

THE REAL SPONSORS OF SOCIAL MEDIA: HOW INTERNET INFLUENCERS ARE ESCAPING FTC DISCLOSURE LAWS

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I. INTRODUCTION

Nine years ago Michelle Phan uploaded her first YouTube video,¹ a simple “Natural Looking Makeup Tutorial,” recorded on her laptop.² She did not have an eye-catching backdrop, ring light, or a camera crew. Nevertheless, the video was viewed over 40,000 times within the first week.³ YouTube was not as saturated as it is today, so it was common to start from the bottom without the high tech devices. As the years went on, Michelle’s videos became a bit more creative, her camera quality improved, and she became a household name (in the YouTube beauty–world).⁴ To adapt with her increasing popularity, she became a full-time Beauty Influencer.⁵ Influencers are “digital natives who post... to their...followers – who then rush out and buy the products they recommend.”⁶ She established her brand and began creating sponsored videos, where she was compensated to review beauty products.⁷ Michelle believed YouTube would be the global television of the future, and she was determined to be a part of the culture.⁸

Michelle is known in the YouTube beauty circles as one of the original Beauty Influencers, and most Beauty Influencers aspire to emulate her career. In 2012, Michelle added another aspect to her brand when she

¹ Natalie Robehmed, *How Michelle Phan Built A \$500 Million Company*, FORBES, (Oct. 5, 2015, 5:17 PM),

<http://www.forbes.com/sites/natalierobehmed/2015/10/05/how-michelle-phan-built-a-500-million-company/#4d026c4a99ae>.

² *Id.*

³ *Id.*

⁴ See Michelle Phan, *Lady Gaga Bad Romance Look*, YOUTUBE (Jan. 18, 2010), <https://www.youtube.com/watch?v=bHVOxhEjpp0>.

⁵ Robehmed, *supra* note 1.

⁶ Rachel Strugatz, *Bloggers and digital Influencers are reshaping the fashion and beauty landscape*, L.A. TIMES (Aug. 10, 2016, 6:00 AM), <http://www.latimes.com/fashion/la-ig-bloggers-20160809-snap-story.html> (Beauty Influencer Arielle Charnas posted about the Peter Thomas Roth Rose Stem Cell Bio-Repair Gel Mask on her Snapchat story. Within 24 hours, 502 masks were sold, or \$17,565 worth of product. That is equal to \$123,000 in sales in a week, \$527,000 in a month or almost \$6.4 million in a year).

⁷ Robehmed, *supra* note 1.

⁸ *Id.*

created Ipsy, a paid subscription service.⁹ Every month subscribers receive a glam bag filled with deluxe samples and full-sized beauty products.¹⁰ With over 1.5 million subscribers¹¹ and a team of nine other Beauty Influencers, known as Ipsy Stylists,¹² who post monthly videos about the glam bag, Ipsy is Michelle's most lucrative business venture to date.¹³ Today, the company is valued at over \$500 million.¹⁴ Since its inception, Ipsy has evolved into more than a subscription service. The company has an open studio with state-of-the-art equipment, props, cameras, and lighting for Beauty Influencers to create their own videos.¹⁵ Michelle believes the company's success is attributed to her niche market on the internet, stating "the beauty of the internet is there's a niche market for everything and if you can focus on it you can build a sustainable and viable business of it."¹⁶

In 2013, with over one billion YouTube views, and a successful business venture, Michelle started her own makeup line, Em, with the beauty company L'Oréal.¹⁷ Her cosmetic line had a wonderful start, but it was underperforming, despite its association with megabrand L'Oréal.¹⁸ In 2015, Michelle set out to "deconstruct [herself], [her] business, and find all of the holes in [her] empire."¹⁹ She was determined to "fill the holes... with people who could do it better."²⁰ Last year Ipsy purchased Em from L'Oréal, allowing Michelle to assume full control of the brand.²¹ Despite the setbacks, Michelle Phan established herself as a brand. She is a Beauty Influencer and a business woman.

⁹ *Id.*

¹⁰ IPSY: ABOUT US, <https://www.ipsy.com/about> (last visited Oct. 25, 2016).

¹¹ Michelle Phan, YOUTUBE, <https://www.youtube.com/channel/UCuYx81nzzz4OFQrhbKDzTng> (last visited Apr. 13, 2017).

¹² See *Who are the official ipsy Creators?* IPSY (Feb. 7, 2017, 5:44 PM), <http://help.ipsy.com/customer/en/portal/articles/452010-who-are-the-official-ipsy-creators->; Michelle Phan, *Back to School + Work Beauty, DIY + more*, YOUTUBE (Sept. 4, 2015), <https://www.youtube.com/watch?v=ezPXHkG77Ro>.

¹³ See Robehmed, *supra* note 1.

¹⁴ *Id.*

¹⁵ See David Yi, *Michelle Phan is starting over*, MASHABLE (Feb. 13, 2016), <http://mashable.com/2016/02/13/michelle-phan-starting-over/#FV618OclakqI>.

¹⁶ Robehmed, *supra* note 1.

¹⁷ *Id.*

¹⁸ Yi, *supra* note 15.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Michelle paved the way for Beauty Influencers today.²² Beauty Influencers are like celebrities in their own right. They receive press packages from companies; they are sent on paid vacations to the Caribbean and Europe; some are paid as much as actors on television; and they have a fan base that value their opinions and look to them for inspiration.²³ Companies allocate larger-than-ever budgets to digital strategy, and are spending less on celebrity endorsements and traditional advertising.²⁴ Beauty Influencers are changing the fashion and beauty landscape.²⁵ Women no longer rely on fashion and beauty magazines for advice; they now turn to Beauty Influencers.²⁶

Companies once relied solely on celebrity endorsements to reach their target market.²⁷ For years, cosmetics company CoverGirl, focused on its celebrity ambassadors Queen Latifah, Ellen DeGeneres and Katy Perry.²⁸ However, in 2016 it announced the company's first "CoverBoy," a 17-year-old, male Beauty Influencer.²⁹ With Beauty Influencers now at the forefront of digital advertising, naturally, consumer protection concerns will arise.³⁰ In an attempt to protect consumers in this new mode of advertising, the Federal Trade Commission (FTC) requires the relationship between an Influencer and a brand to be disclosed.³¹ In 2009, the FTC released updated information regarding the Guides to "advise the public on how to conduct affairs

²² See *YouTuber Creator Stories: How Michelle Phan Became Everyone's Beauty Bestie*, THINK WITH GOOGLE, <https://www.thinkwithgoogle.com/case-studies/michelle-phan.html>.

²³ See Desi Perkins (@desiperkins), INSTAGRAM (Oct. 19, 2016), <https://www.instagram.com/p/BLsZJvxhFxF/?taken-by=desiperkins&hl=en>; see also Desi Perkins, Bora Bora- The Perkins), YOUTUBE (Oct. 24, 2016), <https://www.youtube.com/watch?v=OUNTM67whxE>.

²⁴ Strugatz, *supra* note 6.

²⁵ *Id.*

²⁶ *Id.*; see also Andrea Chang, *YouTube's biggest stars are cashing in offline*, L.A. TIMES (Aug. 7, 2014), <http://www.latimes.com/business/la-fi-youtube-stars-20140808-story.html> ("Any company that has money is approaching YouTubers").

²⁷ See Martin Role, *Celebrity Endorsement Guide*, BRANDING STRATEGY INSIDER (Oct. 2, 2010), http://www.brandingstrategyinsider.com/2010/10/celebrity-endorsement-guide.html#.WBEBK-JMrL_Q.

²⁸ Maria Puente, *Katy Perry is the new face of CoverGirl Cosmetics* (Oct. 16, 2013), <https://www.usatoday.com/story/life/people/2013/10/16/katy-perry-is-the-new-face-of-covergirl-cosmetics/2996729/>.

²⁹ Stephanie Saltzman, *CoverGirl Just Announced Its First-Ever Male Brand Ambassador*, FASHIONISTA BLOG (Oct. 11, 2016), <http://fashionista.com/2016/10/covergirl-male-ambassador-james-charles>.

³⁰ See Fed. Trade Comm'n, *The FTC's Revised Endorsement Guides: What People Are Asking* (June 2010), <http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guides-what-people-are-asking> [hereinafter *Revised Endorsement Guides*].

³¹ *Id.*

regarding sponsorship disclosure.”³² In 2015, it updated the “What People Are Asking” page, to address disclosure language, specifically social media disclosure, but it did not change the underlying principles and policies relating to endorsements.³³

Despite the new wave of social media and its continued influence on the beauty and fashion industry, the FTC has not made any major updates to the Guides itself.³⁴ The FTC has not addressed this change head on, but it desperately needs to. Part I of this note will discuss the history of social media, specifically YouTube, and its relationship with Beauty Influencers. Part II will discuss the FTC, generally, and FTC disclosure law. Part III will address the holes in disclosure law, as applicable to current social media trends, which opens the door for Beauty Influencers and brands to engage in deceptive behavior. Part IV will provide suggestions as to how the FTC should address the current state of social media, Beauty Influencers and its influence on consumers.

II. HISTORY

A. Emergence of Social Media

The early 2000’s was a very important time for social media; Myspace launched in 2003, Facebook and Twitter in 2006 and Tumblr in 2007.³⁵ For the first time in what seemed like forever, the way people interacted with each other changed. It became easier to catch up with friends from 10 years ago, meet family members you heard stories about, and interact with your peers when discussing important entertainment and political events.³⁶ Fast-forward a decade, there is now an app or website for almost every form of communication. Sharing exciting photos with friends?

³² Leah W. Feinman, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 103 (2011).

³³ Alysia Zelter Hutnik & Devon Winkles, *FTC Updates FAQs for Endorsement Guides, Offers More Guidance On Social Media and Video Endorsements*, ABOVE THE LAW (June 12, 2015, 10:00 AM), <http://abovethelaw.com/2015/06/ftc-updates-faqs-for-endorsement-guides-offers-more-guidance-on-social-media-and-video-endorsements/>.

³⁴ *Id.*

³⁵ Drew Hendricks, *Complete History of Social Media: Then And Now*, SMALL BUSINESS TRENDS (May 8, 2013), <https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html>; Eric Schonfeld, (*Founder Stories*) *Why David Karp Started Tumblr: Blogs Don’t Work For Most People*, TECH CRUNCH (Feb. 21, 2011), <https://techcrunch.com/2011/02/21/founder-stories-why-david-karp-started-tumblr-blogs-dont-work-for-most-people/>.

³⁶ See Sara Gates, *Facebook Reunites Sisters After 72 Years*, THE HUFFINGTON POST (Jan. 9, 2013), http://www.huffingtonpost.com/2013/01/07/facebook-reunites-sisters-tanija-delic-hedija-talic-bosnia_n_2425866.html.

Instagram.³⁷ Sharing your thoughts in 140 characters or less? Twitter.³⁸ Sharing a nine second video of a cool moment? Snapchat.³⁹ The list goes on. In 2015, there was an estimated 2.14 billion social media users worldwide.⁴⁰ Seven percent of American adults used social media in 2005, but usage skyrocketed to sixty-five percent in 2015.⁴¹ Ninety percent of young adults (age 18-29) use social media, while those aged sixty-five and older have continuously increased their usage since 2005.⁴²

B. Social Media Today: Effect on Celebrities and Beauty Influencers

1. Celebrities

Social media broadened the traditional definition of communication, and celebrities caught on. With social media at your fingertips, it is easier to keep up with your favorite Kardashian, receive fashion advice from your favorite model, and catch up on the latest celebrity gossip in real time. Celebrities are maximizing their fame and fortune simply by tweeting a fan or raving about their favorite beauty products on Snapchat.⁴³ There is more to a celebrity's social media profile than what the public thinks.⁴⁴

The way celebrities communicate with fans has evolved through social media. Their profiles are dedicated to maintaining their brand image, building relationships with their fan base, reforming their celebrity image and utilizing their profiles to distribute content.⁴⁵ It is common for publicists to control celebrities' social pages by consistently uploading content; however,

³⁷ See Instagram, *About Us*, <https://www.instagram.com/about/us/> (last visited Oct. 29, 2016).

³⁸ See Twitter, *It's What's Happening*, <https://about.twitter.com/company> (last visited Oct. 29, 2016).

³⁹ See Snapchat, *Getting Started*, <https://support.snapchat.com/en-US/article/create> (last visited Oct. 29, 2016).

⁴⁰ Statista, *Number of social media users worldwide from 2010 to 2020 (in billions)*, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited Oct. 29, 2016).

⁴¹ Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CENTER (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>.

⁴² *Id.*

⁴³ See Emily Arata, *A Guide to the \$4,000 of Beauty Swag Kim K Just Showed Off On Snapchat*, ELITE DAILY (July 5, 2016, 1:05 PM), <http://elitedaily.com/women/kim-kardashian-beauty-snapchat/1543100/>.

⁴⁴ Thomas Clayton, *5 Ways Celebrities' Social Media Presence Evolved in 2012*, THE HUFFINGTON POST BLOG (Jan. 22, 2013, 5:43 PM), http://www.huffingtonpost.com/thomas-clayton/celebrities-social-media_b_2529151.html.

⁴⁵ *Id.*

it is evident that some celebrities control their own accounts.⁴⁶ The content from the celebrity-controlled accounts is not as rigid and doesn't appear too "perfect." It is honest, funny and inviting. Supermodel Chrissy Teigen is known for her hilarious, filter-free tweets that fans love.⁴⁷ Once they have established a connection with their fan base on social media, their profiles become the main source of updates.⁴⁸ Trailers for their new movies will be posted on Facebook and pictures from an upcoming magazine cover will be uploaded to Instagram. Celebrities social media presences allows them to "directly distribute[] their own un-regulated content to their fans... [which] benefits the celebrity monetarily... [and] the fans [because] they feel a more personal connection to the stars they love."⁴⁹

2. Beauty Influencers

In the next 60 seconds 300 hours of video footage will be uploaded to YouTube.⁵⁰ The topics will range from beauty, fashion, comedy and technology.⁵¹ YouTube subscribers will learn about new products—lipsticks, video games or vlogs (video blogs).⁵² Michelle Phan may have paved the way for Beauty Influencers today, but she is no longer the "go-to Beauty Influencer." Almost every beauty brand has a select few Beauty Influencers that it relies on to review its products.⁵³ Some started their career the old fashion way on YouTube (continuously posting videos and engaging with subscribers in the comments section), but others utilized social media sites such as Instagram and Facebook before joining YouTube.⁵⁴ Today, it is not

⁴⁶ *Id.*

⁴⁷ See Morgan Baila, *All The Times Chrissy Teigen Was My Life Guru on Twitter*, REFINERY29 (last updated Oct. 5, 2016), <http://www.refinery29.com/2016/07/11/7976/chrissy-teigen-twitter-funny-tweets#slide-1>.

⁴⁸ See generally Clayton, *supra* note 44.

⁴⁹ Clayton, *supra* note 44.

⁵⁰ Craig Smith, *160 Amazing YouTube Statistics*, DMR (last updated Feb. 13, 2017), <http://expandedramblings.com/index.php/youtube-statistics/>.

⁵¹ See Christian Cawley, *7 Most Popular Type of YouTube Video You Can Make Today*, MAKE USE OF (Mar. 7, 2016), <http://www.makeuseof.com/tag/7-popular-types-youtube-video-can-make-today/>.

⁵² See Saikat Basu, *10 Interesting Things You Can Learn on YouTube*, MAKE USE OF (May 13, 2015), <http://www.makeuseof.com/tag/10-interesting-things-can-learn-youtube/>.

⁵³ See generally Cheryl Wischhover, *The Biggest YouTube Beauty Secret Has Nothing to Do With Makeup*, RACKED BLOG (June 2, 2016, 9:10 AM), <http://www.racked.com/2016/6/2/11828904/beauty-vlogger-youtube-ring-lights>; Tarte Cosmetics (@tartecosmetics), INSTAGRAM (Oct. 23, 2016), <https://www.instagram.com/p/BLuhnpjkaG/?taken-by=tartecosmetics&hl=en>.

⁵⁴ See generally Shayla (@makeupshayla), INSTAGRAM, <https://www.instagram.com/makeupshayla/?hl=en> (last visited Feb. 24, 2017); Denise (@makeupbydenise) INSTAGRAM,

unusual for an influencer to build support and a fan base on other social media sites prior to joining YouTube. The most common platform is Instagram because it provides the visual aspect that YouTuber's need to demonstrate their skills and their eye for creativity.⁵⁵ That did not affect their career because like YouTube, Instagram is a visual-based site. It allows direct communication with followers and, at times, can be more personal. However, YouTube influencers are the "biggest" Beauty Influencers.⁵⁶ They are first in line to receive public relation packages from fashion and beauty houses.⁵⁷ They are chosen to travel to exotic locations with well-known makeup brands.⁵⁸ And it is their faces you see on the newest beauty product campaign when you walk into your nearest drugstore or department store.⁵⁹

Brands are turning to Beauty Influencers because of their close connection with target markets.⁶⁰ Consumers are more likely to go online and seek advice or inspiration from Beauty Influencers than go to a department store and work with a professional beauty consultant.⁶¹ Beauty influencers filmed Eighty-six percent of the top 200 most-viewed beauty videos on YouTube, and only fourteen percent were filmed by beauty brands.⁶² However, Beauty Influencers have become professional consultants in their own right. Some have agents, their own production companies and full-time staff.⁶³ They have press packages and negotiate fee contracts, much like what

<https://www.instagram.com/makeupbydenise/> (last visited Feb. 24, 2017).

⁵⁵ See Jessica Willingham, *11 Best YouTube Beauty Vloggers to Follow If You're Looking to Up Your Makeup Game*, BUSTLE (Mar. 26, 2015), <https://www.bustle.com/articles/72139-11-best-youtube-beauty-vloggers-to-follow-if-youre-looking-to-up-your-makeup-game>.

⁵⁶ Jane Lauder: *YouTube Celebs Are the Biggest Beauty Influencers*, FORTUNE BLOG (Sept. 29, 2016, 3:29 PM), <http://fortune.com/video/2016/09/29/youtube-celebs-beauty-influencers/>.

⁵⁷ *Id.*

⁵⁸ Jennifer and Tonic, *Tarte Cosmetics is Sending Influencer to Bora Bora ... Again #TRIPPINGWITHTARTE #TAKETWO*, JENNIFER AND TONIC BLOG, <http://mommyscrubs.blogspot.com/2016/10/trippin-with-tarte-bora-bora.html> (last visited Feb. 24, 2017).

⁵⁹ See generally Kirby Johnson, *Instagram's Best Bloggers Show Off 4 Brow Style – And I Will Surprise You*, POPSUGAR (Aug. 14, 2016), <http://www.popsugar.com/beauty/Benefit-Cosmetics-Brow-Kits-2016-42210343#photo-42210343>.

⁶⁰ Strugatz, *supra* note 6.

⁶¹ See Deborah Weinswig, *Influencers Are The New Brands*, FORBES (Oct. 5, 2016), <https://www.forbes.com/sites/deborahweinswig/2016/10/05/influencers-are-the-new-brands/#14d6a5067919>.

⁶² Elizaveta Gromova, *Stats and Facts: Behind The Beauty Influencers On YouTube*, WELKER MEDIA (Oct. 5, 2016), <http://welkermmedia.com/daily/beauty-influencers-youtube/>.

⁶³ Mya Washington, *About Mya*, SHAMELESS MYA, <http://shamelessmaya.com/> (last visited Feb. 24, 2017); See, Jo Piazza, *It Girl Inc.: How Much Money Social*

is expected of an international celebrity. By combining their creativity with an effective business plan, Influencers can turn their YouTube channel and other social media platforms into a full-time job, and in the long run, a career. On average, popular Influencers make at least \$40,000 a year simply off creating, editing and posting videos.⁶⁴ To be clear, however, that number will vary based on the Influencer's subscribers, total views per video, engagement, ads placed throughout each video, and most importantly YouTube's ever-changing algorithm.⁶⁵ Solo YouTube videos are not always the only source of income.⁶⁶ Most Influencers are signed to a network that promises to provide more opportunities and room for growth.⁶⁷ Additionally, Influencers are paid for sponsored videos or social media posts.⁶⁸ Influencers with over one million Instagram followers can make \$15,000 per post.⁶⁹

Media's Biggest Style Stars Really Make, MARIE CLAIRE (Aug. 17, 2016), <http://www.marieclaire.com/fashion/news/a22091/business-of-style-stars/> (Chiara Ferragni created her fashion blog in 2009. Today, she has over 6.2 million followers on Instagram, receives \$50,000 to host events, launched her own shoe line and works with popular fashion houses such as Yves Saint Laurent to promote their latest products. Almost a decade after her first blog post, she became a successful entrepreneur, employs 14 people, and has garnered approximately seven million dollars in revenue).

⁶⁴ Gromova, *supra* note 62.

⁶⁵ Edward Cox, *Did YouTube's Algorithm Change? Reactions From Big, Small YouTubers*, HEAVY: TECH (Dec 8, 2016, 2:45 PM), <http://heavy.com/tech/2016/12/youtube-algorithm-change-reactions-pewdiepie-jacksepticeye-delete-channel-new-algorithm-how-to-boost-views-revenue/>; *See generally*, Sam GuTelle, *YouTube's Big Change To Its Monetization Policy Isn't A Change At All*, TUBEFILLER (Sept. 1, 2016), <http://www.tubefiller.com/2016/09/01/youtube-advertiser-friendly-demonetization/>.

⁶⁶ Maya Kachoo-Levine, *How Do YouTubers Make Money? A Pro YouTuber Explains Just How The Whole System Works*, BUSTLE (Aug. 10, 2015), <https://www.bustle.com/articles/103239-how-do-youtubers-make-money-a-pro-youtuber-explains-just-how-the-whole-system-works>.

⁶⁷ Joulzey (@Joulzey), YouTube (Dec. 26, 2016), <https://www.youtube.com/watch?v=qO4yz4tNaC4>; YouTube, *Multi-Channel Network (MCN) Overview For YouTube Creators*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2737059?hl=en> (last visited Jan., 5, 2017).

⁶⁸ Piazza, *It Girl Inc.: How Much Money Social Media's Biggest Style Stars Really Make*, MARIE CLAIRE (Aug. 17, 2016), <http://www.marieclaire.com/fashion/news/>.

⁶⁹ Ben Brown, *Making \$15,000 PER POST. Why Instagram Is Now The Best Social Network For Online Retailers*, BITCATCHA (last updated Apr. 10, 2017), <https://www.bitcatcha.com/blog/2015/making-15000-per-post-why-instagram-is-now-the-best-social-network-for-online-retailers/>; *see also* Mya Washington, *About Mya*, SHAMELESS MYA, <http://shamelessmaya.com/> (last visited Feb. 24, 2017) (\$2,000 per post for influencers with 25,000 to 100,00 followers, \$1,000 fee for every additional plink in a post and \$500 for every additional hashtag in a post).

Influencers continue to dominate the beauty and fashion industry. “They are businesswomen who are basically running mini-empires on their own.”⁷⁰

III. THE FTC

A. *General Overview of The Federal Trade Commission*

On September 26, 1914, the Federal Trade Commission Act (FTCA) was signed into Law.⁷¹ Its mission was to prevent unfair methods of competition in commerce as part of the battle to “bust trusts.”⁷² To keep up with the changing economy, Congress continues to pass additional laws giving the agency greater authority to police anticompetitive practices.⁷³ In 1938, Congress broadened the scope of the Federal Trade Commission’s (FTC) authority to encompass a broad prohibition against unfair and deceptive acts or practices.⁷⁴

Over time, the FTC has expanded its original purpose. It is committed to: (1) preventing business practices that are anticompetitive or unfair to consumers; (2) enhancing informed consumer choice and public understanding of the competitive process; (3) accomplishing this without unduly burdening legitimate business activity.⁷⁵ The FTC’s vision and purposes are implemented through three strategic goals: protecting consumers, maintaining competition and advancing performance.⁷⁶

B. *FTC Disclosure Law*

1. *Brief History*

Relationships between brands and public figures have been a topic of conversation since the early twentieth century.⁷⁷ In 1912 Congress enacted the Newspaper Publicity Act.⁷⁸ It subsidized postage publishers so long as it distinguished content that was paid with money or other valuable consideration, as advertisements.⁷⁹ When radio advertising came to the

⁷⁰ Piazza, *supra* note 68.

⁷¹ Fed. Trade Comm’n, *Our History* (2017), <https://www.ftc.gov/about-ftc/our-history>.

⁷² Fed. Trade Comm’n, *About the FTC* (2017), <https://www.ftc.gov/about-ftc>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 327, 332 (2004).

⁷⁸ *Id.* at 335.

⁷⁹ *Id.*

forefront, Congress enacted §19 of the Radio Act of 1927 to combat any attempts to deceive listeners by requiring broadcasters to disclose the role of sponsors in their programming.⁸⁰

In 1934 Congress enacted the Communications Act to regulate interstate and international communications.⁸¹ Through the act, Congress later established the Federal Communications Commission (FCC).⁸² The FTCA and the Communications Act of 1934 are the only relevant pieces of legislation that address regulations for disclosure of sponsorship.⁸³ The 1934 Act addresses sponsorship disclosure regulation in broadcasting⁸⁴ and the FTCA governs all types of trade and commerce.⁸⁵ Today, Influencers' use of social media, as a source of advertising, is governed predominantly by the FTC under the FTCA.⁸⁶

2. *FTC Authority*

The FTC was created to regulate unfair methods of competition. The Commission's goal is to protect consumers by focusing on unfair or deceptive practices in or affecting commerce.⁸⁷

Section 5 of the FTC Act declares unfair or deceptive practices unlawful. Section 12 specifically prohibits false ads likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 defines a false ad for purposes of Section 12 as one which is "misleading in a material respect."⁸⁸

The FTC reviews deceptive practices on a case-by-case basis based on the following elements. First, it will determine if there is a representation, omission or practice that is likely to mislead the consumer.⁸⁹ Misleading practices may include:

false oral or written representations, misleading price claims, sales of hazardous or systematically defective

⁸⁰ *Id.* at 333-34.

⁸¹ *Id.* at 335-36.

⁸² Kielbowicz, *supra* note 77, at 335-336.

⁸³ *Id.*

⁸⁴ 47 U.S.C. § 151 (2012).

⁸⁵ 15 U.S.C. § 45(b) (2012).

⁸⁶ *Id.* § 45(b).

⁸⁷ FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [hereinafter FTC ON DECEPTION].

⁸⁸ *Id.*

⁸⁹ *Id.* at 1.

products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.⁹⁰

Second, it “examine[s] the practice from the perspective of a consumer acting reasonably in the circumstances.”⁹¹ It also examines representations or practices directed toward a particular group by examining the reasonableness from the perspective of that group.⁹² Third, the Commission will examine whether the representation, omission, or practice is material:

The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.⁹³

Accordingly, a practice is deceptive, if to a consumer's detriment, it is likely to mislead a consumer acting reasonably under the circumstances.⁹⁴

3. *FTC Endorsement Guides*

In an attempt to assist consumers and brands in the scope of disclosure law, the FTC released Endorsement Guides (the Guides).⁹⁵ It is essentially a “frequently asked question” section of the FTC's website. Entitled “What People Are Asking,” the page is a source of informal guidance relating to the Guides.⁹⁶ The Guides apply to all advertising media – social media and traditional media.⁹⁷ The Guides are the Commission's interpretations of the Act, and its main principle is to promote honesty.⁹⁸ The FTC promotes a truth-in-advertising principle which follows that endorsements must be honest and not misleading.⁹⁹ It “must reflect the honest opinion of the endorser and can't be used to make a claim that the product's

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² FTC ON DECEPTION, *supra* note 87.

⁹³ *Id.*

⁹⁴ *Id.* at 2.

⁹⁵ Hutnik, *supra* note 33.

⁹⁶ *Endorsement Guides*, *supra* note 30.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

marketer couldn't legally make."¹⁰⁰ Since the FTC regulates practices only after they are reported, "the Guides were designed to encourage voluntary compliance by informing endorsers and advertisers of how to conform their practices to the requirements of the Act."¹⁰¹

a. Legal Basis for the Guides

Standing alone, the Guides do not have the force of law. However, practices that do not align with them, may violate sections of the FTCA.¹⁰² The Guides' legal authority stem from Section 5 of the FTCA.¹⁰³ The FTCA prohibits "unfair or deceptive acts or practices in or affecting commerce."¹⁰⁴ The Guides spell out a three-part test to determine whether a representation, omission or act is deceptive.¹⁰⁵ First, "the representation, omission, or practice must mislead or be likely to mislead the consumer."¹⁰⁶ Second, "the consumer's interpretation of the representation, omission, or practice must be reasonable under the circumstances."¹⁰⁷ Lastly, "the misleading representation, omission or practice must be material."¹⁰⁸ In 2009, the FTC promulgated changes that focused on consumer-generated content, and the amendment clarified the Guides applicability to new technology endorsements by including examples.¹⁰⁹

¹⁰⁰ *Id.*

¹⁰¹ Lea W. Feinman, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 121-22 (2011) (discussing the FTC Endorsement Guides).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ FED. TRADE COMM'N Act § 5, 15 U.S.C. § 45(a)(1) (2012).

¹⁰⁵ Consumer Compliance Handbook, *Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices* (2016), <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; 16 C.F.R. § 255.0 (2009) (Example 8: "A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money... Assuming the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides").

¹⁰⁹ 16 C.F.R. §§ 255.0, 255.1, 255.5 (2009).

b. Proper Disclosure

1. Endorsements: Defined

Under Section 255.0, an endorsement is:

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.¹¹⁰

The FTC categorizes testimonials as advertisements.¹¹¹ Thus, when “advertisements” are mentioned, the language also applies to testimonials.¹¹²

2. When to disclose

Influencers must disclose an endorsement if there is any material connection between an endorser and an advertiser.¹¹³ Because most Beauty Influencers are compensated for posting onto their social media platforms, the FTC considers this to be a material relationship, and it requires disclosure.¹¹⁴ Disclosure is also required if the Influencer is promoting a brand with which she has a relationship.¹¹⁵ Using Michelle Phan as an example, she must disclose her status as founder of Ipsy when she is promoting it to her followers. Furthermore, an Influencer must disclose her affiliation with the brand if she is being compensated in any way to promote or endorse a product or brands.¹¹⁶

¹¹⁰ 16 C.F.R. § 255.0(b).

¹¹¹ *Id.* § 255.0(b).

¹¹² *Id.* § 255.0(b).

¹¹³ *A How-To Guide for Properly Disclosing Your Sponsored Posts*, THE FASHION LAW BLOG (Aug. 31, 2016), <http://www.thefashionlaw.com/home/a-how-to-guide-for-properly-disclosing-your-sponsored-posts?rq=ftc> [hereinafter *How-To Guide*].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The disclosure requirement does not discriminate. A simple photo can trigger the rule.¹¹⁷ By posting a photo of a product, it can potentially convey a positive opinion, and if it does, disclosure is required.¹¹⁸

Brands typically work with Beauty Influencers for long periods of times, and this relationship is also affected by the disclosure requirement.¹¹⁹ For example, prior to launching its new line of concealers, cosmetics company NARS, worked with Beauty Influencer Jackie Aina. She released a series of YouTube Videos, Instagram posts, and Tweets demonstrating how to use the product, and referred to it as “one of her favorite concealers.”¹²⁰ In a situation like Jackie’s, disclosure is required for each individual post and upload.¹²¹

Twitter is known for its 140-character limit updates; in fact, the limit is what makes Twitter, Twitter; however, the FTC says character limits are not an excuse for failing to disclose.¹²² To work around the character limit issue, “Ad” or “#ad” can be used instead of spelling out the entire word.

The rules govern contests as well. When conducting giveaways on their social media platforms, Beauty Influencers and brands must disclose all rules from the beginning.¹²³

In sum, the FTC states disclosures in social media posts require the inclusion of “clear and conspicuous” disclosures near the beginning of each post.¹²⁴

3. *How to Disclose*

At the center of the disclosure requirement for material connections between advertisers and endorsers is the need for “clear and conspicuous” disclosures.¹²⁵ In Section 255.5, the FTC broadly defines “clear and conspicuous,” and included factors it considers when determining whether a disclosure is clear and conspicuous.¹²⁶ Disclosure is required near the

¹¹⁷ *Id.*

¹¹⁸ *How-To Guide, supra* note 113.

¹¹⁹ *See generally How-To Guide, supra* note 113.

¹²⁰ Jackie Aina (@JackieAina), YOUTUBE (July 30, 2016), https://www.youtube.com/watch?v=N_QMLQNfN54; Jackie Aina (@JackiAina), INSTAGRAM (July 30, 2016), https://www.instagram.com/p/BII0lmJD-_Y/?taken-by=jackieaina&hl=en.

¹²¹ *See id.*

¹²² *How-To Guide, supra* note 113.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 16 C.F.R. § 255.5.

beginning of posts.¹²⁷ Abbreviations such as “ad” or clear statements that the/a brand has endorsed the post, will suffice. ‘Sp’ is not accepted.¹²⁸ The disclosure must be:

- “Close to the claims to which it relates (ie., do not hide the disclosure all the way at the bottom of the post or bury it amongst other text or other hashtags, or add "ad" at the end of another hashtag);
- In an easily readable font and font size;
- In a color that stands out against the background (ie., one cannot hide the disclosure this way either);
- [For video ads] On the screen long enough to be noticed, read, and understood; and
- [For audio disclosures] Read at a cadence that is easy for consumers to follow and in words consumers will understand.”¹²⁹

Additionally, disclosures are measured by a reasonable consumer’s perception and understanding of the disclosure. Influencers have freedom as to how they formulate disclosures so long as they are large, clear, and appropriate.¹³⁰ In sum, disclosures cannot be hidden among texts or at the end of other hashtags.¹³¹ Disclosures must be in an easily readable font and font size,¹³² and must be in a color that stands out against the background.¹³³ For sponsored videos- disclosure must be on the screen long enough to be noticed read and understood.¹³⁴

IV. CRITICISM OF THE GUIDES: WHAT PEOPLE ARE SAYING

A. Commentators and Bloggers Differing Opinions

Prior to the 2015 Q&A section of the FTC’s website, the Guides were last updated in 2009. The change came in response to changes in the forms

¹²⁷ *How-To Guide*, *supra* note 113.

¹²⁸ 16 C.F.R. § 255.5 (“Sp” is sometimes used in place of “sponsor” or “sponsored”).

¹²⁹ *Id.* § 255.5.

¹³⁰ *Id.* § 255.5.

¹³¹ *Id.* § 255.5.

¹³² 16 C.F.R. § 255.5.

¹³³ *Id.* § 255.5.

¹³⁴ *Id.* § 255.5.

in which testimonials were being presented.¹³⁵ Bloggers, advertisers and commentators all have varying opinions on the Guides.¹³⁶ Commentators believed the Guides were introduced later than expected; on the other hand, bloggers were worried and a bit skeptical about its release.¹³⁷

Blogger and professor, Dan Gillmor, published an article in response to the FTC's release and received support on his viewpoints from fellow bloggers.¹³⁸ According to Gillmor, the FTC's disclosure requirements for advertisers and endorsers, which are centered around material connections, and penalties of up to \$11,000 in fines for violations, are "unworkable in practice."¹³⁹ Gillmor believes the rules are "worryingly vague and wide-ranging."¹⁴⁰ The Guides focus appears to be on giving traditional print and broadcast journalists a pass, but it applies "harsh regulations to bloggers (and others using conversational media of various kinds)."¹⁴¹ He goes on to say the Guides, in the end, are "an attack on markets and free speech, based on the 20th Century notion of media and advertising that simply does not map to the new era."¹⁴² Gillmor opines that there is a difference between advertising of the past, and present day advertising.¹⁴³ Advertising of the past was a one-to-many system, but today, the internet is a many-to-many system.¹⁴⁴ The past focused on broadcasting, and today the focus is on conversation.¹⁴⁵ Furthermore, advertisers and endorsers must rely on examples to determine

¹³⁵ Lucille M. Ponte, *Mad Men Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews*, 12 J. MARSHALL REV. INTELL. PROP. L. 462, 475 (2013) (discussing changes to the Guides which were initiated as a result of consumer action).

¹³⁶ Alissa Del Riego, *Digest Comment- Context for the Net: A Defense of the FTC's New Blogging Guidelines*, Jolt Digest (Dec. 19, 2009), <http://jolt.law.harvard.edu/digest/digest-comment-context-for-the-net-a-defense-of-the-ftc-e2-80-99s-new-blogging-guidelines>.

¹³⁷ *Id.*

¹³⁸ Dan Gillmor, *A Dangerous Federal Intervention in Social Media*, MEDIACTIVE (Oct. 5, 2009), <http://mediactive.com/2009/10/05/a-dangerous-federal-intervention-in-social-media/>; See Dan Gillmor, *About Dan*, <http://dangillmor.com/about/> (last visited Apr. 13, 2017) (Dan Gillmor is a Professor of Digital Media Literacy at Arizona State University. He publishes books about media and journalism, write commentaries for his own site as well as Future Tense and Backchannel. He is an active member of the media community as he is an investor in media companies and is also a board member or advisor for other media companies).

¹³⁹ Dan Gillmor, *A Dangerous Federal Intervention in Social Media*, MEDIACTIVE (Oct. 5, 2009), <http://mediactive.com/2009/10/05/a-dangerous-federal-intervention-in-social-media/>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Gillmor, *supra* note 139.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

when disclosure is required.¹⁴⁶ However, the examples cannot provide the advertisers or endorsers with a level of security.¹⁴⁷ Bloggers or Influencers are not always sure when they are required to disclose a relationship with a brand.¹⁴⁸

Gillmor concludes, by stating the FTC's motives "seem to be well-intentioned," and it is always better to disclose than hide an affiliation with a company, but he loathes the idea of using bloggers and other online conversations are "commercial sock puppets in a sleazy online word-of-mouth operation."¹⁴⁹ He further elaborates that the real focus should be enforcing fraud laws against "serious fraudsters" that continue to get away with the illegal acts before imposing harsh regulations on speech.¹⁵⁰

Alternatively, some commentators believe the FTC's new found focus on non-traditional media is "good."¹⁵¹ Ryan Jones, commentator and analyst,¹⁵² believes there is nothing to worry about, in regards to the Guides.¹⁵³ Jones states the Guides can only help bloggers.¹⁵⁴ If they (bloggers) want to be treated as seriously as newspaper journalists, they too need to start following the same rules and guidelines.¹⁵⁵ He goes on to state, "the FTC rules are pretty simple" and easy to abide by.¹⁵⁶ If there is truly confusion as to whether disclosure is required, to be on the safe side, just disclose.¹⁵⁷ If someone is still worried about whether to disclose, Jones believes the decision is simple: do not do paid review or posts, and do not accept freebies.¹⁵⁸

B. Basis for the Criticisms

The criticism of the Guides is centered around four basic topics: 1) restricting speech, 2) a double standard in traditional and new advertising mediums, 3) the unenforceability of the Guides and 4) imbalance of responsibility between advertisers and bloggers or Influencers.¹⁵⁹

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Gillmor, *supra* note 139.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Ryan Jones, *Why the FTC Blog Monitoring is Good*, DotCULT (June 22, 2009), <http://www.dotcult.com/why-the-ftc-blog-monitoring-is-good/>.

¹⁵² Ryan Jones, *Ryan Jones*, DotCULT, <http://www.dotcult.com/ryan-jones/> (last visited Apr. 13, 2017).

¹⁵³ Jones, *supra* note 151.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Jones, *supra* note 151.

¹⁵⁹ Del Riego, *supra* note 136.

1. Restricting Speech

As stated earlier in this note, Dan Gillmor, along with other commentators believe the requirements imposed by the Guides can, and will affect Influencers free speech.¹⁶⁰ With the fear of fines looming over each post or paid sponsorship, Influencers will be discouraged from expressing their honest, or paid opinion about products.¹⁶¹ According to commentators, this will result in advertisers cutting back on relying on Influencers to reach a certain target market.¹⁶² The FTC strongly stated that testimonials “are regulated only when a blogger purports to be representative of all product users and when the advertiser cannot substantiate the bloggers claims.”¹⁶³

It is important to note, however, the Guides may restrict speech under certain circumstances. An honest opinion, idea or belief is protected under the First Amendment, but an opinion that does not reflect a genuine belief of the reviewed, and is limited to the reviewed experience is not protected under the First Amendment.¹⁶⁴ Influencers may be fined when they present misleading opinions to their audiences.¹⁶⁵ Despite the nature of the Guides and whether it actually restricts free speech, the FTC has authority to regulate speech under *Central Hudson v. Public Service Commission*.¹⁶⁶

2. Traditional and New Advertising Mediums

Bloggers and Influencers believe the FTC is cracking down on their respective mediums,¹⁶⁷ but the FTC disagrees. It stated the restrictions on the new advertising mediums was an attempt to distinguish between those who receives the compensation and who does the review.¹⁶⁸ FTC Commissioner Richard Cleland stated the FTC’s main criteria is the degree of relationship between the advertiser and the blogger.¹⁶⁹

The primary situation is where there’s a link to the sponsoring seller and the blogger,’ said Cleland. And if a blogger repeatedly reviewed similar products (say, books or

¹⁶⁰ *Id.*; Gillmor, *supra* note 139.

¹⁶¹ Del Riego, *supra* note 136.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Del Riego, *supra* note 136; *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

¹⁶⁷ Ponte, *supra* note 135.

¹⁶⁸ Edward Champion, *Interview with the FTC’s Richard Cleland*, RELUCTANT HABITS (Oct. 5, 2009), <http://www.edrants.com/interview-with-the-ftcs-richard-cleland/>.

¹⁶⁹ *Id.*

smartphones), then the FTC would raise an eyebrow if the blogger either held onto the product or there was any link to an advertisement.¹⁷⁰

To further explain the difference between the mediums, the commissioner uses an example: a blogger and a newspaper both receive books to review.

In the case where the newspaper receives the book and it allows the reviewer to review it, it's still the property of the newspaper. Most of the newspapers have very strict rules about that and on what happens to those products. In the case of books, Cleland saw no problem with a blogger receiving a book, provided there wasn't a linked advertisement to buy the book and that the blogger did not keep the book after he had finished reviewing it. Keeping the book would, from Cleland's standpoint, count as "compensation" and require a disclosure.

Cleland said that a disclosure was necessary when it came to an individual blogger, particularly one who is laboring for free. A paid reviewer was in the clear because money was transferred from an institution to the reviewer, and the reviewer was obligated to dispense with the product. I wondered if Cleland was aware of how many paid reviewers held onto their swag.

I expect that when I read my local newspaper, I may expect that the reviewer got paid," said Cleland. His job is to be paid to do reviews. Your economic model is the advertising on the side.

From Cleland's standpoint, because the reviewer is an individual, the product becomes "compensation."¹⁷¹

According to the commissioner, the relationship between traditional media and sponsors, and new media users (such as bloggers) and sponsors, is different. Which is why disclosure requirements are different.¹⁷²

3. *Unenforceability of the Guides*

The FTC does not investigate every blog post, YouTube upload, or Tweet posted by a blogger or Influencer.¹⁷³ It would be impossible to do so. Thus, the FTC has imposed unenforceable guidelines and it has acknowledged that fact.¹⁷⁴ It stated however, the main purpose of the Guides

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Del Riego, *supra* note 136.

¹⁷⁴ *Id.*

is not to “police the Internet and prosecute bloggers who have violated the guidelines, but rather educate bloggers as to the proper practices and their ethical obligations when endorsing products online.”¹⁷⁵ The FTC still expects bloggers and Influencers to hold themselves to a high standard and abide by the rules.

4. Imbalance of Responsibility Between Influencers and Advertisers

To abide by the guidelines imposed on new media, advertisers must and should take the lead in their relationships with Influencers and bloggers.¹⁷⁶ Advertisers are liable if Influencers post fraudulent claims or fail to disclose any affiliations they have with an advertiser.¹⁷⁷ Advertisers are not required to inform Influencers about the regulations, but since they will pay the cost if there is a violation, it would be in their best financial interest to do so.¹⁷⁸

It may be difficult to ensure the Influencer is properly disclosing its material relationship with an advertiser, but it will most likely be easier than it appears. Brands and Influencers enter into a contract that states the terms and what is expected of the Influencer. The brand knows ahead of time what the Influencer will produce and how it will go about it. Thus, it can simply require a draft to review prior to the post going live on the Internet. It would be in the brands best interest to spell out the FTC’s requirements in every contract with an Influencer to avoid future violations and fines.

V. PROPOSAL

A. The FTC is Too Lenient

The FTC recently vowed to “crack down on misleading celebrity endorsements,”¹⁷⁹ but brands and celebrities probably won’t take that threat

¹⁷⁵ *Id.*

¹⁷⁶ Mark Gibbs, *Bloggers Beware: the FTC is Watching*, COMPUTERWORLD (Oct. 9, 2009, 1:04 PM), <http://www.computerworld.com/article/2528871/networking/bloggers-beware--the-ftc-is-watching.html>; FTC ON DECEPTION, *supra* note 87.

¹⁷⁷ *Id.*

¹⁷⁸ *How-To Guide*, *supra* note 113; *see also* Mark Gibbs, *Bloggers Beware: the FTC is Watching*, COMPUTERWORLD (Oct. 9, 2009, 1:04 PM), <http://www.computerworld.com/article/2528871/networking/bloggers-beware--the-ftc-is-watching.html>.

¹⁷⁹ *The FTC’s Vow to Crack Down on Celebrity Posts Should Start with the Kardashians*, THE FASHION LAW (Aug. 18, 2016), <http://www.thefashionlaw.com/home/the-ftcs-vow-to-crack-down-on-celebrity-posts-should-start-with-the-kardashians?rq=ftc>.

seriously. At the center of the FTC regulation are voluntary disclosures and compliance.¹⁸⁰ The FTC does not investigate every instance in which endorsements are present.¹⁸¹ That, however may be the problem.

With a quick Google search, few articles will come up with the headline “XYZ company fined by FTC,” but much more will pop stating “FTC settles with XYZ company” or “FTC imposes slap on the wrist for XYZ Company.”¹⁸²

1. Past FTC Sanctions

The FTC has reiterated time and time again that it will “crack down” on regulation violations in the world of new media advertising. But will this actually happen? Based on its past imposition of fines, it seems unlikely.

There are few monetary components for violations of the blogger endorsement rules.¹⁸³ A few examples are listed in this note. In 2011 the FTC fined Legacy Learning Systems \$250,00 in settlement damages.¹⁸⁴ The company violated disclosure rules by deceptively advertising its products through online affiliate markets that falsely posed as ordinary consumers or independent reviewers.¹⁸⁵ Legacy was charged with disseminating deceptive advertisements without clearly disclosing that affiliates were paid for every sale they generated.¹⁸⁶ This was the first ever monetary component for a violation of the blogger endorsement rules.¹⁸⁷

¹⁸⁰ Feinman, *supra* note 101.

¹⁸¹ *Id.*

¹⁸² See generally Jake Muncy, *FTC Slaps Machinima on the Wrist for Its Paid Endorsements*, WIRED: CULTURE (Sept. 2, 2015 5:34 PM), <https://www.wired.com/2015/09/ftc-machinima-microsoft-youtube/>; see also Mathew P. Hendrickson, Steven C. Sunshine, Sean M. Tepe, “*FTC Ends Google Investigation With a ‘Slap on the Wrist,’*” SKADDEN (Jan. 4, 2013), https://www.skadden.com/insights/ftc_ends_google_investigation.

¹⁸³ *Why Does the FTC Keep Ignoring Endorsement Violations*, THE FASHION LAW (Dec. 15, 2015), <http://www.thefashionlaw.com/home/why-does-the-ftc-keep-ignoring-endorsement-violations?rq=ftc> [hereinafter *Endorsement Violations*].

¹⁸⁴ *Id.*

¹⁸⁵ Press Release, Fed. Trade Comm’n, *Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online “Consumer” and “Independent” Reviews* (Mar. 15, 2011), <https://www.ftc.gov/news-events/press-releases/2011/03/firm-pay-ftc-250000-settle-charges-it-used-misleading-online>.

¹⁸⁶ *Id.*

¹⁸⁷ *Endorsement Violations*, *supra* note 183.

In 2014, the FTC sued Warner Brothers for failing to adequately disclose that it paid online Influencers to share scripted, positive YouTube videos and social media posts.¹⁸⁸

It argued that Warner Brothers misled consumers by suggesting the Influencers reviews of the game reflected independent or objective views.¹⁸⁹ The Influencers were hired by Warner Brothers' advertising agency to help promote the release of the company's new video game.¹⁹⁰ The Influencers received advanced copies of the game, were paid thousands of dollars, and were required to post positive reviews about the game.¹⁹¹ They could not mention any glitches or bugs, and they were also required to post the FTC disclosures in the description box (which most viewers do not pay attention to, unless the Influencer mentions it).¹⁹² Furthermore, Warner Brothers was aware some videos did not meet the disclosure requirements.¹⁹³ The Influencers did not disclose the extent of their relationship with Warner Brothers.¹⁹⁴ They only mentioned the early release access to the game.¹⁹⁵ Despite the violations, the FTC did not impose an \$11,000 fine. It settled with Warner Brothers.¹⁹⁶ The settlement:

Prohibits Warner Bros. from misrepresenting that any gameplay videos disseminated as part of a marketing campaign are independent opinions or the experiences of impartial video game enthusiasts. Further, it requires the company to clearly and conspicuously disclose any material connection between Warner Bros. and any Influencer or endorser promoting its products.¹⁹⁷

Warner Brothers must clearly and conspicuously disclose any material connection it has with Influencers or endorsers promoting its products.¹⁹⁸ It is required to take minimum steps to abide by disclosure regulations when the company, and any Influencer it hires to conduct campaigns must post

¹⁸⁸ Fed. Trade Comm'n, *Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos* (July 11, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it> [hereinafter *Warner Bros. Settles*].

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Warner Bros. Settles*, *supra* note 188.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Warner Bros. Home Entertainment Inc., Docket No. 152 3034, *Federal Trade Commission* (F.T.C.).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

about Warner Brothers products.¹⁹⁹ It must educate Influencers regarding sponsorship disclosures, monitor Influencer's videos for compliance, terminate or withhold payment for noncompliance – under certain circumstances.²⁰⁰ The settlement appears to be the FTC reiterating its disclosure guidelines. Every element of the settlement aligns with the FTC Guides. The FTC claims brands that violate its rules will receive fines or a suit filed against them, but it seems to be handing out a slap on the wrist to companies, like Warner Bros., that should know better.

B. The Fines

1. Create A Set-In-Stone Fine "Guide"

The FTC should impose actual repercussions for violating the rules. Not simply threats of "fines up to \$11,000."²⁰¹ The fine should be clear and distinct. The FTC should release a counterpart to the Guides monetizing each violation. Every Influencer and company that it works with should be aware of the financial costs of their violations. For example, when YouTuber Jackie Aina worked with cosmetics brand NARS to promote the re-launch of its concealers, she posted on about the product on all her social media outlets.²⁰² She abided by the FTC disclosure rules by including '#ad' in her posts.²⁰³ Hypothetically, if she did not disclose that she had a material relationship with NARS and that she was compensated in any way to promote this product, a quick search on the FTC's website should inform her of future fines for this violation. This form of clarity would bring transparency to the regulations. The FTC would not have to put in extra hours to ensure brands and Influencers are complying with the rules. The set-in-stone monetary cost of violation will ensure all parties involved are utilizing honest practices when targeting consumers. The fear of the fine will be the driving force.

2. Influencers and Brands Should Be Responsible for Violations

The FTC stated that advertisers are liable when the Influencers they work with do not comply with disclosure regulations.²⁰⁴ That should change. Influencers should also be liable for their violations. As mentioned in Part III of this note, there is an imbalance between the responsibility placed upon advertisers and brands, compared to that of Influencers. Advertisers are responsible for Influencer's actions in connection with their contractual

¹⁹⁹ *Supra* note 196.

²⁰⁰ *Id.*

²⁰¹ Gillmor, *supra* 139.

²⁰² Aina, *supra* note 120.

²⁰³ Gibbs, *supra* note 176.

²⁰⁴ FTC ON DECEPTION, *supra* note 87.

relationship.²⁰⁵ This is a logical business relationship, but it would not be out of the norm if the responsibility was even. At the heart of this relationship stands a contract between the two parties. Most contracts spells out the terms of the relationship such as the term period, requirements, and compensation. Advertisers should also be allowed to contract the responsibility of complying with FTC disclosure rules. With the permission of the FTC and other state regulations that may come into play, Influencers should bear the responsibility of their actions or posts. The brands should still ensure, however, that the contracts spell out the disclosure requirements and inform the Influencers of their potential liability. By addressing this issue most commentators seem to address, the weight is even. Influencers will also be liable for failure to properly disclose in a clear and conspicuous manner their material relationship with advertisers.

3. *Yearly Audits*

It is difficult to police every advertisement, blog post and YouTube video. But there are other avenues the FTC can take to actually enforce the disclosure requirements that most view as unenforceable.²⁰⁶ The FTC can conduct yearly audits of bloggers, Influencers and advertisers. It could take notes from the IRS' yearly audits, but in a much simpler, straightforward way. Influencers and Brands should submit yearly reports to the FTC listing their sponsorships. The report should include how they disclosed their material relationships with advertisers in a clear and conspicuous manner. They should discuss compensations, if any, the purpose of the sponsorship, general details about the duration of the sponsorship and their reach, such as engagement, audience interaction, and potential views. This information would not encroach on their privacy, but would provide as much information as necessary to understand the basics of the parties' relationship. This approach would not replace the voluntary disclosure requirements, but it will ensure all parties are abiding by the FTC's rules. By combining the second proposal as mentioned above with this proposal, parties would be responsible for their actions. Influencers will be responsible for ensuring they are abiding by the FTC disclosure requirements and advertisers will still be responsible for ensuring Influencer are aware of the FTC disclosure requirements. Nothing incites compliance like fear. With brands and Influencers, a lot is at stake when they work together. They both want the relationship to be fruitful without any interference from the federal government. By complying with the FTC rules, keeping records of their posts and basic details of their relationships with advertisers and Influencers, each party will have nothing to worry about when, or if, audited by the FTC.

²⁰⁵ *Id.*

²⁰⁶ Del Riego, *supra* note 136.

VI. CONCLUSION

As the name says, Influencers have the power to *influence* thousands, even millions of people on a daily basis. They have closer, more emotional connections with consumers, and to a certain extent, the interactions appear to be more genuine than the traditional celebrities. But, as time goes on, and the influence continues to increase, the FTC will always be playing catch-up. Federal regulations have historically moved at a snail's pace, and with the ever-evolving, complex world of social media, it will continue to have a hard time keeping up.

The FTC guides are helpful, but, nevertheless, not enough. To really regulate this non-traditional industry, changes must be made. The FTC needs to be hands on, connected and in tune with this new media. Self-regulation at its current level, is a great start, but it is only the beginning. The FTC and the consumers it was created to protect will be better served if a revamped and well-created system is implemented. The system should be designed to identify business practices, prevent the unfair and anticompetitive actions, and ensure the consumer and general public are aware of the competitive process. Those standards should be implemented without unduly burdening legitimate business activity.

