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Instagram & the FTC: The Growth of Influencer Marketing & the Government's Ungainly Pursuit

REBECCA DRIVER*

INTRODUCTION

The rise of social media has not just affected the way people view themselves, their friends, and their neighbors; as interactions and communications have evolved with social media, so too have business practices. Instagram influencers, for example, make a significant portion of their income through marketing products to their followers.¹ While this practice is lucrative for businesses, it is harmful for consumers when influencers' advertising breaks the law.² The Federal Trade Commission (the "FTC") regulates how advertisement occurs and has the United States' administrative and judicial processes at its disposal, but is not stamping down on illegal practices sufficiently.³ Luckily, the FTC—and Instagram—can implement several solutions that may help curb the problem.⁴

I. INSTAGRAM INFLUENCER MARKETING

Instagram, one of the most well-known social media sites, is a quintessential site for influencer marketing.⁵ Influencer marketing occurs when Instagram influencers endorse products for companies in exchange for money.⁶ Businesses recognize that this type of marketing is extremely effective, and it is only growing.⁷ Without disclosure of material connections, however, influencer marketing can easily mislead consumers and break the law.⁸

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1. See *infra* Part I.
2. See *infra* Part I.
3. See *infra* Parts II–III.
4. See *infra* Part IV.
5. See *infra* Part I.A.
6. See *infra* Part I.B.
7. See *infra* Part I.C.
8. See *infra* Part I.D.

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A. Instagram Is the Quintessential Site for Influencer Marketing

In the twenty-first century, social media has revolutionized the way people communicate and interact with each other.⁹ One of the most significant and commonly used social media sites is Instagram, a photo—and video—sharing app.¹⁰ This Facebook-owned site¹¹ allows users to post photos and videos in a variety of formats.¹² Users are able to decide how long their content is visible: a post is permanent (although users may archive or delete it), while a story disappears after twenty-four hours.¹³ Instagram moderates its site to ensure users post appropriate content,¹⁴ which ranges from selfies to memes to other people’s art.¹⁵

Besides posting their own content, users can “follow” any accounts that interest them.¹⁶ Many people follow their friends’ accounts, but users can also go to the “Explore” page of the app and find accounts of people they do not know,¹⁷ such as local artisans, shops, more nationally popular celebrities, athletes, and influencers. Because people can post their own content and see other people’s posts, “for most people, checking Instagram is equal parts voyeurism and self-expression.”¹⁸

9. See generally Rebecca Lake, *What Is Social Media for Small Business*, THE BALANCE SMALL BUS., <https://www.thebalancesmb.com/what-is-social-media-2890301> (June 23, 2020); *Introduction to Social Media*, U. OF S. FLA., <https://www.usf.edu/ucm/marketing/intro-social-media.aspx> (last visited Apr. 6, 2023).

10. INSTAGRAM, <https://www.instagram.com> (last visited Apr. 6, 2023).

11. Facebook is now known as “Meta.”

12. William Antonelli, *A Beginner’s Guide to Instagram, the Wildly Popular Photo-Sharing App With Over a Billion Users*, BUS. INSIDER (Dec. 14, 2020, 12:14 PM), <https://www.businessinsider.com/what-is-instagram-how-to-use-guide>.

13. *Instagram Features*, INSTAGRAM, <https://about.instagram.com/features> (last visited Apr. 6, 2023).

14. *How Instagram Uses Artificial Intelligence to Moderate Content*, INSTAGRAM, <https://help.instagram.com/423837189385631> (last visited Apr. 6, 2023) (reporting that Instagram uses technology and human reviewers to evaluate content that may violate Instagram’s Community Guidelines).

15. Hayley Bloomingdale, *The Instagram Rules: The Good, the Bad, and the Very Boring*, VOGUE (Aug. 26, 2015), <https://www.vogue.com/article/instagram-rules-social-media>; *Posting Other People’s Photos or Art on Instagram*, MUSHABOOM STUDIO, <https://www.mushaboom.studio/articles/posting-other-peoples-photos-or-art-on-instagram> (last visited Apr. 6, 2023); see also Team Elle, *People Who Repeatedly Post Their Workouts On Social Media Have Narcissistic Traits, According To New Study*, ELLE (Aug. 28, 2018), <https://www.elle.com/uk/life-and-culture/a22848646/people-post-workouts-facebook-narcissists> (suggesting that people who frequently post about workouts show narcissistic tendencies, such as a preoccupation with physical appearance).

16. Antonelli, *supra* note 7.

17. *Id.*

18. *Id.*

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Instagram is amazingly ubiquitous. The company is the fourth-most prevalent social media site¹⁹ and boasts over one billion users.²⁰ Of these one billion active monthly users, five hundred million use Instagram every day.²¹ The site is only growing, as 2021 saw the addition of 73.5 million more users than 2020.²² Many of these users are young, with 71% under the age of 35.²³

B. How Instagram Influencing Works

Instagram is not only for casual users who want to post their avocado toast or office holiday party outfit.²⁴ Instagram also has a business side that demands attention.²⁵ For companies, brands, and influencers, Instagram is “an indispensable marketing tool with unmatched reach.”²⁶ 71% of U.S. businesses use Instagram.²⁷ For this comment, however, the noteworthy point about Instagram is not how many businesses use it, but how many influencers do.

An “influencer” is a unique phenomenon, only added to the dictionary in 2019.²⁸ Merriam-Webster defines an influencer as “a person who is able to generate interest in something (such as a consumer product) by posting about it on social

19. Shelley Walsh, *The Top 10 Social Media Sites & Platforms 2022*, SEARCH ENGINE JOURNAL (May 30, 2022), <https://www.searchenginejournal.com/social-media/biggest-social-media-sites/#close> (reporting that Instagram follows Facebook, YouTube, and WhatsApp). Instagram is also the eighth most visited website in the world. Christina Newberry, *34 Instagram Stats Marketers Need to Know in 2023*, HOOTSUITE (Jan. 23, 2023), <https://blog.hootsuite.com/instagram-statistics>.

20. *About Instagram*, INSTAGRAM, <https://about.instagram.com/about-us> (last visited Apr. 6, 2023). However, bots, or fake accounts run by computers or algorithms, may make up a substantial percentage of Instagram’s users. Compare Yash Chawlani, *How Do Instagram Bots Affect Your Growth?*, BUS. 2 CMTY (June 4, 2021) <https://www.business2community.com/instagram/how-do-instagram-bots-affect-your-growth-02410311> (arguing that 95 million bot accounts may exist, almost 10% of Instagram users), with AIT News Desk, *HypeAuditor Reveals Key Findings Of Fraud’s Impact On The US Influencer Market*, AiTHORITY (June 30, 2021), <https://aithority.com/technology/analytics/hypeauditor-reveals-key-findings-of-frauds-impact-on-the-us-influencer-market> (noting that “HypeAuditor, the AI analytics platform for brands seeking fair, transparent, and effective influencer marketing” found that “only 59% of Instagram followers in the U.S. are real people, with the other 41% consisting of bots, inactive accounts, and mass followers (accounts with over 1,500 followings)”).

21. Brian Dean, *Instagram Demographic Statistics: How Many People Use Instagram in 2022?*, BACKLINKO (Jan. 5, 2022), <https://backlinko.com/instagram-users> (last visited Dec. 18, 2021).

22. Maryam Mohsin, *10 Instagram Stats Every Marketer Should Know in 2022*, OBERLO (July 10, 2022), <https://www.oberlo.com/blog/instagram-stats-every-marketer-should-know>. Analysts suggest the coronavirus pandemic drove this uptick. *Id.*

23. *Id.*

24. See *supra* Part I.A for a discussion of how non-influencer people (a.k.a., normal people) use Instagram.

25. See *Instagram for Business: Marketing on Instagram*, INSTAGRAM, <https://business.instagram.com> (last visited Apr. 6, 2023).

26. Antonelli, *supra* note 7.

27. Mohsin, *supra* note 16.

28. Jake James Lugo, *The Word ‘Influencer’ Is Now in the Merriam-Webster Dictionary*, INFLUENCER UPDATE.BIZ (May 9, 2019), <https://www.influencerupdate.biz/news/68099/the-word-influencer-is-now-in-the-dictionary>.

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media.”²⁹ Instagram influencers are not businesses or corporations that specialize in advertising, but are perceived as “regular” Instagram users who have “a unique ability to influence others, well-established credibility, and a considerably large audience.”³⁰ Because of their “power to influence potential buyers of a product or service,” Instagram influencers are significant for marketers.³¹

Influencer marketing works similarly to a celebrity endorsement. Paid influencers “might write or film promotional items” or post photos or videos of themselves using a product.³² The goal of such a post may vary from increasing the number of visitors to a website to increasing product sales.³³ A significant characteristic of influencer marketing is that companies do not have the same control over influencers as they may have over in-house advertising, as the influencers have already created their prestige before the company does business with them.³⁴ However, while companies cannot control exactly how an influencer advertises for them, this commentary contends that companies should work with influencers to ensure they do not break any laws, as creative license is not a license to advertise illegally.³⁵

Just as some celebrities are more famous than others, influencers are divided into tiers based on their number of followers.³⁶ Nano influencers have 1,000-10,000 followers; micro influencers have 10,000-50,000; mid-tier influencers have 50,000-500,000; macro influencers have 500,000-1,000,000 followers; and mega influencers have over 1,000,000 followers.³⁷ Generally, the smaller the influencer (i.e., the fewer the followers), the greater the engagement rate.³⁸ An engagement rate is a metric that tracks how involved followers are with a poster’s content, with

29. *Influencer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/influencer> (last visited Apr. 6, 2023).

30. Gary Henderson, *What Is an Instagram Influencer?*, DIGITALMARKETING.ORG (Nov. 12, 2020, 8:42 AM), <https://www.digitalmarketing.org/blog/what-is-an-instagram-influencer>.

31. *Id.*

32. Werner Geysler, *The Definitive Guide to Influencer Marketing – Everything You Need to Know*, INFLUENCER MARKETING HUB (Sept. 20, 2021), <https://influencermarketinghub.com/the-definitive-guide-to-influencer-marketing>.

33. *Id.*

34. *Id.*

35. *See infra* Part II.

36. Arooj Ahmed, *Ever Thought About How Many Influencers Exist in the World, and Across All the Major Social Media Platforms? This Research Shows Some Astonishing Figures*, DIGITAL INFO. WORLD (Apr. 29, 2021), <https://www.digitalinformationworld.com/2021/04/ever-thought-about-how-many-influencers.html>; *How Many Influencers Are There? New Data, Calculations & Chart*, MEDIKIX, <https://mediakix.com/blog/how-many-influencers-are-there/> (last visited Dec. 18, 2021).

37. *How Many Influencers Are There? New Data, Calculations & Chart*, *supra* note 36. While some websites disagree over the ranges for the specific classifications, these five categories are generally accepted.

38. *Influencer Tier Guide for Marketers*, IZEA (Sept. 4, 2020), <https://izea.com/resources/influencer-tier-guide-for-marketers-what-different-levels-of-influencers-can-achieve-for-your-brand>; Geysler, *supra* note 32.

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the assumption that when a viewer interacts with content, they are more likely to become a paying customer.³⁹ Nano influencers and micro influencers have an average engagement rate of 8 percent⁴⁰ and 3.86 percent,⁴¹ respectively, while mega influencers have an average engagement rate of between 1.21 percent⁴² and 1.6 percent.⁴³

As would be expected, the price to purchase an influencer's marketing generally increases for each level of influencer. In 2021, nano-influencers were paid \$10-\$100 per post; micro influencers were \$100-\$500; mid-tier influencers were \$500-\$5,000; macro influencers were \$5,000-\$10,000; and mega influencers were \$10,000 or more.⁴⁴ For example, Alivia Latimer, a photographer with 102,000 followers, making her a mid-tier influencer,⁴⁵ charges around \$1,200 for a branded post.⁴⁶ Interestingly, only about one-third of brands actually pay the influencers with whom they do business.⁴⁷ Some companies get away with "paying" influencers in product samples or discounts, or even entries for giveaways.⁴⁸

Influencer marketing is not a phenomenon that Instagram passively allows on its website—Instagram actively recruits influencers. Instagram's "About" page specifically targets "creators," advertising Instagram's ability to let creators "connect with more people, build influence, and create compelling content that's distinctly [theirs]."⁴⁹ Instagram even publishes tips on its business page to help users "create successful Instagram posts," like "write a compelling caption" and "keep colors consistent with your brand."⁵⁰ Notably, while Instagram's general "Creators" page contains blurbs on how to "Build Your Personal Brand" and "Earn

39. *Engagement Rate*, INFLUENCER MARKETING HUB, <https://influencermarketinghub.com/glossary/engagement-rate> (last visited Apr. 1, 2023) (noting that liking, commenting, and sharing are actions that affect engagement rates).

40. *Influencer Tier Guide for Marketers*, *supra* note 38.

41. Jacinda Santora, *100 Influencer Marketing Statistics for 2021*, INFLUENCER MARKETING HUB (last updated Sept. 7, 2021) <https://influencermarketinghub.com/influencer-marketing-statistics>.

42. *Id.*

43. *Influencer Tier Guide for Marketers*, *supra* note 38.

44. Andrew Macarthy, *Instagram Influencer Pricing 2022: Influencer Rates and Cost Per Post for Instagram*, ANDREW MACARTHY, <https://www.andrewmacarthy.com/andrew-macarthy-social-media/instagram-influencer-pricing> (last visited Dec. 19, 2021).

45. *See How Many Influencers Are There?* *supra* note 36 and accompanying text.

46. Sapna Maheshwari, *Uncovering Instagram Bots With a New Kind of Detective Work*, N.Y. TIMES (March 12, 2018), <https://www.nytimes.com/2018/03/12/business/media/instagram-bots.html>.

47. Santora, *supra* note 35.

48. *Id.*

49. INSTAGRAM, *supra* note 14.

50. *Creative Tips for Posting Photos and Videos on Instagram*, INSTAGRAM FOR BUSINESS, <https://business.instagram.com/a/instagram-creative-tips> (last visited Apr. 10, 2023).

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More,⁵¹ it lacks any clear information to advise influencers to stay on the right side of the law.

C. Instagram Marketing is an Attractive Option for Businesses

One of the reasons why influencer marketing is so popular is because it gives a substantial return on investment. “A Tomoson survey showed that businesses made \$6.50 on average for every dollar they spent on influencer marketing in 2016.”⁵² Influencer Marketing Hub “carried out [their] own research in 2017 and found that [their] survey respondents earned \$7.65 for every \$1 they spent on influencer marketing.”⁵³ Notably, that figure is an average—“[t]he top 13% of businesses received a return of at least \$20 per dollar spent.”⁵⁴ These statistics showcase the power of influencer marketing, which does not go unnoticed by the business world.⁵⁵

Businesses and marketers recognize how impactful influencer marketing is.⁵⁶ In 2021, about 58% of marketers said influencer marketing was “the most effective marketing trend, ahead of SEO, experiential marketing, and short-form video content.”⁵⁷ Additionally, upwards of 80% of marketers believe influencer marketing is “effective,”⁵⁸ and 89% say it “works just as well (if not better) than other marketing channels.”⁵⁹ Furthermore, 71% of marketers believe influencers’ quality of customers and traffic is better than other sources.⁶⁰ Thus, it makes sense that in 2021, 71% of marketers planned to “increase their Influencer marketing budget this year compared with 2020.”⁶¹ For reference, in 2020 “only 57% of marketers planned to increased their influencer marketing budget.”⁶²

51. *Creators*, INSTAGRAM, <https://about.instagram.com/creators> (last visited Apr. 10, 2023).

52. Geyser, *supra* note 32.

53. *Id.*

54. *Id. See id.* (noting that “[t]he bottom 18% didn’t generate any revenue,” possibly because these companies “tried influencer marketing because they had heard it was trendy and didn’t know what they should be doing”).

55. Kristen Baker, *What Will Influencer Marketing Look Like in 2022?*, HUBSPOT, <https://blog.hubspot.com/marketing/how-to-work-with-influencers> (last visited Dec. 18, 2021).

56. *Id.*

57. *Id.*

58. *Compare* Baker, *supra* note 56 with Santora, *supra* note 47 (finding that 90% of survey respondents thought it was effective).

59. Baker, *supra* note 56.

60. *Id.*

61. *Influencer Marketing Costs*, BUSINESS OF APPS (Oct. 20, 2021), <https://www.businessofapps.com/marketplace/influencer-marketing/research/influencer-marketing-costs>.

62. *Id.*

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While marketers believe in influencers, varied evidence exists on whether consumers trust influencers.⁶³ Marketing experts tend to believe that influencer marketing is “the most genuine and authentic method of marketing”⁶⁴ and “can come across as a trusted recommendation from a friend”⁶⁵ Despite this reputation, only one percent of the general population and five percent of Gen Z trust influencers.⁶⁶ Significantly, though, a May 2021 Civic Science study found that consumers do not have to trust influencers in order to buy their products.⁶⁷ Even though trust was low, almost 15% of people aged 18-to-24 have purchased something because an influencer recommended it in the last six months.⁶⁸

D. Instagram Marketing Comes with Significant Concerns

Regardless of the “friend-like” nature of an influencer recommendation, Instagram influencers engage in advertising. Society, through the Federal Trade Commission Act (the “Act”), has condemned unfair or deceptive advertising.⁶⁹ Unfortunately, Instagram is a hotbed of illegal advertising, especially because of a lack of required disclosures.⁷⁰ When Instagram influencers do not disclose that a post is sponsored—that is, that a company paid them to make an endorsement—they break the law.⁷¹ While people’s low trust in influencers⁷² might mean users anticipate shady behavior from them, false or deceptive advertising is still illegal and socially unacceptable, regardless of whether it is expected or not. And, of course, not all users will expect it.⁷³

The problem with Instagram is that the site makes such unfair and false advertising easy. As the eighth most visited website on the Internet, Instagram

63. At the very least, marketers believe in influencers’ efficacy.

64. Geyser, *supra* note 28.

65. Macarthy, *supra* note 38.

66. Shawn Cooke, *Trust in Influencers Isn’t High, but Gen Z Is Still Buying Their Products*, CIVIC SCIENCE (May 20, 2021), <https://civicscience.com/trust-in-influencers-isnt-high-but-gen-z-is-still-buying-their-products> (last visited Dec. 18, 2021).

67. *Id.*

68. *Id.*

69. Federal Trade Commission Act, 15 U.S.C. §§ 41–58. “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45(a)(1).

70. A 2017 Mediakix study found that 93% of the posts from the 50 most-followed celebrities did not comply with guidelines. *93% of Top Celebrity Social Media Endorsements Violate FTC Guidelines*, MEDIKIX (May 31, 2017), <https://mediakix.com/blog/celebrity-social-media-endorsements-violate-ftc-instagram/> [<https://perma.cc/4ZXZ-3TCE>].

71. *See infra* Part II.

72. *See supra* note 69 and accompanying text.

73. FED. TRADE COMM’N, STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER (May 19, 2022) (“Influencers constantly interact with their followers in their market or social niche. These are often relationships of trust and without clear guidelines and responsibilities they are ripe for commercial exploitation and deception.”).

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should do more to protect its community.⁷⁴ Specific rules about advertising exist, but the FTC, not Instagram, notifies influencers of the law.⁷⁵ Unless influencers seek out knowledge of the rules, they may inadvertently advertise illegally.⁷⁶ Not only is it easy to break the law, but little incentive to follow the rules exists, since few consequences result.⁷⁷ Additionally, Instagram users are not pushing the influencers to follow the rules.⁷⁸ Interestingly, only about two-thirds of respondents to a May 2021 CivicScience survey believe that influencers should always disclose which of their posts are sponsored.⁷⁹

II. THE FTC'S RULES GOVERNING INSTAGRAM INFLUENCER MARKETING

The FTC Act created the FTC and authorized the FTC to regulate commerce, which includes marketing on social media sites like Instagram.⁸⁰ Under this authority, the FTC has issued Guidelines on how advertisements and endorsements in general must be made,⁸¹ as well as clarified those rules for social media influencers.⁸²

A. The FTC Act Established the FTC, Which Supervises Instagram's Marketing and Advertising

The FTC Act created the FTC in 1914.⁸³ As an administrative agency, the FTC only has “those powers expressly granted to it by statute.”⁸⁴ The FTC Act expressly granted the FTC a wide array of powers.⁸⁵ The FTC has the broad power to “prevent” “unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.”⁸⁶ To do so, it may create rules that define which acts or practices are unfair or deceptive, and then implement requirements that prevent such acts or practices.⁸⁷ The FTC may investigate entities “engaged in or whose

74. See *supra* note 19.

75. See *infra* Part II.C.

76. See *infra* Part II.B–C.

77. See *infra* Part III.B.

78. Cooke, *supra* note 69.

79. *Id.*

80. See *infra* Part II.A.

81. See *infra* Part II.B.

82. See *infra* Part II.C.

83. Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

84. LOUIS ALTMAN & MARIA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 25.1 (4th ed. 2021), Westlaw.

85. *Federal Trade Commission Act*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act> (last visited Dec. 19, 2021).

86. 15 U.S.C. § 45(1)(2); *Federal Trade Commission Act*, *supra* note 85.

87. 15 U.S.C. § 57(a)(1)(B); *Federal Trade Commission Act*, *supra* note 85.

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business affects commerce,”⁸⁸ and report to Congress and the public.⁸⁹ Finally, it may seek “such relief as . . . necessary to redress injury to consumers or other persons . . . resulting from the rule violation or the unfair or deceptive act or practice”⁹⁰

Essentially, the FTC is “concerned with the control and prevention of unfair competition,” which means it also deals with false and misleading advertising.⁹¹ Notably, the FTC also has jurisdiction over “‘unfair’ advertising.”⁹² Section 5 of the FTC Act discusses the use of endorsements and testimonials in advertising.⁹³

B. The FTC’s Guidelines on Endorsements and Testimonials Guides All Advertisers

The FTC’s “Guides Concerning the Use of Endorsements and Testimonials in Advertising”⁹⁴ (the “Guides”) help advertisers and companies understand how they can obey statutory requirements.⁹⁵ They are “not binding law themselves,”⁹⁶ but they explain how advertisers and endorsers may voluntarily comply with the law.⁹⁷ The Guides also explain how the FTC will evaluate advertisements and endorsements, so private entities can understand how the government will judge their content.⁹⁸

While the Guides allow advertisers and endorsers to voluntarily comply with the law,⁹⁹ they are not voluntary in the sense that there are no repercussions for violations.¹⁰⁰ Any practices that are “inconsistent” with the Guides “may result in corrective action by the Commission under Section 5 [of the FTC Act]¹⁰¹ if, after investigation, the Commission has reason to believe that the practices fall within

88. 15 U.S.C. § 46(a); *Federal Trade Commission Act*, *supra* note 85.

89. 15 U.S.C. § 46(f); *Federal Trade Commission Act*, *supra* note 85.

90. 15 U.S.C. § 57b(b); *Federal Trade Commission Act*, *supra* note 85. However, the FTC does not “authorize the imposition of any exemplary or punitive damages. 15 U.S.C. § 57b.

91. ALTMAN & POLLACK, *supra* note 84, § 5.6.

92. *Id.* (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965)).

93. 15 U.S.C. § 45.

94. 16 C.F.R. § 255 (2021).

95. *FTC Publishes Final Guides Governing Endorsements, Testimonials*, FED. TRADE COMM’N (Oct. 5, 2009), <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>.

96. *Id.*

97. 16 C.F.R. § 255.0(a). “The Guides . . . represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements.” *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Federal Trade Commission Act*, 15 U.S.C. § 45.

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the scope of conduct declared unlawful by the statute.”¹⁰² Essentially, if the FTC wanted to bring an enforcement action against an advertiser for breaking the Guides, the Commission could not use the Guides as a basis for the suit.¹⁰³ Rather, the FTC “would have the burden of proving that the challenged conduct violates the FTC Act.”¹⁰⁴

The FTC’s Guides state that endorsements “must reflect the honest opinions, findings, beliefs, or experience of the endorser.”¹⁰⁵ No distortions are allowed, and “[a]n advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented.”¹⁰⁶ The endorser needs to actually have used the product, and the advertiser can only run the advertisement so long as “it has good reason to believe that the endorser remains a bona fide user of the product.”¹⁰⁷ Notably, the onus here is on the advertiser, not on the endorser.¹⁰⁸

The next section discusses consumer endorsements more in depth.¹⁰⁹ The advertiser is not relieved of its obligations by using an endorser, rather the advertiser must “support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly.”¹¹⁰ The FTC also notes that however the endorser is using the product is likely to be regarded as the representative experience for other consumers.¹¹¹ Therefore, the advertiser needs to make sure that the experience is actually representative, and if it is not, to disclose that to the public.¹¹²

The Guides also state that material connections are subject to mandatory disclosure.¹¹³ “When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.”¹¹⁴

The FTC updated the Guidelines in 2009, “address[ing] endorsements by consumers, experts, organizations, and celebrities, as well as the disclosure of

102. 16 C.F.R. § 255.0(a).

103. *FTC Publishes Final Guides Governing Endorsements, Testimonials*, *supra* note 95.

104. *Id.*

105. 16 C.F.R. § 255.1(a).

106. 16 C.F.R. § 255.1(b).

107. 16 C.F.R. § 255.1(c).

108. 16 C.F.R. § 255.1(b–c).

109. 16 C.F.R. § 255.2.

110. 16 C.F.R. § 255.2(a).

111. 16 C.F.R. § 255.2(b).

112. *Id.*

113. 16 C.F.R. § 255.5.

114. *Id.*

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important connections between advertisers and endorsers.”¹¹⁵ Now, when a consumer endorses a product or service in an ad, and their experience is not usual, the advertiser must “clearly disclose” the normal experience that a consumer can expect.¹¹⁶ In the 1980 guidelines, advertisers could display unusual experiences without discussing usual experiences at all, as long as they included a disclaimer like “results not typical.”¹¹⁷ In addition, the revised Guides reiterate that “decisions will be reached on a case-by-case basis,” but clarifies that “the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement.”¹¹⁸ Therefore, “bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service.”¹¹⁹

Finally, the revised Guides put the onus not just on the advertiser, but on the endorser as well.¹²⁰ They “reflect [FTC] case law and clearly state that both advertisers and endorsers” may be liable when the an endorsement breaks statutory requirements, be it through false or unsubstantiated claims or for failure to disclose material connections.¹²¹ The revised Guides “also make it clear that celebrities have a duty to disclose their relationships with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or in social media.”¹²²

C. The FTC Provides Specific Guidelines for What Influencers Must Disclose.

Even though the Act was enacted in 1914 and the first social media site was not created until 1997,¹²³ the FTC must still keep an eye on social media advertising.¹²⁴ The Guides that the FTC updated in 2009 demonstrate how advertising guidelines apply to social media.¹²⁵ Additionally, the FTC must have wanted to make the rules as clear as possible for influencers, since it also disseminated a brochure entitled “Disclosures 101 for Social Media Influencers” in 2019.¹²⁶ While the Guides focused more on advertisers, this brochure clarifies the duties that an endorser has.¹²⁷ From

115. *FTC Publishes Final Guides Governing Endorsements, Testimonials*, *supra* note 95.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Drew Hendricks, *Complete History of Social Media: Then and Now*, SMALL BUSINESS TRENDS (updated Jan. 22, 2021), <https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html>. Six Degrees was the first recognizable social media site. *Id.*

124. *See supra* Part II.

125. *See supra* Part II.B.

126. FED. TRADE COMM’N, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS (2019).

127. *Id.*

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the beginning, the brochure is clearly worded so everyone can understand.¹²⁸ The brochure reads, “One key is to make a good disclosure of your relationship to the brand.”¹²⁹ “This brochure from FTC staff gives tips on when and how to make good disclosures.”¹³⁰

The brochure explains that when someone endorses a product through social media, they have to disclose their material connections with the brand.¹³¹ It clarifies that a material connection “includes a personal, family, or employment relationship or a financial relationship—such as the brand paying you or giving you free or discounted products or services.”¹³² The brochure explains why this must happen, as “telling your followers about these kinds of relationships is important because it helps keep your recommendations honest and truthful, and it allows people to weigh the value of your endorsements.”¹³³ Importantly, the brochure emphasizes that it is the influencer’s “responsibility” to understand the rules and they cannot “rely on others to do it for [them].”¹³⁴

The brochure explains that a disclosure must be done in a way that makes it “hard to miss.”¹³⁵ It “should be placed with the endorsement message itself,” and should not be relegated to another page or mixed in with hashtags.¹³⁶ Terms like “ad” or “sponsored” are sufficient, but the FTC recommends against using vague or abbreviated terms like “spon,” “collab,” “thanks,” or “ambassador.”¹³⁷ Finally, the FTC argues that influencers should not “assume that a platform’s disclosure tool is good enough, but consider using it in addition to your own, good disclosure.”¹³⁸

III. ENFORCEMENT

The FTC can choose whether to pursue violations of the FTC Act through the administrative process or the judicial process.¹³⁹ During its judicial pursuit of marketing lawbreakers, the FTC has brought several adjudications against social media influencers.¹⁴⁰ Finally, the FTC may also engage in rulemaking.¹⁴¹

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See infra* Part III.A.

140. *See infra* Part III.B.

141. *See infra* Part III.C.

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A. *The FTC May Choose to Enforce Matters Through the Administrative Process or the Courts*

If the FTC investigates an influencer's post and believes it violates the Act, it "may initiate an enforcement action using either an administrative or judicial process if it has 'reason to believe' that the law is being or has been violated."¹⁴² If the FTC decides to take the administrative route, it will issue a complaint.¹⁴³ The respondents may agree to settle the matter and sign a consent agreement.¹⁴⁴ Of course, the respondents may dispute the FTC's claims, in which case an administrative law judge will adjudicate the matter.¹⁴⁵ After a final order is entered, the FTC "may seek consumer redress . . . in federal district court for consumer injury."¹⁴⁶ Additionally, after such final consent order is entered, the FTC "may obtain civil penalties from non-respondents who thereafter violate the standards articulated by the [FTC]."¹⁴⁷

Besides the administrative route, the FTC frequently must use the judicial process when enforcing its provisions.¹⁴⁸ Even if the FTC goes through the administrative process first, it still needs a court to obtain consumer redress, civil penalties, or enforce its order.¹⁴⁹ If the FTC decides to forego the administrative step first, it may challenge a practice in court.¹⁵⁰ Section 13(b) of the Act authorizes the FTC to "seek preliminary and permanent injunctions to remedy 'any provision of law enforced by the Federal Trade Commission.'"¹⁵¹ Whenever the Commission has "reason to believe" that a party "is violating, or is about to violate" a provision of law that the FTC enforces, it "may ask the district court to enjoin the allegedly unlawful conduct," so long as an FTC administrative proceeding confirms that the conduct is unlawful.¹⁵²

142. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last visited Dec. 19, 2021).

143. *Id.*

144. *Id.* If the respondents agree to settle the matter, they will "sign a consent agreement (without admitting liability), consent to entry of a final order, and waive all right to judicial review." *Id.* If the FTC accepts the proposed consent agreement, it will generally allow for thirty days of public comment before deciding if it will finalize the order. *Id.*

145. *Id.* If a party appeals the initial decision, the FTC will hold an appeals process. *Id.* If the Commission's appeal process is appealed, then the case goes to any United States court of appeals with jurisdiction. *Id.*

146. *Id.*

147. *Id.* "To accomplish this, the Commission must show that the violator had 'actual knowledge that such act or practice is unfair or deceptive and is unlawful' under Section 5(a)(1) of the FTC Act." *Id.*

148. *Id.*

149. *Id.* See *supra* notes 146–147 and accompanying text.

150. *Id.*

151. *Id.*; 15 U.S.C. § 53(b).

152. *A Brief Overview, supra* note 142.

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B. The FTC's Actions Against Social Media Influencers.

Though the FTC has always had the power to bring suit against improper influencer marketing, it uses that power sparsely. In 2017, the FTC published a press release announcing the “First-Ever Complaint Against Individual Social Media Influencers.”¹⁵³ Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell, two influencers in the online gaming community, “settled charges that they deceptively endorsed the online gambling service CSGO Lotto, while failing to disclose they jointly owned the company.”¹⁵⁴ The order in the settlement requires that the respondents “clearly and conspicuously disclose any material connections with an endorser or between an endorser and any promoted product or service.”¹⁵⁵ Maureen Ohlhausen, the FTC’s Acting Chairman at the time, stated, “This action, the FTC’s first against individual influencers, should send a message that such connections must be clearly disclosed so consumers can make informed purchasing decisions.”¹⁵⁶

The same press release also mentioned that the FTC sent “educational” letters to 90 influencers and brands, reminding them to disclose relationships, as well as 21 follow-up “warning” letters about their Instagram posts.¹⁵⁷ While the FTC did not take further action regarding these 21 influencers, ad watchdog truthinadvertising.org argued two years later that “20 of the 21 influencers continue to violate federal endorsement guidelines by not clearly and conspicuously disclosing material connections”¹⁵⁸

In 2020, the FTC settled a complaint against Teami, which marketed teas and skincare products.¹⁵⁹ The FTC’s complaint claimed that Instagram posts by Cardi B, Katya Elise Henry, Brittany Renner, Adrienne Bailon, Princess Mae, Jordin Sparks, Alexa PenaVega, Leyla Milani-Khoshbin, Jenicka Lopez, and Darnell Nicole contained inadequate disclosures.¹⁶⁰ The FTC was concerned that viewers “could not see a

153. *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM’N (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*; *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMM’N (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>.

158. *TINA.org Files FTC Complaint Against Instagram Influencers*, GLOBENEWSWIRE (Mar. 5, 2019), <https://www.globenewswire.com/news-release/2019/03/05/1747874/0/en/TINA-org-Files-FTC-Complaint-Against-Instagram-Influencers.html>.

159. *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/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments>.

160. *Id.*

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disclosure that the endorsements were paid-for unless they clicked the ‘more’ option.”¹⁶¹ The endorsement itself was “within the first two or three lines of the post’s caption,” but the fact that it was a paid endorsement was more hidden.¹⁶² In addition to the complaint against Teami, the FTC sent warning letters to the ten above influencers.¹⁶³ The settlement, however, was only with Teami, and required it to clearly and conspicuously disclose material connections, “maintain a system to monitor and review how endorsers are disclosing those connections,” and pay \$1 million.¹⁶⁴

On February 12, 2020, FTC Commissioner Rohit Chopra published a Statement “Regarding the Endorsement Guides Review Commission File No. P204500” that summarized the current situation and what the FTC may do going forward.¹⁶⁵ The FTC is not as interested in small influencers, and wants to focus on companies that “launder advertising by paying someone for a seemingly authentic endorsement or review,” which is “illegal payola.”¹⁶⁶ Chopra admits that “it is not clear whether [the FTC’s] actions are deterring misconduct in the marketplace, due to the limited sanctions [it has] pursued.”¹⁶⁷ Chopra cited a situation with Lord & Taylor, in which the FTC charged Lord & Taylor with “deceiving the public by failing to disclose the company’s connections with these influencers.”¹⁶⁸ Chopra was concerned that the matter settled with “no customer refunds, no forfeiture of ill-gotten gains, no notice to consumers, no deletion of wrongfully obtained personal data, and no findings or admission of liability.”¹⁶⁹

C. *The FTC may also Engage in Rulemaking*

As demonstrated above, adjudication, whether it occurs through the administrative or the judicial process, focuses on individual wrongdoers.¹⁷⁰ If the FTC is concerned

161. *Id.*

162. Lesley Fair, *FTC’s Teami case: Spilling the tea about influencers and advertisers*, FED. TRADE COMM’N (Mar. 6, 2020, 11:22 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers>.

163. *Tea Marketer Misled Consumers, Didn’t Adequately Disclose Payments to Well-Known Influencers, FTC Alleges*, *supra* note 159.

164. Fair, *supra* note 162. The judgment was supposed to be \$15.2 million, but it was partially suspended “based on the defendants’ financial condition.” *Id.*

165. FED. TRADE COMM’N, STATEMENT OF COMMISSIONER ROHIT CHOPRA (Feb. 12, 2020).

166. *Id.*

167. *Id.*

168. *Id.* “Lord & Taylor paid fifty social media influencers focused on fashion thousands of dollars each to post an image with the influencer wearing a particular dress on Instagram or another platform. The dress quickly sold out. In its contracts with influencers, the company required that posts include the company’s Instagram handle and a specific hashtag but did not require that the influencers disclose they were paid.” *Id.*

169. *Id.*

170. *See supra* Part III.B.

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about widespread problematic behavior, it also has the authority to create rules that curb common problems.¹⁷¹ Under § 18 of the FTC Act, the Commission is authorized to prescribe “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce” within the meaning of Section 5(a)(1).¹⁷² “Once the Commission has promulgated a trade regulation rule, anyone who violates the rule ‘with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule’ is liable for civil penalties for each violation.”¹⁷³

IV. HOW INFLUENCER MARKETING CAN BE BETTER REGULATED

Both the FTC and Instagram can change their methods to better regulate influencer marketing.¹⁷⁴ The FTC can implement the steps that Commissioner Chopra suggested, as well as require that influencers in violation of the law spread awareness of the law, and allow consumers to report potential inadequate disclosures.¹⁷⁵ The FTC can also work with Instagram to create a disclosure tool that follows the rules.¹⁷⁶ Additionally, Instagram can automatically inform its users of the rules once the users reach a certain number of followers.¹⁷⁷

A. Potential Solutions the FTC Can Implement

In Commissioner Chopra’s Statement, she listed several action items the FTC will see to or will consider doing in the future.¹⁷⁸ Primarily, the FTC will conduct “a close and careful review of the FTC’s non-binding Endorsement Guides and a self-critical analysis of the agency’s enforcement approach.”¹⁷⁹ The FTC opened up the Guidelines,¹⁸⁰ last revised in 2009, for public comment.¹⁸¹ It will review the public’s

171. 15 U.S.C. § 57a; *A Brief Overview*, *supra* note 142.

172. 15 U.S.C. § 57a; *A Brief Overview*, *supra* note 142.

173. *A Brief Overview*, *supra* note 142.

174. *See infra* Part IV.

175. *See infra* Part IV.A.

176. *See infra* Part IV.B.

177. *See infra* Part IV.B.

178. *Id.* Chopra, *supra* note 171.

179. *Id.*

180. *See supra* Part II.B.

181. *FTC Seeks Public Comment on its Endorsement Guides*, FED. TRADE COMM’N, (Feb. 12, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-seeks-public-comment-its-endorsement-guides>. Opening up the Guidelines for public comment was smart, given that they were last revised twelve years ago, before Instagram was created. Dan Blystone, *The Story of Instagram: The Rise of the #1 Photo-Sharing Application*, INVESTOPEDIA (June 6, 2020), <https://www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp>.

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comments, then “consider taking [three] steps beyond the issuance of voluntary guidance.”¹⁸² First, the FTC may develop requirements for social media platforms like Instagram where influencer marketing occurs.¹⁸³ Second, the FTC may “[c]odify[] elements of the existing endorsement guides into formal rules so that violators can be liable for civil penalties under Section 5(m)(1)(A) and liable for damages under Section 19.”¹⁸⁴ Third, the Commission may control the contracts that advertisers form with influencer marketers.¹⁸⁵

All of the potential steps that Commissioner Chopra suggests should be implemented, although the first two are the best options.¹⁸⁶ The FTC has congressional authority to modify its enforcement regime to better regulate influencer marketing, and they should take full advantage of it. The Guidelines should be developed into formal rules, because as it is now, they are toothless.¹⁸⁷ If the Guidelines can only be enforced if behavior violates the FTC Act, then the Guidelines have no power of their own.¹⁸⁸ However, if the FTC does codify the Guidelines to hold violators liable for civil damages, then the FTC must also enforce the Guidelines. The few arbitrations¹⁸⁹ and the weak letters¹⁹⁰ that the FTC currently uses are inadequate and insufficient.¹⁹¹ Mandating contractual requirements between influencers and advertisers sounds helpful but may be complicated in practice.

Further, the FTC should do more than send influencers letters when they are breaking the law.¹⁹² Clearly, the letters are not working to prevent illegal behavior.¹⁹³ The reason why influencers are being used is because they are thought to have influence over their followers; the FTC might consider the career’s societal influence and scope when responding to its crimes.¹⁹⁴ If an influencer violates the Act, the FTC needs to follow through and take action. If the FTC is hesitant to initiate a formal proceeding, with all of the time and costs involved, a simpler solution would be to instill a less intensive punishment. For example, the FTC could push influencers to rectify their behavior earlier by making them amend their posts and spread awareness of the law and the responsibilities that influencers have. Much as

182. See *supra* note 165.

183. *Id.*

184. *Id.*; 15 U.S.C. § 45(m)(1)(A); 15 U.S.C. § 57b.

185. See *supra* note 165.

186. See *supra* notes 182–185 and accompanying text.

187. See *supra* note 184 and accompanying text.

188. See *supra* note 96 and accompanying text.

189. See *supra* Part III.B.

190. See *supra* notes 157–158 and accompanying text.

191. See *supra* notes 167, 169.

192. See *supra* note 157.

193. See *supra* note 158 and accompanying text.

194. See *supra* Part I.B.

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community service may be used to rehabilitate criminal offenders, notifying an influencer's followers of the Guidelines, and how influencers are supposed to behave, could be an errant influencer's way of giving back to the community they harmed. It would also make the community more resilient in the future since followers may be on the lookout for other suspicious posts after learning about the frequency of such occurrences.

The more that consumers are aware of the concerns, the more they can help report them. The FTC allows consumers to report fraud.¹⁹⁵ They should be able to do that with improper advertising as well. While not all consumers think that disclosures are necessary, 65% do, and it is possible that these users will report influencers who are not making proper disclosures.¹⁹⁶ This should not be too burdensome on the FTC, since disclosure is already required in instances of fraud.

B. Potential Solutions Instagram Can Implement

Instagram should acknowledge that unlawful behavior occurs on its platform and participate in ways to curb it, especially because Instagram encourages influencer marketing.¹⁹⁷ As Commissioner Chopra alluded to, the FTC should work with Instagram to create a tool that lists the exact companies that are paying influencers.¹⁹⁸ For example, instead of the general "paid partnership" tag, influencers should have a section where they can specifically list their partnerships and know that it meets the FTC's guidelines. Although the FTC currently argues that influencers should not "assume that a platform's disclosure tool is good enough," if the FTC partnered with Instagram, influencers could be confident that the platform's disclosure tool is sufficient.¹⁹⁹

Additionally, once an account reaches the level of a nano-influencer,²⁰⁰ they should automatically receive notice of the FTC requirements. This would be an easy change for Instagram to implement, and even if an influencer does not read the requirements, it would at least make that influencer aware that requirements exist.

This comment argues Instagram has an obligation to curb illegal behavior on its platform. Instagram already moderates its content to remove content that is not in line with its Community Guidelines, such as nudity.²⁰¹ Instagram needs to be sure that it also concerns itself with this type of behavior.

195. *FTC Announces New Fraud Reporting Platform for Consumers: ReportFraud.ftc.gov*, FED. TRADE COMM'N (Oct. 22, 2020), <https://www.ftc.gov/news-events/press-releases/2020/10/ftc-announces-new-fraud-reporting-platform-consumers>.

196. Cooke, *supra* note 66.

197. See *supra* notes 49–51 and accompanying text.

198. See *supra* note 183 and accompanying text.

199. See *supra* note 138 and accompanying text.

200. See *supra* note 37 and accompanying text.

201. See *supra* note 14.

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CONCLUSION

Instagram influencers are clearly a force to be reckoned with in the marketing world today, and they are only growing stronger. Troublingly, the growth of influencer marketing, however lucrative it may be for influencers and the involved businesses, comes with significant concerns for consumers and honest competitors. The FTC, through the FTC Act, is the government agency tasked with handling this area, and the FTC has initiated some enforcement action. However, many of the FTC's choices have been toothless and have not curbed the behavior. The FTC needs to act quickly to better regulate Instagram influencers so that they adhere to regulations and do not mislead their followers. The FTC could make the Guidelines enforceable, bring more lawsuits, push errant influencers to spread awareness of the laws, and allow consumers to report illegal behavior. Instagram should also step up and allow tags that fulfill the laws, as well as notify people more proactively when they start gaining followers. These potential solutions will help to instill integrity in Instagram marketing and allow consumers to trust what they are viewing.