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All That Glitters is Gold: The Regulation of Hidden Advertisements and Undisclosed Sponsorships in the World of Beauty Social Media Influencers

Ashley Luong

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ALL THAT GLITTERS IS GOLD: THE REGULATION
OF HIDDEN ADVERTISEMENTS AND
UNDISCLOSED SPONSORSHIPS IN THE WORLD
OF BEAUTY SOCIAL MEDIA INFLUENCERS

ASHLEY LUONG*

ABSTRACT

What happens when a trusted acquaintance is caught lying? What if these lies have influenced your purchasing decisions? In the realm of social media influencers, the line between authentic opinions and sponsored advertisements is a blurred one. Influencers have considerable marketing power over millions of followers and their brand of authenticity makes them a desirable partner to big corporations seeking to promote their products. Under current FTC regulations, the simplified rule for advertisement disclosure is to make the disclosure “clear and conspicuous” with very little guidance beyond that phrase. Influencers are uncertain how to disclose, some choosing to toe the grey areas by hiding disclosures in a mass of text or discreet areas, and brands cast a blind eye to violations. The FTC’s lack of advertisement regulation and enforcement action against social media influencers, who expose consumers to hidden advertisements, enables unfair business practices. Brands savvy enough to utilize these unregulated influencers are able to sell their products to an audience who trust influencers because of their “authenticity.”

* JD Candidate, 2020, William & Mary Law School; BA in Political Science, 2017, Baylor University. I would like to dedicate this Note to my parents, who sacrificed immensely for my brothers and me to pursue our dreams. Thank you for your strength, your endless love, and for always believing in me even when I did not. Cám ơn bố mẹ đã cho con cuộc đời này. Con thương bố mẹ. Thank you to my friends and loved ones, who acted as my cheerleaders, sounding boards, and therapists. I would not have survived law school with most of my sanity intact without you all. Thank you to my professors and mentors for their guidance and encouragement. Lastly, I would like to acknowledge the *William & Mary Business Law Review* for their hard work throughout this publication process.

This Note proposes a revamp of the current regulations to mirror the FTC's German counterpart, the Landesmedienanstalten, with minor adjustments, to clearly guide influencers on how to disclose their hidden advertisements in a manner that is truly clear and conspicuous to consumers. Further, this Note suggests increasing penalties for influencers violating the regulations through enforcement actions, and promoting collaborative efforts with social media platforms to provide tools to properly disclose endorsements in addition to collaborative efforts with brands to notify influencers of the FTC regulations for endorsements.

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INTRODUCTION

Imagine someone raves to you about an amazing new product she just discovered. This product is an item you have been researching and have heard about it. Your curiosity is piqued, and you listen as she excitedly shows you the product and goes into detail discussing how unique it is and how it functions better than other similar products. This person is someone you have grown to trust and sometimes interact with over time. She is an ordinary person like you. At the end of her rave review, you consider whether you would want to purchase this product. If this person were your good friend or family member, perhaps you would be convinced. If this person were a saleswoman, perhaps you would be less convinced of the honesty of her opinion.

Would you be convinced if this person were a non-celebrity influencer on social media? Statistics say you are likely to be swayed.¹ But imagine if this reviewer, who is a regular person like yourself and a fellow enthusiast in your particular hobby, was secretly paid by a company to endorse this product? Is it problematic for her to hide this relationship with the company and portray her opinion as genuine? Do such subversive marketing tactics actually exist and influence consumers?

Marlena Stell,² a popular social media influencer and beauty brand owner, published her controversial YouTube video, “My truth regarding the beauty community,” and stated that, “Last year was a really tough year for Makeup Geek. Our name has not been talked about a lot. The reason why we haven’t been supported by influencers is because we haven’t paid them massive amounts of

¹ Shane Barker, *75 Influencer Marketing Statistics that Will Surprise You in 2018*, MEDIUM (Nov. 7, 2017), https://medium.com/@shane_barker/75-influencer-marketing-statistics-that-will-surprise-you-in-2018-b11c39a92b36 [<https://perma.cc/HDJ7-XUEB>].

² Emma Johnson, *How Makeup Geek CEO Marlena Stell Built a \$10M Business on YouTube and Honesty*, FORBES (May 13, 2015), <https://www.forbes.com/sites/emmajohnson/2015/05/13/how-makeup-geek-ceo-marlena-stell-built-a-10m-business-on-youtube-and-honesty/#1293dd343796> [<https://perma.cc/6V94-RUZD>]; see also Marlena Stell, Makeup Geek Home Page, YOUTUBE (Nov. 21, 2018), <https://www.youtube.com/channel/UCE1BqH-72EBs-siTbDAjOGQ> [<https://perma.cc/R4NY-6WPR>] (detailing Stell’s transition from a music teacher to a fast-growing cosmetics brand owner and popular beauty YouTuber known for her educational makeup application tutorials and product reviews).

money We don't have \$60,000 to pay someone to do one video."³ Her video, viewed over a million times, sparked conversation about undisclosed sponsorships by beauty influencers on social media platforms.⁴ It also raised questions about the suspicious negotiations between brands and influencers to promote products, and paid negative advertisements to harm competitor brands.⁵ Stell's claims of influencers charging exorbitant rates ranging from "\$60,000 per video or \$20,000 for one post on Instagram"⁶ spurred responses from other powerful influencers such as Huda Kattan,⁷ an influencer and successful beauty brand owner.⁸

These claims were further corroborated by an industry insider of thirty years, Kevin James Bennett, who has worked as a makeup artist and brand consultant.⁹ Bennett alleged that he once consulted a brand about working with a prominent beauty influencer, whose management team requested "\$25,000 for a 'product mention in a multi-branded product review,' \$50,000 to \$60,000 for a 'dedicated product review,' and \$75,000 to \$85,000 for a 'dedicated negative review of a competitor's product.'"¹⁰ Other notable beauty influencers, such as James Charles, refuted the allegations made by Bennett and Stell.¹¹ The allegations of undisclosed brand

³ Marlena Stell, *My truth regarding the beauty community*, YOUTUBE (Aug. 27, 2018), <https://youtu.be/fBNZrvGLmyQ> [<https://perma.cc/VRW2-JRPE>].

⁴ *Id.*

⁵ *Id.* ("I've been told if I don't pay this certain amount for a video that they're either gonna talk bad about Makeup Geek or they're not gonna use it at all.")

⁶ *Id.*

⁷ See Zameena Mejia, *How this self-made millionaire and Instagram star built her billion-dollar beauty brand*, CNBC (Oct. 29, 2018), <https://www.cnbc.com/2018/10/29/how-self-made-millionaire-huda-kattan-built-her-billion-dollar-beauty-brand.html> [<https://perma.cc/A4JM-637G>] (providing insight on Kattan's rise on social media for her glamorous makeup tutorials and thorough makeup product reviews, and her creation of a globally popular cosmetics brand).

⁸ Cheryl Wischhover, *The Shady World of Beauty Influencers and the Brands that Pay Them, Explained*, VOX (Aug. 31, 2018), <https://www.vox.com/2018/8/31/17801182/beauty-influencers-pay-negative-reviews> [<https://perma.cc/7KKC-S748>] ("Kattan revealed this year that a brand once offered her \$185,000 for one [Instagram] post.") (alteration in original).

⁹ *Id.* (Bennett is not a social media influencer like aforementioned individuals such as Huda Kattan and Marlena Stell. Bennett is a recognized makeup artist, educator, and Emmy award winner for his artistry).

¹⁰ *Id.*

¹¹ *Id.* ("He wrote, 'I've NEVER heard of this happening and believe what you want, but most of us DO disclose sponsorships'") (emphasis in original).

and influencer relationships highlight the legal failings of the current Federal Trade Commission (FTC) Guidelines for advertisement disclosure, and the impact on consumer protections and fair business practices.¹²

Focusing on the particular realm of beauty influencers, top influencers such as the aforementioned influencer, James Charles, command the attention of a large audience.¹³ For example, Charles's makeup product reviews reach "1.5 million Twitter followers,"¹⁴ "7.6 million Instagram followers,"¹⁵ and "7.8 million subscribers on YouTube."¹⁶ Charles is not the largest beauty influencer on social media. His numbers pale in comparison to the subscriber count of beauty influencer titans like Nikkie Tutorials, Jeffree Star, and Michelle Phan.¹⁷ Given the market influence wielded by these beauty gurus, there are legitimate concerns about the transparency of sponsorships and honest product reviews.¹⁸

The marketing strategies of brands have shifted from traditional sponsorships by Hollywood celebrities to these relatable beauty gurus.¹⁹ The brands harness the closer relationship between influencers and their audience.²⁰ For example, MAC Cosmetics demonstrates this shift from its classic collaborations with traditional "celebrities like Mariah Carey, Rihanna, Brooke Shields, and even Catherine Deneuve" to its recent collaboration with beauty guru Patrick Starr.²¹ Popular YouTubers, such as Chloe Morello and Pretty Pastel Please, confirmed the selling power of influencers and the exorbitant rates charged domestically and

¹² See *infra* note 59.

¹³ See Wischhover, *supra* note 8.

¹⁴ James Charles (@JamesCharles), TWITTER (Nov. 26, 2018), https://twitter.com/jamescharles?ref_src=twsrc%5Eappleosx%7Ctwcamp%5Esafari%7Ctwgr%5Eprofile [<https://perma.cc/7JHP-NERJ>].

¹⁵ James Charles (@JamesCharles), INSTAGRAM (Nov. 26, 2018), <https://www.instagram.com/jamescharles/?hl=en> [<https://perma.cc/7S9H-M7CW>].

¹⁶ See Wischhover, *supra* note 8; see also James Charles, YOUTUBE (Nov. 26, 2018), <https://www.youtube.com/channel/UCucot-Zp428OwkyRm2I7v2Q> [<https://perma.cc/52C2-3NT7>].

¹⁷ See Wischhover, *supra* note 8.

¹⁸ *Id.* ("A Nivea men's aftershave went viral 15 years after it launched when a popular guru said ... that it made a good makeup primer. Brands want to harness that selling power.").

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

internationally.²² However, these rates are reserved for larger influencers, with their smaller counterparts requesting lesser rates for dedicated videos, as they reach a smaller portion of the market.²³

Beyond merely selling new makeup products to their audiences, influencers have been credited with aiding the growth and popularity of cosmetic brands—taking fledgling companies and transforming them into multimillion-dollar brands.²⁴ Two particularly social media-savvy brands are NYX and Becca, whose products and reviews of said products are a constant presence on platforms such as Instagram and YouTube.²⁵ Becca especially benefitted from its collaboration with a large beauty influencer, YouTuber Jaclyn Hill,²⁶ who frequently spoke about the brand's makeup and eventually worked with the brand to create her own product.²⁷

The collaboration was a wild success and the brand's growth exploded and was sold off to cosmetics giant, Estée Lauder, for over \$200 million following the profitable 2015 collaboration with Hill.²⁸ Multiple surveys and business data collections illustrate the selling power of social media influencers.²⁹ One survey by the NPD Group found that, in 2016, prestige makeup brands (higher-end makeup not sold in drugstores) that collaborated

²² See Wischhover, *supra* note 8 (confirming the authenticity of Bennett and Stell's claims of the thousands of dollars that influencers charged brands to make dedicated videos).

²³ *Id.* ("Smaller influencers make way less—\$100 to \$1000.").

²⁴ Deborah Weinswig, *How Social Media Influencers Helped Turn NYX and Becca into Multimillion-Dollar Cosmetics Brands*, FORBES (May 15, 2017), <https://www.forbes.com/sites/deborahweinswig/2017/05/15/how-social-media-influencers-helped-turn-nyx-and-becca-into-multimillion-dollar-cosmetics-brands/#7014a9ba7a44> [<https://perma.cc/G2WN-2R4S>].

²⁵ *Id.* (discussing how the audience for NYX cosmetics watched content reviewing the products and application techniques in an authentic manner).

²⁶ See Jaclyn Hill, *JaclynHill Home Page*, YOUTUBE (Nov. 21, 2018), <https://www.youtube.com/user/Jaclynhill1> [<https://perma.cc/APH9-8K7Z>] (As of November 26, 2018, Hill has 5.5 million subscribers, has garnered 464,576,164 views on her channel since joining YouTube on September 7, 2010, and has risen in popularity due to her tutorials on how to achieve celebrity makeup looks, like the Kardashians, and smoky eye tutorials).

²⁷ See Weinswig, *supra* note 24.

²⁸ *Id.* (stating that Hill's collaboration sold "25,000 units in its first 20 minutes online in July 2015.").

²⁹ *Id.*

with influencers “brought in an average of two times the dollar volume of traditional celebrity collaboration in the first month postlaunch.”³⁰ NPD’s “Makeup In-Depth Consumer Report” found that “92% of makeup users get information on beauty products from influencers’ YouTube videos.”³¹

In other words, social media has developed into a reputable tool for marketing and the relationships between brands and social media influencers have become a central part of the success and popularity of products and brands. But why do influencers hold so much sway over the audience compared to the traditional celebrities? Why does this shift to social media marketing present problems for consumer protection, fair business practices, and advertisement laws?

First and foremost, influencers wield a profitable combination of consumer trust and authenticity.³² Industry leaders on measuring the engagement of beauty gurus in marketing, Brit McCorquodale and Christina Grammenos of Tribe Dynamics, pointed to these factors in measuring the earned media value and consumer response to social media campaigns by brands.³³

Other scientific and business studies on the social media marketing influence on customer purchase behaviors illustrate the relationship between authentic interactions and consumer influence. One study found that engaging customers via social media resulted in higher consumer-brand relationships and word of mouth communications because consumers “anthropomorphize the brand” and avoid feelings of uncertainty.³⁴ In other words, through social media, brands can form connections to consumers to foster trust.³⁵ One easier way to further tighten brand relationships to the customer is using relatable social media influencers rather than risking the brand image and focusing on engagement by

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (discussing how consumers are drawn to influencers deemed trustworthy and considered authentic).

³³ *Id.* (stating that consumers want influencers and their content to be “genuine and realistic”).

³⁴ Simon Hudson et al., *The Influence of Social Media Interactions on Consumer-Brand Relationships: A Three Country Study of Brand Perceptions and Marketing Behaviors*, 33 INT’L J. RES. IN MARKETING 27, 29, 38 (2015).

³⁵ *See id.*

being “on-brand” for customers.³⁶ Influencers have a built-in audience, they are able to market products discretely, and their appeal is established through their engagement with their audience.³⁷ Influencers, in other words, are like a friend to their audience rather than a corporation and are able to wield that trust in the market.³⁸

In a broader context outside of the realm of beauty content, social media, as a potential marketing tool, reaches “over 2.7 billion people ... or approximately, 40% of the world’s population.”³⁹ The issue with the use of these social media influencers is that hidden commercial messages are communicated via subterfuge: the influencers do not disclose to their trusting audience.⁴⁰ Very few influencers actually follow the disclosure requirements for hidden advertisement either by outright noncompliance or failed attempts to comply with confusing rules.⁴¹

The impact, as previously outlined,⁴² extends beyond profits for the brand and the influencer. Marketing studies show that consumers are swayed by social media advertisements.⁴³ A 2018 influencer marketing survey found that 30 percent of consumers were “more likely to buy a product recommended by a non-celebrity blogger” because they viewed the influencer as relatable and valued their opinions more than their celebrity counterparts.⁴⁴

³⁶ See Wischhover, *supra* note 8 (“Kattan revealed this year that a brand once offered her \$185,000 for one [Instagram] post.”) (alteration in original).

³⁷ See Weinswig, *supra* note 24.

³⁸ *Id.*

³⁹ Hudson et al., *supra* note 34, at 27 (detailing the statistics of social media use on networking sites and the dominance of social media as a communicative form).

⁴⁰ Fabian Reinholz, *Hidden Advertising by Sports Influencers*, INT’L SPORTS LAWYER ASS’N (Dec. 11, 2017), <https://www.islasportlawyer.com/hidden-advertising-sports-influencers/> [<https://perma.cc/4V2R-9829>].

⁴¹ *Id.* (discussing how influencers do not adhere to advertisement labeling guidelines on social media and how the trend of noncompliance shifted with recent attempts at regulation and enforcement by international and national supervisory authorities).

⁴² See *supra* Introduction.

⁴³ See Barker, *supra* note 1.

⁴⁴ *Id.* (noting that YouTube appeared to be the second most influential platform with a reported 18 percent of consumers being influenced in their product purchase decisions).

In contrast, only 3 percent of consumers are influenced by celebrity endorsements.⁴⁵ Further, 60 percent of consumers reported that they were influenced by a social media post or blog review while shopping in store.⁴⁶ Simply put, influencers play a role in the purchase decisions for consumers they reach.⁴⁷ Often times, the consumer's decision is based on the supposed authenticity of the influencer's opinions.⁴⁸

Given the capacity of social media to reach a large and diverse audience susceptible to influence, what happens when the blurred lines between honest opinion and advertisements are exposed? What happens when supposedly honest statements are revealed to be hidden advertisements? According to Marlena Stell and other influencers, such subversive tactics are utilized and common across several industries.⁴⁹ The current regulations for hidden advertisements do not effectively prohibit undisclosed sponsorships and unfair business practices.⁵⁰ Confirmed brand and influencer relationships, hidden advertisements, and allegations of paid negative reviews by non-celebrity influencers raise serious legal concerns regarding consumer protections.⁵¹ Because of the novelty of social media marketing and the difficulties of enforcement, the current Guidelines by the Federal Trade Commission (FTC) are insufficient to protect consumers and promote ethical business practices.⁵²

This Note proposes a revision of current FTC Guidelines to mirror the stricter Guidelines established by its German counterpart, the *Landesmedienanstaltan*,⁵³ with minor changes to further clarify when social media influencers must disclose brand sponsorships. In Parts I and II, this Note will discuss the two guidelines for hidden advertisement disclosures on social media platforms and discuss recent legal actions against influencers

⁴⁵ *Id.* (comparing the product purchase decisions of consumers and the impact of celebrity and non-celebrity social media marketing).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Wischhover, *supra* note 8.

⁵⁰ *Id.*

⁵¹ See Stell, *supra* note 3.

⁵² See *supra* Introduction.

⁵³ See *infra* Part II.

who have violated these guidelines.⁵⁴ In Part III, this Note addresses the issues presented by the current social media marketing practices: ambiguity of the current Guidelines by the FTC, difficulties of enforcement due to the sheer mass of content produced, an overburdened Commission, and dependency on self-regulation.⁵⁵ Specifically, this Note proposes three focuses in its approach: (1) increase risk to Influencers who deceive; (2) establish straightforward standards to define what “clear and conspicuous” means; and (3) collaborate with social media companies and brands to enhance disclosure tools.⁵⁶ Part III also discusses the necessity of each prong to provide greater consumer protection, advertisement transparency, and regulation of ethical marketing strategies.⁵⁷ Lastly, the Conclusion discusses the potential legal hurdles remaining, the necessity of evolving guidelines to meet social media marketing strategies, and concludes this Note.⁵⁸

I. UNCLEAR AND INCONSPICUOUS: THE SHORTCOMINGS OF THE FTC’S APPROACH TO HIDDEN ADVERTISEMENTS

The Federal Trade Commission’s (FTC) Endorsement Guidelines (“Guidelines”) “reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.”⁵⁹ The Guidelines’ focus is to create transparency regarding the connection between marketers and endorsers to empower consumers to properly evaluate the endorsement.⁶⁰

Much like traditional forms of media, new media platforms like blogs and social media require truthful advertisements for the sake of protecting consumers.⁶¹ Not every consumer is aware

⁵⁴ See *infra* Parts I and II.

⁵⁵ See *infra* Part III.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *infra* Conclusion.

⁵⁹ FED. TRADE COMM’N, THE FTC’S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/F9BD-Y8KA>] [hereinafter FTC ENDORSEMENT GUIDES].

⁶⁰ *Id.*

⁶¹ *Id.*

of the relationships between influencers and brands, and the law simply defines deceptive practice as one that “misleads ‘a significant minority’ of consumers.”⁶² The FTC Act applies to modern and traditional media outlets, but unlike with television, monitoring of bloggers is nonexistent and enforcement is difficult.⁶³ While the Guidelines lack legal force, the FTC Act supports them by requiring violators to relinquish their earnings from the sponsorship or comply with the provisions in the Guidelines.⁶⁴

The FTC Guidelines’ flaws are apparent in its regulation of advertisement disclosure and endorsements. When an influencer purchases an item herself or receives it as a free sample without any payment or perk in return for a promotion, no disclosure is necessary.⁶⁵ For gifts sent by a company of little monetary value (“only worth a few dollars”), disclosure depends on whether the credibility of an influencer’s opinion would be affected by this gift.⁶⁶ The FTC notes when influencers continuously receive gifts for free, especially from the same advertisers, that relationship is suspicious and potentially leads to false positive reviews.⁶⁷ For example, if a luxury cosmetics brand constantly sends a beauty guru free makeup and opportunities to go on paid brand trips—essentially paid vacations to exotic places by cosmetic brands to promote new products—that beauty guru may feel swayed to give glowing reviews of the products to maintain a positive relationship with that brand.⁶⁸

What this cursory glance at the rules for disclosure shows is that, while the FTC provides some semblance of guidance, there is a lot of discretion involved on behalf of the influencer to determine if they believe that their opinions may be biased and whether they are disclosing their relationship with the brand clearly. The following section provides more depth in how the

⁶² *Id.* (recognizing that while such financial arrangements between influencers and companies may be common knowledge and apparent to industry insiders, not every consumer is as aware).

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (“The FTC is only concerned about endorsements that are made on behalf of a sponsoring advertiser.”).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See id.*

FTC defines “clear and conspicuous” to underscore how ambiguous and malleable the law is.

A. “*Clear and Conspicuous*”

In September 2017, the FTC revised its “Guide[line]s Concerning the Use of Endorsements and Testimonials in Advertising” to align with Section 5 of the FTC Act, which prohibits deceptive advertisements.⁶⁹ In general, the FTC stressed that product endorsements ought to “reflect the honest opinions, findings, beliefs, or experience of the endorser.”⁷⁰ The revised Guidelines can be boiled down to the simple concept of “clear[] and conspicuous[]” disclosures.⁷¹ For example, the Guidelines require clear disclosure when there are financial or family ties with a brand.⁷² The FTC stresses that while some platforms provide disclosure tools, these tools may not be effective, so influencers have to consider whether any material connection is obvious to their followers and whether the means of disclosure is sufficient to notify followers.⁷³ But, ultimately, the “responsibility for making clear disclosures is [*the influencer’s*].”⁷⁴

Further, the Guidelines instruct influencers to avoid ambiguous disclosures such as “#thanks, #collab, #sp, #spon, or #ambassador” as a means to communicate relationships with companies.⁷⁵ The Guidelines provide other advice such as not placing disclosures after a “CLICK MORE” link or other easily missed locations.⁷⁶ The issue is that the Guidelines suggest that the influencers use their best judgment on what is the better way to

⁶⁹ FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (Sept. 2017), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf> [<https://perma.cc/DX9B-JZM9>].

⁷⁰ *Id.* § 255.1(a).

⁷¹ Lesley Fair, *Three FTC actions of interest to influencers*, FED. TRADE COMM’N (Sep. 7, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers> [<https://perma.cc/6PRB-ZB7N>].

⁷² *Id.*

⁷³ *Id.* (stating influencers should consider “whether the disclosure attracts viewers’ attention, taking into account where people are likely to look on a particular platform” such as off to the side of a picture).

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Id.* (“Think of it like football. Unless the quarterback throws the ball and the receiver catches it, it’s an incomplete pass.”).

⁷⁶ *Id.* (“When disclosing a brand relationship, the better approach is to hit ‘em right between the eyes.”).

disclose to their followers, not how they *must* disclose in certain scenarios.⁷⁷ Between the ambiguity of the Guidelines and the discretion of the influencers, this Note addresses the uncertainty on what is the proper means of compliance. “Clear and conspicuous” is anything but.⁷⁸

For example, for scenarios such as when a company provides an influencer a product of little monetary value, the FTC defers to the judgment of the influencer.⁷⁹ In particular, the FTC’s website states that the influencer ought to reflect on whether this incentive, irrespective of its minimal financial value, would impact the weight or credibility of an endorsement.⁸⁰ For example, charitable incentives may unduly influence an individual when a company makes donations to the influencer’s favorite charity in return for favorable reviews.⁸¹

The FTC’s advice becomes murkier as the Guidelines progress. For example, in a scenario where a blogger dedicates her website to restaurant reviews and it is clear that some restaurants pay for ads on the site, disclosure of which restaurants provide free meals is discretionary.⁸² These nebulous scenarios present issues where disclosure to an audience is based on the judgment calls of the influencer, who often are swayed by free products.⁸³ At best, the FTC strongly advises influencers to disclose when there are financial relationships with the companies to endorse a product irrespective of whether the post is positive or negative.⁸⁴

Ambiguity and plenty of guesswork is required of the influencer to determine when they ought to disclose, even in situations where an influencer is a known spokesperson.⁸⁵ When an influencer is a known spokesperson, the FTC suggests considering whether a significant portion of an influencer’s followers would be aware

⁷⁷ *See id.*

⁷⁸ Fair, *supra* note 71.

⁷⁹ FTC ENDORSEMENT GUIDES, *supra* note 59.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* (“If you get free meals, you *should* let your readers know.”) (emphasis added).

⁸³ *Id.* (discussing hypotheticals where a YouTube channel reviewing knives receives free knives from manufacturers).

⁸⁴ *Id.* (“[I]f you don’t have any relationship with the advertiser, then your posts simply are not subject to the FTC Act The FTC Act covers only endorsements made on behalf of a sponsoring advertiser.”).

⁸⁵ *Id.*

that there is that relationship and that the posts are endorsed.⁸⁶ The Guidelines provide no special wording for disclosure, simply requesting “effective communication” and whatever is necessary to give a “heads-up to your viewers” about the sponsorship.⁸⁷ The amount of details needed to meet that threshold is unclear.⁸⁸ In a simplified explanation of the Guidelines, the FTC repeatedly states that the threshold is whatever is “essential information” for “effective communication” to the audience.⁸⁹ The FTC does not “mandat[e] ... specific wording [or] disclosures” but rather encourages influencers to ensure “that people get the information they need to evaluate sponsored statements” and states that “#ad” may be effective disclosure.⁹⁰

Beyond the ambiguity of when to disclose and how to disclose, the FTC further provides vague instruction on where to disclose.⁹¹ For example, in using disclosure tags such as “#ad” the FTC states that it “does not dictate where you have to place the #ad” but will look for “whether it is easily noticed and understood” by the audience.⁹² The Guidelines go on and on with hypothetical scenarios that essentially state that it is up to the discretion of the consumer to determine whether the disclosures are “clear and conspicuous,” which the FTC defines as “plain and unambiguous language.”⁹³ In general, the FTC suggests placing disclosures near related product claims, in a legible font, in a shade not disguised in the image, on screen long enough to be “noticed, read, and understood,” and/or read at a cadence “easy for consumers to follow and in words consumers will understand.”⁹⁴

The FTC lists more ambiguities and hypotheticals with unclear answers, but the advice can be easily surmised as “do whatever you think is best,” which doubtlessly causes influencers to scratch their heads in confusion and leaves room for abuse.⁹⁵

⁸⁶ *Id.* (Admittedly, the FTC does suggest that influencers ought to err on the side of caution and opt to disclose when things are unclear.).

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See generally id.*

The issue is that the FTC's Guidelines are far too lax and open for manipulation by influencers and companies regarding disclosure and creates difficulties in enforcement.⁹⁶

B. The Difficulties of Enforcement and the Misguided Reliance on Self-Regulation

Another difficulty beyond the ambiguous Guidelines is that the FTC's Guidelines are difficult to enforce.⁹⁷ In part, the difficulty stems from a dependence on self-regulation because the FTC does not monitor social media influencers.⁹⁸ This is likely due to the sheer amount of content to potentially monitor and analyze.⁹⁹ Further, enforcement actions are typically against the company rather than against the influencers.¹⁰⁰ This is because the companies hold more power in the business relationship and must "have reasonable programs in place to train and monitor the influencers you pay and direct" to post about products.¹⁰¹ But, the FTC does not do much monitoring itself—opting instead to wait until possible violations of the FTC Act are brought to their attention for evaluation.¹⁰² At worst, influencers may be sent warning letters.¹⁰³ In the rare occasion that enforcement is brought against them, the violation must be egregious.¹⁰⁴

1. The FTC's Letters to Instagram Influencers

In 2015, the FTC released its "Enforcement Policy Statement on Deceptively Formatted Advertisements."¹⁰⁵ This statement

⁹⁶ See *supra* Introduction.

⁹⁷ See FTC ENDORSEMENT GUIDES, *supra* note 59.

⁹⁸ *Id.*

⁹⁹ See *id.*

¹⁰⁰ *Id.* ("If law enforcement becomes necessary, our focus usually will be on advertisers ... [a]ction against an individual endorser, however, might be appropriate in certain circumstances, such as if the endorser has continued to fail to make required disclosures despite warnings.").

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ *Id.*

¹⁰⁵ FED. TRADE COMM'N, COMMISSION ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS (Dec. 22, 2015), <https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted> [<https://perma.cc/G3JN-5M2V>].

warned potential violators “Section 5 of the FTC Act prohibits ‘unfair or deceptive acts or practices in or affecting commerce.’”¹⁰⁶ This policy statement emphasized that “[t]he Commission has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself.”¹⁰⁷

The problematic enforcement of the FTC Guidelines and identification of violators is illustrated in the 2017 warnings sent to Instagram influencers.¹⁰⁸ In March 2017, the FTC sent warning letters to Instagram influencers ranging from celebrity to non-celebrity influencers.¹⁰⁹ In September 2017, the FTC sent follow up letters to influencers for suspected noncompliance despite prior warnings.¹¹⁰ For example, in its follow up letter to non-celebrity beauty influencer, Lilly Ghalachi, the FTC wrote:

As you may recall, I wrote to you in March regarding one of your Instagram posts endorsing HAIRtamin vitamins. As I said in my earlier letter, if you are endorsing a brand and have a ‘material connection’ with the marketer (that is a connection or relationship that might affect the weight or credibility that your followers give the endorsement), then your connection should be clearly and conspicuously disclosed, unless the connection is already clear from the context of the endorsement Five of your other Instagram posts, attached to this letter, have recently come to our attention.¹¹¹

¹⁰⁶ *Id.* at 1.

¹⁰⁷ *Id.* (“Knowing the source of an advertisement or promotional message typically affects the weight or credibility consumers give it.”).

¹⁰⁸ *See generally* Letters from FTC to Instagram Influencers, FED. TRADE COMM’N, No.2017-00799 (Apr. 2017), https://www.ftc.gov/system/files/documents/foia_requests/1b-2017-00799_instagram_influencers_327_pgs.pdf [<https://perma.cc/327V-2JKB>].

¹⁰⁹ *See generally id.*

¹¹⁰ *See generally* Follow Up on March Letter to Instagram Influencers, FED. TRADE COMM’N, No. 2017-01436 (Sept. 2017), https://www.ftc.gov/system/files/documents/foia_requests/all_of_the_signed_letters.pdf [<https://perma.cc/Z7MU-42FK>].

¹¹¹ *Id.* at 22 (discussing suspected material relationships between Ghalachi and the following companies: Ryan & Walter Bridal, Duke Photography, Wedding Estates, Petals LA, and White Lilac Inc.) (emphasis added).

The letter details the posts suspected of hidden advertisements with images of the posts and detailed descriptions about the posts' texts and potential violation.¹¹² The FTC concludes its warning letter to Ghalachi by requesting a written response by the end of the month "advising the FTC staff of whether you have a material connection with each of the businesses that you endorsed in your wedding related posts" and describing any actions taken to adhere to the "clear[] and conspicuous[]" disclosures of such relationships.¹¹³

This exact format was sent to several Instagram influencers and ended with the same request for the influencers to let the FTC know if they had any hidden relationships with brands.¹¹⁴ The issue is the uncertainty of identifying who is in violation of the Act and catching an influencer when they violate the Act.¹¹⁵ In part, the FTC relies heavily on self-regulation and honesty from these influencers that may not necessarily be provided.¹¹⁶ In all iterations of the Instagram Influencer Warning Letters, the FTC consistently appealed to the honesty of the influencers to reveal if the suspected "material connections" existed and requested for compliance with the disclosure Guidelines.¹¹⁷ These requests were clearly not complied with and it is unclear whether suspected violators suffered any legal ramifications.¹¹⁸

After all, consider the predicament these influencers are placed in. Would you admit to breaking a law and risk punishment? Most likely not. The stakes are even higher for top influencers. The combination of endorsements generating thousands of dollars and vague, lenient laws likely cause the moral obligations to consumers to be outweighed by financial gain. If a large company offered you \$75,000 to post an innocuous picture of its product to your millions of followers without disclosure, the law itself essentially asks you to be honest but is unable to punish

¹¹² *Id.* at 22–28.

¹¹³ *Id.* at 23 (emphasis added).

¹¹⁴ *See generally id.*

¹¹⁵ *See* FTC ENDORSEMENT GUIDES, *supra* note 59.

¹¹⁶ *See, e.g.*, Letters from FTC to Instagram Influencers, *supra* note 108.

¹¹⁷ *Id.*; Follow Up on March Letter to Instagram Influencers, *supra* note 110.

¹¹⁸ That the requests were not complied with is evident from the FTC's follow up letters. No formal FTC actions were commenced against the suspected violators.

you with certainty. In many cases, not every individual would elect to be an upstanding citizen. For the low cost of a post on social media and the reward of a hefty check, morality and responsibilities to consumers may be cast aside. Enforcement thus presents a challenging problem for the FTC in such a nebulous realm as vast and active as social media. However, when it does enforce, the ramifications are not public and discouraging to other companies and influencers, often leading to settlement.¹¹⁹

2. *The Cases of Counter-Strike: Global Offensive Lotto and Lord & Taylor*

The FTC's first-ever law enforcement action was against video game YouTubers, Trevor Martin (TmarTn) and Thomas Cassell (Syndicate)¹²⁰ for "deceptively endorsing the online gambling site CSGO Lotto (Counter-Strike: Global Offensive Lotto) without disclosing that they owned the company."¹²¹ On an online game called Counter-Strike: Global Offensive (CS:GO), players may collect, trade, and purchase game collectibles called "skins" which also double as virtual currency on gambling sites such as CSGOLotto.com.¹²² In 2015, Martin posted a YouTube video endorsing CSGO Lotto with the following statement:

We found this new site called CSGO Lotto, so I'll link it down in the description if you guys want to check it out. But we were betting on it today and I won a pot of like \$69 or something like that so it was a pretty small pot but it was like the coolest feeling ever. And I ended up like following them on Twitter and stuff and they hit me up. And they're like talking

¹¹⁹ Fair, *supra* note 71.

¹²⁰ Trevor Martin, *TmarTn Home Page*, YOUTUBE (Nov. 22, 2018), <https://www.youtube.com/TmarTn> [<https://perma.cc/2D4M-G2Q8>] (Martin boasts 3.4 million subscribers and is popular for uploading videos of himself playing the video game series *Call of Duty*. His channel has garnered over 815 million views.); Thomas Cassell, *TheSyndicateProject Home Page*, YOUTUBE (Nov. 22, 2018), <https://www.youtube.com/user/TheSyndicateProject> [<https://perma.cc/YC4X-YAWN>] (Cassell has 9.9 million subscribers and posts videos of himself playing a variety of video games. His channel has garnered over 2 billion views.).

¹²¹ Fair, *supra* note 71.

¹²² *Id.* (noting that "skins" were traded, purchased, and sold for real money and that "[p]layers could challenge others to a one-on-one coin flip, wagering their pooled skins").

to me about potentially doing like a skins sponsorship like they'll give me skins to be able to bet on the site and stuff. And I've been like considering doing it.¹²³

Martin posted subsequent videos of his success gambling on the website and even made statements on other social media platforms such as Twitter and Instagram.¹²⁴ Cassell similarly promoted the website, CSGO Lotto, with social media posts and “videos that were viewed more than five million times.”¹²⁵

In response, the FTC filed a complaint challenging the influencers on their connections to CSGO Lotto and produced multiple exhibits (A to V) on the clear violations of undisclosed sponsorship.¹²⁶ Here, the violation was extreme given the fact that Martin and Cassell were not only sponsored by the company, CSGO Lotto, Inc., but they were officers of the corporation, strengthening their alleged financial ties.¹²⁷ Specifically, Martin was the President of the corporation and a 42.5 percent owner while Cassell was the Vice President with 42.5 percent ownership.¹²⁸

In the Complaint, the FTC detailed the multiple occasions the YouTubers had posted videos, tweets, and posts on various social media platforms promoting <http://www.csgolotto.com>, in which they discussed their large earnings without disclosing the fact that they owned the company and therefore had a direct financial relationship with the business, CSGO Lotto, Inc.¹²⁹ The YouTubers utilized an “Influencer Program” to have other influencers promote

¹²³ *Id.*

¹²⁴ *Id.* (stating that Martin tweeted, “Made \$13k in about 5 minutes on CSGO betting. Absolutely insane!” and posted on Instagram, “Unreal! Won two back to back CSGOLotto games today on stream—\$13,000 in total winnings.”).

¹²⁵ *Id.* (quoting Cassell’s tweet, “I lied ... I didn’t turn \$200 into \$4,000 on @CSGOLotto ... I turned it into \$6,000!!!!”).

¹²⁶ See generally Complaint, CSGOLOTTO, Inc., Trevor Martin, and Thomas Cassel, No. C-162-3184 (F.T.C. Sept. 7, 2017) [hereinafter Complaint].

¹²⁷ *Id.* at 1.

¹²⁸ *Id.* at 1.

¹²⁹ *Id.* at 2–3 (“Martin posted at least 12 promotional videos to his ‘TmarTn2’ YouTube channel showing himself gambling on CSGO Lotto, including ones with titles such as, ‘HOW TO WIN \$13,000 IN 5 MINUTES (CS-GO BETTING)’ Cassell posted at least seven promotional videos showing himself gambling on CSGO Lotto, including ones with titles such as, ‘INSANE KNIFE BETS! (CS:GO Betting)’”).

CSGO Lotto and discuss their experiences.¹³⁰ These influencers were contractually prohibited from “making ‘statements, claims or representations ... that would impair the name, reputation and goodwill of CSGO Lotto.’”¹³¹ Influencers were paid in amounts ranging from \$2,500 to \$55,000 and promoted the website on YouTube, Twitch,¹³² and Facebook, but many promotions of CSGO Lotto failed to include any sponsorship disclosures.¹³³

For example, one Twitter user by the name of @hotted89 tweeted out, “LET’S GOOOO @CSGOLotto,” and included a screenshot of this individual “winning a betting pool worth over \$4,100 on CSGO Lotto.”¹³⁴ Upon revelation that Martin and Cassell ran the company operating CSGO Lotto, the FTC pursued charges and investigated the deceptive failure to disclose material connections to CSGO Lotto, Inc.¹³⁵ As Count I, False Claim of Independent Reviews, and Count II, Deceptive Failure to Disclose Endorsers were Owners and Officers, declare, Martin, Cassell, and other influencers made posts that did not reflect impartial opinions and failed to disclose material connections that were instrumental to “consumers in their decisions regarding using CSGO Lotto.”¹³⁶ In short, Cassell and Martin violated section 5(a) of the Federal Trade Commission Act, which prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in affecting commerce.”¹³⁷

The YouTubers failed to disclose their material connections and any disclosure made was not “clearly and conspicuously” done, meaning it would be difficult to miss.¹³⁸ They did not make the disclosure through the same means through which the communication was presented, a visual standout from other visual elements or

¹³⁰ *Id.* at 2.

¹³¹ *Id.* at 2.

¹³² Twitch is an online streaming platform predominantly catering to video game players. TWITCH, <http://www.twitch.tv> [<https://perma.cc/3PBM-KTG2>].

¹³³ Complaint, *supra* note 126.

¹³⁴ *Id.* at Exhibit O (detailing Exhibits O to V, examples of influencers contracted to promote CSGO Lotto, but failing to disclose their ties to the business).

¹³⁵ *Id.* at 1, 5.

¹³⁶ *Id.* at 5.

¹³⁷ Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006).

¹³⁸ CSGOLotto, Inc., Trevor Martin, and Thomas Cassell, No. C-162-3184, slip. op. at 2–3 (F.T.C. Sept. 7, 2017) (defining “clearly and conspicuously,” “close proximity,” “Respondents,” and “unexpected material connection”).

text, comprehensible to the average consumer, or mitigate any misunderstandings.¹³⁹ Further, these YouTubers failed to cater to their audience's ability to recognize a material connection with a brand.¹⁴⁰ The FTC states that “[w]hen the representation ... targets a specific audience, such as children, the elderly, or the terminally ill, ‘ordinary consumers’ includes reasonable members of that group.”¹⁴¹ The FTC ultimately ordered the violators to disclose these material connections, to monitor the contracted influencers for compliance, and make timely submissions to the Commission as well as keep record of the orders and compliance.¹⁴²

At first glance, the case of CSGO Lotto appears to be a happy ending for the FTC and a successful enforcement action against two violators. In reality, the FTC's penalties against influencers are insufficient deterrents for those who continue to use deceptive practices.¹⁴³ This FTC action was not the first involving Cassell.¹⁴⁴ In 2015, Cassell faced enforcement action by the FTC for his undisclosed endorsements with Machinima, Inc., a California-based online entertainment network that paid influencers “to post YouTube videos endorsing Microsoft's Xbox One system and several games.”¹⁴⁵ Cassell, along with other influencers, were a “part of an Xbox One marketing campaign managed by Microsoft's advertising agency, Starcom MediaVest Group, and were given early access to the console and games to produce two endorsement videos per influencer.”¹⁴⁶ The influencers were paid between \$15,000 to \$30,000 and Machinima did not require disclosure regarding the paid endorsement.¹⁴⁷ The company did provide specific guidelines for the influencers such as the content of their first video needing to include the following: a montage of past Xbox 360 footage (the predecessor of the new Xbox One

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 3.

¹⁴² *Id.* at 5–8.

¹⁴³ See, e.g., *Xbox One Promoter Settles FTC Charges That it Deceived Consumers With Endorsement Videos Posted by Paid Influencers*, FED. TRADE COMM'N (Sept. 2, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers> [<https://perma.cc/YUX2-P5L9>].

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

console), two to three talking points about new Xbox One features, specifying the Ryse game, showcasing the products in a positive light, and making the video at least two minutes in length.¹⁴⁸ While the influencers were named and subjected to compliance, the action was brought against Machinima for its violation of the Federal Trade Commission Act, section 5, for its deceptive practices.¹⁴⁹ The company acted deceptively by imposing conditions on the influencers such as confidentiality provisions, discouraging disclosure, and compensating influencers for violations.¹⁵⁰ Clearly, these influencers were far from impartial in their reviews, and the FTC formally issued its complaint against Machinima on March 16, 2016.¹⁵¹ As the FTC did in the case against CSGO Lotto, it once more settled with the company that the enforcement action was against, and ordered disclosure and compliance with section 5 of the FTC Act.¹⁵² Further, the FTC ordered Machinima, Inc. to discontinue the misrepresentations in its deceptive influencer campaign, to prominently disclose any material connections, to not pay any influencer who has not made the required disclosures, to monitor these influencers, and to send follow up reports to the FTC on its compliance during this ad campaign to ensure continued disclosures.¹⁵³

Of course, the realm of successful FTC enforcement actions is not limited to the world of video game influencers on YouTube.¹⁵⁴ The FTC also brought action against large department stores such as Lord & Taylor, LLC, for violating the FTC Act in its Instagram Ad Campaign.¹⁵⁵ At the end of March 2015, Lord & Taylor created a marketing plan that involved “a comprehensive social media campaign” that would consist of:

Lord & Taylor–branded blog posts, photos, video uploads, native advertising editorials in online fashion magazines, and

¹⁴⁸ Complaint at 2, Machinima, Inc., No. C-142-3090 (F.T.C. Mar. 17, 2016) (detailing the instructions influencers received for both videos and how to structure their endorsements of the upcoming Xbox One consoles and games).

¹⁴⁹ *Id.* at 1.

¹⁵⁰ *Id.* at 2–3.

¹⁵¹ *Id.* at 5.

¹⁵² Machinima, Inc., No. C-142-3090, slip op. at 3–5 (F.T.C. Mar. 17, 2016).

¹⁵³ *Id.*

¹⁵⁴ Complaint at 1, Lord & Taylor, LLC, No. 152-3181 (F.T.C. May 20, 2016).

¹⁵⁵ *Id.* at 1–2.

use of a team of fashion influencers recruited for their fashion style and extensive base of followers on social media platforms, all focused on a single article of clothing, the Design Lab Paisley Asymmetrical Dress.¹⁵⁶

Fifty fashion influencers were gifted the Paisley Asymmetrical Dress and paid “in amounts ranging from \$1,000 to \$4,000 ... to pose on the social media platform Instagram one photo of themselves wearing [the dress] during a specified timeframe during the weekend of March 27–28, 2015.”¹⁵⁷ Influencers had freedom to style the dress however they pleased, but they were contractually obligated to mention the company in their descriptions as “@lordandtaylor” and use the campaign hashtag “#DesignLab” in the photo caption as well as tag the “@lordandtaylor” Instagram designation.¹⁵⁸ Similar to the contracts in the cases against CSGO Lotto and Machinima, these influencers had no contractual obligation to disclose that Lord & Taylor compensated them, that the dress was received for free, and that it was a part of an advertisement campaign.¹⁵⁹

Lord & Taylor’s campaign on Instagram “reached 11.4 million individual Instagram users” and “resulted in 328,000 brand engagements with Lord & Taylor’s own Instagram user handle.”¹⁶⁰ The dress sold out after the launch of the campaign.¹⁶¹ In its settlement terms, Lord & Taylor was “prohibited from misrepresenting that paid ads are from an independent source” and were “required to ensure that its influencers clearly disclose when they have been compensated in exchange for their endorsements.”¹⁶² Jessica Rich, Director of the FTC’s Bureau of

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Press Release, Fed. Trade Comm’n, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers” (March 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> [<https://perma.cc/SL98-8L9Z>] [hereinafter Lord & Taylor Settles]; *see also* In Re Lord & Taylor, LLC, No. 152-3181 slip op. at 3 (F.T.C. May 20, 2016).

Consumer Protection, chastised the company for its deceptive marketing practices and emphasized the necessity of protecting consumers from covert advertisements.¹⁶³ In other words, the penalty Lord & Taylor suffered was a public scolding and a slap on the wrist for its deceit. The one action against Lord & Taylor was that it could not lie about the nature of these posts and had to wrangle in its influencers to adhere to the FTC Guidelines.¹⁶⁴

Ultimately, what the three cases show is a trend of enforcement against corporations, who presumably have more control over the influencer's adherence to FTC regulations and more financial risk in lawsuits.¹⁶⁵ Even in cases such as CSGO Lotto, the YouTubers faced penalties for their positions as owners of a corporation, not in their personal capacity as social media influencers.¹⁶⁶ At the time of this Note, late 2018, these three cases stand as the few notable cases of enforcement action by the FTC for subversive social media advertisement campaigns. There has been no direct enforcement against any celebrity or noncelebrity beyond the warning letters, and influencers persist in an unregulated realm of tweets, posts, and stories, beyond the watch of the FTC.

From these few cases available on the FTC's website and the persistent violations of influencers, it is clear that enforcement is ineffective.¹⁶⁷ Likewise, the goodwill efforts of some influencers to disclose may be thwarted by the vague definition of "clear and conspicuous" and the insufficiency of disclosure via social media tools.¹⁶⁸ But, the influx of social media posts requires more instruction than what the FTC Guidelines provide to encourage transparency and protect susceptible consumers—particularly children who also access social media websites and may not be as

¹⁶³ Lord & Taylor Settles, *supra* note 162.

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* notes 121–64 and accompanying text.

¹⁶⁶ Complaint at 3, In Re CSGOLOTTO Inc., Trevor Martin, and Thomas Cassel, No. C-162-3184 (F.T.C. Sept. 7, 2017).

¹⁶⁷ See, e.g., *supra* notes 143–45 and accompanying text.

¹⁶⁸ See Anthony Ha, *Instagram is testing a new way for celebrities and influencers to identify their sponsored posts*, TECHCRUNCH (June 14, 2017, 9:07 AM), <https://techcrunch.com/2017/06/14/instagram-sponsored-posts/> [<https://perma.cc/PT5V-TKUV>] (Influencers and advertisers asked Instagram's Creative Programs Director to help streamline disclosures. His solution allows influencers to tag a brand as the sponsor for the post, which appear as "Paid Partnership with" at the top of the post.).

sophisticated as their older counterparts to decipher covert advertisements.¹⁶⁹ Simply approaching the issue through the concept of penalizing and clarifying the law is not sufficient. There must be awareness of the law by influencers, who are often ordinary people without legal sophistication, and collaboration between all the parties involved—influencers, companies, the FTC, and social media platforms.

It is important to not only have meaningful enforcement actions to deter both brands and companies from violating the law, but also to simplify the process of compliance. This way, well-meaning influencers will be able to successfully disclose their endorsements when required.

Of course, this Note does not presuppose that social media influencers are intentionally acting fraudulently or refusing to comply. This Note merely points out the difficulty of enforcing unclear laws and misguided reliance on self-regulation. Self-regulation is unreliable because influencers rely on their image of authenticity, which may be tainted by close brand relationships.¹⁷⁰ “Clear and conspicuous” is unclear given the ambiguous rules, minimal enforcement, and reliance on self-regulation.¹⁷¹ So how do we clarify “clear and conspicuous”? Where the answer may lie to resolve the issues of unclear rules and ineffective compliance, at least to tighten up the preexisting Guidelines in America, may be found with the FTC’s German counterpart, the *Landesmedienanstalten*.

II. GERMANY’S LANDESMEDIENANSTALTEN AND THE CRACKDOWN ON HIDDEN ADVERTISEMENTS

Compared to the more ambiguous and lenient standards established by the FTC, Germany’s supervisory authority, the *Landesmedienanstalten*, enacted comprehensive and detailed guidelines on when and how social media influencers ought to

¹⁶⁹ See generally Carly Nyst, *Children and Digital Marketing: Rights, Risk, and Responsibilities*, UNICEF (Apr. 2018), [https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities\(2\).pdf](https://www.unicef.org/csr/css/Children_and_Digital_Marketing_-_Rights_Risks_and_Responsibilities(2).pdf) [<https://perma.cc/96NW-NBYP>].

¹⁷⁰ Maddie Raedts, *Taking a Stand on Authenticity in Influencer Marketing*, FORBES (Mar. 29, 2019), <https://www.forbes.com/sites/forbesagencycouncil/2019/03/29/taking-a-stand-on-authenticity-in-influencer-marketing/#62abaae57270> [<https://perma.cc/WXB5-LWE6>].

¹⁷¹ See *supra* Abstract.

disclose their advertisements.¹⁷² Most notably, there have been several high-profile lawsuits against influencers for failing to abide by these guidelines.¹⁷³ These include suits against YouTuber Flying Uwe, famous German drugstore chains, and notable fashion bloggers in Germany.¹⁷⁴ In comparison to the sparse legal actions and the difficulties of enforcement in the United States, Germany's clearer guidelines have resulted in setting an example to other German influencers through the penalization of Flying Uwe, a fitness guru who gained notoriety as the "first (German) influencer who was sanctioned for unmarked social media advertising in Germany."¹⁷⁵ Likewise, the German Association against Unfair Competition successfully sued a "famous German drugstore chain for insufficient labeling of an influencer's advertising on Instagram" about discount opportunities.¹⁷⁶ The only denotation that the Instagram post was sponsored was a "#ad" hidden at the end of a lengthy chain of other hashtags, which the Court of Appeals of the city of Celle found to be insufficient identification and a clear violation of the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*).¹⁷⁷

The influencer's post specifically violated section 5(a), Irreführung durch Unterlassen, paragraph 6 of the *Gesetz gegen den unlauteren Wettbewerb*,¹⁷⁸ which states:

Unfairness shall also have occurred where the commercial intent of a commercial practice is not identified, unless this is

¹⁷² Mona Hellenkemper, *The Ultimate Guide to Disclosing Sponsored Content in Germany*, INFLUENCER DB (July 11, 2017), <https://www.influencerdb.net/blog/ultimate-guide-to-disclosing-sponsored-content-germany/> [<https://perma.cc/RUP3-QXTX>].

¹⁷³ Reinholz, *supra* note 40.

¹⁷⁴ *Id.*; see also Welt Hamburg & Schleswig-Holstein, *YouTuber Flying Uwe muss empfindliche Geldbuße zahlen* (Aug. 06, 2017), <https://www.welt.de/regionals/hamburg/article165340902/YouTuber-Flying-Uwe-muss-empfindliche-Geldbusse-zahlen.html> [<https://perma.cc/G8P7-3VLG>]; Flying Uwe, *Reaktion Aud 10.500 Euro Strafe!*, YOUTUBE (June 11, 2017), <https://youtu.be/HfVyU-3DB-E> [<https://perma.cc/ZV9L-LA9F>].

¹⁷⁵ Reinholz, *supra* note 40 (noting that Flying Uwe was penalized by the State Media Authority of Hamburg for € 10,500 for "recommending food supplements" to his 1.3 million followers without disclosing his paid sponsorship).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

directly apparent from the context, and where such failure to identify the commercial intent is suited to causing the consumer to take a transactional decision which he would not have taken otherwise.¹⁷⁹

In other words, the influencer, in partnership with the grocery store chain, misled consumers by omitting advertisement identifications.¹⁸⁰

The Association also successfully prevailed in a legal action against a fashion blogger for posting pictures on Instagram with hyperlinks to sellers of cosmetics without disclosing the commercial ties with the company.¹⁸¹ Germany's crackdown on these different types of hidden advertisements and recent legal successes in enforcement are linked to the clarity of the rules compared to the FTC's "clear and conspicuous" standard.¹⁸²

Similar to the FTC's recent updates to its Guidelines, Germany's State Media Authority, *Landesmedienanstalten*, clarified its rules for accurate disclosure on social networks "due to the influencers' responsibility for their followers."¹⁸³ Several existing laws, which expressly prohibit hidden advertisements, support German guidelines.¹⁸⁴ Germany provides concise categories of disclosures while striking a fine balance of free speech, business relationships, and transparency to consumers.

For example, disclosure is never necessary when an influencer personally purchases a product and states a personal opinion via any means of communication.¹⁸⁵ The nuances in disclosure

¹⁷⁹ Gesetz gegen den unlauteren Wettbewerb (UWG), § 5a "Misleading by Omission" ¶ 6 (Feb. 17, 2016) ("Unlauter handelt auch, wer den kommerziellen Zweck einer geschäftlichen Handlung nicht kenntlich macht, sofern sich dieser nicht unmittelbar aus den Umständen ergibt, und das Nichtkenntlichmachen geeignet ist, den Verbraucher zu einer geschäftlichen Entscheidung zu veranlassen, die er andernfalls nicht getroffen hätte."), available at https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#p0071 [<https://perma.cc/4FU2-RVWW>].

¹⁸⁰ See *supra* notes 174–79.

¹⁸¹ Reinholz, *supra* note 40.

¹⁸² Hellenkemper, *supra* note 172.

¹⁸³ *Id.* (emphasizing the Association's focus on promoting "transparency, honesty, and authenticity").

¹⁸⁴ *Id.* (identifying supporting German laws such as *Gesetz gegen den unlauteren Wettbewerb*, *Telemediengesetz*, and *Rundfunkstaatsvertrag*).

¹⁸⁵ *Id.*

arise the moment a brand interacts with an influencer by sending a product or service, or even providing payment in services.¹⁸⁶ When brands send a free product, disclosure is not necessary if the brand does not provide guidelines on how the product should be presented and the influencer presents the item objectively.¹⁸⁷

In this hypothetical scenario, disclosure with “*werbung*” in pictures and “*unterstützt durch XY*” on videos, with a verbal disclaimer that the company provided the company free of charge, is required when the brand provides guidelines or expresses expectations of a positive review.¹⁸⁸ Further, when the content of a video is centered on said product, the entirety of the video must be denoted with a display of “*dauerwerbung*” or “*werbevideo*” and remain visible the whole video.¹⁸⁹ Further, if the video is editorial content (non-advertisement-based content), but includes the free product, or the product is a part of the video’s plotline, disclosure depends on the value of the product.¹⁹⁰

In scenarios when the brand pays influencers to present products, disclosure is always required, but how an influencer discloses depends on the content and presentation of the product to the audience.¹⁹¹ When the content is focused on the product, pictures must be denoted with “*werbung*” and videos must also use the same label every time the product is displayed, or simply mark the beginning of the video with the label “*untersützt durch XY*” and verbally state the partnership with the brand.¹⁹² “*Dauerwerbung*” or “*Werbevideo*” is required when the video is focused entirely on the product.¹⁹³

Similarly, editorial content that includes the products, even when the product is not a main part of the video, still must include

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (noting that disclosure is required even if the promoted product is the influencer’s, in reference to the legal sanctions against German YouTuber, Flying Uwe).

¹⁹⁰ *Id.* (specifying that products less than €1,000 do not require disclosure, but products worth more than €1,000 require labels such as “*Produktplatzierung*,” “*unterstützt durch Produktplatzierung*,” or “*unterstützt durch (Produktname)*” to denote the influencer’s ties to the company).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

a disclosure of the product placement.¹⁹⁴ For affiliate links where the influencer receives a commission, the links must be disclosed by “*enthält Webrelink*.”¹⁹⁵ The specificity of the German guidelines for when and how disclosure ought to be made even extends to where the denotations must be displayed and the length of time.¹⁹⁶ For example, Instagram pictures need to display the disclosure at the very beginning of a chain of hashtags in the description, not the comments.¹⁹⁷ For videos, the display for products placement must appear at the beginning and end of the video and remain on screen for at least three seconds.¹⁹⁸ Phrases like “*Webrevideo*” must be displayed permanently in situations requiring this particular descriptor.¹⁹⁹ When a product is only displayed in parts of the video, but it is clear that the product is the focus, the displayed terms only need to be present when the product is shown.²⁰⁰

III. REVAMPING THE LANDESMEDIENANSTALTEN’S APPROACH: A THREE-PRONGED PROPOSAL

This Note proposes a three-pronged approach to alleviate the burdens on the FTC. First, the rules for disclosure must be clarified. Second, there must be greater enforcement actions. Third, there needs to be collaborative efforts amongst the involved parties to promote transparency to consumers about these business relationships. In particular, this Note wishes to adopt the current guidelines outlined in Part II by the *Landesmedienanstalten* and to add minor revisions to further promote transparency amongst social media influencers. While not absolute in its protection of consumers, this Proposal aims to strengthen the FTC’s current approach and strike a fine balance between business transactions in the free market and keeping consumers informed. This proposed approach focuses on (1) revising the FTC Guidelines to provide clear disclosure requirements; (2) increasing the risk of

¹⁹⁴ *Id.* (requiring disclosure at the beginning of the video with a display of “*Produktplatzierung*,” “*unterstützt durch Produktplatzierung*,” or “*unterstützt durch (Produktname)*”).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

legal enforcement actions against both companies and influencers as a means of deterrence; and (3) raising awareness of the rules in the Guidelines and simplifying the process of disclosing through collaborative efforts with social media platforms and companies.

A. Clarified and Clear-Cut Guidelines

The first prong of this Note's proposal is to adopt the guidelines established by *Landesmedienanstalten* as discussed in Part II of this Note. The German model is more specific when compared to its American counterpart and has more mandatory disclosure requirements rather than allowing the disclosure to be subjected to influencer discretion, eliminating the confusion and flexibility open to abuse.²⁰¹ What the German model offers is clarity to influencers seeking to comply with the laws, but who lack the knowledge or intuition as to when and how they ought to disclose. Further, the German model closes the loopholes open to potential abuse compared to the FTC's Guidelines, which rely heavily on self-regulation and honesty on the part of suspected violators.²⁰² The *Landesmedienanstalten* states that influencers *must* disclose in particular scenarios rather than leave the decision to the judgment of the influencers, who may even fail to make disclosures "clear and conspicuous."²⁰³ Germany simply instructs their influencers that *when* such a scenario occurs, they *must* use specific terminology such as "*produktplatzierung*" and even specifies where it should be placed in relation to the post and other content.²⁰⁴

Perhaps the German model appears restrictive rather than clear in comparison, but the restrictive nature of the German model provides specific answers to clear up the confusion any influencer may have in when and how to disclose.²⁰⁵ What this Note further suggests beyond merely adopting Germany's model is to add additional specifics regarding topics such as affiliate links. Influencers should inform consumers exactly which links are affiliated rather than vaguely saying some are affiliated links and beneficial to the influencer.²⁰⁶

²⁰¹ See *supra* Parts I and II.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See *supra* Part II.

²⁰⁵ Hellenkemper, *supra* note 172.

²⁰⁶ See *supra* Part II.

For example, YouTubers such as Jaclyn Hill publish videos with information in their description boxes on where to buy discussed products, where to find the makeup and clothes Hill is wearing in the video, and other related information.²⁰⁷ In a recent video published by Hill, her description box provides links to her recent collaboration with Quay Australia, a sunglasses manufacturer, and Morphe Cosmetics, a drugstore makeup brand, as well as her business contact information and links to the products mentioned.²⁰⁸

At the end of a list of eighteen items, Hill denotes that “*SOME links provided above are affiliate links! I am compensated based on some affiliate purchases.”²⁰⁹ Other YouTubers opt to simply label this section of their description box with some variation of Hill’s phrasing or simply “Coupon Codes” to signal to their audience of some material connection to a business.²¹⁰ Both labels pass muster under the current FTC Guidelines as means to disclose affiliate links and would even survive under the German model.²¹¹ Clarifying ambiguous laws will simplify the process of meeting disclosure requirements in different scenarios, which adds enforcement capabilities.

So rather than simply leaving this list of affiliate links under a title that states only *some* are affiliated with a brand, but not *which* ones are, this Note proposes specifying the links. Influencers could simply identify which links are affiliated with a denotation such as “[affiliated]” or some other identification.

Of course, changing the current Guidelines to be clearer requires more effort on the part of influencers, but the cost of this exerted energy can be outweighed by the risk of enforcement and the convenience of social media disclosure tools.

²⁰⁷ Jaclyn Hill, *My Fall/Winter Favorites 2018*, YOUTUBE (Nov. 16, 2018), https://www.youtube.com/watch?v=X8_yNc7QRY0&t=739s [https://perma.cc/Y4DR-9G3T] (providing a recent example of Hill’s use of affiliate links in the description box, a common format mimicked by other popular makeup YouTubers).

²⁰⁸ *Id.* (Hill titles each section as follows: “BUY MY SUNNIES HERE,” “BUY MY MAKEUP COLLECTIONS HERE,” and “♡ ♡ ♡ PRODUCTS MENTIONED!”).

²⁰⁹ *Id.*

²¹⁰ James Charles, *Mermaid Halloween Makeup Tutorial*, YOUTUBE (Oct. 26, 2018), <https://www.youtube.com/watch?v=MYN12Y5AV3g> [https://perma.cc/478R-WUC7].

²¹¹ FTC ENDORSEMENT GUIDES, *supra* note 59.

B. Enforcement Actions Against Brands and Influencers

Coupled with the first prong of this Note proposal, the second prong focuses on bringing enforcement actions against brands and influencers. If the rules of disclosure were made clearer, then it would be easier to locate violators of the FTC Guidelines. A few things may inform the FTC on violators, as seen in Part II of this Note, such as the suspicious nature of the Instagram posts, the presence of tagged brands, prominence of a product's feature, an odd surge in popularity in a specific product for reviews, or stilted dialogue in captions.²¹²

In Parts II and III, the distinctions between notable American and German enforcement actions draw a few distinctions—who the enforcement action is against and the severity of the penalty.²¹³ Germany enforced its covert ad regulations against both the influencer and the brands.²¹⁴ America simply enforced the action against the corporations.²¹⁵

The importance of penalizing brands and influencers is to deter both parties from deceptive practices by threatening reputational damage (especially if the influencer relies on authenticity),²¹⁶ and financial penalty.²¹⁷ For influencers, the monetary penalties could be disastrous considering the varying levels of market power and wealth among influencers. Likewise, enforcing against well-known influencers could alert peers of the existence of the FTC Guidelines and risks of violations. In the case of Germany, when the *Landesmedienanstalten* fined YouTuber Flying Uwe, the action drew the attention of other social media influencers and traditional news media outlets given the celebrity of Flying Uwe.²¹⁸ The fitness YouTuber drew further attention in an attempt to control the damage to the news by posting a video discussing his violations and fines.²¹⁹

In the video, Flying Uwe reads comments on social media about his penalty for his violation and stated that he is far from

²¹² See *supra* Part I.

²¹³ See *supra* Parts I and II.

²¹⁴ See *supra* Part II.

²¹⁵ See *supra* Part I.

²¹⁶ See *supra* Introduction.

²¹⁷ See *supra* Part I.

²¹⁸ Hamburg & Schleswig-Holstein, *supra* note 174.

²¹⁹ Flying Uwe, *supra* note 174.

the first to discreetly advertise products on his channel, especially his own products.²²⁰ What had set him apart was that he was the first to face enforcement action and get fined.²²¹ Notably, Flying Uwe commented on the attention his fines drew from the public, fellow German influencers, and the news.²²² To reiterate, enforcement against the brand alone is insufficient because companies may have deep pockets and there is no deterrence for the influencers, who are equally complicit.²²³ Increasing the risk influencers face in violating, especially doing so knowingly, could deter small influencers due to monetary penalties and large influencers because of reputational damage.²²⁴ This Note does not mean to say the current method of enforcement ought to be changed, but merely that the target of enforcements should be broadened in tandem with detailed guidance on how to disclose “clearly and conspicuously.” This Note recognizes that there are still difficulties with confirming violations of the Guidelines given the nature of self-reporting and social media trends, and does not assert that more enforcement is necessary. Some high-profile enforcement actions against notable brands and influencers may signal the increased risk, thereby promoting adherence to rules and caution amongst the influencers.²²⁵

C. Collaborative Efforts with Social Media Platforms and Brands

Lastly, to accomplish stronger regulatory and enforcement actions, there must be collaborative efforts between the involved parties. Namely, collaboration between the FTC and social media platforms could further simplify and streamline the ability of influencers to disclose any material ties. Likewise, collaborative efforts with large companies can aid in notifying influencers of their duty to disclose and promote transparency as a whole. As

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *See supra* Part I (noting that the corporations involved in enforcement actions are worth millions of dollars, the influencers are paid as low as a free gift to hundreds of thousands for participation in the ad campaigns, and the settlements typically result in merely complying with the Guidelines).

²²⁴ *Id.*

²²⁵ *Ha, supra* note 168.

briefly discussed in Part I,²²⁶ social media platforms currently have tools to help disclose an influencer's material ties to a company. For example, Instagram has a tool where influencers can tag brands and a display appears at the top of the post stating, "Paid partnership with" and the name of the corporation.²²⁷ The receptiveness of social media platforms to the needs of advertisement disclosure is not a rare phenomenon.²²⁸

For example, in 2018, Twitter unveiled new guidelines and stricter disclosures for political advertisements due to concern over Russian interference in the 2016 election.²²⁹ The rules clearly instruct advertisers what methods are necessary to distinguish political advertisements and how to apply for certification on Twitter.²³⁰ Twitter's policy ensures compliance with existing Federal Election Commission (FEC) regulations and monitors compliance through its Ads Transparency Center.²³¹

Presumably, there is a mutually beneficial relationship between influencers, companies, and social media platforms when it comes to advertisement and bringing in a large audience to expose to the ads. Given past efforts by social media platforms to promote transparency in advertisements, collaboration with these popular websites to create efficient disclosure tools may be the answer. Currently, Instagram's tool could be considered noncompliant under the FTC's Guidelines depending on how "obvious" and "clear" the endorsement is to the average consumer.²³²

In constructing a concise Guideline so influencers can know when and how they can violate the rules, social media platforms

²²⁶ See *supra* Part I.

²²⁷ Ha, *supra* note 168.

²²⁸ See *supra* Part I.

²²⁹ Nick Statt, *Twitter Reveals new guidelines and rules for political ads*, THE VERGE (May 24, 2018), <https://www.theverge.com/2018/5/24/17390156/twitter-political-advertising-guidelines-transparency-rules> [<https://perma.cc/MY9D-DHL4>].

²³⁰ *Id.* ("As part of this new policy, we will require advertisers who want to run political campaigning ads for Federal elections to self-identify and certify that they are located in the US. Candidates and committees will have to provide their FEC ID, and non-FEC registered organizations and individuals will have to submit a notarized form.")

²³¹ *Id.* (detailing Twitter's compliance with the provisions of the Honest Ads Act, a bipartisan bill that had yet to pass at the time of the announcement).

²³² See *supra* Part I.

may also be informed on how to support influencers to disclose endorsements appropriately. For example, Instagram already denotes “verified” users,²³³ but perhaps it could provide some sort of marker for users to place on their posts in plain view and in an eye-catching way to denote endorsements. Or, perhaps platforms could follow Twitter and create a center dedicated to monitoring any potential violations of the FTC Guidelines to minimize the burdens of monitoring by the government agency.²³⁴ Of course, those details would depend on what would be necessary to incentivize the participation of these platforms. This Note supposes the influencer’s desire to keep a large audience engaged, maintain the presence of social media influencers, and receive advertisement engagements with the large audiences maintained through influencer interactions because of its value. However, these are merely speculations.

In short, collaboration with social media platforms may enhance enforcement of the FTC Guidelines, promote compliance, and aid in monitoring violations.

1. Raising Awareness of the Guidelines in Collaboration with Brands: The Case of GlamLifeGuru and MAC Cosmetics

Lastly, as this Note has emphasized, collaboration with social media platforms could yield favorable results and ease adherence.²³⁵ Another means of approaching collaboration is to encourage awareness and mitigate noncompliance between brands and influencers. Brands seeking to avoid enforcement actions can shield themselves from liability by alerting influencers of disclosure policies. This collaboration stresses the importance of joint efforts and the mutual benefits available for all parties involved. Namely, the influencer is properly informed of the resources and rules, the Cosmetics brands mitigate the risk of fines or legal repercussions, and influencers may be able to raise awareness to

²³³ Taylor Hatmaker, *You can now apply to get a verified badge on Instagram—here’s how*, TECHCRUNCH (Sept. 2018), <https://techcrunch.com/2018/08/28/instagram-how-to-get-verified/> [<https://perma.cc/QQ69-BRTF>] (verifying that Instagram provides the blue verification mark for confirmed celebrities, public figures, and global brands or entities).

²³⁴ *See supra* Part III.

²³⁵ *Id.*

their peers and followers. A recent example illustrates the simplicity and minimal burden of such efforts.

Youtubers such as Tati Westbrook²³⁶ (also known as GlamLifeGuru) publish videos of unboxing Public Relations packages (PR packages), which shows viewers the free items sent by companies to influencers.²³⁷ In one of her recent videos, Westbrook received a package containing new makeup collections from MAC Cosmetics and finds a pamphlet inside the box.²³⁸ The pamphlet read: “MAC Cosmetics values our relationship with you and encourages your full transparency to your readers. We remind you to disclose each post when you receive compensation, products, experiences, services, or significant gifts. Please check the latest FTC Guidelines here.”²³⁹

Simply placing notices and resources in PR packages raises more awareness to the laws than simply monitoring influencers and sending strongly worded letters. A video like Westbrook’s draws over one million views²⁴⁰ and engages consumers by drawing their attention to potential hidden advertisements, peers who watch the videos, and provides notice to the YouTuber herself.

Evaluating the overall burden on a brand to slip in a note, perhaps provided by the FTC, would raise sufficient awareness to the existence of laws, which influencers may simply be unaware of.²⁴¹ Further, the brands may avoid the higher cost of legal recourse should an influencer be charged for violation of FTC Guidelines.²⁴²

²³⁶ See Tati Westbrook, *GlamLifeGuru Home Page*, YOUTUBE (Nov. 21, 2018), <https://www.youtube.com/user/GlamLifeGuru/playlists> [<https://perma.cc/7VQT-VYLD>] (exemplifying that Westbrook is a popular YouTuber with over one billion channel views, 4.9 million subscribers, and her outrageous reviews on luxury beauty products and drugstore beauty product hauls).

²³⁷ *Id.*

²³⁸ Tati Westbrook, *Free Stuff Beauty Gurus Get, Unboxing PR Packages + Massive Giveaway*, YOUTUBE (Nov. 5, 2018), https://www.youtube.com/watch?v=G89Uez_hvWU [<https://perma.cc/786L-HWYD>].

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ See *supra* Introduction (discussing the authenticity of influencers as “average people” and the success stories of hobbyists such as Marlina Stell).

²⁴² See Fair, *supra* note 71 (detailing the notable enforcement against influencers Trevor Martin and Thomas Cassell, online video game players who post YouTube videos of their games, for deceptively endorsing an online gambling site without disclosure); see also *supra* Part I.

Weighing the costs and benefits of raising awareness through a means as simple as adding a small written notice in PR packages could save all parties from future burdens. In other words, the parties involved in the world of online celebrity can work together to ensure compliance with the FTC regulations either by cost-heavy means such as creating the tools and monitoring centers, or by simply alerting the influencer of their responsibilities. The efficacy of this approach depends on the willingness of the parties to collaborate and the clarity of the regulation itself. Incentives to comply may be strengthened with stronger penalties and risk for violators.

CONCLUSION

Again, picture the following scenario: one of your peers constantly talks about an amazing upcoming event. He sits you down and shows you pictures of sandy beaches and the beautiful ocean. There are attractive men and women strolling along the waters, laughing, and leaving their footprints in the wet sand. There are extravagant outdoor venues where people lounge, drink, and dance to music. Throughout the month, more of your peers begin talking about this event. They tell you how much fun it is going to be and how affordable the tickets are. You would get to fly out on a custom, VIP-configured Boeing 737, experience glamorous nightlife, and indulge in decadent foods. Out of excitement, you purchase this ticket and prepare for an adventure. Instead, you are stuck in the airport for hours, dragging your luggage out of a shipping container in the dead of night, and given a piece of bread with a slice of cheese on it. Instead of your luxurious villa, you're sleeping in a rundown tent outside.

Would you be outraged? Would you feel frustrated about being fooled into spending time and money on this false portrayal of a doomed vacation? The image is less than desirable, but it was the reality of many festivalgoers at the infamous Fyre Festival.²⁴³ The music festival left “hundreds of attendees ... stranded in the Bahamas last year” after falsely promising “two transformative

²⁴³ Mary Hanbury, *These photos reveal why the 27-year-old organizer of the disastrous Fyre Festival has been sentenced to 6 years in prison*, BUS. INSIDER (Jan. 19, 2019), <https://www.businessinsider.com/fyre-festival-expectations-vs-reality-2017-4> [<https://perma.cc/D6XR-5965>].

weekends” and “an immersive music festival.”²⁴⁴ The unknown festival gained traction when various celebrity influencers such as Hailey Baldwin, Emily Ratajkowski, and Bella Hadid began to promote the festival as an amazing experience, encouraging people to purchase tickets.²⁴⁵ Social media influencers were the driving force behind the promotion of Fyre Festival.²⁴⁶ They drew the attention of the public by advertising the event on their Instagram feeds.²⁴⁷

Reportedly, the festival first appeared when influencer and celebrity Kendall Jenner “announced it to her 100 million Instagram followers.”²⁴⁸ She was allegedly paid \$250,000 to do so.²⁴⁹ Fyre Festival proved the legitimacy of influencers as a marketing tool. This incident demonstrated influencers promoting events and products falsely and without an understanding or care about what they are promoting. The legal implications of this Note are not limited to the beauty industry. As seen in Parts I and II, the issue of covert advertisement expands to every other market from video games and fashion to exercise products. The central theme is the danger of unregulated influencers and unfair business practices.

As this Note has outlined, the influence social media stars wield in the market and on consumers has yielded profits for companies seeking to capitalize on the influencer’s brand of authenticity.²⁵⁰ Consumers, susceptible to social media influencers, lack sufficient protections and transparency about the advertisements and sponsorships they are bombarded with in fantastical pictures and videos.²⁵¹ Seemingly innocuous pictures displaying raving reviews on lipsticks, shirts, and other products are paid product reviews with guidelines on how to present said product.²⁵²

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Andrea Valdez, *Fyre Festival Documentaries Dissect Attendees’—And Your—FOMO (Fear of Missing Out)*, WIRED (Jan. 24, 2019), <https://www.wired.com/story/fyre-festival-documentaries/> [<https://perma.cc/Z3EW-XPXB>].

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* (stating that the alleged post has now been deleted since the debacle and infamy following the festival’s failure).

²⁵⁰ *See supra* Introduction.

²⁵¹ *See supra* Introduction.

²⁵² *See supra* Introduction.

The relatable image exuded by beauty gurus, such as Jaclyn Hill, and the gurus' influential reach to an audience of millions presented a new venue for advertisement and joint business dealings between influencers and brands that has proved profitable.²⁵³ Hidden advertisements and undisclosed sponsorships on social media has been an area lacking strong regulation by the Federal Trade Commission.²⁵⁴ The FTC provided updated Guidelines to respond to this new realm of advertisements, which has proved to be expansive and difficult to track compared to television or print media.²⁵⁵

The FTC Guidelines emphasized the use of “tags in pictures, disclosures in Snapchat and Instagram, the use of hashtags”²⁵⁶ and other built-in disclosure tools. The motto of the FTC was “clear and conspicuous” disclosure, but the Guidelines were far from establishing any sort of standard for what a disclosure should look like.²⁵⁷ Influencers were confused about how to clearly and conspicuously disclose and failed to comply despite numerous warning letters from the FTC,²⁵⁸ thus demonstrating a fundamental flaw in enforcement: the reliance on self-regulation and self-reporting of violations.²⁵⁹

Enforcement actions are few and far between, highlighting the difficulties of identifying violations and following up with actual enforcement.²⁶⁰ In comparison, the German model by its FTC equivalent, the *Landesmedienanstalten*, provided a stronger and more concise basis for guiding influencers and companies on how to clearly disclose to consumers any material business relationships.²⁶¹ The German guidelines provide stricter rules on the frequency and visibility of disclosure depending on the type of relationship that exists between influencers and companies and

²⁵³ See *supra* Introduction.

²⁵⁴ See *supra* Part I.

²⁵⁵ See *supra* Part I.

²⁵⁶ Fair, *supra* note 71.

²⁵⁷ See *supra* Part I.

²⁵⁸ See *supra* Part I.

²⁵⁹ See Follow Up on March Letter to Instagram Influencers, *supra* note 110; Letters from FTC to Instagram Influencers, *supra* note 108.

²⁶⁰ See *supra* Part I; see also Fair, *supra* note 71.

²⁶¹ See *supra* Part II.

how impartial the influencer's opinion may be as a result of material business relationships.²⁶²

In establishing an aggressive and clear level of transparency between consumers/followers of influencers, the *Landesmedienanstalten* clarified confusion and made it easier to enforce against high-profile social media influencers and garner attention of other influencers and their legal teams.²⁶³ However, there still remain the issues of awareness, stronger monitoring and enforcement capabilities, and increasing actual compliance by influencers and the companies affiliated with them.²⁶⁴

To address these concerns, this Note uses the guidelines established in Germany as its foundation and builds upon areas of concern such as the specific disclosure of affiliate links. Additionally, this Note suggests a three-pronged approach to the vast and poorly regulated realm of social media.²⁶⁵ The emphasis of this proposal aligns with the ideals promulgated by the FTC and *Landesmedienanstalten*: transparency, compliance, fairness in the markets, and protections for the average consumer.²⁶⁶

Establishing clear guidelines that instruct influencers on how and when they ought to disclose is a simple fix for honest influencers.²⁶⁷ Collaborative efforts with companies and social media platforms further raise awareness to naïve or unaware influencers on the exact guidelines, source of information, and duty to comply.²⁶⁸ Further, putting influencers on notice and tracking larger influencers for violations, and making these violations public beyond the FTC website, alerts companies and influencers to the ramifications of violating the Guidelines.²⁶⁹

Platforms such as Twitter have already collaborated to monitor political ads and can perhaps extend their programs to monitor suspicious advertisements.²⁷⁰ Even collaboration between the FTC and companies to notify popular influencers through PR

²⁶² See *supra* Part II.

²⁶³ See *supra* Part II.

²⁶⁴ See *supra* Part III.

²⁶⁵ See *supra* Part III.

²⁶⁶ See *supra* Parts I and II.

²⁶⁷ See *supra* Part III.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

Packages is a feasible and mutually beneficial means of placing influencers on notice beyond the FTC's sole capacity, and perhaps encourage influencers to notify their peers of regulations and compliance.²⁷¹ Simple changes such as clear rules, public enforcement actions against popular influencers and brands, and collaborative awareness efforts can promote transparency to consumers.²⁷²

Of course, this Note is aware that regulation still remains an issue in cases where influencers are deceitful. However, with increased awareness, reporting potential violators will be easier. If influencers know the rules, they can identify and report non-compliant peers and foster a stronger culture of self-regulation for the sake of fair competitive practices. Hypothetically, the aforementioned three-pronged approach could yield the results the FTC sought when it revised the Guidelines. The concept of self-regulation is far from new. Fields such as the legal profession itself self-regulates to an extent in terms of professional conduct and ethical responsibilities.²⁷³

This Note is aware of the limitations in its legal argument. The issue of covert advertisements, unfair business practices, and consumer protection, especially on a global medium such as the Internet, is a complex and vast issue. Considerations such as enforcement against non-citizens and lack of uniformity in regulations internationally yield other issues that are unresolved in this Note. However, a step toward the right direction is to recognize what can be done to promote transparency online in America.

This Note ultimately seeks to strike a balance between encouraging business transactions and protecting consumers and competitor brands from unfair and deceitful practices. Stricter and clearer Guidelines would simplify any questions influencers may have on when and how to disclose.²⁷⁴ It would also heighten the level of transparency for consumers so they can identify material relationships between influencers and companies and make informed purchases.²⁷⁵ Informed consumers also present the

²⁷¹ *Id.*

²⁷² *See supra* Introduction.

²⁷³ *Model Rules of Professional Conduct: Preamble & Scope*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ [<https://perma.cc/2XC7-QM8Y>].

²⁷⁴ *See supra* Part III.

²⁷⁵ *Id.*

additional risk of enforcement actions against violators.²⁷⁶ Awareness and ease of disclosure through collaborative efforts further assist the goal of transparency.²⁷⁷ Ultimately, the undue influence of brands on the integrity of influencers presents a real dilemma in ethical business practices. In the realm of beauty influencers, the glitter was not the only thing on sale—access to millions of unsuspecting followers was available to companies for the right price.

²⁷⁶ *Id.*

²⁷⁷ *Id.*