforcement or administrative responsibilities under more than 70 laws.”).

12. *FTC Seeks Public Comment on Its Endorsement Guides*, FED. TRADE COMM'N (Feb. 12, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-seeks-public-comment-its-endorsement-guides> [<https://perma.cc/2MYE-EFUR>].

13. *Id.*; FED. TRADE COMM'N, *supra* note 7, at 1.

14. FED. TRADE COMM'N, *supra* note 7, at 2.

15. *FTC Seeks Public Comment on Its Endorsement Guides*, *supra* note 12.

16. FED. TRADE COMM'N, *supra* note 7, at 1.

whole. This Article also suggests that the technology employed by these influencers fluctuates too often to be governed by a rigid, binding legal framework with harsh penalties for noncompliance. As a result, a lighter regulatory approach from the FTC is warranted.

II. RISE OF THE INFLUENCERS

If you could turn your social media use into \$40,000–\$100,000 annually, would you be interested?¹⁷ Sure, it would take some work to build up a following, but with around ten to fifty thousand followers, this kind of money would not be unrealistic.¹⁸ With these numbers, it is no wonder that influencer marketing has “turned into a bona fide career path.”¹⁹ In today’s lexicon, “influencers” are consumers who promote products to their followers on social media.²⁰ However, the concept of “influencer marketing” has been around as long as there have been celebrities and athletes willing to push products to their fans. In fact, most of the laws that are applicable to this practice were created for television, radio, and print endorsements.²¹ As consumer media consumption has changed, television, radio, and print endorsements have lost some of their effectiveness, and brands have looked for ways to connect with an increasingly distracted audience. Rather than watching live network television and the corresponding commercials, consumers are now primarily consuming content from their phones.²² This makes it more difficult for brands to reach consumers through traditional media.²³ Brands needed a way to get commercial messages to consumers where they were spending most of their time, namely on social media.²⁴ Thus, influencer marketing, as we know it today, was

17. See Lieber, *supra* note 4 (“People with smaller followings [who are known as nanoinfluencers] can make between \$30,000 and \$60,000 a year. The micro-influencers can make anywhere from \$40,000 to \$100,000. Celeb influencers make way, way more.”).

18. See *id.*

19. See *id.*

20. See Dianne Esber & Jane Wong, *Discussions in Digital: Influencer Marketing Is Ready for Its Close-Up*, MCKINSEY & CO. (Apr. 15, 2020), <https://www.Mckinsey.Com/Business-Functions/Marketing-And-Sales/Our-Insights/Discussions-In-Digital-Influencer-Marketing-Is-Ready-For-Its-Close-Up> [<https://perma.cc/BJ26-FHDD>].

21. See J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, *Endorsements and Testimonials Guide*, Address at the American Conference Institute’s Regulatory Summit for Advertisers and Marketers (June 25, 2009); *FTC Seeks Public Comment on Its Endorsement Guides*, *supra* note 12.

22. See Giselle Abramovich, *4 Consumer Trends That Are Revolutionizing Content Consumption*, ADOBE BLOG (Sept. 7, 2017), <https://cmo.adobe.com/articles/2017/9/media-and-entertainment-study-on-consumer-behavior-adi-.html#gs.e4h8hd> [<https://perma.cc/FB8C-9J4K?type=image>].

23. See *id.*

24. See *id.*

born. Influencer marketing began to evolve with the advent of social media. Suddenly, people who were “famous for nothing”²⁵ could earn thousands of dollars for posting about products on their social media pages,²⁶ and popular teenage social media influencers are starring in Super Bowl ads.²⁷

These days, companies spend significant percentages of their annual advertising budgets on influencer marketing. Indeed, it is estimated that brands will spend \$15 billion by 2022 on influencer marketing.²⁸ Pre-Pandemic estimates for 2020 forecasted the online advertising market to be upwards of \$2.5 billion on Instagram alone.²⁹ Brands experienced equally impressive results from influencer marketing—one study of European consumers across thirty product areas and more than one hundred brands found that, in 2014, social media recommendations induced an average of 26 percent of all purchases.³⁰ That figure was up 10 percent from the previous year.³¹

As with all types of advertising, the COVID-19 Pandemic has impacted influencer marketing; however, influencer marketing has shown to be one of the more resilient forms of advertising during the Pandemic.³² While influencer marketing spend is predicted to be down

25. See Sheila Marikar, *Top 5 Celebrities Famous for . . . Nothing*, ABC NEWS (June 5, 2009, 7:13 AM), <https://abcnews.go.com/Entertainment/CelebrityCafe/story?id=7762876&page=1> [<https://perma.cc/U4N7-TUNF>].

26. See Seamus Kirst, *The Kardashian’s Social Media Influence*, FORBES (Dec. 17, 2015, 6:15 PM), <https://www.forbes.com/sites/seamuskirst/2015/12/17/the-kardashians-social-media-influence/#2eadcec61f03> [<https://perma.cc/RA3C-QNJ5>]; Erica Gonzales, *Kris Jenner Reveals How Much Her Famous Daughters Get Paid for Sponsored Instagram Posts*, HARPER’S BAZAAR (Apr. 17, 2019, 12:00 AM), <https://www.harpersbazaar.com/celebrity/latest/a27171148/kardashian-family-pay-sponsored-instagram-post/> [<https://perma.cc/3SKU-V9XN>].

27. See Kat Tenbarge, *Inside the Life of 15-Year-Old Charli D’Amelio, the Most Popular Teen on the Internet Who Became the Top TikTok for Her Viral Dances and Hype House Membership*, INSIDER (Mar. 25, 2020, 10:54 AM), <https://www.insider.com/charli-d-amelio-bio-how-old-tiktok-famous-renegade-super-bowl-2020> [<https://perma.cc/QPX2-UTDR>].

28. Audrey Schomer, *Influencer Marketing: State of the Social Media Influencer Market in 2020*, BUS. INSIDER (Dec. 17, 2019, 2:07 PM), <https://www.businessinsider.com/influencer-marketing-report> [<https://perma.cc/ZQP9-YYEG>].

29. Paolo Zialcita, *FTC Issues Rules for Disclosure of Ads by Social Media Influencers*, NPR (Nov. 5, 2019, 4:57 PM), <https://www.npr.org/2019/11/05/776488326/ftc-issues-rules-for-disclosure-of-ads-by-social-media-influencers> [<https://perma.cc/FC7J-VWCJ>].

30. Jacques Bughin, *Getting a Sharper Picture of Social Media’s Influence*, MCKINSEY & CO.: MCKINSEY Q. (July 1, 2015), <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/getting-a-sharper-picture-of-social-medias-influence> [<https://perma.cc/JXZ5-B4FE>].

31. *Id.*

32. Ryan Skinner, *How Has the Pandemic Impacted Influencer Marketing?*, FORRESTER (July 23, 2020), <https://go.forrester.com/blogs/how-has-the-pandemic-impacted-influencer-marketing/> [<https://perma.cc/6F4M-AW2R>]; SHAR VANBOSKIRK, TINA MOFFETT, RICK

by as much as 20 percent from the previous year as marketing budgets are adjusted for changed economics and consumer behavior during a pandemic, many businesses see opportunity in social media marketing.³³ This is especially true as traditional avenues of producing content (TV, print, movies) dry up due to (a) the challenge in developing large-scale productions during a pandemic and (b) consumers being largely confined to their homes.³⁴ During a pandemic, it is much easier and safer for influencers to prepare content in their homes with their smartphones than for a company to attempt to produce a TV commercial with multiple actors and large crews. Additionally, studies show that consumers are spending more time on social media during the Pandemic.³⁵ Because of these factors, social media advertising may end up being the marketing sector least impacted by the Pandemic.³⁶

Influencer marketing is also enticing to companies because social media allows brands to more easily calculate a campaign's return on investment (ROI). Clicks, views, and conversions can be viewed and interpreted in near real time. This data is critical for brands to both understand their customers and develop content and campaigns that are relevant to such customers. If influencers can reach an appropriate balance between paid content and personal content, their income (and influence) will grow with their audience.³⁷ Compared to traditional avenues of paid endorsement work (i.e., becoming a movie star or professional athlete), social media endorsement work has a much lower barrier of entry thanks to free-to-sign-up social media profiles, easy content creation from smart devices, provable ROI and audience, and

PARRISH & BRANDON VERBLOW, FORRESTER, THE 2020 COVID-19 CRISIS WILL STUN US MARKETING 6 (2020).

33. Skinner, *supra* note 32; *see also* Thomas Seal, *Barilla Pays Influencers to Peddle Pasta Because No One's Making TV Ads*, BLOOMBERG (May 29, 2020, 12:00 AM), <https://www.bloomberg.com/news/articles/2020-05-30/barilla-pays-influencers-to-peddle-pasta-because-no-one-s-making-tv-ads> [<https://perma.cc/F5E6-AZJT>].

34. Skinner, *supra* note 32; *see* Seal, *supra* note 33.

35. *See* REED SMITH, AN ANA AND REED SMITH LEGAL GUIDE: THE IMPACT OF COVID-19 ON BRAND ADVERTISING AND MARKETING 9 (2d ed. 2020), <https://www.reedsmith.com/en/perspectives/2020/04/an-ana-and-reed-smith-legal-guide-the-impact-of-covid-19> [<https://perma.cc/BH76-TQGM>].

36. *See* Skinner, *supra* note 32; REED SMITH, *supra* note 35.

37. Sujan Patel, *How You Can Build a Powerful Influencer Marketing Strategy in 2020*, BIGCOMMERCE, <https://www.bigcommerce.com/blog/influencer-marketing/#executive-summary> [<https://perma.cc/JL9G-KRSS>] (last visited Dec. 4, 2020); *18 Types of Social Posts to Keep Your Followers Interested*, INFLUENCER MKTG. HUB (Jan. 11, 2019), <https://influencermarketinghub.com/18-types-of-social-posts-to-keep-your-followers-interested/> [<https://perma.cc/498L-M85P>].

unlimited reach.³⁸ This has provided an avenue for people who are not movie stars or professional athletes to do paid endorsement work with brands.

Influencer marketing eventually found its way to every social media platform, with Facebook-owned Instagram leading the way.³⁹ Even newer platforms, like TikTok, are starting to see more promotional activity from influencers and brands.⁴⁰ Reports estimate that one-third of US social media users ages sixteen to thirty-four, or 25.5 million people, are social media content creators with a following that would allow them to be considered “influencers.”⁴¹ Over 1.5 million of these individuals have already had a paid brand partnership.⁴²

III. CURRENT REGULATION OF INFLUENCER MARKETING

In the early years of social media, influencer marketing was perceived as a win-win for brands and social media users. Brands found new ways to reach consumers and consumers received relevant brand messaging. Additionally, influencers could make income and even become famous in their own right. Eventually, however, the law caught up to social media marketing and, in particular, influencer activity. In the past few years, there have been numerous examples of investigations, warning letters, complaints, and lawsuits based on social media influencer activity.⁴³

38. See Tim Peterson, *The Barrier to Entry Is Zero: Confessions of a Social Marketing Exec on the Crowded Influencer Marketing Market*, DIGIDAY (July 19, 2018), <https://digiday.com/marketing/barrier-entry-zero-confessions-social-marketing-exec-crowded-influencer-marketing-market/> [<https://perma.cc/CR53-RXYD>]; Erika Montgomery, *How to Find and Evaluate Social Media Influencers*, THREE GIRLS MEDIA, INC. (July 19, 2019), <https://www.threegirlsmedia.com/2019/07/19/how-to-find-and-evaluate-social-media-influencers/> [<https://perma.cc/W8AC-TG35>].

39. See Lieber, *supra* note 4; Angela Hausman, *The Rise and Fall of the Social Media Influencer*, MKTG. INSIDER GRP. (Jan. 17, 2019), <https://marketinginsidergroup.com/influencer-marketing/the-rise-and-fall-of-the-social-media-influencer/> [<https://perma.cc/9VBC-JTQX>].

40. See Liz Flora, *TikTok Livestreaming Attracts Beauty Brands*, GLOSSY (June 16, 2020), https://www.glossy.co/beauty/tiktok-livestreaming-attracts-beauty-brands?utm_source=digiday.com&utm_medium=referral&utm_campaign=digidaydis&utm_content=digidayap-explore-more-glossy [<https://perma.cc/8C3V-LWRE>].

41. PSFK & CISCO, CONSUMER 2020: CREATING A NEW GENERATION OF RETAIL AND EXPERIENCE STRATEGIES 6 (2017), <https://www.slideshare.net/PSFK/consumer-2020-77269097> [<https://perma.cc/9DBZ-NRCZ>].

42. *Id.*

43. See, e.g., *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMM'N (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/94JA-T7T9>]; Letter from Mary K. Engle, Assoc. Dir. for Advert. Practices, Fed. Trade Comm'n, on Cole Haan, FTC File No. 142-3041 to Christie Thompson (Mar. 20, 2014) [hereinafter Cole Haan].

Social media, and in particular influencer marketing, has proven difficult to regulate. There is not an individual source of law applicable to influencer marketing, and the existing laws were created long before the advent of today's social media platforms. Brands and their influencers—typically lay individuals without any formal legal training—were suddenly expected to navigate a web of advertising, endorsement, promotion, contract, and intellectual property laws and regulations—many of which do not adequately address the practicalities of social media.⁴⁴ This has been further complicated by the fact that social media is constantly evolving and rules are irregularly enforced. New platforms are frequently introduced while existing platforms introduce novel functionalities, and influencers, brands, and regulators all have to evaluate these changes in real time. For example, as soon as the FTC begins to get comfortable with Instagram, brands start engaging with influencers on TikTok.⁴⁵

Despite the aforementioned challenges, the FTC has been actively cracking down on influencer activity. Recently, the agency has initiated enforcement actions against influencer marketers.⁴⁶ The FTC's enforcement actions against influencer marketing have traditionally analogized paid social media content to “endorsements.”⁴⁷ As such, the FTC primarily uses the 2009 Endorsement Guides as the framework for lawful influencer marketing.⁴⁸ The Endorsement Guides were first issued in 1975 and were applied to endorsements in traditional media.⁴⁹ In 2009, the Endorsement Guides were substantially updated for the internet age to address online reviews and

Letter], https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaan_closingletter.pdf [https://perma.cc/MYN9-QWBN]; Lord & Taylor, LLC, No. C-4576, at *1–3 (F.T.C. May 20, 2016) (complaint); Lesley Fair, *FTC's Teami Case: Spilling the Tea About Influencers and Advertisers*, FED. TRADE COMM'N (Mar. 6, 2020, 11:22 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers> [https://perma.cc/Q422-8CPZ]; *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM'N (Sept. 7, 2017) [hereinafter *CSGO Lotto Owners Settle*], <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [https://perma.cc/7KD6-EYTJ].

44. See *Enforcement*, *supra* note 11; Andrew Contiguglia, *Top 5 Legal Concerns for Influencers on Social Media*, CONTIGUGLIA L. FIRM: BLOG (June 17, 2020), <https://contiguglia.com/blog/legal-concerns-for-influencers-on-social-media/> [https://perma.cc/REL4-DE4G].

45. See, e.g., Flora, *supra* note 40.

46. See Lesley Fair, *Three FTC Actions of Interest to Influencers*, FED. TRADE COMM'N (Sept. 7, 2017, 11:11 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers> [https://perma.cc/BK94-LU5Z].

47. See *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 11.

48. See *id.*

49. Rosch, *supra* note 21.

bloggers.⁵⁰ During the early years of social media influencer marketing, the FTC applied the blogging provisions of the Endorsement Guides to social media.⁵¹ This position was confirmed and bolstered by the FTC's recent 2019 guidance document, which specifically applied the Endorsement Guides to social media influencers and reiterated the need for "clear and conspicuous" disclosures.⁵²

The Endorsement Guides (and other FTC guidance documents on the subject) are not binding law; they are merely guidance to help social marketers avoid violating the FTC's general Section 5 "deceptive practices" authority.⁵³ Thus, violating the Endorsement Guides is not per se illegal, but violations are pursued by the FTC as deceptive practices.⁵⁴ Section 5 of the FTC Act gives the FTC the authority to enforce Congress's prohibition against deceptive business practices.⁵⁵ To show that a defendant has acted with deception in violation of Section 5, the FTC must establish three elements: (1) there was a material representation, omission, or practice; (2) the representation, omission, or practice was likely to mislead consumers; and (3) the consumers were acting reasonably under the circumstances.⁵⁶ The

50. See *FTC Publishes Final Guides Governing Endorsements, Testimonials*, FED. TRADE COMM'N (Oct. 5, 2009), <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials> [<https://perma.cc/B279-DMJW>].

51. See Gregory A. Nylén, *Social Media Influencers as Endorsers: Pitfalls and Best Practices to Avoid the Ire of the FTC*, ORANGE CNTY. LAW., Apr. 2020, at 37, 38.

52. 16 C.F.R. § 255.5 (2020); *FTC Releases Advertising Disclosures Guidance for Online Influencers*, FED. TRADE COMM'N (Nov. 5, 2019), <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers> [<https://perma.cc/9MDU-22RV>]; FED. TRADE COMM'N, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS 2 (2019) [hereinafter DISCLOSURES 101], https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/E3DQ-4ZLZ>].

53. See *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 11. Congress originally created the agency to enforce the antitrust laws through the FTC Act of 1914 but later added consumer protection issues to its portfolio in 1938 when Congress expanded the agency's authority under Section 5 of the FTC Act to prohibit "unfair or deceptive acts or practices." See Robert Freer, Comm'r, Fed. Trade Comm'n, Address Before the Annual Convention of the Proprietary Association: The Wheeler-Lea Act (May 17, 1938); see also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

54. 16 C.F.R. § 255.0 (2020). "Deceptive" practices are defined in the Commission's Policy Statement on Deception as involving a material representation, omission, or practice that is likely to mislead a consumer acting reasonably in the circumstances. Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Hon. John D. Dingell, Chairman, House Comm. on Energy & Com. (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/CZ67-BDPD>]. An act or practice is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

55. See 15 U.S.C. § 45(a)(1)–(2).

56. See, e.g., *FTC v. Verity Int'l, Ltd.*, 124 F. Supp. 2d 193, 200 (S.D.N.Y. 2000).

guidance documents have instructed and governed social media marketing for the last ten years, and the FTC has become adept in applying the guidance documents in enforcement actions targeting the influencer marketing industry.⁵⁷

As violations of the Endorsement Guides are pursued under the FTC's general Section 5 enforcement, the FTC's enforcement attempts typically proceed in three stages: (1) inquiry and investigation; (2) consent order; and (3) if necessary, an administrative or judicial proceeding.⁵⁸ Any FTC investigation originates from a government request, a public complaint, or through the FTC's own monitoring processes.⁵⁹ The FTC may then initiate either an informal inquiry to explore the veracity and severity of the potential infraction, or instead move directly to a formal investigation.⁶⁰ At this stage, the FTC seeks information by issuing informal requests or compulsory process, such as subpoenas and civil investigative demands (CIDs).⁶¹ Target companies may or may not be notified of the FTC's investigation.⁶²

If the FTC concludes that the target company violated certain regulations, it will then move to the second stage. During the second stage, the FTC usually issues written notifications to the company, which include a draft complaint and a proposed consent order.⁶³ The consent order provides the target company with an opportunity to settle the charges before the FTC files the complaint and without an admission of liability.⁶⁴ Settlement terms in the consent order vary from case to case, but they typically include FTC monitoring for up to

57. *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 11; *see, e.g.*, sources cited *supra* note 43.

58. *See FTC Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 9. The FTC can opt to pursue either an administrative adjudication or judicial enforcement when bringing a Section 5 enforcement action. *See* 15 U.S.C. §§ 45(b), 53(a)–(b). Administrative adjudication provides advantages to the FTC and thus “the FTC typically opts for the administrative process, particularly when faced with unique, fact-driven cases.” *See* Timothy E. Deal, Note, *Moving Beyond “Reasonable”: Clarifying the FTC’s Use of Its Unfairness Authority in Data Security Enforcement Actions*, 84 *FORDHAM L. REV.* 2227, 2237 (2016).

59. *See* Mark Eichorn, *If the FTC Comes to Call*, *FED. TRADE COMM’N* (May 20, 2015, 10:51 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2015/05/if-ftc-comes-call> [<https://perma.cc/9UTB-KKF4>].

60. *See id.*

61. *See* 15 U.S.C. § 57b-1(c)(1).

62. *See id.*

63. *See* 16 C.F.R. §§ 2.31–2.34 (2020); *FTC Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 9; *see, e.g.*, *Turn Inc.*, No. 152 3099, at *2–3 (F.T.C. Dec. 20, 2016) (decision and order).

64. *FTC Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 9.

twenty years and a ban on future similar misconduct.⁶⁵ The FTC cannot administratively impose civil penalties for violations of the Endorsement Guides under general Section 5 “deceptive practices” authority but may for violations of consent orders, FTC rules, or court orders.⁶⁶

Judicial and administrative proceedings, the third stage, occur when the company declines to settle the complaint by consent order.⁶⁷ At this point, the FTC may seek injunctions, civil penalties in specific cases, and other damages.⁶⁸ Most enforcement actions for influencer marketing in violation of the Endorsement Guides are resolved by consent order, with the brand, agency, or influencer agreeing to monitoring and compliance without substantial civil or criminal penalties.⁶⁹ For first-time offenders, this typically means that monetary penalties can be avoided.⁷⁰

Under the Endorsement Guides, the FTC takes the position that primary compliance responsibility rests with the brand sponsoring the message or post.⁷¹ It is the brand’s duty to ensure influencers utilize proper notices, despite the fact that the influencer is the one posting the content on his or her personal page.⁷² Brands and influencers often struggle with the Endorsement Guides because the mandates are often at odds with the desires of modern marketing departments and the realities of social media.⁷³ Brands increasingly value authenticity and strive for “grassroots” campaigns.⁷⁴ Under the FTC’s guidelines,

65. See, e.g., *GeoCities*, 127 F.T.C. 94, 123–32 (1999) (decision and order); *BJ’s Wholesale Club, Inc.*, 140 F.T.C. 465, 470–72 (2005) (decision and order); Andrew Serwin, *The Federal Trade Commission and Privacy: Defining Enforcement and Encouraging the Adoption of Best Practices*, 48 SAN DIEGO L. REV. 809, 834 (2011); Deal, *supra* note 58, at 2240; Gerard M. Stegmaier & Wendell Bartnick, *Psychics, Russian Roulette, and Data Security: The FTC’s Hidden Data-Security Requirements*, 20 GEO. MASON L. REV. 673, 690–91 (2013).

66. *Advertisement Endorsements*, *supra* note 9; 15 U.S.C. § 45(m); Stegmaier & Bartnick, *supra* note 65.

67. *FTC Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 9.

68. See 15 U.S.C. § 57b(b); *FTC Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 9.

69. See Laura E. Bladow, Note, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM. & MARY L. REV. 1123, 1153–54, 1159–60 (2018).

70. See Veronica N. Ramirez, Note, *Fashion Statements Turned Endorsements: How FTC Enforcement Could Cripple the Internet’s Trendsetters*, 68 SYRACUSE L. REV. 483, 492 (2018).

71. See 16 C.F.R. § 255.1 (2020).

72. See 16 C.F.R. § 255.5 (2020).

73. See Squire Patton Boggs, *Spreading the Influence: FTC Issues New Guidance for Influencers*, LEXOLOGY: GLOB. BUS. IP & TECH. BLOG (Nov. 18, 2019), <https://www.lexology.com/library/detail.aspx?g=97d0a0bf-f4ec-41fb-95f8-e6487e3c3e5b> [<https://perma.cc/WKN7-WUEJ>].

74. See Pamela N. Danziger, *How Retailers Big and Small Can Activate Grassroots Influencers on Social Media*, FORBES (Mar. 6, 2019, 11:46 AM), <https://www.forbes.com/sites/>

however, influencers must disclose—within the post itself—when they are paid for a post or receive a product for free or at a discounted price, regardless of whether the influencer would have felt the same way if the product was purchased by the individual.⁷⁵ Further, a specific social media platform’s functionality may make appropriate disclosure difficult or impossible. This was evident with Twitter’s character limits—only so much disclosure is possible in Twitter’s original 140-character limit. The FTC reacted to this issue by recommending influencers include #Ad or #Sponsored in the post—much to the disdain of creatives everywhere.⁷⁶ Even these simple recommendations can be difficult in practice, however, as brands must find a way to control their numerous influencers across various platforms, who are sometimes unaware of the FTC’s guidelines or even that they are making an “endorsement.”⁷⁷

This was the case when the FTC admonished Cole Haan, a footwear purveyor, for soliciting Pinterest “endorsements” from the general public without satisfactory disclosures.⁷⁸ Cole Haan ran a promotion on Pinterest in which the contest rules instructed entrants to create Pinterest boards that included images of Cole Haan shoes and used the hashtag “#WanderingSole” in each pin description for a chance to win a \$1,000 shopping spree.⁷⁹ These posts did not come from influencers as the classification is typically understood but rather individual consumers trying to win a contest.⁸⁰ Despite this, the FTC took the position that “participants’ pins featuring Cole Haan products were endorsements of the Cole Haan products, and the fact that the pins were incentivized by the opportunity to win a \$1,000 shopping spree would not reasonably be expected by consumers who saw the pins,” and thus, the posts were all deceptive endorsements.⁸¹

Since this was an issue of first impression for the FTC, the FTC decided not to pursue an enforcement action against Cole Haan but rather stated that it expects “that Cole Haan will take reasonable steps to monitor social media influencers’ compliance with

pamdanziger/2019/03/06/how-retailers-big-and-small-can-activate-grassroots-influencers-on-social-media/#7ae58af96309 [https://perma.cc/ACA3-AW8V] (defining grassroots influencers as “real people sharing their real-world experiences with a retailer or a brand”); Francesca Nicasio, *The Age of Authentic Marketing: A Guide to Gain Consumer Trust*, POWER REVS., <https://www.power-reviews.com/blog/authentic-marketing/> [https://perma.cc/Y5JE-B2W7] (last visited Dec. 6, 2020).

75. See Boggs, *supra* note 73.

76. See *id.*

77. See, e.g., *infra* Part III (discussing the Lord & Taylor campaign).

78. See Cole Haan Letter, *supra* note 43.

79. *Id.*

80. *Id.*

81. *Id.*

the obligation to disclose material connections when endorsing its products” and ultimately “reserve[d] the right to take further action as the public interest may warrant.”⁸²

Similarly, in 2016, the FTC censured clothing retailer Lord & Taylor for paying fifty fashion influencers to post Instagram pictures of themselves wearing the same dress but failing to ensure that the compensation and the resulting “material connection”⁸³ were disclosed to the influencers’ followers.⁸⁴ The campaign was ultimately very successful—the dress sold out on the strength of the campaign’s reach to 11.4 million Instagram users, which, in turn, resulted in over 320,000 unique brand engagements or interactions with consumers and potential consumers.⁸⁵ The FTC was displeased with the lack of disclosures and held Lord & Taylor responsible.⁸⁶ Lord & Taylor ultimately settled the matter, and the FTC issued an enforcement policy statement.⁸⁷ The statement confirmed the FTC’s position that:

an ad’s format is deceptive if it materially misleads consumers about the ad’s commercial nature, including through any implied or express representation that it comes from a party other than the sponsoring advertiser. If the source of advertising content is clear, consumers can make informed decisions about whether to interact with the advertising and the weight to give the information conveyed in the ad.⁸⁸

More recently, the FTC settled another case with Teami, LLC, a purveyor of health- and beauty-focused tea products.⁸⁹ The FTC’s initial complaint alleged that Teami made misleading claims about the weight loss and health benefits of its products, in addition to paying influencers for endorsements that were not properly disclosed.⁹⁰ The Commission had previously demanded Teami’s advertisements maintain disclosures

82. *Id.*

83. DISCLOSURES 101, *supra* note 52 (“A ‘material connection’ to the brand includes a personal, family, or employment relationship or a financial relationship – such as the brand paying you or giving you free or discounted products or services.”).

84. Lord & Taylor, LLC, No. C-4576, at *1–3 (F.T.C. May 20, 2016) (complaint).

85. *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers,”* FED. TRADE COMM’N (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> [<https://perma.cc/MP4S-AM8J>].

86. *See id.*

87. *Id.*

88. *FTC Issues Enforcement Policy Statement Addressing “Native” Advertising and Deceptively Formatted Advertisements,* FED. TRADE COMM’N (Dec. 22, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-issues-enforcement-policy-statement-addressing-native> [<https://perma.cc/TP49-QC2A>].

89. Fair, *supra* note 43.

90. *Id.*; *see also* Complaint for Permanent Injunction and Other Equitable Relief at 17, *FTC v. Teami, LLC*, No. 8:20-cv-00518 (M.D. Fla. Mar. 5, 2020) [hereinafter *Teami Complaint*].

that are “clear and conspicuous.”⁹¹ The FTC maintained that disclosures require unambiguous language that can be easily noticed and understood by consumers.⁹² The FTC also noted a particular characteristic of Instagram: users typically only see the first few lines unless they click “more.”⁹³ To prevent obscuring the disclosures, the FTC required endorsers to disclose any material connection above the “more” link.⁹⁴

The Teami example, in particular, illustrates some of the technical and creative difficulties in complying with the Endorsement Guides. For Teami, disclosure itself was not enough. The disclosure had to be “above the fold” as specifically applied to Instagram posts.⁹⁵ Furthermore, modern social media platforms emphasize video and livestreaming over text. How would this “above the fold” requirement apply to livestreaming? It is difficult to translate the “clear and conspicuous” disclosure requirement from the Endorsement Guides’ blogging examples to modern, video-centric platforms like TikTok and Twitch.⁹⁶ While those platforms offer functionalities like text overlay, which would allow for certain disclosures, the FTC has shown that it takes a very nuanced approach to the “clear and conspicuous” requirements for disclosures, yet it has not provided clear and specific requirements for disclosures in such contexts. What’s more, there has recently been a surge in popularity of content-sharing platforms that require paid registration (e.g., OnlyFans).⁹⁷ These paid or registration-required sites pose additional challenges to FTC investigation and enforcement of endorsement compliance. The FTC’s guidelines fail to provide adequate specificity to account for the intricacies present in contemporary social media channels and related advertising strategies.

91. See Fair, *supra* note 43.

92. *Id.*

93. *Id.*

94. *Id.*; see also Teami Complaint, *supra* note 90, at 13.

95. See Fair, *supra* note 43.

96. See, e.g., 16 C.F.R. § 255.5, ex. 7 (2020). The website influencer examples in the Guidelines primarily cover bloggers. See *id.* § 255.1, ex. 5, § 255.5, ex. 7. In the blogging examples, the FTC simply recommends adding text to the blog post to “clearly and conspicuously disclose” the connection. *Id.*

97. See *How It Works*, ONLYFANS, onlyfans.com/how [https://perma.cc/5535-PEXN] (last visited Dec. 6, 2020); see also Seren Morris, *What Is OnlyFans, Who Uses It and How Does It Work?*, NEWSWEEK (July 23, 2020, 11:47 AM), https://www.newsweek.com/what-who-how-only-fans-social-media-platform-content-creators-1520001 [https://perma.cc/H344-NBUN].

IV. PROPOSED EXPANSION OF REGULATION AND PENALTIES

Despite the difficulties and limitations of the current regulatory framework, its application over the last decade has allowed brands and influencers to anticipate how the rules will be enforced and the potential risks of noncompliance. However, shortly after the ten-year anniversary of the modern Endorsement Guides, the FTC released a proposal to enhance its enforcement and penalty capabilities in connection with influencer marketing.⁹⁸ In February 2020, the FTC requested public comment on proposals to strengthen the FTC's regulation of influencer marketing.⁹⁹ As stated in FTC Commissioner Rohit Chopra's proposal, the FTC is concerned that "[m]isinformation is plaguing the digital economy, and recent no-money, no-fault FTC settlements with well-known retailers and brands to address fake reviews and undisclosed influencer endorsements may be doing little to deter deception."¹⁰⁰

Based on this concern, the FTC is pursuing the ability to seek civil penalties for violations of the FTC's Endorsement Guides.¹⁰¹ Specifically, Commissioner Chopra is considering creating formal rules based on the requirements in the Endorsement Guides, which would provide the FTC with more punitive actions for violations.¹⁰² The FTC is also seeking to specify "the requirement that companies must adhere to in their contractual arrangements with influencers, including through sample terms that companies can include in contracts."¹⁰³

On one hand, the federal government, specifically the FTC and other government agencies, plays an important role in protecting consumers and prohibiting malicious and clearly deceptive marketing in US commerce.¹⁰⁴ But with respect to influencer marketing, Commissioner Chopra is concerned that the nonbinding guidelines do not go far enough to protect consumers and has instead proposed

98. FED. TRADE COMM'N, *supra* note 7, at 3.

99. *Id.*

100. *Id.* at 1.

101. *Id.* at 3.

102. *Id.*

103. *Id.*

104. See *FTC Wins \$5.2 Million Judgment Against Defendants Who Tricked Consumers with Ads for Non-Existent Rental Properties and 'Free' Credit Reports*, FED. TRADE COMM'N (July 5, 2018), <https://www.ftc.gov/news-events/press-releases/2018/07/ftc-wins-52-million-judgment-against-defendants-who-tricked> [<https://perma.cc/LML8-AKNN>]; see also Lesley Fair, *Violating Made in USA Order Lands Filtration Seller in Hot Water*, FED. TRADE COMM'N (Apr. 17, 2020, 11:51 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/04/violating-made-usa-order-lands-filtration-seller-hot-water> [<https://perma.cc/N647-625B>].

harsher penalties under the FTC Act for actual rules violations.¹⁰⁵ Thus, Commissioner Chopra desires to “codify[] elements of the existing endorsement guides into formal rules so that violators can be liable for civil penalties under Section 5(m)(1)(A) and liable for damages under Section 19” instead of relying on the general Section 5 deceptive practices authority, which typically results in settlements and consent orders without admission of liability.¹⁰⁶ Yet, for the reasons discussed in this Article,¹⁰⁷ the FTC’s proposal to move “beyond the issuance of voluntary guidance”¹⁰⁸ to instead issue formal rules and seek civil penalties for violations is unwarranted and may have unintended consequences.

As this Article discusses in Part V, it is more appropriate for the FTC to continue recommending and enforcing best practices through the Endorsement Guides and other guidance documents while minimizing penalties. This approach would allow brands and influencers to continue innovating influencer marketing and increase information and content available to consumers. The FTC’s current enforcement of the Endorsement Guides is sufficiently capable of protecting consumers while allowing the flexibility required for innovative technology like social media.

V. ADEQUATE CONSUMER PROTECTION EXISTS WITHOUT FORMAL RULEMAKING AND CIVIL PENALTIES

The FTC Endorsement Guides call for honest and representative statements that are able to be substantiated while barring deceptive or misleading claims.¹⁰⁹ Specifically, the Endorsement Guides require that:

- (i) endorsements reflect the actual opinions or experiences of the endorser;¹¹⁰
- (ii) endorsements may not contain any representations that would be deceptive, or could not be substantiated, if made directly by the advertiser;¹¹¹
- (iii) an advertisement employing a consumer endorsement on a central or key attribute of a product will be

105. FED. TRADE COMM’N, *supra* note 7, at 3; *see* 15 U.S.C. §§ 45(m)(1)(A), 57b.

106. FED. TRADE COMM’N, *supra* note 7, at 3; *see* 15 U.S.C. §§ 45(m)(1)(A), 57b; *see also* discussion *infra* Parts V, VI.

107. *See* discussion *supra* Part IV; discussion *infra* Part V.

108. FED. TRADE COMM’N, *supra* note 7, at 3.

109. 16 C.F.R. § 255 (2020).

110. *Id.* § 255.1(a).

111. *Id.*

interpreted as representing that the endorser's experience is representative of what consumers will generally achieve;¹¹²

- (iv) advertisements represented as consumer endorsements must cite actual consumers or conspicuously disclose that the persons are not actual consumers;¹¹³
- (v) endorsements must clearly disclose any connection between the endorser and the brand owner "that might materially affect the weight or credibility of the endorsement."¹¹⁴

These requirements may appear straightforward. This was the case when they were applied to traditional media or even bloggers. However, these requirements can be difficult to implement in the context of social media. Specifically, Provision (v), which requires parties to fully disclose their connections, creates complications for many brands and influencers.¹¹⁵ This requirement is the most ambiguous and difficult to understand in the entire social media industry.

Over the last several years, enforcement of Provision (v) has taken several shapes, from the Cole Haan endorsement sweepstakes¹¹⁶ and the Lord & Taylor grassroots campaign¹¹⁷ mentioned in Part III,¹¹⁸ to issues with employees¹¹⁹ and owners¹²⁰ posting about their companies and products without disclosures. The variety in these enforcement actions (all based on the same requirement) illustrates that both brands and the FTC must continually evolve their understanding of this requirement. As technology and consumer behavior change, these enforcements should serve as an example of why rigid laws with harsh penalties would be ineffective in an ever-changing and evolving industry.

112. *Id.* § 255.2(a) (stating that if an advertiser does not have adequate substantiation that the endorser's experience is representative, the advertisement should contain a clear and conspicuous disclosure).

113. *Id.* § 255.2(c).

114. *Id.* § 255.5.

115. *Id.*

116. Cole Haan Letter, *supra* note 43.

117. Lord & Taylor, LLC, No. C-4576, at *3 (F.T.C. May 20, 2016) (complaint).

118. *See* discussion *supra* Part III.

119. *FTC Approves Final Orders Related to False Advertising by Sony Computer Entertainment America and Its Ad Agency Deutsch LA for PS Vita Game Console*, FED. TRADE COMM'N (Mar. 31, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-orders-related-false-advertising-sony-computer> [<https://perma.cc/796Q-HXG4>].

120. *CSGO Lotto Owners Settle*, *supra* note 43.

A. *Social Media's Rapid Evolution Requires a Flexible Approach*

Given the rapid evolution of social media, the flexibility in the current regulatory scheme, along with nominal penalties, is necessary. The FTC addressed this in *The FTC's Endorsement Guides: What People Are Asking* guidance document from 2017.¹²¹ In this document, the FTC attempted to clarify many of the questions that arose as people tried to apply the Endorsement Guides to then-innovative social media platforms like Twitter and Snapchat.¹²² The FTC clarified that influencers only need to sacrifice three characters (#ad) on Twitter and that users need to “superimpose a disclosure on Snapchat” while considering “how well [the disclosure] contrasts against the image.”¹²³ These answers are sufficient (to some extent) for platforms that existed in 2017, but what about when new platforms arrive? Who is responsible for the appropriate disclosures in a TikTok response video (known as a “duet”)?¹²⁴ What about OnlyFans or augmented reality platforms? It is difficult to predict where social media will go in the future, which emphasizes the need for flexibility in the rules governing this space.

There is also an element of self-regulation already built into social media marketing, as influencers will often hear from their followers if they perceive the influencer to be pushing too much paid and branded content.¹²⁵ Considering the “harm” to consumers (or lack thereof) for failure to disclose the material connection, being critiqued by your followers seems like a sufficient punishment for most cases. Consider the Lord & Taylor case cited by the FTC as a warranted use of enforcement power.¹²⁶ As previously discussed, the retailer paid fifty influencers to wear the same dress and post a picture with the company's handle.¹²⁷ The FTC charged Lord & Taylor with deceiving the public by failing to disclose that the company compensated the influencers for those posts.¹²⁸ The FTC then settled the case for “no customer refunds, no forfeiture of ill-gotten gains, no notice to

121. *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 11.

122. *Id.*

123. *Id.*

124. Melanie Weir, *How to Duet on TikTok and Record a Video Alongside Someone Else's*, BUS. INSIDER (June 11, 2020, 9:10 PM), <https://www.businessinsider.com/how-to-duet-on-tiktok> [<https://perma.cc/Z2JN-MRTE>] (“When TikTok first came out, one of its biggest features was duets. These gave you the ability to record your own video alongside someone else's.”).

125. Salma El-Wardany, *Influencers Aren't the Problem — They're Just Trying to Make It in a Broken System*, BUZZFEED NEWS (Jan. 22, 2019, 4:16 PM), <https://www.buzzfeednews.com/article/salmaelwardany/dont-hate-the-influencers-hate-the-game> [<https://perma.cc/73WK-NFRD>].

126. FED. TRADE COMM'N, *supra* note 7, at 3.

127. *Id.* at 2.

128. *Id.* at 3.

consumers, no deletion of wrongfully obtained personal data, and no findings or admission of liability.”¹²⁹

What was the harm here to consumers—that they bought a dress they might not have otherwise purchased? If that was the case, would a disclosure have changed their minds? If the product itself was defective for some reason, should that liability rest with the manufacturer or retailer rather than with the person that made a post about it online? If the pictures of the dress had been viewed in the Lord & Taylor catalogue or during a commercial rather than on Instagram, would the purchasers have made a different decision? The influencers were clearly wearing the dress in the posts and complied with all of the other requirements in the Endorsement Guides but just not the final endorsement connection disclosure requirement under 16 C.F.R. § 255.5.¹³⁰ Considering the lack of actual injury to customers by the influencer—financial or otherwise—the brand’s publicity damage paired with FTC threats is sufficient recourse. Because of the absence of actual injury to consumers, significant monetary liability imposed by the FTC was unnecessary.¹³¹

Commissioner Chopra argues that enhanced enforcement and penalties are necessary because “when companies launder advertising by paying someone for a seemingly authentic endorsement or review, this is illegal payola.”¹³² However, Commissioner Chopra’s statement also admits that “[w]hen individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern.”¹³³ This dichotomy illustrates the lack of uniformity in assessing influencer behavior and the difficulty in assessing blame. Accordingly, the existing light-handed framework is a more appropriate way to address this kind of conduct than harsh civil penalties.

B. Consumer Perception Has Evolved and Paid Content on Social Media Is Readily Recognized

As social media platforms gained prominence, users were not always able to tell whether an influencer was compensated for a post or whether it was an organic endorsement.¹³⁴ However, consumers have

129. *Id.*

130. *Id.* at 2.

131. *Id.* at 3.

132. *Id.* at 2.

133. *Id.*

134. *Internet Experts Who Attract Paid Advertisers Run the Risk of Alienating ‘Followers,’* JOHNS HOPKINS UNIV. (Apr. 4, 2019), <https://carey.jhu.edu/articles/research/internet-experts-who-attract-paid-advertisers-run-risk-alienating-followers> [<https://perma.cc/24JX-X8GV>].

now lived with Facebook, Twitter, and Instagram for nearly a decade.¹³⁵ Today, social media users are largely perceptive digital consumers who are easily able to differentiate “between an advert, a personal recommendation, and an advert masked under a personal recommendation.”¹³⁶ This suggests that consumers may not be as misled by influencer marketing as the FTC believes.

Influencers who (1) use the products they promote; (2) provide only truthful claims that are inherently free of deception; and (3) disclose material facts around their use of the product (even if there is not a clear Provision (v) connection disclosure) are arguably not harming consumers with posts about the product. There is ample data showing that the presence or absence of a connection between the influencer and the brand does not materially affect the weight or credibility of the endorsement and, therefore, does not need to be disclosed.¹³⁷ Social media users already understand trends of social media marketing and can recognize an influencer’s post when they see one.¹³⁸ Studies have shown that a material connection disclosure neither positively nor negatively impacts a consumer’s perception of a brand.¹³⁹ Furthermore, brands that work with more recognized “mega-influencers” (i.e., those with 10 million or more followers) average reduced rates of social engagement (likes and comments on their posts).¹⁴⁰ Experts estimate that the

135. See *Facebook Launches*, HIST. (Oct. 24, 2020), <https://www.history.com/this-day-in-history/facebook-launches-mark-zuckerberg> [<https://perma.cc/RRD8-7JDF>]; *Twitter Launches*, HIST., <https://www.history.com/this-day-in-history/twitter-launches> [<https://perma.cc/DJ8G-95SQ>] (last updated July 14, 2020); Dan Blystone, *The Story of Instagram: The Rise of the #1 Photo-Sharing Application*, INVESTOPEDIA (June 6, 2020), <https://www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp> [<https://perma.cc/3UP4-KLZZ>].

136. *80 Influencer Marketing Statistics for 2020*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/influencer-marketing-statistics/> [<https://perma.cc/9VWA-DK9B>] (last updated June 15, 2020).

137. See, e.g., *id.*; Ana Gotter, *Influencer Marketing in 2020: 5 Guidelines for Maximizing the Results of Working with Influencers*, ADESPRESSO (Feb. 11, 2020), <https://adespresso.com/blog/influencer-marketing-guidelines/> [<https://perma.cc/F29M-3ZVQ>]; Robert Williams, *Social Media Users Trust Fellow Consumers More than Brands, Study Finds*, MOBILE MARKETER (Apr. 18, 2019), <https://www.mobilemarketer.com/news/social-media-users-trust-fellow-consumers-more-than-brands-study-finds/552994/> [<https://perma.cc/JS7S-3RMS>].

138. See *80 Influencer Marketing Statistics for 2020*, *supra* note 136.

139. Alice Audrezet & Karine Charry, *Do Influencers Need to Tell Audiences They’re Getting Paid?*, HARV. BUS. REV. (Aug. 29, 2019), <https://hbr.org/2019/08/do-influencers-need-to-tell-audiences-theyre-getting-paid> [<https://perma.cc/56SV-RWEM>].

140. *Micro Influencer Marketing 101: Why Bigger Isn’t Always Better*, SWAY GRP, <https://blog.swaygroup.com/micro-influencer> [<https://perma.cc/2L9C-FETZ>] (last visited Dec. 6, 2020); *80 Influencer Marketing Statistics for 2020*, *supra* note 136; Audrezet & Charry, *supra* note 139.

“mega-influencers” get “tuned out the same way we skip commercials or other traditional advertising.”¹⁴¹ This evidence illustrates that the “material connection” between the brand and influencer is unlikely to materially affect the weight of an endorsement in the minds of consumers, and even if it does have an effect, it is likely to be negative.

In fact, creating laws that come with steep civil penalties for marketing activities in the ever-changing social media ecosystem could be interpreted as a direct violation of the FTC’s mission to act “without unduly burdening legitimate business activity.”¹⁴² Some studies have found that influencer marketing is actually beneficial to consumers, with one citing that “over 50% of [social media] users prefer getting product information from influencers and other users rather than straight from brands or advertising.”¹⁴³ There is also evidence that “regulation is bad for followers, who suffer from the decline in the quality of advice.¹⁴⁴ The regulation is bad for marketers, who observe lower levels of engagement with their paid content, and it is bad for influencers, who receive lower pay from marketers.”¹⁴⁵

Today’s consumers are accustomed to and prepared for paid content from many sources, even if disclosures are not present. For example, consumers frequently see paid “product placement,” the act of embedding and displaying products or brands, in television and movies.¹⁴⁶ The FTC has taken the position that product placement in entertainment content is different from sponsored content and “doesn’t require a disclosure that the advertiser paid for the placement.”¹⁴⁷ In 2015, a study reported that an estimated 85 percent of people watching a television show notice and recognize product placement.¹⁴⁸ As with product placement in movies or television, the vast majority of social media users also understand when a product is being endorsed and only follow a specific influencer because they “‘just like looking at their posts’

141. *Micro Influencer Marketing 101: Why Bigger Isn’t Always Better*, *supra* note 140.

142. *Cf. About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/E9MJ-JCBL>] (last visited Dec. 6, 2020) (stating that the FTC’s mission is to prevent “anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity”).

143. Gotter, *supra* note 137.

144. *Internet Experts Who Attract Paid Advertisers Run the Risk of Alienating ‘Followers,’* *supra* note 134.

145. *Id.*

146. Will Kenton, *Product Placement*, INVESTOPEDIA (July 4, 2020), <https://www.investopedia.com/terms/p/product-placement.asp> [<https://perma.cc/CMR7-NQ33>].

147. *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 11.

148. Faith Saucier, *Product Placement: Do You Believe in Magic?*, PLATFORM MAG. (Mar. 6, 2020, 5:48 PM), <https://platformmagazine.org/2020/03/06/product-placement-do-you-believe-in-magic/> [<https://perma.cc/75XS-RZ9C>].

while only 29% said they have made a purchase based on an influencer post.”¹⁴⁹ Does the FTC really believe that consumers are capable of identifying product placement in film and television but not on social media? Is Instagram not largely “entertainment content” like film and television?¹⁵⁰ The amount of time users are spending on such apps would suggest that it is entertainment content.¹⁵¹ It would be inconsistent to treat product placement in movies and television differently from an influencer’s creative and heavily curated Instagram page. In fact, the FTC partially makes the argument against forced disclosure under this analogy in the agency’s provided Example 2 to Section 255.5 of the Endorsement Guides.¹⁵²

Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star’s compensation for the commercial is a \$1 million cash payment or a royalty for each product sold by the advertiser during the next year, *no disclosure is required because such payments likely are ordinarily expected by viewers.*¹⁵³

As traditional modes of advertising lose effectiveness, paid social media content is becoming the new norm. Consumers know and expect to see these posts. In the words of the FTC example above, influencers’ endorsements are “ordinarily expected by viewers.”¹⁵⁴

Furthermore, even if consumers do not initially recognize paid content, there are many sources of product reviews and product information freely available online from which consumers can quickly and easily get a second opinion before any purchase.¹⁵⁵ In these scenarios, consumers not only recognize paid content but there is also evidence that the required disclosures are beginning to disrupt the social media experience, causing what has been called “influencer

149. Williams, *supra* note 137; see *80 Influencer Marketing Statistics for 2020*, *supra* note 136.

150. Cf. *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 11 (explaining that product placement in “entertainment content,” like film and television, does not require a disclosure that an advertiser paid for the placement).

151. See, e.g., Kevin Westcott, Jeff Loucks, Shashank Srivastava & David Ciampa, *Digital Media Segments: Looking Beyond Generations*, DELOITTE INSIGHTS (Oct. 5, 2018), <https://www2.deloitte.com/us/en/insights/industry/telecommunications/media-consumption-behavior-across-generations.html> [<https://perma.cc/J7WW-44KT>].

152. 16 CFR § 255, ex. 2 (2020).

153. *Id.* (emphasis added).

154. *Id.*; see also Gotter, *supra* note 137; Williams, *supra* note 137; *80 Influencer Marketing Statistics for 2020*, *supra* note 136.

155. See, e.g., Lindsay Kolowich Cox, *31 Customer Review Sites for Collecting Business & Product Reviews*, HUBSPOT (Aug. 26, 2020, 11:45 AM), <https://blog.hubspot.com/service/customer-review-sites> [<https://perma.cc/G3H2-ZW7R>].

fatigue.”¹⁵⁶ This fatigue erodes the trust that consumers have in influencers. In 2019, it was reported that “only 4% of people believe that information shared by influencers on social media is true.”¹⁵⁷ Not only does this demonstrate that consumers are keenly aware that social media includes paid content but it also shows that consumers are not substantially influenced by influencer posts. Instead, the required disclosures and disclaimers have disrupted the social media experience for many users. Civil liabilities and additional mandated disclosures under Section 255.5 would likely exacerbate influencer fatigue. The Harvard Business Review has expressly stated that “in any particular year, disclosure makes almost no difference to the impact of the influencer’s recommendation on the purchase decision.”¹⁵⁸ In essence, most social media users are going to believe what they want to believe, and the presence or absence of a mandated disclosure likely does little to change this fact.

This evidence refutes some of the primary reasoning in the Commissioner’s statement for harsher penalties.¹⁵⁹ In the February 12, 2020, statement, Commissioner Chopra argues for increased accountability by stating that “[f]ake accounts, fake likes, fake followers, and fake reviews are now polluting the digital economy, *making it difficult for families and small businesses looking for truthful information.*”¹⁶⁰ But if influencers genuinely like the products they are paid to post and modern consumers are not particularly swayed by influencer content, can easily compare reviews and obtain second opinions online, and buy things they think they will like, does the absence of a material connection disclosure really “pollute the digital economy?” With mounting evidence showing the limited effect influencer disclosures have on consumer decision-making, along with the growing expectation of social media users that influencer posts are

156. See Brian Casey, *Is ‘Influencer Fatigue’ Signaling the End of Influencer Marketing?*, IMPACT (Jan. 30, 2020), <https://www.impactbnd.com/blog/influencer-fatigue-and-influencer-marketing> [<https://perma.cc/E395-7MUL>] (defining “influencer fatigue” as consumers that “are getting worn down by the number of ads and sponsored posts”).

157. *Id.*

158. Audrezet & Charry, *supra* note 139.

159. See FED. TRADE COMM’N, *supra* note 7, at 2 (“If these companies are also pressuring influencers to post in ways that disguise that their review or endorsement is paid advertising, those advertisers especially need to be held accountable.”).

160. *Id.* (emphasis added).

sponsored, the FTC's proposal for enhanced enforcement and penalties is both belated and unnecessary.¹⁶¹

VI. CONCLUSION

Social media influencer advertising provides a new means for brands to reach consumers in the modern era. As consumers become more aware of this practice, some might be annoyed by paid content while others may appreciate the targeted recommendations. Yet, very few consumers are tricked or manipulated by such content and even fewer are substantially damaged by it.

While the existing regulatory framework for influencer marketing is not perfect, its light-handed, flexible approach allows for brands and influencers to participate without fear of substantial penalties. If the FTC enhances the potential penalties, as proposed in Commissioner Chopra's February 12, 2020, statement, the risks will substantially outweigh the rewards and this novel and, at times, useful form of advertising may cease to exist. Influencers will slowly become extinct due to burdensome regulatory schemes and increased liability. As traditional forms of advertising decline, consumers will suffer from a lack of brand and product knowledge, brands will suffer from a lack of exposure, and social media users will lose a valuable revenue stream. The FTC occasionally reevaluates its rules and considers revising them to apply to the modern construct.¹⁶² Here, perhaps a reevaluation is appropriate, but the goal should be to simplify the regulations and ease potential penalties rather than to enhance enforcement as was recently proposed by the FTC.

161. See Robert Williams, *Study: 27% of Social Media Users View Ads More Negatively*, MOBILE MARKETER (Apr. 5, 2018), <https://www.mobilemarketer.com/news/study-27-of-social-media-users-view-ads-more-negatively/520656/> [<https://perma.cc/5ZVP-2GCB>]; Casey, *supra* note 156; Williams, *supra* note 137.

162. See, e.g., *Retrospective Review of FTC Rules and Guides*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides> [<https://perma.cc/4ATX-2JYY>] (last visited Dec. 6, 2020); *The FTC's Regulatory Reform Program: Twenty Years of Systematic Retrospective Rule Reviews & New Prospective Initiatives to Increase Public Participation and Reduce Burdens on Business Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 112th Cong. 1 (2011) (statement of the Federal Trade Commission).