



1-5-2021

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Keith Coop

Loyola Law School, Los Angeles

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Recommended Citation

Keith Coop, *Influencers: Not So Fluent in Disclosure Compliance*, 41 Loy. L.A. Ent. L. Rev. 77 (2021).
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Cover Page Footnote

J.D. Candidate, 2021, Loyola Law School, Los Angeles. The author would like to, first and foremost, thank God for the blessings that he has provided. He would like to thank Professor Therese Maynard for all of the guidance she has provided on this Note and his law school education. He would like to thank the staff and editors of Loyola of Los Angeles Entertainment Law Review for their diligent work and feedback. Most notably, he would like to thank his grandparents, Roy and Linda Cooper, and his parents, Keith Cooper and Shastin Angel, and the rest of his family for their love and support.

INFLUENCERS: NOT SO FLUENT IN DISCLOSURE COMPLIANCE

*Keith Cooper**

The Fyre Festival is one of the most infamous disasters in music festival history. Lesser known to the public is that the influencers involved in Fyre Festival's influencer marketing campaign were required to disclose their payments for endorsing the event. These types of disclosures are regulated by the Federal Trade Commission ("FTC") pursuant to its authority granted under the Federal Trade Commission Act ("FTC Act"). The disclosure requirement is set forth in the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Endorsement Guides"), which are nonbinding instructions that educate influencers on how to comply with Section 5 of the FTC Act.

While the FTC pursues companies and influencers that violate the disclosure requirements, its attempts are futile due to the Endorsement Guides' nonbinding nature. With influencer marketing growing rapidly and fraudulent practices becoming rampant, the FTC must make two changes to become more effective. First, the agency must use its rulemaking authority under the FTC Act to codify elements of the Endorsement Guides, and other FTC works into formal rules that will allow it to seek monetary penalties and consumer redress against violators. Second, the FTC must mandate disclosure provisions to be present in every influencer-company endorsement contract to prevent the prevalent deceptive business practice. By implementing these two changes, the FTC will have adequate tools at its disposal to prevent and punish violators who previously remained outside its grasp.

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I. INTRODUCTION

In the early morning of April 27, 2017, “chaos” ensued on the sandy beaches of the Bahamian Island of Great Exuma.¹ Recognized as one of the most infamous events in music festival history, the Fyre Festival has been the subject of numerous lawsuits stemming from a single disastrous weekend.² Festivalgoers were promised a luxurious experience of a lifetime, which included “private planes, yachts, villas, wellness activities, free-flowing booze, and the chance of expanding their Instagram following by a few thousand.”³ Upon nightfall, anarchy ensued among the guests because there was scarce food, electricity, lighting, or basic necessities.⁴ To add to the state of disarray, artists scheduled for the “two transformative weekends” canceled days prior to the disastrous event,⁵ leaving many attendees to speculate as to whether they were scammed.

Previously, in December 2016, Fyre Festival, Inc., attempted to make a name for itself in the music festival scene and attract the attention of potential festivalgoers by launching its marketing campaign on social media.⁶ The company was resilient in its marketing efforts, becoming heavily reliant on “influencer marketing,” a growing area of advertising used to recruit

1. See Abby Ohlheiser, *The Complete Disaster of Fyre Festival Played Out on Social Media for All to See; ‘Not My Fault’ Says Organizer Ja Rule*, WASH. POST (Apr. 28, 2017, 11:50 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/04/28/the-complete-and-utter-disaster-that-was-fyre-festival-played-out-on-social-media-for-all-to-see/> [https://perma.cc/H55K-NP2E].

2. See Jack Garson, *How to Be an Influencer and Not Get Sued*, FORBES (May 7, 2019, 4:47 PM), <https://www.forbes.com/sites/jackgarson/2019/05/07/how-to-be-an-influencer-and-not-get-sued/#786876bf645a> [http://archive.today/r7kzl].

3. Margaret Abrams, *What is Fyre Festival? Guests Who Got Scammed by Billy McFarland Tell Their Horrifying Stories*, EVENING STANDARD: INSIDER (Apr. 29, 2019), <https://www.standard.co.uk/insider/alist/fyre-festival-what-happened-a4039896.html> [https://perma.cc/7AUF-B49N].

4. See Ohlheiser, *supra* note 1.

5. See *id.*

6. No, *Fyre Festival Wasn’t an Influencer Marketing Success (and Other Lessons from a Disaster)*, INFLUENCER MARKETINGHUB, <https://influencermarketinghub.com/no-fyre-festival-wasnt-an-influencer-marketing-success-and-other-lessons-from-a-disaster/> (last updated Jan. 31, 2019) [https://perma.cc/37WJ-E3NH].

concertgoers.⁷ Influencer marketing is a “type of marketing that focuses on using key leaders to drive [a] brand’s message to the larger market.”⁸ An influencer is someone who “exerts” his or her influence in ways that “inspire[] or guide[] the actions of others.”⁹ Seeking to offset the exorbitant costs of hosting an event on a private island, Fyre Festival, Inc. jumpstarted its marketing efforts by contracting with sixty-three high-profile influencers to simultaneously post “a vague orange colored graphic” with the hashtag #FyreFest.¹⁰

As over 400 influencers joined Fyre Festival’s marketing ranks, almost all of their social media posts failed to comply with the Federal Trade Commission’s (“FTC”) disclosure requirement compelling influencers to inform the public of any payments or material benefits received for promoting the festival.¹¹ The FTC imposes this disclosure obligation pursuant to Section 5 of the Federal Trade Commission Act (“FTC Act”), which entrusts the agency with the responsibility of regulating a wide array of business

7. Atanu Shaw, *What Marketers Can Learn From the Fyre Festival’s Influencer Marketing Fiasco*, FORBES (Apr. 16, 2019, 8:00 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2019/04/16/what-marketers-can-learn-from-the-fyre-festivals-influencer-marketing-fiasco/#25fb03b31308> [http://archive.today/78v5r].

8. *Influencer Marketing*, TAPINFLUENCE (June 2, 2015), https://www.tapinfluence.com/blog-what-is-influencer-marketing/#what_is [https://perma.cc/48AE-7JZ4]. Key leaders in this area are known as “influencers.” See *The Ultimate Guide to Influencer Marketing*, IZEA, <https://izea.com/influencer-marketing/> [https://perma.cc/PB7J-YZ42].

9. *Influencer*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/influencer> [https://perma.cc/7KXE-JA59].

10. *No, Fyre Festival Wasn’t an Influencer Marketing Success (and Other Lessons from a Disaster)*, *supra* note 6. Among those contracted were celebrities like Kendall Jenner, Emily Ratajowski, and Hailey Baldwin, who were each paid excessive sums of money and other incentives in exchange for a few social media posts promoting the supposed lucrative event.

11. See Shaw, *supra* note 7 (“[Fyre Festival] reportedly spent millions in . . . payments to influencers and celebrities that promoted Fyre . . . [a]nd most of the influencers also violated the Federal Trade Commission (FTC) regulations”). Fyre Festival “spen[t] millions on flying the models/influencers down to the Bahamas every other weekend, so the models could take pictures from the beach and on yachts,” thereby emitting a luxurious vibe for its promotional content. *No, Fyre Festival Wasn’t an Influencer Marketing Success (and Other Lessons from a Disaster)*, *supra* note 6. See also 16 C.F.R. § 255.5 (2020) (informing influencers and advertisers that they must fully disclose any connection between the parties that might materially affect an endorsement); FED. TRADE COMM’N, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS (2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [https://perma.cc/JB76-NNL5].

practices, including advertising and its influencer marketing subset.¹² Surprisingly, the FTC abrogated this responsibility by not pursuing the parties involved in the catastrophic event,¹³ but even if it had, it was ill-equipped to remedy the concertgoers' losses.¹⁴

To date, influencer marketing has opened a variety of lucrative income-producing opportunities to all but has remained mostly unregulated.¹⁵ Without strictly imposed rules and regulations, the lure of fame and substantial material compensation has led many individuals and companies to partake in deceptive actions to the detriment of consumers when exploiting the digital marketing method.¹⁶ While some influencers are genuinely unfamiliar with the disclosure requirements, the mostly unregulated landscape gives others the perverse incentive to purposefully provide inadequate disclosure with the hope that the endorsed content emits a trustworthy appeal to consumers.¹⁷ Consequently, consumers are left speculating as to whether posts are sponsored, and many pay the price for an influencer's failed disclosure with no FTC intervention.¹⁸

12. The FTC has broad authority to regulate activities involving "unfair" or "deceptive" practice that affect commerce. See Federal Trade Commission (FTC) Act § 5(a), 15 U.S.C. §§ 45(a)(1)–(a)(2) (2018).

13. See Nicholas Sun, *Influencers Under Fyre: The Case for Greater Enforcement of FTC Endorsement Guidelines Against Social Media Influencers*, COLUM. BUS. L. REV. (Aug. 13, 2019), <https://journals.library.columbia.edu/index.php/CBLR/announcement/view/184> [<https://perma.cc/G3FB-QYZB>].

14. See discussion *infra* Part IV.

15. See Simon Owens, *Is It Time to Regulate Social Media Influencers?*, N.Y. MAG.: INTELLIGENCER (Jan. 17, 2019), <http://nymag.com/intelligencer/2019/01/is-it-time-to-regulate-social-media-influencers.html> [<http://archive.today/CxQm1>].

16. See *id.*

17. See Complaint at 3, *In re Machinima, Inc.*, No. C-4569 (F.T.C. Mar. 16, 2016) [hereinafter *Machinima Complaint*], available at <https://www.ftc.gov/system/files/documents/cases/160317machinimacmpt.pdf> [<https://perma.cc/D7FZ-REEQ>] ("[T]he influencers agreed to keep confidential at all times in perpetuity all matters relating to their agreement with Respondent."); see also Complaint at 2, *In re Warner Bros. Home Ent. Inc.*, No. C-4595 (F.T.C. Nov. 17, 2016) [hereinafter *Warner Bros. Complaint*], available at https://www.ftc.gov/system/files/documents/cases/161811warner_bros_complaint.pdf [<https://perma.cc/N8EG-EB28>] ("Video[s] will promote positive sentiment about the game.").

18. See Owens, *supra* note 15; see also Sun, *supra* note 13.

Part II of this Note discusses the history of influencer marketing and its impact on motivating influencers and companies to engage in deceptive conduct. Part III provides insight into the FTC's authority to regulate influencers and its guides concerning disclosure. Part IV demonstrates that the FTC's enforcement mechanisms are useless against violators without implementation of fundamental changes. Part V argues that the FTC should use its rulemaking authority to deem failed disclosure an FTC Act violation and require that every contractual endorsement agreement with influencers include mandatory provisions respecting disclosure. By choosing to regulate influencer marketing in this manner, the FTC would rectify its previous enforcement failures, thereby aiding consumers in accurately assessing endorsed content.¹⁹

II. THE EVOLUTION OF INFLUENCER MARKETING AND THE CURRENT INCENTIVE TO ENGAGE IN DECEPTIVE BUSINESS PRACTICES

In the twenty-first century, the influencer marketing industry continues to proliferate year after year.²⁰ The estimated influencer marketing growth for 2020 is \$9.7 billion, an increase of \$8 billion from 2016.²¹ A vast majority of companies now create standalone budgets dedicated to the content-based marketing method.²² While the media often criticizes the sincerity of influencers, there is no question that the influencer marketing industry is a "highly popular and effective form of marketing."²³ Nevertheless, as influencer marketing continues to grow, so does the concern over the growth of deceptive business practices.²⁴

19. See generally DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS, *supra* note 11.

20. See *The State of Influencer Marketing 2020: Benchmark Report*, INFLUENCER MARKETINGHUB, <https://influencemarketinghub.com/influencer-marketing-benchmark-report-2020/> (last updated Mar. 1, 2020) [<https://perma.cc/KJ55-DQQF>].

21. See *id.*

22. Influencer marketing relies on influencers to generate content on their social media platforms. See *id.*

23. See *id.*

24. See *id.*

A. *The Brief History of Early Influencer Marketing*

Contrary to the common misconception, influencer marketing predates the twentieth century.²⁵ Although the marketing method is not a new invention, the term “influencer” has recently gained traction and was officially added to the English dictionary in 2019.²⁶ One of the first influencer collaborations was between a potter named Josiah Wedgwood and Queen Charlotte of England in 1760.²⁷ The “forward-thinking” potter created a tea set for the Queen and marketed it as “Royal-approved,” cementing the brand with the luxurious status that it still holds to this day.²⁸ Monarchs dominated the influencer status during this period in British history, but in the modern era, celebrities too became entrusted with the power to influence.²⁹

In 1984, Nike, an athletic shoe company, took a gamble on a young basketball player by spending nearly all of its shoe marketing budget to create a new signature shoe line that would cement the rookie player as the original “signature shoe king.”³⁰ Labeled as a “once-in-a-generation athlete,” Michael Jordan not only became a household name in the sports world but also a famous cultural icon.³¹ Nike’s bet ultimately paid off. To illustrate, the Jordan brand made billions of dollars in profits in the 2019 fiscal year.³² Consumers worldwide spend their hard-earned capital for even the slightest

25. See Aaron Brooks, *[Timeline] A Brief History of Influencers*, SOCIALMEDIATODAY (May 9, 2019), <https://www.socialmediatoday.com/news/timeline-a-brief-history-of-influencers/554377/> [<https://perma.cc/AB27-SYF5>].

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. See Ronald D. White, *How Michael Jordan Became a Brand*, L.A. TIMES (Feb. 14, 2019, 3:00 AM), <https://www.latimes.com/business/la-ig-michael-jordan-jordan-brand-sneakers-sneaker-20190214-story.html> [<https://archive.is/gvKLX>].

31. *See id.*

32. See Kurt Badenhausen, *How Michael Jordan Will Make \$145 Million in 2019*, FORBES (Aug. 28, 2019, 8:54 AM), <https://www.forbes.com/sites/kurtbadenhausen/2019/08/28/how-michael-jordan-will-make-145-million-in-2019/#6391d5631064> [<http://archive.today/1x3tP>].

chance to play like “the guy who could fly” on the basketball court.³³ As a testament to the brand’s success, although Michael Jordan retired in 2003, he still commands influence over consumer purchases because his persona and name brand are synonymous with greatness.³⁴ Celebrities, in addition to star athletes, remain highly sought after for their reach and ability to connect with younger generations.³⁵ As social media platforms continue to garner mass popularity in recent years, the influencer market has evolved, becoming more prevalent, and enabled almost anyone to become an influencer.³⁶

B. How the Modern Incarnation of Influencer Marketing Practices Paves the Way for Fraudulent Business Practices

As society becomes overly dependent on technology in the twenty-first century,³⁷ the internet has become a center for individuals to create a profitable business by influencing others across their designated social media profiles.³⁸ Social media has progressed beyond the mere function of communication by converging with e-commerce, whereby companies turn to influencers as prominent figures to market their products.³⁹ Social media platforms like Instagram and TikTok are becoming a primary method for

33. See White, *supra* note 30.

34. See Scott Davis et al., *Most Americans Think Michael Jordan is the ‘GOAT’ over LeBron James, and It’s Not Even Close*, BUS. INSIDER (Mar. 18, 2019, 5:38 PM), <https://www.businessinsider.com/jordan-lebron-goat-debate-americans-jordan-2019-3> [https://perma.cc/3NEE-5E5B].

35. See generally Georgia Hatton, *Micro Influencers vs Macro Influencers*, SOCIALMEDIATODAY (Feb. 13, 2018), <https://www.socialmediatoday.com/news/micro-influencers-vs-macro-influencers/516896/> [https://perma.cc/WP4W-DGGJ].

36. See Brooks, *supra* note 25.

37. See Marguerite Darlington, *This is What Digital Addiction Looks Like*, REWIRE (Dec. 12, 2017), <https://www.rewire.org/digital-addiction/> [https://perma.cc/CH7P-5RJQ].

38. See Shane Barker, *How to Make Money on Social Media as an Influencer*, SHANE BARKER (Mar. 31, 2020), <https://shanebarker.com/blog/influencer-make-big-money-on-social-media/> [https://perma.cc/8RX7-GACT].

39. See Audrey Schomer, *Influencer Marketing: State of the Social Media Influencer Market in 2020*, BUS. INSIDER (Dec. 17, 2019, 7:07 PM), <https://www.businessinsider.com/influencer-marketing-report> [https://perma.cc/HYB4-TNFS].

companies to connect with younger generations of consumers.⁴⁰ Moreover, it is becoming increasingly difficult to find a brand that does not implement an influencer marketing campaign on Instagram.⁴¹ Because of its success, influencer marketing is now a typical expense on a company's balance sheet.⁴² By the year 2022, companies are set to spend upwards of \$15 billion on influencer marketing.⁴³ While there are many monetary benefits that await those who venture into the realm of influencer marketing,⁴⁴ it is crucial to first gain insight into the marketing method's pay-for-endorsement structure to understand the negative connotations it implicitly invokes.

Before embarking on an influencer marketing journey, companies must consider a host of factors to determine how to reach the right target audience.⁴⁵ While not an exhaustive list, many companies consider the following factors in selecting an influencer: social media platform, influencer following, engagement rates, market category, content format, campaign deliverables, exclusivity, and production costs.⁴⁶ Influencers, too, consider these factors when electing to build a business around their respective followings.⁴⁷ These influencers selectively tailor their content using factors they believe companies prioritize, which empowers influencers to "charge in a manner similar to any business offering a service."⁴⁸

Since influencer marketing is a service-oriented industry, influencers are frequently segmented into a tiered system based on their social media followings.⁴⁹ Using a tiered system, marketers can paint a picture of the

40. See *The State of Influencer Marketing 2020: Benchmark Report*, *supra* note 20.

41. See generally *id.*

42. See generally *id.*

43. See Schomer, *supra* note 39.

44. See *The State of Influencer Marketing 2020: Benchmark Report*, *supra* note 20.

45. See *Influencer Rates: How Much Do Influencers Charge?*, MEDIAXIX, <https://mediakix.com/blog/influencer-rates/> [<https://perma.cc/4XUF-ZVXF>].

46. See *id.*

47. See *id.*

48. See *id.*

49. See *id.*

estimated costs for electing to retain a particular type of influencer.⁵⁰ At the bottom tier are nano-influencers who are like most of the general population without celebrity-like status, have follower counts of less than ten thousand, and generally receive free products or monetary compensation up to \$500 for each endorsed post.⁵¹ While compensation in this tier seems quite minuscule, nano-influencers can earn anywhere between \$30,000 to \$60,000 per year.⁵² Next are micro-influencers who have followings of ten to fifty thousand accounts and can charge companies anywhere from \$200 to \$4,000 per post,⁵³ making \$40,000 to \$100,000 annually.⁵⁴ Macro-influencers are one tier above micro-influencers and have a following of five hundred thousand to one million accounts, which allows them to demand compensation of \$5,000 to \$25,000 per post.⁵⁵ Lastly, a mega-influencer is in the highest tier, eclipsing the compensation that macro-influencers receive while having a following of over a one million accounts.⁵⁶ Within the mega-influencer tier, which often includes celebrities, are individuals who can command compensation of more than \$500,000 per post.⁵⁷

As influencer marketing has exploded from its infancy on social media, its landscape has continued to evolve.⁵⁸ In the past decade, companies have diverted away from securing the traditional type of influencer.⁵⁹ Companies

50. *See id.*

51. *See id.*

52. *See* Audrey Conklin, *How Much Money Do Social Media Influencers Make?*, FOXBUSINESS (Mar. 11, 2020), <https://www.foxbusiness.com/lifestyle/social-media-influencer-pay> [<https://perma.cc/5LBQ-CWBU>].

53. *See Influencer Rates*, *supra* note 45.

54. *See* Conklin, *supra* note 52.

55. *See Influencer Rates*, *supra* note 45.

56. *See id.*

57. *See id.*; *see also* Conklin, *supra* note 52.

58. *See Influencer Rates*, *supra* note 45.

59. *See* Megan DeGruttola, *Why the Future of Influencer Marketing Will Be Organic Influencers*, SOCIALMEDIATODAY (Nov. 17, 2019), <https://www.socialmediatoday.com/news/why-the-future-of-influencer-marketing-will-be-organic-influencers/567463/> [<https://perma.cc/BC25-ANFD>].

used to select traditional influencers such as celebrities or individuals with a high number of followers based on the belief that consumers would purchase more of their products or services.⁶⁰ Much to the dismay of these companies, while “traditional influencers may have been able to deliver the initial eye-balls,” research has demonstrated that high viewership does not equate to a higher purchase rate by the consumer.⁶¹ To illustrate, “many people follow mega-influencers and celebrities, they often do so, simply because they recognize the name, rather than for any great interest in the topic of [their] posts.”⁶²

Moreover, due to an oversaturated industry and barrage of high-profile scandals, the general public is gradually losing the trust they once placed in mega and celebrity influencers.⁶³ Consequently, the current trend followed by companies is to secure nano or micro influencers rather than their mega or celebrity counterparts.⁶⁴ However, there are drawbacks to this modern trend. The FTC has limited resources, making it inefficient to police the thousands of nano or micro influencers who have little notoriety aside from their small followings.⁶⁵

C. Influencer Marketing’s Contractual Nature is the Culprit for Encouraging Deceptive Behavior

As the general population becomes less inclined to respond to traditional marketing methods, influencer marketing has growing exponentially.⁶⁶ The current generation is deeply persuaded by advertising and

60. *See generally id.*

61. *See id.*; *see also The State of Influencer Marketing 2020: Benchmark Report, supra note 20.*

62. *See The State of Influencer Marketing 2020: Benchmark Report, supra note 20.*

63. *See DeGruttola, supra note 59.*

64. *See The State of Influencer Marketing 2020: Benchmark Report, supra note 20.*

65. The FTC is an agency with finite resources, making it selective in pursuing violators who have a greater following of accounts to set an example. *See* 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, 1141 (2018).

66. *See generally DeGruttola, supra note 59.*

promotional content that radiates an authentic yet creative feel.⁶⁷ In order to appeal to these unique desires, marketers have turned to influencers to create “high-quality content that fits within their brand aesthetic” and fulfills that authentic appeal.⁶⁸ However, authentic content becomes eerily suspicious if one considers “that the minute you pay someone for content, it becomes inherently inauthentic.”⁶⁹

Influence is successful when it is premised on credibility, but can be corrupted if it is based on deception.⁷⁰ While this may seem intuitive, many consumers do not realize that deception is inherent in the contractual nature of influencer marketing.⁷¹ When individuals are contractually obligated to repeatedly mention a product or company or post promotional content of a company on their respective social media accounts, they cease to be influencers.⁷² Instead, the influencer functions as an online “mercenary,” an individual who will post promotional content for the right price or material benefit.⁷³ Inadvertently, a sliver of marketing that was intended to establish an authentic connection is replaced with individuals who are simply “walking advertisement[s].”⁷⁴ A recurring theme in influencer marketing “is to deceive, to make believe that a recommendation is genuine and to hide the fact that there is a contract.”⁷⁵

A series of scandals reveal the underlying problems with the influencer marketing model.⁷⁶ If brands “stipulate how often an influencer has to

67. *See id.*

68. *See id.*

69. *See id.*

70. *See* Enrique Dans, *Influencer Marketing: A Phony Industry Based on False Premises*, FORBES (July 17, 2019, 6:02 AM), <https://www.forbes.com/sites/enriquedans/2019/07/17/influencer-marketing-a-phony-industry-based-on-falsepremis/#b4fcf546d6b> [http://archive.today/tjRGO].

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See* DeGruttola, *supra* note 59. *See also* Kaya Yurieff, *Instagram Star Isn't What She Seems. But Brands are Buying In*, CNN BUS. (June 25, 2018, 11:23 AM), <https://money.cnn.com>

mention [the] brand and where and when, while . . . [hoping] he or she [does not] do something disastrous,” authenticity becomes but a mere fable.⁷⁷ For instance, Bootea, a detox tea company, engaged celebrity influencer Scott Disick to market its tea products using his Instagram platform to reach target audiences.⁷⁸ However, due to the degree of control Bootea maintained over his social media posts and Disick’s failure to act diligently, Disick accidentally copied and pasted the company’s directions into his post, including the time to post and the pre-written caption drafted by the company.⁷⁹ Disick’s mishap unintentionally alerted the public to the contractual nature behind his decision to post the content, thereby exposing the deception behind their relationship.⁸⁰

Consumers are not the only parties who experience the shortcomings of a marketing method that idolizes individuals who allegedly have influence.⁸¹ Companies must grapple with the fact that “social networks are filled with imaginary people whose followers, likes and comments are paid for and who have absolutely zero influence.”⁸² The desire to secure a lucrative contract through the appearance of authenticity and a large following has incentivized influencers “[t]o appear more influential than they actually are” by inflating their online presence with purchased fake followers.⁸³ CNBC reported that the fraudulent activity of buying fake followers to “like” or comment on social media posts cost advertisers an estimated \$1.3 billion in

/2018/06/25/technology/lil-miquela-social-media-influencer-cgi/index.html?sr=liCNN062518lil-miquela-social-media-influencer-cgi0144PMStory.cgi/index.html?sr=liCNN062518lil-miquela-social-media-influencer-cgi0144PMStory [https://perma.cc/5MPV-DD4T]; Conklin, *supra* note 52.

77. Dans, *supra* note 70.

78. See Hatton, *supra* note 35.

79. See *id.*

80. See *id.*

81. See generally Dans, *supra* note 70; DeGruttola, *supra* note 59.

82. Dans, *supra* note 70.

83. Megan Graham, *Fake Followers in Influencer Marketing Will Cost \$1.3 Billion This Year, Report Says*, CNBC (July 24, 2019, 1:31 PM), <https://www.cnbc.com/2019/07/24/fake-followers-in-influencer-marketing-will-cost-1point3-billion-in-2019.html> [https://perma.cc/ZV7X-G2EJ].

2019.⁸⁴ The fraudulent practice was so profitable that an American company named Devumi was able to earn millions of dollars by selling followers “to celebrities, businesses and anyone who wants to appear more popular or exert influence online.”⁸⁵ As companies and consumers grow increasingly concerned over influencer fraud due to deceptive behavior influencers routinely employ,⁸⁶ the FTC must strike at the heart of influencer marketing by making disclosure a required element in every influencer-company endorsement contract.⁸⁷

III. THE FTC’S AUTHORITY TO REGULATE INFLUENCER MARKETING AND THE USE OF ITS ENDORSEMENT GUIDES TO PROVIDE INSTRUCTION ON ADEQUATE DISCLOSURE

The FTC is an independent agency of the United States government dedicated to protecting the rights of consumers.⁸⁸ The agency’s mission has long been “to stop deceptive ads,” which include endorsements made through a designated social media platform.⁸⁹ The FTC periodically provides tips and instructions on how to comply with relevant laws.⁹⁰ Before discussing the disclosure requirements that influencers must follow, it is necessary to describe the FTC’s scope of regulatory authority, which ultimately gave rise to the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”).

A. *The Establishment of the FTC’s Power to Regulate the Unfair*

84. *See id.*

85. Nicholas Confessore et al., *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/interactive/2018/01/27/technology/social-media-bots.html> [<https://perma.cc/X5H6-JZNH>].

86. *See The State of Influencer Marketing 2020: Benchmark Report*, *supra* note 20.

87. *See infra* Part V.

88. *See* Sorilbran Stone, *The New FTC Regulations For Influencer Marketing*, THE SHELF (July 6, 2017), <https://www.thesheff.com/the-blog/ftc-influencer-disclosure-rules> [<https://perma.cc/B7FM-JP3C>].

89. *See* DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS, *supra* note 11.

90. *See id.*

and Deceptive Practices Utilized in Influencer Marketing

The FTC Act grants the FTC broad powers to prohibit “persons, partnerships, or corporations” from engaging in “unfair” or “deceptive” practices that affect commerce.⁹¹ An act or practice is considered “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁹² The FTC Act does not define “deceptive acts or practices,”⁹³ but the FTC has issued a policy statement providing guidance on the term “deception.”⁹⁴ In the policy statement, the FTC defines deception as “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”⁹⁵ More importantly, an omission is deceptive “when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed.”⁹⁶

Not all deceptive omissions are actionable.⁹⁷ The omission in question must be material, meaning that “consumers are likely to have chosen differently but for the deception.”⁹⁸ The test applied by the FTC is “whether the consumer’s interpretation or reaction is reasonable” in light of the claim being brought.⁹⁹ An interpretation may be reasonable even if not shared by a majority of the relevant class; rather, a deceptive act needs only to “[mislead]

91. Federal Trade Commission (FTC) Act § 5(a)(2), 15 U.S.C. § 45(a)(2) (2018).

92. 15 U.S.C. § 45(n).

93. 15 U.S.C. § 45(a)(4)(A).

94. See Letter from James C. Miller III, Chairman, Fed. Trade Comm’n, to the Honorable John D. Dingell, Chairman, Comm. on Energy & Commerce, U.S. House of Representatives (Oct. 14, 1983) [hereinafter FTC Policy Statement on Deception], available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/5NWJ-XE9B].

95. *Id.*

96. *Id.*

97. Omissions that are not material are not actionable. See *id.*

98. *Id.*

99. *Id.*

a significant minority of reasonable consumers.”¹⁰⁰ Courts have interpreted a “significant minority” as slightly above or precisely ten percent of affected reasonable consumers.¹⁰¹

In its mission to prevent deceptive practices, the FTC may exercise its rulemaking authority to prescribe two different sets of rules, each having its own implications.¹⁰² First, the FTC may furnish “interpretive rules and general statements of policy” to provide guidance on avoiding conduct that amounts “to unfair or deceptive acts or practices in or affecting commerce.”¹⁰³ Interpretative rules are more akin to guidelines and do not carry the weight of law, meaning violators will not be subject to civil penalties or consumer redress under the FTC Act’s Section 5 and Section 19, respectively.¹⁰⁴ Second, the FTC can issue “rules which define with specificity [the] acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”¹⁰⁵ Unlike interpretative rules, these defined rules function as formal rules of law, granting the FTC the discretion to pursue civil penalties and consumer redress against violators.¹⁰⁶ The framework of the Endorsement Guides, which articulate the disclosure requirements for both influencers and the companies that contract with influencers, is the embodiment of the FTC’s interpretative rule promulgation designed to prevent

100. *Id.*

101. *See* Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir. 1973) (affirming a finding of deception where an ad misleads at least ten percent of the purchasing public); *see also* FTC v. John Beck Amazing Profits, LLC, 865 F. Supp. 2d 1052, 1070-71 n.88 (C.D. Cal. 2012) (“10.5% to 17.3% . . . is sufficient to prove the complaint allegation that the challenged representation had been made.”).

102. *See* Federal Trade Commission (FTC) Act § 18, 15 U.S.C. § 57a (2018); *see also* *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [https://perma.cc/W74N-PQP5].

103. 15 U.S.C. § 57a.

104. The FTC may pursue a civil action for civil penalties or consumer redress when an individual violates a rule “other than an interpretive rule.” *See* 15 U.S.C. §§ 45(m), 57b.

105. 15 U.S.C. § 57a. *See A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, *supra* note 102.

106. 15 U.S.C. §§ 45(m), 57b. *See A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, *supra* note 102.

deceptive behavior in influencer marketing.¹⁰⁷ However, since they are interpretative guides and not formal rules,¹⁰⁸ they serve a weak function to further the FTC's mission.

B. The Framework of the FTC's Disclosure Requirement: An Attempt at Preventing Influencers and Companies from Acting Deceptive with Endorsements

The FTC realizes that “[e]ndorsements are an important tool for advertisers and they can be persuasive to consumers” but can also be “misleading if they are not accompanied by information describing what consumers can generally expect from use of the product or service.”¹⁰⁹ To prevent misleading consumers, the FTC issued its Endorsement Guides to demonstrate that influencer marketing is subject to the same truthful advertising laws that apply to other forms of advertising.¹¹⁰ In particular, the Endorsement Guides seek to link “the application of Section 5 of the FTC Act . . . to the use of endorsements and testimonials in [influencer marketing].”¹¹¹ The Endorsement Guides are not conclusive on “whether the law has been violated.”¹¹² Consequently, “there are no civil penalties associated with [violating] them. But if advertisers fail to comply, “the FTC may decide to investigate whether the practices are unfair or deceptive under the FTC Act.”¹¹³

Compliance with the Endorsement Guides is not mandatory; rather, they provide influencers and companies with the information necessary to voluntarily comply with the law.¹¹⁴ For purposes of enforcing the FTC Act,

107. See 16 C.F.R. § 255.0 (2020).

108. See *id.*; see also *Advertisement Endorsements*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements> [<https://perma.cc/S7EF-FAV9>].

109. *Advertisement Endorsements*, *supra* note 108.

110. See *id.*

111. 16 C.F.R. § 255.0.

112. Bladow, *supra* note 65, at 1135 n.97 (citations omitted).

113. *Advertisement Endorsements*, *supra* note 108.

114. See 16 C.F.R. § 255.0.

the FTC treats endorsements and testimonials identically.¹¹⁵ The FTC defines endorsement as:

[A]ny advertising message (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) *that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser*, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.¹¹⁶

When making an endorsement, the endorser’s message “must reflect the honest opinions, findings, beliefs, or experience of the endorser.”¹¹⁷ Accordingly, consumer endorsements do not serve as “competent and reliable scientific evidence.”¹¹⁸

The Endorsement Guides require full disclosure of “a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement.”¹¹⁹ A “material connection” to a seller or brand includes “a personal, family, or employment relationship or a financial relationship – such as the brand paying you or giving you free or discounted products or services.”¹²⁰ In complying with the Endorsement Guides, a disclosure must “clearly and conspicuously” place consumers on notice that they are viewing an endorsement.¹²¹ Because

115. While not formally defined in the statute, testimonials are statements that an individual makes regarding the benefits of a product or service he or she used. *See id.*

116. *Id.* (emphasis added).

117. 16 C.F.R. § 255.1(a).

118. 16 C.F.R. § 255.2.

119. 16 C.F.R. § 255.5.

120. 16 C.F.R. § 255.0; DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS, *supra* note 11, at 2.

121. 16 C.F.R. § 255.5.

the Endorsement Guides do not define the degree of disclosure required,¹²² the FTC has supplied supplemental guides that provide clarification.¹²³ “In evaluating whether a disclosure is likely to be clear and conspicuous, advertisers should consider its placement in the ad and its proximity to the relevant claim. The closer the disclosure is to the claim to which it relates, the better.”¹²⁴ Additionally, other important considerations include:

[T]he prominence of the disclosure; whether it is unavoidable; whether other parts of the ad distract attention from the disclosure; whether the disclosure needs to be repeated at different places on a website; whether disclosures in audio messages are presented in an adequate volume and cadence; whether visual disclosures appear for a sufficient duration; and whether the language of the disclosure is understandable to the intended audience.¹²⁵

The FTC also emphasizes that “[d]isclosures must be effectively communicated to consumers *before* they make a purchase or incur a financial obligation.”¹²⁶ These principles are highly adaptable and meant to be implemented across almost any platform.¹²⁷ Nevertheless, if a designated “platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require [such] disclosures.”¹²⁸

The FTC emphasizes that advertisers should perceive their advertisements from a reasonable consumer’s perspective.¹²⁹ In determining whether an advertisement is misleading, the “key is the overall net impression” in the

122. *See id.*

123. *See .Com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FED. TRADE COMM’N, (Mar. 2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> [<https://perma.cc/KJC9-JJGW>].

124. *Id.* at i.

125. *Id.* at i-ii.

126. *Id.* at 14 (emphasis added).

127. *See id.* at i.

128. *Id.* at iii.

129. *See id.* at 6.

eyes of a consumer.¹³⁰ As such, it is the influencer's "responsibility to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads."¹³¹ Adequate disclosure "will depend on the specific factual circumstances," or put more simply, a case-by-case basis.¹³² "Liability as an endorser turns on whether a consumer would reasonably attribute the views, opinions, or beliefs expressed as personal to the speaker or merely as those of the sponsoring advertiser."¹³³ Despite the specificity of the FTC's disclosure requirements, liability is seldomly imposed by the FTC, resulting in a plethora of influencers that avoid liability even after failing to comply.¹³⁴ Without formal rules that impose civil penalties, voluntary compliance is insufficient to remedy this deceptive behavior.¹³⁵

IV. THE FTC'S ENFORCEMENT CAMPAIGN AGAINST INFLUENCERS WHO FAIL TO DISCLOSE AND ITS INABILITY TO DETER THE DECEPTIVE BEHAVIOR

Before 2015, influencer marketing was in its infancy compared to the billion-dollar industry it has become today.¹³⁶ However, by the beginning of 2015, influencer marketing began gaining traction.¹³⁷ At the time, "brands were really just starting to test ads on the platform to see if the FTC was really paying attention."¹³⁸ Shortly thereafter, it became increasingly clear to brands that it was lucrative to leverage social media to market their

130. *Id.*

131. DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS, *supra* note 11.

132. 16 C.F.R. § 255.0(a) (2020).

133. *FTC v. Garvey*, NO. CV 00-9358 (GAF)(CWx), 2001 U.S. Dist. LEXIS 25060, at *18 (C.D. Cal. Nov. 8, 2001).

134. *See The State of Influencer Marketing 2020: Benchmark Report*, *supra* note 20 ("If influencers don't improve their performance soon, there is a real danger that the FTC . . . will start prosecuting rather than just warning and educating.").

135. *See infra* Part IV.

136. *See generally* Stone, *supra* note 88.

137. *See id.*

138. *Id.*

products and services to consumers.¹³⁹ As companies started to strategize for creative ways to connect with “people using social media for their personal and professional lives,” a pressing need arose to “ensure there are rules in place to level the playing field between brands, influencers, and consumers.”¹⁴⁰ The FTC attempted to fill the void, investigating and pursuing “brands, influencers, and consumers” that did not play by the rules.¹⁴¹

A. *An Examination of the FTC’s Enforcement Campaign Against Federal Trade Commission Act Violators*

The FTC “may initiate an enforcement action using either an administrative or judicial process if it has ‘*reason to believe*’ that the law is being or has been violated.”¹⁴² The Commission’s principal motive for bringing an enforcement action is to deter a violator from engaging in the same conduct in the future.¹⁴³ As the first step in an enforcement action, the FTC issues a complaint setting forth the charges it has reason to believe the respondent violated.¹⁴⁴ If the respondent accepts the charges and “elects to settle [the them], it may sign a consent agreement (without admitting liability), consent to entry of a final order, and waive all right to judicial review.”¹⁴⁵ “If the respondent elects to contest the charges, the complaint is adjudicated before an administrative law judge . . . in a trial-type proceeding.”¹⁴⁶ After the

139. *See id.*

140. *Id.*

141. *Id.*

142. *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, *supra* note 102 (emphasis added).

143. *See* 15 U.S.C. § 45(a)(2) (2018) (“The Commission is hereby empowered and directed to *prevent* persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts”) (emphasis added).

144. *See A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, *supra* note 102.

145. *Id.*

146. *Id.*

hearing concludes, the administrative law judge will recommend that the FTC either enter an order to cease and desist or dismiss the complaint.¹⁴⁷

Generally, no civil penalties are issued against violators unless a respondent violates the FTC's final order issued in an enforcement proceeding, or a non-respondent knowingly violates either the FTC Act or a FTC final cease and desist order.¹⁴⁸ The latter requires that the violator have "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."¹⁴⁹ Each violation will result in a civil penalty of up to \$10,000 per offense, and depending on the type of offense, may also warrant injunctive and other equitable relief.¹⁵⁰ Additionally, the FTC may seek remedial damages, and other types of relief against violators of the FTC Act or a FTC final cease and desist order as a remedial measure for consumer injury.¹⁵¹ However, the FTC cannot seek damages or other relief in issuing a final cease and desist order against a violator unless it can show that the violation related to conduct "which a reasonable man would have known under the circumstances was dishonest or fraudulent."¹⁵²

If the FTC is successful in satisfying this requirement, additional relief imposed "may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages."¹⁵³ The FTC cannot unilaterally obtain civil penalties or consumer redress against violators.¹⁵⁴ Rather, the FTC must seek "judicial

147. *See id.*

148. *See* 15 U.S.C. § 45(l)–(m); *see also* *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 102.

149. 15 U.S.C. § 45(m).

150. *See* U.S.C. § 45(l)–(m); *see also* *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 102.

151. *See* 15 U.S.C. § 57b; *see also* *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 102.

152. 15 U.S.C. § 57b; *see also* *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 102.

153. 15 U.S.C. § 57b.

154. *See* 15 U.S.C. § 45(l)–(m); *see also* 15 U.S.C. § 57b; *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 102.

enforcement” from any federal district court that the FTC Act empowered to grant such relief.¹⁵⁵ Nevertheless, the FTC will remain powerless, effectively unable to seek civil penalties or consumer redress, until it deems failed influencer disclosure an unfair or deceptive act.

B. The FTC’s Enforcement Actions Serve as Educational Lessons Rather than a Deterrence to Influencers and Companies from Violating the Federal Trade Commission Act

When brands were just starting to test the uncharted waters by placing ads on the social media platforms,¹⁵⁶ one of the first brands to use influencer marketing and catch the eye of the FTC was fashion clothing brand icon Lord & Taylor, LLC (“Lord & Taylor”).¹⁵⁷ The clothing brand launched an Instagram campaign in 2014, which gave rise to conduct that drove the FTC to serve Lord & Taylor with a complaint in 2016.¹⁵⁸ The campaign “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.”¹⁵⁹ Each of the fifty selected fashion influencers were paid compensation ranging from \$1,000 to \$4,000.¹⁶⁰ The influencers were given creative freedom to style their post wearing a specific Lord & Taylor dress, but were contractually obligated to “exclusively mention” the company using hashtags and photo tags.¹⁶¹

Although Lord & Taylor’s contractual agreement with the influencers gave detailed instructions on how to mention the company in their posted

155. *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, *supra* note 102 (“[T]he Commission must still seek the aid of a court to obtain civil penalties or consumer redress for violations”); 15 U.S.C. § 45(l)–(m); *see also* 15 U.S.C. § 57b.

156. *See* Stone, *supra* note 88.

157. *See* Complaint, *In re* Lord & Taylor LLC, No. C-4576 (F.T.C. May 20, 2016) [hereinafter Lord & Taylor Complaint], available at <https://www.ftc.gov/system/files/documents/cases/160523lordtaylorcmpt.pdf> [<https://perma.cc/9BB9-C75W>].

158. *Id.* at 1.

159. *Id.*

160. *Id.* at 2.

161. *Id.*

content, the contract did not require these influencers to disclose their material connection to Lord & Taylor.¹⁶² The Instagram campaign was a success, reaching over 11.4 million individual Instagram users,¹⁶³ and resulted in the dress selling out.¹⁶⁴ In response to the failed disclosure, the FTC ordered that Lord & Taylor “not misrepresent, in any manner, expressly or by implication, that an endorser of such product or service is an independent user or ordinary consumer of the product or service.”¹⁶⁵ Further, the FTC ordered Lord & Taylor “shall clearly and conspicuously, and in close proximity to the representation, disclose a material connection, if one exists, between such endorser and [Lord & Taylor].”¹⁶⁶ Yet, the FTC’s Decision and Order did not impose any form of civil penalties,¹⁶⁷ nor did the FTC pursue any of the influencers involved.¹⁶⁸

After wrapping up its enforcement action with Lord & Taylor, the FTC set its sights on another prominent company, Warner Bros. Home Entertainment Inc. (“WBHE”).¹⁶⁹ The deceptive conduct related to the WBHE action dated back to 2014, however, the liability WBHE faced was due to the conduct of Warner Bros. Interactive Entertainment (“WBIE”), a division of WBHE.¹⁷⁰ Before the release of the video game titled, *Middle Earth: Shadow of Mordor* (“*Shadow of Mordor*”), WBIE hired an advertising

162. *Id.*

163. *Id.*

164. *Id.*

165. Decision and Order at 3, *In re* Lord & Taylor, LLC, No. C-4576 (F.T.C. May 20, 2016) [hereinafter Lord & Taylor Order], available at <https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf> [<https://perma.cc/C7XF-4YN5>].

166. *Id.* at 4.

167. *See id.*

168. The FTC opted to pursue Lord & Taylor rather than spend its time and resources targeting individual influencers. *See* Wendy Davis, *FTC to Review Influencer Marketing*, MEDIAPOST (Feb. 12, 2020), <https://www.mediapost.com/publications/article/347001/ftc-to-review-influencer-marketing.html> [<https://perma.cc/6D2K-BTM3>]. *See generally* Lord & Taylor Complaint, *supra* note 157, at 1.

169. *See* Warner Bros. Complaint, *supra* note 17.

170. *Id.* at 1.

agency to coordinate a YouTube Influencer Campaign.¹⁷¹ The agency secured influencers with impressive reputations in both the gaming and YouTube communities to post positive reviews of the game on their YouTube channels.¹⁷² These reviews were in direct conflict with FTC's Endorsement Guides, which state that "[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser."¹⁷³ While the agency that secured the influencers did provide instruction to the influencers to place visible sponsorship disclosures "above the fold" in the description box, most did not comply, either placing the disclosure out of sight "below the line" or in another inadequate manner.¹⁷⁴

In this instance, the YouTube influencers received a pre-release version of *Shadow of Mordor* and a cash payment ranging from a couple hundred to tens of thousands of dollars.¹⁷⁵ The FTC did find that on at least two occasions, influencers made disclosures that they received free access to the game.¹⁷⁶ Nevertheless, the disclosure was hardly adequate for the FTC's purposes since they omitted that monetary compensation was also received.¹⁷⁷ The YouTube influencers posted over thirty gameplay videos on YouTube, which were viewed over 5.5 million times by consumers.¹⁷⁸ To deter the violating conduct, the FTC ordered both WBHE and WBIE to "[c]learly and [c]onspicuously disclose a [m]aterial [c]onnection" in any future influencer campaign.¹⁷⁹ Again, no implementation of civil penalties

171. *Id.*

172. *Id.*

173. 16 C.F.R. § 255.1(a) (2020); *see also* Warner Bros. Complaint, *supra* note 17, at 3 ("In truth and in fact, these gameplay videos of *Shadow of Mordor* do not reflect the independent opinions or experiences of impartial video game enthusiasts.").

174. *See* Warner Bros. Complaint, *supra* note 17, at 2–3.

175. *Id.* at 1–2.

176. *Id.* at 3.

177. *Id.*

178. *Id.*

179. Decision and Order at 3, *In re* Warner Bros. Home Entm't Inc., No. C-4595 (F.T.C. Nov. 17, 2016) [hereinafter Warner Bros. Order], available at https://www.ftc.gov/system/files/documents/cases/161811warner_bros_complaint.pdf [<https://perma.cc/NB3H-8Z5J>].

were included in the FTC's Decision and Order, nor were any charges brought against the influencers involved.¹⁸⁰

Until 2017, influencers roamed social media platforms largely free from any legal consequences.¹⁸¹ During this period, the FTC reviewed "Instagram posts by celebrities, athletes, and other influencers" and found they did not comply with the FTC's guidelines.¹⁸² In response to this finding, the FTC "sent out more than 90 letters reminding influencers and marketers that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media."¹⁸³ This action marked the first time that the FTC reached out directly to educate social media influencers.¹⁸⁴ The letters served as a warning that the Endorsement Guides are applicable to both influencers and marketers.¹⁸⁵

A wave of change occurred—or so many thought—on September 7, 2017, when the FTC handed down its first-ever complaint against social media influencers.¹⁸⁶ Trevor Martin and Thomas Cassell, also known respectively by their social media monikers "TmarTn" and "Tom Syndicate," engaged in conduct that seemed deceptive in operating an online gambling website using their legal entity, CSGOLotto, Inc ("CGSO Lotto").¹⁸⁷ Both individuals were widely known in the gaming community and used their

180. See Warner Bros. Order, *supra* note 179; see also Warner Bros. Complaint, *supra* note 17.

181. See *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> [https://perma.cc/N788-H6BD].

182. *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMM'N, (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [https://perma.cc/P9FM-2J9X].

183. See *id.*

184. See *id.*

185. See *id.*

186. See *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, *supra* note 181.

187. See *id.*; see Complaint, *In re CSGOLotto, Inc.*, No. C-4632 (F.T.C. Nov. 28, 2017) [hereinafter *CSGO Lotto Complaint*], available at https://www.ftc.gov/system/files/documents/cases/1623184_c_csgolotto_complaint.pdf [https://perma.cc/5DTM-4F74].

influence to profit from unsuspecting consumers who were unaware of their ownership interest in the website.¹⁸⁸ Primarily, Martin and Cassell preyed on players of the online video game Counter-Strike: Global Offensive (“CSGO”) by encouraging gamers to use their “skins,” which are collectible game items that can be bought or sold for real-world money in order to gamble on the influencers’ website while the influencers collected fees.¹⁸⁹

Each of the influencers created promotional videos on their respective YouTube channels showing themselves gambling on the site and providing tips on winning large sums of money.¹⁹⁰ However, when it came to the required disclosures, “[n]owhere in his videos promoting CSGO Lotto or in the videos’ descriptions did Respondent Martin disclose that he was an officer and owner of the company operating CSGO Lotto or that he was gambling with free skins provided by that company.”¹⁹¹ The influencers paid other influencers \$2,500 to \$55,000 to create posts describing their experiences with the gambling website but prohibited them from saying anything that would disparage CSGO Lotto’s name.¹⁹² Similarly, these other influencers also failed to disclose the contractual relationship with CSGO Lotto, but the FTC did not pursue them.¹⁹³ Following the FTC’s precedent, the Commission ordered both Martin and Cassell to comply with the FTC’s disclosure requirements but did not impose any civil penalties.¹⁹⁴ The FTC issued corrective action in all three cases,¹⁹⁵ but such actions were devoid of

188. See *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, *supra* note 181, at 1; see also *CSGO Lotto Complaint*, *supra* note 187, at 2.

189. See *CSGO Lotto Complaint*, *supra* note 187, at 2.

190. See *id.* at 2–3.

191. *Id.* at 2.

192. See *id.* at 4.

193. See *id.* at 4–5.

194. See Decision and Order, *In re CSGO Lotto, Inc.*, No. C-4632 (F.T.C. Nov. 28, 2017) [hereinafter *CSGO Lotto Order*], available at https://www.ftc.gov/system/files/documents/cases/1623184_c_-_csgolotto_decision_and_order.pdf [<https://perma.cc/2JY5-36NE>].

195. See *Lord & Taylor Complaint*, *supra* note 157; *Warner Bros. Order*, *supra* note 179; *CSGO Lotto Order*, *supra* note 194.

any civil penalties or consumer redress that could be imposed because of one key detail: “[t]he Guides are not regulations.”¹⁹⁶

C. Unregulated: The Irony of an Enforcement Regime Without Influence Over an Industry that is Dependent on Influence

Currently, influencer marketing has seemingly escaped the clutches of any imposed regulatory scheme, while fraudulent practices continue to become more frequent.¹⁹⁷ In response, some social networks have implemented platform tools that make it easier for brands and influencers to post content in compliance with the FTC’s disclosure requirements.¹⁹⁸ However, influencers still choose not to comply, and do so without facing any significant consequences from the FTC.¹⁹⁹ Even more concerning, Influencer MarketingHub, an organization that issues annual reports on the state of the influencer marketing industry, conducted a research project analyzing 1,000 fashion micro-influencers posts for a month and found that only 14% complied with the FTC guidelines.²⁰⁰ Failure to comply is not exclusive to micro- and nano-influencers; celebrities routinely fail to disclose their material relationship to a brand or company and are often rewarded with massive amounts of compensation.²⁰¹

Reflecting on the FTC’s past conduct, FTC Commissioner Rohit Chopra recently stated, “I am concerned that companies paying for undisclosed influencer endorsements and reviews are not held fully accountable for this illegal activity.”²⁰² He further stated, “[w]hile the FTC has pursued enforcement actions against popular brands for disguising their advertising, it is not clear whether our actions are deterring misconduct in the marketplace, due

196. *Advertisement Endorsements*, *supra* note 108.

197. *See Owens*, *supra* note 15.

198. *See The State of Influencer Marketing 2020: Benchmark Report*, *supra* note 20.

199. *See* CSGO Lotto Order, *supra* note 194 (the FTC did not impose any sanctions for failing to disclose); *see also* Davis, *supra* note 168; Owens, *supra* note 15.

200. *See The State of Influencer Marketing 2020: Benchmark Report*, *supra* note 20.

201. *See* Shaw, *supra* note 7; *see also* Conklin, *supra* note 52.

202. Davis, *supra* note 168.

to the limited sanctions we have pursued.”²⁰³ To date, it is widely believed that the FTC’s enforcement actions have been too lenient on companies and influencers involved in the deceptive conduct.²⁰⁴ Time after time, the FTC has settled these enforcement actions “for no customer refunds, no forfeiture of ill-gotten gains, no notice to consumers, no deletion of wrongfully obtained personal data, and no findings or admission of liability.”²⁰⁵ Moreover, the FTC’s “punitive actions only represent a tiny portion of the ethical infractions, illegal and otherwise, that are carried out within the influencer marketing world every day.”²⁰⁶ As influencer marketing remains “largely unregulated,” with fraud “becoming more rampant,”²⁰⁷ there still has been no action by the FTC to use its rulemaking authority to pass formal rules that regulate influencer marketing.

V. PROPOSITION: IT IS TIME FOR THE FTC TO OVERHAUL THE INFLUENCER MARKETING INDUSTRY TO PROTECT CONSUMERS AND BUSINESSES

To date, influencer marketing is left highly “unregulated” with industry players invoking their own self-regulatory schemes to prevent deceptive behavior, which are neither adequate nor in compliance with the FTC’s standards.²⁰⁸ “Studies have shown how reviews can lead to an increase in sales,”²⁰⁹ but the FTC continues to allow influencers and companies to

203. *Id.*

204. *See id.*; *See also* Owens, *supra* note 15 (“In instances when it has targeted actual influencers, the FTC has mostly issued warning letters demanding they clean up their act.”).

205. Davis, *supra* note 168.

206. Owens, *supra* note 15.

207. *Id.*

208. *See id.* (“[T]he [FTC] revealed that the disclosure tools that platforms like Facebook have put in place are not sufficient.”).

209. Rohit Chopra, *Commissioner, Statement of Commissioner Rohit Chopra Regarding the Endorsement Guides Review*, 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 [<https://perma.cc/VP74-4MJS>].

escape liability for their actions.²¹⁰ Accordingly, it is imperative that the FTC rise to the occasion and combat this “\$8.2 billion ad fraud problem” by making the following two changes.²¹¹ First, the FTC must use its rulemaking authority to adopt formal rules from its disclosure provisions in the Endorsement Guides. Second, the FTC should regulate the influencer-company relationship by requiring that certain provisions are present in every endorsement contract.

A. Going Beyond Guidance: The Use of the FTC’s Rulemaking Authority to Develop Stringent Rules that Actually Prevent Deceptive Behavior

The FTC must first adopt certain provisions of the Endorsement Guides into formal rules. Currently, the FTC’s Endorsement Guides serve as a substantial education tool for influencers and companies in its mission “to stop deceptive ads.”²¹² However, the Endorsement Guides’ inherent flaw is their unenforceability.²¹³ To remedy this flaw, the Endorsement Guides should no longer be solely used as an education tool. Instead, the FTC should codify certain aspects of the Endorsement Guides into formal rules that would enable the FTC to seek civil penalties, remedial damages, and other relief in accordance with the FTC Act.²¹⁴ In particular, the FTC should, at a minimum, adopt the disclosure provisions from the Endorsement Guides, deeming it a violation of the FTC Act for failed compliance. The disclosure provisions state, “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement material connection . . . such connection must

210. See *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, *supra* note 102.

211. Owens, *supra* note 15.

212. DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS, *supra* note 11.

213. See 16 C.F.R. § 255.1 (2020) (“The Guides provide the basis for *voluntary compliance* with the law by advertisers and endorsers.”) (emphasis added).

214. See 15 U.S.C. §§ 45(1)–(m), 57b (2018); see also Dami Lee, *The FTC is Cracking Down on Influencer Marketing on YouTube, Instagram, and TikTok*, VERGE (Feb. 12, 2020, 5:15 PM), <https://www.theverge.com/2020/2/12/21135183/ftc-influencer-ad-sponsored-tiktok-youtube-instagram-review> [<https://archive.is/zAn2N>].

be fully disclosed.”²¹⁵ Moreover, the advertisement or endorsement should “clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement” or that the endorser favored the advertised product for some material benefit.²¹⁶

By converting the disclosure provisions into formal rules, the FTC is validly exercising its rulemaking authority pursuant to section 18 of the FTC Act.²¹⁷ While some may fear that the imposition of civil penalties may disproportionately affect nano- or micro-influencers who often receive little compensation in exchange for their endorsements, this concern is alleviated given that district courts will consider several factors in determining the amount of the penalty.²¹⁸ These factors include “the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.”²¹⁹ Critics may also question whether influencers who did not know about the disclosure requirements should face civil penalties for violating the newly adopted rules. However, this concern is also mitigated. The FTC Act contains a safeguard whereby the FTC must prove the influencer violated the rule with “actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.”²²⁰

Adopting the disclosure provisions into formal rules would provide the FTC with the tools to deter deceptive conduct. For example, Thomas Cassell was not a first-time offender when he failed to disclose his ownership interest in the CSGO Lotto case.²²¹ Cassell was involved in a prior FTC enforcement

215. 16 C.F.R. § 255.5.

216. *Id.*

217. See 15 U.S.C. § 57a (“[T]he Commission may prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce”).

218. See 15 U.S.C. § 45(m).

219. *Id.*

220. *Id.*

221. See *Machinima Complaint*, *supra* note 17, at 3; Lesley Fair, *Three FTC Actions of Interest to Influencers*, FED. TRADE COMM’N (Sept. 7, 2017, 11:11 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers> [https://perma.cc/HSA3-BMHJ].

action against Machinima, Inc. (“Machinima”), where he was not sued, but the complaint did mention that “[n]owhere in the videos or in the videos’ descriptions did *Cassell* disclose that [Machinima] paid him to create and upload them.”²²² If the disclosure provisions were formal rules, the FTC could have done more against Cassell, a repeat offender, when the FTC issued the formal order to comply in the CSGO Lotto case.²²³ By being previously implicated in the FTC’s enforcement action against Machinima,²²⁴ Cassell clearly had requisite knowledge in CSGO Lotto to be eligible for civil penalties under section 45 of the FTC Act.²²⁵ Moreover, his decision to hide his ownership interest while pocketing fees from unwitting consumers would enable the FTC to pursue consumer redress pursuant to section 19, which includes “refund[ing] [consumer] money” and “pay[ing] damages.”²²⁶

While the FTC never brought charges against any of the parties involved in the Fyre Festival disaster,²²⁷ with newly adopted formal rules, the FTC could have pursued the influencers for consumer redress.²²⁸ Therefore, if the FTC is exhausted from settling its enforcement actions “for no customer refunds, no forfeiture of ill-gotten gains, . . . and no findings or admission of liability,”²²⁹ it must codify the disclosure provisions into formal rules.

B. Promulgating the Contractual Provisions that Govern an Influencer-Company Relationship

To reinforce its decision to adopt the disclosure provisions into formal rules, the FTC should again use its rulemaking authority, specifying the provisions that must be present in every influencer-company contract. Contracts are the creation of a fundamental component that gives rise to the influencer-

222. Machinima Complaint, *supra* note 17, at 3 (emphasis added).

223. See CSGO Lotto Order, *supra* note 194, at 2.

224. See Machinima Complaint, *supra* note 17, at 3; see also Fair, *supra* note 221.

225. See 15 U.S.C. § 45(m) (2018).

226. 15 U.S.C. § 57b.

227. See Sun, *supra* note 13.

228. See 15 U.S.C. § 57b (“The court . . . shall have jurisdiction to grant such relief as the court finds necessary to *redress injury to consumers*”) (emphasis added).

229. Davis, *supra* note 168.

company endorsement relationship.²³⁰ Continuously, the FTC has stood idly while watching companies exploit this legally enforceable function to avoid appearing less than authentic.²³¹ Since companies retain a vast amount of leverage when selecting the right influencer for its campaign,²³² it is appropriate that the entity that drafts the contract must also include contractual provisions that mandate that influencers comply with the Endorsement Guides. These contractual provisions should be modeled after the FTC's ".com Disclosures" guide, which provides precise instructions on how to give "clear and conspicuous" disclosure in accordance with the Endorsement guides.²³³ Furthermore, the provisions should also include language that "[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser."²³⁴ Additionally, as Federal Trade Commissioner Chopra stated, the FTC could provide "sample terms that companies can include in contracts."²³⁵

By using its rulemaking authority granted in section 18 of the FTC Act, the FTC could make it an unfair or deceptive act or practice for a company to fail to include provisions that provide instruction on giving adequate disclosure.²³⁶ Moreover, this is not the first time that the FTC has used this authority to govern the contractual relationship between two parties.²³⁷ For example, the FTC created the Credit Practices Rule, which affects consumer

230. See generally Warner Bros. Complaint, *supra* note 17; Machinima Complaint, *supra* note 17, at 2.

231. See Lee, *supra* note 214; Warner Bros. Complaint, *supra* note 17, at 4; Machinima Complaint, *supra* note 17, at 5.

232. See *Influencer Rates*, *supra* note 45.

233. *.Com Disclosures*, *supra* note 123, at ii-iii.

234. 16 C.F.R. § 255.1 (2020).

235. See Chopra, *supra* note 209.

236. See 15 U.S.C. § 57b (2018) (demonstrating that the FTC deemed it an unfair act or practice within the meaning of Section 5 of the FTC Act for creditor to take or receive certain contractual obligations).

237. See 16 C.F.R. § 444.2 (2020); see also *Complying with the Credit Practices Rule*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-credit-practices-rule> [https://perma.cc/HK7P-9TLB].

contracts by prohibiting the use of specific provisions.²³⁸ If a creditor does not comply with the Credit Practices Rule, the FTC can sue the violator in federal court for civil penalties.²³⁹ Similarly, with the new formal rules modeled on the FTC's guides, the FTC could seek civil penalties against a company in violation.²⁴⁰ Additionally, if an influencer were to fail to abide by the FTC's required contractual provisions, companies could then disclaim liability by terminating the agreement and seeking recourse, a practice that companies have routinely employed with breaching influencers.²⁴¹

To date, the FTC continues to discover companies that provide inadequate or nonexistent instructions on giving adequate disclosure in compliance with the FTC's requirements.²⁴² Moreover, such companies habitually direct the contracted endorser to review the company in a positive light.²⁴³ There is nothing to indicate that these deceptive practices are slowing down. More recently, Sunday Riley Modern Skincare, LLC, a cosmetic company that sold its products through Sephora, was the subject of an FTC enforcement action for instructing its employees to post fake positive reviews of its products.²⁴⁴ The company also provided instructions on masking their IP addresses and engaging in other questionable methods to avoid detection.²⁴⁵ However, the FTC settled the matter without civil penalties and without the company admitting fault.²⁴⁶

If the FTC is exhausted from not seeing changes in these types of behaviors, it must require certain provisions to be present in every influencer-

238. See 16 C.F.R. § 444.2; see also *Complying with the Credit Practices Rule*, *supra* note 237.

239. See *Complying with the Credit Practices Rule*, *supra* note 237.

240. See 15 U.S.C. § 45(m).

241. See Garson, *supra* note 2.

242. See, e.g., Lord & Taylor Complaint, *supra* note 157, at 2.

243. See Machinima Complaint, *supra* note 17, at 2 (“[Machinima] directed each influencer to include . . . Microsoft in a positive light”); see also Chopra, *supra* note 209.

244. See Cristina Miranda, *Cosmetic Company Wrote Fake Reviews*, FED. TRADE COMM’N (Oct. 21, 2019), <https://www.consumer.ftc.gov/blog/2019/10/cosmetic-company-wrote-fake-reviews> [<https://perma.cc/YLZ6-CPAZ>].

245. *Id.*

246. *Id.*

company contract. No longer would companies like Warner Brothers, Machinima, or Sunday Riley Modern Skincare be able to escape liability.²⁴⁷ The FTC would have adequate mechanisms, such as civil penalties and damages,²⁴⁸ at its disposal to penalize and prevent this deceptive conduct. Without the FTC mandating these contractual provisions, consumers are forced to rely on the self-regulating nature of social media platforms that “have little incentive to address this misinformation.”²⁴⁹

VI. CONCLUSION

The Fyre Festival catastrophe highlighted the grotesque nature of influencer marketing by demonstrating the injustice that results from failed influencer disclosure. With influencer marketing growing rapidly and fraudulent practices becoming rampant, the FTC must save the industry from itself. Unfortunately, precedent has shown that “voluntary compliance” does not have the same impact on violators as mandatory compliance.²⁵⁰ By codifying elements of the Endorsement Guides and other FTC guides into formal rules, the FTC would hold companies and influencers accountable for the profits they accrue from the digital marketing method.²⁵¹ Moreover, there is no opportunity for companies or influencers to escape liability where the FTC requires that each contractual agreement include specific provisions mandating endorsements reflect the honest opinion of the endorser and disclosures be stated clearly and conspicuously.²⁵² With the FTC implementing these two changes, a marketing method built on falsities would become but a memory in our distant past.

247. See Chopra, *supra* note 209.

248. See 15 U.S.C. §§ 45(m), 57b (2018).

249. Chopra, *supra* note 209.

250. See 16 C.F.R. § 255.0 (2020).

251. See Davis, *supra* note 168.

252. See 16 C.F.R. § 255.5.