

WHEN #AD IS #BAD: WHY THE FTC MUST REFORM ITS ENFORCEMENT OF DISCLOSURE POLICY IN THE DIGITAL AGE

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I. INTRODUCTION

You're on your fifth daily scroll through your Facebook newsfeed when a BuzzFeed¹ article suddenly catches your eye. Underneath a photo of some colorful, minimalistic gadgets reads: "29 Cheap Things That'll Make You Look Fancier Than You Really Are."² Intrigued, you click the article, which is organized just like any other BuzzFeed article, listing the novelty items and tools with photos and witty captions in an easy-to-read format. There are links to purchase underneath, and a short, one-line disclaimer at the bottom of the page that this article was sponsored by Amazon.

During your lunch hour, you check your Instagram account, thumbing through your newsfeed mindlessly when you come across your favorite television personality's latest post. She is holding a small grey package with bright pink lettering that reads "Tummy Tea", and gushes about the tea's anti-inflammatory and anti-bloating benefits. At the end of her caption, she hashtags "#ad."

Without a doubt, social media is an established fixture of today's culture, and it is only gaining credibility as a powerful marketing tool. More and more businesses are realizing their potential for reaching new consumers in unprecedented ways; for example, in 2014, 83% of Fortune 500 companies maintained Twitter business accounts and 80% maintained Facebook business profiles.³ Additionally, using social

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¹ BuzzFeed is a popular digital media company that delivers news and entertainment to a global audience. *About BuzzFeed*, BUZZFEED, <https://www.buzzfeed.com/about> (last visited Jan. 7, 2019).

² Emma McAnaw, *29 Cheap Things That'll Make You Look Fancier Than You Really Are*, BUZZFEED (Oct. 16, 2018), <https://www.buzzfeed.com/emmamcanaw/cheap-things-thatll-make-you-look-fancier-than-you> [<https://perma.cc/JM3J-AZMD>].

³ Hannah L. Cook, *#Liability: Avoiding the Lanham Act and the Right of Publicity on Social Media*, 83 U. CHI. L. REV. 457, 458 (2016) (citing Nora Ganim Barnes and Ava M. Lescault, *The 2014 Fortune 500 and Social Media: LinkedIn Dominates as Use of Newer Tools Explodes*, UMASS DARTMOUTH,

media as an advertising tool can be a smart, cost-effective business choice as just a single post can be deceptively powerful and far-reaching, especially with celebrity endorsements.⁴ For example, Samsung was mentioned nearly nine hundred times a minute on social media, with nearly three million retweets and millions of views within the first day, after a 2014 Oscars selfie with Ellen DeGeneres, Meryl Streep, Bradley Cooper, and Jennifer Lawrence went viral.⁵ However, social media as a marketing tool is beneficial for the same reason as it is problematic. Businesses and public figures alike have recently come under fire for deceptive marketing, taking advantage of the potential to “piggyback” on the power of influencers with established social media followings and personal brands as a more organic way to reach an audience.⁶ The Ellen DeGeneres’ viral selfie phenomenon was rather suspect for that very reason: when DeGeneres posted the spur-of-the-moment selfie to her personal Twitter account, she did not mention Samsung at all, nor did she disclose whether there was any sponsorship deal,⁷ and Samsung claims that the picture was unplanned.⁸ Some advertising experts claim that the timing and circumstances were impeccable, almost too good to be true.⁹ Yet, without any certain sign that Samsung paid DeGeneres for the selfie, or even that they merely gifted her the phone with no strings attached, it is nearly impossible to fault either party.

Thus, the organic nature of social media marketing creates a grey area of enforcement for the Federal Trade Commission (FTC): how can the FTC enforce disclosure laws when businesses are not up front with their sponsorships? Should the FTC’s policy be more geared towards educating businesses and influencers on their obligations, or should

<https://www.umassd.edu/cmr/social-media-research/2014-fortune-500> (last visited Apr. 20, 2019) [<http://perma.cc/LYR5-FNPT>].

⁴ *Id.* at 458.

⁵ *Id.* at 459.

⁶ Organic, as compared to more “in-your-face” forms of advertising such as TV commercials and billboards.

⁷ Beth Snyder Bulik, *Ellen DeGeneres’ Samsung Selfie Ups Social-Marketing Game*, AD AGE (Mar. 5, 2014), <https://adage.com/article/media/ellen-degeneres-samsung-selfie-ups-social-marketing-game/291989> [<https://perma.cc/WU59-UKXP>].

⁸ *Id.* (“While we were a sponsor of the Oscars and had an integration with ABC, we were delighted to see Ellen organically incorporate the device into the selfie moment that had everyone talking. A great surprise for everyone, she captured something that nobody expected.”).

⁹ *Id.* (“It was absolutely no fluke,” said Josh Feldmeth, CEO of Interbrand New York, Toronto, and San Francisco. “The conditions were perfectly cultivated for that to occur . . . it was not by chance.”).

the FTC increase the penalties to coerce businesses and influencers into compliance? Is it possible for the FTC to strike a balance between effective advertising and adequate consumer disclosure?

In Part II, this article will briefly cover the history of FTC laws regarding disclosure in advertising, starting from the television era to the Internet-dominated era of today. Part III will cover the rise of social media as a nontraditional form of marketing. It will set out how social media and the internet differ from conventional forms of media in terms of advertising. Part IV will take a look into some recent clashes between disclosure law and influencers, highlighting how FTC advertising laws have struggled to keep up with the rapidly evolving social media world. Additionally, Part IV will illustrate the current inadequacy of enforcement of disclosure laws and will set out why the FTC's method of addressing these issues has been unsatisfactory. In response, Part V will propose a three-pronged solution, requiring the FTC to have a heavier hand in regulating advertisement through education and enforcing punishments and legal remedies. The ultimate solution will require the FTC to return to its original roots of protecting the consumer above all, as this Article will conclude that there is no way to truly strike an equitable balance between effective, organic marketing and fair consumer disclosure.

II. LEGAL BACKGROUND: A BRIEF HISTORY OF FTC DISCLOSURE LAW

In 1914, Congress passed the Federal Trade Commission Act (FTCA) and established the FTC, whose mission is currently listed as “[p]rotecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”¹⁰ The FTC's power to regulate advertising stems from Section 5 of the FTCA, which after the Wheeler-Lea Act's amendment in 1938,¹¹ prohibits unfair methods of competition and unfair or deceptive practices in or affecting commerce.¹² While this seems simple enough on its face, the combination of the agency's broad authority and vagueness in defining the parameters of unfair practices has led to enforcement issues and

¹⁰ *About the FTC*, FTC, <https://www.ftc.gov/about-ftc> (last visited Nov. 27, 2018).

¹¹ Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938) (current version at 15 U.S.C. § 45(a)(1) (2012)).

¹² *Id.*

confusion amongst businesses and influencers.¹³ For example, influencers will often use hashtags like “#ad,” “sponsored,” or “sp,” seemingly straightforward indicators of a paid advertisement, thinking that they have sufficiently disclosed the material relation between the influencer and the sponsoring company to their audience. However, the FTC warned that even this may not always be enough if the consumer does not notice or understand the hashtag.¹⁴ Despite this warning, most influencers are not aware that their disclosure is insufficient, as these hashtags have continued to rise in popularity. This can be attributed, in fair part, to the substantial discretion granted to the FTC from both Congress and the courts.¹⁵

A. Congressional Deference

Congress passed the FTCA with an intentionally vaguely-worded Section 5, providing that “unfair methods of competition . . . are hereby declared unlawful.”¹⁶ Recognizing that fairness was a highly subjective term defined by values that differ from person to person, Congress purposely left the term undefined and provided no meaningful guidance as to how to interpret what “unfairness” encompassed.¹⁷ After Congress passed the 1982 Export Trading Company

¹³ See *Internet Law — Advertising and Consumer Protection — FTC Extends Endorsement and Testimonial Guides to Cover Bloggers*. — 74 *Fed. Reg.* 53,124 (Oct. 15, 2009) (to be codified at 16 *C.F.R.* Pt. 255), 123 *HARV. L. REV.* 1540, 1542 (2010) (“Bloggers expressed particular concern that the rules were overbroad, exceedingly vague . . .”); see also *id.* at 1542 n.25.

¹⁴ *FTC Cracking Down on Social Influencer’s Labeling of Paid Promotions*, AD AGE (Aug. 5, 2016) [hereinafter *FTC Cracking Down*], <https://adage.com/article/digital/ftc-cracking-social-influencers-labeling-promotions/305345> [<https://perma.cc/7GKG-979G>].

¹⁵ Candace Lance Oxendale, Comment, *The FTC and Deceptive Trade Practices: A Reasonable Standard?*, 35 *EMORY L.J.* 683, 685 (1986).

¹⁶ Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (current version at 15 U.S.C. § 45 (2012)).

¹⁷ Alexander Simonson, *Unfair Advertising and the FTC: Structural Evolution of the Law and Implications for Marketing and Public Policy*, 14 *J. PUB. POL’Y & MKTG.* 321 (1995). The 1914 House Conference Report stated:

[I]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin all over again. If Congress were to adapt the method of definition, it would undertake an endless task.

Act,¹⁸ which expanded Section 5 to include prohibition of “unfair and deceptive acts or practices in or affecting commerce,”¹⁹ it declined to define another key word, this time being “deception.”²⁰ Despite a two-commissioner minority suggesting a statutory definition, Congress opted instead to have the FTC draft a deception policy statement, again avoiding the responsibility of defining another key term.²¹ In addition to keeping statutory language vague, the government also encouraged the FTC’s broad range of power to expand by passing legislation that would grant it new enforcement abilities. For example, Congress delegated the agency rulemaking authority in 1975 in response to concerns regarding the potential harm of television advertisements aimed at children²² and passed the FTCA Amendments of 1994, which allowed the FTC “full reign to uncover and regulate advertising in the marketplace,” provided that the FTC has “reason to believe that unfair or deceptive . . . are prevalent.”²³

B. *Judicial Deference*

Courts, on the other hand, were slower to pick up on the broadening of the FTC’s discretion, but eventually closely aligned with Congress’ mentality on the issue. During the early years of the FTC’s inception, the Court mainly focused on the issue of what constituted “unfair methods of competition.”²⁴ In the first FTC case to be heard by the Supreme Court of the United States, the Court held in *FTC v. Gratz* that the FTC’s discretion was to be limited to defining “unfair methods of competition” only in practices that violated “the letter of established legal principles,” and that moral considerations of “deception, bad faith, fraud, or oppression” were not to be included in its definition.²⁵ Citing the language of the 1914 FTCA,²⁶ the Supreme Court found that because “unfair methods of competition” was not defined, the power to determine what was included in those parameters

¹⁸ 15 U.S.C. §§ 4001–4053 (2012).

¹⁹ 15 U.S.C. § 45(a)(1) (2012).

²⁰ Oxendale, *supra* note 15, at 683.

²¹ *Id.* at 684 n.3.

²² *FTC Cracking Down*, *supra* note 14.

²³ Simonson, *supra* note 17, at 322.

²⁴ *See* *FTC v. Gratz*, 253 U.S. 421 (1920).

²⁵ James A. Carney, *Section 5 of the Federal Trade Commission Act - Unfairness to Consumers*, 1972 WIS. L. REV. 1071, 1073 (1972) (citing *Gratz*, 253 U.S. at 427).

²⁶ 15 U.S.C. § 45 (2012)

. Section 5 of the FTCA provides that “[u]nfair methods of competition in . . . commerce . . . are hereby declared unlawful.” § 45(a)(1).

was reserved for the Court.²⁷ However, fourteen years later, the Court reexamined the FTC's discretionary power, suggesting in its *FTC v. R.F. Keppel & Bros.* decision that the FTC's power to determine "unfair methods of competition" went beyond established legal principles.²⁸ Soon after, the passage of the Wheeler-Lea Act's amendment to Section 5, with its overall intention of making "the consumer, who may be injured by unfair trade practices, of equal concern before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor,"²⁹ ultimately settled the issue of competitive impact and shifted the Court's focus onto how to define the scope of the FTC's discretion.³⁰ After the amendment, the Court gave the Act's legislative history considerable weight, recognizing Congress' intention in avoiding specific language to allow the FTC substantial "flexibility to reach out and control with abusive practices which might develop at later times or which might inadvertently have been omitted from a more rigid definition."³¹ In contrast to the Court's opinion in *Gratz* which strictly limited the FTC's discretion to the letter of the law, the Court's opinion in *Sperry* reflected the new judicial deference to the FTC's expertise as a matter of public policy; the FTC, "like a court of equity, [could consider] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."³²

C. Implications for the FTC

With substantial discretion granted from both Congress and the courts, the FTC was largely free to take the actions it deemed necessary in promoting its policies and achieving its goals regarding consumer protection.³³ The parameters of enforcement have since largely been defined by the FTC's decisions, whether through policy statements and guides³⁴ or through their choice in which cases should be brought and how violations should be dealt with.³⁵ However, despite being granted

²⁷ *Gratz*, 253 U.S. at 427.

²⁸ *Carney*, *supra* note 25, at 1077 (citing *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304 (1934)).

²⁹ *Id.* at 1078 (citing H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937)).

³⁰ *Id.* at 1074.

³¹ *Id.* at 1082 (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972)).

³² *Simonson*, *supra* note 17, at 322 (citing *Sperry*, 405 U.S. at 244).

³³ *Oxendale*, *supra* note 15, at 685.

³⁴ *See, e.g., Guidance*, FTC, <https://www.ftc.gov/tips-advice/business-center/guidance> (last visited Feb. 14, 2019).

³⁵ *Oxendale*, *supra* note 15, at 685.

broad discretion and judicial deference, the FTC did not have any substantial enforcement powers under Section 5, so its means of carrying out its policies were limited to injunctions and civil penalties.³⁶ Furthermore, because Congress and the courts delegated most of the enforcement and policymaking power to the FTC, the FTC was essentially singlehandedly charged with that huge burden.³⁷

III. SOCIAL MEDIA'S CLAIM TO FAME

A. *History of Social Media*

Fast forward to 2009. The Internet had been in mainstream existence for approximately twenty years, starting with the rise in popularity of personal desktop computers³⁸ and electronic mail³⁹ in the 1980's and extending to the birth of the World Wide Web in the 1990's.⁴⁰ The extent of online advertising up until this time was mainly confined to display and search engine advertisements, or in other words, the use of website space that was specifically designated for advertising.⁴¹ However, the manner in which the average consumer engaged with the Internet was forever changed when Web 2.0 applications and user generated content, including what we consider modern-day social media websites such as Facebook and Youtube, emerged in 2005.

Social media revolutionized digital interaction over the World Wide Web, fostering ongoing discussions between content creators and their audience that closely resembled real life dialogue, thereby

³⁶ *Id.* at 685 n.7 (citing 5 U.S.C. §§ 45(m), 53(a) (2012)).

³⁷ See discussion *supra* Part II.A–B.

³⁸ Martin Campbell-Kelly & Daniel D. Garcia-Swartz, *The History of the Internet: The Missing Narratives*, 28 J. INFO. TECH. 18, 25 (2013).

³⁹ *Id.* at 27.

⁴⁰ *Id.* at 30. For the purposes of this article, it is assumed that the average person's first point of contact with the Internet was through desktop personal computers, which were invented in the 1980's, and through e-mail providers and web browsers, the first of which appeared in the 90's (AOL and MOSAIC, respectively). See generally *Id.*

⁴¹ David S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, 23 J. ECON. PERSP. 37, 38–39 (2009). Display advertisements are defined as “a type of advertising that typically contains text (i.e., copy), logos, photographs or other images, location maps, and similar items,” and search engine marketing “involves the promotion of websites by increasing their visibility in search engine results pages (SERPs) through optimization and advertising.” Masoud Nosrati et al., *Internet Marketing or Modern Advertising! How? Why?*, 2 INT'L J. ECON., MGMT. & SOC. SCI. 56, 57 (2013).

allowing for greater relationship-building potential than traditional websites.⁴² Through a post, like, share, comment, tweet, or follow,⁴³ users could interact with their social network and receive reciprocating responses, creating the emotional, intuitive experience that can satisfy the desire to find useful information or to do or share something with others.⁴⁴ This almost continuous connectivity is called engagement, and it is what advertisers look to capitalize on.⁴⁵

B. Social Media as an Advertising Channel

Companies immediately harnessed this immense potential; between 2007 and 2009, social network advertising spending shot up 165.8%, from \$884 million to \$2.34 billion.⁴⁶ Recognizing the ability to utilize the tremendous database of demographic information gathered from user profiles in more efficient and accurate ad targeting, companies expanded their toolkit of advertising methods to include display ads, profile maintenance, and branded applications and widgets.⁴⁷

Social media platforms, however, not only allowed advertisers to have a further yet more targeted reach, but also offered new ways to engage with consumers. Companies discovered that creating corporate social media accounts to promote their own content could build brand loyalty among consumers.⁴⁸ While they may aim to advertise new products or promotions, corporate social media accounts were just as likely to share a heartwarming story about a dedicated employee or a “happy holidays” status update as they were to share a sale on

⁴² Irene J. Dickey & William F. Lewis, *The Evolution (Revolution) of Social Media and Social Networking as a Necessary Topic in the Marketing Curriculum: A Case for Integrating Social Media into Marketing Classes*, U. DAYTON MGMT. & MKTG. FAC. PUBL'N. (PAPER 32) 140, 141 (2010).

⁴³ Dara Fontein, *The Social Media Glossary: 226 Essential Definition*, HOOTSUITE (Nov. 10, 2016), <https://blog.hootsuite.com/social-media-glossary-definitions> (defining these terms in the context of social media networks) [<http://perma.cc/L2UM-AXSA>].

⁴⁴ Hilde A. M. Voorveld et al., *Engagement with Social Media and Social Media Advertising: The Differentiating Role of Platform Type*, 47 J. ADVERT. 38, 40 (2018).

⁴⁵ Dickey & Lewis, *supra* note 42, at 140.

⁴⁶ *Id.*

⁴⁷ *Id.* at 141.

⁴⁸ Cook, *supra* note 3, at 464. Brand loyalty is defined as “the tendency of consumers to continue buying a particular brand instead of trying a different one.” *Id.* (citing *Brand Loyalty*, COLLINS ENG. DICTIONARY (13th ed. 2018)).

Christmas decorations.⁴⁹ In addition, companies have formed powerful connections with their customers through one-on-one interaction over their corporate social media accounts.⁵⁰ For example, receiving positive customer care from a brand after a negative experience can sustain brand loyalty; a study by the Harvard Business Review found that customers who received a response to their question from the business on social media were more likely to spend more money with the brand, remain loyal customers, and recommend the brand to others.⁵¹ Thus, corporate social media accounts were, in a way, a personified version of the company more accessible to the average consumer than ever before. Companies also found that social media fostered a unique breed of word-of-mouth advertising. The combination of a global audience and the ease in which a user could read about actual consumer experiences at the click of a button made social media the ideal place for consumers to share amongst each other products and brands they love (and do not love).⁵² Companies increasingly relied on these user recommendations and brand affiliations to market their products and establish new fans.⁵³

As social media use among consumers climbed, marketing and media became mutually dependent: media relied on advertising revenue to keep afloat, and advertisers counted on media as a way to reach an audience.⁵⁴ At the same time, companies found that consumer desensitization to advertisements was growing, and traditional ways of advertising were no longer as effective, as consumers were becoming

⁴⁹ *Id.* (citing Aleksandra Sagan, *Tips for a Successful Social Media Holiday Campaign*, HOOTSUITE (Dec. 22, 2014), <https://blog.hootsuite.com/social-media-holiday-campaign> [<https://perma.cc/M25H-XTYB>]).

⁵⁰ Liz Greene, *Social Media Is a Customer Service Channel – Whether You Like It or Not*, DIG. MKTG. INST., <https://digitalmarketinginstitute.com/en-us/blog/social-media-is-a-customer-service-channel-whether-you-like-it-or-not> (last visited Feb. 12, 2019) [<https://perma.cc/6YGY-G7R7>].

⁵¹ Laurence Dessart et al., *Consumer Engagement in Online Brand Communities: A Social Media Perspective*, 24 J. PRODUCT & BRAND MGMT. 28, 37 (2015); see also Wayne Huang et al., *How Customer Service Can Turn Angry Customers Into Loyal Ones*, HARV. BUS. REV. (Jan. 16, 2018), <https://hbr.org/2018/01/how-customer-service-can-turn-angry-customers-into-loyal-ones> [<https://perma.cc/H3U8-33E4>].

⁵² Dessart, *supra* note 51, at 37.

⁵³ *Id.* For example, when a new father sees on his Facebook newsfeed that fourteen of his closest friends have all purchased the same baby seat from the same brand and have all posted glowing reviews, he might not waste much time in doing research and will likely purchase this same baby seat, because his friends have already done the hard work of researching and testing out the seat. *Id.*

⁵⁴ Susie Khamis et al., *Self-Branding, ‘Micro-Celebrity’ and the Rise of Social Media Influencers*, 8 CELEBRITY STUD., 191, 193-196 (2016).

increasingly distrusting of brands and their marketing tactics.⁵⁵ In the midst of this all, a new microcosm within the social media sphere was burgeoning. Otherwise ordinary individuals, who regularly posted curated social media content (of food, fashion, their lifestyle, or their travels, to name a few genres), were gaining loyal followings and becoming known as “influencers.”⁵⁶ Companies seized the opportunity to capitalize on the influencer market. Influencers were, in a way, their own brand: they were in control of their message, created their own content, and chose how to portray it.⁵⁷ They catered to niche audiences who watched their every move and engaged with their followers to build relationships and loyalty. At the same time, influencers were real-life people, albeit considered experts in their field, constituting a relevant and authentic bridge between companies and consumers.⁵⁸ And unlike celebrity endorsements, influencer marketing was built on the same foundation that its predecessor, word-of-mouth advertising, was centered on: trust.⁵⁹

Native advertising, a variant of influencer marketing, has also recently blown up. Blurring the already fuzzy line between advertising and editorial content, native advertisements are sponsored articles or posts built into a website’s usual content.⁶⁰ While these advertisements are usually clearly labeled with a disclaimer, their format and placement are suspiciously similar to other non-sponsored posts; on The New York Times website, for example, ads are placed in the middle of the page with a graphic treatment that resembles that of

⁵⁵ Joel Mathew, *Understanding Influencer Marketing and Why It Is So Effective*, FORBES (Jul. 30, 2018 8:00AM), <https://www.forbes.com/sites/theyec/2018/07/30/understanding-influencer-marketing-and-why-it-is-so-effective/#731edd1e71a9> [<https://perma.cc/GM36-WYZ2>].

⁵⁶ Morgan Glucksman, *The Rise of Social Media Influencer Marketing on Lifestyle Branding: A Case Study of Lucie Fink*, 8 ELON J. UNDERGRAD. RES. COMM. 77, 78 (2017). On social media, an influencer is an independent, third-party endorser who shapes their audience’s attitudes through their social media posts, which often promote certain brands in order to obtain a following and brand recognition. Influencers include photographers, “foodies,” fashionistas, beauticians, artists, models, and personalities. *Id.*

⁵⁷ Mathew, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Social Media Endorsements: Where Will Marketers Draw the Line?*, KNOWLEDGE@WHARTON (May 23, 2017) [hereinafter *Social Media Endorsements*], <http://knowledge.wharton.upenn.edu/article/social-media-influencers-will-marketers-draw-line> [<https://perma.cc/8439-7Q5V>].

articles.⁶¹ Compared to traditional banner or display advertisements, the distinction is much more unclear here because the advertisement is not confined to a space that consumers traditionally expect to find advertisements.⁶² Native advertisements are appealing to both businesses and social media platforms alike because they match the visual design of the media while consistently behaving like normal content that users experience on the website.⁶³

C. *Why Has Social Media Dethroned Traditional Forms of Advertisement?*

Harkening a new era in advertising, social media has quickly left traditional forms of advertising⁶⁴ in the dust.⁶⁵ This seemingly overnight phenomenon can be attributed to multiple factors. First, the sheer number of social media users offers advertisers the opportunity to reach millions of people without spending money on distribution.⁶⁶ The immense reach of social media far outruns that of conventional media. In 2013, Facebook had 1.23 billion active monthly users, towering over the largest American consumer magazine, AARP, which had a mere 22.3 million subscribers.⁶⁷ The number of social media users is not only large but also continuously growing, as shown by the number of adult social media users jumping nearly tenfold in a decade.⁶⁸ Attributing to the popularity of social media is the omnipresence of the smartphone, which allows consumers to take their

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Native Advertising Insights*, SHARETHROUGH, <https://www.sharethrough.com/nativeadvertising> (last visited Nov. 30, 2018) [<https://perma.cc/R5SV-GJAV>].

⁶⁴ Traditional forms of advertising, for the sake of this Article, can be defined as advertising through print (newspaper, magazines, etc.), television, billboard, or radio.

⁶⁵ Cook, *supra* note 3, at 466 (citing Emily Guskin, Mark Jurkowitz, and Amy Mitchell, *Network: By the Numbers*, PEW RESEARCH CTR. (2013), <https://www.journalism.org/topics/state-of-the-news-media/overview-2013> [<https://perma.cc/DZ6L-QXGX>]). Even evening news broadcasts on popular channels such as ABC, CBS, and NBC, which have an average of 22.1 million viewers, pale in comparison to Facebook's audience. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 465.

⁶⁸ Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CTR. (Oct. 8, 2015), https://www.secretintelligenceservice.org/wp-content/uploads/2016/02/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf [<https://perma.cc/77V8-ZZPS>].

social media wherever they go. Smartphone users, akin to social media users, represent a sizable majority of the country's population, as 77% of Americans own smartphones,⁶⁹ and it is expected that by 2020, there will be nearly 6.2 billion smartphones in the world.⁷⁰ Best of all, entering into this global marketplace comes at no price; the act of creating an account, making a post, and pressing share is free.⁷¹ While it may require some money to hire production staff or to create the actual content, the overall cost is dramatically less than the cost in creating a commercial or print advertisement.⁷²

Additionally, unlike conventional forms of media, social media involves human interaction and creates a sense of community by encouraging the building of relationships amongst members.⁷³ Because social media is interactive and allows fans to engage in conversations not only with each other, but also with their favorite Internet personalities, celebrities, and companies, it creates a deeper relationship and sense of loyalty to influencers and brands.⁷⁴ The most successful social media platforms, not surprisingly, are the ones that mirror real-life communities, crafting relationships built on trust and fostering "a sense of belongingness . . . among members."⁷⁵

Lastly, social media marketing is a more organic form of marketing, as companies may piggyback off relationships and reputations that influencers already have with their audience.⁷⁶ Influencer marketing fits relatively seamlessly into an influencer's content, as influencers can pick and choose brands to work with that align with their values and interests;⁷⁷ they also have a great deal of autonomy and personalization, integrating a company's advertising specifications into their own style and voice by choosing how they would like to portray their message, thus producing a less forced form

⁶⁹ *Mobile Fact Sheet*, PEW RESEARCH CTR., (Feb. 5, 2018),

<http://www.pewinternet.org/fact-sheet/mobile> [<https://perma.cc/3R83-EW5N>].

⁷⁰ Guy Sheerit, *The Demand for Mobile-Ready Content Across Social Media Is Rising: Are You Ready?*, ADWEEK, (Apr. 4, 2018),

<https://www.adweek.com/digital/the-demand-for-mobile-ready-content-across-social-media-is-rising-are-you-ready> [<https://perma.cc/RU4L-TZQN>].

⁷¹ Cook, *supra* note 3, at 467.

⁷² *Id.*

⁷³ Dickey & Lewis, *supra* note 42.

⁷⁴ Sheerit, *supra* note 70.

⁷⁵ Dickey & Lewis, *supra* note 42.

⁷⁶ Mathew, *supra* note 55.

⁷⁷ Lauren Metzler, *Social Media "Influencers" Add a New Twist to Advertising*, CBS, (Feb. 8, 2018), <https://www.cbsnews.com/news/social-media-influencers-brand-advertising> [<https://perma.cc/QA2E-V4Q8>].

of advertisement.⁷⁸ Likewise, native advertising relies on sliding in between content that consumers would not expect to be advertising, and it works; in a recent study of adults who regularly use the Internet, 77% of those surveyed did not interpret native ads as advertising.⁷⁹

IV. ALL BARK, (MOSTLY) NO BITE: THE FTC'S CURRENT ENFORCEMENT POLICY

A. *The Less You Know, The Better*

Influencer marketing is beneficial to companies for the same reason it can be harmful to consumers: the less consumers are aware that the content they are engaging with is an advertisement, the more effective the advertisement is for the company.⁸⁰ Playing on consumers' trust in the expertise of influencers whom they follow or in the reliable content of websites they frequent, businesses can easily exploit the system.⁸¹ Businesses may not require the influencers they work with to share that they received compensation for their sponsored post.⁸² Native advertisements that are too similar in subject matter to the rest of the content on a website are likely to trick readers into believing that the content was produced by the website.⁸³ Both dishonest and illegal, these practices are "deceptive" and prohibited under the language of Section 5.⁸⁴

In making the determination that a practice is "deceptive", the FTC starts by evaluating each instance on a case-by-case basis.⁸⁵ The FTC first looks at whether the representation was material, or in other words, likely to affect the consumer's conduct or decision with regard

⁷⁸ Mathew, *supra* note 55.

⁷⁹ *Social Media Endorsements*, *supra* note 60.

⁸⁰ *Id.* ("One reason word of mouth is 10 times more effective than advertising is that people trust it more. Knowing someone got paid to talk about something makes us much less likely to trust that message.")

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Native Advertising: A Guide for Businesses*, FTC (Dec. 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> [<https://perma.cc/9PSC-7FNR>].

⁸⁴ See *id.* for more examples of influencer marketing and native advertising that violate Section 5.

⁸⁵ FTC, DOT COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 1 (2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [<https://perma.cc/X677-PJLP>].

to a product or service.⁸⁶ Then, the FTC determines whether the representation was likely to mislead a consumer, as determined from the perspective of a consumer acting reasonably under the circumstances and with regards to the specific communication method or social media format.⁸⁷ For example, an audio disclosure in a YouTube video must be presented in an appropriate volume and cadence such that the audience can hear and understand it.⁸⁸ In analyzing the nature of the representation, the FTC also looks at the placement, which must be “clear and conspicuous,” and the proximity of the disclosure to the relevant claim.⁸⁹ If the FTC determines that the connection is material and that the consumers would have chosen differently but-for the deception, then the consumer has been injured by the representation.⁹⁰ The FTC, at its discretion, can then choose to enforce a civil monetary penalty or take the injurious party to court.⁹¹

B. *Education Through Guidances*

As the FTC’s modern policy continues to turn on consumer protection, its main method of enforcement is through guidances. These guidances, written in plain language meant to be understood by the ordinary consumer, are intended to update the public on how to apply Section 5 of the FTC to relevant legal issues. Recognizing the Internet as a new and challenging playing field for advertisers and consumers alike, the FTC updated its Endorsement Guide for the first time in thirty years in 2009.⁹² The FTC began addressing Internet marketing in its guidances; now any “material connection” between an advertiser and endorser that consumers would not reasonably expect needs to be disclosed.⁹³ Additionally, the guidance stated that both the endorser and the advertiser may be held liable for failure to disclose.⁹⁴

⁸⁶ *Id.* at 4 n.11.

⁸⁷ *Id.*

⁸⁸ *Id.* at 20.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.*

⁹¹ 15 U.S.C. § 45(l)-(m) (2012).

⁹² Press Release, FTC, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009), <https://ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials> [<https://perma.cc/9LWZ-X89N>].

⁹³ Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation, 74 Fed. Reg. 53,124, 53142 (Oct.15, 2009) (to be codified at 16 C.F.R. pt. 255).

⁹⁴ *Id.* at 53,139.

The FTC provided several examples to illustrate what may fall under this wide umbrella of “material connection,” one of which stated:

A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences The manufacturer of a newly released video game sends the student a free copy of the system and asks him to write about it on his blog Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious . . . this fact would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge.⁹⁵

Ingenuous forms of web advertising prompted the FTC to release new guidances in 2013⁹⁶ and 2015.⁹⁷ Compared to the dated examples of blogging and television commercials in the 2009 guidance, the 2013 guidance honed-in on new hurdles presented by social media platforms.⁹⁸ The 2013 “Dot Com” guidance built on the 2009 guidance, requiring “clear and conspicuous” disclosure and focusing on factors such as placement in the ad, proximity to the relevant claim, repetition, and making the claim obvious in terms of language and volume.⁹⁹ The FTC addressed native advertising in its 2015 guidance, similarly requiring transparency, clarity, and prominence in native ads.¹⁰⁰ In short, the guidances require that companies mindfully tailor their advertisements as a whole, not just an individual phrase or statement, to ensure that consumers have all the material information they need to make informed business decisions.¹⁰¹

While the guidances are a handy tool for advertisers and businesses, that is essentially the extent of their impact. Guidances are merely interpretations of the law written to facilitate the understanding of the general public of said laws, but do not act as binding law themselves.¹⁰² And although they are meant to be accessible to the public, it is uncertain whether influencers and businesses actually read

⁹⁵ *Id.* at 53,137.

⁹⁶ DOT COM DISCLOSURES, *supra* note 85.

⁹⁷ *Native Advertising*, *supra* note 83.

⁹⁸ DOT COM DISCLOSURES, *supra* note 85.

⁹⁹ *Id.*

¹⁰⁰ *Native Advertising*, *supra* note 83.

¹⁰¹ *Id.*

¹⁰² Press Release, *supra* note 92.

or understand these guidances, or whether they simply choose to ignore them.

C. Enforcement: Spotty at Best

While spreading awareness of disclosure laws is an important issue, enforcement of these guidelines has posed an even greater problem for the FTC. The millions of non-celebrity influencers on social media present a tremendous enforcement problem for the FTC. Technically, even a teenager sent a free pair of pants who then posts a positive comment to her social media account is still liable for disclosure.¹⁰³ Thus, the FTC's actions have generally been aimed at high profile celebrities, who are easier targets. Although there are civil remedies for failing to abide by FTC disclosure law,¹⁰⁴ the FTC has mainly chosen to pursue enforcement through warning letters. For example, when celebrity Kim Kardashian was pregnant, she posted a photo on her Instagram with a pill bottle, praising the drug's beneficial effect on morning sickness in the caption.¹⁰⁵ The FDA sent a letter to the drugmaker, citing Kardashian's failure to mention any of the adverse risks associated with the drug along with the lack of any disclosure from Kardashian about the paid endorsement.¹⁰⁶ The punishment was a mere slap on the wrist, as Kardashian was told to remove the Instagram post but was not forced to remove her Twitter post that bore the same endorsement without disclosure.¹⁰⁷

The impact of these warning letters has been minimal. In the six week period after receiving warning letters, celebrities who were cited for disclosure violations continued to pay no heed to the warning; of the 412 sponsored posts during this period, 79% did not include proper disclosure.¹⁰⁸ Additionally, given the sheer volume of celebrities and their countless social media posts, it is surprising that the FTC has only

¹⁰³ *See id.*

¹⁰⁴ 15 U.S.C. § 45(l)-(m) (2012). Civil remedies for violation of FTC disclosure laws include civil action to recover penalties, a cease and desist order, or up to \$10,000 in fines. *Id.*

¹⁰⁵ Jeff John Roberts, *Kim Kardashian Instagram Slip-Up Shows Risks of Social Media Marketing*, FORTUNE (Aug. 14, 2015), <http://fortune.com/2015/08/14/kardashian-fda-ftc>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Letter from Robert Wiessman, President, Public Citizen, to Tom Pahl, Acting Director, FTC, and Mary K. Engle, Associate Director, FTC (June 26, 2017), https://www.citizen.org/system/files/case_documents/ftc_instagram_letter_and_investigation.pdf.

sent warning letters to twenty-one celebrities in 2018,¹⁰⁹ much less than the ninety letters sent in 2017.¹¹⁰ Indeed, for celebrities, FTC enforcement of disclosure policy has been an echo of the Kim Kardashian situation, as the FTC has settled for attempted enforcement through warnings rather than through civil or legal remedies.¹¹¹ Sometimes, however, the FTC even gets it wrong; supermodel Naomi Campbell received a warning letter after posting about Globe-Trotter, but her attorney responded that Ms. Campbell had praised the luxury luggage brand on her own good will and had no financial ties to the company.¹¹²

In one of the few instances of the FTC actually taking legal action against a violator, advertising firm Deutsch LA was in hot water in 2014 after the FTC took them to court for engaging in deceptive marketing for their client's new gaming console.¹¹³ Deutsch LA encouraged their employees to use their personal Twitter accounts to post favorable reviews to their following, using the hashtag "#gamechanger" but without disclosing their connection to their agency or to Sony.¹¹⁴ In this case, the FTC and Deutsch LA reached a settlement after Deutsch sought to mend the issue to avoid going to trial.¹¹⁵ The FTC also took department store chain Lord & Taylor to court for their use of deceptive native advertising; Lord & Taylor and Nylon, an online fashion magazine, had signed a contract in which

¹⁰⁹ Sam Sabin, *A Year After Major Actions, FTC's Influencer Marketing Guidelines Still Overlooked*, MORNING CONSULT (Oct. 4, 2018), <https://morningconsult.com/2018/10/04/a-year-later-ftcs-influencer-marketing-guidelines-still-largely-ignored>.

¹¹⁰ Keith J. Kelly, *Why Insta-famous Celebs Got a Stern Warning from the FTC*, N.Y. POST (Apr. 20, 2017), <https://nypost.com/2017/04/20/why-insta-famous-celebs-got-a-stern-warning-from-the-ftc>.

¹¹¹ See Katie Notopoulos, *A Consumer Group is Asking the FTC to Investigate Celebs for Shady Instagram Advertisements*, BUZZFEED NEWS (June 26, 2017), <https://www.buzzfeednews.com/article/katienotopoulos/ftc-asked-to-investigate-celebs-for-instagram-ads>. Public Citizen, the consumer group bringing the complaint, kept an eye on the social media accounts of forty-six celebrities who received warning letters from the FTC, finding that 79% did not abide by FTC disclosure laws. Among these influencers were Scott Disick, Zendaya, and Jennifer Lopez. *Id.*

¹¹² Matthew Dalton, *Social-Media Stars Are Turning Heads—of Regulators*, WALL ST. J. (Dec. 15, 2017 8:00 AM), <https://www.wsj.com/articles/social-media-influencers-get-noticed-by-regulators-1513342801>.

¹¹³ Maureen Morrison, *FTC Calls Out Sony—and Deutsch LA—For Deceptive Advertising*, AD AGE (Nov. 25, 2014), <https://adage.com/article/news/ftc-sony-deutsch-la-deceived-consumers/296004>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Lord & Taylor reviewed and approved a paid-for article on Nylon without including a disclosure statement.¹¹⁶ But since 2011, the FTC has only filed five lawsuits, which, compared to the number of misleading advertising campaigns and influencers that are out there in the social media world, is relatively disproportionate.¹¹⁷

D. Problems with FTC Enforcement Policy

As seen in the above examples, the FTC's current enforcement policy leaves much to be desired. It is true that the FTC is faced with a formidable problem; the Internet is a massive world, and punishing every single violation is nearly impossible with so many celebrities and influencers posting new content every day. On top of that, there is no way for the FTC to ascertain whether a post was paid for, or whether the influencer purchased the product themselves and posted a gratuitous review, as it is difficult to draw a bright line between the two in this grey area of disclosure. Furthermore, sending a warning letter once a post has already been disseminated and viewed by millions does not repair the damage already done. From the influencer perspective, because the FTC is delegated broad authority in enforcement, there is no knowing whether the FTC will apply the same unfairness adjudication analysis to each case,¹¹⁸ or even to each party.¹¹⁹ And lastly, while the \$10,000 daily fine can be a huge blow to most influencers, this penalty is but an empty threat given the FTC's track record for bringing lawsuits to enforce their disclosure policy.¹²⁰

The FTC's focus on education over enforcement is problematic because without consistent and strict enforcement, even companies and influencers who are aware of the law will continue to find ways to weasel their way out of compliance. In the sections to come, I will discuss three solutions to FTC enforcement, and offer my own solution at the end.

¹¹⁶ Lesley Fair, *FTC's Lord & Taylor Case: In Native Advertising, Clear Disclosure Is Always in Style*, FTC (Mar. 15, 2016, 8:37 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2016/03/ftcs-lord-taylor-case-native-advertising-clear-disclosure>.

¹¹⁷ Notopolous, *supra* note 111.

¹¹⁸ Simonson, *supra* note 17, at 325–26 (“[B]ecause the law now specifically enables public policy considerations to weigh in determining unfairness . . . some types of advertising may be scrutinized more heavily than others.”).

¹¹⁹ Roberts, *supra* note 105. In the Kim Kardashian example, although the punishment was miniscule, only Kardashian was penalized—there was no indication that the drug company was fined. *Id.*

¹²⁰ *Supra* notes 113–117 and accompanying text.

V. SOLUTIONS

First, it can be helpful to separate disclosure violators into some categories and subcategories for ease of reference. Violators can be either influencers or companies. There are three kinds of violators. First, there are those that simply do not know about FTC disclosure policies, the uninformed violators. Then, there are those that know of the policies and do not care to abide by them, the blatant violators. Lastly, there are those that know about the disclosure policies, want to abide by them, but do so incorrectly not out of bad intentions, but rather because they misconstrue the policies; these are the misinformed violators. The ideal solution aims to reach all three groups, and to educate, enforce, and deter with equal vigor.

A. *Educating Influencers and Businesses*

When installing a new software on a computer, the software will usually require the user to go through a tutorial on how to use the program. Likewise, social media platforms should require influencers and businesses to undergo a brief, in-app training program on how to properly disclose on advertisements in order to continue using the platform. For those with existing accounts, social media platforms should require those users to complete the training before they are allowed to access their account. For new users, the training program should be a requirement before allowing a user to create their business or influencer profile. The tutorial should break down the law in an easy-to-understand manner, including concrete examples of what to include in captions, and after each “unit”, the user should be required to pass a quiz demonstrating that they understand what is required of them. In a recent study analyzing 800 Instagram influencers, 71.5% attempted to disclose their sponsored relationship, but only 25% properly disclosed their material connection in compliance with FTC regulations;¹²¹ therefore, users may be making good faith efforts to follow FTC disclosure policies, but simply do not know the proper way to do so.¹²² The program should also make clear the punishments;

¹²¹ Jim Tobin, *Ignorance, Apathy or Greed? Why Most Influencers Still Don't Comply with FTC Guidelines*, FORBES (Apr. 27, 2018), <https://www.forbes.com/sites/forbesagencycouncil/2018/04/27/ignorance-apathy-or-greed-why-most-influencers-still-dont-comply-with-ftc-guidelines/#60a155277e9d>.

¹²² See Dalton, *supra* note 112 (interviewing actress Shay Mitchell, who was contacted by the FTC after even a clearly articulated “Thank You” to the sponsoring company was insufficient as disclosure).

including this information may convince influencers who otherwise would not have known of the implications of noncompliance to start abiding by disclosure laws. While the proposed solution does not wipe out the possibility of a willful violator, it does ensure that users are aware of the laws they must abide by.

Given the vast number of influencers, celebrities, and businesses who use social media, social media platforms can start by targeting those with business or verified profiles. Most major social media platforms offer the option for businesses and influencers to switch from a personal account to a business account;¹²³ this allows them to obtain useful insights about their content and engagement for the purposes of tailoring their reach for sponsored posts.¹²⁴ Just in the year and a half after the business profile feature was released, Instagram reported a whopping 25 million active business profiles on their platform, up 15 million business accounts from just four months prior.¹²⁵ Thus, although this would not catch all influencers as some may choose not to switch to a business profile, this would significantly narrow the pool of potential violators.

Additionally, businesses should focus on internally educating their employees about disclosure laws. In an E-Marketer survey, 41% of influencers surveyed admitted that they only disclose when they are asked to;¹²⁶ while this is not a majority, this statistic can be reduced if businesses are more consistent in communicating the point across to influencers, as education will have a trickle-down effect. In order to promote compliance across the board, businesses must educate both their employees and the influencers they work with. Businesses should have mandatory compliance training sessions for their public relations teams, monitor their influencer relationships to ensure all employees are informing influencers of their disclosure requirements, and create

¹²³ See *How Do I Set Up a Business Profile on Instagram*, INSTAGRAM, <https://help.instagram.com/502981923235522?helpref=search&sr=2&query=business%20profile>. On Instagram, for example, there is an option to change your personal account to a business account. Additionally, celebrities and businesses can be “verified” with a blue badge next to their name.

¹²⁴ Lesya Liu, *The Definitive Guide to Instagram Analytics: So Much More Than Just a Pretty Picture*, ENTREPRENEUR (Mar. 23, 2018), <https://www.entrepreneur.com/article/309345>.

¹²⁵ Anthony Ha, *There Are Now 25M Active Business Profiles on Instagram*, TECHCRUNCH (Nov. 30, 2017), <https://techcrunch.com/2017/11/30/instagram-25-million-business-profiles>.

¹²⁶ Tracy Hazzard, *Without These 3 Things Brands and Influencers Have Declining Trust*, INC. (Mar. 20, 2018), <https://www.inc.com/tracy-leigh-hazzard/shopper-research-shows-millennials-trust-influencers-less-less.html>.

clear, easy-to-read infographics with FTC disclosure laws to send to the influencers with whom they collaborate. Additionally, as a liability measure, brands should also include in contracts that the influencer is aware of FTC disclosure policies and agrees to abide by them, as well as including an indemnity clause with termination of the contract in the event of noncompliance.¹²⁷ Requiring businesses, the starting point of all sponsorships, to do their part in educating their employees and the influencers they work with of FTC disclosure laws may well have a larger impact on education than FTC guidances.

B. Enforcement

Combined with the lack of urgency amongst business and influencers in following the law, there have been very few repercussions for a violation. As seen in the aforementioned examples, although the FTCA outlines penalties for violators, the FTC has generally resorted to warning letters and the occasional lawsuit.¹²⁸ Warning letters are barely penalties; the FTC only asks influencers who received letters to spell out steps they will take to ensure that they are adequately disclosing their material connection to the brand or business.¹²⁹ Usually, the most that happens is that the influencer removes the post.¹³⁰ And because litigation is so expensive and time-consuming, it is not an option that the FTC usually chooses, turning it into an empty threat. The FTC has generally only gone after companies and not individuals,¹³¹ which gives individuals the idea that they will likely not be punished for their actions and are essentially free to break whatever laws they want with only the threat of a warning letter. And even in the CSGO Lotto case, the lawsuit was not hugely publicized

¹²⁷ Meegan Brooks & Nilda Nejah, *Insight: Retailers Should Check Their Social Media Practices Before the FTC Makes Its Next Move*, BNA (Aug. 22, 2018), <https://www.bna.com/insight-retailers-check-n73014481933>.

¹²⁸ *Supra* notes 103–120 and accompanying text.

¹²⁹ Lesley Fair, *Three FTC Actions of Interest to Influencers*, FTC (Sept. 7, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers>.

¹³⁰ *See* Tobin, *supra* note 121. After Hale was sent a warning letter from the FTC, she removed her post.

¹³¹ *Id.* Past lawsuits involving the FTC and violation of disclosure policy have been against companies such as Legacy Learning Systems, Cole Haan, Lord & Taylor, and Warner Bros. *But see CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, FTC (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> (discussing the first time the FTC has ever sued an individual for violation of disclosure policies).

because the company sued works within a niche online gaming industry that the bulk of influencers may not be familiar with.¹³²

As one can see, the FTC has hit on both ends of the spectrum, either aiming to educate with warning letters or to occasionally taking action in court, but neither have done much to advance its deterrence efforts.¹³³ Simply put, the FTC needs to hit influencers and businesses where it hurts the most: in the wallet. Enforcing monetary punishments can serve to deter other influencers once they see that the policy is actually being enforced. This domino effect can result in greater awareness of disclosure policies; word spreads like wildfire on social media. Although the FTC has the ability to disgorge profits, it has reportedly decided against using this punishment in enforcing actions involving influencer marketing.¹³⁴ Nor has it implemented the \$10,000 fine for each day of violation,¹³⁵ which can certainly add up, even for the wealthiest celebrity. Accordingly, the FTC needs to add some bite to its bark—having a hefty penalty means nothing without actually carrying it out. The FTC must follow up on repeat offenders who fail to pay heed to warning letters and enforce fines in order to demonstrate to the public that they are truly taking the issue seriously, and to show influencers that there are enforceable repercussions when they do not follow the law.

The FTC must also enforce punishment on businesses that fail to inform the influencers they work with about the need to properly disclose. This second layer of enforcement would require the FTC to impose a fine on businesses who work with influencers but who fail to remind these influencers of their responsibility to disclose.¹³⁶ Because sponsorships generally start out with a business reaching out to an influencer, businesses have the ability to plant the initial seed in influencers' minds of the duty to properly disclose their material relationship before the working relationship even takes off. Therefore, businesses can be responsible when they fail to inform influencers of this duty and the influencers inadvertently fail to disclose their material

¹³² Sabin, *supra* note 109.

¹³³ *Is the FTC Doing Enough to Fight Undisclosed Ads in Fashion?*, FASHION LAW (Mar. 15, 2018), <http://www.thefashionlaw.com/home/why-isnt-the-federal-trade-commission-doing-more-to-fight-undisclosed-ads>.

¹³⁴ Dalton, *supra* note 112.

¹³⁵ 15 U.S.C. § 45(l) (2012).

¹³⁶ A study conducted by Fahlgren Mortine, an advertising agency, reports that 35% of businesses surveyed know of FTC disclosure policy but leave compliance up to the influencer. *Influencer Relations: Destination Marketing on Thin Legal Ice*, FAHLGREN MORTINE, <https://fahlgrenmortine.com/media/docs/dmo-survey.pdf> (last visited Mar. 4).

relationship according to FTC policy.¹³⁷ When businesses know of the law and seek to avoid disclosing the material relationship, they are blatant violators and should be held fully responsible.¹³⁸ Businesses that may not know of the law can also fall in this category, as negligence in not knowing their legal duties is no excuse for noncompliance. Either way, these businesses, which remain silent or take affirmative action to prevent disclosure, should be subjected to the same punishments that individuals may face: the daily \$10,000 fee for each day of violation and disgorgement of profits.¹³⁹

Lastly, a drastic measure may be for the FTC to take a high-profile violating influencer to court. On one hand, it may seem unfair that a single influencer is being punished to this degree while others are merely given warnings; on the other, making a publicized example out of an influencer who repeatedly disobeys the law even after numerous warning may be what it takes to shock the industry and make a substantial impact. Although the FTC has taken a few cases to court, these have mainly been against one or two influencers who, albeit having a large following, are popular in only niche communities and whose content are not well known to the average consumer.¹⁴⁰ Taking a well-known celebrity to court can have a much larger impact, both among consumers and among other celebrities. It is not to say that celebrity lawsuits are rare and always publicized; celebrities are sued all the time, but never over this issue. Combined with other penalties, the bad publicity of being the first celebrity sued for violating disclosure law could potentially be tremendous; imagine Kendall Jenner's Instagram account suddenly being deactivated one day, and the next day seeing in the news that Kendall is being sued for breaking FTC disclosure law. Litigation may be pricey, but making an example

¹³⁷ Richard B. Newman, *FTC Laser Focused on Paid Social Media Influencer Disclosures*, N.Y. L.J. (Aug. 8, 2018, 2:30 PM), <https://www.law.com/newyorklawjournal/2018/08/08/ftc-laser-focused-on-paid-social-media-influencer-disclosures/?slreturn=20181013221312>.

¹³⁸ One reason why brands might do this is to trick consumers into believing that the use of a product is purely due to an influencer's good will. For example, a beverage company offered to pay Sanders Kennedy, a popular Youtuber, to leave a can of the beverage on his desk while filming so that it would appear in the frame, without requiring him to disclose the material relationship to his audience. Paris Martineau, *Inside the Pricey War to Influence Your Instagram Feed*, WIRED (Nov. 18, 2018, 7:00 AM), <https://www.wired.com/story/pricy-war-influence-your-instagram-feed>.

¹³⁹ 15 U.S.C. § 45(1) (2012).

¹⁴⁰ Sabin, *supra* note 109.

out of just one celebrity could be what it takes to demonstrate to the public that the FTC takes its job seriously.

C. Collaboration and Supervision

Increased punishment and enforcement begs the question: just how? The FTC has already been criticized for being spread too thin to fully regulate the problem on its own.¹⁴¹ Therefore, because this is a massive endeavor, the FTC will need to enlist some help from outside sources.

First, the FTC should collaborate its efforts with social media platforms. Some platforms have already taken well-intentioned steps in enforcing disclosure policies, implementing tools to help encourage users to properly disclose, but their execution could use some fine-tuning. For example, Instagram¹⁴² rolled out a branded content policy, commonly known as a handshake tool,¹⁴³ which includes a new “paid partnership with” feature as a sub-header appearing under the username on sponsored posts.¹⁴⁴ Unfortunately, even though these tools are widely available to influencers, many choose not to use them. In a 2017 Forbes survey, of the 90% of influencers who were aware of the new branded content tools on Instagram and YouTube, only 34% were actually utilizing them.¹⁴⁵ Additionally, the FTC suggests that the handshake tools by themselves may be inadequate depending on their location on the platform, and that to be safe, influencers should still clearly disclose material relationships in the caption.¹⁴⁶ It can therefore be beneficial for the FTC and social media platforms to work side by side so that they are on the same page.

Cooperation and communication between social media platforms and the FTC can be beneficial for a number of reasons. First, while it

¹⁴¹ *Id.*

¹⁴² *What is Instagram?*, INSTAGRAM, <https://help.instagram.com/424737657584573> (last visited Jan. 13, 2019). Instagram is a free social media platform centered on sharing images and videos within the virtual community. Users can view, comment, and like posts shared by accounts that they follow.

¹⁴³ Tobin, *supra* note 121.

¹⁴⁴ Todd Spangler, *Instagram Will Add ‘Paid Partnership’ Tag to Sponsored Posts, After FTC’s Warning to Celebrity Users*, VARIETY (June 14, 2017), <https://variety.com/2017/digital/news/instagram-paid-partnership-tag-sponsored-ftc-celebrity-warning-1202466310>.

¹⁴⁵ Holly Pavlika, *How Are Real-Life Influencers Reacting to FTC’s New Disclosure Guidelines?*, FORBES (Nov. 14, 2017), <https://www.forbes.com/sites/forbesagencycouncil/2017/11/14/how-are-real-life-influencers-reacting-to-the-ftcs-new-disclosure-guidelines/#28e1a82fd32f>.

¹⁴⁶ Fair, *supra* note 129.

may be difficult for the FTC alone to carry out enforcement when there are so many influencers and businesses and not enough FTC personnel, social media platforms have an edge in identifying violators. Instagram has also begun sending in-app notifications to users who are flagged by the system for making a post that it believes is branded without disclosure.¹⁴⁷ However, like the FTC and their warning letters, one downside to current methods of enforcement is that they are a mere slap on the wrist and a mild inconvenience, at best. If social media platforms collaborated with the FTC to find violators and enforce more stringent punishments, it could have a greater impact on deterrence. One suggestion to even further increase the bite of the proposed enforcement policy is for social media platforms to threaten influencers and businesses with termination or suspension of their account if they are flagged too many times. Some influencers base their livelihoods on monetizing their social media accounts,¹⁴⁸ so this can have a devastating effect and serve as a lesson for other influencers. Furthermore, communication and cooperation can help solve the problem of inadequate handshake tools; while social media platforms have the right intentions in implementing these tools, collaboration between the FTC and social media platforms can lead to handshake tools that are more likely to be clear and informing to consumers. Because influencers would not be able to reach their audience without social media platforms, social media platforms need to step up in working together with the FTC to deter deceptive consumer advertising.

The FTC should also work with businesses to help enforce disclosure policies. This can be achieved through monitoring and reporting. First, businesses should be required to monitor sponsored posts for compliance, and if they find a violation, businesses should

¹⁴⁷ Kerry Flynn, *Instagram Is Rolling Out a Big Change to How It Handles Sponsored Content*, MASHABLE (Nov. 7, 2017), <https://mashable.com/2017/11/07/instagram-sponsored-content-not-disclose-paid-promotion-tag-/#g0SShqxEgqH>.

¹⁴⁸ See Aki Ito, *What It Takes to Make Instagram Into a Full-Time Career*, BLOOMBERG (Nov. 29, 2018), <https://www.bloomberg.com/news/articles/2018-11-29/what-it-takes-to-make-instagram-influencing-a-full-time-career>, describing how Megan Young, a mountain climber, makes a living off her social media sponsorships. Those with smaller followings (nanoinfluencers) can make between \$30,000-60,000 a year, and micro influencers can make upwards of \$100,000 a year. Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of an Influencer Agency Explains*, VOX (Nov. 28, 2018), <https://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube>.

get into contact with the influencer as soon as possible to either take down the post or to add a proper disclosure to the post. In the event that an influencer continuously fails to comply with disclosure policies, a law-abiding business should be encouraged to report an influencer to the FTC,¹⁴⁹ creating a self-policing system. If a business does its part in ensuring that the influencer is fully aware of their responsibility, then they should not be punished for the influencer's violation, as the FTC has looked favorably on businesses that have implemented compliance programs or that have acted quickly to address allegedly deceptive practices.¹⁵⁰

Lastly, if the FTC wants to maintain their reputation as protectors of the average consumer, the FTC should consider fortifying their internal manpower to demonstrate their commitment to their mission. The FTC has been criticized in the past for not allotting enough personnel and resources towards consumer protection in advertising, focusing its efforts instead on more "pressing" issues such as antitrust busting and mergers and acquisitions. As advertising involves multiple variables such as ethical, moral, social, and economic evaluation, critics question whether the FTC by itself is qualified in weighing such concerns when determining if a consumer is adequately protected.¹⁵¹ To address these problems, the FTC may want to consider hiring specialists such as economists and marketing scholars to provide more integrated consumer analysis and to demonstrate their true dedication to protecting consumers. This can also help with tailoring FTC policies to the ever-changing consumer sphere.¹⁵² For example, the FTC could work with software engineers to create artificial intelligence that would automatically flag posts that disobey rules. Marketing experts could be hired to conduct research (through surveys or focus groups, for example) into how current FTC policies impact consumer perception of digital advertisements, providing valuable information

¹⁴⁹ *Submit a Consumer Complaint to the FTC*, FTC,

<https://www.ftc.gov/faq/consumer-protection/submit-consumer-complaint-ftc> (last visited Jan. 13, 2019). The FTC has a section on their website dedicated to reporting unfair business practices.

¹⁵⁰ Brooks & Nejah, *supra* note 127. For example, "the FTC decided not to take action against Microsoft, the brand being promoted, or its advertising agency Starcom, because Microsoft had in place at the time of the violation a 'robust' compliance program, including specific legal and marketing guidelines concerning the FTC's Endorsement Guides, which they had shared with employees, vendors, and Starcom personnel." *Id.*

¹⁵¹ M.D. Bernacchi, *The Expanding Jurisdiction of Deceptive, Misleading, and False Advertising by the FTC*, 6 J. ADVERT. 29, 30 (1977).

¹⁵² *Id.*

that could help the FTC adjust their approach as needed. These experts can also help by acting as liaisons between the FTC and outside groups such as social media platforms and consumer advocacy groups; software engineers that design programs to catch violators can work with Instagram and Facebook to implement these programs into their platforms in a mutually beneficial manner. Because the FTC deals with numerous aspects of consumer life, hiring regulators and experts to help carry out enforcement of disclosure policies can lead to broader and more accurate coverage.

The FTC should also consider working with some outside groups with specialized knowledge, as outside policing is an additional resource that may help with catching influencers who otherwise slip through the cracks. Public Citizen,¹⁵³ a consumer watchdog group, can potentially be a key player in foiling sneaky influencers. After criticizing the FTC for their passive enforcement of disclosure policy, Public Citizen conducted its own survey on influencer disclosure and was largely responsible for initiating the FTC's warning letters.¹⁵⁴ Even after the initial warning letters, Public Citizen followed up on their recipients and continued to monitor their posts for compliance.¹⁵⁵ But not only is Public Citizen incredibly persistent; they are also persistently vigilant in keeping up to date on that latest issues in advertisement disclosure, a challenge for the FTC as the world of social media is very fast-paced. For example, Public Citizen shared a post from just last week of an Instagram video Kris Jenner had posted, deemed "the next wave of 'empowerment' sponsorship,"¹⁵⁶ before the

¹⁵³ *About Us*, PUBLIC CITIZEN, <https://www.citizen.org/about/about-us> (last visited Jan. 14, 2019). Public Citizen is a "nonprofit consumer advocacy organization that champions the public interest." *Id.* There are over 400,000 members and supporters, who together "mobilize activists to grow democratic movements, watchdog Congress, sue the government when it fails to do its job, petition regulatory agencies to safeguard the public, and engage in cutting edge research." *Id.*

¹⁵⁴ Letter from Robert Wiessman, *supra* note 108.

¹⁵⁵ *Id.*

¹⁵⁶ *Kendall Jenner, Proactiv, and the Next Wave of 'Empowerment' Spon*, PUBLIC CITIZEN (Jan. 9, 2019) [hereinafter *Kendall Jenner, Proactiv*], <https://commercialalert.org/kendall-jenner-proactiv-and-the-next-wave-of-empowerment-spon>. In the video, which was filmed to imitate the weekly teasers for her show *Keeping Up with the Kardashians*, Kris Kardashian used "raw" and "brave" language to describe her daughter Kendall's struggle as a teenager, which she said would be revealed on Kendall's Twitter later that night. Maria Sherman, *Kendall Jenner, Proactiv, and the Next Wave of 'Empowerment' Spon*, JEZEBEL (Jan. 7, 2019), <https://jezebel.com/kendall-jenner-proactiv-and-the-next-wave-of-empowerm-1831548755>. However, Kendall revealed that she would be the new

FTC had even had a chance to comment on it. Working with Public Citizen and other consumer advocate groups can help delegate the task of supervision, as groups like these are more tailored to address consumer injury and have less on their plate than the FTC does. Consumer advocate groups can also represent a wealth of knowledge regarding consumer practices and advertising trends, as they follow influencers closely and are more familiar with current events in the social media sphere than the relatively out-of-touch FTC. With the help of consumer advocacy groups such as Public Citizen, the FTC's manpower would be fortified with thousands of individuals who have a similar mission to the FTC, and who may offer greater insight and closer supervision of the vast realm of social media.

Additionally, the FTC should consider implementing a social media campaign to spread awareness of deceptive advertising. With such a large digital space to work with, the FTC is challenged with accounting for hundreds of thousands of influencers, so what better way to reach these influencers than through spreading the word internally? The FTC can harness the power of social media to promote compliance by formulating an advertising campaign, complete with a catchy title, hashtag,¹⁵⁷ and call to action. To promote the campaign, the FTC should reach out to a handful of influencers, but may consider setting aside some funds as payment, as many influencers charge a fee for promotion. Since running a successful campaign will require some specialized knowledge, the FTC can also recruit the help of a social media marketing agency to select influencers that would collectively have the most extensive reach. Although it may seem obvious to select influencers with the greatest amount of followers, follower count can sometimes be deceiving with the increasing presence of paid followers,¹⁵⁸ plus influencers with more followers have the power to

face of Proactiv, an acne skincare line. *Id.* The article that Public Citizen shared suggested that this was a deceptive advertising practice because it used personal content as a way to draw hype up, just to spring an advertising campaign. *Kendall Jenner, Proactiv, supra* note 156.

¹⁵⁷ A hashtag (#) is a label for content, and are used to help others who are interested in a certain topic find content on that same topic. Anita Campbell, *What is a Hashtag? And What Do You Do With Hashtags?*, SMALL BUS. TRENDS (Dec. 24, 2018), <https://smallbiztrends.com/2013/08/what-is-a-hashtag.html>. In the marketing context, a unique hashtag can be used to help promote a specific advertisement campaign or contest. *Id.* For example, Cotton Fashion used the hashtag “#FabricOfMySummer” to promote a Twitter contest. *Id.*

¹⁵⁸ Jacquelyn, *5 Reasons Why Engagement Means More Than Large Followings*, SCRUNCH, <https://blog.scrunch.com/why-engagement-means-more-than-numbers> (last visited Jan. 16, 2019). A common trend today is purchasing fake followers,

charge higher rates. The key to this campaign is reaching as many different types of people as possible, so an influencer's demographic, area of focus (food, fashion, or gaming, for example), engagement,¹⁵⁹ and preferred social media platform are just a few of the many factors that should be taken into account when determining which influencers to include in the campaign. Influencers should be asked to talk about what transparency means to them and what it should mean to consumers, connecting it back to how they conduct their social media presence.

The benefits are three-fold. First, influencers who participate in this campaign have the chance to build greater rapport with their followers, making a statement on the intolerability of consumer deception and demonstrating their commitment to transparency. Second, such a campaign would spread awareness amongst followers and other influencers alike. Reaching out to influencers themselves to promote disclosure compliance can be more effective than trying to effect change from the outside, because influencer communities can be quite close-knit, whether merely over the Internet or even in real life. As influencers have the chance to interact with other influencers every day, from engaging in comment pods¹⁶⁰ to grabbing monthly brunch at blogger meetups,¹⁶¹ word of mouth can spread from person to person in the influencer community quickly. Therefore, from an influencer's point of view, it can be more impactful to see a fellow influencer leading by example rather than being directed what to do from an outside agency. Lastly, it could encourage self-policing amongst influencers. Keeping influencers accountable for not only themselves, but also their fellow influencers, can eventually lead to a more

which can be purchased in the thousands for a small fee of around \$10. Because they are so easy to come by, a follower count is not a good metric for measuring an influencer's marketing worth.

¹⁵⁹ *Id.* Follower engagement is a better metric than follower count for measuring an influencer's marketing worth because it implies that the followers are actually real, signifies that the followers trust the influencer, and overall demonstrates that the influencer has a solid, genuine relationship with his or her followers.

¹⁶⁰ Shareen Pathak, *Podghazi: Instagram Influencers Use Comment Collusion to Game the Algorithm*, DIGIDAY (July 26, 2017), <https://digiday.com/marketing/podghazi-instagram-influencers-use-comment-collusion-game-algorithm>. A comment pod is a group of up to 30 Instagrammers that engage daily with each others' posts through comments and likes in order to increase engagement and visibility of posts.

¹⁶¹ See *Dallas Blogger Brunch*, SKINNY ARM, <https://www.theskinnyarm.com/dallasbloggerbrunch> (last visited Jan. 15, 2019). Rhonda Jenkins, who runs the fashion blog "The Skinny Arm," hosts monthly brunches to connect the local Dallas fashion community, allowing attendees the opportunity to network and meet new like-minded people.

conducive atmosphere in which disclosure has been established as the norm.

VI. CONCLUSION

Consumers are constantly bombarded with decisions— where to eat, what clothing brand to buy, which airline to travel with—and in this digital age, often time the answers are just a tap away. The “sharing” culture of social media platforms is both a valuable trove of information and a “Wild West” of sorts; a consumer can base her decision of where to purchase a lipstick off of the enthusiastic Facebook status of her old college roommate, or from a complete stranger’s review on the Sephora website, or from a recommendation by her neighbor. The options are overwhelming. But along comes the YouTube-famous makeup guru with millions of adoring fans— certainly, with such an established following and huge social media presence, she must know the best lipstick brand. Social media influencers have increasingly played a huge role in decisions like these, as consumers place their trust in the expertise of their favorite celebrities and social media stars. While it is ultimately up to consumers to make the determination of where their hard-earned money goes, powerful brands and influencers can prey on the naivete of the public through disguised advertising. And as social media platforms continue to exert an enormous power among both consumers and influencers alike, the FTC has been faced with the formidable challenge of how to address deceptive advertising while still allowing businesses and individuals to carry out engagement with their followers.

This Article discussed the growth of the FTC to what it is today: a government agency charged with broad discretion in protecting consumer interest, and the solutions proposed by this Article seek to achieve just that. In recent years, influencers and businesses have escaped any real, serious punishment from the FTC, and as social media advertising and the number of influencers are projected to continue to grow rapidly, this is a problem that will not become any easier to solve as time goes on and as these practices become integrated into influencer marketing culture; the FTC *must* act. A main fixture of the ultimate solution would be cooperation between the FTC and social media platforms to promote education while tightening down on deterrence and consistent enforcement. The FTC should work alongside social media platforms, as they have a fair amount of specialized knowledge and power about their users, to implement a comprehensive yet understandable disclosure tutorial that will target

all business and influencers accounts, requiring them to complete the tutorial before they are allowed to use their account. By harnessing the help of social media platforms in weeding out influencers, celebrities, and businesses, the FTC will have an easier time in enforcing its policies as it will circumvent the issue of having too large a pool to wade through.

Additionally, the FTC should be more stringent on enforcing punishment for both individuals and business, adopting a two-pronged threat of monetary punishment and suspension of social media accounts. Again, the FTC should be working with social media platforms to promote consistent enforcement, keeping an eye on specially designated business and celebrity profiles. Because the FTC will be able to concentrate their efforts on a smaller group of people, they will be able to dole out violations with greater ease and efficiency. Requiring businesses to educate their employees as well as ensuring that the influencers they work with are clear on their duties to disclose are also essential. The combined forces of educating these users, flagging the violators, enforcing monetary punishment, and potentially taking frequent violators to court should reinforce the FTC's policy with more of a bite.

The FTC will certainly require some assistance, as the social media sphere is vast and ever-changing. Buffing up their internal manpower with more regulators and experts in relevant fields can help them to carry out their job more efficiently, demonstrating that their commitment to consumer protection stands. Outside sources such as consumer advocacy groups and even influencers and businesses themselves can help play a vital role in policing the digital sphere; two heads are better than one, especially when they have such specialized knowledge. Internally, the FTC needs to demonstrate a better commitment to their original mission of protecting consumers and allot more resources towards increasing their manpower. They can do so by reinforcing their internal structure with experts that can help with the writing of guidances and shaping FTC policy as well as hiring more employees to help act as a bridge between outside parties and themselves. All in all, the FTC must accept that this is more than a one-man job, and they should not be hesitant to rely on the many resources that could make this job easier.