

GET READY WITH ME: UNVEILING THE REGULATORY REALITIES OF INFLUENCER MARKETING

Abstract: Influencer marketing has rapidly evolved from a casual practice to an essential and increasingly regulated industry. The COVID-19 pandemic and subsequent global lockdowns accelerated this shift by confining consumers indoors and pushing them into a largely virtual world. In this digital landscape, influencer marketing emerged as a key strategy for brands seeking to enhance visibility and engagement. The saturation of social media spaces with influencer content has intensified the urgency around purchasing decisions and blurred the line between entertainment and commerce. Despite its effectiveness, influencer marketing raises significant concerns about deceptive practices—such as undisclosed sponsorships and misleading endorsements—that evade regulatory oversight and erode consumer trust. This Note argues that the Federal Trade Commission’s slow and reactive response to these practices inadvertently fosters unfair competition and compromises consumer loyalty. To protect consumers and strengthen the integrity of influencer marketing, this Note proposes a range of proactive regulatory strategies, including technological solutions, federal-state partnerships, voluntary certification, educational initiatives, and increased brand accountability.

INTRODUCTION

The phrase “get ready with me” (GRWM) is more than just an invitation into someone’s personal pre-outing routine; it is a gateway to the multi-billion-dollar influencer marketing industry.¹ As social media personalities walk viewers through their GRWM routines—sharing makeup tips, fashion choices, and intimate details of daily life—they have also begun to partner with brands eager to capitalize on their authentic viewer engagement through paid endorsements.² With more brands embracing influencer marketing, the demand for

¹ See Taylor Herzlich, *Why “Get Ready with Me” Videos Have Become a Booming TikTok Genre*, TODAY (May 16, 2023), <https://www.today.com/popculture/get-ready-with-me-grwm-videos-trend-rcna-84166> [<https://perma.cc/X78J-FLHA>] (describing the “get ready with me” (GRWM) video genre, where influencers document their “getting ready” process while telling stories); Jen King, *Guide to Influencer Marketing: Trends, Tactics, and KPIs*, EMARKETER (Aug. 5, 2024), <https://www.emarketer.com/insights/influencer-marketing-report> [<https://perma.cc/53GV-6DL6>] (valuing the influencer economy at \$75 billion in 2024). For influencers creating GRWM videos, “their currency is charm, not expertise.” Herzlich, *supra*. Alix Earle, a lifestyle influencer, popularized the GRWM video genre by sharing intimate details about her life while getting ready for various occasions. Ashley Wong, *How “Get Ready with Me” Videos Became the Ultimate Confessional*, WALL ST. J. (May 11, 2023), <https://www.wsj.com/articles/get-ready-with-me-tiktok-61d6810> [<https://perma.cc/95FC-5JQX>].

² See Wong, *supra* note 1 (calling GRWM videos the “ultimate confessional” where influencers “may talk about starting antidepressants as a teenager, getting suspended in middle school for fighting

influencers who can attract new customers and drive sales is also on the rise.³ What began as casual product mentions and recommendations has evolved into a complex industry that blurs the line between genuine endorsements and advertisements, potentially misleading unsuspecting consumers.⁴ For influencers

or being bullied by colleagues at a venture-capital firm”); Herzlich, *supra* note 1 (discussing the economics of GRWM videos and their potential to secure brand deals for influencers); *see also* Giovanni Rivera (@giofilmedthis), *COQUETTE Makeup for my GF*, TIKTOK (Feb. 27, 2024), <https://www.tiktok.com/@giofilmedthis/video/7340450119558368542> [<https://perma.cc/NLV4-RGV5>] (demonstrating a step-by-step Valentine’s Day dinner GRWM routine using Urban Decay makeup products, with a partnership hashtag, #UrbanDecayPartner, at the start of the video and in the caption, followed by the brand’s TikTok account handle); Alaina Titley (@alain.jannette), *Two of My Favs from @Princess Polly*, TIKTOK (Feb. 1, 2024), <https://www.tiktok.com/@alain.jannette/video/7330658867262606634> [<https://perma.cc/N8NG-5XAJ>] (choosing between two Princess Polly dresses for a date, with an affiliate code, 20ALAINA, included at the start of the video and in the caption, followed by the brand’s TikTok handle and partnership hashtag, #pppartner).

For example, Alix Earle’s GRWM videos effortlessly explore different aspects of her life—smoothly transitioning from talking about her plastic surgery journey to applying Drunk Elephant skincare, sharing her experiences with acne, and showcasing her makeup techniques. Wong, *supra* note 1; *see* Alix Earle (@alixearle), *Wish Them a Happy Birthday*, TIKTOK (Jan. 5, 2023), <https://www.tiktok.com/@alixearle/video/7185355951661206827> [<https://perma.cc/G67F-MQK2>] (applying Drunk Elephant skincare and completing a makeup look while opening up about her cosmetic surgery experience). This dynamic presentation style creates an immersive experience for viewers, making them feel as though they are engaged in a video chat with the influencer. *See* Christian Allaire, *TikTok’s “Get Ready with Me” Videos Are a Comforting Phenomenon*, VOGUE (Jan. 4, 2023), <https://www.vogue.com/article/tiktok-get-ready-with-me-videos> [<https://perma.cc/45YM-ASJH>] (comparing GRWM videos to FaceTime calls with real friends). The “Alix Earle effect,” driven by her genuine appeal and relatable persona, allows her to earn between \$40,000 and \$70,000 per brand partnership video. Jenna Kelley, *TikTok Influencer Alix Earle Makes Up to \$70K per Video & She Does a Lot of GRWM Posts*, NARCITY, <https://www.narcity.com/miami/tiktok-influencer-alix-earle-makes-up-to-70k-for-one-video-her-audience-is-triggered> [<https://perma.cc/G4NH-G5EW>] (Jan. 12, 2023); *see* Anahy Diaz, *Alix Earle Has Nearly 6M TikTok Followers. She Reveals Her One Piece of Advice for Success*, TODAY, <https://www.today.com/popculture/who-is-alix-earle-rcna65669> [<https://perma.cc/5XYD-ZYNC>] (Sept. 20, 2023) (exploring the “Alix Earle effect,” defined by her “fine balance being both glamorous and self-deprecating,” leaving viewers “wanting to see more”).

³ *See* Simon Owens, *Is It Time to Regulate Social Media Influencers?*, INTELLIGENCER (Jan. 17, 2019), <https://nymag.com/intelligencer/2019/01/is-it-time-to-regulate-social-media-influencers.html> [<https://perma.cc/9N6K-LB6M>] (highlighting the rise of influencer marketing and the “ethical lapses” of the industry). Just under a decade ago, securing an endorsement from a well-known influencer cost between \$5,000 and \$10,000. Paris Martineau, *Inside the Pricey War to Influence Your Instagram Feed*, WIRED (Nov. 18, 2018), <https://www.wired.com/story/pricey-war-influence-your-instagram-feed> [<https://perma.cc/ZXK6-JEB7>]. Today, brands are prepared to spend over \$100,000 for comparable endorsements. *Id.*

⁴ *See* Peter Suci, *History of Influencer Marketing Predates Social Media by Centuries—But Is There Enough Transparency in the 21st Century?*, FORBES (Dec. 7, 2020), <https://www.forbes.com/sites/petersuci/2020/12/07/history-of-influencer-marketing-predates-social-media-by-centuries—but-is-there-enough-transparency-in-the-21st-century> [<https://perma.cc/X58Q-JD2P>] (discussing the evolution from early forms of paid influence to modern influencer marketing, where paid endorsements often blend with organic content); Scott Hervey, *The Briefing: Navigating the Evolving Landscape of Influencer Marketing—A Guide to the Latest FTC Changes*, IPWATCHDOG (Jan. 31, 2024), <https://ipwatchdog.com/2024/01/31/briefing-navigating-evolving-landscape-influencer-marketing-guide-ftc> [<https://perma.cc/3TRN-RBSU>] (examining the possible pitfalls in the regulatory scheme affecting influencer marketing). Influencer marketing is similar to word-of-mouth advertising, as consumers

unfamiliar with the ins and outs of the Federal Trade Commission's (FTC) regulatory framework, the ease of engaging in "unfair or deceptive acts or practices" poses a significant problem in this rapidly growing and pervasive industry.⁵

In 2023, the FTC updated its decade-old guidelines to adapt to the evolving influencer marketing environment.⁶ This new regulatory framework, however, still struggles to adequately address the complexities of influencer-brand dynamics, allowing both parties to circumvent regulatory scrutiny.⁷ Against

tend to trust the experiences and recommendations of people they know, including their friends and families. Sarah Conrad, *Why Influencers Are Essential for Scaling Your Word-of-Mouth Marketing Efforts*, GRIN (June 2023), <https://grin.co/blog/word-of-mouth-marketing-with-influencers> [<https://perma.cc/9ZBV-H5S4>]. Influencer marketing, however, takes this a step further by leveraging the power of blogs and social media, which have become increasingly popular in recent years. Chris Jacks, *A Brief History of Influencer Marketing*, HIRE INFLUENCE (Mar. 15, 2023), <https://hireinfluence.com/blog/history-influencer-marketing> [<https://perma.cc/7E2W-FFJC>]. For example, mommy bloggers began to rise in popularity in the early 2000s by sharing their insights and advice with fellow mothers on blogging platforms. *Id.* When Instagram launched in 2010, it introduced a new platform based on images, making it an ideal place for brands to promote their products through strategic partnerships and product placements. *See id.* (highlighting how early influencers leveraged Instagram to engage with their followers and share recommendations); Chris Stokel-Walker, *How TikTok Beat Instagram*, BUS. INSIDER (Feb. 2, 2023), <https://www.businessinsider.com/why-instagram-cant-compete-tiktok-videos-algorithm-influencers-engagement-2023-2> [<https://perma.cc/VC88-EJE9>] (noting that brand sponsorships became an integral part of Instagram's image-first platform). These partnerships are seamlessly integrated, allowing brands to reach a wider audience and promote their products in a more engaging and authentic way. *See Stokel-Walker, supra* (praising Instagram's design for influencer marketing).

⁵ See 15 U.S.C. § 45(a)(1)–(2) (outlawing unfair and deceptive business practices); Keith Cooper, Note, *Influencers: Not So Fluent in Disclosure Compliance*, 41 LOY. L.A. ENT. L. REV. 77, 80 (2021) (explaining that insufficient regulation of influencer marketing allows influencers to provide inadequate disclosures, which misleads their audience into falsely trusting the authenticity of their recommendations); FED. TRADE COMM'N, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS 2 (2019) (discussing why influencers must comply with the Federal Trade Commission's (FTC) disclosure rules when endorsing products to avoid misleading advertising). The Federal Trade Commission Act (FTC Act) prohibits individuals and businesses from engaging in unfair or deceptive practices that impact commerce. 15 U.S.C. § 45(a)(1)–(2). A practice is deemed deceptive if it involves material representations likely to mislead a reasonable consumer. *FTC v. Romero*, 658 F. Supp. 3d 1129, 1141–42 (M.D. Fla. 2023). A business practice is considered unfair if it seeks to gain an advantage by circumventing merit-based competition, thereby reducing market competition. *See FTC Restores Enforcement of Law Banning Unfair Methods of Competition*, FED. TRADE COMM'N (Nov. 20, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition> [<https://perma.cc/VU82-TQQ8>].

⁶ See Lesley Fair, *FTC and Endorsements: Final Revised Guides, a Proposed New Rule, and an Updated Staff Publication*, FED. TRADE COMM'N (June 30, 2023), <https://www.ftc.gov/business-guidance/blog/2023/06/ftc-endorsements-final-revised-guides-proposed-new-rule-updated-staff-publication> [<https://perma.cc/3WPM-EFU9>] (announcing the FTC's updated regulations, which had last been revised fourteen years prior).

⁷ See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(a) (2023) (providing the foundation for "voluntary compliance" with the FTC Act); Cooper, *supra* note 5, at 77 (attributing regulatory enforcement challenges to the nonbinding nature of the FTC's guidelines); Kate Cooper (@thelegalinfluence), *I Keep Hearing About More & More Brands, TIKTOK* (Jan. 3, 2024), <https://www.tiktok.com/@thelegalinfluence/video/7319910138662489387>

this backdrop, this Note aims to unveil the regulatory realities of influencer marketing, evaluate the shortcomings in the FTC's current enforcement practices, and propose proactive measures to safeguard consumers and promote transparency within the industry.⁸

Part I of this Note traces the growing prominence of influencers in a consumerism-dominated world and delves into their impact on the modern economy.⁹ Additionally, Part I outlines the changes social media platforms have made to address influencer marketing partnerships on their platforms and the regulatory role played by the FTC and its Guides Concerning the Use of Endorsements and Testimonials in Advertising (FTC Guides).¹⁰

As influencers maintain their strong impact, Part II explores the shortcomings of the FTC's current regulations and enforcement strategies on influencer marketing.¹¹ By contrasting the FTC Guides with the specific measures implemented by social media platforms, Part II highlights the flaws in existing enforcement methods and underscores the need for a more proactive strategy in tackling deceptive marketing practices.¹²

Part III proposes proactive strategies to address the evolving challenges in influencer marketing regulation.¹³ In doing so, Part III suggests real-time compliance tracking, collaboration between the FTC and state agencies, a voluntary certification program, educational campaigns, and active brand involvement in compliance monitoring.¹⁴ Ultimately, Part III encourages a multi-tiered collaborative approach to enhance consumer trust, protect the integrity of influencer marketing, and promote a fair and sustainable ecosystem for all stakeholders.¹⁵

[<https://perma.cc/D8S7-HX2Z>] (referring to the problematic trend where brands request that influencers omit the disclosure of their partnership). Kate Cooper is an attorney and a full-time influencer who utilizes her platform to educate people about the legal nuances of influencer marketing. See Kate Cooper, *About the Legal Influence*, LEGAL INFLUENCE, <https://thelegalinfluence.com/about> [<https://perma.cc/6KVL-A8J2>] (detailing Kate Cooper's journey from a traditional legal career to online influencing). Kate Cooper manages a blog and podcast dedicated to demystifying the responsibilities of influencers in compliance with FTC regulations. Kate Cooper, *FTC Disclosure Guidelines for Influencers and Content Creators*, LEGAL INFLUENCE, <https://thelegalinfluence.com/ftc-disclosure-guidelines-for-influencers> [<https://perma.cc/5GK9-F28U>]. In January 2024, Kate Cooper expressed her concern on TikTok about the increasing number of brands allegedly requesting influencers to conceal their connection with the brand, particularly when receiving free products. Cooper, *I Keep Hearing About More & More Brands*, *supra*. In the TikTok video, she emphasized that disclosing a relationship with a brand as required by the FTC is a simple task and noted that non-compliance with this disclosure requirement may indicate non-compliance with other laws. See *id.* (suggesting that brands intentionally avoiding disclosure requirements are likely also circumventing other regulations).

⁸ See *infra* notes 16–213 and accompanying text.

⁹ See *infra* notes 16–103 and accompanying text.

¹⁰ See *infra* notes 16–103 and accompanying text.

¹¹ See *infra* notes 104–167 and accompanying text.

¹² See *infra* notes 104–167 and accompanying text.

¹³ See *infra* notes 168–213 and accompanying text.

¹⁴ See *infra* notes 168–213 and accompanying text.

¹⁵ See *infra* notes 168–213 and accompanying text.

I. INFLUENCERS IN THE SPOTLIGHT: SHAPING A CONSUMER-DRIVEN ECONOMY

Part I of this Note discusses the principles and dynamics of influencer marketing in today's consumer-centric environment.¹⁶ This Part also highlights the limitations of the current regulatory framework in governing influencer marketing.¹⁷

Section A of this Part explores the foundation of influencer marketing, emphasizing its inherent link to consumerism and its pivotal role in expanding brand visibility across diverse niche audiences.¹⁸ Next, Section B explores the tools various social media platforms employ to manage content generated from influencer marketing collaborations.¹⁹ Section C outlines the FTC's role in overseeing influencer marketing practices.²⁰ Finally, Section D navigates the FTC Guides, which offer directives to influencers regarding adherence to the Federal Trade Commission Act (FTC Act).²¹

A. From Interest to Consumerism: The Evolution of Influencer Marketing

Fundamentally, an influencer is an individual who generates interest in a particular thing by sharing content through social media.²² Influencer culture, however, is not solely about generating interest; it is inextricably linked to consumerism.²³ Influencers provide immense value to brands aiming to reach broader or more niche audiences.²⁴ This industry thrives on the symbiotic rela-

¹⁶ See *infra* notes 16–103 and accompanying text.

¹⁷ See *infra* notes 16–103 and accompanying text.

¹⁸ See *infra* notes 22–48 and accompanying text.

¹⁹ See *infra* notes 49–64 and accompanying text.

²⁰ See *infra* notes 65–77 and accompanying text.

²¹ See *infra* notes 78–103 and accompanying text.

²² *Influencer*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/influencer> [<https://perma.cc/75JB-C82G>] (Oct. 12, 2024).

²³ Paris Martineau, *The WIRED Guide to Influencers*, WIRED (Dec. 6, 2019), <https://www.wired.com/story/what-is-an-influencer> [<https://perma.cc/WG2R-TZEL>]. Consumerism promotes increased consumption of goods, based on the belief that buying more is both economically beneficial and socially appealing. *Consumerism*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/consumerism> [<https://perma.cc/43P4-XMF5>] (Oct. 5, 2024); see Timothy Moore, *What Is Consumerism?*, SOFI (Aug. 8, 2023), <https://www.sofi.com/learn/content/what-is-consumerism> [<https://perma.cc/CA9A-N4PA>] (describing the social component of consumerism). Consumerism drives economic growth, global job creation, and innovation, but it also faces criticism for its potential negative impacts on mental and physical health, environmental harm, and the financial burdens it places on consumers. Moore, *supra*.

²⁴ Jacinda Santora, *35 Influencer Marketing Statistics Shaping 2024*, INFLUENCER MKTG. HUB (Dec. 13, 2024), <https://influencermarketinghub.com/influencer-marketing-statistics> [<https://perma.cc/S2BA-ZXPR>]. A niche market is a specialized market that targets a specific group of individuals with distinct traits and interests. *Niche Market*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/niche-market> [<https://perma.cc/W4TX-9JZD>]. Popular influencer marketing niches include beauty, fashion, health and fitness, travel, and parenting. 10 *Powerhouse Influencer Marketing*

tionships between influencers and brands, allowing them to engage with audiences in a more personal and impactful way.²⁵

Through influencer marketing partnerships, brands enlist influencers with robust social followings to promote their products or services to their viewers.²⁶ Besides enhancing brand visibility, such collaborations leverage the trust and feeling of authenticity that influencers cultivate with their audiences, providing brands with an immersive avenue to engage with their target demographics.²⁷

Influencer marketing has surpassed traditional advertising methods in the evolving social-media-shaped marketing landscape media, both in terms of reach and engagement with the target audience.²⁸ Influencer marketing utilizes

Niches, VIRAL NATION (Aug. 20, 2019), <https://www.viralnation.com/blog/10-powerhouse-influencer-marketing-niches> [<https://perma.cc/X6W4-Y22B>].

²⁵ Joel Mathew, *Understanding Influencer Marketing and Why It Is So Effective*, FORBES (July 30, 2018), <https://www.forbes.com/sites/theyec/2018/07/30/understanding-influencer-marketing-and-why-it-is-so-effective> [<https://perma.cc/3TR4-QJ7G>]; see Paula Celestino, *Influencer Marketing in 2023: Benefits and Best Practices*, FORBES (Mar. 10, 2023), <https://www.forbes.com/sites/forbesagencycouncil/2023/03/10/influencer-marketing-in-2023-benefits-and-best-practices> [<https://perma.cc/4WZQ-P4NV>] (highlighting the effectiveness of influencer marketing in reaching consumers, as illustrated by an influencer campaign that generated forty-million impressions, 7,000 new Instagram followers, and a \$30,000 increase in e-commerce sales for a luxury furniture brand). Influencers shape buying decisions by leveraging their authority, knowledge, and genuine connections with their followers. *What Is an Influencer?—Social Media Influencers Defined*, INFLUENCER MKTG. HUB (Aug. 30, 2024), <https://influencermarketinghub.com/what-is-an-influencer> [<https://perma.cc/RMU7-BQ9X>].

²⁶ Zdenka Kádeková & Mária Holienčinová, *Influencer Marketing as a Modern Phenomenon Creating a New Frontier of Virtual Opportunities*, 9 COMM’N TODAY 91, 92 (2018); see *What Is an Influencer?—Social Media Influencers Defined*, *supra* note 25 (highlighting influencers’ active engagement with their social following within their specific niche). Brands compensate influencers for promoting their products or services using a diverse range of payment structures, such as gifting, performance-based incentives, affiliate network commissions, and fixed rates. Blaire McClure, *How Do Brands Pay Influencers?*, IMPACT.COM, <https://impact.com/influencer/how-do-brands-pay-influencers> [<https://perma.cc/R8VB-54K9>]. An influencer’s earning potential can reach thousands of dollars per social media post, depending on their follower count, niche, and engagement rates. Nikola Bojkov, *How Much Money Do Instagram Influencers Make in 2024?*, EMBEDSOCIAL (Sept. 20, 2024), <https://embedsocial.com/blog/how-much-do-instagram-influencers-make> [<https://perma.cc/6NWB-4FMQ>].

²⁷ Flytant, *Influencer Marketing vs. Old Traditional Marketing*, LINKEDIN (Oct. 6, 2023), <https://www.linkedin.com/pulse/influencer-marketing-vs-old-traditional-flytant> [<https://perma.cc/ZDU5-L5HM>]; see Kádeková & Holienčinová, *supra* note 26 (highlighting how influencer marketing can connect with target audiences organically); Celestino, *supra* note 25 (describing how brands can leverage the trust influencers have with their followers to connect with target audiences in a more genuine and impactful manner). Brands gain value by leveraging the goodwill influencers build with their social media followers. Coursera Staff, *What Is Influencer Marketing? How to Develop Your Strategy*, COURSEERA (Jan. 5, 2024), <https://www.coursera.org/articles/influencer-marketing> [<https://perma.cc/KM5F-HTLE>].

²⁸ Sarah Saffari, *Influencer Marketing vs. Traditional Advertising: The Verdict*, LINKEDIN (Oct. 3, 2023), <https://www.linkedin.com/pulse/influencer-marketing-vs-traditional-advertising-verdict-sarah-saffari> [<https://perma.cc/MTV3-44DC>]. The influencer marketing global market size increased from \$1.7 billion in 2016 to \$16.4 billion in 2022 and an estimated \$21.1 billion in 2023. *Influencer Marketing Market Size Worldwide from 2016 to 2023*, STATISTA (Feb. 2023), <https://www.statista.com/statistics/1092819/global-influencer-market-size> [<https://perma.cc/MED2-F58G>]. Traditional advertis-

the authenticity of personal recommendations, interactive content, and storytelling from trusted online personalities to create genuine connections with consumers in specific niches.²⁹ Traditional advertising, on the other hand, faces challenges, including declining trust, difficulties fostering engagement, and high costs.³⁰ Consumers increasingly view traditional advertisements as intrusive and unreliable, leading to the rise of ad blockers and widespread ad avoidance among consumers.³¹

ing modes include print, billboards, television, radio, and paid advertisements across a variety of platforms. Saffari, *supra*.

²⁹ Saffari, *supra* note 28 (listing key factors contributing to the success of influencer marketing). By seamlessly integrating product and service recommendations into their social media content, influencers and brands leverage the power of word-of-mouth marketing on a broader scale. *Id.* The success of a word-of-mouth strategy hinges on the idea that people tend to trust and act on recommendations from trusted individuals. Mike Alton, *The Science Behind the Effectiveness of Word of Mouth*, SOC. MEDIA HAT (Mar. 29, 2023), <https://www.thesocialmediahat.com/blog/the-science-behind-the-effectiveness-of-word-of-mouth> [<https://perma.cc/R6TU-UWW5>].

³⁰ Saffari, *supra* note 28. According to a brand trust survey, 63% of consumers between the ages of eighteen and thirty-four place more trust in influencers' messaging about a brand than in the brand's own messaging about itself. RICHARD EDELMAN, 2019 EDELMAN TRUST BAROMETER SPECIAL REPORT 3 (2019). The survey revealed that these consumers turn to influencers for guidance not because of their large social followings, but because they trust them. *Id.* at 10. Traditional marketing operates through one-way communication, whereas digital marketing fosters a two-way interaction between companies and potential consumers. *Marketing Smack Down: Traditional vs. Digital*, STRAY MEDIA GRP. (June 15, 2017), <https://straymediagroup.com/marketing-smack-down-traditional-vs-digital> [<https://perma.cc/4BLX-9LSC>]; see *Why I Believe Traditional Advertising Can't Measure Up to Influencer Marketing*, SWAY GRP., <https://swaygroup.com/traditional-advertising-vs-influencer-marketing> [<https://perma.cc/2SY3-RC4L>] (noting that traditional ads are "conversational dead ends" unlike interactive influencer content); see also Gregory M. Dickinson, *The Patterns of Digital Deception*, 65 B.C. L. REV. 2457, 2480 (2024) (describing digital advertising as "the premier method for businesses to reach potential customers").

Traditional advertising is also often more expensive; a black-and-white one-inch column ad in the *Wall Street Journal*, for example, costs approximately \$1,576. See Audrey Rawnie Rico, *Newspaper Ad Cost & Factors Affecting How Much You Pay*, FIT SMALL BUS. (Aug. 1, 2024), <https://fitsmallbusiness.com/newspaper-advertising-costs> [<https://perma.cc/U8G3-HMG7>] (providing full-page ad costs for various newspapers); Dickinson, *supra*, at 2481 (noting that digital advertising provides more cost-effective campaigns and higher customer conversion rates). Moreover, airing a thirty-second commercial on a national television network costs approximately \$350,000. *Cost to Advertise on National TV*, WEBFX, <https://www.webfx.com/digital-advertising/pricing/cost-to-advertise-national-tv> [<https://perma.cc/S8Q3-F38F>].

³¹ Saffari, *supra* note 28. Consumers are increasingly avoiding traditional advertising, making it more difficult for brands to engage with consumers. See EDELMAN, *supra* note 30, at 3, 8 (noting the increase in consumers using ad blockers and ad-free networks). Certain traditional advertising methods, like pop-up ads and interruptive audio or video clips, force unwelcome disruptions and increasingly lead consumers to use ad blockers and opt for subscriptions that allow them to avoid such experiences. Chelsea Peng, *Influencer Marketing: Statistics and Skepticism*, 11 OPEN J. BUS. & MGMT. 744, 748 (2023); see James Wohr, *Ad Blocking: What It Is and Why It Matters to Marketers and Advertisers*, EMARKETER, <https://www.emarketer.com/insights/ad-blocking> [<https://perma.cc/CPV8-9TCQ>] (Sept. 4, 2024) (providing that approximately 30% of consumers in the United States have purchased ad blockers to enjoy ad-free digital experiences). For example, consumers can purchase ad-free subscriptions on social media platforms, like Facebook and Instagram, as well as on video-streaming platforms, such as YouTube and Hulu. See *Facebook and Instagram to Offer Subscription*

Further, influencer marketing offers more comprehensive and accurate measurements to assess a brand's return on investment (ROI) than traditional marketing.³² Measuring ROI from traditional marketing is challenging due to the difficulty in pinpointing the exact sales generated by a campaign and identifying which sales came from the intended target market.³³ In contrast, influencer marketing ROI is more manageable to gauge through metrics such as shares, saves, and sales from shoppable social media posts, trackable links, and unique discount codes.³⁴

Influencer marketing partnerships often involve brand deals and affiliate commission structures, fostering mutual benefits between brands and influencers.³⁵ In the brand deal model, influencers receive compensation at a flat rate for featuring a product or service in one or more social media posts.³⁶ In the affiliate marketing model, influencers post about products or services using a

for *No Ads in Europe*, META (Oct. 30, 2023), <https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe> [<https://perma.cc/X6JG-L579>] (reporting on Meta's new ad-free Instagram and Facebook subscriptions for European users); *YouTube Premium*, YOUTUBE, <https://www.youtube.com/premium> [<https://perma.cc/WWM3-BUYR>] (providing sign-up information for YouTube's ad-free YouTube Premium plan); *No Ads*, HULU, <https://www.hulu.com/no-ads> [<https://perma.cc/QDS2-7RVT>] (providing sign-up information for Hulu's No Ads plan).

³² Saffari, *supra* note 28. Return on investment (ROI) is a financial metric that helps measure an investment's profitability by comparing the amount earned from that investment to the cost of the investment. Emily Guy Birken, *Return on Investment (ROI)*, FORBES, <https://www.forbes.com/advisor/investing/roi-return-on-investment> [<https://perma.cc/97JR-6PUW>] (Sept. 28, 2022). ROI is determined by dividing the net profit gained from the investment by the total cost of the investment and then expressing this figure as a percentage. *Id.* This metric allows investors and businesses to evaluate the effectiveness of their investments and make informed decisions about future investments. *Id.*

³³ See Dustin Brackett, *Understanding and Proving Marketing ROI*, LINKEDIN (Apr. 4, 2016), <https://www.linkedin.com/pulse/understanding-proving-marketing-roi-dustin-brackett> [<https://perma.cc/9KLH-6GAP>] (noting that "the only way to get any idea of the ROI of your [traditional marketing] campaign was to have a separate phone number for that campaign, separate URL, or special deal if you mentioned the billboard").

³⁴ Forbes Agency Council, *16 Smart Ways to Measure Influencer Marketing ROI in 2023*, FORBES, <https://www.forbes.com/councils/forbesagencycouncil/2023/05/16/16-smart-ways-to-measure-influencer-marketing-roi-in-2023> [<https://perma.cc/S3YX-T97V>] (Sept. 6, 2023). Brands realize substantial ROI through influencer marketing, earning an average \$5.20 for every dollar spent. Neal Schaffer, *Influencer Marketing ROI: The Ultimate Guide to Measuring It the Right Way*, NEAL SCHAFFER, <https://nealschaffer.com/influence-marketing-roi> [<https://perma.cc/HPS5-S8SB>] (Nov. 2, 2024).

³⁵ *What Is Influencer Marketing?*, MCKINSEY & CO. (Apr. 10, 2023), <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-influencer-marketing> [<https://perma.cc/PW93-GAR9>].

³⁶ *Id.* Influencers engage in brand partnerships using various styles of branded content, such as reaction videos, unboxing hauls, and creating lookbooks and tutorials. See YouTube Creators, *What Is Branded Content?*, YOUTUBE (Feb. 13, 2018), <https://www.youtube.com/watch?v=6ysdXcdKy-4> [<https://perma.cc/22TA-EBR2>] (mentioning reaction and tutorial branded content forms); Lucy Maguire, *TikTok Unboxing: Luxury Fashion's Low-Cost Marketing Tool*, VOGUE (Sept. 2, 2022), <https://www.voguebusiness.com/fashion/tiktok-unboxing-luxury-fashions-low-cost-marketing-tool> [<https://perma.cc/84HT-FHRX>] (discussing haul and unboxing video formats).

link to a purchase gateway or designated promo code, earning an affiliate commission each time a viewer purchases through the provided link or code.³⁷

Brands primarily collaborate with influencers on TikTok, Instagram, Facebook, and YouTube.³⁸ TikTok has grown into a dependable and productive marketing channel because of its pervasive use, broad audience reach, and interactive user experience.³⁹ TikTok particularly resonates with Generation Z (Gen Z)⁴⁰ users and features a notable amount of micro-influencers.⁴¹ Brands

³⁷ *What Is Influencer Marketing?*, *supra* note 35. Affiliate marketing is a performance-driven influencer strategy where influencers earn commissions by driving attention and generating traffic for sponsored products. *Maximize Your Earnings: Top Affiliate Influencer Marketing Strategies for 2024*, ADVERTISE PURPLE (Dec. 26, 2023), <https://www.advertisepurple.com/affiliate-influencer-marketing> [<https://perma.cc/VQ7B-HGAM>]. In affiliate marketing, influencers like Lauryn Bosstick create blog websites that incorporate reviews, tips, and affiliate links for various products to organically attract attention and generate traffic, all while earning commissions from the various sellers. *See, e.g.*, Skinny Confidential Team, *Quick & Easy Tips For Youthful, Smooth & Supple Skin*, THE SKINNY CONFIDENTIAL, <https://www.theskinnyconfidential.com/quick-easy-tips-for-youthful-smooth-supple-skin> [<https://perma.cc/2F4Q-QKKB>] (reviewing sponsored skincare products and providing links to them throughout the blog); *Privacy*, THE SKINNY CONFIDENTIAL, <https://www.theskinnyconfidential.com/privacy> [<https://perma.cc/XV57-JHBL>] (Sept. 1, 2020) (noting that The Skinny Confidential website includes affiliate links, through which it earns a commission for each purchase made via these links).

Other influencers like Alix Earle manage Amazon Storefronts, curating lists such as “going out clothing,” “workout gear,” and “shower necessities.” *Alix Earle*, AMAZON, https://www.amazon.com/shop/alix_earle [<https://perma.cc/RZU6-KN85>]. This allows consumers to shop directly from the influencers’ virtual stores and, in return, the influencers earn commissions from Amazon. *See Amazon Creator University, Storefronts 101: Make the Most Out of Your Content*, AMAZON, <https://www.amazon.com/amazon-storefront-start/b?ie=UTF8&node=53641474011> [<https://perma.cc/6UDY-GJRX>] (highlighting the Amazon Storefront as a “one-stop shop” where followers can directly purchase products from influencers’ virtual stores, allowing influencers to earn commissions for each successful sale).

³⁸ INFLUENCER MKTG. HUB, THE STATE OF INFLUENCE MARKETING 36 (2023). According to an influencer marketing report, 55.5% of brands engaging in influencer marketing use TikTok, 50.8% use Instagram, 42.1% use Facebook, and 38.3% use YouTube. *Id.*

³⁹ Valentina Dencheva, *Influencer Marketing Worldwide - Statistics & Facts*, STATISTA (Dec. 18, 2023), <https://www.statista.com/topics/2496/influence-marketing> [<https://perma.cc/5MBN-3N9M>]. The “For You” feed, the hallmark of TikTok’s engaging and never-ending scrolling experience, is a personally tailored video recommendation system. *For You*, TIKTOK, <https://support.tiktok.com/en/getting-started/for-you> [<https://perma.cc/G9TD-FBJR>]. The algorithm customizes TikTok users’ feeds based on their preferences while also integrating a feature that allows users to explore and discover new ideas and topics. *Id.*

⁴⁰ *See What Is Gen Z?*, MCKINSEY & CO. (Aug. 28, 2024), <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-gen-z> [<https://perma.cc/4KRT-JJCS>] (defining the Gen Z demographic as individuals born between 1996 and 2010). Growing up with constant internet access, Gen Z has developed digital fluency and quick adaptation to new technologies. *Id.*; *see* Tracy Francis & Fernanda Hoefel, ‘True Gen’: Generation Z and Its Implications for Companies, MCKINSEY & CO. (Nov. 12, 2018), <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/true-generation-z-and-its-implications-for-companies> [<https://perma.cc/MPB5-Q5BU>] (describing Gen Z as “digital natives”).

⁴¹ Dencheva, *supra* note 39; *see* Kristen Wiley, *TikTok Micro-Influencers: Why Smaller Creators Are Best for Brands*, STATUSPHERE (July 1, 2023), <https://brands.joinstatus.com/tiktok-micro-influencers> [<https://perma.cc/Y4QE-Q36F>] (highlighting the high-demand and presence of micro-influencers on TikTok). In 2023, a marketing analyst declared TikTok as the official influencer platform. Ellyn Briggs, *TikTok Is Officially the Influencer Platform*, MORNING CONSULT (Sept. 25, 2023),

capitalize on TikTok's short video format by employing strategies like branded challenges or dances to go viral and boost brand awareness.⁴² Further, TikTok users can purchase an influencer's product recommendations directly from the TikTok Shop (Shop)—TikTok's new e-commerce interface.⁴³

Instagram also offers immense value to brands by providing them with a platform for influencer discovery and recruitment through its direct messaging feature.⁴⁴ Instagram features diverse promotional formats, including photos, tags, polls, co-authored posts, stories, profile highlights, live videos, reels, direct links to brand websites, and a shopping tab.⁴⁵

The swift evolution of influencer marketing and the inherent diversity among influencers, brands, platforms, and marketing strategies present a complex landscape that demands regulatory attention.⁴⁶ As influencers collaborate

morningconsult.com/analysis/tiktok-gen-z-influencers [https://perma.cc/ANX3-EP7D]. According to a survey, Gen Z social media users prefer to follow influencers on TikTok compared to other platforms. *Id.*

⁴² Neal Schaffer, *TikTok Influencer Marketing: The Complete Guide to Get You Started*, NEAL SCHAFFER, <https://nealschaffer.com/tiktok-influencer-marketing> [https://perma.cc/3BRD-NAQK] (Oct. 15, 2024). For example, at the onset of the COVID-19 pandemic, Aerie made its TikTok debut with influencer Charli D'Amelio, who started the #AerieRealPositivity challenge. Katie Richards, *How Aerie Established a TikTok Following in Two Weeks*, GLOSSY (Apr. 28, 2020), <https://www.glossy.co/fashion/how-aerie-established-a-tiktok-following-in-two-weeks> [https://perma.cc/JAG7-EAZJ]. The #AerieRealPositivity challenge encouraged users to post videos with the hashtag and share three things they are thankful for. *Id.* Within two weeks, Aerie gained 17,400 followers and received 6,600 challenge-tagged videos, resulting in over 1.3 billion views. *Id.* After the challenge, Aerie's online sales increased by 75% within a single quarter. Schaffer, *supra*.

⁴³ See TikTok Seller Center, *Sell More with TikTok Shop*, TIKTOK, <https://seller-us-accounts.tiktok.com/account/register> [https://perma.cc/9WZW-U9F9] (describing the TikTok Shop as an all-in-one solution for promoting brand growth and driving sales). According to TikTok, 70% of users learn about new products and brands through using the platform. *Id.*

⁴⁴ *The Ultimate 2024 Guide to Instagram Features for Marketers*, INFLUENCER MKTG. HUB (Aug. 26, 2024), <https://influencermarketinghub.com/instagram-features> [https://perma.cc/53D8-F4LC].

⁴⁵ *Id.*; Dencheva, *supra* note 39; Amanda Demeku, *The Ultimate Guide to Instagram Influencer Marketing*, LATER (Oct. 18, 2023), <https://later.com/blog/instagram-influencer-marketing> [https://perma.cc/66F6-SBYE]. Instagram's various features create a unique environment for influencer marketing to thrive. See Demeku, *supra* (praising Instagram's features for carrying out influencer marketing goals). Instagram Collabs allows two users to co-author a post, which then appears on both of their profiles and is visible to each of their followers in the Instagram feed. Instagram Help Center, *About Collab Posts on Instagram*, INSTAGRAM, <https://help.instagram.com/291200585956732> [https://perma.cc/Z235-BE64]. Instagram Shopping is an interactive set of features that enables users to shop directly from a brand's Instagram photos and videos. *Instagram Shopping Helps You Reach New Customers*, INSTAGRAM, <https://business.instagram.com/shopping> [https://perma.cc/7N8P-7RLF]. According to a study, nearly 50% of active Instagram users shop on the platform weekly. *Id.*

⁴⁶ Richard A. Yumang, *The Evolution and Impact of Influencer Marketing in 2023*, LINKEDIN (Oct. 18, 2023), <https://www.linkedin.com/pulse/evolution-impact-influencer-marketing-2023-richard-yumang-qz0we> [https://perma.cc/N2KF-TC52]; see Hanson Cheng, *The Challenges of Influencer Marketing for Business Campaigns*, FREEDOM TO ASCEND (July 21, 2023), <https://www.freedomtoascend.com/marketing/marketing-trends/influencer-marketing/influencer-marketing-challenges> [https://perma.cc/EW65-89UJ] (highlighting some of the legal and regulatory issues that brands and influencers must navigate cautiously when conducting influencer marketing).

with brands to promote products or services, brands depend on followers' trust in influencers to induce consumer engagement and buying behavior.⁴⁷ In response to this dynamic, social media platforms have established guidelines to manage the nuanced trust factor essential to influencer marketing.⁴⁸

B. Platform Accountability: How Social Media Regulates Influencer Content

In recent years, social media platforms have implemented various regulations to ensure that sponsored content produced by influencers is transparent and clearly identified as promotional.⁴⁹

⁴⁷ See Digital Habibi, *The Power of Influencers: How Social Media Stars Are Shaping Consumer Behavior*, LINKEDIN (Oct. 30, 2023), <https://www.linkedin.com/pulse/power-influencers-how-social-media-stars-shaping-consumer-khtwf> [<https://perma.cc/YE6X-VKH7>] (emphasizing the value brands put on an influencer's authentic and reliable content).

⁴⁸ See *id.* (underscoring the essential role of trust in influencer marketing dynamics); Instagram Help Center, *Partnership Ads on Facebook and Instagram*, INSTAGRAM, <https://help.instagram.com/116947042301556> [<https://perma.cc/AV6V-64EY>] (providing Instagram's rules regarding branded content); YouTube Help, *Add Paid Product Placements, Sponsorships & Endorsements*, GOOGLE, <https://support.google.com/youtube/answer/154235?hl=en> [<https://perma.cc/F7XN-A2YX>] (stating YouTube's paid promotion disclosure requirements).

⁴⁹ See TikTok Help Center, *Promoting a Brand, Product, or Service*, TIKTOK, <https://support.tiktok.com/en/business-and-creator/creator-and-business-accounts/promoting-a-brand-product-or-service> [<https://perma.cc/R9V2-65A9>] (outlining TikTok's content disclosure requirements for brand promotions); Instagram Help Center, *supra* note 48 (outlining Instagram's disclosure requirements for branded content). TikTok launched its Promote feature in 2021. Jasmine Williams, *TikTok Promotion: Boost Your Visibility in 2024*, SPROUT SOC. (Feb. 7, 2024), <https://sproutsocial.com/insights/tiktok-promotion> [<https://perma.cc/F36E-6MZ3>]. Instagram, however, introduced its branded content tools in 2017 with the launch of the "paid partnership with" tag. Instagram Business Team, *Why Transparency Matters: Enhancing Creator and Business Partnerships*, META, <https://business.instagram.com/blog/tagging-and-insights> [<https://perma.cc/YK8N-TSZ2>] (Aug. 29, 2017). Over time, Instagram has strengthened its branded content tool to include a notification system that alerts creators when their content fails to meet the platform's guidelines and allows them to remediate the issue. See Instagram Business Team, *Expanding Access to the Branded Content Tool on Instagram*, META (Nov. 7, 2017), <https://business.instagram.com/blog/branded-content-tool-expansion> [<https://perma.cc/HP66-TUKF>] (introducing Instagram's in-app notification system). In 2019, Instagram introduced a new feature that allows advertisers to promote creators' branded content in their feed and Stories. See Instagram Business Team, *New: Branded Content Ads on Instagram*, META (June 4, 2019), <https://business.instagram.com/blog/branded-content-ads-on-instagram> [<https://perma.cc/95CF-DJMP>] (introducing branded content ads as a way to increase the reach of branded content organically). In 2020, Instagram introduced several new branded content capabilities: the branded content tag to Reels and Stories, tappable elements for branded content ads featured in Stories, product tags for branded content ads, and the ability for influencers and brands to customize the minimum age for their branded content feed posts based on the country they are targeting. Instagram Business Team, *More Branded Content Capabilities on Instagram*, META (Nov. 20, 2020), <https://business.instagram.com/blog/more-branded-content-capabilities-on-instagram> [<https://perma.cc/LPA2-94PP>].

In 2023, Instagram reintroduced its branded content ads as partnership ads, allowing brands to promote a broader range of organic content, including branded and non-branded posts, Instagram Collab posts, mentions, product tags, and user tags. Instagram Business Team, *Branded Content Ads Are Now Partnership Ads*, META (May 1, 2023), <https://business.instagram.com/blog/partnershipsads>

TikTok, the popular short-form video app, requires influencers to make sponsored content transparent by adhering to all relevant laws and regulations.⁵⁰ To support this, the app includes a branded content disclosure tool that tags the brand the influencer is partnering with and displays a “paid partnership” disclaimer at the bottom of the video.⁵¹

The TikTok Creator Marketplace serves as the official hub for influencer-brand partnerships on TikTok, offering brands the opportunity to easily discover, manage, and engage with influencers.⁵² The platform provides brands with in-depth insights into influencer performance and real-time campaign metrics via a dedicated dashboard, enabling them to evaluate and optimize campaign success.⁵³

[<https://perma.cc/QG8W-QVHK>]. This rebrand simplified ad creation as advertisers can now generate new ads in Ads Manager without an existing post. *Id.* Additionally, Instagram updated its user permissions to support these features and streamline the ad creation process. *Id.*

⁵⁰ See *Branded Content Policy*, TIKTOK, <https://www.tiktok.com/legal/page/global/bc-policy/en> [<https://perma.cc/J5QX-A8EF>] (Nov. 2023) (outlining TikTok’s branded content policies). TikTok’s branded content policy prohibits the promotion of certain industries, including sexual products, alcohol, animals, contraceptive products, dating services, professional services, weight loss products, and weapons. See *id.* (listing prohibited industries from which creators may not promote products or services). Moreover, TikTok has also implemented a feature called “branded effects,” which allows brands to create custom filters and effects for influencers to use in their videos. See *Branded Effect: Place Your Brand Center Stage*, TIKTOK (July 13, 2021), <https://www.tiktok.com/business/en-US/blog/branded-effect-place-your-brand-center-stage> [<https://perma.cc/F7MW-Z9MW>] (discussing the branded effect TikTok feature).

⁵¹ *Promoting a Brand, Product, or Service*, TIKTOK, <https://support.tiktok.com/en/business-and-creator/creator-and-business-accounts/promoting-a-brand-product-or-service> [<https://perma.cc/FXR8-9DBJ>] (discussing the branded content tools available on TikTok). TikTok users who are paid or receive an incentive to create branded content must enable the content disclosure settings when posting the branded content. *Id.* The content disclosure tool has the option to choose “your brand,” which then labels the video “promotional content,” or to choose “branded content,” which then labels the video “paid partnership.” *Id.* By activating the branded content disclosure settings, TikTok’s moderation team will review any branded content that users post to ensure that it adheres to the platform’s branded content policy. *Id.* If a creator’s post fails to comply with the policy, it may be subject to removal from TikTok. *Id.* TikTok’s content moderation team, with help from its automated moderation tools, aims to quickly address any disturbing content before it can reach a wider audience. *Our Approach to Content Moderation*, TIKTOK, <https://www.tiktok.com/transparency/en/content-moderation> [<https://perma.cc/K6S7-JVD3>].

⁵² *Why Do Branded Content with Creators*, TIKTOK, <https://www.tiktokcreatormarketplace-learninglab.com/apac/why-branded-content-with-tiktok-creators> [<https://perma.cc/24YL-Z477>]. Within the TikTok Creator Marketplace, brands have access to an extensive network of over 800,000 influencers from twenty-five countries and diverse niches. *Id.* Brands can filter influencers based on criteria such as demographics, content topics, and audience interests. *Id.*

⁵³ See *id.* (outlining the different insights accessible through the TikTok Creator Marketplace). Brands using the TikTok Creator Marketplace can access daily campaign performance reports through the Campaign Reporting dashboard. See *TikTok Creator Marketplace Campaign Reporting*, TIKTOK, <https://creatormarketplace.tiktok.com/help/doc/10004351/10018131> [<https://perma.cc/28T2-YE33>] (stating that campaign performance reports are updated daily). This dashboard comprises an overview, audience, and engagement tab for branded content. *Id.* The overview tab, for example, provides reports on organic and sponsored video views, reach, engagement rate, and cost-per-engagement. *Id.* The engagement tab provides reports on likes, comments, shares, and average view time. *Id.* Lastly, the audience tab provides reports on gender, age, country or region, states, and audience overlap. *Id.*

Instagram, one of the most popular social media platforms for influencer marketing, has similar branded content policies in place.⁵⁴ The platform requires influencers to clearly disclose sponsored content using its brand content tool.⁵⁵ Instagram also prohibits influencers from making false or misleading claims about a product or service and requires that all content comply with its community guidelines and advertising policies.⁵⁶ In addition, any content that is sponsored or promoted by a brand on Instagram must adhere to specific formats.⁵⁷

The Instagram Creator Marketplace is a platform that enables business and creator account users to collaborate with brands and create branded content.⁵⁸ To participate, users must adhere to Instagram's policies and guidelines.⁵⁹ Instagram requires creators to disclose all branded content in stories, feed posts, reels, and live videos using the paid partnership label.⁶⁰

Both platforms have implemented reporting tools that allow users to report content that they believe violates the platform's policies.⁶¹ TikTok, for instance, has a report feature that enables users to report content that is misleading or deceptive.⁶² Instagram, similarly, has a "report ad" feature that allows users to report ads that they believe are misleading or inappropriate.⁶³

⁵⁴ See *The Beginner's Guide to Influencer Marketing on Instagram in 2024*, INFLUENCER MKTG. HUB (June 24, 2024), <https://influencermarketinghub.com/influencer-marketing-instagram> [<https://perma.cc/5AZZ-R25G>] (highlighting Instagram's two billion active and engaged user base). Compare *Branded Content Policies*, INSTAGRAM, <https://help.instagram.com/1695974997209192> [<https://perma.cc/94GK-YDDZ>] (detailing Instagram's branded content policies, which are similar to TikTok's policies), with TikTok, *Branded Content Policy*, *supra* note 50 (providing TikTok's branded content policies).

⁵⁵ *Branded Content Policies*, *supra* note 54. Instagram's branded content guidelines prohibit the promotion of certain goods, services, or brands, including illegal products, drugs, firearms, adult services or products, and multilevel marketing. *Id.* Additionally, Instagram has specific requirements for restricted content promotion, such as alcohol, weight loss, and contraception, which must adhere to age and geographical location restrictions to limit the audience that can see the post. *Id.* Certain businesses, including dating services, pharmacies, and drug and alcohol treatment centers, must obtain pre-authorization from Instagram prior to partnering with influencers to create branded content. *Id.* Nonetheless, the branded content tool is not available for all Instagram users. See *id.* (stating that only some Pages in some geographic regions may use the branded content tool).

⁵⁶ *Id.*

⁵⁷ See *Eligible Formats for Partnership Ads*, INSTAGRAM, <https://help.instagram.com/864398265379023> [<https://perma.cc/V4SD-69ZH>] (outlining the acceptable formats for branded content on Instagram such as feed posts, stories, and reels).

⁵⁸ *About the Creator Marketplace*, INSTAGRAM, <https://help.instagram.com/337707278243327> [<https://perma.cc/5UAU-HDAV>].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *How to Report Things*, INSTAGRAM, <https://help.instagram.com/2922067214679225> [<https://perma.cc/N2DF-AZ3H>] (outlining procedures for reporting issues on Instagram); *Report a Problem*, TIKTOK, <https://support.tiktok.com/en/safety-hc/report-a-problem> [<https://perma.cc/FX5X-HEQZ>] (allowing TikTok users to report a variety of issues).

⁶² *Report an Account*, TIKTOK, <https://support.tiktok.com/en/safety-hc/report-a-problem/report-a-user> [<https://perma.cc/8A3J-Z62K>]; see *Community Guidelines Enforcement Report*, TIKTOK (Oct. 13,

In addition to these platform-specific measures, the FTC works as the primary authority regulating influencer marketing in the United States.⁶⁴

C. The Federal Regulatory Landscape: The FTC's Role in Influencer Marketing

The FTC is dedicated to safeguarding the public against unfair or deceptive business practices and promoting fair market competition through law enforcement, research initiatives, advocacy, and educational outreach.⁶⁵ Established in 1914 through the FTC Act, the FTC's original purpose was to prevent unfair competition schemes in commerce as part of an extensive campaign against monopolies.⁶⁶ In 1938, Congress broadened this mission to include a

2021), <https://www.tiktok.com/transparency/en-gb/community-guidelines-enforcement-2021-2> [<https://perma.cc/G2MW-6ZJ3>] (stating that TikTok has policies against deceptive and misleading advertising).

⁶³ See *What Can You Do If You See an Ad You Don't Like on Instagram*, INSTAGRAM, <https://help.instagram.com/615366948510230> [<https://perma.cc/T7FB-SL5B>] (allowing Instagram users to report ads on the platform); *Introduction to the Advertising Standards*, META, <https://transparency.fb.com/policies/ad-standards> [<https://perma.cc/4T5J-V3SB>] (stating that Meta policies prohibit deceptive or misleading ads).

⁶⁴ See *Endorsements, Influencers, and Reviews*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/advertising-marketing/endorsements-influencers-reviews> [<https://perma.cc/KL8P-GKVP>] (asserting that influencers must comply with FTC standards); *DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS*, *supra* note 5, at 2 (stating that influencers must comply with federal law when promoting brands).

⁶⁵ *About the FTC*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/7DN3-58YB>]. The FTC develops policy and research tools related to antitrust and consumer protection through a variety of methods, such as advocacy letters, amicus briefs, congressional testimony, soliciting and reviewing public comments, issuing advisory opinions, conducting workshops, publishing reports, and conducting studies. *Id.*; see *Policy*, FED. TRADE COMM'N, <https://www.ftc.gov/policy> [<https://perma.cc/97XL-YAFC>] (outlining the various approaches employed by the FTC in advancing its policy and research initiatives). Furthermore, the FTC creates clear and practical educational programs for businesses and consumers navigating the global marketplace. See *About the FTC*, *supra* (highlighting the FTC's goal to enhance consumer and business understanding in the marketplace). The FTC Act mandates the agency to conduct research and disclose certain information for the benefit of the public. 15 U.S.C. § 46(a), (f) (enabling the FTC to investigate certain entities and activities and make disclosures where the information would serve the public interest).

⁶⁶ See *About the FTC*, *supra* note 65 (highlighting the FTC's purpose at the time of its creation). President Woodrow Wilson created the FTC by signing the FTC Act on September 26, 1914, as part of the "bust the trusts" campaign. *Our History*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/history> [<https://perma.cc/24MX-KUMZ>]. Government policies at the time were geared toward trust-busting and aimed to dissolve monopolies and business trusts. See Marc Davis, *A Short History of the US Federal Trade Commission (FTC)*, INVESTOPEDIA, <https://www.investopedia.com/articles/financial-theory/10/the-us-federal-trade-commission.asp> [<https://perma.cc/NNC2-ZA3T>] (Nov. 6, 2023) (discussing the FTC's initial enforcement priorities); *Trustbuster*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trustbuster> [<https://perma.cc/4NLL-6JPB>] (defining "trustbuster" as "a federal official who prosecutes trusts under antitrust laws"). President Theodore Roosevelt emerged as the original trustbuster and pursued such policies by reviving the dormant Sherman Anti-Trust Act (Sherman Act) to dismantle a massive railroad conglomerate. See *The Sherman Act*, THEODORE ROOSEVELT CTR., <https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Capitalism-and-Labor/The-Sherman-Act.aspx> [<https://perma.cc/YTC2-N7Q5>]

prohibition against “unfair and deceptive acts or practices.”⁶⁷ Since then, the FTC’s jurisdiction has expanded to include administering various consumer protection laws and implementing trade regulations across industries.⁶⁸

The FTC is composed of the Bureau of Competition, Consumer Protection, and Economics and various other offices that manage the agency’s internal operations and strategies.⁶⁹ The Bureau of Competition enforces federal antitrust laws to prevent unfair business practices and foster healthy competition, ensuring consumers can choose goods and services at prices and quality levels that suit their needs.⁷⁰ The Bureau of Consumer Protection focuses on shielding consumers from unfair, fraudulent, or deceptive practices by enforcing consumer protection laws and trade regulation rules.⁷¹ The Bureau of Economics assesses the economic consequences of the FTC’s antitrust and consumer protection interventions while also evaluating the effects of federal regulation on consumers and competition.⁷²

(detailing Roosevelt’s trust-busting initiative under the Sherman Act); *Theodore Roosevelt*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/theodore-roosevelt> [<https://perma.cc/L8ZB-FPMJ>] (noting that President Roosevelt emerged as a trustbuster when he forced a railroad company’s dissolution). Woodrow Wilson campaigned using a trust-busting ideology, as demonstrated through one of his 1912 presidential campaign songs, “Bust the Trusts.” See *Bust the Trusts*, THEODORE ROOSEVELT CTR., <https://theodorerooseveltcenter.org/Research/Digital-Library/Record?libID=o293452> [<https://perma.cc/X8ZX-TADP>] (providing the campaign song’s lyrics, which state: “We can’t depend on Roosevelt, and in Taft we cannot trust. The courts also are leary, when it comes to Busting Trusts . . . To lessen our hard burdens, and get what is only just, we will vote for Woodrow Wilson, and then he will Bust the Trusts”).

⁶⁷ *About the FTC*, *supra* note 65. The 1938 amendment to the FTC Act shifted the FTC’s focus from trust-busting to consumers and business competition. See Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1141 (1992) (asserting that the 1938 amendment to the FTC Act underscored the FTC’s concern for consumers and business competition).

⁶⁸ *About the FTC*, *supra* note 65.

⁶⁹ *Bureaus & Offices*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/bureaus-offices> [<https://perma.cc/HZ67-ZA5X>]. The offices, which include the Office of Administrative Law Judges, the Office of the Chief Privacy Officer, the Office of Congressional Relations, the Office of Workplace Inclusivity and Opportunity, the Office of the Executive Director, the Office of International Affairs, the Office of Policy Planning, the Office of the General Counsel, the Office of Public Affairs, the Office of the Secretary, and the Office of Technology, each play distinct roles within the FTC’s organizational framework. *Id.* Additionally, the FTC has regional offices that conduct the FTC’s mission on a regional scale by conducting investigations, providing resources to consumers and businesses, and building partnerships with various levels of law enforcement authorities. *Regional Offices*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/bureaus-offices/regional-offices> [<https://perma.cc/M7QY-4X2W>]. The regional offices are located in Cleveland, Chicago, Seattle, New York, Atlanta, Dallas, San Francisco, and Los Angeles. *Id.*

⁷⁰ *Bureaus & Offices*, *supra* note 69.

⁷¹ *Id.* The Bureau of Consumer Protection accomplishes its consumer protection goals through investigations, litigation, rulemaking, and educational initiatives. *Id.*

⁷² *Id.*

The FTC regulates advertising and marketing as part of its consumer protection efforts.⁷³ The agency mandates that claims in advertisements be honest, devoid of deception and unfairness, and supported by evidence.⁷⁴ Influencer marketing, under the umbrella of advertising and marketing, falls within the FTC's regulatory oversight.⁷⁵ Consequently, the standards established by the FTC Act and the FTC Guides apply to influencer marketing.⁷⁶ Influencers, serving as conduits for brand promotion, must navigate these guidelines diligently to ensure that their endorsements meet the required standards and that material connections to brands are appropriately disclosed.⁷⁷

⁷³ See *Business Guidance*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance> [<https://perma.cc/Y64U-B3ZE>] (highlighting the Bureau of Consumer Protection Business Center's role in regulating advertising and marketing); *Advertising and Marketing*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/advertising-marketing> [<https://perma.cc/YYD9-DNTV>] (providing advertising and marketing regulatory guidance). The Bureau of Consumer Protection's Division of Advertising (DAP) is responsible for overseeing and devising enforcement strategies related to issues in the realm of advertising. *Division of Advertising Practice*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices> [<https://perma.cc/BX8Y-MEXW>]. Utilizing a diverse set of tools, DAP actively monitors and addresses challenges within this dynamic landscape. See *id.* (describing how DAP leverages law enforcement, issues warnings, creates rules, encourages self-regulation, and educates consumers to protect against deceptive advertising).

⁷⁴ See *Advertising and Marketing*, *supra* note 73 (highlighting the general "truth-in-advertising" standards for claims in advertisements). DAP's enforcement priorities are rooted in the foundational principles of "truth-in-advertising" standards. *Id.* These "truth-in-advertising" laws apply to all mediums where advertisements are displayed, including magazines, social media, and even buses. *Truth in Advertising*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising> [<https://perma.cc/7DRC-A2FV>]. Bus advertising is a common practice that reaches a diverse audience across various demographics and locations. *Why Bus Advertising Works*, ALLOVER MEDIA (Oct. 12, 2020), <https://allovermedia.com/blog/why-bus-advertising-works> [<https://perma.cc/3MCB-PYNL>]; see *How to Get Started with Bus Advertising*, BILLUPS (May 11, 2023), <https://www.billups.com/articles/bus-advertising> [<https://perma.cc/6FKV-R3J7>] (discussing how bus advertising reaches pedestrians, riders, and other vehicles while traveling throughout urban and residential areas). Buses travel for many hours daily and serve as mobile billboards. *How to Get Started with Bus Advertising*, *supra*; see *Why Bus Advertising Works*, *supra* (noting that buses operate for ten to eighteen hours daily).

⁷⁵ See *Advertising and Marketing*, *supra* note 73 (asserting the FTC's authority over advertising and marketing practices involving endorsements, social media influencers, and consumer reviews).

⁷⁶ See *id.* (acknowledging that the Guides Concerning the Use of Endorsements and Testimonials in Advertising (FTC Guides) apply to social media influencers); 15 U.S.C. § 45(a) (enabling the FTC to intervene in unfair business practices within its jurisdiction).

⁷⁷ See *Advertising and Marketing*, *supra* note 73 (requiring influencers and businesses engaged in influencer marketing to comply with the FTC Guides); Eric Dahan, *Why Companies Should Invest in Influencers During a Challenging Economy*, OPEN INFLUENCE (Jan. 6, 2023), <https://openinfluence.com/why-companies-should-invest-in-influencers-during-a-challenging-economy-pro-insight> [<https://perma.cc/DJ4S-Y9GP>] (explaining how influencers "are the conduit" to brands' target audiences) (emphasis added). In 2023, the FTC updated the FTC Guides to reflect shifts in the consumer landscape driven by social media. See *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FED. TRADE COMM'N (June 29, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements> [<https://perma.cc/UW2J-DGTH>]. Im-

D. The FTC Guides: Navigating Transparency in Influencer Marketing

The FTC Guides are founded on the FTC's mission of promoting honesty and preventing companies from disseminating misleading information in advertising.⁷⁸ In line with this truth-in-advertising principle, influencers must disclose any connections with brands that could impact how consumers perceive endorsements to ensure transparency in advertising and prevent misleading consumers.⁷⁹

Though the practical guidelines in the FTC Guides are not federal regulations, advertisers who disregard them may still face investigation under Section 5 of the FTC Act.⁸⁰ The FTC Act explicitly states that compliance with the FTC Guides is voluntary.⁸¹ Paradoxically, however, advertising practices inconsistent with these "voluntary" guidelines can trigger corrective action, such as requiring defendants to forfeit money earned from violations.⁸² The FTC Guides require influencers to disclose any material connections with a brand,

portantly, the updated FTC Guides clarify the term "clear and conspicuous," redefine "endorsements," and specify liability for companies, influencers, and intermediaries. *Id.*

⁷⁸ *FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/9QZN-563S>]; *Mission*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission> [<https://perma.cc/2K34-94K9>]. Current FTC Chair Lina M. Khan is a staunch supporter of consumer rights and a skeptic of evolving technologies. See Memorandum from Lina M. Kahn, Fed. Trade Comm'n Chair, to Comm'n Staff & Comm'rs (Sept. 22, 2021) (on file with the author) (addressing the FTC's priorities and underlining the importance of evaluating emerging technologies before and as they impact consumers).

⁷⁹ *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78. Influencers must disclose material connections with brands because these connections can influence how consumers perceive their endorsement. *Id.*; see 16 C.F.R. § 255.5(a) (mandating disclosure of material connections between endorsers and advertisers). According to the FTC Guides, "an endorsement is an advertising message that consumers are likely to believe reflects the opinions or beliefs of someone other than the sponsoring advertiser." *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78.

⁸⁰ See *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (stating that the FTC Guides do not "have the force of law"); *The FTC's Endorsement Guides: Being Up-Front With Consumers*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising/advertisement-endorsements> [<https://perma.cc/9AMR-THYY>] (clarifying that the FTC Guides "are not regulations but if advertisers don't follow the [FTC] Guides, the FTC may investigate if the practices are unfair or deceptive under the FTC Act, in which case the FTC may decide to bring a lawsuit"); see also *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission/enforcement-authority> [<https://perma.cc/4YNK-UQPK>] (May 2021) (discussing the FTC's authority under Section 5 of the FTC Act).

There is no private right of action under the FTC Act. See *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 603 (1926) (disregarding an unfair competition claim because relief under the FTC Act "must be afforded in the first instance" by the FTC); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 997 (D.C. Cir. 1973) (affirming that claims under the FTC Act "must be brought by the FTC and not by private parties").

⁸¹ 16 C.F.R. § 255.0(a).

⁸² *Id.*; see *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (clarifying that violations of the FTC Act do not incur "fines," but influencers might need to forfeit earnings from branded content).

such as an incentivized or paid endorsement.⁸³ The FTC Guides outline examples of acceptable material connection disclosures, but the FTC determines on a case-by-case basis whether an omission is deceptive and constitutes a violation of the FTC Act.⁸⁴

The FTC Guides encourage brands to provide adequate guidance to influencers on the “need” to communicate honestly and make necessary disclosures, monitor influencers’ compliance, and act when influencers fall short of these standards.⁸⁵ The FTC Guides stipulate that endorsements must genuinely reflect the influencer’s opinion and cannot be used to make claims that the brand is not legally permitted to make.⁸⁶ If there is an unexpected connection between the influencer and the brand, such as employment, family ties, or friendship, and if this connection could affect consumers’ perception of the endorsement, it must be clearly and conspicuously disclosed.⁸⁷

A clear and conspicuous disclosure is easy to notice, readily understandable to ordinary consumers, and made through the same means by which the endorsement is communicated.⁸⁸ Therefore, a disclosure should be visual for visual endorsements, audible for audible endorsements, and presented visually and audibly for endorsements using both visual and audible elements.⁸⁹

The FTC Guides provide guidance to brands and influencers regarding compliance with the FTC Act’s rules against unfair or deceptive practices.⁹⁰ To

⁸³ *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 78.

⁸⁴ *See* 16 C.F.R. §§ 255.0(a), 255.5 (stating that “whether a particular endorsement . . . is deceptive will depend on the specific factual circumstances of the advertisement at issue” and assessing various material connection disclosure scenarios). The FTC Guides state that when a connection exists between a brand and an endorser that “might materially affect the weight or credibility of the endorse[r],” this connection must be disclosed. *Id.* § 255.5. The FTC Guides suggest disclosing a connection when, for example, a student known for his gaming expertise reviews a free video game system sent by the manufacturer on his blog. *See id.* § 255.5(b)(7). Since readers might not know he received the system at no cost, this undisclosed relationship could impact their trust in his endorsement and thus warrants disclosure. *Id.*

⁸⁵ *See id.* § 255.1(d)(1)–(3) (suggesting that advertisers take proactive measures to mitigate deceptive endorsements).

⁸⁶ *See id.* § 255.1(a) (stating that endorsements must be honest and devoid of deception); *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 78 (explaining how the FTC Guides reflect the FTC’s truth-in-advertising principle). All parties involved in deceptive advertising who are aware or should be aware of the misleading statements may face liability. *See* 16 C.F.R. § 255.1(d)–(f) (outlining potential liability parties that endorse or allow deceptive advertising practices). Therefore, the failure to disclose material connections clearly and conspicuously may impose liability on all involved parties—influencers, brands, or intermediaries. *See id.* (outlining potential liability for failure to disclose material connections).

⁸⁷ *See FTC’s Endorsement Guides: What People Are Asking*, *supra* note 78 (requiring clear and conspicuous disclosure of material connections between brands and influencers).

⁸⁸ *See* 16 C.F.R. § 255.0(f) (defining “clear and conspicuous” in the context of disclosures and emphasizing that the communication of disclosures should mirror the endorsement’s delivery).

⁸⁹ *See id.* (clarifying how disclosures should match the delivery method of the endorsement).

⁹⁰ *See Federal Trade Commission Announced Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FED. TRADE COMM’N (June 29, 2023), <https://www.ftc.gov/news-events/>

promote compliance with the statute, the FTC often sends warning letters to brands and influencers to notify them of their potential regulatory violations.⁹¹ FTC warning letters are not considered formal enforcement measures because they allow influencers and brands to address potential violations without facing any repercussions, such as fines or court action.⁹² These notices, however, outline the legal consequences they may face for noncompliance if they do not rectify the issues promptly after receiving the letter.⁹³ These letters are often the quickest and most effective way for the agency to address FTC Act violations.⁹⁴

The FTC does not proactively monitor influencers for potential violations of the FTC Act, but it does assess concerns on an individual basis when they are brought to its attention.⁹⁵ When legal action is necessary, the FTC mainly directs its law enforcement actions toward brands, but it may also take appro-

news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements [https://perma.cc/QSF4-ZKGG] (discussing the FTC Guides' goal to advise about unfair or deceptive acts).

⁹¹ *Legal Library: Warning Letters*, FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/warning-letters> [https://perma.cc/XCL5-RUQC]; *About FTC Warning Letters*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/topics/truth-advertising/about-ftc-warning-letters> [https://perma.cc/3AXS-K57J]. In 2023, the American Beverage Association and the Canadian Sugar Institute hired several social media influencers to endorse the safety of aspartame and sugar-containing products and encourage their consumption. *FTC Warns Two Trade Associations and a Dozen Influencers About Social Media Posts Promoting Consumption of Aspartame or Sugar*, FED. TRADE COMM'N (Nov. 15, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-warns-two-trade-associations-dozen-influencers-about-social-media-posts-promoting-consumption> [https://perma.cc/YV9C-E8MG]. The FTC found that certain influencers, who are registered dietitians and health coaches, made statements regarding the safety and health effects of aspartame and sugar without revealing that they received compensation from trade associations within the industry that rely on the use of aspartame and sugar. *Id.* These influencers exploited the trust they had built with their audience through their professional associations, ultimately misleading consumers who rely on the guidance of registered dietitians and health coaches. *See id.* (emphasizing the importance of transparency about material connections by registered dietitians and similar professionals on whose recommendations people depend for nutritional guidance).

⁹² *About FTC Warning Letters*, *supra* note 91. *But see* Barry Bendes, Wasim Bleibel, Sharon Blinkoff & Daniel Solitro, *FTC Takes Action Against Social Media Posts for Failure to Disclose Material Connections*, JD SUPRA (Nov. 21, 2023), <https://www.jdsupra.com/legalnews/ftc-takes-action-against-social-media-6115347> [https://perma.cc/5CB2-HTQL] (indicating that the warning letters to the aspartame-promoting trade associations carried the threat of fines).

⁹³ *Legal Library: Warning Letters*, *supra* note 91. When the FTC issued letters to the American Beverage Association, the Canadian Sugar Institute, and the influencers they hired for not adequately disclosing their relationships, the FTC cautioned that any future nondisclosure could result in civil penalties of up to \$50,120 for each violation. *FTC Warns Two Trade Associations and a Dozen Influencers About Social Media Posts Promoting Consumption of Aspartame or Sugar*, *supra* note 91. In addition, the recipients were asked to contact the FTC within fifteen days to report on actions taken or planned to address the concerns raised by the FTC. *Id.*

⁹⁴ *See Legal Library: Warning Letters*, *supra* note 91 (reporting on the effectiveness of FTC warning letters). FTC warning letter recipients often take prompt action to rectify marketing issues to ensure compliance. *Id.*

⁹⁵ *See FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (clarifying that possible FTC Act violations are evaluated on a case-by-case basis).

priate measures against influencers, especially when they fail to make mandatory disclosures despite previous warnings.⁹⁶ To prevent an FTC investigation, an influencer must clearly and conspicuously disclose their affiliation with a brand when their audience would not be able to understand this relationship from the content alone.⁹⁷

All influencers who receive compensation or other brand perks in exchange for reviewing or recommending products must comply with the FTC Act.⁹⁸ The FTC Guides advise influencers to disclose all advertiser relationships irrespective of their financial value because such relationships can impact the credibility of an influencer's endorsement.⁹⁹ Likewise, influencers should disclose brand relationships in every branded post, regardless of prior disclosures in other posts for the same brand, to avoid deception if viewers miss those disclosures.¹⁰⁰ Furthermore, influencers must also follow the FTC Guides' disclosure requirements regardless of the medium or content format.¹⁰¹

The FTC Act and the FTC Guides seek to deter unfair and deceptive influencer marketing practices.¹⁰² The FTC's insufficient enforcement efforts, however, have compromised the efficacy of these regulatory measures.¹⁰³

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 16 C.F.R. § 255.5(a); DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS, *supra* note 5, at 2.

⁹⁹ *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78.

¹⁰⁰ *See id.* (recommending that influencers disclose their commercial relationships with brands on each branded post, regardless of the frequency of disclosure).

¹⁰¹ *Id.*

¹⁰² *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, *supra* note 76.

¹⁰³ *See* Tisha James, *The Real Sponsors of Social Media: How Internet Influencers Are Escaping FTC Disclosure Laws*, 11 OHIO ST. BUS. L.J. 61, 79–80, 81 (2017) (highlighting that an overwhelming majority of influencer marketing content violates disclosure requirements). In 2017, the FTC sent educational letters to ninety influencers and brands, addressing concerns about disclosure in their social media posts. *See FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMM'N (Apr. 19, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship> [<https://perma.cc/N76S-3PCP>] (discussing the ninety educational letters sent to brands and influencers in violation of the disclosure guidelines). In doing so, the FTC initiated direct communication with influencers and educated them about the requisite disclosure protocols for the first time. *See id.* (explaining that the FTC sent warning letters to influencers for the first time). Following this, the agency issued twenty-one follow-up warning letters relating to posts on Instagram. Rebecca B. Lederhouse, *FTC Sends Warning Letters to Influencers and Updates Guidance Document for Endorsements*, LEXOLOGY (Sept. 8, 2017), <https://www.lexology.com/library/detail.aspx?g=67f03a9f-8480-40a2-8ba8-695f7952b554> [<https://perma.cc/K6HZ-ZQLH>]. The FTC refrained from additional legal action; however, consumer protection advocates found that after two years, twenty of these influencers and brands still breached FTC guidelines. *See* Letter from Laura Smith, Legal Dir., Truth in Advert. & Bonnie Patten, Exec. Dir., Truth in Advert., to Andrew Smith, Dir., Bureau of Consumer Prot., Mary Engle, Assoc. Dir., Div. of Advert. Pracs., Mamie Kresses, Senior Att'y, Div. of Advert. Pracs. & Michael Ostheimer, Att'y, Div. of Advert. Pracs. (Mar. 4, 2019) (on file with the author) (calling out twenty influencers for continuing to violate the FTC's disclosure regulations).

II. UNVEILING THE SHORTCOMINGS OF FTC ENFORCEMENT IN INFLUENCER MARKETING

Influencer marketing has emerged as a popular and essential business strategy for brands aiming to boost consumer engagement.¹⁰⁴ To preserve consumer trust and prevent deceptive practices, the FTC advocates for transparent disclosure of influencer-brand relationships.¹⁰⁵ The FTC warns that it will utilize all available tools to hold companies accountable for using deceptive endorsements.¹⁰⁶ This Part demonstrates, however, that the FTC's current enforcement mechanisms and disclosure guidelines often fall short of its stated goal, reinforcing, rather than preventing, unfair competition.¹⁰⁷

Section A of this Part discusses the FTC's delayed and reactive investigation and enforcement of potential FTC Act violations.¹⁰⁸ Section B then highlights the differences between certain platform-specific disclosure tools and the FTC's dis-

¹⁰⁴ David Kirkpatrick, *Study: Influencer Marketing Budgets Are Bigger This Year for 63% of Marketers*, MKTG. DIVE (Mar. 22, 2017), <https://www.marketingdive.com/news/study-influencer-marketing-budgets-are-bigger-this-year-for-63-of-markete/438662> [<https://perma.cc/4DDH-N5BG>]; AdSkate, *The Power of Influencer Marketing: The Rise, Impact, and 5Ws of This Marketing Strategy*, LINKEDIN (May 5, 2023), <https://www.linkedin.com/pulse/power-influencer-marketing-rise-impact-5ws-strategy-adskate-inc> [<https://perma.cc/468M-XB35>]. Influencer marketing is a critical strategy for brands largely due to the high ROI it provides. Flori Needle, *Benefits of Influencer Marketing [Data + Expert Insight]*, HUBSPOT (Oct. 7, 2024), <https://blog.hubspot.com/marketing/benefits-of-influencer-marketing> [<https://perma.cc/BX4E-8LG2>]. Specifically, influencer marketing yields an ROI eleven times higher than traditional banner ads. Rowan Byers, *The Benefits of Influencer Marketing for Brands*, GOAT (Mar. 20, 2023), <https://goatagency.com/blog/influencer-marketing/influencer-marketing-benefits> [<https://perma.cc/2X2F-QKKP>]. Moreover, endorsements from influencers provide a powerful testament to a brand's credibility, as influencers have built trust with their audiences. See GRIN Contributor, *Why Influencer Marketing Is an Important Part of Today's Businesses*, GRIN (July 2024), <https://grin.co/blog/why-influencer-marketing> [<https://perma.cc/RE7G-T6DU>] (noting that collaborations with influencers foster consumer trust due to the influencers' credibility). Ultimately, influencers provide brands with a scalable word-of-mouth advertising approach that is fresh and engaging. *Id.*

¹⁰⁵ See Lesley Fair, *Influencers, Are Your #Materialconnection #Disclosures #Clearandconspicuous?*, FED. TRADE COMM'N (Apr. 19, 2017), <https://www.ftc.gov/business-guidance/blog/2017/04/influencers-are-your-materialconnection-disclosures-clearandconspicuous> [<https://perma.cc/9VFW-4S87>] (discussing the legal responsibility to disclose influencer-brand relationships, providing guidance on how to make effective disclosures, and emphasizing truth-in-advertising standards); Mallory A. Field & M. Alexander Monahan, *Navigating the Updated Federal Trade Commission Guidelines for Social Media Influencer Marketing*, NAT'L L. REV. (Oct. 24, 2023), <https://www.natlawreview.com/article/navigating-updated-federal-trade-commission-guidelines-social-media-influencer> [<https://perma.cc/6842-42AH>] (emphasizing the FTC's objectives for consumer protection by ensuring transparent disclosures, avoiding misleading endorsements, and encouraging responsible marketing practices).

¹⁰⁶ *FTC Puts Hundreds of Businesses on Notice About Fake Reviews and Other Misleading Endorsements*, FED. TRADE COMM'N (Oct. 13, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements> [<https://perma.cc/D56D-VL82>].

¹⁰⁷ See *infra* notes 111–167 and accompanying text.

¹⁰⁸ See *infra* notes 111–134 and accompanying text.

closure requirements.¹⁰⁹ Finally, Section C demonstrates how the current regulatory landscape reinforces unfair competition in influencer marketing.¹¹⁰

A. The FTC's Delayed Enforcement: A Challenge for Rapidly Evolving Markets

1. The Dynamics of the FTC's Reactive Investigations

The influencer marketing industry and its impact on consumer behavior evolve at such a rapid pace that the FTC's reactive enforcement process frequently struggles to keep up.¹¹¹ As the governing regulatory authority for influencer marketing, the FTC is responsible for safeguarding consumers from deceptive practices that could potentially harm them.¹¹² The agency, however, relies on consumer complaints and media reports to monitor disclosure compliance, and its intervention process allows influencers and brands significant flexibility to address and rectify any FTC Act violation.¹¹³

¹⁰⁹ See *infra* notes 135–149 and accompanying text.

¹¹⁰ See *infra* notes 150–167 and accompanying text.

¹¹¹ See Colin Campbell & Pamela E. Grimm, *The Challenges Native Advertising Poses: Exploring Potential Federal Trade Commission Responses and Identifying Research Needs*, 38 J. PUB. POL'Y & MKTG. 110, 110–11 (2019) (exploring how quickly the internet and digital media have driven the expansion of influencer marketing, outpacing the FTC's ability to regulate it); Liz Young, *Eyeliner Out of Stock? Blame TikTok*, WALL ST. J. (Dec. 22, 2022), <https://www.wsj.com/articles/eyeliner-out-of-stock-blame-tiktok-11671670496> [<https://perma.cc/RHT7-6PED>] (highlighting the role of influencers in making products go viral and sell out). For instance, a Pew Research Center survey revealed that nearly one-third of users on social media platforms have been influenced to purchase a product based on an influencer's endorsement. Young, *supra*. Among women between eighteen and twenty-nine, 50% reported buying a product after an influencer promoted it online. *Id.*

¹¹² See 15 U.S.C. § 45(a)(1)–(2), § 45(b) (outlawing deceptive practices and acts that impact consumers in their business dealings and empowering the FTC to enforce the FTC Act to protect consumers).

¹¹³ See *Influencer Marketing in FTC's Crosshairs*, BLOOMBERG (Dec. 15, 2023), <https://www.bloomberg.com/news/videos/2023-12-15/influencer-marketing-in-ftc-s-crosshairs-video> [<https://perma.cc/8KA3-2MUE>] (explaining that the FTC uses consumer complaints and media reports primarily to track compliance with disclosure requirements); Sample Educational Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Social Media Influencer (on file with author) (detailing potential FTC violations and educating influencers on disclosure requirements in instances where a material connection exists between an influencer and a brand); Warning Letter Template from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Instagram Influencer (Sept. 6, 2017) (on file with author) (warning Instagram influencers about their potential FTC violations after they received educational letters previously); Letter from Laura Smith, Legal Dir., Truth in Advert. & Bonnie Patten, Exec. Dir., Truth in Advert., *supra* note 103 (calling out the Instagram influencers who received FTC warning letters who continue to violate the FTC's disclosure regulations).

2. Case Study: Fyre Festival and Its Misleading Promotions

In 2017, the Fyre Festival exposed the ineffectiveness of the FTC's enforcement approach.¹¹⁴ As multi-day outdoor music festivals gained popularity, the Fyre Festival aimed to promote Fyre Media, a digital platform designed to streamline the process of booking musicians or public figures for events.¹¹⁵ The Fyre Festival promises attendees a unique festival experience on a private Bahamian island, luxurious accommodations, and appearances by high-profile celebrities.¹¹⁶ These promises, however, turned out to be false, raising concerns about deceptive influencer marketing practices that lured consumers into buying tickets and attending the festival.¹¹⁷

On December 12, 2016, Fyre Festival launched its influencer marketing campaign when sixty-three influencers, including well-known figures like Kendall Jenner and Bella Hadid, simultaneously posted the same obscure im-

¹¹⁴ See Lauryn Harris, Comment, *Too Little, Too Late: FTC Guidelines on "Deceptive and Misleading" Endorsements by Social Media Influencers*, 62 HOWARD L.J. 947, 957–58 (2019) (illustrating the need for heightened FTC enforcement in response to the ignorance among Fyre Festival influencers regarding their duties to disclose their material relationship with the festival); Atanu Shaw, *What Marketers Can Learn from the Fyre Festival's Influencer Marketing Fiasco*, FORBES (Apr. 16, 2019), <https://www.forbes.com/sites/forbescommunicationscouncil/2019/04/16/what-marketers-can-learn-from-the-fyre-festivals-influencer-marketing-fiasco> [<https://perma.cc/ZD7Q-RG3A>] (analyzing how influencers involved with Fyre Fest neglected to follow FTC endorsement disclosure guidelines).

¹¹⁵ See Mahita Gajanan, *How Music Festivals Became a Massive Business in the 50 Years Since Woodstock*, TIME (Aug. 14, 2019), <https://time.com/5651255/business-of-music-festivals> [<https://perma.cc/9NU7-Z2WD>] (discussing the growth and popularity of music festivals); Tom Huddleston, Jr., *Fyre Festival: How a 25-Year-Old Scammed Investors Out of \$26 Million*, CNBC (Aug. 22, 2019), <https://www.cnbc.com/2019/08/18/how-fyre-festivals-organizer-scammed-investors-out-of-26-million.html> [<https://perma.cc/7XWR-VYJZ>] (describing the Fyre app's purported service of facilitating private bookings with notable musicians). Billy McFarland, the founder of Fyre Media, teamed up with rapper Ja Rule to organize the Fyre Festival and promote the Fyre app. Kaitlyn Simpson, *Fyre Festival Where Are They Now: Billy McFarland, Ja Rule, Andy King and More*, US WEEKLY (Aug. 22, 2023), <https://www.usmagazine.com/celebrity-news/pictures/fyre-festival-organizers-where-are-they-now> [<https://perma.cc/S353-3TMN>]. Interestingly, Ja Rule has created an app named ICONN that follows the same concept as the Fyre app. *Id.* McFarland, on the other hand, is planning to launch Fyre Festival II in December 2024. Vanessa Romo, *Billy McFarland Went to Prison for Fyre Fest. Are His Plans for a Reboot Legal?*, NAT. PUB. RADIO (Aug. 24, 2024), <https://www.npr.org/2023/08/24/1195569809/billy-mcfarland-went-to-prison-for-fyre-fest-are-his-plans-for-a-reboot-legal> [<https://perma.cc/SE7U-C25A>].

¹¹⁶ See Margaret Abrams, *What Is Fyre Festival? Guests Who Got Scammed by Billy McFarland Tell Their Horrifying Stories*, THE STANDARD (June 10, 2019), <https://www.standard.co.uk/lifestyle/celebrity/fyre-festival-what-happened-a4039896.html> [<https://perma.cc/3JWG-RATD>] (detailing the stark disparity between expectations and reality for individuals who attended Fyre Festival); Shaw, *supra* note 114 (referring to the advertised promises of the Fyre Festival).

¹¹⁷ Nicole Firenze, *Fyre Festival: A Lesson for Influencers*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (Feb. 28, 2019), <http://www.fordhamiplj.org/2019/02/28/fyre-festival-a-lesson-for-influencers> [<https://perma.cc/8HG6-TCKB>]; see Abrams, *supra* note 116 (recounting experiences from Fyre Festival attendees who encountered far less than the luxurious conditions and celebrity appearances they were promised).

age on their social media accounts using the hashtag #FyreFest.¹¹⁸ Within twenty-four hours, Fyre Festival sold ninety-five percent of its tickets after the launch garnered 300 million impressions.¹¹⁹ The influencers promoted the Fyre Festival on their social media in exchange for compensation but failed to disclose this financial relationship, misleading consumers into purchasing tickets based on misrepresented information about the festival.¹²⁰ Therefore, the inadequate Fyre Festival relationship disclosures significantly influenced consumer behavior before any FTC intervention was possible.¹²¹

The Fyre Festival debacle highlighted the limitations of the FTC's regulatory approach because the rapid spread of Fyre Festival's misleading promotions outpaced the FTC's ability to enforce these regulations.¹²² The resulting consumer deception and the chaos at the festival site emphasized the need for more effective enforcement mechanisms and consumer protection policies in the age of influencer marketing.¹²³

3. The Consequences of Delayed FTC Responses

Unfortunately, the FTC's delayed and reactive approach means that by the time enforcement actions are taken, the influencer's content has already reached and influenced a substantial audience, rendering regulatory intervention ineffec-

¹¹⁸ *No, Fyre Festival Wasn't an Influencer Marketing Success (and Other Lessons from a Disaster)*, INFLUENCER MKTG. HUB (June 24, 2024), <https://influencermarketinghub.com/no-fyre-festival-wasnt-an-influencer-marketing-success-and-other-lessons-from-a-disaster> [<https://perma.cc/6CMD-5TL2>]; Shaw, *supra* note 114.

¹¹⁹ Olivia Blair, *Fyre Festival Documentary: 9 Questions We Still Need Answered*, COSMOPOLITAN (Jan. 25, 2019), <https://www.cosmopolitan.com/uk/entertainment/a25986366/fyre-festival-documentary-netflix-questions-answers> [<https://perma.cc/FK36-XLKX>]; *No, Fyre Festival Wasn't an Influencer Marketing Success (and Other Lessons from a Disaster)*, *supra* note 118. Impressions refer to how often social media content is displayed to viewers. GRIN Contributor, *Quick Guide to Earned Media Value & Influencer Media Value*, GRIN, <https://grin.co/blog/quick-guide-to-earned-media-value> [<https://perma.cc/KAR7-YCYU>] (Nov. 2023).

¹²⁰ Firenze, *supra* note 117.

¹²¹ See Nicholas Sun, *Influencers Under Fyre: The Case for Greater Enforcement of FTC Endorsement Guidelines Against Social Media Influencers*, COLUM. BUS. L. REV. (Aug. 13, 2019), <https://journals.library.columbia.edu/index.php/CBLR/announcement/view/184> [<https://perma.cc/VC36-6N7A>] (highlighting the lack of disclosures by the influencers and Fyre Festival and the lack of enforcement by the FTC); Cooper, *supra* note 5, at 79–80 (explaining how lack of proper disclosures can adversely affect consumer decisions).

¹²² Sun, *supra* note 121; Ronn Torossian, *How the Fyre Festival Ignited Debate About Influencer Accountability*, AGILITY PR SOLS. (Feb. 4, 2019), <https://www.agilitypr.com/pr-news/public-relations/how-the-fyre-festival-ignited-debate-about-influencer-accountability> [<https://perma.cc/9A7Z-EKWT>].

¹²³ See Sun, *supra* note 121 (explaining how the FTC may improve its inadequate strategy in the wake of the Fyre Festival fiasco); Matt Higgins, *Fyre Festival Aftermath: New Rules for Influencers?*, U. CIN. L. REV. (Mar. 25, 2019), <https://uclawreview.org/2019/03/25/fyre-festival-aftermath-new-rules-for-influencers> [<https://perma.cc/7V7U-T4U5>] (describing the Fyre Fest as “nothing short of a nightmare: bands canceled last minute, there were not enough beds for guests, almost nothing advertised was seen on site, and general chaos ensued”).

tive.¹²⁴ Influencers and brands may also perceive the delay as a loophole, which could facilitate further non-compliance and erode consumer trust.¹²⁵

In light of these challenges, there is an ongoing conversation around the potential for integrating AI technologies to enhance the FTC's monitoring capabilities.¹²⁶ Despite this potential, the FTC engages in ex post facto analysis and does not monitor compliance in real time.¹²⁷ AI technologies could enable the FTC to detect non-compliance in real time, thereby providing a more immediate and effective enforcement response.¹²⁸

Moreover, as the FTC acknowledges the need for modernized regulatory mechanisms, there are opportunities to revise the FTC Guides every ten years to better reflect the advertising landscape.¹²⁹ The agency's call for public

¹²⁴ See Campbell & Grimm, *supra* note 111, at 111 (discussing how the rapid development of the internet outpaces its regulation by the FTC); Kendall Tietz, *How TikTok's 'Hot Best Friend' Alix Earle Earns Lucrative Brand Deals, Causes Product Sales to Skyrocket*, FOX NEWS (Jan. 31, 2023), <https://www.foxnews.com/media/tiktoks-best-friend-alix-earle-earns-lucrative-brand-deals-causes-product-sales-to-skyrocket> [<https://perma.cc/XJ65-F2WW>] (discussing Alix Earle's impact on the popularity of products mentioned her TikTok videos). Alix Earle has been able to secure lucrative brand deals and significantly boost product sales through her GRWM videos. *Id.* A study conducted by Ubiquitous, an influencer marketing company, analyzed thirty-three products that Alix Earle mentioned in her TikTok videos. *Id.* During the study, ten of the products were already sold out, and the majority of the other products sold out after being featured in one of Alix's videos. *Id.* In addition, all the items experienced a search interest spike on Google. *Id.*

¹²⁵ See *What Are the FTC Social Media Guidelines That Influencer Marketing Professionals Should Adhere To?*, INFLUENCER MKTG. HUB (June 24, 2024), <https://influencermarketinghub.com/ftc-social-media-guidelines> [<https://perma.cc/A9UY-J5FY>] (discussing the "wait and see" approach taken by influencers and brands regarding whether to abide by the FTC Guides); Niko Javakhishvili, *Beyond the Hype: Navigating the Ethics of Influencer Marketing*, LINKEDIN (Apr. 21, 2023), <https://www.linkedin.com/pulse/beyond-hype-navigating-ethics-influencer-marketing-niko-javakhishvili> [<https://perma.cc/S5NY-TPZ7>] (highlighting the potential erosion of consumer trust due to deceptive influencer marketing practices).

¹²⁶ FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2025, at 9 (2025), https://www.ftc.gov/system/files/ftc_gov/pdf/fy25-cbj.pdf [<https://perma.cc/89MH-2CZX>] (explaining that part of the FTC's budget request increase is to understand AI tools); *Influencer Marketing in FTC's Crosshairs*, *supra* note 113 (discussing how the FTC might enhance its compliance monitoring with the use of AI). In response to how the FTC tracks disclosure compliance, Mary Engle, former Director of the FTC's Division of Advertising Practices, mentioned that she can envision the FTC implementing AI to track compliance on social media. *Influencer Marketing in FTC's Crosshairs*, *supra* note 113.

¹²⁷ See Michale Stuart, Note, *Failure to Influence: Legislation Requiring Social Media Influencers to Disclose Their Retouched Images Will Not Address Youth Body Image Concerns*, 31 MIA. INT'L & COMPAR. L. REV. 455, 482 (2024) (discussing how "[t]he FTC only regulates practices after they have been reported"); *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (noting that real-time monitoring of "short-lived endorsements" like Instagram Stories is impractical); *Influencer Marketing in FTC's Crosshairs*, *supra* note 113 (stating that the FTC monitors compliance mainly through consumer complaints and media reports).

¹²⁸ See Teksun Inc., *What Is the Role of AI in Human Activity Tracking?*, LINKEDIN (July 26, 2023), <https://www.linkedin.com/pulse/what-role-ai-human-activity-tracking-teksun> [<https://perma.cc/W56J-28JZ>] (discussing how AI can provide real-time monitoring).

¹²⁹ See *FTC Seeks Public Comment on Its Endorsement Guides*, FED. TRADE COMM'N (Feb. 12, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-seeks-public-comment-its>

comments on the FTC Guides on February 12, 2020, indicates an understanding that the existing regulations may not be sufficiently robust or clear for the influencers, brands, and platforms involved.¹³⁰ Social media platforms, however, are constantly changing and outpacing FTC regulation.¹³¹

Furthermore, the FTC's ability to enforce its regulations is constrained by limited resources.¹³² The FTC's employment levels have not kept pace with its growing workload and responsibilities, which puts a strain on the agency's resources.¹³³ Moreover, the FTC, though endowed with broad enforcement powers, operates with a relatively modest budget and staffing disproportionate to its dual responsibilities in consumer protection and competition.¹³⁴

endorsement-guides [<https://perma.cc/UB57-CTG8>] (soliciting public comments to assess the need to make changes to the Guides); *Retrospective Review of FTC Rules and Guides*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/rulemaking/retrospective-review-ftc-rules-guides> [<https://perma.cc/VRJ3-GBV3>] (describing how the FTC's retrospective review system assesses if a "rule or guide [has] been affected by any technological, economic, or other industry changes").

¹³⁰ See *FTC Seeks Public Comment on Its Endorsement Guides*, *supra* note 129 (outlining the FTC's public comment request regarding influencer marketing).

¹³¹ Campbell & Grimm, *supra* note 111, at 111; see Nichole Howson, *How to Stay Up to Date with Social Media Changes and Trends*, AIM SOC. MKTG., <https://aimsmmarketing.com/how-to-stay-up-to-date-with-social-media-changes-and-trends> [<https://perma.cc/AW77-Z79E>] (discussing how social media platforms change "every day").

¹³² See Dickinson, *supra* note 30, at 2461 (noting that the FTC "has resources to pursue only a tiny fraction of potential claims"); see also CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2025, *supra* note 126, at 9 (highlighting the FTC's "needed resources" for fiscal year 2025).

¹³³ FED. TRADE COMM'N, *supra* note 126, at 9 (highlighting the FTC's growing workload and staffing needs). Until very recently, the FTC operated with three Commissioners instead of the intended five. *Commissioners*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/commissioners-staff/commissioners> [<https://perma.cc/XQ87-M7B8>]. In 2021, the FTC encountered difficulties with employee morale after Lina Khan's initial year as Chair, despite its prior positive reputation for worker treatment. Cat Zakrzewski, *Sinking FTC Workplace Rankings Threaten Chair Lina Khan's Agenda*, WASH. POST (July 13, 2022), <https://www.washingtonpost.com/technology/2022/07/13/ftc-lina-khan-rankings> [<https://perma.cc/B8GL-F9PX>]. This period was characterized by partisan divisions and limited resources, which led to a decrease in the FTC's ranking for employee satisfaction. *Id.* In 2022, employee satisfaction at the FTC increased, but partisan divisions continued to threaten Khan's leadership. See Emily Birnbaum & Leah Nylen, *FTC Staff Morale, Satisfaction Rise Under Khan, Survey Shows, Rankings Threaten Chair Lina Khan's Agenda*, BLOOMBERG (Nov. 13, 2022), <https://www.bloomberg.com/news/articles/2023-11-13/ftc-staff-morale-rises-survey-shows-increased-satisfaction> [<https://perma.cc/6K7R-PESS>] (discussing the increasing support for Chair Khan in the workplace, alongside ongoing criticism from Republicans about Khan's leadership).

¹³⁴ See FED. TRADE COMM'N, *supra* note 126, at 9 (outlining the FTC's fiscal year 2023 initiatives and accomplishments in consumer protection and promoting fair competition); *Budget and Strategy*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/budget-strategy> [<https://perma.cc/9NV8-5ETS>] (stating that the FTC had a budget of \$430 million in 2024); *Federal Trade Commission (FTC)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/federal-sector/federal-trade-commission-ftc-0> [<https://perma.cc/9Z26-V65C>] (highlighting that the FTC currently has 1,092 employees).

B. The Complexity of Disclosure Compliance in a Varied Digital Space

1. Variability and Inadequacy of Platform-Specific Disclosure Tools

The FTC emphasizes the need for honest endorsements, but the reality of influencer-brand exchanges challenges this principle, blurring the line between genuine recommendations and paid promotions.¹³⁵ Although some social media platforms have implemented their own disclosure tools and guidelines, their requirements vary, contributing to confusion rather than clarity.¹³⁶ Furthermore, the FTC asserts that influencers cannot depend solely on built-in tools on social media platforms to disclose their material connections.¹³⁷ These built-in disclosure features may not be sufficiently noticeable or clear, potentially leading to consumer deception.¹³⁸

¹³⁵ See *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (emphasizing the need for honest endorsements); *What Are the FTC Social Media Guidelines That Influencer Marketing Professionals Should Adhere To?*, *supra* note 125 (highlighting the common reluctance among influencers and brands to comply with disclosure guidelines); *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, *supra* note 103 (highlighting some ways that influencers and brands confuse consumers based on insufficient disclosures). Realizing the limitations of mobile viewing on platforms like Instagram, the FTC has cautioned that disclosures should appear before the "more" button to ensure viewers do not need to expand the caption to find the disclosure. *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, *supra* note 103. Further, the FTC has advised against ambiguous tags or hashtags, like "#sp," "Thanks [Brand]," or "#partner," that might obscure the sponsored nature of a post. *Id.*

¹³⁶ See *The Scoop on Social Media Influencer Disclosure Requirements*, TRUTH IN ADVERT., <https://truthinadvertising.org/resource/social-media-influencer-disclosure-requirements> [<https://perma.cc/V39X-UGCC>] (indicating that due to varying practices among social media platforms and the diverse ways in which users interact with them, reliance on social media's built-in disclosure mechanisms alone is insufficient). Not all social media platforms offer built-in disclosure tools, and the FTC does not require that platforms provide these tools. See Stasia Skalbani, Comment, *Advising 101 for the Growing Field of Social Media Influencers*, 92 WASH. L. REV. 667, 694 (2022) (noting that social media platforms are not required to create disclosure tools).

¹³⁷ Lesley Fair, *Staff Warning Letters to Trade Associations and Influencers Convey Some Salty Words About Sweetener Posts*, FED. TRADE COMM'N (Nov. 15, 2023), <https://www.ftc.gov/business-guidance/blog/2023/11/staff-warning-letters-trade-associations-influencers-convey-some-salty-words-about-sweetener-posts> [<https://perma.cc/GD82-SQFG>]; see Nancy J. Felsten, Allison B. Condra & Kimberly Bousquet, *In a One, Two, Three Punch, the FTC Issues Updated Endorsement Guides*, DAVIS WRIGHT TREMAINE LLP (July 10, 2023), <https://www.dwt.com/insights/2023/07/ftc-advertising-endorsement-and-testimonial-guides> [<https://perma.cc/QA3U-SXPC>] (emphasizing that influencers must not depend exclusively on social media's built-in disclosure tools and clickable links for transparency).

¹³⁸ Raqiyyah Pippins et al., *FTC Proposed Updates to Endorsement Guides and .com Disclosures Guidance Signal Continued Regulatory Focus on Influencers and Social Media*, ARNOLD & PORTER (June 6, 2022), <https://www.arnoldporter.com/en/perspectives/advisories/2022/06/ftc-proposed-updates-to-endorsement-guides> [<https://perma.cc/3GRR-EHTF>]. The FTC has alerted social media platforms that they may face legal consequences for the inadequacy of their disclosure mechanisms. See *FTC Proposes to Strengthen Advertising Guidelines Against Fake and Manipulated Reviews*, FED. TRADE COMM'N (May 19, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-proposes-strengthen-advertising-guidelines-against-fake-manipulated-reviews> [<https://perma.cc/68SH-XFHJ>] (warning social media platforms that they may face liability for their inadequate disclosure tools).

For example, TikTok mandates that influencers on the platform use its branded content disclosure tool, which displays a “paid partnership” disclaimer on sponsored content.¹³⁹ The disclaimer, however, appears below the caption at the very bottom of the TikTok interface.¹⁴⁰ Also, TikTok’s disclosure settings are not automatic and must be actively enabled by influencers when posting branded content.¹⁴¹ Similarly, Instagram requires influencers posting sponsored content to use its branded content tool that automatically adds a “paid partnership” label to the content.¹⁴² The “paid partnership” label appears either directly above the branded content or at the top of the Instagram interface, depending on the type of post.¹⁴³ Despite these measures, many influencers fail to use the disclosure tools, leading to inadequate disclosures across different platforms.¹⁴⁴

2. The Format Challenge: Aligning Disclosures with Content Types

The FTC’s clear and conspicuous standard requires influencers to ensure that their disclosures are easy to notice and understandable to ordinary consumers.¹⁴⁵ On social media, a disclosure satisfies this standard when it is obvious and mirrors the style of the branded content—visual content requires visual disclosures, auditory content requires auditory disclosures, and mixed con-

¹³⁹ *Creating Branded Content on TikTok*, *supra* note 51.

¹⁴⁰ See Dale Barnett, *How to Disclose Sponsored Influencer Content on TikTok*, INFLUENCER INTELLIGENCE, <https://www.influencerintelligence.com/blog/TKw/how-to-disclose-sponsored-influencer-content-on-tik-tok> [<https://perma.cc/W4YD-47CD>] (featuring two TikTok videos with the “paid partnership” label).

¹⁴¹ *Promoting a Brand, Product, or Service*, *supra* note 49.

¹⁴² *Branded Content Policies*, *supra* note 54; *Get Started with Branded Content on Instagram*, INSTAGRAM, <https://help.instagram.com/1123581461537025> [<https://perma.cc/P9SV-XCNW>].

¹⁴³ *What Does It Mean When an Instagram Post Says That It’s a Paid Partnership with Someone?*, INSTAGRAM, <https://help.instagram.com/1199202110205564> [<https://perma.cc/TST7-V6AP>]; see *What Is “Paid Partnership With” Feature on Instagram and How Does It Work?*, RIGHT FIT, <https://theright.fit/blog/what-is-paid-partnership-with-feature-on-instagram-and-how-does-it-work> [<https://perma.cc/WG3F-ZPPT>] (featuring examples of how the “paid partnership” disclosure tool appears on Instagram in feed and in stories).

¹⁴⁴ See *Investigation of the Commission and Consumer Authorities Finds That Online Influencers Rarely Disclose Commercial Content*, EUR. COMM’N (Feb. 14, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_708 [<https://perma.cc/P674-FTLQ>] (finding that 38% of influencers failed to use platform disclosure tools). A European Commission study involving 576 influencers found that, although 97% of them produced branded content, only 20% consistently made proper disclosures. *Id.*

¹⁴⁵ 16 C.F.R. § 255.0(f). To avoid misleading consumers, the FTC emphasizes that disclosures must be clear and conspicuous. Lesley Fair, *Full Disclosure*, FED. TRADE COMM’N (Sept. 23, 2014), <https://www.ftc.gov/business-guidance/blog/2014/09/full-disclosure> [<https://perma.cc/FRG2-6ZUE>]. The FTC assesses the clarity of a disclosure based on ordinary consumers, but the “ordinary consumers” conception is not fixed. See 16 C.F.R. § 255.0(f) (discussing how “ordinary consumers” may shift based on an endorsement’s target audience). Therefore, endorsements intended for specific audiences are evaluated with that audience included in the group of “ordinary consumers.” See *id.* (stating that an endorsement’s target audience is included in the “ordinary consumers” analysis).

tent requires both.¹⁴⁶ Although the FTC does not prescribe a one-size-fits-all method for evaluating compliance with the clear and conspicuous standard, it is important for disclosures to attract consumers' attention.¹⁴⁷

Social media platforms are equipped with a diverse range of content formats—from short-form videos and ephemeral stories to in-feed posts and interactive content—that introduce complexities for influencers making appropriate disclosures.¹⁴⁸ The versatility and mixed media nature of social media content, however, presents challenges, as influencers must consider various factors, such as the potential for certain elements to distract from the disclosure.¹⁴⁹

C. Reinforcing Unfair Competition Through Inconsistent Enforcement

There is also concern that the FTC's current enforcement practices may inadvertently reinforce unfair competition dynamics in influencer marketing.¹⁵⁰ Although the FTC produces guidelines to promote transparency and honesty in influencer-brand relationships, the practical application of these measures often falls short.¹⁵¹

1. Dynamics of Influencer Content Dissemination and FTC's Post-Hoc Regulatory Actions

In the current social media landscape, influencers with a substantial number of followers have the ability to rapidly disseminate content to a broad audience and significantly induce consumer behavior before any regulatory scrutiny is applied.¹⁵² The FTC begins its enforcement procedures by sending out

¹⁴⁶ See 16 C.F.R. § 255.0(f) (discussing disclosure requirements based on content format). According to the FTC, disclosures that are made visually and audibly are more likely to meet the clear and conspicuous standard. *Id.*

¹⁴⁷ Fair, *supra* note 145.

¹⁴⁸ See *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (exploring diverse social media content types and their respective methods for transparency).

¹⁴⁹ *Id.* Influencers should consider the placement, readability, and clarity of their disclosure. *Id.*

¹⁵⁰ See Cooper, *supra* note 5, at 80 (illustrating how influencers and brands may intentionally use minimal disclosures to maintain an appearance of authenticity to engage more effectively with their audience).

¹⁵¹ See *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (highlighting the purpose of the FTC Guides); Monique Groen, *Swipe Up to Subscribe: The Law and Social Media Influencers*, 21 TEX. REV. ENT. & SPORTS L. 113, 123–24, 127 (2020) (highlighting various explanations for the sparsity in the FTC's enforcement of the FTC Guides).

¹⁵² See Véronique Hyland, *The Alix Earle Effect*, ELLE (Aug. 30, 2023), <https://www.elle.com/culture/celebrities/a44775813/alix-earle-tiktok-interview-2023> [<https://perma.cc/U5JA-KW6T>] (discussing Alix Earle's impact on the virality of products she features on social media); Teneal Zuvela, *Alix Earle Is the Internet's New Hot Best Friend*, ELLE (Jan. 31, 2023), <https://www.elle.com.au/culture/news/alix-earle-age-net-worth-amazon-store-front-28171> [<https://perma.cc/6G6M-K753>] (highlighting how a mere mention by Alix Earle can lead to a product selling out in a matter of minutes); Claire Sullivan & Olivia Cigliano, *The Best Products We Tested from Alix Earle's Makeup Routine*, WOMEN'S WEAR DAILY (July 15, 2024), <https://wwd.com/shop/shop-beauty/alix-earle->

educational or warning letters to influencers and brands, giving them an opportunity to rectify any non-compliance with the disclosure requirements.¹⁵³ Recipients are typically given fifteen business days to respond to the FTC with their plans for addressing the concerns raised in the warning letters.¹⁵⁴ By the time an influencer adjusts their disclosure method fifteen days after the FTC noticed a violation, the fast-paced nature of influencer content could have already affected consumer behavior and generated returns for brands.¹⁵⁵ This rapid influence makes it difficult for the FTC to engage in preemptive consumer protection and thus effectively reinforces unfair competition by allowing content to go undisclosed for relatively long periods of time.¹⁵⁶

2. Economic Drivers and Compliance Disincentives in Influencer Marketing

Inadequate partnership disclosures can benefit brands by making influencer content appear more organic.¹⁵⁷ Moreover, the relationship between

makeup-routine-1235767979 [https://perma.cc/PS9K-BPZB] (encouraging consumers to act fast when they “find an Alix-approved product in stock,” because “any TikTok-loved beauty product that Earle uses rarely goes on sale and tends to sell out quickly”); *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 78 (indicating that the FTC assesses potential violations as they are brought to the agency’s notice).

¹⁵³ See *Legal Library: Warning Letters*, *supra* note 91 (stating the purpose of FTC warning letters); Sample Educational Letter, *supra* note 113 (detailing potential FTC violations and educating influencers on disclosure requirements); Warning Letter Template, *supra* note 113 (warning Instagram influencers about their potential FTC violations after they received educational letters previously).

¹⁵⁴ See *About FTC Warning Letters*, *supra* note 91 (requiring that recipients of the warning letter respond to the FTC within “several” days to confirm that the necessary changes have been implemented); Warning Letter Template, *supra* note 113 (noting that influencers are often given 15 days to respond); *FTC Warns Two Trade Associations and a Dozen Influencers About Social Media Posts Promoting Consumption of Aspartame or Sugar*, *supra* note 91 (providing recipients of warning letters with a fifteen-day period to reply to the FTC regarding their intended or completed corrective measures for deceptive endorsements).

¹⁵⁵ See Sarah Spruch-Feiner, *11 Beauty Products That Went Viral on TikTok in 2022*, GLOSSY (Dec. 30, 2022), <https://www.glossy.co/pop/10-beauty-products-that-went-viral-on-tiktok-in-2022> [https://perma.cc/6LT9-3BWW] (highlighting the impact of TikTok influencers on selling out products and raising consumer engagement with brands); Darshita Goyal, *Why Is Everything Good Always Sold Out?*, ELLE (Oct. 12, 2023), <https://www.elle.com/fashion/shopping/a45500102/tiktok-fashion-influencer-viral-sold-out-brands> [https://perma.cc/UB6J-5SR7] (discussing how the TikTok algorithm promotes consumerism by encouraging purchases tailored to users and quickly selling out products).

¹⁵⁶ See *Influencer Marketing in FTC’s Crosshairs*, *supra* note 113 (stating that the FTC relies on consumer complaints and media reports); *Sample Consumer Complaint Letter*, FED. TRADE COMM’N (Nov. 2023), <https://consumer.ftc.gov/articles/sample-customer-complaint-letter> [https://perma.cc/7ZQU-YWMF] (signifying that the FTC does not directly respond to each individual consumer complaint but instead compiles them to discern patterns of misconduct); Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 134–35 (2020) (noting that the majority of user engagement with social media posts occurs within the initial hours of posting, thereby reducing the effectiveness of injunctive relief unless there’s a discernible pattern of deceptive practices).

¹⁵⁷ See Cooper, *supra* note 5, at 80 (addressing the issue of influencers intentionally providing insufficient disclosures); Gillian Follett, *How the FTC’s Influencer Marketing Warnings May Disrupt*

brands and influencers can become disingenuous due to the transactional nature of influencer marketing strategies.¹⁵⁸ Brands invest heavily in these partnerships to maximize their economic gains, creating pressure to generate results quickly and effectively.¹⁵⁹ As a result, the potential financial rewards from appearing genuine can create a system where brands tacitly tolerate or even encourage noncompliance, reinforcing unfair competition in the market.¹⁶⁰

Furthermore, the threatened fines for non-compliance are frequently insubstantial compared to the significant profits that influencers and brands can accrue with these marketing strategies.¹⁶¹ Nevertheless, as warning letter recipients “overwhelmingly” amend their misleading practices, the anticipated financial repercussions rarely materialize, potentially reducing the incentive to comply with guidelines when the economic advantages outweigh the risks of incurring penalties.¹⁶²

Brand and Creator Deals, ADAGE (Nov. 20, 2023), <https://adage.com/article/digital-marketing-ad-tech-news/ftc-influencer-marketing-warning-may-disrupt-brand-and-creator-deals/2530476> [<https://perma.cc/RYM5-NANM>] (discussing how the goal of sponsored content is to appear as unsponsored as possible).

¹⁵⁸ See Deanna Ting, ‘It’s Very Transactional’: Confessions of a Marketer on Working with Influencers, DIGIDAY (Nov. 4, 2019), <https://digiday.com/marketing/transactional-confessions-marketer-working-influencers> [<https://perma.cc/93H5-7W2E>] (describing the relationship between brands and influencers as transactional); Shane Barker, *Why Influencer Marketing Should Focus on Relationships*, BUSINESS.COM, <https://www.business.com/articles/why-influencer-marketing-should-focus-on-relationships> [<https://perma.cc/8KLX-R35Y>] (Dec. 19, 2024) (underscoring the mutually beneficial relationship between a brand and an influencer).

¹⁵⁹ See Tahir Abbas Syed, Fahad Mehmood & Talia Qaiser, *Brand—SMI Collaboration in Influencer Marketing Campaigns: A Transaction Cost Economics Perspective*, 192 TECH. FORECASTING & SOC. CHANGE 122,580, 122,581 (2023) (noting that “[t]he growing power of social media influencers creates a tempting opportunity for brands to market their products both efficiently and quickly”); see also Fine F. Leung, Flora F. Gu & Robert W. Palmatier, *Online Influencer Marketing*, 50 J. ACAD. MKTG. SCI. 226–27 (2022) (outlining key elements of influencer marketing, including brand selection and incentives, influencer-audience engagement, and leveraging influencers’ unique assets for promotion); Mendel Cohen, *Why Influencer Marketing Is Becoming a Crucial Part of Every Marketing Strategy*, FAST CO. (Feb. 15, 2023), <https://www.fastcompany.com/90848836/why-influencer-marketing-is-becoming-a-crucial-part-of-every-marketing-strategy> [<https://perma.cc/SL63-N9AM>] (underscoring the credibility that influencers provide to brands facing a decline in consumer confidence).

¹⁶⁰ Cooper, *supra* note 5, at 80.

¹⁶¹ See *FTC Warns Two Trade Associations and a Dozen Influencers About Social Media Posts Promoting Consumption of Aspartame or Sugar*, *supra* note 91 (threatening to fine warning letter recipients \$50,120 for failure to correct their deceptive practices); Joe Hitchcock, *Influencer Pricing: The Cost of Influencers in 2024*, SHOPIFY (Aug. 28, 2024), <https://www.shopify.com/blog/influencer-pricing> [<https://perma.cc/DJX4-GLFG>] (highlighting that, on average, an influencer with over 500,000 followers may receive \$10,000 for each sponsored post on Instagram); Santora, *supra* note 24 (pointing out that brands may generate \$5.78 for each dollar invested in influencer marketing).

¹⁶² See *About FTC Warning Letters*, *supra* note 91 (emphasizing that warning letter recipients often correct their problematic practices); *Notices of Penalty Offenses*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/penalty-offenses> [<https://perma.cc/2G9S-G5Z6>] (explaining that the FTC can impose civil penalties for deceptive or unfair practices after issuing a notice identifying such prac-

3. Regulatory Discrepancies Between High-Profile and Niche Influencers

Within the current regulatory framework, micro-influencers are less likely to receive consumer complaints that trigger FTC intervention.¹⁶³ These micro-influencers, with follower counts ranging between 10,000 and 50,000, are known for their strong connections with niche audiences.¹⁶⁴ The smaller reach of micro-influencers, despite fostering engaged communities, often does not garner the same level of regulatory attention as more prominent influencers, leading to a potential enforcement oversight.¹⁶⁵ For example, Bloom Nutrition (Bloom) has significantly boosted its sales and online presence by utilizing micro-influencer relationships on TikTok to promote its products across social media platforms.¹⁶⁶ Bloom influencers use minimal disclosures in their videos and the Bloom product is randomly placed among other products within the influencer's GRWM video.¹⁶⁷

tices and allowing recipients to make corrections). The FTC has outlined various practices related to endorsements that are unfair or deceptive and in violation of the FTC Act. FED. TRADE COMM'N, NOTICE OF PENALTY OFFENSES CONCERNING DECEPTIVE OF UNFAIR CONDUCT AROUND ENDORSEMENTS AND TESTIMONIALS, https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/notice-penalty_offenses-endorsements.pdf [<https://perma.cc/TR6K-QNAC>].

¹⁶³ See Danielle Izzo, Note, *The Influencer Next Door Is Helping Major Corporations Evade International Laws: Why Micro Influencers Pose a Unique Regulatory Problem for Consumer Protection Laws*, 20 J. INT'L BUS. & L. 50, 51 (2020) (suggesting that micro-influencers may escape regulatory scrutiny due to their smaller reach). Consumers tend to trust micro-influencers more than larger influencers when they share images of themselves using products as part of their daily routine, as it is easier to believe that micro-influencers have genuinely purchased or used the featured products. Georgia Hatton, *Micro Influencers vs Macro Influencers*, SOC. MEDIA TODAY (Feb. 13, 2018), <https://www.socialmediatoday.com/news/micro-influencers-vs-macro-influencers/516896> [<https://perma.cc/6X3Z-ZQY5>].

¹⁶⁴ Kelly Ehlers, *Micro-Influencers: When Smaller Is Better*, FORBES, <https://www.forbes.com/councils/forbesagencycouncil/2021/06/02/micro-influencers-when-smaller-is-better> [<https://perma.cc/R5ZB-F8P8>] (Apr. 14, 2022).

¹⁶⁵ See *id.* (comparing the impact of micro-influencers to that of macro-influencers, classified as those with 500,000 to 1 million followers); Izzo, *supra* note 163, at 52, 53–54 (highlighting the positive impact of micro-influencers on engagement, despite their smaller following and mentioning that regulators often struggle to identify micro-influencers); Roberts, *supra* note 156, at 91 (emphasizing the perceived greater authenticity and trustworthiness of micro-influencers in the eyes of consumers, which tends to enhance consumer engagement and interaction).

¹⁶⁶ See Helen Grace White, *Bloom Nutrition, Social Media, and Influencer Relations*, CAPSTONE AGENCY (Oct. 10, 2023), <https://www.capstoneagency.org/blog/bloom-nutrition-social-media-and-influencer-relations> [<https://perma.cc/6QN8-2S9F>] (noting the widespread presence of Bloom influencers on TikTok and the increase in Bloom sales); Rhiannon Faith Ireland, *Influencers Swear By Bloom Nutrition. Should You?*, LIST (Apr. 7, 2023), <https://www.thelist.com/1251477/influencers-swear-bloom-nutrition-should-you> [<https://perma.cc/5ZDA-VH56>] (describing the TikTok hype of Bloom's Greens & Superfoods powder supplement and suggesting that consumers "may want to hold off" on buying the product); Kate (@herculeankate), *#Greenscreen Can We Also Talk About*, TIKTOK (Jan. 20, 2023), <https://www.tiktok.com/@herculeankate/video/719083923865577387> [<https://perma.cc/YE5V-4CHA>] (showing an email sent to a micro-influencer offering Bloom products in exchange for a post).

¹⁶⁷ See Kate, *supra* note 166 (noting that Bloom aims to circumvent FTC regulations by promoting product placements without clear advertisement disclosures); Leandra (@leandrayomo), *Inquiring*

III. PROACTIVE STRATEGIES TO ADDRESS THE EVOLVING CHALLENGES IN INFLUENCER MARKETING

The evolving landscape of influencer marketing presents complex challenges that require a more proactive and multi-faceted approach to regulatory enforcement.¹⁶⁸ The growth of influencer marketing has outpaced current oversight, leading to widespread noncompliance with disclosure requirements.¹⁶⁹ To effectively address the complexities of influencer-brand dynamics, this Part proposes comprehensive solutions aimed at strengthening enforcement mechanisms, improving education for both consumers and influencers, and incentivizing compliance among social media platforms.¹⁷⁰

Section A of this Part advocates a real-time compliance system using AI to enhance the FTC's ability to monitor and enforce influencer marketing regulations.¹⁷¹ Section B recommends that the FTC enhance federal-state collaboration by enabling state agencies to enforce influencer marketing guidelines locally for more efficient oversight.¹⁷² Section C proposes a voluntary certification program for social media platforms to encourage them to adopt stronger compliance measures in exchange for reputational and financial benefits.¹⁷³ Section D advocates for educational campaigns for influencers and consumers to promote marketing transparency and inform influencers about their disclosure obligations.¹⁷⁴ Lastly, Section E urges brands to enhance disclosure compliance by implementing influencer policies and monitoring partnerships more effectively.¹⁷⁵

Minds Would Like to Know, TIKTOK (Nov. 30, 2023), <https://www.tiktok.com/@leandrayomo/video/7172011987772181803> [<https://perma.cc/GY3C-9E5T>] (calling out Bloom influencer videos for leaving out disclosures); Lissette (@lissettecalv), *Replying to @Chey*, TIKTOK (Sept. 21, 2023), <https://www.tiktok.com/@lissettecalv/video/7281416851039522091> [<https://perma.cc/BW2A-LEP5>] (alleging that Bloom encourages influencers to make inadequate disclosures); Michelle Raleigh Bartender (@michellebellexo), *Replying to @Lulu*, TIKTOK (May 29, 2023), <https://www.tiktok.com/@michellebellexo/video/7238664539066158382> [<https://perma.cc/G8QM-S87C>] (mentioning that Bloom instructed an influencer to integrate the product into their lifestyle content without mandating disclosure of the content as sponsored).

¹⁶⁸ See 16 C.F.R. § 255.0(a) (providing that “voluntary compliance” is the foundational principle behind the FTC Guides); Cooper, *supra* note 5, at 77 (noting that the difficulty in enforcing disclosure standards on brands and influencers is due to the nonbinding status of the FTC Guides).

¹⁶⁹ See Emily Hund, *Why the Influencer Industry Needs Guardrails*, HARV. BUS. REV. (May–June 2024), <https://hbr.org/2024/05/why-the-influencer-industry-needs-guardrails> [<https://perma.cc/2KX3-5PND>] (addressing the rapid development of influencer marketing and the challenges faced by government agencies in regulating influencer content).

¹⁷⁰ See *infra* notes 168–213 and accompanying text.

¹⁷¹ See *infra* notes 176–189 and accompanying text.

¹⁷² See *infra* notes 190–193 and accompanying text.

¹⁷³ See *infra* notes 194–196 and accompanying text.

¹⁷⁴ See *infra* notes 197–207 and accompanying text.

¹⁷⁵ See *infra* notes 208–213 and accompanying text.

A. Developing a Real-Time Compliance and Reporting Portal

To improve oversight and mitigate deceptive influencer marketing practices, the FTC should develop a real-time compliance tracking and reporting system to enhance its capacity to monitor influencer marketing content and enforce regulations.¹⁷⁶ This system would use artificial technology (AI) to continuously monitor social media platforms for non-compliant content and provide immediate feedback to the FTC and social media platforms.¹⁷⁷ AI-driven monitoring would allow the FTC to identify violations as they occur, facilitating faster enforcement and minimizing the spread of misleading endorsements before they gain a large audience.¹⁷⁸

In addition to AI detection, the system should feature a public reporting mechanism, allowing social media users to flag non-compliant content.¹⁷⁹ Currently, consumers can report influencers to the FTC through its website or consumer response center, but in-app reporting would be a more effective use of resources as deceptive practices occur directly on these platforms.¹⁸⁰ Unlike existing social media reporting tools, which only notify the platform, this compliance tracking system would also send reports directly to the FTC.¹⁸¹ By enabling consumers, brands, and platforms to actively participate in compliance

¹⁷⁶ See Geri Mileva, *How AI Is Transforming Influencer Marketing*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/ai-influencer-marketing> [<https://perma.cc/B55P-BK4P>] (Jan. 23, 2025) (highlighting the possibility of AI tools to monitor compliance with contract terms, including FTC regulations); *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (acknowledging that the FTC acts on deceptive business practices if they come to its attention).

¹⁷⁷ See Mileva, *supra* note 176 (underscoring the use of AI to assist in overseeing influencer adherence to FTC regulations); Desirae Damm, *Tapfluence Launches First Automated FTC Compliance Tool for Influencer Marketing & Social Media*, BUS. WIRE (Apr. 12, 2017), <https://www.businesswire.com/news/home/20170412005662/en/TapInfluence-Launches-First-Automated-FTC-Compliance-Tool-for-Influencer-Marketing-Social-Media> [<https://perma.cc/29BK-9344>] (describing TapInfluence's FTC Auditor tool, which some companies currently use automatically track FTC compliance).

¹⁷⁸ See Mileva, *supra* note 176 (discussing various AI capabilities that currently exist through influencer marketing platforms). The FTC has requested a budget for 2025 that includes a plan to add ten more employees to the Bureau of Consumer Protection. FED. TRADE COMM'N, *supra* note 126, at 9. In doing so, the agency is seeking to tackle the growing impact of AI in marketing practices and support rulemaking on issues such as compliance surveillance with Orders and Notices of Penalty Offenses. *Id.*

¹⁷⁹ See Kate Crawford & Tarleton Gillespie, *What Is a Flag For? Social Media Reporting Tools and the Vocabulary of Complaint*, MICROSOFT (July 2014), <https://www.microsoft.com/en-us/research/publication/what-is-a-flag-for-social-media-reporting-tools-and-the-vocabulary-of-complaint> [<https://perma.cc/LZ8Z-LKAH>] (highlighting Microsoft's "flag" tool that allows users to report content to online platforms).

¹⁸⁰ Ali Talip Pınarbaşı, *FTC Requirements for Influencers: Guidelines and Rules*, TERMLY (Feb. 2, 2024), <https://termly.io/resources/articles/ftc-requirements-for-influencers> [<https://perma.cc/XY6R-6CQW>].

¹⁸¹ See *supra* notes 61–63 and accompanying text.

efforts, the FTC would gain an additional layer of enforcement.¹⁸² Real-time monitoring would also alleviate the burden on brands to supervise influencer content, shifting more accountability to a centralized and impartial system.¹⁸³

This real-time system could mirror the model used by the Department of Homeland Security's (DHS) Fusion Centers, which use real-time data-sharing mechanisms to identify and respond to public safety threats.¹⁸⁴ DHS monitors social media "to [i]dentify [t]hreats and [m]aintain [s]ituational [a]wareness" and shares this information with Fusion Centers.¹⁸⁵ Adopting a similar system for influencer marketing would allow the FTC to swiftly detect and respond to deceptive practices before they can cause significant harm.¹⁸⁶

Though the FTC has been cautious about embracing AI for regulatory enforcement of online issues, the rapid advancements in AI technologies now offer reliable tools to enhance compliance efforts.¹⁸⁷ Some critics have privacy concerns around AI, but the public nature of influencer profiles mitigates these concerns since they are already accessible to anyone online.¹⁸⁸ Consequently,

¹⁸² See *Social Media and Email Marketing Compliance*, USERCENTRICS (Sept. 26, 2024), <https://usercentrics.com/guides/social-media-email-marketing-compliance> [<https://perma.cc/RV4R-D6FD>] (exploring how digital compliance tools enable organizations to promptly address violations).

¹⁸³ See *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (imposing a significant duty on brands to oversee disclosure practices presently); *Teksun Inc.*, *supra* note 128 (discussing how AI can provide real-time monitoring); *What Are the FTC Social Media Guidelines That Influencer Marketing Professionals Should Adhere To?*, *supra* note 125 (discussing the "wait and see" approach taken by influencers and brands regarding whether to abide by the FTC Guides).

¹⁸⁴ See *Fusion Centers*, DEP'T HOMELAND SEC., <https://www.dhs.gov/fusion-centers> [<https://perma.cc/37BP-VG6F>] (Oct. 17, 2022) (discussing the Department of Homeland Security's Fusion Centers as facilitating a bidirectional intelligence and information exchange among federal, state, and private sector partners).

¹⁸⁵ U.S. DEP'T HOMELAND SEC., OFF. INSPECTOR GEN., *DHS PARTNERS DID NOT ALWAYS USE DHS TECHNOLOGY TO OBTAIN EMERGING THREAT INFORMATION* 4, 7 (2024), <https://www.oig.dhs.gov/sites/default/files/assets/2024-09/OIG-24-62-Sep24.pdf> [<https://perma.cc/3F29-V28A>]. A recent report found that, in addition to the information generally distributed by DHS, some Fusion Centers also "have their own social media monitoring contracts." *Id.* at 7.

¹⁸⁶ See *id.* at 7 (emphasizing the Fusion Centers' capability to anticipate and address various threats and hazards).

¹⁸⁷ See *FTC Report Warns About Using Artificial Intelligence to Combat Online Problems*, FED. TRADE COMM'N (June 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-report-warns-about-using-artificial-intelligence-combat-online-problems> [<https://perma.cc/Y7B4-3G26>] (discussing skepticism about using AI to fix online problems); Rashi Maheshwari, *Advantages of Artificial Intelligence (AI) in 2024*, FORBES (Aug. 24, 2023), <https://www.forbes.com/advisor/in/business/software/advantages-of-ai> [<https://perma.cc/SJA3-N7LF>] (highlighting the benefits of AI, including improved algorithm processing, full-time productivity, and digital chatbot assistants); *Teksun, Inc.*, *supra* note 128 (discussing AI's real-time monitoring capabilities).

¹⁸⁸ See Cameron F. Kerry, *Protecting Privacy in an AI-Driven World*, BROOKINGS (Feb. 10, 2020), <https://www.brookings.edu/articles/protecting-privacy-in-an-ai-driven-world> [<https://perma.cc/J9G2-8N38>] (highlighting the growing concerns about AI on privacy); Cayley Olivier, Student Essay, *What's in a Public Figure?*, PFEIFFER L. (Oct. 30, 2017), <https://www.pfeifferlaw.com/entertainment-law-blog/whats-in-a-public-figure> [<https://perma.cc/WK36-V997>] (asserting that influencers are public figures). Social media influencers generally have public profiles that anyone on the internet can

monitoring publicly available content would not infringe on individual privacy but would ensure a higher level of accountability in influencer marketing.¹⁸⁹

B. Federal-State Collaboration: A Unified Enforcement Approach

In addition to technological advancements, collaborative enforcement between the FTC and state agencies is essential for effectively monitoring and enforcing compliance in influencer marketing.¹⁹⁰ Although the FTC has previously explored collaborative efforts with state-level agencies, these efforts have largely focused on areas like fraud protection rather than the unique challenges posed by influencer marketing.¹⁹¹ To streamline enforcement and improve efficiency, the FTC should empower state-level consumer protection agencies to enforce its guidelines on influencer marketing within their jurisdictions.¹⁹² Delegating authority to state entities—such as state Attorneys General or consumer watchdog divisions—would allow for faster responses to local violations, while the FTC focuses on larger, more complex cases.¹⁹³

access, not just their followers or users of a specific platform. *See id.* (noting the public nature of influencer profiles).

¹⁸⁹ *See Monitoring Public Information Is Not a Violation of Privacy*, SOC. MEDIA TODAY (Apr. 24, 2013), <https://www.socialmediatoday.com/content/monitoring-public-information-not-violation-privacy> [<https://perma.cc/7G46-7WFK>] (asserting that monitoring information that is available to the public is not invasive of an individual's privacy).

¹⁹⁰ *See Commission Seeks Public Comment on Collaboration with State Attorneys General*, FED. TRADE COMM'N (June 7, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/commission-seeks-public-comment-collaboration-state-attorneys-general> [<https://perma.cc/X5EN-3HDT>] (discussing the FTC's federal-state collaboration efforts in general); *FTC Issues Report to Congress on Collaboration with State Attorneys General*, FED. TRADE COMM'N (Apr. 10, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-issues-report-congress-collaboration-state-attorneys-general> [<https://perma.cc/BN3P-7GG3>] (highlighting the FTC's cooperative enforcement initiatives with state attorneys general across the country).

¹⁹¹ *See FTC Issues Report to Congress on Collaboration with State Attorneys General*, *supra* note 190 (discussing “the roles and responsibilities of the FTC and state [attorneys general] in protecting consumers from frauds and scams”); Paul Singer, Beth Chun & Abigail Stempson, *The FTC Collaboration Act of 2021: The Relationship Between the FTC and State Attorneys General (Part One)*, AM. BAR ASS'N (Mar. 13, 2023), https://www.americanbar.org/groups/antitrust_law/resources/newsletters/ftc-collaboration-act-2021-part-1 [<https://perma.cc/VEJ4-5AW9>] (discussing the FTC Collaboration Act of 2021 and the partnership between the FTC and Attorney Generals).

¹⁹² *See FTC Issues Report to Congress on Collaboration with State Attorneys General*, *supra* note 190 (stating that the current challenges in consumer protection demand a collective effort).

¹⁹³ *See id.* (outlining strategies to improve cooperation between the FTC and state attorneys general and consumer protection agencies). The FTC's eight regional offices could work with state and local actors improve enforcement efforts. *See* FED. TRADE COMM'N, WORKING TOGETHER TO PROTECT CONSUMERS: A STUDY AND RECOMMENDATIONS ON FTC COLLABORATION WITH THE STATE ATTORNEYS GENERAL 12 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p238400_ftc_collaboration_act_report.pdf [<https://perma.cc/Z4H3-WNNJ>] (discussing the role of the FTC's regional offices as key contact points for local law enforcement and community partners); *Regional Offices*, *supra* note 69 (noting that the regional offices offer resources to consumers and partner with law enforcement).

C. Voluntary Certification for Platforms: Incentivizing Compliance

As social media platforms are a critical piece of the compliance puzzle, the FTC should create a voluntary certification program to incentivize platforms to adopt stronger compliance mechanisms.¹⁹⁴ Under this program, platforms could receive an “FTC-Compliant” certification for implementing monitoring processes to detect non-compliant content and promptly act on flagged violations.¹⁹⁵ Platforms that achieve certification could display a consumer trust mark, signaling to consumers that the platform prioritizes transparency and accountability and providing a reputational advantage for platforms, thereby incentivizing them to invest in robust compliance measures.¹⁹⁶

¹⁹⁴ See Press Release, Lou Mastria, CEO and President, Digital Advertising Alliance, DAA Statement Regarding Federal Trade Commission Report on Social Media and Video Streaming Services (Sept. 19, 2024), <https://digitaladvertisingalliance.org/press-release/daa-statement-regarding-federal-trade-commission-report-social-media-and-video> [perma.cc/F6LD-H4BV] (noting that a recent FTC report “fails to acknowledge the remarkable success of industry self-regulation more broadly”); see also Anthony E. DiResta, Da’Morus A. Cohen & Benjamin A. Genn, *Advertising on Social Media Regulation: Comments from an FTC Official*, HOLLAND & KNIGHT (Feb. 24, 2021), <https://www.hklaw.com/en/insights/publications/2021/02/advertising-on-social-media-regulation-comments-from-an-ftc-official> [https://perma.cc/9Z3N-BQJW] (emphasizing the significance of social media policies in the digital advertising environment).

¹⁹⁵ See *FTC Issues Orders to Social Media and Video Streaming Platforms Regarding Efforts to Address Surge in Advertising for Fraudulent Products and Scams*, FED. TRADE COMM’N (Mar. 16, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-issues-orders-social-media-video-streaming-platforms-regarding-efforts-address-surge-advertising> [https://perma.cc/D8AH-6WJ7] (suggesting that platforms implement systems for screening and flagging deceptive content); see also *Influencer Marketing in FTC’s Crosshairs*, *supra* note 113 (featuring an interview with the former FTC DAP director, who suggested brands develop active monitoring to ensure influencer compliance with the FTC Act).

The Digital Advertising Alliance (DAA) AdChoices program is a self-regulatory initiative that helps consumers understand and control how their data is used for personalized advertising. See Press Release, Survey Finds Broad Consumer Recognition, Trust, Understanding, and Support for DAA’s AdChoices Icon (Apr. 2, 2024), <https://digitaladvertisingalliance.org/press-release/survey-finds-broad-consumer-recognition-trust-understanding-and-support-daas-adchoices> [https://perma.cc/QM2E-HRCN] (describing the AdChoices program as “one of the great success stories in modern advertising self-regulation”). The AdChoices program’s blue triangular icon, commonly shown on ads, websites, and apps, lets users access information on data-driven advertising and choose their ad preferences. *Id.*; see Press Release, Digital Advertising Alliance, Digital Advertising Alliance Unveils New DAA AdChoices Icon Implementation Guidelines for Video Ads (Nov. 2, 2015), <https://digitaladvertisingalliance.org/press-release/new-daa-adchoices-icon> [https://perma.cc/7TNZ-KVH6] (noting that the “AdChoices icon has become a visual touchstone for millions of consumers”).

¹⁹⁶ See Bram Van Wiele, *A Closer Look at Certification Marks and Their Value to Consumers and Businesses*, UNIV. AUCKLAND BUS. SCH., <https://www.exec.auckland.ac.nz/the-value-of-certification-marks> [https://perma.cc/8GXC-HJMJ] (highlighting the beneficial effects of certification marks on how consumers view products); *Five Ways Certifications Connect with Consumers*, NSF (Sept. 18, 2020), <https://www.nsf.org/knowledge-library/five-ways-certifications-connect-consumers> [https://perma.cc/MN4S-9NF6] (asserting that certification marks provide companies with a competitive advantage in the marketplace). Certification logos boost consumer trust in online transactions by lowering uncertainties about a merchant’s reliability and privacy practices. See Pingjun Jiang, David B. Jones & Sharon Javie, *How Third-Party Certification Programs Relate to Consumer Trust in Online*

D. Educating Influencers and Consumers: Building a Culture of Compliance

Consumer and influencer education is critical to ensuring long-term compliance with the FTC's guidelines.¹⁹⁷ The FTC should launch targeted educational campaigns aimed at informing consumers and influencers about the importance of transparency in influencer marketing.¹⁹⁸ As federal agencies have a responsibility to protect the public, these campaigns would empower consumers to recognize deceptive endorsements and make informed choices while also teaching influencers how to disclose paid partnerships properly.¹⁹⁹

For influencers, the FTC should collaborate with social media platforms to integrate in-app educational tools that provide real-time guidance on compliance.²⁰⁰ Interactive checklists or "nudges" could be built into content creation tools, helping influencers comply with disclosure rules as they post branded content.²⁰¹

Transactions: An Exploratory Study, 25 PSYCH. & MKTG. 839, 839–40 (2008) (discussing how third-party certifications enhance consumer confidence during online shopping). Acting as trust signals, these logos can significantly impact consumer behavior, particularly when consumers recognize and understand the certifying authority's role in upholding standards. *Id.*

¹⁹⁷ See *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, *supra* note 103 (noting the FTC's efforts to educate brands and influencers); *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (providing updated educational guidance to influencers, consumers, and brands).

¹⁹⁸ See *FTC Releases Advertising Disclosures Guidance for Online Influencers*, FED. TRADE COMM'N (Nov. 5, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers> [<https://perma.cc/RC46-HLWE>] (emphasizing updated guidelines and related videos to inform influencers of their duties to disclose).

¹⁹⁹ See Sprinklr Team, *3 Government Agencies Doing Innovative Things on Social*, SPRINKLR (Jan. 19, 2021), <https://www.sprinklr.com/blog/government-agencies-social-media-engagement> [<https://perma.cc/TPW3-H7AZ>] (highlighting the responsibility that federal agencies have to the public and the direct communication offered through social media).

²⁰⁰ See *About Instagram's Creator Marketplace*, *supra* note 58 (describing the Instagram Creator Marketplace and requiring participants to comply with Instagram's policies and guidelines); *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (offering an elaborate explanation of the FTC's guidelines). The FTC asserts that it is "always willing to discuss [disclosure tools] with any platforms that might want to make improvements." *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78.

²⁰¹ See *Discover the Best Interactive Content Creation Tools*, NATIVEMSG (Nov. 7, 2023), <https://nativemsg.com/resources/interactive-marketing/discover-the-best-interactive-content-creation-tools> [<https://perma.cc/W9Q2-RGW8>] (highlighting a variety of interactive social media tools such as quizzes and polls); Aditya Bhattacharyya, *The Ultimate Guide to In-App Nudges in 2024*, PLOTLINE (Sept. 12, 2024), <https://www.plotline.so/blog/in-app-nudges-ultimate-guide> [<https://perma.cc/FP2T-U8UA>] (explaining the use of "in-app nudges," which are "subtle, non-intrusive directions or assistance for a user, relevant to the user's context at all times"). Instagram already uses nudging to encourage users to explore different types of content, address cyberbullying, and manage screen time at night. *Why Am I Seeing a Nudge to Explore Something Different?*, INSTAGRAM, <https://help.instagram.com/544650263825365> [<https://perma.cc/KC6V-75G7>]; Shirin Ghaffary, *Instagram's Surprising Strategy for Bullies: Tell Them to Be Nice*, VOX (Oct. 20, 2022), <https://www.vox.com/recode/2022/10/20/23413581/instagram-nudging-meta-creators-wellbeing-bullying-harassment> [<https://perma.cc/>

Moreover, platforms with creator marketplaces should be required to incorporate compliance education into their onboarding processes.²⁰² Rather than simply presenting terms and conditions, this training should be interactive and educational, helping influencers understand their obligations before entering into brand partnerships.²⁰³

Despite the FTC's active social media presence, influencers still lack a seamless, integrated way to access the FTC's accounts or guidelines, which enables widespread noncompliance.²⁰⁴ Given the high volume of commercial activity on social media and the critical role of clear disclosures in protecting consumers, expanding consumer education is crucial.²⁰⁵ The FTC Guides are comprehensive, but influencers who often focus on promoting specific brands may find it challenging to apply the broad guidelines to individual posts.²⁰⁶ Therefore, the FTC should provide influencers with succinct, relevant, in-app information tailored to their specific promotional content.²⁰⁷

E. Brands as Guardians of Compliance: Ensuring Influencers Follow the Rules

Brands must take a more active role in ensuring their influencer partners adhere to the FTC Guides by implementing disclosure policies and monitoring

XX3J-AVCG]; Molly Bohannon, *Teens Will Now Be 'Nudged' to Get Off Instagram at Night*, FORBES, <https://www.forbes.com/sites/mollybohannon/2024/01/18/teens-will-now-be-nudged-to-get-off-instagram-at-night> [<https://perma.cc/97VJ-L3BY>] (Jan. 18, 2024).

²⁰² See *About the Creator Marketplace on Instagram*, *supra* note 58 (requiring participants in the Instagram Creator Marketplace to comply with Instagram's policies and guidelines).

²⁰³ See *Creator Marketplace*, LATER SOC. MEDIA MGMT., <https://later.com/social-media-glossary/creator-marketplaces> [<https://perma.cc/TVT7-7MPN>] (describing the creator marketplace concept); Michael Grothaus, *More Than 1/3 of Gen Zers Never Fully Read Contracts. That's Bad as They Enter the Workforce*, FAST CO. (Sept. 1, 2023), <https://www.fastcompany.com/90956107/gen-z-legal-contracts-read-adobe-post-college> [<https://perma.cc/ZCY6-6FNR>] (reporting that one-third of Gen-Z members do not read contracts completely).

²⁰⁴ See FTC (@FTC), X, <https://x.com/FTC> [<https://perma.cc/SQR9-EJEP>] (requiring X users to search for the FTC's profile if they want to learn more about the FTC disclosure requirements); Federal Trade Commission (@federaltradedecommission), FACEBOOK, <https://www.facebook.com/federaltradedecommission> [<https://perma.cc/3QFA-MV3R>] (requiring Facebook users to search for the FTC's page to learn more about FTC disclosure requirements).

²⁰⁵ See *Ways to Shop on Instagram*, INSTAGRAM, <https://help.instagram.com/465338663964342> [<https://perma.cc/9SKK-EVUK>] (detailing ways to shop on Instagram); *TikTok Shop*, TIKTOK, <https://shop.tiktok.com/business/en> [<https://perma.cc/CGF8-6GZM>] (describing the TikTok Shop); *Transparent Transactions: The Role of Product Disclosures in Caveat Emptor*, FASTERCAPITAL, <https://fastercapital.com/content/Transparent-Transactions—The-Role-of-Product-Disclosures-in-Caveat-Emptor.html> [<https://perma.cc/2Y9Y-L8HF>] (June 6, 2024) (highlighting the positive impact of clear disclosures on consumers).

²⁰⁶ See *FTC's Endorsement Guides: What People Are Asking*, *supra* note 78 (providing educational guidance to consumers and discussing the varied content in the FTC Guides).

²⁰⁷ See *Influencer Marketing in FTC's Crosshairs*, *supra* note 113 (asserting that brands must be clear and succinct when informing influencers of their obligations).

processes.²⁰⁸ These policies should be more than a simple contract provision; they should be engrained within the actual working relationship between brands and influencers.²⁰⁹

For example, in 2020, the FTC issued warning letters to Teami, a tea company, and several influencers who promoted its weight-loss detox tea on social media without proper disclosures.²¹⁰ Even after receiving the warning letters, Teami and its influencers continued engaging in deceptive marketing practices.²¹¹ The FTC settled with Teami for \$1 million and required the company to implement a system to monitor and review influencer disclosures.²¹² This type of active brand engagement should be standard practice across the influencer marketing industry, not limited to settlement agreements.²¹³

CONCLUSION

Influencer marketing has become a valuable tool for enhancing brand visibility and engagement. Brands' increased reliance on influencers, however, has also raised concerns about deceptive practices that threaten to undermine the trust that is fundamental to the symbiotic dynamic between influencers and

²⁰⁸ See *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, *supra* note 103 (notifying brands about disclosure regulations and emphasizing their responsibility for compliance); *Influencer Marketing in FTC's Crosshairs*, *supra* note 113 (encouraging brands to create clear written policies for influencers).

²⁰⁹ See Lesley Fair, *FTC's Teami Case: Spilling the Tea About Influencers and Advertisers*, FED. TRADE COMM'N (Mar. 6, 2020), <https://www.ftc.gov/business-guidance/blog/2020/03/ftc-teami-case-spilling-tea-about-influencers-and-advertisers> [<https://perma.cc/6H4U-7XJ2>] (indicating that a contract clause demanding clear and noticeable disclosures may not effectively inform influencers). Clearly defining the working relationship in both practice and writing can strengthen the influencer-brand dynamic by accurately representing it. See *Influencer Agreements: What You Need to Know*, IRONCLAD, <https://ironcladapp.com/journal/contracts/influencer-agreements-what-you-need-to-know-about-managing-influencer-marketing-contracts> [<https://perma.cc/77AS-FW67>] (emphasizing that influencer contracts can help minimize ambiguity).

²¹⁰ See *Tea Marketer Misled Consumers, Didn't Adequately Disclose Payments to Well-Known Influencers, FTC Alleges*, FED. TRADE COMM'N (Mar. 6, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments-well-known-influencers-ftc-alleges> [<https://perma.cc/SWA4-JJKR>] (reviewing the FTC's measures targeting Teami and the influencers who promoted its products without adequate disclosures); Warning Letter from Richard A. Quarasima, Acting Assoc. Dir. Fed. Trade Comm'n, to Ms. Adrienne Eliza Houghton (Mar. 5, 2020) (on file with the author) (issuing a warning letter to Adrienne Bailon, an influencer, for failing to disclose her financial relationship with Teami).

²¹¹ See *Tea Marketer Misled Consumers, Didn't Adequately Disclose Payments to Well-Known Influencers, FTC Alleges*, *supra* note 210 (highlighting Teami and the influencers' failure to comply after receiving warning letters); Neal Schaffer, *FTC Influencer Guidelines: What You Need to Know Today*, NEAL SCHAFFER, <https://nealschaffer.com/ftc-influencer-guidelines> [<https://perma.cc/4HZ2-B6VK>] (Jan. 19, 2025) (describing the settlement as "devastating" and noting that new influencer contracts must comply with FTC guidelines, with Teami required to approve all influencer content before posting).

²¹² See Schaffer, *supra* note 211 (noting that advertisers are responsible for FTC compliance).

²¹³ See *id.* (highlighting the settlement between the FTC and Teami).

their audiences. The FTC's reactive and delayed regulatory enforcement of deceptive influencer marketing practices inadvertently reinforces unfair competition and undermines consumer trust. The current landscape of influencer marketing regulation underscores the need for a more robust and proactive approach, including real-time compliance tracking, collaboration between the FTC and state agencies, a voluntary certification program, educational campaigns, and active brand participation in compliance monitoring. By implementing a multi-tiered approach, the FTC can fundamentally reshape the regulatory landscape of influencer marketing, ensuring timely, effective, and comprehensive enforcement that meets the demands of the digital age.

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