

**DISCLOSING UNDER THE INFLUENCER:
HOW THE FTC FAILS TO GUIDE ADVERTISERS AND
PROTECT CONSUMERS IN SOCIAL MEDIA
“INFLUENCER” MARKETING**

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“The regulatory scheme envisioned in the [Federal Trade Commission] Act for the slower-paced antitrust problem was not ideally suited for the faster moving advertising field, in which speed in enforcement might become of the essence.” – Ira M. Millstein.¹

The argument adopted by Millstein—that the Federal Trade Commission is ill-suited to assume a regulatory role in the fast-developing advertising field²—deserves particular focus in today’s social media-driven world. As the role of advertisers adapts to a world of rapid technological growth, Federal Trade Commission regulations regarding advertisements fail to keep up.

1. Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 451 (1964).

2. *See id.*

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I. INTRODUCTION

In early December of 2017, Kim Kardashian West began sharing a series of “candid” photographs on her personal social media accounts.³ The photos featured Kardashian West dressed in clothing from husband Kanye West’s upcoming Yeezy fashion line.⁴ One month later, in January 2018, various celebrities, models, friends of the Kardashian West family, and “social influencers”⁵ began sharing photos of themselves dressed in the same Yeezy attire, often in the same locations.⁶

The many social media posts displaying the Yeezy brand were far from coincidental, and undoubtedly demonstrate a buzz-worthy social media marketing campaign.⁷ Nevertheless, the question remains: was the campaign legal? The answer, arguably, is “no,” because consumers viewing the posts likely were unaware of any formal advertising campaign.⁸ But this raises another question: was the Yeezy legal team, and the celebrities, models, and influencers that promoted the clothing line, properly informed that the campaign might be illegal? The answer, again, is an arguable “no,” because the agency tasked with promoting consumer protection does not provide clear guidelines in the quickly-developing field of social media advertising.⁹

This note argues that the FTC’s endorsement guides are ill-suited for the fast-developing advertising field, and that the guides are insufficient to both protect consumers against deceptive advertising practices, and to inform businesses and endorsers to ensure compliance with FTC regulations. As advertisers adapt to rapid technological growth, FTC regulations governing advertisements—in particular, endorsements in social media advertising—fail to keep up.

3. Julia Pimentel, *Kanye West Debuts Yeezy Season 6 With an Army of Kim Kardashian Clones*, COMPLEX (Jan. 31, 2018), <https://www.complex.com/style/2018/01/kanye-west-yeezy-season-6-kim-kardashian-clones>.

4. *See id.*; *see e.g.*, Kim Kardashian West (@kimkardashian), INSTAGRAM (Dec. 4, 2017), <https://www.instagram.com/p/ABcTSCpYILOQ>.

5. *See infra* Section II.B, p. 8 (defining “social influencers” and their role in social media advertising).

6. For more on the Yeezy marketing campaign, *see* Pimentel, *supra* note 3.

7. *See* Pimentel, *supra* note 3; *see also* *Is Kanye West’s #YeezySeason6 Campaign Illegal?*, THE FASHION L. (Jan. 31, 2018), <http://www.thefashionlaw.com/home/kanye-wests-latest-yeezyseason6-roll-out-in-probably-illegal>.

8. *See* discussion *infra* Section IV.

9. *See infra* Section IV.A.i.

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II. BACKGROUND

A. Federal Trade Commission

The United States Federal Trade Commission was created by the Federal Trade Commission Act of 1914 in response to realized shortcomings of the Sherman Antitrust Act that “led to demands for legislation that would clarify the nation’s antitrust laws and simplify their administration.”¹⁰ Congress’s solution was to create an administration with “regulatory and quasi-judicial authority” to define and prohibit “unfair methods of competition.”¹¹ The FTC’s main objective was “to protect consumers by preventing anticompetitive, deceptive, and unfair business practices, [and by] enhancing informed consumer choice . . . without unduly burdening legitimate business activity,”¹² and, more than 60 years after its creation, the FTC was granted authority to establish industry-wide regulations.¹³ Although its role has expanded over time, the FTC today maintains authority in three areas—investigation, enforcement, and litigation.¹⁴

While supporting the FTC’s investigative, enforcement, and litigating authority, scholars have argued that the FTC was not intended to regulate advertising practices.¹⁵ Rather, they argue, as a response to negative Sherman Antitrust Act feedback, Congress envisioned the FTC as an agency built for addressing slower-paced antitrust problems, and not for taking on “the faster moving advertising field, in which speed in enforcement might become of the essence.”¹⁶

10. 5 LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3701 (Earl W. Kintner, ed., 1978), HeinOnline.

11. *See id.*

12. *See About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> (last visited Nov. 18, 2018).

13. *See id.*

14. *See* Aimee Khuong, *Complying with the Federal Trade Commission’s Disclosure Requirements: What Companies Need to Know When Using Social-Media Platforms as Marketing and Advertising Spaces*, 13 HASTINGS BUS. L.J. 129, 131–32 (2016).

15. *See generally* Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 450–51 (1964). In fact, the man likely most responsible for the Act, Progressive Era lawyer George Rublee, “later stated that there had been no intent to cover fraudulent business practices.” *See id.*

16. *See, e.g., id.* at 450–51.

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Nonetheless, the Commission's authority over advertising was "a fortuitous by-product" of early Commissioners concerning themselves with false advertising, and the FTC quickly began regulating deceptive advertising practices.¹⁷

B. Changing Advertising Landscape

At its inception, the FTC hardly could have imagined the advertising techniques in place today. When radio, television, and eventually widespread internet access entered the homes of the American people, businesses took to these new media in the hope of increasing promotion and sales.¹⁸ As the percentage of American adults who regularly use internet services trends upwards,¹⁹ advertisers focus increasingly on social media for consumer exposure.²⁰

Today, Facebook, Instagram, Twitter, and Snapchat are among the most popular social networking applications in the United States and worldwide,²¹ and as the use of such applications (particularly on mobile devices²²) continues to rise, advertisers gain more opportunities to reach consumers through expanding advertising techniques.²³

17. See *id.* at 450, 452–53 (citing *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922)).

18. For an overview of important developments in American advertising from the early 1700s to 1999, see *Ad Age Advertising Century: Timeline*, ADAGE (Mar. 29, 1999), <http://adage.com/article/special-report-the-advertising-century/ad-age-advertising-century-timeline/143661>.

19. See *Internet/Broadband Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/internet-broadband>.

20. See *e.g.*, Pimental, *supra* note 3.

21. See *Most Popular Mobile Social Networking Apps in the United States as of July 2018*, STATISTA, <https://www.statista.com/statistics/248074/most-popular-us-social-networking-apps-ranked-by-audience> (last visited Nov. 18, 2018).

22. See *Mobile Social Media – Statistics & Facts*, STATISTA, <https://www.statista.com/topics/2478/mobile-social-networks> (last visited Nov. 18, 2018) ("This increased usage of social networks is due to the popularization of mobile technologies in the past decade and the increasing availability and affordability of mobile internet.").

23. See *Marketing in the Digital Age: A Brand New Game*, THE ECONOMIST (Aug. 27, 2015), <https://www.economist.com/business/2015/08/27/a-brand-new-game>.

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One common method of advertising, dating back to at least the early twentieth century, is the use of celebrity endorsements.²⁴ Brands often employ notable actors, models, and athletes to appear in advertising campaigns for products and services, in the hope that consumers will desire the products that their favorite celebrities are employed to market.²⁵ But whereas celebrity endorsements in print and television originated with the likes of actors and actresses, models, and athletes,²⁶ recent trends have seen the rise of the “social media influencer” in advertising.²⁷

Generally, a social media influencer (“social influencer” or “influencer”) is an individual with a large social media following who is contacted by brands to promote products or services.²⁸ The key difference between influencers and traditional celebrity endorsers is that endorsements featuring notable celebrities are typically easier to spot than endorsements fronted by social influencers, leaving consumers unaware that an advertisement is in fact an advertisement.²⁹

24. See, e.g., Julie Creswell, *Nothing Sells Like Celebrity*, N.Y. TIMES (Jun. 22, 2008), <http://www.nytimes.com/2008/06/22/business/media/22celeb.html> (“Using celebrities for promotion is hardly new. Film stars in the 1940s posed for cigarette companies, and Bob Hope pitched American Express in the late 1950s. Joe Namath slipped into Hanes pantyhose in the 1970s . . .”).

25. See *id.*; see also, e.g., Sarah Steimer, *Kit Kat Goes Viral With Chance the Rapper*, AM. MARKETING ASS'N (Apr. 3, 2017), <https://www.ama.org/publications/MarketingNews/Pages/kitkat-goes-viral-chance-the-rapper-campaign.aspx>. One of the most famous celebrity endorsements in recent history is Gatorade’s iconic “Be Like Mike” ad campaign featuring Hall of Fame basketball player Michael Jordan. See generally bigwayne84, *Be Like Mike Gatorade Commercial (ORIGINAL)*, YOUTUBE (Oct. 23, 2006), https://www.youtube.com/watch?v=b0AGiq9j_Ak.

26. See Lauren Meltzer, *Social Media “Influencers” Add a New Twist to Advertising*, CBS NEWS: MONEYWATCH (Feb. 8, 2018, 5:00 AM), <https://www.cbsnews.com/news/social-media-influencers-brand-advertising>.

27. See Rachel Gee, *Influencers Top List of the Biggest Celebrity Endorsers in 2016*, MARKETING WK. (Jan. 24, 2017, 5:19 PM), <https://www.marketingweek.com/2017/01/24/top-20-endorsers-2016> (“Social media influencers were among the top celebrity endorsers for brands in 2016, according to a new report by Celebrity Intelligence. . . . The list highlights that social media influencers are now contending with more traditional celebrities to be brand endorsers.”).

28. See generally *id.*

29. See *The Annual Brand and Influencer Report: The Good, Bad, and Highly Problematic*, THE FASHION L. (Jan. 4, 2017), <http://www.thefashionlaw.com/home/quarterly-brands-and-influencers-report-the-good-bad-and-problematic>. Influencer-fronted campaigns are likely cheaper than traditional-celebrity-fronted campaigns, further incentivizing businesses to engage in influencer marketing. See *Influencer Marketing vs. Celebrity Endorsements: Which is*

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Recently, many social media platforms have begun incorporating live-streaming features into their websites and mobile device applications.³⁰ Instagram Live is a feature developed by Facebook-owned Instagram where users of the platform are able to broadcast live videos of themselves to their followers or, in some cases, to all users of the picture- and video-sharing application.³¹ Additionally, viewers of the live stream are able to submit comments and questions to the broadcasting user throughout the live stream.³² As a growing number of social media platforms develop live-streaming features,³³ it is not hard to discern the regulation issues facing the FTC,³⁴ especially as the issue relates to social influencer marketing.³⁵

Better?, MEDIKIX (Dec. 6, 2017), http://mediakix.com/2017/12/influencer-marketing-vs-celebrity-endorsements-pros-cons/#gs.aqQ=F_U.

30. See, e.g., *Facebook Live*, FACEBOOK, <https://live.fb.com> (last visited Nov. 18, 2018); *How Do I Start a Live Video on Instagram?*, INSTAGRAM, <https://help.instagram.com/292478487812558> (last visited Nov. 18, 2018); Nick Summers, *You Can Now Livestream Directly from Twitter's Mobile Apps*, ENGADGET (Dec. 14, 2016), <https://www.engadget.com/2016/12/14/twitter-livestream-app-without-periscope>.

31. See generally *How Do I Start a Live Video on Instagram?*, INSTAGRAM, <https://help.instagram.com/292478487812558> (last visited Nov. 18, 2018).

32. See *How Do I View Someone's Live Video?*, INSTAGRAM, <https://help.instagram.com/699289326902954?helpref=search&sr=1&query=How%20do%20I%20start%20a%20live%20video%20on%20Instagram%3F> (last visited Nov. 18, 2018).

33. See *supra* note 29.

34. See *Legal Ins and Outs of Live Streaming in Public*, SARAH F. HAWKINS ATT'Y AT L. (Oct. 5, 2015), <https://sarafhawkins.com/legal-live-streaming-in-public> (describing the key legal concerns with live-streaming on social media, including FTC disclosures on "sponsored" live streams). See generally David Ingram & Diane Bartz, *FTC Demands Endorsement Info from Instagram "Influencers"*, REUTERS (Sept. 13, 2017, 6:01 PM), <https://www.reuters.com/article/us-usa-ftc-celebrities/ftc-demands-endorsement-info-from-instagram-influencers-idUSKCN1B02TE> ("The letters sent by the U.S. Federal Trade Commission to 21 people with large Instagram followings represent an escalation of the agency's interest in so-called social media 'influencers.'").

35. Lauren Meltzer, *Social Media "Influencers" Add a New Twist to Advertising*, CBS NEWS: MONEYWATCH (Feb. 8, 2018, 5:00 AM), <https://www.cbsnews.com/news/social-media-influencers-brand-advertising> (Though not necessarily discussing legality of influencer marketing, the article mentions the "Wild West" nature of influencer marketing, as it does not have a particular proven method of guidance.).

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III. ANALYSIS

A. FTC's Endorsement Guides

When “commercial speech”—that is, speech that proposes a commercial transaction³⁶—is misleading, courts (and by the power vested in it, the FTC³⁷) can restrict speech to protect consumers from deceptive statements.³⁸ And when determining deceptiveness, courts take a fact-specific approach,³⁹ focusing on the impact an advertisement may have on a “reasonable consumer.”⁴⁰

In attempting to effectively regulate deceptive practices in advertising, the Commission regularly updates a list of guidelines⁴¹ to try and keep up with evolving advertising practices.⁴² The objective of the guidelines is to help educate advertisers (and, as of recently, social influencers) regarding proper disclosure of material connections in advertisements so as not to deceptively influence consumers.⁴³ Though the FTC's Endorsement Guides are not legally binding, “practices inconsistent with the Guides” may prompt the Commission to investigate whether the actions are unfair or deceptive and “may result in law enforcement actions alleging violations of the FTC Act.”⁴⁴ The Guides are designed to help advertisers meet the “truth in advertising” standards acceptable under Section V of the FTC Act.⁴⁵

36. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760–61 (1976).

37. The Commission is given authority to regulate deceptive practices under Section 5 of the FTC Act. 15 U.S.C. § 45(a)(2) (2017).

38. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980); see also *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 141 (1994).

39. See *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687–88 (3d Cir. 1982).

40. See *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (last updated Sept. 2017) [hereinafter *Endorsement Guides FAQ*].

41. See *FTC Publishes Final Guides Governing Endorsements, Testimonials: Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements*, FED. TRADE COMM'N (Oct. 5, 2009), <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>.

42. See *Guides Concerning Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255 (2018); see also *Endorsement Guides FAQ*, *supra* note 40.

43. *Id.*

44. See *Endorsement Guides FAQ*, *supra* note 40. Violations of the FTC Act can result in orders that require defendants to fork over the money they may have received from their violations and to follow various requirements in future ads and endorsements. *Id.*

45. Amy Ralph Mudge, *Cover Story, Native Advertising, Influences, and Endorsements: Where is the Line Between Integrated Content and Deceptively Formatted Advertising?*, 31

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IV. ARGUMENT

Imagine a scenario where an influencer broadcasts a video over a live-streaming application while simultaneously using (e.g., wearing, drinking, eating, or otherwise utilizing) a product, without explicitly endorsing it. In this scenario—if the influencer has a material connection to the product—is an influencer required to disclose his or her material connection? On the other hand, if there exists no material connection, is it in the best interest of the consumer to disclose the lack of a material connection?

The FTC's regulations regarding endorsements on social media require posters with a "material connection" to the displayed product or service to disclose such connection.⁴⁶ When determining whether a disclosure in an advertisement is required, the FTC focuses on the impact such disclosure may have on an individual viewing the advertisement.⁴⁷ In essence, advertisers should analyze an endorsement from the perspective of consumers to determine if a disclosure is required.⁴⁸ If consumers are likely to give greater weight to an endorsement when they believe the endorser is unpaid, and the endorser has indeed been paid, then influencers must disclose such compensation.⁴⁹

ANTITRUST ABA 80, 80 (2017). Additionally, the FTC recently announced its intention to shy away from swift enforcement actions and instead focus on educating businesses and consumers on proper advertising and marketing strategies, and how to comply with Section V of the FTC Act. *Id.* Although the decision to refrain from enforcement action undoubtedly plays a role in the FTC's ability to properly protect consumers, this Article does not address FTC enforcement decisions.

46. See *Endorsement Guides FAQ*, *supra* note 40 (discussing appropriate disclosure methods for various circumstances).

47. See *Endorsement Guides FAQ*, *supra* note 40 (When determining whether to disclose compensation provided for a product review, endorsers should consider "whether the information would have an effect on the weight readers would give [their] review . . . [a]nd if it is something so small that it would not affect the weight readers would give [their] review, [the endorser] may not need to disclose anything.").

48. See *id.*

49. See *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53, 1243124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255) ("Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.").

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A. Product Placement in Live-Streaming Social Media

One avenue for social influencers and businesses seeking widespread advertising is the use of “embedded advertising,” the most common technique of which is known as product placement.⁵⁰ Social media platforms that provide live broadcasting more closely resemble television programs than other advertising mediums. As such, pivoting to a structure that governs embedded advertising is perhaps the most effective means of regulating endorsements on live-streaming social media platforms.

i. FTC’s Lax Product Placement Requirements

When addressing product placement, the FTC duly notes that Federal Communications Commission (“FCC”) law regulates product placement in television.⁵¹ Internet advertisements (including those on social media), however, are governed by FTC regulations, and the FTC has opined that under its current regulations, product placement— “merely showing products or brands in third-party entertainment content . . . as distinguished from sponsored content or disguised commercials”⁵²— “[does not] require a disclosure that the advertiser paid for the placement.”⁵³

The key distinction here is the difference between “merely showing products or brands in third-party entertainment content” and “sponsored content or disguised commercials,” but the FTC fails to explain what distinguishes the two.⁵⁴ While the FTC makes it clear that “mere” product placement requires no disclosure of payment, it does not provide an adequate definition of “mere product placement.”

50. Edward L. Ong, Comment, *An Embedded Solution: Improving the Advertising Disclosure Rules in Television*, 18 UCLA ENT. L. REV. 114, 116 (2011); see also Jennifer Fujawa, Note, *The FCC’s Sponsorship Identification Rules: Ineffective Regulation of Embedded Advertising in Today’s Media Marketplace*, 64 FED. COMM. L.J 549, 551–52 (2012).

51. See *Endorsement Guides FAQ*, supra note 40.

52. *Id.*

53. *Id.*

54. *Id.* In fact, the words “disguised” and “commercial” do not appear in the FTC Endorsement Guides FAQ in any place other than the location cited. See *id.*

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For example, pretend that an influencer begins a live-stream on Instagram, and in the stream, the influencer is visibly drinking a new energy drink, while discussing her new luggage equipment. Throughout the stream, the influencer is seen taking sips of the drink, but she never displays luggage. If the influencer was paid to promote both the energy drink and the luggage (or given the product for free under the condition that it be endorsed on her social media accounts), the FTC's Endorsement Guides can be read as suggesting that the explicit endorsement of the luggage would require a disclosure of the material connection, but drinking the energy drink would not, because the drink was not "endorsed" and instead was a mere "product placement."⁵⁵

Again, the FTC (i) warns against neglecting to disclose material connections in regards to "sponsored content" or "disguised commercials,"⁵⁶ (ii) does not require disclosures when a product is merely represented in third-party content, but (iii) fails to differentiate between the two.⁵⁷

ii. The FTC Should Adopt FCC-like Product Placement Requirements

The FCC, by contrast to the FTC, *does* require disclosures of product placement in television shows, abandoning the seemingly thin-lined distinction adopted by the FTC.⁵⁸ Essentially, under the FTC Act, advertisers are not required to disclose material connections relating to mere product placements, but FCC regulations require disclosures in similarly-structured TV product placement scenarios.⁵⁹ This creates a discord in disclosure requirements between embedded advertising in live-streaming social media platforms and embedded advertising in television programs.

55. *Id.* According to the guidelines, if the host of a talk show endorses a product with as little as exclaiming, "wow, this is awesome," then this is more than product placement, and a disclosure is required. *Id.* However, one can interpret the guidelines as suggesting that, without any sort of explicit endorsement, no disclosure is required, even when a third-party business or advertiser has paid the endorser to utilize the product or service. *See id.*

56. *See id.*

57. *See Endorsement Guides FAQ, supra* note 40.

58. *Id.*

59. *Id.*

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This is not to say that the FTC's guidelines ignore advertising in the live-streaming atmosphere altogether.⁶⁰ The FTC provides that disclosures must be made in certain live-streaming situations, but that not all instances where advertisers utilize a product or service in live-streaming videos warrant such disclosure.⁶¹ Rather, the FTC's guidelines fail to protect consumers and educate advertisers in the most appropriate fashion.

To close this gap, the FTC should consider implementing the FCC's embedded advertisement regulations. Perhaps celebrities and influencers should be required to disclose, at the top of their social media account profiles, the brands with which they have material connections. Current FCC regulations provide that, as long as a proper disclosure is made just one time "at any time during the course of the broadcast,"⁶² then the regulations have been satisfied.

Applying a similar structure to endorsements in live-streaming social media platforms does not provide for a perfect transition, but it may eliminate any confusion on the part of the viewer-consumer. For instance, influencers (and traditional celebrities alike) can simply place a disclosure at the beginning of their live-streaming videos that identifies all of the influencer's material brand connections, and even provide a link to a webpage that lists all material connections. This could serve as the proper one-time disclosure required under current FCC regulations, and would apply to any live-streaming videos an influencer may broadcast to his or her social media followers.

Although seemingly impractical, requiring such disclosures before or during live-streaming applications is perhaps the only way to truly protect consumers from deceptive advertisements involving product placements.⁶³

60. See *Endorsement Guides FAQ*, *supra* note 40. While the FTC's guidelines do not address the specific issue of product placement in live-streaming situations, the guidelines do mention the requirement of disclosures in live-streaming video. See *id.* Specifically, the guidelines provide an example where an endorser is paid to play a videogame and gives live commentary while the entire "playthrough" is live-streamed. *Id.* The FTC guide suggests that periodic disclosures throughout the stream are more appropriate than a one-time disclosure at the beginning of the stream, because viewers can tune in at any time and miss a disclosure at the beginning of the stream. *Id.*

61. See *supra* note 44 and accompanying text.

62. See 47 C.F.R. § 73.1212(a)–(f).

63. Of course, many viewer-consumers would neglect to consult such a list, but whether consumers choose to utilize this information is a decision for the consumer alone. An analogous situation occurs when a disclosure is made during a television program at either end of a commercial break, but a viewer-consumer—using a digital video recorder (DVR) device—skips over commercials. Although the disclosure satisfies FCC requirements, the

*RUTGERS UNIVERSITY LAW REVIEW**B. The FTC Fails to Educate Advertisers*

One other form of advertising that is prevalent in today's social media advertising landscape is "native advertising."⁶⁴ Native advertising arose as a natural progression from embedded advertising, and it is "content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online,"⁶⁵ or on social media platforms. In essence, native advertisements are meant to look and/or act like the native content of the platform, thus leaving viewer-consumers unaware that they are indeed looking at an advertisement.⁶⁶

Where embedded advertising is a technique incorporating a product into content (e.g., including a product in a photo posted to Instagram), native advertising is an attempt to merge the product with the content of the platform on which the product is being promoted (e.g., creating an Instagram advertisement for a product that is meant to look like a user's ordinary Instagram post). Additionally, in the context of social media platforms, embedded advertising is typically a result of an endorser's creativity in promoting a product, while native advertising is typically a creation of the advertiser: "[t]he [FTC's] Native Advertising Guide, by contrast to the Endorsement Guides, is less focused on influencers writing on their own platforms and more focused on advertiser-directed news articles and other content housed on third-party publications."⁶⁷

consumer's decision to bypass the disclosure is not an FCC enforcement issue. Funnily enough, increasing use of DVRs was cited as a leading factor in the rise of embedded advertising in the late 2000s. 73 Fed. Reg. 43195, ¶ 2 (proposed July 23, 2008).

64. Cooper Smith, *The Native Ad Rush Is On: Social Media Budgets Are Pouring into In-Stream Ads*, BUSINESS INSIDER (Nov. 5, 2013), <http://www.businessinsider.com/the-rise-of-social-native-advertising-2013-10>.

65. *Native Advertising: A Guide for Businesses*, FED. TRADE COMM'N (Dec. 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> [hereinafter *FTC's Native Advertising Guide*].

66. Brandon R. Einstein, Note, *Reading Between the Lines: The Rise of Native Advertising and the FTC's Inability to Regulate It*, 10 BROOK. J. CORP. FIN. & COM. L. 225, 225.

67. See Mudge, *supra* note 45, at 81.

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This subtle distinction creates confusion for and fails to properly guide advertisers and endorsers.⁶⁸ For instance, the Commission has repeated its stance that there should be no difference between influencers posting to their own social media accounts, and writers creating content for third-party websites.⁶⁹ In each instance the Commission has stated that, if a reasonable consumer is likely to misunderstand the commercial nature of the advertisement, a disclosure must be made because the Commission's focus is the impression an advertisement will have on the reasonable consumer: "[r]egardless of an ad's format or medium of dissemination . . . [d]eception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material."⁷⁰

Nevertheless, the FTC's regulations can be read as suggesting harsher rules for native advertisements than for endorsements by influencers.⁷¹ In both the FTC's Native Advertising Guide and its Endorsement Guide, the Commission requires advertisers and influencers alike to disclose material connections,⁷² but the Commission's advice for making the disclosures is at times ambiguous and is ultimately inconsistent between the two advertising techniques.

The Commission's Endorsement Guide explains that no specific set of words is required to make a proper disclosure on social media platforms.⁷³ The objective of the disclosure is to provide viewer-consumers the essential information to understand that a social media post is sponsored content.⁷⁴ For example, if the words "Company X gave me this product to try" accompany an influencer's social media post featuring Company X's product, then consumers are likely to draw a material connection between the influencer and Company X, and the FTC's standards have been met.⁷⁵

68. See generally Mudge, *supra* note 45 (arguing that the subtle differences between the FTC's endorsement guidelines and native advertising guidelines create unclear standards that are difficult for businesses to adhere to).

69. *Enforcement Policy Statement on Deceptively Formatted Advertisements*, FED. TRADE COMM'N, 2 (Dec. 2015).

70. *Id.* at 2, 11.

71. See generally Mudge, *supra* note 45, at 82; see also *Endorsement Guides FAQ*, *supra* note 40; *FTC's Native Advertising Guide*, *supra* note 65.

72. See generally *Endorsement Guides FAQ*, *supra* note 40; *FTC's Native Advertising Guide*, *supra* note 65.

73. *Endorsement Guides FAQ*, *supra* note 40, at ¶ 5.

74. *Id.*

75. *Id.*

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On the other hand, the Native Advertising Guide “expresses a strong preference for disclosures to include the specific word ‘ad’ or ‘advertisement,’” because disclosures are only effective if consumers understand that the content before them is commercial advertising.⁷⁶ The Native Advertising Guide explains that other terms—such as using “promoted” or “promoted story” to disclose a material connection⁷⁷—are ambiguous and may even lead consumers to believe that content is endorsed by the publishing social media platform.⁷⁸ These differences between the Commission’s Endorsement Guide and the Native Advertising Guide create further ambiguity in disclosure requirements—on one platform, using the term “promoted” might be sufficient for disclosing material connections, while using the same language on a different platform is not enough to inform consumers.⁷⁹

These differences are perhaps best explained by the Commission’s focus on a “reasonable consumer” standard.⁸⁰ Perhaps the Commission has concluded that visitors to websites such as Instagram or Twitter have an understanding of sponsored content different from that of visitors to the “web-at-large,” and that the “views of what reasonable consumers understand on different social media platforms or websites will evolve” with the changing social media advertising landscape.⁸¹

Though these differences may indeed be explainable, the issue presents yet another example of the FTC’s inability to (i) properly inform and educate advertisers, and thus their inability (ii) properly regulate advertising to protect consumers.

76. Mudge, *supra* note 45, at 82 (citing *FTC’s Native Advertising Guide*, *supra* note 63 (“Disclosures are not effective unless consumers understand them to mean that native ads are commercial advertising . . . Terms likely to be understood include ‘Ad,’ ‘Advertisement,’ ‘Paid Advertisement,’ ‘Sponsored Advertising Content,’ or some variation thereof.”)).

77. *FTC’s Native Advertising Guide*, *supra* note 65.

78. *Id.*

79. *See supra* notes 74–76 and accompanying text.

80. Whether an advertisement’s format is misleading depends on “how reasonable consumers [will] interpret the ad in a particular situation.” ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS, FED. TRADE COMM’N 11 (Dec. 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222_deceptiveenforcement.pdf.

81. Mudge, *supra* note 45, at 83.

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V. CONCLUSION

In the end, because social influencers accept compensation to promote brands,⁸² they must be required to disclose such information to unknowing consumers to maintain fair business competition and protect unaware consumers. The Federal Trade Commission must implement further measures to protect consumers as social media advertisements evolve with technology.⁸³

In the meantime, the most efficient and effective way to educate and inform advertisers, businesses, and endorsers, is for the FTC to continually update and revise its guidelines in social media advertising, including more precise guidelines for live-streaming, so as to treat these guides as “living, breathing documents.”⁸⁴ By doing so, the FTC can more readily address an ever-changing advertising landscape,⁸⁵ and thus protect consumers from misleading advertising practices.

82. *Influencers Sound Off on Why They Do Not Want to Disclose Sponsored Posts*, THE FASHION LAW (Oct. 13, 2017), <http://www.thefashionlaw.com/home/influencers-sound-off-on-why-they-do-not-want-to-disclose-sponsored-posts>.

83. The influencer advertising problem is not unique to the United States. In March 2018, the United Arab Emirates announced it would require influencers to register for government-issued licenses, similar to that of magazines and newspapers. Haneen Dajani, *UAE's Paid Social Media Influencers Will Need Licence Under New Media Rules*, THE NATIONAL (Mar. 6, 2018), <https://www.thenational.ae/uae/uae-s-paid-social-media-influencers-will-need-licence-under-new-media-rules-1.710664>.

84. See generally Mudge, *supra* note 45, at 85.

85. For more on developing advertising lawmaking see Rita-Marie Cain Reid, *Embedded Advertising to Children: A Tactic that Requires a New Regulatory Approach*, 51 AM. BUS. L.J. 721 (2014).