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THROW THE BOOK AT THEM: WHY THE FTC NEEDS TO GET TOUGH WITH INFLUENCERS

Christopher Terry, Eliezer Joseph Silberberg** & Stephen
Schmitz****

The Federal Trade Commission is an administrative agency that has traditionally been aggressive when deploying its delegated authority. At the core of these actions is the FTC's interpretive definition of deception as based upon a reasonable consumer standard. Specifically, the commission has regularly used Section 5(a) of the FTC Act, in tandem with its interpretive definition of deception, as a sword in a variety of contexts, including enforcement actions for deceptive advertising, endorsements, and claim substantiation against a range of industries. These include successfully brought actions or consent decrees obtained in

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enforcement proceedings against powerful economic entities, including Google and Facebook. Yet, in one area, the FTC has been reluctant to engage in the hard tactics it regularly deploys in other areas. The Commission has struggled to employ a coherent enforcement strategy for deceptive practices by Social Media Influencers. The Commission has taken significant steps towards deception and disclosure enforcement for influencers, including publication of a set of guidelines for disclosure. However, with the exception of a series of warning letters sent to high profile influencers in April of 2017, the Commission has not engaged in a significant enforcement action—choosing instead to launch an inquiry in February 2020 to review the disclosure guidelines. As empirical research demonstrates that consumers do not understand the nature of the influencer process, this Article argues that the FTC should employ a commitment to a robust enforcement stance. The FTC’s failure to “make an example” of high-profile influencers or to take a hardline approach with influencers, as the Commission did with native advertising online, represents a parting with the manner with which the Commissions has traditionally enforced the deception standard in endorsement ads. This departure, this Article argues, is undermining the FTC’s consumer protections.

INTRODUCTION

Social media influencers have become a pipeline for merchandise branding, product sales promotion, and advertising campaigns to persuade the masses across a range of platforms.¹ Advertising campaigns driven through social media platforms are inescapable, prefabricated, everyday events.² Influencers are

¹ Rochelle Bailis, *The State of Influencer Marketing: 10 Influencer Marketing Statistics to Inform Where You Invest*, BIGCOMMERCE BLOG, <https://www.bigcommerce.com/blog/influencer-marketing-statistics/> (last visited Jan. 22, 2021) (“When you want to really scale and when you want to reach new audiences, you need content that makes people WANT you—and that comes from having great content. One of the best ways to get this content is from influencers—they know how to tell a story that fits the social media channel’s objective.”).

² Brent Barnhart, *What Is Viral Marketing (And Does It Actually Work in 2020)*, SPROUT BLOG (Jan. 16, 2021), <https://sproutsocial.com/insights/viral-marketing/>.

everywhere: on people's timelines and in business strategy.³ To put it mildly, influencer marketing is *exploding*,⁴ but the law has not kept up.

Indeed, for nearly any hobby, practice, or field of entertainment, there is a corresponding group of influencers whose content reaches an interested audience. These influencers can have enormous reach because of the sheer size of their follower base.⁵ For example, soccer fans may not only have watched Cristiano Ronaldo, but they may be one of his 148 million followers on Facebook.⁶ The same is true of non-traditional sports stars like Turner "Tfue" Tenney who commands 10.1 million followers on Twitch.tv,⁷ or Lee "Faker" Sang-hyeok with nearly 2.8 million followers on Twitch.tv.⁸ Politics is not immune to influencer culture either. For example, President Barack Obama has more than 127 million followers on Twitter.⁹ Pop culture is filled with influencers like Kylie Jenner who has 219 million followers on Instagram, and her sister Kendall Jenner who has 154 million on that platform.¹⁰ Even individuals who otherwise

³ 20 *Surprising Influencer Marketing Statistics*, DIGIT. MKTG. INST. (Oct. 25, 2018), <https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you> (indicating that 60% of people have been influenced by influencers before purchasing an item and that two-thirds of marketers promote content via influencer marketing).

⁴ See *id.* (stating that "Influencer Marketing Has Surpassed Print Marketing").

⁵ Indeed, there are websites which track users who have the most followers on different social media platforms. See, e.g., *The Most Followed Accounts on Twitter*, BRANDWATCH, www.brandwatch.com/%2Fblog/%2Fmost-twitter-followers%2F (last updated Jan. 9, 2021).

⁶ Cristiano Ronaldo (@Cristiano), FACEBOOK, <https://www.facebook.com/Cristiano/> (last visited Jan. 22, 2020). This is just his Facebook, and does not include his other follower bases on other social media accounts.

⁷ Turner Tenney (Tfue), TWITCH, <https://www.twitch.tv/tfue/> (last visited Jan. 22, 2021).

⁸ Lee Sang-hyeok (Faker), TWITCH, <https://www.twitch.tv/faker> (last visited Jan. 22, 2021).

⁹ Barack Obama (@BarackObama), TWITTER, <https://twitter.com/BarackObama> (last visited Jan. 22, 2021).

¹⁰ Kylie Jenner (@KylieJenner), INSTAGRAM, <https://www.instagram.com/kyliejenner/> (last visited Jan. 22, 2021); Kendall Jenner (@KendallJenner), INSTAGRAM, <https://www.instagram.com/kendalljenner/> (last visited Jan. 22, 2020).

lack traditional celebrity status can become social media influencers, such as Addison Rae who has 77.6 million followers on TikTok¹¹ or Dude Perfect who has 55.4 million subscribers on YouTube.¹²

Along with their pervasive presence, influencers have become an integral part of marketing strategies. And influencers can charge accordingly—a sponsored post from Dwayne ‘The Rock’ Johnson, for example, is valued at just over \$1,000,000.¹³ Kylie Jenner’s price tag-per-post is also valued at about \$1,000,000.¹⁴ Though other influencers may charge less per post, the top ten richest influencers on Instagram all make more than \$700,000 per post.¹⁵ Even outside of the payment-per-post realm, regular influencer activity can generate significant profits. For example, “e-sports” influencer Daequan “TSM_Daequan” Loco has been estimated to earn roughly \$750,000 a year from Twitch.tv subscriber fees alone, not counting advertisement views or any other built-in tip jar features.¹⁶

The popularity of influencers does not end with their followers—it extends to business as well. Influencer advertising campaigns have changed dramatically over the past few years, but the general view that influencer advertising is a successful brand-

¹¹ Addison Rae (@addisonre), TIKTOK, <https://www.tiktok.com/@addisonre> (last visited Jan. 22, 2021).

¹² Dude Perfect, YOUTUBE, <https://www.youtube.com/channel/UCRijo3ddMThIHyNSNXpNQ> (last visited Jan. 22, 2021).

¹³ *The Rock Ranks as Instagram’s ‘Most Valuable Star’*, BBC NEWS (July 2, 2020), <https://www.bbc.com/news/business-53261043>. Other similar high-grossing influencers include household sports star names like Neymar da Silva Santos Junior and popular culture icons such as Taylor Swift. *Id.*

¹⁴ 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/>.

¹⁵ *Id.*; see also *Instagram Rich List 2020*, HOPPERHQ, <https://www.hopperhq.com/blog/instagram-rich-list/> (last visited Mar. 31, 2021) (listing the cost per post of mega-influencers).

¹⁶ Julian, *How Much Money Daequan Loco Makes on Twitch & Youtube—Net Worth*, NAIBUZZ, <https://naibuzz.com/how-much-money-daequan-loco-makes-on-twitch-youtube-net-worth/> (last updated Feb. 20, 2020).

marketing strategy has not changed.¹⁷ Advertisers pay for influencer endorsements because brands and the advertising industry recognize that influencers wield an immense amount of power in the never-ending battle to sell goods.¹⁸ With a potential return on investment of \$5.78 for every \$1 spent by a brand, influencers have become an integral part of the advertising industry.¹⁹ And there is no indication that the deluge of posts, payments, and sales will slow down given the success of influencers so far.²⁰

In the face of the successes of influencer marketing, the FTC has struggled to regulate influencer commercial speech and improve influencer compliance with FTC Act requirements.²¹ At the close of 2020, the FTC has issued only one ruling against individual influencers,²² supplementing its previous issuing of ninety

¹⁷ Taylor Lorenz, *The Instagram Aesthetic Is Over*, ATLANTIC (Apr. 23, 2019), <https://www.theatlantic.com/technology/archive/2019/04/influencers-are-abandoning-instagram-look/587803/>.

¹⁸ Bailis, *supra* note 1.

¹⁹ See *The State of Influencer Marketing 2020: Benchmark Report*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020/> (last updated Feb. 14, 2021) (noting highlights of the continued growth of the influencer age—such as 80% of firms surveyed using their marketing budget to pay influencers); *cf.* DIGIT. MKTG. INST., *supra* note 3 (indicating earnings of \$6.50 per \$1 spent on influencer advertising).

²⁰ See Alexandra Mondalek, *Are We in the Golden Age of the ‘Influencer Brand’?*, FASHIONISTA, https://fashionista.com/2020/02/influencer-fashion-brands-market_ (last updated Feb. 18, 2020) (describing a fashion company’s—known as Revolve—notoriety for pairing of influencers with metadata concerning sales, turning individual influencers into household fashion names). *But see* Laura DeMaude, *Is the Golden Age of Social Media Influencers Gone for Good?*, JAMMY BEAR (Aug. 29, 2019), <https://jammybear.com/is-the-golden-age-of-social-media-influencers-gone-for-good/> (claiming that increased FTC attention in 2019 would spell the end of the golden age of social media influencers). Given the subject of this Article, it is fair to say that Mondalek had, perhaps, the better prediction of the current zeitgeist.

²¹ See, e.g., *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers> (last visited Jan. 22, 2021).

²² See *CSGO Lotto, Inc.*, 164 F.T.C. 785 (2017); see also *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM’N (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>. The FTC does not seem to consider its action in Nudge LLC an action

educational letters, and twenty-one follow-up letters to influencers.²³ But this strategy has failed to cause a shift in influencer compliance. While the FTC has gone after a slew of *businesses*, such as Devumi,²⁴ Teami,²⁵ and Machinima,²⁶ this strategy has not induced sufficient systematic change.²⁷ For more

against an influencer, and so it is not described as an action against an influencer in this Article. *See generally* Complaint, FTC v. Nudge, LLC, FTC File No. 182 3016, No. 2:19-CV-00867-RJS (D. Utah Nov. 5, 2019), available at https://www.ftc.gov/system/files/documents/cases/182_3016_nudge_complaint_redacted-public.pdf.

²³ *See 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> (informational letters); *see also* Mary K. Engle, *Instagram Influencer Warning Template*, FED. TRADE COMM’N, https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contra-influyentes-de/instagram_influencer_warning_letter_template_9-6-17.pdf (last visited Jan. 22, 2021) (follow-up letters).

²⁴ *See generally* FTC v. Devumi, LLC, FTC File No. 182 3066, No. 9:19-CV-81419-RKA (S.D. Fla. Oct. 18, 2019), available at https://www.ftc.gov/system/files/documents/cases/devumi_complaint.pdf (complaint).

²⁵ *See generally* FTC v. Teami, LLC, FTC File No. 182 3174, No. 8:20-CV-518 (M.D. Fla. Mar. 6, 2020), available at https://www.ftc.gov/system/files/documents/cases/complaint_4.pdf (complaint).

²⁶ *See generally* Machinima, Inc., 161 F.T.C. 318 (2016).

²⁷ *See* Lara O’Reilly, ‘One of Many Stages of Maturity’: Ad Industry Welcomes Instagram Influencer Marketing Labeling Changes, DIGIDAY (Oct. 19, 2020), <https://digiday.com/marketing/one-of-many-stages-of-maturity-ad-industry-welcomes-instagram-influencer-marketing-labeling-changes/> (describing Instagram’s “labelled” posts feature, a platform feature unveiled to mark paid promotions and sponsored content). An important discussion in O’Reilly’s article is the possible business repercussions of follower disengagement and algorithm de-prioritization with posts with disclosed material connections through post labelling. While companies may ostensibly be taking precautions to improve disclosure, there appears to be anxiety over the disadvantages of FTCA compliant disclosures. *Id.* This indicates that while regulating businesses which engage in influencer advertising is an important piece of the puzzle, it cannot be the only piece. Just as interestingly, other influencer marketing firms believe that platforms are likely to be policed by regulation agencies. *Id.* Recent FTC platform chasing indicates that this is an accurate belief. *See FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information*, FED. TRADE COMM’N (Dec. 14, 2020), <https://www.ftc.gov/news-events/press->

than a decade—or better understood, since the influencers-were-usually-bloggers era²⁸—the FTC has failed to take meaningful action against influencers themselves.

The FTC's failures to induce influencer's compliance with FTC endorsement regulations by enforcing against widespread endorsement deception in a relatively new and popular marketplace, through a relatively new and popular marketing strategy, tangibly harms consumers. Empirical research strongly suggests that many consumers do not understand the nature of the influencer process.²⁹ As a result, consumers are tricked into buying products that they think are being impartially endorsed by individual influencers who are anything but impartial.³⁰ In the face of an already nearly \$10 billion dollar a year industry,³¹ the FTC has not been able to effectively protect consumers from influencer non-compliance with its regulations on endorsement disclosure.

The FTC's ongoing refusal to take meaningful action against influencers who fail to disclose the material connections between themselves and the products they are promoting has created an advertising mechanism engaged in systematic deception. This lack of enforcement functionally undermines the agency's wider consumer protection authority—its efficacy and potency—under Section 5 (as well as Section 13) of the FTC Act.³²

releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services. The authors of this Article do not opine on whether platform chasing is a good or bad option, as that is beyond the scope of this Article. Instead, we merely argue that engendering influencer compliance will require actually enforcing against influencers, and not just businesses. Another example of this can be seen by the repeated influencer deception standard infractions between the FTC's first influencer enforcements and the most recent enforcements. See *infra* Part III.

²⁸ See Jack Shafer, *The FTC's Mad Power Grab*, SLATE: PRESS BOX (Oct. 7, 2009, 6:29 PM), <https://slate.com/news-and-politics/2009/10/hey-blogger-the-consumer-protection-police-would-like-a-word-with-you.html> (discussing the FTC's increased scrutiny of blogger endorsements).

²⁹ Lu Zhang, Pei-Jou Kuo & Michael McCall, *Microcelebrity: The Impact of Information Source, Hotel Type, and Misleading Photos on Consumers' Responses*, 60 CORNELL HOSP. Q. 285–97 (2019).

³⁰ *Id.*

³¹ INFLUENCER MKTG. HUB, *supra* note 19, at 7.

³² 15 U.S.C. §§ 45(a), 53(b).

As the primary consumer protection administrative agency, the FTC's lack of action on influencers is not just unsustainable—it is harmful to consumers. Influencers may be mouthpieces,³³ but under any traditional enforcement they should also be considered endorsers who regularly engage in deceptive practices.³⁴ A cursory examination of most social media platforms can inundate a consumer with a range of false and deceptive claims.³⁵ With nothing more than a “please stop, or we might say stop again” from the FTC, influencers are operating in a world of unmatched freedom to deceive consumers.

This Article argues that the FTC should deploy a commitment to a strong, and when necessary, aggressive, enforcement stance on influencer content—just as the agency does for other forms of commercial speech. Such a strategy will require enforcement against individual influencers, not just businesses and platforms. The FTC's failure to “make an example” of serial violating, high-profile influencers³⁶ is a departure from how the FTC has

³³ In fact, to say that influencers are not part of sophisticated global networks would be to ignore what the FTC has admitted it is up against since before 2016. See Complaint ¶¶ 6–8, *Machinima, Inc.*, 161 F.T.C. 318 (2016) (No. C-4569), available at <https://www.ftc.gov/system/files/documents/cases/150902machinima-cmpt.pdf> (“Microsoft . . . embarked on a global advertising campaign to promote the Xbox One and new Launch Titles Respondent eventually entered into a written agreement . . . to provide advertising on behalf of Microsoft as outlined in Respondent's proposal.”). See generally Julie Muncy, *FTC Slaps Machinima on the Wrist for Its Paid Endorsements*, WIRED (Sept. 2, 2015, 5:34 PM), <https://www.wired.com/2015/09/ftc-machinima-microsoft-youtube/> (describing one commentator's immediate disdain for the FTC's lack of meaningful punishment against Machinima).

³⁴ See Ari Lazarus, *Is That Post #Sponsored?*, FED. TRADE COMM'N (Apr. 19, 2017), <https://www.consumer.ftc.gov/blog/2017/04/post-sponsored> (showing that commenters recognize that the FTC “talks a big talk” but has not taken sufficient action).

³⁵ *Id.*

³⁶ Brittany Renner's advertisements for Teami Teas through her Instagram posts are just one example of an influencer's repeated violations of FTC disclosure requirements. Ms. Renner's posts are far from the only example, but unlike other disclosure violations, Renner's violations have been used by the FTC as part of its complaint exhibits and related press release. See *Tea Marketer Misled Consumers, Didn't Adequately Disclose Payments to Well-Known Influencers, FTC Alleges*, FED. TRADE COMM'N (Mar. 6, 2020), <https://www.ftc.gov/news->

traditionally enforced the deception standard in endorsement advertising.³⁷ The FTC's departure from its longstanding efforts to police deception in advertising has undermined its consumer protection authority and left consumers at the whims of influencers producing deceptive online content that the FTC has routinely challenged in other media in the past.

Part I of this Article discusses how influencers have become part and parcel of the advertising industry and explores some social science research about influencer content. Part II explores the FTC's Section 5(a) authority to enforce deceptive practices. Part III explores the evolution of the FTC's influencer enforcement case line. Part IV reports a coded analysis of the comments submitted to the FTC's 2020 review of its endorsement guidelines, including the responses to questions asked by the agency dealing with social media influencer content. Part V proposes that the agency is undermining its consumer enforcement duties and argues that the incoming FTC must launch a policy of active enforcement against the rampant deceptions in the commercial speech being produced by influencers.

events/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments; Exhibit 17C, *FTC v. Teami, LLC*, FTC File No. 182 3174, No. 8:20-CV-518 (M.D. Fla. Mar. 5, 2020), available at <https://www.ftc.gov/system/files/documents/cases/1823174teamiexhibit17.c.mp4> (one of the violative videos posted to Instagram by Brittany Renner in September 2018).

³⁷ For example, the Commission has previously taken hardline approaches against embedded online native advertising. *Disclosures: How to Make Effective Disclosures in Digital Advertising*, FED. TRADE COMM'N (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [hereinafter *How to Make Effective Disclosures*]. Commissioners in the FTC have previously argued in favor of stronger regulation against general online deception, though this has not necessarily been construed to apply to individual influencers. *Statement of Commissioner Rohit Chopra*, FED. TRADE COMM'N (July 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1578231/social_bots_chopra_statement.pdf ("We Cannot Trust Tech Platforms to Police This Problem."); see also *Enforcement Policy Statement on Deceptively Formatted Advertisements*, FED. TRADE COMM'N 1–2 (Dec. 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf [hereinafter *Enforcement Policy Statement*] ("The principle that advertising and promotional messages should be identifiable as advertising is found in Commission and staff policy guidance . . .").

I. INFLUENCERS—A CONCISE HISTORY

A. Influencers, a New Walking Billboard

Social media influencers have become an integral part of the larger media and advertising ecology.³⁸ This is largely because of their unique advertising abilities and mechanics.³⁹ With internet users becoming immune to traditional visual advertisements, advertisers began to turn toward organic advertising techniques, such as celebrity endorsements.⁴⁰ These endorsements combine word of mouth marketing with the mass appeal of a celebrity. While streaming platforms like YouTube or Twitch.tv deliver large quantities of influencer produced content, Instagram remains the primary mechanism for the delivery of influencer-driven advertising campaigns.⁴¹

Rather than discuss the types of content which appear in various platforms, we propose that for regulatory purposes, an influencer can be defined as an individual who has a material connection to commercial products or services that are endorsed or promoted through social media content to a group of followers. By this definition, a social media influencer is a person who acts as a perceived authority, who has a trusted voice that is perceived to be neutral, and whose voice is functionally that of a paid spokesperson.⁴²

Influencers come in many sizes and are generally categorized into four separate types: mega, macro, micro, and nano.⁴³ Mega-

³⁸ See, e.g., DIGIT. MKTG. INST., *supra* note 3.

³⁹ *Id.*

⁴⁰ Leah W. Feinman, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 98–103 (2011).

⁴¹ See INFLUENCER MKTG. HUB, *supra* note 19 (“87% of respondents use Instagram for influencer marketing . . .”).

⁴² Laura E. Bladow, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM. & MARY L. REV. 1123, 1128 (2018).

⁴³ These different levels are not universally agreed upon, and the number of followers required to reach each type is not universally agreed upon either. Compare Ismail, *supra* note 14 (stating that nano is 1,000 or fewer followers), with Bella Foxwell, *A Guide to Social Media Influencers: Mega, Macro, Micro*,

level influencers have at least a million followers and are often celebrities or public figures outside of social media.⁴⁴ Mega-level influencers are not always celebrities in the general sense—the influencers may simply be highly followed individuals without any other celebrity status.⁴⁵ Macro-level influencers are typically executives or writers/bloggers in an area. Macro-level influencers have a large base of followers and their opinions are often important to followers within the topical area they are associated with. Micro-level influencers are everyday consumers producing social media content for between one and ten thousand followers. Micro-level influencers are highly sought after by advertisers; these influencers are thought to generate the highest level of brand relevance because their statements seem largely organic.⁴⁶ Nano-level influencers round out the influencer categories and have the smallest following base at one thousand or fewer followers.⁴⁷

Influence can be quantitatively assessed by one's ability to influence others and, conversely, how susceptible an audience is to external influence.⁴⁸ Marketers utilizing the services of social media influencers have recognized that while both assessments of influence are important, the latter element is key. An audience's ability to be influenced flows from its perception of the "mimic-ability" of an influencer's images—or whether the audience deems the images eminently attainable.⁴⁹ The mimic-ability of an

and Nano, ICONOSQUARE, <https://blog.iconosquare.com/guide-to-social-media-influencers/> (last updated Feb. 17, 2020) (stating that nano is 10,000 or fewer followers).

⁴⁴ See Ismail, *supra* note 14 ("Mega-influencers are the highest-ranking category of social media influencer, they typically have more than a million followers.").

⁴⁵ Lorenz, *supra* note 17.

⁴⁶ See Ismail, *supra* note 14.

⁴⁷ Gregory A. Nysten, *Social Media Influencers as Endorsers: Pitfalls and Best Practices to Avoid the Ire of the FTC*, LAWYERS' MUT. 31, 37 (Apr. 2020), <http://www.virtualonlineeditions.com/publication/?m=15276&i=655845&p=38>; see also Ismail, *supra* note 14.

⁴⁸ Duncan J. Watts & Peter Sheridan Dodd, *Influentials, Networks, and Public Opinions Formation*, 34 J. CONSUMER RSCH. 441, 441–43, (2007).

⁴⁹ Chung-Wha Ki & Youn-Kyung Kim, *The Mechanism by Which Social Media Influencers Persuade Consumers: The Role of Consumers' Desire to*

influencer also plays into the audience's desire, for any number of rational and irrational reasons, to mimic influencers and their lifestyles.⁵⁰ The end result is that deploying influencers who come off as believable, credible, and mimicable to promote products has become a key strategy for businesses looking to achieve a better bottom line.⁵¹

There are currently no signs that the marketing industry is *seriously* rethinking influencer use.⁵² There is little question that the marketing industry believes that influencer advertising is an effective tactic, with over 90% of marketers believing that influencer marketing produces return-on-investment is comparable to, or greater than, other marketing methods.⁵³ In fact, advertising and public relations professionals indicate the hardest part in using influencers is identifying which influencers to use, rather than

Mimic, 36 PSYCH. & MKTG. 905, 905 (2019), available at <https://onlinelibrary.wiley.com/doi/abs/10.1002/mar.21244>.

⁵⁰ Chung-Wha Ki, *The Drivers and Impacts of Social Media Influencers: The Role of Mimicry*, TRACE: TENN. RSCH. AND CREATIVE EXCH., UNIV. TENN. 26–27 (2018), https://trace.tennessee.edu/cgi/viewcontent.cgi?article=6611&context=utk_graddiss (“Compliance means conformity, and it refers to the act of adapting to others’ wishes, to a rule, or to necessity. In other words, compliance is a submissive response made in reaction to others’ request or influence appeals. An influencer can encourage a target’s compliance desire by using her power resources that link the influencer’s desired behavior to something that is of value to the target.” (citations omitted)).

⁵¹ See, e.g., *10 Lessons from Instagram Influencers*, SPROUTSOCIAL, <https://sproutsocial.com/insights/guides/instagram-influencers/> (last visited Jan. 22, 2020) (discussing the importance of “Sell[ing] Lifestyle, Not Product” as the method of improving consumer engagement). In fact, the article speaks to the success of simple photos and “longform” captions, which detail stories that are thought provoking contextualized by photos of lifestyles that appear to be entirely attainable. *Id.*

⁵² While there is some indication of the “maturation” of the industry, there is no indication that the advertising business has seriously rethought how it uses interns. See INFLUENCER MKTG. HUB, *supra* note 19 (“Influencer fraud is still of concern to respondents, but less so than in the past.”).

⁵³ Bailis, *supra* note 1. See also Ying Lin, *10 Influencer Marketing Statistics You Need to Know in 2021 [Infographic]*, OBERLO (Mar. 31, 2020), <https://www.oberlo.com/blog/influencer-marketing-statistics> (“93% of marketers use influencer marketing.”).

whether or not to use them.⁵⁴ So far, economic analysis of influencer marketing campaigns shows the usage of influencers is justified.⁵⁵

B. Trust, the Fuel of Influencers

Unironically, in a regulatory regime based around the legal concept of deception, trust remains an important component of the success of social media influencers. Influencers who generate a following also generate trust from their followers.⁵⁶ Research has demonstrated a positive relationship between influencer disclosure, follower trust, and follower interest in the purchase of products promoted through a properly disclosed social media post.⁵⁷ The results of another study indicated that endorsements yielded more positive attitude when recommended by micro-level influencers; even when study participants were shown misleading photos, a higher level of trust of the endorsement from a micro-level influencer remained.⁵⁸ The advertising industry has quickly observed that this trust between influencer and follower is ripe for exploitation. Sadly, one study indicated that three-in-ten influencers

⁵⁴ See DIGIT. MKTG. INST., *supra* note 3 (stating that major brands expect “an increase in spend, with some 67% of marketers planning to increase their budgets in the next 12 months, particularly on Instagram”). Furthermore while “73% of marketers have a budget set aside for influencer marketing, . . . 67% are actively engaging with and have a relationship with influencers.” *Id.*

⁵⁵ See *80 Influencer Marketing Statistics for 2020*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/influencer-marketing-statistics/> (last updated Jun. 15, 2020) (indicating that businesses have a \$5.20 return-on-investment for every \$1 spent on influencer marketing). The top 13% of firms make \$20 return-on-investment for every \$1. However, some firms generate little to no return on investment. *Id.*

⁵⁶ See Ki & Kim, *supra* note 49, at 910 (“Peer consumers today view [social media influencers] as trusted sources of information . . . because they provide information not only about a product/service’s features or quality, but also reviews that detail their personal experiences using it.”).

⁵⁷ See *The 2017 State of the Creator Economy Study*, IZEA 72, 85 (2017), [http://content.izea.com/hubfs/Gated_Content/2017%20State%20of%20the%20Creator%20Economy%20\(SOCE\).pdf](http://content.izea.com/hubfs/Gated_Content/2017%20State%20of%20the%20Creator%20Economy%20(SOCE).pdf) (indicating the interrelationship between disclosure and trust).

⁵⁸ Zhang, Kuo & McCall, *supra* note 29, at 285–97.

have been asked to hide sponsorship disclosure.⁵⁹ This may not be malicious, but instead the result of a marketing firm's inability to understand the FTC's guidelines—while two-thirds of marketers are aware of FTC guidelines, only 11% of marketers claim to understand them.⁶⁰ This combination of trust and deception—despite decreasing over the past year—continues to victimize consumers, with one survey indicating that 38% of consumers experience influencer fraud.⁶¹

Whether or not the industry is pushing for non-disclosure,⁶² some have argued that the FTC failed at supporting the disclosure guidelines it has provided, suggesting in part that social media influencers are not educated enough to engage in proper disclosure.⁶³ One assessment has argued that more training and information is needed, and pointed at results indicating that of 70% of influencers that had attempted to disclose their material relationship, only 25% successfully complied with the

⁵⁹ Christina Sauerborn, Note, *Making the FTC ☺: An Approach to Material Connections Disclosures in the Emoji Age*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 571, 575 (2018) (“While influencers seem to have a better grasp on disclosure requirements . . . three-in-ten influencers reported having been asked by a client or marketer to hide the sponsored nature of their post.”).

⁶⁰ IZEA, *supra* note 57, at 47.

⁶¹ See INFLUENCER MKTG. HUB, *supra* note 19 (indicating a drop from 68% to 38% consumer fraud rate due to influencers). While this drop is both substantial and heartening, it still leaves nearly four in ten consumers at risk, which is hardly cause for celebration. See Zhang *supra* note 29, at 285–97 (providing similar statistics regarding influencer fraud at a similar rate).

⁶² Alice Audrezet & Karine Charry, *Do Influencers Need to Tell Audiences They're Getting Paid?*, HARV. BUS. R. (Aug. 29, 2019), <https://hbr.org/2019/08/do-influencers-need-to-tell-audiences-theyre-getting-paid> (“We find that in any particular year, disclosure makes almost no difference to the impact of the influencer's recommendation on the purchase decision.”). It should be noted that at least one study has indicated that disclosure does not negatively impact trust rates among influencer follower bases. For example, Audrezet and Charry argue that their surveys indicate that disclosure may improve trust among follower bases, and therefore companies and influencers do not help their bottom-line by refusing to disclose. *Id.*

⁶³ Arunesh Mathur, Arvind Narayanan, & Marshini Chetty, *Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest*, 2 PROC. OF THE ACM ON HUMAN-COMPUTER INTERACTION (2018).

requirements.⁶⁴ Additionally, one showed that influencers did not like the suggestion that the minimal language of “ad” be included as a visible disclosure in a post.⁶⁵

In comparison, native advertising—a type of online advertising the FTC has been quite serious about regulating—now requires a disclosure that is clear and prominent, despite similar concerns about appearance.⁶⁶ And the comparison between native advertising online and social media influencer content is not an empty one. Native advertising is hidden or embedded on websites, while influencers who do not comply are functionally hiding sponsored content on their personal pages.

There is substantial evidence that influencers are not following or complying with the FTC’s disclosure requirements. In one assessment of disclosures, only about 10% of affiliate marketing content contained any disclosures at all, with even less meeting the guidelines.⁶⁷ Another assessment suggested that influencers were improving, moving from 11% compliance in 2018 to 14% compliance in 2019.⁶⁸ Overall, these findings indicate that the FTC’s attempts thus far⁶⁹ to curb influencer non-compliance have been unsuccessful.

II. THE FTC’S DECEPTION STANDARD

The FTC is granted the ability to regulate commerce by preventing unfair or deceptive trade practices which harm

⁶⁴ Vanessa Chan, *When #Ad Is #Bad: Why the FTC Must Reform Its Enforcement of Disclosure Policy in the Digital Age*, 13 OHIO ST. BUS. L.J. 303, 321 (2019).

⁶⁵ Amy R. Mudge, *Native Advertising, Influencers, and Endorsements: Where Is the Line Between Integrated Content and Deceptively Formatted Advertising?*, ANTITRUST MAGAZINE 80, 83 (2017).

⁶⁶ See *Native Advertising: A Guide for Businesses*, FED. TRADE COMM’N (Dec. 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> (“Any clarifying information necessary to prevent deception must be disclosed clearly and prominently to overcome any misleading impression.”).

⁶⁷ Mathur et al., *supra* note 63.

⁶⁸ INFLUENCER MKTG. HUB, *supra* note 19.

⁶⁹ See, e.g., FED. TRADE COMM’N, *supra* note 21 (explaining FTC authority and disclosure requirements in a consumer-friendly booklet format).

consumers under Section 5(a) of the Federal Trade Commission Act (“FTCA”).⁷⁰ Under the language of Section 5, the FTC applies a broadly written, flexibly applied deception standard when reviewing the material claims of advertising. While an extended discussion of deception is outside of the scope of this Article,⁷¹ the FTC has stated that it will find a breach of the deception standard, as outlined in its 1983 policy paper, “if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer’s detriment.”⁷²

This standard has never required actual injury, however. Instead, only the possibility of deception is required. Under this standard an actor need not actually deceive anyone. Injury instead comes from the possibility of deceiving through acts or practices. The FTC has never ruled that any particular percentage of consumers being deceived definitively indicates that a practice is deceptive. However, the FTC has publicly reaffirmed that a deception rate of 15% is sufficient to demonstrate deception in cases of deceptive advertising.⁷³

This somewhat confusing standard—a quasi-objective, but realistically, a subjective standard—was in need of clarification as applied to endorsements. This came in the form of the Endorsement Guides, first promulgated in 1980.⁷⁴ While not carrying the force of

⁷⁰ 15 U.S.C. § 45.

⁷¹ See generally Jack E. Karns, *The Federal Trade Commission’s Evolving Deception Standard*, 22 U. RICH. L. REV. 389 (1988); Cliffdale Assoc., Inc., 103 F.T.C. 110 (1984).

⁷² *FTC Policy Statement on Deception*, FED. TRADE COMM’N (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

⁷³ See Sarah Sluis, *FTC: Publishers Will Be Held Responsible for Misleading Native Ads*, ADEXCHANGER (June 3, 2015, 3:15 PM), <https://www.adexchanger.com/publishers/ftc-publishers-will-be-held-responsible-for-misleading-native-ads/> (“An ad is deceptive if it misleads a significant percentage of consumers [Engle] clarified that usually means 15% of consumers, and sometimes as few as 10% of consumers.”). The origin of this percentage is likely *Firestone*. See *Firestone Tire & Rubber Co. v. Fed. Trade Comm’n*, 481 F.2d 246, 249 (6th Cir. 1973) (“We find it hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public.”).

⁷⁴ 16 C.F.R. § 255.0 (2021).

law, the Enforcement Guides clarify how the FTC enforces the deception standard.⁷⁵ The initial purpose of the Endorsement Guides was to give guidance to the advertising industry about how to handle celebrity endorsements.⁷⁶ These celebrity endorsements often took the form of appearing in an ad for a company or mentioning a product on air.⁷⁷

Initially in the 2000s, bloggers were the social media advertising issue.⁷⁸ Sponsored blog posts appear among the other unsponsored content from a particular blogger and may look and read like their own posts.⁷⁹ While previously celebrities would appear on behalf of a company, the introduction of blogger endorsements wove advertisements into an otherwise impartial-seeming personal feed of media. Additionally, it was not clear if the endorsers would even be liable for the statements made at the request of an advertising agency.⁸⁰ Without clear liability, blog posts could be solicited word-of-mouth advertisements that appeared as otherwise indistinguishable from other impartial posts. These features, and others, compelled the FTC to update the Endorsement Guides in 2009⁸¹—nearly three decades after first promulgation—to address the new age (and now ancient methods) of internet-based advertising.

In the FTC’s own words, the Guides were meant to enforce the law so that consumers could trust what they see in social media: “Moreover, to the extent that consumers’ willingness to trust social media depends on the ability of those media to retain their credibility as reliable sources of information, application of the general principles embodied in the Guides presumably would have a

⁷⁵ See, e.g., *State v. Amoco Oil Co.*, 293 N.W.2d 487, 495–96 (Wis. 1980).

⁷⁶ Feinman, *supra* note 40, at 121.

⁷⁷ *Id.* at 105–10.

⁷⁸ See *How to Make Effective Disclosures*, *supra* note 37, at 4 n.10 (“[W]hen the Endorsement Guides were reviewed in 2009, examples involving blogs were included, to make clear that the FTC Act applies to this then-new form of social media marketing.”).

⁷⁹ Chan, *supra* note 64, at 314–15.

⁸⁰ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,123, 52,129 (Oct. 15, 2009) (codified at 16 C.F.R. § 255 (2021)).

⁸¹ Chan, *supra* note 64, at 316.

beneficial, not detrimental, effect.”⁸² In fact, the promulgation of the updated Guides in 2009 specifically stated that industry self-regulation would be insufficient to maintain trust in the virtual marketplace: “[A]lthough industry self-regulation certainly can play an important role in protecting consumers as these new forms of marketing continue to evolve and new ones are developed, self-regulation works best when it is backed up by a strong law enforcement presence.”⁸³

The nitty-gritty of the Enforcement Guides is critical to understanding the make-up of influencer enforcement opportunities. According to the Guides, an endorser is “[t]he party whose opinions, beliefs, findings, or experience the message appears to reflect . . . and may be an individual, group, or institution.”⁸⁴ For the purpose of the Guides, endorsers are a broad category. And this choice makes sense, since as the examples show, modern commercial media can take a variety of forms, formats, voices, and speakers.⁸⁵

The endorsement standard, codified in the Endorsement Guides, defines “endorsement” broadly to mean “any advertising message.”⁸⁶ The Guides indicated that breadth in expounding on what constitutes “advertising,” including “verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization.”⁸⁷

An endorsement doesn’t have to mean that a statement was actually intended as an endorsement by the endorser.⁸⁸ Formalistically understood, to be treated as an endorsement, one must merely make a statement “that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”⁸⁹ Under this standard, the statement merely needs to be one that a consumer, acting as a

⁸² Guides Concerning the use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. at 53,126.

⁸³ *Id.*

⁸⁴ 16 C.F.R. § 255.0(b) (2021).

⁸⁵ *Id.* exs. (a)–(f).

⁸⁶ *Id.* § 255.0(b).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

reasonable consumer in the circumstances—would likely believe is an endorsement.⁹⁰ In response to public comment about the supposed uncertainty this would cause, the FTC stated outright that the Guides “focus[] on the message consumers take from the speech at issue.”⁹¹

The extent to which this applies in the contemporary influencer world is somewhat unsettled. In the Federal Register responses, the FTC suggested some hesitation attaching this standard to anyone making a positive statement about a brand or product.⁹² The FTC instead stated it would opt to utilize what is an apparently unincorporated test concerning whether the speaker is: “(1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker’s statement is an ‘endorsement’ that is part of an overall marketing campaign.”⁹³ Though this Article does not discuss this issue at length—as the influencers and influencing being discussed here are nearly universally part of some compensation scheme—this test does not seem as intuitive as perhaps the FTC originally believed. This is especially the case because the Guides indicate that the endorsement definition includes endorsements honestly believed by the endorser that “are identical to those of the sponsoring advertiser.”⁹⁴ Muddying these waters even more, the endorsement standard treats testimonial statements as identical to endorsements.⁹⁵

More straightforwardly, endorsements have some basic substantive requirements. They must not be lies; that is, “[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.”⁹⁶ This sets the bar high for endorsement deception. Statements that even distort the truth are considered deceptive under this standard.⁹⁷ In effect, this means that

⁹⁰ *Id.*

⁹¹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,123, 52,125 (Oct. 15, 2009) (codified at 16 C.F.R. § 255 (2021)).

⁹² *Id.* at 53,126.

⁹³ *Id.*

⁹⁴ 16 C.F.R. § 255.0(b) (2021).

⁹⁵ *Id.* § 255.0(c).

⁹⁶ *Id.* § 255.1(a).

⁹⁷ *Id.* § 255.1(b).

individuals stating something they believe in order to sell a product, even if they are not intending to make an endorsement, must be telling their subjective truth. If they are touting an experience with that product, then the experience being told must reflect that subjective truth as well.⁹⁸ As this Article will indicate, this is at odds with the history of endorsements, endorsement enforcements, and the magical world of influencers.⁹⁹

But more than just telling their subjective truth, endorsers cannot say anything that is not objectively true from the brand's standpoint either. Endorsements by an endorser about a product are deceptive just as they would be deceptive had they been made by the business or manufacturer.¹⁰⁰ Constrained between telling their own subjective truth and the brand's objective truth, the Enforcement Guides' manifest intent is to ensure that consumers are fed only honest opinions.

The FTC's intent in clarifying the duty to be truthful in endorsements is evident in the Federal Register comments. These comments indicate that failure to be truthful by the terms set by the Enforcement Guides would meet with penalties for both the company and the endorser.¹⁰¹ While the FTC's 1980 Enforcement Guides were ambiguous on this matter, the 2009 Enforcement Guides contained language the FTC affirmatively stated was intended to put endorsers on notice of this liability.¹⁰² The FTC's

⁹⁸ *Id.*

⁹⁹ See discussion *infra* Part III.

¹⁰⁰ 16 C.F.R. § 255.1(a) (2021).

¹⁰¹ See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,123, 53,127 (Oct. 15, 2009) (codified at 16 C.F.R. § 255 (2021)). (“The Commission is revising new Example 5, however, to clarify that both the advertiser and the blogger are subject to liability for misleading or unsubstantiated representations made in the course of the blogger’s endorsement.”).

¹⁰² *Id.* at 53,127–28 (“The 1980 Guides did not explicitly state that endorsers, as well as advertisers, could be liable under the FTC Act for statements they make in an endorsement. To make that potential liability more apparent to those who might be considering making an endorsement (and to those counseling prospective endorsers), the Commission’s proposed revised Guides included new language in Section 255.1(d) stating that ‘Endorsers . . . may be liable for statements made in the course of their endorsements.’ The Commission’s proposal also included several new examples featuring celebrities and experts.”).

language in Section 255.1(d) makes clear this intent: “Endorsers . . . may be liable for statements made in the course of their endorsements.”¹⁰³ Furthermore, the FTC did not view this as putting celebrity endorsers through any form of excessive scrutiny for their statements. Instead, the FTC explained that “th[e] new provision merely ‘explicitly recognizes two principles that the Commission’s law enforcement activities have already made clear,’ one of which is ‘that endorsers may also be subject to liability for their statements.’”¹⁰⁴

The FTC’s hardball verbiage did not end there. It explicitly stated that “[a]n advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement.”¹⁰⁵ By this view the FTC stated that when a consumer endorsement is made, the brand must be able to substantiate the claim made.¹⁰⁶ Furthermore, the FTC takes the statement on its face: if the endorser makes a statement and a consumer acting reasonably in the circumstances could believe that the statement is likely to be true, then the product must live up to that standard.¹⁰⁷

Furthermore, the FTC requires parties (persons, partnerships, or corporations) to disclose “material connections” “clearly and conspicuously.”¹⁰⁸ “Material connections” means any relationships that would impact the weight or credibility that the audience gives the endorsement. Disclosures must also be clear—*i.e.*, the audience must be able to easily read the disclosure.¹⁰⁹ This standard applies to claims made by endorsers ranging from consumers to celebrities to experts and expert agencies.¹¹⁰ In today’s climate of online

¹⁰³ 16 C.F.R. § 255.1(d) (2021).

¹⁰⁴ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. at 53,128.

¹⁰⁵ 16 C.F.R. § 255.2(a) (2021).

¹⁰⁶ *Id.* § 255.2(b).

¹⁰⁷ *Enforcement Policy Statement*, *supra* note 37, at 1.

¹⁰⁸ Veronica N. Ramirez, Note, *Fashion Statements Turned Endorsements: How FTC Enforcement Could Cripple the Internet’s Trendsetter*, 68 SYRACUSE L. REV. 483, 486 (2018).

¹⁰⁹ *See id.* at 487 n.19.

¹¹⁰ *See generally* 16 C.F.R. §§ 255.1–4 (2021).

endorsement, the FTC specifically intended to target endorsers as the ones likely needing to disclose—as opposed to brands—because of the fluidity and ease of online publication of endorsements.¹¹¹ While disclosure by endorsers takes on a heightened level of importance, following from the FTC’s dual liability view of endorsement liability attaching to both sponsors and endorsers, the Enforcement Guides were also intended to ensure that marketers take care to ensure “full disclosure” by their endorsers.¹¹²

Non-disclosure of material connections is not always deceptive. Omissions are deceptive when: (1) the “information necessary to prevent a reasonable expectation or belief from being misleading is not disclosed,” and (2) “consumers are likely to have chosen differently but for the deception.”¹¹³ Unfortunately, because of the difficulty in assessing just what a reasonable individual might think, the FTC has given seemingly conflicting examples of how it intends to enforce the rules in the Enforcement Guides.

III. FTC ENFORCEMENT ON INFLUENCE AND INFLUENCERS—A CONCISE HISTORY

A. *Lunada and the Blog Baseline: Influencers as Bloggers Posting Opinions*

In *FTC v. Lunada Biomedical, Inc.*, the FTC brought an enforcement action against a drug company that sold “Amberen,” which was purported to cause weight loss among pre-menopausal

¹¹¹ See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,123, 53,134 (Oct. 15, 2009) (codified at 16 C.F.R. § 255 (2021)). (“The recent creation of consumer-generated media means that in many instances, endorsements are now disseminated by the endorser, rather than by the sponsoring advertiser. In these contexts, the Commission believes that the endorser is the party primarily responsible for disclosing material connections with the advertiser.”).

¹¹² See 16 C.F.R. § 255.5 (2021) (codifying necessity for full disclosure). See also Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. at 52,134 (“[M]arketers should effectively monitor disclosure of their word-of-mouth advocates.”); 16 C.F.R. § 255.1(d) (2021) (codifying dual liability view of endorsement).

¹¹³ FED. TRADE COMM’N, *supra* note 72.

and menopausal women.¹¹⁴ In order to advertise Amberen, Lunada entered into an agreement with International Marketing Company (“IMC”), in which Lunada agreed to pay IMC \$2,000 per month as well as daily and hourly fees.¹¹⁵ That agreement included a provision in which IMC would operate a blog featuring Amberen.¹¹⁶ Pursuant to the agreement, in December 2009 IMC began operating “Ask Carol: A Menopause Blog” (“Carol’s Blog”).¹¹⁷ Carol’s Blog’s posts were actually based upon IMC’s president’s own experiences with menopause.¹¹⁸ That blog endorsed Amberen as a product that “provided relief for her menopause symptoms, including weight gain, hot flashes, irritability, and sleeplessness.”¹¹⁹ Carol’s Blog even included IMC’s president’s background as a nurse, promoted Amberen as a “safe alternative” to hormone replacement therapy, and even included a toll-free number to procure Amberen.¹²⁰

No disclosure of the material connection between the blog, its writer, and the drug manufacturer were provided.¹²¹ In its stipulated order for permanent injunction, the court enjoined Lunada from future prohibited representations regarding drug benefits and required disclosure of material connections between Lunada and its endorsers.¹²²

Lunada presents modern deceptive influencing under the guise of the *old* issue of blogging. Carol’s Blog masqueraded as a blog, but actually was more akin to contemporary influencer advertising

¹¹⁴ Complaint at 2, *FTC v. Lunada Biomedical, Inc.*, FTC File No. 132 3067, No. CV-15-3380-MWF (PLA) (C.D. Cal. May 12, 2015), available at https://www.ftc.gov/system/files/documents/cases/150506lunadacmpt_0.pdf.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.* at 5–6.

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 6.

¹²⁰ *Id.*

¹²¹ *Id.* at 18, 22; *see generally id.* at 56–57.

¹²² Stipulated Order at 6, 10, *FTC v. Lunada Biomedical, Inc.*, FTC File No. 132 3067, No. CV-15-3380-MWF (PLA) (C.D. Cal. May 25, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160525lunadastip.pdf>.

campaigns.¹²³ Carol's Blog was professionally created to appeal to and build rapport with a specific demographic through carefully constructed personal stories while pushing native advertising.¹²⁴ While Carol's Blog does not aesthetically resemble influencer deception,¹²⁵ it did roughly the same thing—present advertising material masked as personal opinions from a trustable source, without proper disclosure, for monetary gain.

Lunada provides an indication of what content and which parties the FTC previously felt comfortable enforcing against. Reasoning from the blog-baseline—that only the company that benefits from the disclosure violations should be enforced against—the FTC did not enforce against IMC.¹²⁶ Despite IMC being a professional advertising agency¹²⁷ and a sophisticated party, the FTC chose not to do so. The FTC's unstated, baseline assumption was that businesses, and not individual bloggers, are engaged in deceit. *Lunada* shows that this reasoning is largely inapplicable to effectively regulating sophisticated influencer marketing.

*B. Machinima: Enforce Against Companies, Make
Companies Police Influencers*

In *In re Machinima, Inc.*, the FTC brought an enforcement action against Machinima,¹²⁸ a video game video production

¹²³ Complaint, *supra* note 114, at 56–57 (indicating the imagery of the blog). This is not to say that one could view *Lunada*'s Carol's Blog as akin to the blog baseline because it is a blog. Even under that view, Carol's Blog indicates what the FTC was previously comfortable with and how the FTC has unsuccessfully transitioned to enforcement against influencers.

¹²⁴ *Id.* at 6.

¹²⁵ *Id.* at 58–59.

¹²⁶ See generally *id.* (lacking any enforcement against IMC); see also Stipulated Order, *supra* note 122 (failing to mention IMC's role in the press release); *Marketers of Dietary Supplement Amberen Settle FTC Charges Regarding Misleading Weight-Loss and Menopause Relief Claims*, FED. TRADE COMM'N (May 20, 2016), <https://www.ftc.gov/news-events/press-releases/2016/05/marketers-dietary-supplement-amberen-settle-ftc-charges-regarding>.

¹²⁷ Complaint, *supra* note 114, at 5.

¹²⁸ *Machinima, Inc.*, 161 F.T.C. 318 (2016).

company.¹²⁹ In 2013, Machinima approached Microsoft and its advertising partner, Starcom, to market the Xbox One console and a variety of the titles that would launch upon the Xbox One release.¹³⁰ The plan to advertise the console contained two parts.¹³¹ In phase one, five influencers under Machinima's banner would each produce two videos to talk positively about the Xbox One and the launch games.¹³² The videos had no disclosures about the compensation that the video-makers would receive.¹³³ In phase two, Machinima gave influencers \$1 for every 1,000 views until Machinima had paid out \$25,000.¹³⁴ In order to join the second phase of the campaign, an influencer was required to sign a Video Campaign agreement including requirements that each video include thirty seconds of Xbox One and launch games in the first two minutes of the video.¹³⁵ It also required there to be no negative content concerning Machinima, Xbox One, or the launch titles. Influencers produced more than three hundred videos under phase-two terms.¹³⁶ In its Decision and Order, the FTC required, among other things, that Machinima establish influencer disclosure requirements as well as a system for monitoring influencer activity.¹³⁷

The takeaway from *Machinima* is two-fold. First, the FTC's baseline view of online deception as an issue of blogging, and not influencers, shines through in *Machinima*. For example, even though the Decision and Order used the term "influencer" in its

¹²⁹ Tola Onanuga, *The Collapse of Machinima Is a Stark Warning to YouTube Creators*, WIRED (Jan. 27, 2019), <https://www.wired.co.uk/article/machinima-youtube>.

¹³⁰ Complaint at 2, *Machinima*, 161 F.T.C. 318 (2016) (No. C-4569), available at https://www.ftc.gov/system/files/documents/cases/150902_machinima-cmpt.pdf.

¹³¹ *Id.* at 2–3.

¹³² *Id.* at 2.

¹³³ *Id.* at 3.

¹³⁴ *Id.*

¹³⁵ *Id.* at 4.

¹³⁶ *Id.*

¹³⁷ Decision and Order at 3–5, *Machinima*, 161 F.T.C. 318 (No. C-4569), available at https://www.ftc.gov/system/files/documents/cases/160317_machinimado.pdf.

consumer blog, the FTC still referred to the video game YouTubers as “bloggers” in 2015.¹³⁸ This could not have been farther from the reality. In that same blog, the FTC acknowledged that Machinima, a company, generated billions of views per month.¹³⁹ But it did not recognize that Machinima’s gaming content came from a collective of individual gamer-YouTubers who each had their own followings as part of a larger community within YouTube.¹⁴⁰ The influencers themselves were affiliated with Machinima and were already popular figures within the Machinima community—they were not wholly uninformed, unsophisticated parties. For example, one of the “bloggers,” Tom Cassell,¹⁴¹ received \$30,000 for videos receiving 730,000 views and 300,000 views, respectively.¹⁴² Yet the FTC treated Machinima, the company, as solely the culprit and solely responsible for enforcing and monitoring future disclosures.

Second, *Machinima* calls into question the efficacy of the view of some commentators that influencers should be able to show their own personal opinions without having to make a disclosure. It is highly likely that the gamers that were called on to promote Machinima, the Xbox One, and the slew of games were not going to disparage some or any of the list in any case.¹⁴³ Their position as

¹³⁸ Alvaro Puig, *FTC: Video Reviews of Xbox One Were Deceptive*, FED. TRADE COMM’N (Sept. 2, 2015), <https://www.consumer.ftc.gov/blog/2015/09/ftc-video-reviews-xbox-one-were-deceptive>; see also FED. TRADE COMM’N, *supra* note 22.

¹³⁹ See Puig, *supra* note 138 (“Machinima, the operator of a popular YouTube network with 3 billion monthly video views . . .”).

¹⁴⁰ Onanuga, *supra* note 129.

¹⁴¹ See generally *Syndicate*, YOUTUBE, <https://www.youtube.com/user/TheSyndicateProject> (last visited Jan. 22, 2021).

¹⁴² Complaint, *supra* note 130, at 3.

¹⁴³ In general, Machinima’s gaming content was not negative towards a specific game. In fact, the channel contained content that praised games in an informal and gaming community centered way. See, e.g., *Archive: Call of Duty XP 2011—Team Respawn Explores COD XP! Stark, Hutch, SeaNanners, Tejbz*, YOUTUBE (Kaminaji Apr. 11, 2019), <https://www.youtube.com/watch?v=Rd3u9IzYlh4> (giving an accurate depiction of a type of video that would have been posted as part of the Machinima page as part of a community project). Machinima had multiple sections of its video production, one of which was called “Respawn” which featured gameplay from the Call of Duty game series, which formed the foundation for some gaming influencers’, like Tom Cassell’s, careers.

gamer-influencers within the Machinima community meant that the gamers not enforced against were likely to buy an Xbox One and play games built for the console as part of their standard influencer fare.¹⁴⁴ It is possible that the views described would have been the personal views of the gamer-influencers had they not participated. Nonetheless, that possibility is not the reality, and the origin of the beliefs matters. The mere fact that the views expressed could have actually been their views does not detract from the *actual* fact that the gamers were engaged in an advertising campaign, they were paid to do so, and the non-disclosure of these facts meant that those gamers—not just Machinima—were deceiving their fanbase (including minors).

C. *Lord & Taylor: Machinima Redux*

In *In re Lord & Taylor, LLC*, the FTC brought an enforcement action against Lord & Taylor for its deceptive marketing of the “Paisley Asymmetric Dress,” which was sold under its “Design Lab” label.¹⁴⁵ In that action, the FTC stated that Lord & Taylor had developed plans to market its dress through a social media campaign it called a “product bomb” that was launched in March of 2015.¹⁴⁶ The FTC described the campaign as “comprised of Lord & Taylor-branded blog posts, photos, video uploads, native advertising editorials in online fashion magazines, and use of a team of fashion influencers recruited for their fashion style and extensive base of followers on social media platforms.”¹⁴⁷ That campaign utilized both influencer marketing as well as marketing through Nylon

See *Machinima Respawn*, YOUTUBE, <https://www.youtube.com/user/machinimarespawn> (last visited Apr. 1, 2021).

¹⁴⁴ See Blame Truth—the CODFather, *What Happened to Machinima Respawn? (Black Ops 3 Gameplay)*, YOUTUBE (June 30, 2016), <https://www.youtube.com/watch?v=9MI-LJ2cQFo>; see also Tejbz, *Modern Warfare 2 SeaNanners Dual Commentary—Team Deathmatch Afghan ACR*, YOUTUBE (Jan. 16, 2010), <https://www.youtube.com/watch?v=p7mty67Teh0>.

¹⁴⁵ Complaint at 1, *Lord & Taylor, LLC*, FTC File No. 152 3181 (Mar. 15, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160523lordtaylorcmt.pdf>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Magazine.¹⁴⁸ In making social media posts, Lord & Taylor “did not require the influencers to disclose in their postings that the company had compensated them, nor obligate the influencers to disclose that they had been compensated.”¹⁴⁹ The FTC imposed a twenty-year order precluding, among other things, Lord & Taylor’s future failure to adequately disclose material connections and affiliation with influencers who make online misrepresentations.¹⁵⁰ Once again, no punishments were imposed on the influencers who participated in the campaign.¹⁵¹

Lord & Taylor presents a scenario where the FTC’s *Machinima* standard of business self-enforcement could have been viable. Similar to *Machinima*, Lord & Taylor’s “product bomb” used influencer marketing over social media to disseminate native advertising.¹⁵² But Lord & Taylor was much more involved than *Machinima* in its implementation of the “product bomb.”¹⁵³ Lord & Taylor coordinated gifting the dress to fifty “select fashion influencers” and then paid those influencers between \$1,000 and \$4,000 to post “one photo of themselves wearing the Design Labs dress during a specified time frame” in March of 2015.¹⁵⁴ While the influencers were free to style the dress as they liked, “Lord & Taylor contractually obligated them to exclusively mention the company using the ‘@lordandtaylor’ Instagram user designation”¹⁵⁵ Influencers were also required to use the campaign hashtag

¹⁴⁸ See *id.* at 2 (discussing Nylon Magazine’s part in the marketing campaign).

¹⁴⁹ See *id.*

¹⁵⁰ Decision and Order at 7, Lord & Taylor, LLC, FTC File No. 152 3181 (May 23, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf>.

¹⁵¹ See generally *id.* (refusing to impose sanctions on the involved influencers).

¹⁵² See Lesley Fair, *FTC’s Lord & Taylor Case: In Native Advertising, Clear Disclosure Is Always in Style*, FED TRADE COMM’N (Mar. 15, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2016/03/ftcs-lord-taylor-case-native-advertising-clear-disclosure> (describing the marketing campaign as native advertising).

¹⁵³ See Complaint, *supra* note 145, at 2 (describing Lord & Taylor’s posting requirements in contracts, including a pre-post oversight).

¹⁵⁴ See *id.* at 2.

¹⁵⁵ See *id.*

“#DesignLab” in the caption as well as tag Lord & Taylor using its user designation in the photo.¹⁵⁶ Lord & Taylor even required pre-approval of influencer posts.¹⁵⁷

Without addressing whether the FTC should be allowed to order disgorgement and restitution of funds, *Machinima*’s standard as applied in *Lord & Taylor* amounts to a two-strike standard, where one violation does little but require that a violator follow the law, which was the requirement before the violation. Lord & Taylor *could* have followed deception laws; it chose not to, and it was rewarded with 11.4 million collective user views, 328,000 post engagements with native advertising, and a sold-out product.¹⁵⁸ Lord & Taylor’s punishment was an injunction on further violations, with no monetary penalties assessed.¹⁵⁹

D. Warner Bros. Home Entertainment: Machinima Blows Up in the FTC’s Face.

In *In re Warner Bros. Home Entertainment, Inc.*,¹⁶⁰ the FTC pursued an enforcement action under Section 5(a) authority against Warner Bros. Home Entertainment (“WBHE”) for its contract with Plaid Social Labs LLC (“Plaid Social Labs”) to conduct a marketing campaign centered around gaming influencers on YouTube.¹⁶¹ Plaid Social Labs coordinated this campaign—appropriately called the “YouTube Influencer Campaign”—which focused on promoting the upcoming video game title *Middle Earth: Shadow of Mordor*.¹⁶² To promote the game, Plaid Social Labs hired notable YouTube gaming influencers to promote the game.¹⁶³ Those YouTubers agreed to specific conditions in return for compensation, including that their

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Letter to Sharp Mann, FED. TRADE COMM’N (May 20, 2016), <https://www.ftc.gov/system/files/documents/cases/160523lordtaylorletters.pdf>.

¹⁶⁰ Warner Bros. Home Entm’t, Inc., 162 F.T.C. 1040 (2016).

¹⁶¹ Complaint at 1, *Warner Bros.*, 162 F.T.C. 1040 (No. C-4595), available at https://www.ftc.gov/system/files/documents/cases/161811warner_bros_complaint.pdf.

¹⁶² *Id.*

¹⁶³ *Id.*

video “feature gameplay” of *Shadow of Mordor*, that they have a “strong verbal call-to-action” to click a description box hyperlink to the video game’s website, and that they make one Facebook post or Tweet “in support of [their] video.”¹⁶⁴ Importantly, the influencers were to “promote positive sentiment” about the video game and were not to promote “negative sentiment” about the game, the game publisher, or affiliated businesses.¹⁶⁵ In return, influencers received free, pre-release access to the game, as well as hundreds to thousands of dollars in payment for their video and social media post.¹⁶⁶ While Plaid Social Labs required that the influencers give a disclaimer in the description box of their video, it was not conspicuous—this was similarly true for the influencers’ related social media post about the video. The campaign generated more than 5.5 million views.¹⁶⁷

There are two important takeaways from *Warner Bros.* First, Plaid Social Labs was not enforced against.¹⁶⁸ Though in a later case, *Inside Publications*, a middle-man marketing firm was enforced against for having been a material agent in creating the deceptive influencer campaign, here Plaid Social Labs—having taken on a seemingly identical role—was not enforced against at all.¹⁶⁹ This shows that FTC enforcement has taken at least one (small) step forward in bringing enforcements against those responsible for influencer deception since *Warner Bros.*¹⁷⁰

Second, *Warner Bros.* puts the nail in the coffin for the *Machinima* standard’s workability. While the influencers in this campaign go largely unmentioned in the agency’s enforcement action, the influencers in this case are not unsophisticated parties and they were required by the terms of their agreement to include

¹⁶⁴ *Id.* at 2.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 3.

¹⁶⁸ See generally Decision and Order, *Warner Bros.*, 162 F.T.C. 1040 (No. C-4595), available at https://www.ftc.gov/system/files/documents/cases/161811_c-4595_warner_bros_do.pdf.

¹⁶⁹ *Id.*

¹⁷⁰ See Decision and Order, *Inside Publications, LLC*, FTC File No. 172 3067 (Jan. 31, 2019), available at https://www.ftc.gov/system/files/documents/cases/c-4669_172_3067_inside_publications_decision_and_order_2-8-19.pdf.

disclosures in their posts.¹⁷¹ In effect, not only were influencers not enforced against for failing to conspicuously disclose, some influencers were given a pass for their failure to even follow disclosure requirements they had *agreed* to use.¹⁷² While the influencers were subject to post pre-approval by WBHE or Plaid Social Labs,¹⁷³ the influencers selected were popular gaming community figures with large bases of subscribers and followers.¹⁷⁴ These individual gaming influencers were not unsophisticated parties—they were seasoned professional video game entertainers.¹⁷⁵ Viewed with this background, it is odd that the FTC felt at ease exclusively faulting Warner Bros. for the failure of professional influencers to disclose their connections, even when a group of those professional influencers failed to follow their contract by including the full disclosure *required* by Plaid Social Labs.

E. CSGOLotto: The FTC Gets It Right, but Only Kind Of

In *In re CSGOLotto, Trevor Martin, and Thomas Cassell*, the only case where influencers themselves had an action brought against them, Martin and Cassell owned CSGO Lotto, a gambling

¹⁷¹ See Complaint, *supra* note 161, at 2–3.

¹⁷² *Id.* at 3.

¹⁷³ *Id.*

¹⁷⁴ For example, the exhibits indicate that the influencers chosen included PewDiePie and SivHD, among others, both of which had significant follower bases at the time and could generate hundreds of thousands to millions of video views. See Exhibits A1–D2, *Warner Bros.*, 162 F.T.C. 1040 (No. C-4595), available at https://www.ftc.gov/system/files/documents/cases/161811_warner_bros_complaint_exhibits.pdf.

¹⁷⁵ Though SivHD or PewDiePie were unlikely themselves to be familiar with disclosure laws, both are sophisticated parties that could be expected to recognize the importance of complying with disclosure laws or contract with attorneys knowledgeable on the issue. See, e.g., GameJunky0826, *What Ever Happened to SivHD?*, REDDIT (Sept. 16, 2016), https://www.reddit.com/r/leagueoflegends/comments/533hyk/what_ever_happened_to_sivhd/; Kevin Roose, *What Does PewDiePie Really Believe?* N.Y. TIMES MAGAZINE (Oct. 9, 2019), <https://www.nytimes.com/interactive/2019/10/09/magazine/PewDiePie-interview.html>.

site.¹⁷⁶ The site facilitated the gambling of “skins” from an online shooter game known as Counter-Strike: Global Offensive,¹⁷⁷ and charged an 8% fee on the bets.¹⁷⁸ Martin and Cassell posted on their personal YouTube channels as users of this website without disclosing their ownership of it.¹⁷⁹ Martin “discovered” the website in a video and claimed he won \$69 in a bet.¹⁸⁰ He then went on to talk about how nice the owners were on Twitter as well as the possibility of a future sponsorship.¹⁸¹ The pair continued posting videos with large sums of money listed in the title, including values of \$13,000 and \$24,000. Neither ever disclosed their ownership of the site.¹⁸² In response, the FTC enjoined the influencers from, among other things, failing to disclose their connections in future endeavors clearly and conspicuously, and required that all use of endorsers be monitored, with clear guidance to endorsers to disclose their material connections.¹⁸³

CSGOLotto can be seen as a step forward for the FTC. Rather shockingly, *CSGOLotto* is the only cases where influencers themselves have been enforced against by the FTC.¹⁸⁴ Because the

¹⁷⁶ Complaint ¶ 7, *CSGOLotto, Inc.*, 164 F.T.C. 785 (No. C-4632), available at https://www.ftc.gov/system/files/documents/cases/1623184_c-_csgolotto_complaint.pdf.

¹⁷⁷ *Id.* ¶ 6.

¹⁷⁸ Skins, which can be bought and sold for real world money, are specific colorations of in game assets (like guns, knives, etc.) and have generated an out-of-game market. *See, e.g., Operation Broken Fang Case, CS:GO STASH*, <https://csgostash.com> (last visited Mar. 19, 2021). *See also* Jacob Wolf, *Federal Trade Commission Settles with Owners of CSGO Lotto*, ESPN (Sept. 8, 2017), https://www.espn.com/esports/story/_/id/20635149/federal-trade-commission-settles-owners-csgo-lotto (“Eilers & Krejcik Gaming and Narus Advisors estimated that skin betting was a \$5 billion marketplace in 2016 . . .”).

¹⁷⁹ Complaint, *supra* note 176, ¶¶ 7, 9; *see also*, Marie Antoinette, *How to Win \$13,000 in 5 Minutes CS GO Betting (Tmartn Deleted Video)*, YOUTUBE (July 4, 2016), <https://www.youtube.com/watch?v=1v6t6iqhoSI>.

¹⁸⁰ Complaint, *supra* note 176, ¶ 9.

¹⁸¹ *Id.*

¹⁸² *Id.* ¶ 27.

¹⁸³ Decision and Order at 3–4, *CSGOLotto*, 164 F.T.C. 785 (No. C-4632), available at https://www.ftc.gov/system/files/documents/cases/1623184_c-_csgolotto_decision_and_order.pdf.

¹⁸⁴ *See* FED. TRADE COMM’N, *supra* note 22 (stating that this was the first ever enforcement against individual influencers).

FTC acknowledged that the influencers had used their popularity and trust within their follower base to deceive individuals, it took a step towards enforcement against influencers for their own part in the deception.¹⁸⁵ In doing so, *CSGO Lotto* indicates that the FTC not only acknowledged influencers' agency in violating the law, but recognized the value in enforcing against those violations.

But *CSGO Lotto* is not that clear of a step forward from *Machinima*. In *CSGO Lotto*, the FTC may have enforced against influencers, but it did so because the influencers were themselves the owners and operators of a deceptive company.¹⁸⁶ In fact, other gaming influencers were hired by the respondents,¹⁸⁷ all of whom were well-established influencers (and paid accordingly),¹⁸⁸ and none of whom were enforced against.¹⁸⁹ The key difference regarding *CSGO Lotto* is the influencers' ownership in the company.¹⁹⁰ As in other cases, the contracted influencers were not enforced against while the ownership of the company was.¹⁹¹ So while the FTC acknowledged the importance of Cassell and Martin's influencer status to the operation of the deceptive scheme, it is unclear whether the pair would have been enforced against had

¹⁸⁵ See Complaint, *supra* note 176, ¶¶ 25–28.

¹⁸⁶ See generally Decision and Order, *supra* note 183; see also Charlie Hall, *CSGO Lotto's Lawyer Says It Was Never a Gambling Site, and Here's Why*, POLYGON (Dec. 18, 2017), <https://www.polygon.com/2017/12/18/16782124/csgo-lotto-lawsuit-gambling-terms-of-use-tmartn>.

¹⁸⁷ Complaint, *supra* note 176, ¶ 20.

¹⁸⁸ See, e.g., GoldGloveTV, YOUTUBE, <https://www.youtube.com/goldglovetv> (last visited Jan. 22, 2021) (boasting 1.2 million followers, just on YouTube, at the time of this publication). Payments involved ranged from \$2,500 to \$55,000 for advertising the website. Complaint, *supra* note 176, ¶ 19.

¹⁸⁹ See generally Decision and Order, *supra* note 183. Ironically, in the press release, past FTC Commissioner Olhausen stated, “[c]onsumers need to know when social media influencers are being paid or have any other material connection to the brands endorsed in their posts.” FED. TRADE COMM’N, *supra*, note 23. In fact, then-acting commissioner Olhausen went further to state, “This action, the FTC’s first against individual influencers, should send a message that such connections must be clearly disclosed so consumers can make informed purchasing decisions.” *Id.* Yet, as explained, the actual enforcement does not reflect this sentiment.

¹⁹⁰ See Complaint, *supra* note 176, ¶¶ 2–3.

¹⁹¹ See discussion *infra* Part III, Sections F–G.

they simply been contracted to do exactly what they did by an outside party.

F. Telomerase: The Backslide Begins

In *In re Telomerase Activation Sciences, Inc.*,¹⁹² the FTC pursued an enforcement action against Telomerase Activation Sciences (“TAS”), a company that sold what were purportedly anti-aging drugs.¹⁹³ In the process of selling those drugs, TAS utilized ads, endorsers, and even TV hosts to push their product.¹⁹⁴ The campaign included a stint on the *Suzanne Show* for the cost of \$89,000.¹⁹⁵ That show was hosted by Suzanne Somers.¹⁹⁶ During that segment, both individuals representing TAS and Suzanne Somers spoke about the positive effects of the company’s anti-aging products, in what essentially amounted to a paid-for, segment-length commercial for TAS’ products.¹⁹⁷ However, it was never disclosed that the segment was paid for.¹⁹⁸ Even after the segment was finished airing, the *Suzanne Show* agreed to continue to feature the drugs in its advertising campaigns.¹⁹⁹ The FTC brought an enforcement action against TAS for false establishment, false efficacy, as well as claims for deceptive format and failure to disclose material connections, among other claims.²⁰⁰

¹⁹² *Telomerase Activation Sciences, Inc.*, 165 F.T.C. 558 (2018).

¹⁹³ Complaint ¶ 10, *Telomerase*, 165 F.T.C. 558 (No. C-4644), available at https://www.ftc.gov/system/files/documents/cases/142_3103_-_telomerase_complaint_final.pdf.

¹⁹⁴ *See, e.g., id.* ¶¶ 9, 27, 31.

¹⁹⁵ *Id.* ¶ 26.

¹⁹⁶ *Id.*

¹⁹⁷ *See* Exhibit G, *Telomerase*, 165 F.T.C. 558 (No. C-4644), available at https://www.ftc.gov/system/files/documents/cases/142_3103_-_telomerase_complaint_ex_g_ta-65_infomercial_0.mp4; *see also* Exhibit H, *Telomerase*, 165 F.T.C. 558 (No. C-4644), available at https://www.ftc.gov/system/files/documents/cases/1423103telomerasecmpltexhh_0.pdf.

¹⁹⁸ Complaint, *supra* note 193, ¶ 32.

¹⁹⁹ *Id.* ¶ 28.

²⁰⁰ *See generally id.* ¶¶ 42–55.

Returning to the pre-*CSGOLotto* trend, the FTC did not enforce against Somers.²⁰¹ *Telomerase* can be viewed as somewhat confirming the suspicion that had Martin and Cassell not been the operators of the deception—in other words, had they merely been influencers contracted to work their influencer magic—the FTC would not have enforced against them.

Telomerase goes beyond this conclusion and indicates a significant backslide. While the FTC brought a count against TAS for providing the means and instrumentalities to deceive against the company, it did not pursue any action against Somers.²⁰² If any influencer should have known that their non-disclosure was deceptive, it would have been Somers. After all, Somers was (and is) a seasoned TV personality, and not an unsophisticated party.²⁰³ Whether or not Somers knew that the product was faulty, it would be difficult for her *not to have* understood that she was failing to disclose a material connection to the individuals and the product that she was broadcasting to her audience.²⁰⁴ That the FTC's complaint discusses her participation at length and indicates she furthered that deception for her own gain, but lets her go unpunished, is irrational and asymmetric.²⁰⁵

G. Creaxion: The Backslide Continues

In *In re Creaxion Corporation*, and its related case, *In re Inside Publications, LLC*,²⁰⁶ the FTC brought an enforcement action against Inside Publications and Creaxion Corporation.²⁰⁷ Creaxion

²⁰¹ See generally Decision and Order, *Telomerase*, 165 F.T.C. 558 (No. C-4644), available at https://www.ftc.gov/system/files/documents/cases/142_3103_telomerase_decision_and_order_final.pdf.

²⁰² See Complaint, *supra* note 193, ¶ 53–55.

²⁰³ E.g., SUZANNE SOMERS, <https://www.suzannesomers.com/> (last visited Jan. 22, 2021).

²⁰⁴ See Complaint, *supra* note 193, ¶ 41.

²⁰⁵ See *id.* ¶¶ 26–33.

²⁰⁶ Inside Publications, LLC, FTC File No. 172 3067 (Nov. 13, 2018) (complaint), available at https://www.ftc.gov/system/files/documents/cases/172_3066_cre-ip_complaint_0.pdf.

²⁰⁷ See generally Complaint, Creaxion Corp., FTC File No. 172 3066 (Nov. 13, 2018), available at https://www.ftc.gov/system/files/documents/cases/172_

was enlisted by a company called HealthPro Brands to market and promote HealthPro’s mosquito repellent in the face of the worldwide Zika outbreak.²⁰⁸ Creaxion operated as a broker between HealthPro and Inside Publications, and the three parties agreed to a “Social and Digital Media Activation and Athlete Engagement” agreement” in which Inside Publications agreed to, among other things, publish two articles praising the mosquito repellent, create a gift basket with the mosquito repellent that would be given to American Olympians, and utilize ex-Olympian influencers as endorsers and supply those influencers with pre-written posts.²⁰⁹ In its complaint the FTC alleged, among other violations, that no disclosure was given that would indicate that endorsers were not offering their independent, impartial opinions and no disclosure of material connections between the influencers, the publisher, and the product were disclosed.²¹⁰

The FTC focused on the culpability of Creaxion and Inside Publications for the deceptive and misleading statements made by the two contracted influencers.²¹¹ The exhibits outlined in the complaint itself show scripted media advertising.²¹² But a closer look at the full list of exhibits shows that the influencers had creative license over what they said.²¹³ For example, the exhibits show, in addition to the scripted posts, more creative posts by the contracted influencers that contain exorbitant claims—such as Carly Patterson’s comment that the mosquito repellent protected her from Zika carrying mosquitos.²¹⁴ These comments were not completely

3066_cre-ip_complaint.pdf (indicating the underlying reasons behind the enforcement).

²⁰⁸ *Id.* ¶ 7.

²⁰⁹ *Id.* ¶¶ 8–9.

²¹⁰ *Id.* ¶¶ 25–33.

²¹¹ *Id.*

²¹² *See, e.g., id.* ¶¶ 15–19.

²¹³ Jake Dalton posted, “Getting Rio Ready! Not worried about Zika. Fit Organic has my back and body covered. Love the Fit mosquito repellent.” Exhibit C at 1, Creaxion Corp., FTC File No. 172 3066 (Nov. 13, 2018), available at https://www.ftc.gov/system/files/documents/cases/172_3066_cre-ip_compl_exhibits_a-g.pdf.

²¹⁴ Patterson made this comment despite previously admitting over social media that she personally would not be participating in the Olympics. *See* Exhibit B at 1, Creaxion Corp., FTC File No. 172 3066 (Nov. 13, 2018), available at

false (protection generally from mosquitos would protect from Zika virus-carrying mosquitos), but they certainly stretched the truth and potentially put the lives of others at risk.²¹⁵ The same was true of the other influencer, Jake Dalton. His social media posts included statements that he was not afraid of Zika because the mosquito repellent “ha[d] [his] back and body covered.”²¹⁶ While the FTC complaint only included advertisements that were prefabricated and standardized, the exhibits indicated that both influencers were involved in the writing and posting of deceptive, false, and potentially life-threatening information during the Zika pandemic.²¹⁷ Despite having willingly propagated possibly the most dangerous deception of any of the influencer cases discussed, the FTC still did not enforce against them.

H. Teami, the Current Standard: Enforce Against Companies, Educate Influencers

In *FTC v. Teami*, the FTC brought an enforcement action under Section 5(a) and Section 12 of the FTC Act against an online tea seller.²¹⁸ Teami sold multiple blends of teas and tea products through its online store.²¹⁹ On its website, Teami advertised that its tea blends had specific health benefits, such as colon detoxification and weight loss.²²⁰ Teami advertised its products through its own social media posts, as well as via the posts of paid influencers,²²¹ a number of whom are pop-culture celebrities.²²² In its complaint, the

https://www.ftc.gov/system/files/documents/cases/172_3066_cre-ip_compl_exhibits_a-g.pdf.

²¹⁵ See *Zika*, CDC, <https://www.cdc.gov/dotw/zika/index.html> (last visited Jan. 22, 2021).

²¹⁶ See Exhibit C, *supra* note 213, at 1.

²¹⁷ See generally *id.*; *supra* note 214.

²¹⁸ Complaint ¶ 4, *FTC v. Teami, LLC*, FTC File No. 182 3174, No. 8:20-CV-518 (M.D. Fla. Mar. 5, 2020), available at https://www.ftc.gov/system/files/documents/cases/complaint_4.pdf.

²¹⁹ *Id.* ¶ 11.

²²⁰ *Id.* ¶ 14.

²²¹ These included Demi Lovato, Cardi B, and Adrienne Eliza Houghton, among others. *Id.* ¶¶ 11, 20.

²²² *Id.* ¶¶ 20–21. These totaled tens-of-millions of views. For example, Cardi B’s post alone garnered 20.4 million views. *Id.* ¶ 20.

FTC alleged Teami had misrepresented the effects of using their products and had failed to disclose material connections in advertising.²²³ The FTC also stated that it had previously reached out to the defendants to inform them of their need to create a disclosure policy for its influencers.²²⁴ The FTC then noted that Teami agreed to implement policies which would require disclosure and post content monitoring by Teami, but Teami failed to enforce these policies.²²⁵ In response to these violations, the FTC and Teami stipulated to a monetary judgment of \$15,209,452, with \$14,209,452 suspended upon the payment of \$1 million.²²⁶ The FTC also ordered an injunction against Teami's assertion of false claims related to the health effects of its tea products²²⁷ and mandated disclosure of material connections in its advertising.²²⁸ Finally, the FTC sent out "Warning Letters to Instagram Influencers to Prominently Disclose Paid Endorsements" to the influencers involved.²²⁹

A closer look at the decision reveals that the thrust of the press release and the enforcement concerned just how deceptive the influencer advertising of Teami's products was. In its enforcement, the FTC included a forty-nine page, twenty-six exhibit list indicating just how deeply involved Teami's influencers were in propagating its deception.²³⁰ The FTC found that Teami relied on influencers in

²²³ *Id.* ¶ 25–30.

²²⁴ *Id.* ¶¶ 16–19.

²²⁵ *Id.*

²²⁶ Stipulated Order for Permanent Injunction and Monetary Judgment at 13–14, *FTC v. Teami, LLC*, FTC File No. 182 3174, No. 8:20-CV-518 (M.D. Fla. Mar. 17, 2020), available at <https://www.ftc.gov/enforcement/cases-proceedings/182-3174/teami-llc>.

²²⁷ *Id.* at 5–6.

²²⁸ *Id.* at 11–12.

²²⁹ See *Warning Letters to Instagram Influencers to Prominently Disclose Paid Endorsements*, FED. TRADE COMM'N (2020), <https://www.ftc.gov/system/files/documents/cases/1823174teamiwarningletters.pdf>.

²³⁰ Exhibits 9–13, *FTC v. Teami, LLC*, FTC File No. 182 3174, No. 8:20-CV-518 (M.D. Fla. Mar. 5, 2020), available at https://www.ftc.gov/system/files/documents/cases/1823174teamicomplaint_exhibits1-26.pdf (including statements like “[t]his detox is my all time FAVE [sic] . . . especially because I see a difference *within like 3 days* . . . I’ve been drinking it now for a week and I’ve already lost about 3 pounds . . . insane.” (emphasis added)).

a variety of fields—from singers to fashion models, pop culture icons, and fitness icons.²³¹ In total, these influencers had the ability to reach tens of millions of followers on Instagram alone.²³² The FTC also acknowledged that Teami had guidelines for influencer posting requirements,²³³ even if Teami’s own enforcement of those guidelines was insufficient.²³⁴

The influencers involved were not micro-influencers. Instead, a number of the influencers on Teami’s payroll were household pop-culture names who are themselves sophisticated, or have access to sophisticated business teams.²³⁵ Yet the FTC chose *not* to enforce against these parties, and instead sent out what it called “Warning Letters to Instagram Influencers to Prominently Disclose Paid Endorsements.”²³⁶ In the warning letters, the FTC gave the influencers legal advice regarding how they could comply with FTC regulation in the future.²³⁷ The letters also “strongly recommend[ed]” that the influencers review its Disclosures 101 guide.²³⁸ The strongest enforcement within the letter was that the FTC required a written response requesting that influencers describe how they will alter their social media activities to comply with its rules.²³⁹

In spilling Teami’s tea, the FTC’s enforcement can best be described as curiously asymmetric. While the FTC was at pains to

²³¹ Complaint, *supra* note 218, at 14 (listing Cardi B, Brittany Renner, and Leyla Milani-Khoshbin, among others).

²³² *See id.*

²³³ *See id.* ¶¶ 16–18.

²³⁴ *Id.*

²³⁵ *See supra* notes 218–224, 231 and accompanying text. These influencers have large following bases, but several are contracted to companies which represent them. *E.g.*, *Cardi B*, CAA, <https://www.caa.com/entertainmenttalent/touring/artist/cardib> (last visited Jan. 22, 2021). Demi Lovato provides a more recent indication of sophistication as a party. *See* Shirley Halperin, *Demi Lovato Signs with Scooter Braun for Management*, VARIETY (May 11, 2019), <https://variety.com/2019/music/news/demi-lovato-signs-scooter-braun-manager-1203212073/>.

²³⁶ *See generally* FED. TRADE COMM’N, *supra* note 229.

²³⁷ *See, e.g., id.* at 2.

²³⁸ *Id.*

²³⁹ *Id.*

point out the strength of its enforcement,²⁴⁰ it also provided arguably better reasoning for enforcement against the influencers involved.²⁴¹ While the FTC was clear that the use of influencers was key to Teami's social media deception and Section 5 violation, its non-enforcement against sophisticated influencers who broke with Teami's internal social media policy was starkly in contrast to its enforcement against Teami.²⁴² The FTC fined Teami \$15.2 million (suspended after the payment of 1 million), and the influencers received a letter requiring them to do the bare minimum.²⁴³ This asymmetry aptly describes the current standard: aggressively enforce against businesses, but slap influencers on the wrist.

I. Outside the Enforcement Regime 2017–2020

While the disclosure standard has long been applied to endorsements in advertising content, it has not been widely applied to influencers in enforcement actions involving social media influencer-produced content. Instead, akin to the *Teami* paradigm, the FTC's efforts at stemming influencer non-compliance have been focused on education.²⁴⁴

In April 2017 the FTC sent ninety "educational letters" to marketers and influencers to remind them that they must disclose material connections.²⁴⁵ Then, in September 2017, twenty-one influencers received follow-up warning letters regarding potential failures to disclose material connections.²⁴⁶ That month, the FTC brought its first enforcement action against social media influencers that failed to disclose their joint ownership of companies whose

²⁴⁰ See FED. TRADE COMM'N, *supra* note 36 (discussing the variety of sanctions imposed by the FTC and the severity of the sanctions).

²⁴¹ See *id.* (showing the deception perpetrated by influencers contracted by Teami).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See, e.g., FED. TRADE COMM'N, *supra* note 21.

²⁴⁵ See FED. TRADE COMM'N, *supra* note 23.

²⁴⁶ See Lesley Fair, *Three FTC Actions of Interest to Influencers*, FED. TRADE COMM'N (Sept. 7, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers>.

products they advertised.²⁴⁷ The FTC also updated its FAQs in September 2017,²⁴⁸ telling influencers: (1) Use clear and unambiguous disclosure language; (2) do not bury disclosures; (3) comply with the Enforcement Guides when tagging a brand; (4) consider *all* potential material connections; (5) disclose any connection that would be relevant to how the consumer views the endorsement; and (6) disclose within images on image-only platforms.²⁴⁹

This was followed in November of 2019 by the FTC's "Disclosures 101 for Social Media Influencers,"²⁵⁰ an eight-page brochure that took the form of a soft approach to education, as opposed to the imposing letter format.²⁵¹ However, the brochure also indicated that influencers bore the affirmative requirement of disclosure of material connections, familiarity with the Endorsement Guides, and compliance with the law.²⁵² Though this did not break with endorsement disclosure regulations generally,²⁵³ the brochure's

²⁴⁷ *Id.*; see also *supra* Part III.E (discussing the enforcement action in CSGOLotto).

²⁴⁸ See Fair, *supra* note 246.

²⁴⁹ See *FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

²⁵⁰ FED. TRADE COMM'N, *supra* note 21. It should be noted that this is *not* the only educational effort the FTC has made. The FTC has engaged in a wide variety of educational activities regarding deception. See, e.g., *Advertisement Endorsements*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements> (last visited Apr. 12, 2021) (providing resources for related public events held by the FTC, as well as public statements and reports).

²⁵¹ See FED. TRADE COMM'N, *supra* note 249.

²⁵² FED. TRADE COMM'N, *supra* note 21, at 2 ("As an influencer, it's your responsibility to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads. Don't rely on others to do it for you.").

²⁵³ For example, the FTC's guide, *What People Are Asking*, published in September of 2017, stated that influencers are required to self-regulate by disclosing. See FED. TRADE COMM'N, *supra* note 249. ("Yes, an endorsement can be aspirational. It's an endorsement if the blogger is explicitly or implicitly expressing his or her views about the sports car (e.g., "I want this car"). If the blogger was paid, it should be disclosed."). The FTC's 2009 publication of the Endorsement Guides represented the first time that the FTC explicitly required

requirements placed the onus on influencers where every influencer enforcement but *CSGOLotto* had not.

While likely well intentioned, FTC's gentler, educational method accomplished little.²⁵⁴ Empirical data indicates that the vast majority of influencers continued (and still continue) to violate disclosure requirements.²⁵⁵ In response to the recent, but unrelenting, issue of influencer non-compliance, at least one FTC Commissioner argued in favor of essentially returning to the *Machinima* method—just enforce against businesses.²⁵⁶ Having failed to accomplish its goals through enforcement (almost entirely against businesses), the FTC also failed to accomplish those same goals by educating influencers.

IV. PUBLIC COMMENTS AND THE 2020 NOPR

The FTC, as evidenced by the line of enforcements just discussed, has not responded to the growing use of influencers in advertising, endorsements, and product promotions. Despite a clear, acknowledged authority to apply the deception standard, the FTC

influencers to disclose material connections, these policies were later codified in the Code of Federal Regulations. *See generally* 16 C.F.R. § 255 (2021); *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, FED. TRADE COMM'N (2009), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.

²⁵⁴ Robin Langford, *Three Quarters of Instagram Influencers Hide Their Advertisement Disclosure in Their Posts*, NETIMPERATIVE (Sept. 22, 2020), <http://www.netimperative.com/2020/09/22/three-quarters-of-instagram-influencers-hide-their-advertisement-disclosure-in-their-posts-2/> (“More than three quarters of influencer adverts on Instagram have the disclosure hidden somewhere in the post, whether that be in the middle, at the end or in a comment, according to new research.”).

²⁵⁵ *Id.*

²⁵⁶ *Statement of Commissioner Rohit Chopra Regarding the Endorsement Guides Review Commission File No. P204500*, FED. TRADE COMM'N (Feb. 12, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf (“When individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern. But when companies launder advertising by paying someone for a seemingly authentic endorsement or review, this is illegal payola.”).

has not brought meaningful enforcement actions against influencers. Worse, the FTC has yet to find an influencer liable *solely* for their role in deceiving the public as an advertising mechanism for another organization. All of this despite the empirical backdrop of 86% influencer non-compliance.²⁵⁷ Instead of taking action against influencers, in February of 2020 the FTC once again balked on using its enforcement authority, choosing instead to include questions on the issue of social media influencers in its regularly scheduled ten-year review of the agency's endorsement guidelines.²⁵⁸

During this review, the FTC solicited public comment on “the economic impact of and the continuing need for its Endorsement Guides; possible conflict between the Guides and state, local, federal, or international laws; and the effect of any technological, economic, environmental, or other industry changes on the Guides.”²⁵⁹ Three of the twenty-two areas the agency solicited comment on involved endorsements and social media.²⁶⁰

For example, Premise 14 asked:

How well are advertisers and endorsers disclosing unexpected material connections on social media platforms? Does this depend on the type of material connection? What disclosures of material connections are sufficiently clear (*i.e.*, understandable) to consumers when used in social media? What disclosures of material connection currently being used in social media are likely not understood by consumers? Does the sufficiency or insufficiency vary by platform, type of material connection (*e.g.*, a paid post versus a free product), or other factors, and, if so, how? To the extent that these connections are not being adequately disclosed, do the problems tend to be in the substance of the disclosures or in their

²⁵⁷ See *infra* note 293; see also INFLUENCER MKTG. HUB, *supra* note 19.

²⁵⁸ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. 10104 (Feb. 21, 2020).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

conspicuousness (e.g., placement, visibility, or audibility)? Should the Guides provide more detail on what disclosures of material connections are sufficiently clear or unclear in different social media formats? Does the fact that Commission Guides are generally reviewed every ten years affect your answer as to whether providing more detail would be helpful?²⁶¹

Likewise Premise 19 sought comment on citizen knowledge of influencer advertising:

Some advertisers contend that consumers who use social media understand that influencers who promote products are generally doing so only because they are paid or given something by the marketer, regardless of what or whether disclosures appear in social media posts. What evidence is there to support or contradict this assertion and does the answer differ depending on the nature of the material connection? In particular cases, what factors might be considered to determine whether a material connection is unexpected? Do consumer expectations vary by the age of the audience, the product category, the nature of the influencer, the format or substance of the endorsement, or otherwise, and if so, how?²⁶²

And Premise 20 asked for comment on the relationship between influencers and affiliate links:

Some endorsers (including the authors of some product reviews) include affiliate links that can be used to purchase the products they are endorsing. Should the Guides address such links, and if so, how? To what extent do consumers expect that these endorsers are compensated for purchases through those links? If so, what compensation arrangements do consumers ordinarily expect? To what extent would knowing of such compensation affect the

²⁶¹ *Id.*

²⁶² *Id.*

weight or credibility given to those endorsements? Is there a distinction in terms of either consumer expectations or the weight ascribed to an endorsement between affiliate links to a product's marketer and affiliate links to one or more retailers? If so, how, why, and how should that be addressed?

²⁶³

The initial inquiry was set to run from February 21 to April 21, 2020,²⁶⁴ but the agency extended the deadline for responses until June 21, 2020.²⁶⁵ During the four months, the FTC received 118 comments through a comment portal on Regulations.gov.²⁶⁶ At the close of the comment period, all 118 comments were obtained from the website for analysis. Each comment was read and categorized for five specific attributes:

1. Did the comment mention social media influencers or refer to questions 14, 19 or 20?

2. Does the text of the comment advocate for stronger enforcement of the agency's endorsement guidelines?

3. Did the comment contain evidence (empirical or otherwise) or was it a simple opinion?

4. Did the commenter indicate a belief that social media influencers or social media influencer-produced content could be deceptive under the current standard?

5. Was the commenter associated with the advertising industry?

Quantitatively, of the 118 comments received, only nine of the comments did not address influencers directly or respond to

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. 19,709 (Apr. 8, 2020) ("The Commission believes that a two-month extension is appropriate. Accordingly, it has decided to extend the deadline for submission of comments on the Endorsement Guides to Monday, June 22, 2020.").

²⁶⁶ See Fed. Trade Comm'n., *Proposed Rule: Guides Concerning the Use of Endorsements and Testimonials in Advertising*, REGULATIONS.GOV, <https://www.regulations.gov/document/FTC-2020-0017-0001/comment> (last visited Mar. 14, 2020).

questions 14, 19 or 20 posed by the agency.²⁶⁷ Thirty comments came from advertising industry or trade groups.²⁶⁸ Sixteen of the comments were opposed to any additional regulation of social media influencers, and nineteen of them argued that social media influencers were not engaged in deceptive practices currently.²⁶⁹

In response to the FTC's larger inquiry, a combined total of twenty-eight of the 118 comments did not advocate for stronger enforcement mechanisms and thirty-two did not indicate a belief or provide evidence that influencer conduct was deceptive in some way.²⁷⁰ Eighty-one of the 118 comments advocated, in at least some language, for stronger enforcement by the agency, and two comments in this category also argued for promulgation of rules that would provide a parity with the regulation of social media influencer content in Europe.²⁷¹

Coders also took qualitative notes about the themes of the comments. Comment length ranged from a single sentence advocating for disclosure guidelines similar to the FTC's regulation of online native advertising, to detailed filings with examples of influencers who are violating the current guidelines under the November 2019 Disclosures 101, from pro-consumer advocacy groups like Truth in Advertising.²⁷² An additional detailed comment

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *See, e.g.*, Am. Influencer Council, Inc., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Apr. 19, 2020), <https://beta.regulations.gov/comment/FTC-2020-0017-0078> (arguing that influencers are not engaging in deceptive practices).

²⁷¹ One such comment argued that “[i]nfluencer marketing is not a national issue: as an illustration, influencers from the United States have a European fanbase, and viceversa [sic]. For this reason, regulatory developments should ideally be coordinated, or at least need to circulate beyond the jurisdiction where they originate. Similarly, the study of influencer marketing ought to take into account the post-jurisdictional nature of social media.” Maastricht Univ., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Apr. 22, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0082>.

²⁷² Truth in Advert., Inc., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Jun. 22, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0108>.

opposed to additional regulations came from a self-described social media influencer advocacy organization, called the American Influencer Council.²⁷³

A pair of the comments were focused primarily on the issue of deception by social media influencers who produce content targeted at children.²⁷⁴ A significant series of the comments in the inquiry docket were filed by what appeared to be university students, with one entry's attachment titled "Extra Credit" that included a student's name and course number in the upper left of the document.²⁷⁵ Two comments conflated the FTC's endorsement guidelines with the similar and longstanding sponsorship identification rules enforced on broadcast radio and television stations by the FCC.²⁷⁶

Multiple commenters proposed that the agency's ten-year cycle for reviewing its endorsement guidelines was too long.²⁷⁷ In one

²⁷³ See Am. Influencer Council, Inc., *supra* note 270.

²⁷⁴ Common Sense Media, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 22, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0095>.

²⁷⁵ Serena Maldonado, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Mar. 31, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0069>.

²⁷⁶ 47 CFR § 73.1212 (2020); Mihir Kshirsagar, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 22, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0103>; see also Nat'l Retail Fed., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 21, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0097>.

²⁷⁷ *E.g.*, Jane Weesner, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Mar. 21, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0010> ("[I]t is not realistic that a review every ten years can capture the new ways in which our world communicates. . . . [T]he FTC should review their guides at least every five years."); Jake Zeidman, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Mar. 29, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0044> ("Social media is constantly emerging, and the guidelines need to be reviewed more often than every 10 years."); Sofia W., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (Mar. 10, 2020) <https://www.regulations.gov/comment/FTC-2020-0017-0007> ("I believe it would be of the best interest for the FTC to review their guidelines every 3–4 years, rather than every 10 years.").

example, the commenter suggested an annual review process, while others argued for three and five-year cycles.²⁷⁸ Another theme which appeared in multiple comments, including one focused on the activities of “e-sports” influencers, proposed that the FTC needed to be more specific about when disclosures are required for influencers as well as additional specificity about the language the agency would like to see in posts.²⁷⁹ Likewise, the majority of the comments filed by advertising industry representatives advocated for more clarity regarding when the existing rules apply to content, but argued against additional regulations, especially as they related to the content produced by social media influencers.²⁸⁰ One comment proposed some revisions to the existing guidelines, rather than expanding them, but argued that a more expansive scheme of industry self-regulation was preferable to FTC action.²⁸¹

²⁷⁸ NetChoice, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 21, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0090>; *see also* Am. Influencer Council, Inc., *supra* note 270.

²⁷⁹ Esports Bar Ass’n, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 21, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0113>.

²⁸⁰ Nat’l Retail Fed., *supra* note 276; *see also* Performance Mktg. Ass’n, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 21, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0089> (entitling the first heading: “Greater Clarity on What Constitutes Disclosure is Needed”); Performance-Driven Mktg. Inst., Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 22, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0094> (“PDMI’s major concern is that the Commission avoid ‘one size fits all’ rules of disclosure which would chill the effective communication of advertising messages while not adding in an appreciable way to the useful information made available to consumers.”); Ass’n of Nat’l Advertisers, Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising (June 22, 2020), <https://www.regulations.gov/comment/FTC-2020-0017-0091> (“While instructive in many ways, the current Guides do not adequately address current social media realities and related consumer behavior. Instead, they provide several outdated examples that are difficult for many to apply, particularly in the current media landscape.”).

²⁸¹ Kshirsagar, *supra* note 276.

V. DISCUSSIONS OF CHANGING FTC ENFORCEMENT POLICY

The FTC's apparent desire to keep kicking the social media influencer can down the road is unsustainable if the agency intends to continue to serve as a consumer protection entity. Non-disclosure of material connections by influencers concerning payment by businesses to advertise products has become a systemic problem.²⁸² The violations have become so normalized that an otherwise regulation-averse advertising industry now admits that something must be done to outline what kind of advertising is permissible.²⁸³ Despite the fact that the FTC has brought powerful online entities like Google, Snapchat and Facebook to heel using deception enforcement, it has been reluctant to apply its enforcement authority to the users of those platforms engaged in what even the agency itself has acknowledged are deceptive practices.²⁸⁴

We believe the regulatory answer to the issue of influencer deception is quite simple. The FTC just needs to use its enforcement authority against influencers who engage in deceptive practices. We believe a minimum of six to eight enforcement actions across the realm of the influencer economy is past due. Influencers at various follower levels ranging from nano to mega should be enforced against. But it is also critical that the advertisers, affiliate groups, and brands that utilize influencers, but fail to proactively require

²⁸² See *supra* Part III.

²⁸³ See *supra* Part IV.

²⁸⁴ See *generally supra* Part III. Interestingly, when compared to the FCC's enforcement, the FTC's non-enforcement is particularly odd. Comparatively, even the normally content enforcement-reluctant Federal Communications Commission maintains a low tolerance for complaints dealing with non-disclosure for sponsored broadcast elements. See 47 C.F.R. § 73.1212 (2020) (requiring disclosure for video news releases). Aside from the \$13 million fine assessed to Sinclair for failure to comply with the rules under § 73.1212 while running video news releases, the FCC has assessed fines for non-disclosure in cases involving brokered political news content and even for actively failing to include the name of a business in a regularly scheduled advertisement. See Sinclair Broad. Grp., Inc., 32 FCC Rcd. 10853, 10853 (2017) (fining Sinclair Broadcast Group \$13,376,200). While broadcasters languish under rules that are still stringently enforced, social media influencers have been given a universal hall pass by the FTC to continue to engage in deceptive practices.

disclosure compliance among their paid endorsers, be enforced against as well.

This rights three specific issues with the discussed line of enforcements. First, in finally enforcing against an influencer as part and parcel of a deceptive scheme, the FTC would reverse the harmful precedent of the previous enforcements.²⁸⁵ For example, in enforcing against an influencer, the FTC would reverse its precedent in *Creaxion* and *Telomerase* and finally acknowledge that influencers have sufficient agency to comply or not comply with federal deception laws.²⁸⁶ Bringing an enforcement would also recognize that influencers are engaged in business practices as influencers, which *CSGO*Lotto got right, but *Warner Bros. Home Entertainment*, *Machinima*, and *Lord & Taylor* did not.²⁸⁷ Doing so would also set clear precedent for future enforcement, the metaphorical stick that has been largely missing from deception enforcement of influencers. Most importantly, this will reestablish the FTC's enforcement credibility on consumer protection against deceptive claims and undisclosed material connections, things that all evidence demonstrates social media influencers are delivering in large quantities.²⁸⁸

Second, the FTC needs to set some guideposts by engaging in some enforcement actions against social media influencers who are serial violators of deception rules. The guideposts do not have to be uniform for every kind of influencer. Engaging in several

²⁸⁵ See *supra* Part III.

²⁸⁶ For example, some marketers have argued that influencer marketing differs from traditional marketing strategy in part because influencers need to be given room to run to create the kind of content that feels authentic. *100 Influencer Marketing Statistics for 2021*, INFLUENCER MKTG. HUB (Feb. 24, 2021), <https://influencermarketinghub.com/influencer-marketing-statistics/>. This view requires the implicit assumption that influencers are capable of producing quality work that fits within a specific request's purview, without going too far afield from what their authentic content should be like for consumers. *Id.* ("For influencer marketing to sustain, authenticity and credibility is key."). By this view marketers should not smother influencers by asserting full control because that would stymie the effectiveness of utilizing influencers in the first place. *Id.* ("[T]oday's consumer can tell the difference between an advert, a personal recommendation, and an advert masked under a personal recommendation.").

²⁸⁷ See *supra* Part III.

²⁸⁸ See Chan, *supra* note 64, at 332–33.

enforcements would allow the FTC to tailor specific protocol requirements to specific kinds of influencers. For example, gaming influencers, like those in *Warner Bros.* and *Machinima*, are often engaged in different forms of influencer campaigns, may be most active on gaming-centric social media platforms, and may violate disclosure requirements in different ways from fashion influencers.²⁸⁹ This is simply one example, but by creating guideposts for different kinds of influencers, the FTC can effectively create expectations of what is required for both influencers and the businesses which contract with them. This will balance the use of influencers in social media with endorsements or endorsers that appear in advertising in other mediums.

Third, it will put advertisers and influencers on notice that non-compliance with the agency's disclosure requirements could result in some expensive consequences. Several enforcements could create reasonable expectations of sanction for size and kind of influencer. Multiple and varied types of enforcement actions would give the FTC the opportunity to set precedent that acknowledges that each level of influencer possesses a different level of sophistication, and therefore different degrees of responsibility.²⁹⁰ For example, the FTC could utilize financial sanctions that scale with the quantity of followers, reserving the high-profile headlines proclaiming large

²⁸⁹ Compare Marianna Hewitt, *Ask a Blogger: Exactly How Do Fashion Bloggers Make Money?*, HARPER'S BAZAAR (Aug. 18, 2015), <https://www.harpersbazaar.com/culture/features/a11902/how-do-fashion-bloggers-make-money/> (listing different methods of becoming a professional fashion blogger), and Sabrina Fenster, *How to Choose A Fashion Affiliate Network*, SHELF (Aug. 25, 2019), <https://www.theshelf.com/influencer-resources/how-to-choose-a-fashion-affiliate-network> (discussing affiliate link programs in greater detail), with *The Ultimate Guide to Becoming a Gaming Influencer on Livestream Platforms*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/how-to-be-gaming-influencer/> (last updated May 14, 2020) (indicating that video game influencers rely less upon affiliate link programs and rely more upon cultivation of a brand and subsequent platform payment tools).

²⁹⁰ Max Willens, *'A More Sophisticated Influencer Strategy': Publishers are Building Teams to Recruit 'Expert Networks'*, DIGIDAY (Apr. 12, 2019), <https://digiday.com/media/sophisticated-influencer-strategy-business-news-publishers-accumulate-influential-audiences/> (indicating the increasing sophistication of influencer strategies).

finances for cases against well-known celebrities or other wealthy influencers.²⁹¹

This is mutually beneficial overall. Following these sanctions, the advertising industry will proclaim its ability to self-regulate, and adjudicative action is certain to generate some attention as well as expand compliance with the rules. An action taken against a high-profile influencer or public figure will also generate headlines outside of the advertising world, spreading the message even further.

While we recognize the FTC cannot fully police the entire realm of social media, there are plenty of candidates among the 86% of non-complying influencers for the FTC to choose from.²⁹² While some of the commenters called out for drastic action in the FTC's 2020 endorsement guideline inquiry, in practical terms what we are arguing is that what the agency needs to do is "set some precedent."²⁹³ The agency has already made the determination

²⁹¹ Still, even scaled enforcements would recognize that influencers are often highly sophisticated parties that should be expected to comply with the law. For example, before the FTC enforced against Machinima, Machinima was a behemoth of a channel and boasted over 12 million subscribers. Bill Flook, *Veenome's Kevin Lenane on Twitch, Amazon and the Validation of User-Generated Content*, WASH. BUS. J. (Apr. 28, 2014), <https://www.bizjournals.com/washington/blog/techflash/2014/08/veenomes-kevin-lenane-on-twitch-amazon-and-the.html>; Julia Alexander, *Machinima, One of YouTube's Biggest and Oldest Channels, Goes Dark*, VERGE (Jan. 19, 2019), <https://www.theverge.com/2019/1/19/18189611/machinima-youtube-fullscreen-warner-bros-multi-channel-network>.

²⁹² See INFLUENCER MKTG. HUB, *supra* note 19 ("We found only 14% of posts to be fully compliant and meeting all regulatory guidelines as set out by the FTC and CMA."). Importantly, even the Influencer Marketing Hub report recognized the possibility of FTC enforcement due to the high number of non-complying influencer posts. *See id.* ("[T]here is a real danger that the FTC and CMA will start prosecuting rather than just warning and educating."). Unsurprisingly, and likely in part because of the FTC's failure to enforce its § 5(a) authority, this compliance rate is only marginally higher than the previous year's 11% compliance rate. *Id.*

²⁹³ While the authors are staunch First Amendment advocates who are generally reluctant to make calls for subsequent punishment in the form of state action, it bears mention that deceptive commercial speech is not granted the same deference as other forms of speech under the First Amendment. *See Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–73 (1976).

through its letters that nondisclosure in influencer speech is deceptive. If the FTC wants to move past those determinations, the opportunity to use some of the many examples of failed disclosures provided by the commentators within the Endorsement Guides review remains available.²⁹⁴

We also do not make this proposal absent a consideration of the commenters who were opposed to additional regulation, many of whom stated in their comments that they were seeking some additional guidance on the rules.²⁹⁵ Adjudications will achieve this result faster and certainly more effectively than an extended rulemaking proceeding, to say nothing of the months that have passed without formal agency action since the inquiry was closed.²⁹⁶

Nor do we propose enforcement against influencers as the sole option.²⁹⁷ The FTC's educational outreach to influencers should continue, and the FTC should continue to pursue opportunities to create compliance incentives outside of enforcement.²⁹⁸ However,

²⁹⁴ See generally Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. 10104, 10105–07 (Feb. 21, 2020) (offering numerous examples of failed disclosures and methods to curb these abuses).

²⁹⁵ See, e.g., Maastricht Univ., *supra* note 271 (listing many likely issues that discourage the FTC's coaxing influencers to comply with the guides).

²⁹⁶ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. at 10104 (indicating the date of the rule and the length of time passed since comments have been received).

²⁹⁷ Indeed, even comments on the FTC's website indicate that the FTC is a "great resource" for compliance information. See Lesley Fair, *Endorsement Guides: The FTC Wants Your Feedback*, FED. TRADE COMM'N (Feb. 12, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/02/endorsement-guides-ftc-wants-your-feedback>. These authors do not think the FTC should unpublish its guides, the Disclosure 101 documentation, or cease its social media outreach events; they propose instead that these should bolster enforcement action for violations by influencers.

²⁹⁸ Platforms defunding advertisements for non-compliant influencers has become one trendy solution, but it is unlikely to succeed without sufficient enforcement against select, non-compliant influencers by the FTC. See Andrew Hutchinson, *Instagram Announces New Crackdown on Influencers Who Fail to Disclose Commercial Partnerships*, SOCIALMEDIATODAY (Oct. 16, 2020), <https://www.socialmediatoday.com/news/instagram-announces-new-crackdown-on-influencers-who-fail-to-disclose-comme/587229/> (discussing Instagram's history of attempts to curb influencer non-disclosure).

sufficiently strong enforcement against influencers *must* be part of the solution, regardless of the other prongs the FTC chooses to undertake.

CONCLUSION

Historically, the FTC has used enforcement actions as a model for other advertisers to follow, and to outline actions to avoid in future advertising.²⁹⁹ The FTC's lack of enforcement against influencers has led to a status quo of non-compliance. After two attempts at self-regulation, another set of advisory guidelines or another informational video where an FTC staff attorney uses jump cuts and outfit changes in a failed attempt to appear hip is not going to generate compliance. Not ironically, the FTC's passive approach to influencers has turned it into the follower without influence.

Deceptive practices by social media influencers have become normatively accepted while the FTC has dawdled on exercising the same authority that it has widely used against endorsements in advertising appearing in traditional media for decades. The FTC, if it wishes to take the agency's consumer protection mission seriously, must step up and enforce deception in online advertising, including that of influencers. As 2020 has come and gone, the FTC has refused to take the issue on directly, offering guidelines rather than engaging in adjudicative enforcement actions against serial violators. If the FTC does not act, brands, advertising firms, and influencers will continue to flaunt the law.³⁰⁰

²⁹⁹ See generally Karns, *supra* note 71, at 429–30 (detailing FTC's use of advertising enforcement actions and adjudication from the 1930s to the 1980s to assert its advertising deception policy stances).

³⁰⁰ For example, the FTC has created blog posts that purport to solve this issue, but a glance at the comments section indicates that nearly all commenters disagree. Fair, *supra* note 246.