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Influencing the FTC to Update Disclosure Rules For the Social Media Era

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I. INTRODUCTION

Social media has revolutionized the way that we interact. In a Pew Research Center study, sixty-nine percent of respondents...
indicated that they use social media. This number stands in contrast to usage ten years ago, when only twenty-one percent of U.S. adults used social media. “Over a mere few years, what started as a means for regular people to connect with friends, family and coworkers has become an advertiser’s dream.” As social media has changed the ways we communicate, advertising has correspondingly changed as well. One such change to advertising is the rise of influencer marketing.

In Part II, this article will explore the history of influencer marketing and its prevalence on the internet and social media, particularly on the social media platform Instagram. The Federal Trade Commission (FTC) has the authority to take action against unfair and deceptive advertising practices, and thus is a source of oversight for influencer marketing practices, as will be discussed herein. Part III will discuss the sources of FTC oversight power, and how the FTC has attempted to provide guidelines for influencers. These guidelines impact influencers and the brands they promote, and thus compliance obligations for influencers, advertisers, and businesses will be discussed in Part IV. Finally, Part V will explore ways the FTC could better clarify internet disclosure obligations for influencers, businesses, and advertisers.

II. THE RISE OF INFLUENCER MARKETING

“Influencer marketing is simply the action of promoting and selling products or services through people (influencers) who have the capacity to have an effect on the character of a brand.”

2. Id.
4. See id.
Influencers are paid in exchange for promoting content.\(^7\) The rise of social media has allowed influencer marketing to become more extensive.\(^8\) In a recent survey by eMarketer, eighty-four percent of those surveyed said they would utilize at least one influencer marketing campaign in the next twelve months.\(^9\)

\textit{A. A Brief History of Influencer Marketing}

While influencer marketing is typically associated with a product being hawked on social media, the concept has been in existence long before the internet.\(^10\) Josiah Wedgwood, a potter who operated a workshop starting in the 1750s, is credited with spawning the first influencers.\(^11\) Wedgwood relied on the press and product placement to build his brand.\(^12\) He recruited painters, architects and other fashionable people of the day to increase the prevalence of his brands, in effect acting as influencers.\(^13\) One of those fashionable people was Queen Charlotte.\(^14\) Wedgwood created a tea set for Queen Charlotte, and then used his newfound status as “potter to Her Majesty” to create a “Queen’s Ware” product line which helped him to “extend his brand into the mass market with stimulating appeal for his more upmarket products.”\(^15\)

While Wedgwood was an early influencer, the idea of using celebrities to endorse products did not widely catch on until much later. Over time, companies began to use celebrities and religious

\begin{itemize}
  \item \textit{7.} See, e.g., The highest-paid Instagram influencers, including one star who gets £14,000 per post, TELEGRAPH (July 19, 2017), http://www.telegraph.co.uk/business/0/highest-paid-instagram-influencers-including-one-star-gets-14000/picture-instagram-user-liz-eswein/ [https://perma.cc/83JG-THTC].
  \item \textit{9.} Id.
  \item \textit{10.} History of Advertising: No 129: Josiah Wedgwood’s Queen’s Ware, CAMPAIGN (Apr. 23, 2015), https://www.campaignlive.co.uk/article/history-advertising-no-129-josiah-wedgwoods-queens-ware/1343726 [https://perma.cc/U9TK-UWD5].
  \item \textit{11.} Id.
  \item \textit{12.} Id.
  \item \textit{13.} See id.
  \item \textit{14.} Id.
  \item \textit{15.} Id.
\end{itemize}
figures to promote consumer products. Companies also began to use characters to forge a connection with buyers, as well as to help buyers link products with their corresponding brands. For example, the 1950s saw the rise of the Marlboro Man, a mustached cowboy who was used to promote a popular brand of cigarettes. The use of celebrity and character endorsements continued throughout the twentieth century and continues through to today. Indeed, between “14% to 19% of advertisements that aired in the United States in recent years featured celebrities that endorsed products and brands, and the number was over twice as high in certain foreign markets.”

The longstanding use of celebrity endorsement continues because it pays off. A 2011 study published in the Journal of Advertising Research found that an athlete’s brand endorsement leads to a four percent growth in revenue for a company, resulting in about $10 million a year in added sales of branded products along with a 0.25 percent growth in stock returns. Using a celebrity to endorse products can also lead to an increase in market share.

However, the use of celebrity product endorsement does have risks. On the mild end, a celebrity may not be a good fit for a product, and the advertisement or celebrity endorsement may go viral for the wrong reasons. Brad Pitt starred in a perfume

17. Id. (including, for example, the introduction of Aunt Jemima to promote pancake mix in 1890, and Santa Claus to promote Coca Cola in the 1920s and 1930s).
18. Id.
19. Id.
21. See id. (studying the effects of celebrity athlete endorsement on stock returns and sales, as well as the implications for the advertising industry).
23. See Elberse & Verleun, supra note 20, at 163.
24. Knowledge @ Wharton, supra note 22.
advertisement for fashion powerhouse Chanel that was mocked on *Saturday Night Live* and *Conan* as “pretentious and esoteric.”\(^{25}\) On the more serious end, a celebrity may be convicted of serious crimes that could negatively impact a brand.\(^{26}\) While the concept of influencer marketing is not a new one, it is one that has risen to prominence due to the increased prevalence of social media.\(^{27}\)

**B. Social Media’s Influence**

Influencer marketing is not a new concept, and has the potential to significantly impact a brand, both positively and negatively. Social media has expanded the use of influencer marketing, and influencer marketing has increased exponentially over the last two years.\(^{28}\) Social media has changed influencer marketing because companies no longer have to advertise exclusively using a magazine, billboard, or commercial.\(^{29}\) Both large and small brands can now more readily reach consumers by simply having a blogger or social media influencer promote their products.\(^{30}\)

The rise of social media has also led to User Generated Content (UGC).\(^{31}\) UGC is defined as: “any type of content that has been created and put out there unpaid contributors or, using a better term, fans. It can refer to pictures, videos, testimonials, tweets, blog posts, and everything in between and is the act of users promoting a brand rather than the brand itself.”\(^{32}\) The rise of social media has turned the focus towards authenticity and connection in marketing.\(^{33}\) UGC

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25. Knowledge @ Wharton, *supra* note 22.
30. *Id.*
31. *Id.*
33. *See* id.
encourages social media users to feel like they have influence over a community, as well as an emotional connection to the brand or product. 34

The rise of UGC and social media means that anyone with a social media profile or blog can be an influencer, no longer limiting endorsements to celebrities, royalty, and professional athletes. 35 To become a social media influencer, many social media users first find a niche to distinguish their content and stand apart from current influencers. 36 Next, hopeful influencers are guided to “just keep uploading.” 37 Finally, prospective influencers are prompted to carefully consider which social media network gives the best opportunity for follower growth. 38 As discussed below, many influencers use the social media network Instagram to display their content.

C. Instagram – The Prime Medium for Influencer Marketing

1. How Instagram Works

While there are numerous social media platforms an influencer can utilize, the photo-sharing website Instagram is by far the most often used. 39 A report from a platform that connects companies with influencers found that 99.3 percent of respondent influencers used Instagram to share their messages, as compared to Facebook (67.1 percent), Snapchat (50.8 percent), and Twitter (43.1 percent). 40

34. See id.
35. Gallegos, supra note 16.
37. Id.
38. Id.
Instagram allows users to edit and share photographs and video (also known as content). When a user adds content, it is displayed on the user’s profile, and other Instagram users who “follow” them are able to see the content. The main goal is “to share and find only the best photos and videos.” Each Instagram profile has a “Followers” and “Following” count which allows Instagram users to know who they follow, and how many users follow them. A profile may be set to “public,” where all Instagram users may see the content, or to “private,” where an Instagram user’s followers can see the content.

Instagram has a “Search” tab which allows users to find or add friends, and to search for interesting accounts to follow. An algorithm tailors each individual user’s recommended content to their unique interests. Instagram users can also use the search bar to look for specific users or hashtags. “Hashtags are words or multi-word phrases preceded by the # symbol . . . .” If a Instagram post includes hashtags on a public post, then the post will appear on the hashtag page. Instagram further allows followers to utilize hashtags, which lets users, that do not follow the influencer, to discover the post, which could potentially lead to a new follower for the influencer.

42. See id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
2. How Influencers Use Instagram

The Search page is crucial for influencers. Because the Search Tab shows content that is unique to a user’s specific interests, it shows content that is the most popular in the area the user lives in, as well as content that is popular with the accounts a user follows.52 The Search Tab shows content that a user may not otherwise have seen.53 “This creates an environment for increased relevancy in the content discovery process giving you the best (if not only) way to gain viral reach with the content you’re sharing on Instagram.”54

Instagram influencers who use the platform to share photos and videos can be paid in excess of $10,000 for a single Instagram post, and even have agencies to help manage their Instagram profiles.55 One agency—Socialyte—will not work with an influence unless they have more than 100,000 followers.56

Followers are the driving factor behind the success (or failure) of an Instagram influencer. Influencers can be sorted into different “tiers” based on their number of followers.57 A tier one influencer may have in excess of 7 million followers, and command $21,500 per post.58 Even a tier four influencer, known as a micro influencer, can command $8,400 per post.59

Because follower count is the driving force behind the price a post commands, influencers are constantly trying to increase their follower count. A not-so-secret trick used by influencers is to buy followers.60 Purchased followers are usually “bots” or robots that

52. See Alex Ditty, How to Get Discovered on the Instagram Explore Tab, BUSINESS 2 COMMUNITY (Mar. 11, 2015, 7:00 PM), https://www.business2community.com/instagram/get-discovered-instagram-explore-tab-01181099 [https://perma.cc/6JEY-6GH2].
53. See id.
54. Id.
55. Chafkin, supra note 51.
56. Id.
58. Id.
59. Id.
60. Zohny, supra note 36.
artificially increase a follower count.\textsuperscript{61} Even if an influencer has a number of bot followers, it still increases the chances that an influencer could get more followers.\textsuperscript{62} Some influencers may go even farther and turn their account into a bot, by using a website to automate the account.\textsuperscript{63} The bot account automatically follows and unfollows other users to increase engagement.\textsuperscript{64} Automating an account or purchasing followers may put an influencer at odds with Instagram’s Community Guidelines.\textsuperscript{65} Instagram’s Community Guidelines state: “Help us stay spam-free by not artificially collecting likes, followers, or shares, posting repetitive comments or content, or repeatedly contacting people for commercial purposes without their consent.”\textsuperscript{66} However, violating the Instagram Community Guidelines may not be the only rule violated. As will be discussed in depth in Part III, many influencer’s Instagram posts do not conform to the Federal Trade Commission’s (FTC) rules and guidelines related to marketing and endorsement.

III. FTC OVERSIGHT OF MARKETING PRACTICES

The Federal Trade Commission Act (the Act) established the Federal Trade Commission.\textsuperscript{67} Under the Act, the FTC is empowered to:

(a) prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce;
(b) seek monetary redress and other relief for conduct injurious to consumers;
(c) prescribe rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices;
(d) gather and compile information and conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See id.}
\item \textit{Our History, FTC, https://www.ftc.gov/about-ftc/our-history [https://perma.cc/JWT2-WERP].}
\end{enumerate}
(e) make reports and legislative recommendations to Congress and the public.\textsuperscript{68}

Of particular interest is 15 U.S.C. § 45a.\textsuperscript{69} This section relates to consumer protection, and forbids “unfair or deceptive acts or practices.”\textsuperscript{70} The FTC enforces its consumer protection laws through administrative and judicial enforcement mechanisms.\textsuperscript{71} As part of this enforcement, the FTC has released a number of guidelines regarding endorsements and advertising.\textsuperscript{72} “The FTC’s original 1980 Endorsement Guides did not require that payments to expert or celebrity endorsers be disclosed because consumers would understand that these professionals would be paid a fee to appear in an ad.”\textsuperscript{73}

A. Material Connections Disclosure Requirements

However, the FTC’s views of celebrity endorsement have changed since 1980. The FTC now requires disclosure of “material connections” between a consumer and advertiser, which are those that a consumer may not otherwise expect.\textsuperscript{74} In 2009, the FTC updated its \textit{Guides Concerning the Use of Endorsements and Testimonials}.
Testimonials in Advertising.  The 2009 update (2009 Guide), the first update since 1980, was needed in light of the changes to the marketing landscape. The 2009 Guide reiterated the “material connections” principle. It further clarified that while decisions are on a case-by-case basis, “the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement.” It further stated, “[B]loggers who make an endorsement must disclose the material connections they share with the seller of the product or service” and that a paid endorsement—like any other advertisement—is deceptive if it makes false or misleading claims.

This was the first guide to address influencers and celebrities specifically. The 2009 Guide also clarified that celebrity endorsers are liable under the FTC Act for statements they make in an endorsement, and that they may be liable for the failure to disclose material connections between the advertiser and the endorser. “The revised Guides also make it clear that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or in social media.”

In 2013, the FTC released the .com Disclosures: How to Make Effective Disclosures in Digital Advertising (.com Guide). The .com Guide reinforced that material connections must be disclosed, as well as that online ads must include information that would

76. See FTC, supra note 74.
77. See id.
78. Id.
79. Id.
80. See id.
81. See FTC, supra note 74.
82. Id. (alteration in original).
prevent an advertiser from deceiving a customer.\textsuperscript{84} The .com Guide also required that advertisements “be clear, conspicuous, and proximate to any ad content that requires qualifications or disclosures to prevent deception.”\textsuperscript{85} Further, the FTC noted, “If a disclosure is necessary to prevent an advertisement from being deceptive [or] unfair . . . and if it is not possible to make the disclosure clear and conspicuous, then either the claim should be modified or the ad should not be disseminated.”\textsuperscript{86} Another aspect of the .com Guide was the creation of FAQ lists to assist celebrities and endorsers in compliance with the FTC guides.\textsuperscript{87}

In recent years, the FTC has clarified what is required to indicate a material connection.\textsuperscript{88} For example, guidance has been given on what is acceptable and unacceptable to indicate a material connection on Instagram.\textsuperscript{89} Examples of those that are acceptable include, “#Ad, [#BrandName]Sweepstakes, #Sponsored”, and those hashtags that would be unacceptable include “#Sp, #Collab, #Sweeps.”\textsuperscript{90} The FTC also clarified that an advertiser’s logo, or an advertiser’s hashtag, is insufficient to constitute a material disclosure.\textsuperscript{91}

B. The FTC and Influencer Marketing

Despite this guidance, “[a]n estimated 93 percent of paid content violates FTC guidelines.”\textsuperscript{92} Since 2011, the FTC has resolved thirteen matters relating to influencer marketing.\textsuperscript{93} The first Instagram specific FTC action was against Lord & Taylor in

\textsuperscript{84} Alan Friel, et. al., \textit{DO TELL: Targeting native advertising and influencer marketing, the FTC mandates “clear and conspicuous disclosure guidelines”}, 40 L.A. LAW. 28, 28 (2017).
\textsuperscript{85} Id.
\textsuperscript{86} FTC, \textit{supra} note 83; Alan Friel, et. al, \textit{supra} note 84, at 28.
\textsuperscript{87} \textit{See}, e.g., \textit{What People are Asking}, \textit{supra} note 72.
\textsuperscript{88} Alan Friel, et. al., \textit{supra} note 84, at 28.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{93} \textit{FTC Social Media Actions}, TRUTH IN ADVERTISING, https://www.truthinadvertising.org/ftc-social-media-actions/ [https://perma.cc/G6BB-KSXQ].
May of 2016.\textsuperscript{94} In that instance, Lord & Taylor used fifty fashion influencers to post pictures of them wearing dresses from Lord & Taylor, without the influencers making it clear that the dresses were free or in exchange for payment.\textsuperscript{95} As a result, the FTC and Lord & Taylor entered into a consent agreement.\textsuperscript{96}

In April 2017, the FTC further cracked down on influencer marketing, and sent ninety letters to influencers and marketers.\textsuperscript{97} The letters reminded influencers of the disclosure requirements between influencers and the content they promote.\textsuperscript{98} The letters also reiterated the requirements of “clear” and “conspicuous” disclosure.\textsuperscript{99} Some of the letters specifically pointed out that the use of hashtags such as “#sp,” “Thanks[Brand],” or “partner” may be insufficient to let a consumer know that the post is sponsored.\textsuperscript{100} In addition, the FTC noted that multiple hashtags at the end of a long post may be skipped over by a consumer, and therefore are not conspicuous.\textsuperscript{101} The FTC sent an additional twenty-one follow up letters in September of 2017.\textsuperscript{102}

\begin{itemize}
\item \textsuperscript{94} Id.
\item \textsuperscript{95} See id.
\item \textsuperscript{96} Id.
\item \textsuperscript{98} Martin, supra note 97.
\item \textsuperscript{99} Id.
\item \textsuperscript{101} Id.
Later in 2017, the FTC undertook its first enforcement action specifically against individual online influencers, based on their alleged misleading practices. The action was instituted against Trevor Martin and Thomas Cassell, who endorsed the online gaming company CSGO Lotto, without disclosing that they owned the company. GSCO Lotto was based off of a game called “Counter-Strike: Global Offensive.” The game allowed users to collect game “skins” which could be sold, purchased, or traded in for real money. GSCO Lotto allowed users to challenge other users to a coin-flip for the skins.

Trevor Martin and Thomas Cassell, through their YouTube pages “TmarTN” and “Syndicate”, posted videos promoting GSCO Lotto. For example, Cassell wrote “Bruh.. i’ve won like $8,000 worth of CS:GO Skins today on @CSGOLotto. I cannot even believe it!” The FTC’s complaint alleged that Martin and Cassell ran a scheme where they paid gamers to promote GSCO Lotto, and included language in such contracts that the promotion could not “impair the name, reputation, and goodwill” of GSCO Lotto. The FTC argued that the pair “falsely claimed that their videos and social media posts—and the videos and posts of the influencers they hired—reflected the independent opinions of impartial users.” The FTC settled with Martin and Cassell. The proposed settlement order “prohibits Martin, Cassell, and CSGOLotto, Inc. from misrepresenting that any endorser is an independent user or ordinary consumer of a product or service. The order also requires

[https://perma.cc/933D-SEYP].

Fair, supra note 102.

Id.

Id.

Id.

Id.

Id. The FTC article covering the influencing actions took a tongue-in-cheek approach to covering this issue, and wrote, “[w]ell, Bruhs, while we’re on the subject of things we cannot even believe, did either of you like consider clearly disclosing that you like owned the company – a material connection requiring disclosure under FTC law?”

Id.

Id.

Id.

Id.

Id.
clear and conspicuous disclosures of any unexpected material connections with endorsers.”

C. Why FTC Oversight is Needed

As previously discussed, the FTC has the power to take action against unfair and deceptive trade practices, and has begun enforcement actions against social media influencers. But why is this oversight needed? It is needed because the FTC focuses on ensuring that the connection between a brand and an influencer is clearly and conspicuously disclosed. This disclosure allows consumers to decide how much weight to give an advertiser’s statements. Disclosures are particularly needed in influencer marketing, because it may be difficult to spot a paid post.

“Consumers view influencers as their peers, and will give the same high-level of value to a fashion influencer’s opinion as they would to a best friend that goes shopping with them.” Some influencers report having been asked not to disclose the connection between the content they are posting and the brand they are promoting. Disclosures inherently jeopardize the influencer marketing relationship, as they show that a post that may appear to be peer recommendation is instead paid content. Based on this, it is unlikely that the market will correct itself on its own. Therefore, FTC oversight is needed.

116. See id. at 1133.
117. See id.
118. See id.
119. See id.
IV. Influencer Compliance with FTC Guidelines

The FTC is clearly concerned with compliance and disclosure guidelines. However, the issue of who is responsible for ensuring compliance with FTC advertising requirements is a difficult one given the overall context of influencer marketing. Under FTC Enforcement Guidelines the advertiser, the company whose content is being promoted, and the influencer can all be held responsible.\textsuperscript{120} As discussed, the FTC answered many questions related to influencer marketing in *The FTC Enforcement Guides: What People are Asking.*\textsuperscript{121} However, these clarifications may provide more questions than answers for companies, advertisers, and influencers alike.

A. Advertisers

Under the guidelines, advertisers are required to have reasonable programs in place to train and monitor the influencers who are promoting their content.\textsuperscript{122} This requires advertisers to know what the influencers they have hired are saying, but does not require that an advertiser be aware of every statement made by an influencer.\textsuperscript{123} The scope of the oversight also depends on the type of content being promoted.\textsuperscript{124} The FTC gives health products as an example of promoted content that requires more oversight.\textsuperscript{125} In response to a question posed of whether an advertiser would be held liable for the actions of a rogue content promoter, the FTC replied that it was unlikely that blame would be assigned to an advertiser if there was a reasonable compliance program in place.\textsuperscript{126} Intermediaries that recruit influencers are likewise treated as advertisers, and are required to have reasonable programs in place to train and monitor the influencers they recruit.\textsuperscript{127}

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\textsuperscript{120} What People Are Asking, supra note 72.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} See id.
\textsuperscript{124} See id.
\textsuperscript{125} What People Are Asking, supra note 72.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
B. Companies

However, the FTC’s above guidance seems at odds with another question answered by the FTC. The FTC stated that a company is ultimately responsible for what others do on their behalf. 128 Thus, if a company outsources their marketing to a public relations firm, a company is responsible for ensuring that the public relations firm is training and monitoring its social media promoters. 129 The FTC states that: “[d]elegating part of your promotional program to an outside entity doesn’t relieve you of responsibility under the FTC Act.” 130 While an advertiser would not be liable for the actions of a rogue blogger, a company is deemed to be ultimately responsible for the content promoted on their behalf. 131 It remains to be seen if a company would then be held liable by the FTC for a blogger who is violating a company’s content promotion and the FTC’s marketing guidelines.

C. Influencers

The influencers themselves are also ultimately responsible for their posts. If someone is posting as part of a sponsored campaign, or they are ultimately being compensated for their post, then a disclosure is required. 132 A single disclosure stating “many of the products I discuss on this site are provided to me free by their manufacturers” in the heading of a page, such as in the biography section of a person’s Instagram page, would be insufficient to disclose the relationship between a promoter and the content being promoted. 133 Similarly, an Instagram post that includes a disclosure in the description of the post may be insufficient if it is not featured within the first four lines of the post. 134 Additionally, simply putting

128. Id.
129. Id.
130. What People Are Asking, supra note 72.
131. See id.
132. See id.
133. Id.
134. Id. (“When people view Instagram streams on most smartphones, descriptions more than four lines long are truncated, with only the first three lines displayed. To see the rest, you have to click ‘more.’ If an Instagram post makes an endorsement through the picture or the first three lines of the description, any required disclosure should be presented without having to click ‘more.’”).
the company’s name with “ad” in a hashtag is insufficient, as is saying thank you to a company in a post.\textsuperscript{135} “The big-picture point is that the ultimate responsibility for clearly disclosing a material connection rests with the influencer and the brand – not the platform.”\textsuperscript{136}

V. More Questions Than Answers

The disclosure requirements of companies, advertisers, intermediaries, and influencers are still complex and confusing. While the FTC has attempted to clarify requirements by releasing \textit{The FTC Enforcement Guides: What People are Asking}, the guide leaves the reader with more questions than answers. Take, for example, a social media site that includes a built-in tool for disclosure, such as Instagram.\textsuperscript{137} This tool is arguably the easiest way for a promoter with average knowledge of FTC regulations to comply with advertising requirements.

However, the FTC may still deem this built-in tool to be insufficient,\textsuperscript{138} because it may not disclose the particular connection between a promoter and the content promoted.\textsuperscript{139} The FTC provides three key takeaways about why this tool may be inadequate.\textsuperscript{140} First, on a photo-sharing site (the FTC does not mention Instagram specifically, although it seems implied), the disclosure may be lost because a consumer would be more focused on the photo under the disclosure.\textsuperscript{141} Second, the disclosure should be in an easy to read font that stands out from its background and is easy to understand.\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{135} \textit{What People Are Asking}, supra note 72.
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} See David Cohen, \textit{Instagram Just Added a Tag to Make Sponsored Content More Transparent}, \textit{ADWEEK} (June 14, 2017), http://www.adweek.com/digital/instagram-paid-partnership-with/ [https://perma.cc/GAN7-BSCV]. Ironically, this disclosure tool may be an insufficient disclosure under the FTC’s guidelines.
\item \textsuperscript{138} \textit{Id.} For example, Instagram has a tool that allows a sub-heading that reads “Paid partnership with” and allows an influencer to include the product being promoted. See Cohen, supra note 131. It seems odd that this tool specifically made to enable disclosures may be insufficient under the FTC’s guidelines. See also \textit{What People are Asking}, supra note 72.
\item \textsuperscript{139} \textit{What People are Asking}, supra note 72.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} See \textit{id.}
\item \textsuperscript{142} \textit{Id.}
\end{itemize}
Instagram’s “Paid partnership” tool is in the same font as the Instagram name, and the rest of the post, and could therefore likely be considered insufficient.\textsuperscript{143} Third, the disclosure should be worded in a way that is easy for the ordinary person to understand.\textsuperscript{144} The FTC states that flagging a post as paid content may be deficient if more than one brand is mentioned in the post or not all mentions are paid mentions.\textsuperscript{145}

The FTC’s guidelines are complex and confusing. An influencer may be attempting to comply with FTC advertising guidelines by using the built-in tool, and may believe that they are in compliance. However, because the FTC has stated that the built-in tool may be insufficient, it leaves influencers, advertisers, and companies in a precarious position. It is with this context that potential solutions, and temporary fixes are discussed.

VI. THE FTC NEEDS TO UPDATE GUIDANCE FOR THE SOCIAL MEDIA ERA

The FTC has initiated enforcement actions against brands, advertisers, and individual endorsers.\textsuperscript{146} While the FTC seems intent on cracking down on disclosures, it should better clarify how a brand, advertiser or endorser can comply with the FTC’s regulations on social media. One way the FTC could do this is by providing guidelines for social media giants, such as Facebook, Instagram, and Twitter, that could aid these platforms in creating built-in paid content tools. While compliance obligations ultimately lie with the promoter, company or advertiser,\textsuperscript{147} a social media platform could become more attractive for promoters if it is easy to clearly display the connection. It would also make compliance simpler, as a content promoter would be assured that they are conforming with the FTC’s requirements.

\textsuperscript{143} See id.; Cohen, supra note 137.
\textsuperscript{144} What People Are Asking, supra note 72.
\textsuperscript{145} Id.
\textsuperscript{147} See What People are Asking, supra note 72.
The FTC should also clarify the tension created by the statement that businesses are responsible for the content promoted on their behalf, but advertisers are not responsible for the actions of a rogue promoter. 148 While businesses should be held responsible for deceptive content, the FTC should distinguish between a business and advertiser’s practices, and ultimately place liability with the party directing the placement of the content, such as the intermediary or advertiser.

The FTC should also better target their advertising guidelines to the audience they most affect—the influencers themselves. The average influencer is likely not aware of the FTC’s requirements and guidelines. For example, the FTC could interact with influencers by “partnerships with brands, affiliate networks, and professional influencers.”149

The FTC could also utilize one of the tools most used to promote content—social media—to make influencers aware of advertising guidelines. While the FTC does utilize Twitter to respond to questions,150 it could better engage influencers by using Instagram, Facebook, and YouTube. The FTC does not currently have an Instagram,151 which is interesting given that Instagram is one of the platforms where many issues arise. Creating an FTC Instagram, which could give out compliance tips, would make it easier to reach influencers because influencers could follow the FTC’s page and see tips on their timelines. The FTC could also better utilize its Facebook page to engage influencers, such as by hosting a live weekly Facebook Q&A session where influencers could ask questions.152 While engaging social media may be unfamiliar territory for the FTC, it would better speak to the FTC’s target

148.  Id.
149.  Bladow, supra note 115, at 1162–63.
150.  See id at 1162 n.297. See also FTC (@FTC), TWITTER (Sept. 20, 2017, 1:45 PM), https://twitter.com/ftc/status/910605784651829250 [https://perma.cc/6595-63UB].
151.  The author searched Instagram on February 26, 2019, and found no record of an official “FTC” or “Federal Trade Commission” Instagram page.
audience, and ensure that the FTC’s concerns over deceptive advertising practices will be heard.

Finally, the FTC should clarify what a sponsor or partnership is for purposes of disclosures. 153 By clarifying these definitions, influencers would better know how to classify their relationship with the content they are promoting. This would also reduce the incidence of mislabeled posts that incorrectly identify the relationship between the influencer and the company. 154

Until the FTC better clarifies compliance requirements, advertisers and companies need to establish best practices in order to be in conformance with FTC rules. Companies can do this by creating a process for monitoring and reviewing social media content to ensure it is in compliance. 155 The FTC does not clarify how frequently this monitoring should take place, 156 but consistent monitoring would seem to best ensure that paid content associated with a company stays in compliance with the FTC’s requirements.

The FTC gives the below advice for compliance programs:

1. Given an advertiser’s responsibility for substantiating objective product claims, explain to members of your network what they can (and can’t) say about the products – for example, a list of the health claims they can make for your products, along with instructions not to go beyond those claims;

2. Instruct members of the network on their responsibilities for disclosing their connections to you;

3. Periodically search for what your people are saying; and

4. Follow up if you find questionable practices. 157

In addition to the above elements, a company should have a process for getting a signed and dated agreement documenting the relationship between a company and the influencer. 158 This

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154. See id.

155. O’Neill & Fleisher, supra note 146.

156. See What People are Asking, supra note 72.

157. Id.

158. See O’Neill & Fleisher, supra note 146.
agreement could also include an explicit requirement that an endorser make clear and prominent disclosures, in an attempt to ensure compliance with the FTC’s disclosure requirements.\(^{159}\) Further, the agreement could include a right for a company to terminate the relationship if the influencer violates the promotion guidelines.\(^{160}\) Incorporating the FTC’s requirements, as well as a signed agreement, may best ensure that a company’s promoted content conforms to FTC guidelines, as well would provide a mechanism to terminate a relationship with an influencer who violates a company’s requirements.

### VII. Conclusion

Influencer marketing appears here to stay. As social media has changed the ways we interact each day, it has increased the ability of brands and marketers to reach consumers. The shift to influencer marketing on social media platforms, such as Instagram, has brought the content directly to the consumer. This creates a more personal relationship between a customer and brand. Because the advertisement comes from what may appear to be a peer, it may be difficult for the customer to discern that the content they are seeing is actually a paid advertisement.

Changes in marketing practices have led the FTC to try and adapt its disclosure guidelines. While the FTC has tried to meet the challenges that come with advertising on social media, it has not done enough to clarify its guidelines. To remedy this, the FTC should elucidate its instructions, and use social media to make influencers, marketers, and companies aware of disclosure requirements.

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\(^{159}\) See id.

\(^{160}\) See id.