WHEN I GROW UP, I WANNA BE FAMOUS: HOW BUSINESSES USE SOCIAL MEDIA INFLUENCERS

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∗ Nerma Pasic, a law student at the University of Houston and avid TikTok user, became interested in the ways that social media has helped businesses, big and small, flourish. In her research, she discovered that much of the advertising taking place on social media, especially TikTok, was exaggerated or heavily incentivized therefore creating ingenuine promotions of products. This realization sparked the ideas and commentary that culminated in this paper. Nerma would like to extend thanks to her friends and family for supporting her through law school.

I. INTRODUCTION

The existing Federal Trade Commission (FTC) guidelines pertaining to social media influencers exhibit notable shortcomings as they do not comprehensively define the parameters of a material relationship, nor do they provide clear directives for the proper disclosure of such relationships. These inadequacies, compounded by the inherent difficulties in enforcing these guidelines, have inadvertently created opportunities for influencers to exploit ambiguities, resulting in substantial financial gains at the expense of impressionable consumer demographics.

Social media influencing has changed the way businesses market their products.[1] Because of the novelty of influencer marketing, brands and content creators are often clueless as to how to ensure their transactions with each other are lawful.[2] Despite the FTC attempting to regulate influencers, many of its rules are practically unenforceable due to the sheer number of sponsored posts they apply to and because they are difficult to interpret.[3] As a result, the FTC guidelines provide loopholes for influencers that increase profits for brands. These measures raise questions about the unintended consequences of influencer marketing, including its potential to exacerbate consumer materialism and unrealistic expectations, especially among younger generations that are easily persuaded.

This paper argues that the FTC's approach to governing social media influencing does not consider the recent changes to influencing or the fictitious relationship that consumers form with influencers that make them more susceptible to being affected by promotions. The first part of this article discusses the background of influencing. The second part addresses how the FTC has reacted to influencers and the guidelines they set forward, while the third part explores the profitability of influencing—highlighting the close bond consumers establish with their online idols. The fourth and final part of this article offers a proposed solution to amend the FTC regulations and speculates about the future landscape of social media influencing.

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1. Katheryn A. Andresen, *Marketing Through Social Networks: Business Considerations – From Brand to Privacy*, 38 WM. MITCHELL L. REV. 290, 292 (2011).

2. See *id.* at 311-313 (discussing the complexities leading to legal risks associated with social media marketing).

3. *See* Ashley Luong, All That Glitters is Gold: The Regulation of Hidden Advertisements and Undisclosed Sponsorships in the World of Beauty Social Media Influencers, 11 WM. & MARY BUS. L. REV. 565, 578 (discussing the difficulty in interpreting FTC guidelines).

II. THE BEGINNINGS OF SOCIAL MEDIA AND INFLUENCING

During the early 2000s, the social media realm witnessed an unprecedented surge in applications and websites dedicated to fostering social communication.[4] The site MySpace, which was developed in 2011 and is considered the birthplace of social networking, allowed people to connect with others across the world for the first time and quickly became a cultural hub.[5] Additionally, the website allowed for people to customize their profiles and creatively find ways to express themselves and their personalities, essentially allowing users to control the way they appeared to others.[6] Just a few years later, Twitter, Facebook, and Instagram emerged almost simultaneously, and there were more than enough ways for people to build relationships online.[7] Now, social network platforms include over 4.95 billion users worldwide.[8]

The innovative idea of connecting with others through something as portable as a phone invites young people to take advantage of new opportunities to get paid by using social media.[9] Although making a profit off an internet platform was familiar because of YouTube's previous success, the rise of smartphones made consumers increasingly more accessible.[10] This career became known as "Social Media Influencer" and allowed people to transform their following into a source of income.[11] While the notion of being an influencer is not new, with historical roots reaching back to the 18th century and with the more contemporary "mommy bloggers" influencers, this modern breed of influencer holds significantly more influence and power.[12]

Being an influencer brings an ability to impact consumer decisions in a way that brands find profitable. So profitable, in fact, that companies began to pay influencers to promote their products.[13] Unlike other

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4. Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), https://ourworldindata.org/rise-of-social-media.

5. Michelle Richardson, *Rediscovering MySpace: Nostalgia and the Rise of Social Networking*, MEDIUM (Nov. 17, 2023), https://medium.com/@michellerichardson_11188/rediscovering-myspace-nostalgia-and-the-rise-of-social-networking-5ba554e1e17d.

6. *See id.* (discussing how customizable users' profiles were and how this customization made it possible for users to express themselves).

7. *Id.*

8. Brian Dean, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2023?*, BACKLINKO (Mar. 27, 2023), https://backlinko.com/social-media-users.

9. Tisha James, *The Real Sponsors of Social Media: How Internet Influencers are Escaping FTC Disclosure Laws*, 11.1 OHIO BUS. L.J. 63, 63 (Jan. 1, 2017).

10. Nicholas Jackson, *Infographic: The History of Video Advertising on YouTube*, THE ATLANTIC (Aug. 3, 2011), https://www.theatlantic.com/technology/archive/2011/08/infographic-the-history-of-video-advertising-on-youtube/242836/.

11. Rudly Raphael, *Why Consumers Trust Influencers Over Celebrities*, QUESTIONPRO, https://www.questionpro.com/blog/consumers-trust-influencers-celebrities/.

12. Guest Blogger, *A History of Social Media Influencers*, FIND YOUR INFLUENCE (Jul. 26, 2021), https://findyourinfluence.com/a-history-of-social-media-influencers/.

13. James, *supra* note 9, at 4.

marketing jobs, influencers can have almost no overhead costs.[14] Advertisements can be filmed from essentially anywhere with a regular iPhone, and influencers can communicate directly with brands without an official representative.[15] This has made being an influencer one of the most sought-after careers, despite its unpredictability.[16]

Surprisingly, influencing carries a strikingly low level of litigation risk even when influencers engage in deceptive or untruthful practices related to the products they promote.[17] This minimal risk does not come from a lack of rules, but instead a lack of action and enforcement from the FTC, a notably passive actor in the space of influencing.[18] The FTC's noninvolvement has essentially created a risk-free job.

There are four main categories of influencers: nano, micro, macro, and mega.[19] Mega influencers, those with over a million followers, are the most influential class of influencers and have a huge impact on their audience's buying habits.[20] Alix Earle is one of today's most relevant mega influencers.[21] Earle gained popularity in 2020 for her lifestyle and beauty videos where she shared with followers her makeup routine and how she picked her outfit for the night.[22] As of the publication of this paper, Earle has over seven million followers on TikTok and over three million followers on Instagram.[23] She connects with her followers on an almost daily basis and consistently features paid sponsorships that fund her exaggerated lifestyle, all while maintaining relatability with consumers.[24]

On the other end of the spectrum, nano influencers, as the name suggests, operate on a much smaller scale and may have less than one

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14. Adriana, *A Typical Day in the Life of An Influencer*, PLANOLY (Jun. 18, 2019) https://www.planoly.com/blog/a-typical-day-in-the-life-of-an-influencer-planoly.

15. *Id.*

16. Eleanor Pringle, *$40k a post within three months of fame: Welcome to the world of the influencer, the most sought-after career which can "vanish overnight"*, YAHOO! (Jan. 21, 2023), https://www.yahoo.com/now/40k-post-within-three-months-100100301.html.

17. *See* CT Jones, *TikTok's Eyelash Controversy Is Really About Truth in Advertising*, ROLLING STONE (Jan. 26, 2023), https://www.rollingstone.com/culture/culture-news/mikayla-nogueira-lash-controversy-tiktok-honesty-1234668898/ (stating that an influencer can completely misrepresent a product and its effects and not be punished by the FTC).

18. Christopher Terry et al., *Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers*, 29 J. of L. & Pol'Y. 406, 412 (2021).

19. Jacindo Santora, *12 Types of Influencers You Can Use to Improve Your Marketing*, INFLUENCER MARKETING HUB (May 27, 2024), https://influencermarketinghub.com/types-of-influencers/.

20. *Id.*

21. Dahvi Shira, *Inside the rise of Alix Earle, TikTok's beauty breakout star*, GLOSSY (Jan. 6, 2023), https://www.glossy.co/pop/inside-the-rise-of-alix-earle-tiktoks-beauty-breakout-star/.

22. *Id.*

23. Alix Earle (@alixearle), TIKTOK, https://www.tiktok.com/@alixearle?lang=en (last visited Oct. 16, 2024); Alix Ashley Earle (alix_earle), INSTAGRAM, (last visited Oct. 16, 2024).

24. Julia Moore, *Who Is Alix Earle? All About the Viral TikTok Sensation*, PEOPLE, https://people.com/style/who-is-alix-earle-tiktok-makeup-star/ (Nov. 14, 2023, 7:27 AM).

thousand followers.[25] Brands choose to work with nano influencers because of their niche following and willingness to accept less compensation.[26] For example, an energy drink brand whose target audience is athletes may pay a small-scale gymnast to promote their energy drink if the gymnast's following consists of mostly athletes. Even though the gymnast has a moderate following, the influencer's endorsement can prove invaluable in reaching a highly relevant and interested audience within the brand's target demographic.[27] Between the extremities of mega and nano influencers, micro and macro influencer classes offer varying degrees of reach and engagement potential.[28]

Recently, brands have shifted their promotional strategies, showing a growing reliance on influencers rather than their traditional dependence on celebrities.[29] Although celebrities typically have larger followings than influencers, consumers no longer trust celebrity endorsements.[30] These kinds of endorsements can often appear artificial or forced, especially when the celebrity is extremely wealthy.[31] On the other hand, influencers tend to *appear* more relatable than celebrities, making their advertisements seem more credible to consumers.[32]

In reality, influencers can be paid just as much as celebrities to promote a product.[33] In fact, Alix Earle is rumored to charge upwards of $100,000 per advertisement—a sum greater than the average yearly income of U.S. citizens.[34] Furthermore, in exchange for promoting products, influencers may receive supplemental rewards beyond monetary compensation, including extravagant influencer brand trips worldwide and exclusive event invitations, promoting the idea that the

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25. Sapna Maheshwari*, Are You Ready for the Nanoinfluencers?*, N.Y. TIMES (Nov. 11, 2018), https://www.nytimes.com/2018/11/11/business/media/nanoinfluencers-instagram-influencers.html.

26. *Id.*

27. AIContentfy Team, *The Benefits of Influencer Marketing for Niche Audiences*, AICONTENTFY (Nov. 6, 2023), https://aicontentfy.com/en/blog/benefits-of-influencer-marketing-for-niche-audiences.

28. Jacinda Santora, *12 Types of Influencers You Can Use to Improve Your Marketing*, INFLUENCER MARKETINGHUB (May 27, 2024), https://influencermarketinghub.com/types-of-influencers/.

29. 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/?sh=5acb846871a9.

30. Raphael, *supra* note 11.

31. *See id.*

32. Fine F. Leung et al., *Does Influencer Marketing Really Pay Off?*, HARV. BUS. REV. (2022) (explaining the 'follower-brand' fit where posts correspond with their followers' interests because of what the influencer posts about prior to any promotional deals).

33. *See* Shira, *supra* note 21 (speculating that Alix Earle charges six figures per promotion).

34. *Id.*; Katherine Haan, *Average Salary By Age In 2024*, FORBES (May 23, 2023, 6:43 PM), https://www.forbes.com/advisor/business/average-salary-by-age/.

advertiser's products are just as luxurious as the trip.[35] In return, the influencer prolongs her relationship with the brand and expands her social network and visibility, making her more attractive to other brands.[36] As the influencer continues to associate with the brand through events and ad campaigns, she becomes so closely linked with the products that she essentially transform into a perpetual advertisement, sometimes called a brand ambassador. The mere presence of the influencer serves as a reminder to consumers of the brand she diligently endorsed throughout her extensive involvement in these promotional events.

Despite this, influencers possess a unique allure, characterized by their relatability, even when they amass a following and wield as much influence as celebrities like Oprah Winfrey or Katy Perry.[37]

An influencer's relatability and likeability are essentially their currency when it comes to assessing their profitability.[38] When an influencer is relatable, they are more likely to be the subject of parasocial relationships and consequently gain the trust of their followers.[39] A parasocial relationship is a one-sided relationship that is usually characterized by a strong identification and sense of connection.[40] These relationships end up functioning as an unbalanced friendship, where viewers feel loyalty towards the creator who they have not and often will never meet. Influencers can benefit from these relationships because it gives them increased market power. Their product recommendations will be more likely to affect a consumer's purchasing choices if that consumer feels connected to the person making the recommendation.[41] This marketing development has revolutionized the advertising landscape, with brands recognizing the authenticity and engagement that influencers can offer, creating a seismic change in the way products and services are promoted and

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35. Charles Taylor, *Tarte Goes Back to Bora Bora: Influencer Trips As A Promotional Device,* FORBES (Feb. 29, 2024), https://www.forbes.com/sites/charlesrtaylor/2024/02/28/tarte-goes-to-bora-bora-influencer-trips-as-a-promotional-device/.

36. *Id.*

37. *See* Ana Sandoval, *Are Influencers Relatable? Redefining Relatability*, NEOREACH (Jan. 13, 2022), https://neoreach.com/relatable/.

38. *See Importance of Relatability in Influencer Marketing – With Examples*, IZEA, (Oct. 23, 2023), https://izea.com/resources/importance-of-relatability-in-influencer-marketing/ (for evidence that a large portion of the population base their buying choices off of influencers).

39. Taylor Nicole Ackerman, *Parasocial Relationships in Social Media: A Comparative Study of Instagram Posts by Celebrities and Micro-Celebrities/Influencers* (May 7, 2021)(M.A. thesis, University of Memphis)(on file with University of Memphis Digital Commons), at 13.

40. *Friend or Faux? Are Parasocial Relationships Healthy?*, CLEVELAND CLINIC: HEALTHESSENTIALS (July 5, 2023), https://health.clevelandclinic.org/parasocial-relationships.

41. *See Importance of Relatability in Influencer Marketing - With Examples*, *supra* note 38.

consumed.[42] This shift led to the growth of influencer marketing and its $21 billion industry.[43]

III. DIFFICULTY IN INTERPRETING INFLUENCER GUIDELINES

While the risk of litigation for influencers may be relatively low, they remain theoretically bound by regulations and enforcement by the FTC.[44] In particular, influencers are mandated to transparently disclose any significant affiliations that amount to a "material relationship" with a brand, even in the absence of a formal agreement.[45] For instance, if an influencer were to post an honest review about a product they received for free or at a discounted rate, they would be obligated to disclose this information.[46]

Interpreting the FTC guidelines can be challenging for influencers because the definition of a "material connection" is broad and subjective. Factors like the value of free products received, any affiliate commissions earned, and the nature of relationships with brands could impact whether disclosure is required.[47] While overt cases such as direct monetary compensation or a formal sponsorship deal may be relatively straightforward, subtler forms of compensation or perks such as complimentary products, discounts, or even personal relationships with brand representatives present more nuanced challenges.

Considering an influencer's job is essentially to review products and stay relevant, it becomes difficult to imagine a relationship with a brand that would not amount to a material one given the influencer's visibility.[48] This is especially true considering the active approach brands have taken by maximizing the number of products they send to influencers.[49]

Additionally, the FTC states disclosures should be clear and conspicuous, but specifics like font size, placement, and wording are not

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42. Joel Mathew, *Understanding Influencer Marketing and Why It Is So Effective*, FORBES: YEC COUNCIL POST (Apr. 14, 2022), https://www.forbes.com/sites/theyec/2018/07/30/understanding-influencer-marketing-and- why-it-is-so-effective/.

43. Jacinda Santora, *17 Key Influencer Marketing Statistics to Fuel Your Strategy*, INFLUENCER MARKETING HUB (Feb. 6, 2024), https://influencermarketinghub.com/influencer-marketing-statistics/.

44. Ali Talip Pinarbasi, *FTC Requirements For Influencers: Guidelines and Rules*, TERMLY (Feb. 2, 2024), https://termly.io/resources/articles/ftc-requirements-for-influencers/.

45. 16 C.F.R. § 255.5(a)(2023).

46. 16 C.F.R. § 255.5(b) (2023) (providing an example when a material connection can be formed when receiving free products).

47. 16 C.F.R. § 255.5(a)(2023).

48. Micaela George, *Three Tips for Staying Relevant as a Content Creator*, INFLUENCELOGIC (Aug. 3, 2022), https://influencelogic.com/three-tips-for-staying-relevant-as-a-content-creator/.

49. *See* Meagan Faye, *The Ugly Truth About Those PR Haul Videos You Love*, MEDIUM (Feb. 3, 2019), https://medium.com/@hello_57048/the-ugly-truth-about-the-pr-haul-videos-you-love-cab37c7b294e (providing evidence that there are 1.3 million YouTube videos covering the unboxing of PR packages).

prescribed.[50] This ambiguity means influencers must make judgment calls about when and how to disclose their profitable relationship with a brand. Influencers must navigate the diverse formatting and presentation requirements across various platforms to ensure that their disclosures are readily noticeable to their audience, all while maintaining their brand consistency and follower engagement. This balancing act is crucial to achieve for influencers considering the trend of consumers becoming tired of people who are constantly advertising products, leading to less engagement for the content creator.[51] This complicates matters as audiences are drawn to real and authentic content, but being overly obvious with sponsored posts hurts the engagement and overall profitability of influencers.[52]

The easy way to maintain this balance would be to not properly address sponsored posts, making the content seem organic, which is what consumers want to see.[53] This may explain why, despite the conservativeness of the FTC, many influencers have seemingly ignored the guidelines and continued to post endorsements without disclosing their relationship with the brand.[54]

As social media changes and new forms of communication develop, the responsibility of influencers becomes even more unclear. For example, when there is a change in user interface from one version to another, how will an influencer know if their sponsored posts still meet the FTC guidelines? The answer is still unresolved.

IV. FTC AUTHORITY AND RISKS CONSUMERS FACE

The FTC has clear authority to prevent unfair or deceptive trade practices which harm consumers under Section 5(a) of the Federal Trade Commission Act (FTCA).[55] In essence, Section 5(a) of the FTCA grants the FTC the power to prevent not only manifestly fraudulent advertising but also practices that, while not overtly deceptive, might have a detrimental impact on consumers.[56] Furthermore, the FTC has created a set of regulations known as the "Endorsement Guides."[57] These guidelines outline the requirements for influencers to properly

50. 16 C.F.R. § 255.5(a)(2023).

51. Sinead Norenius-Raniere, *Navigating Influencer Fatigue*, PR NEWS (Oct. 2, 2023), https://www.prnewsonline.com/navigating-influencer-fatigue/.

52. *See id.* (providing evidence that continuous sponsored posts affect the way a content creator is perceived and decreases their engagement).

53. *See id.*

54. Tom Burton, *Four out of Five Influencer Posts Fail to Disclose Advertising Ties*, FINANCIAL REVIEW (May 7, 2023), https://www.afr.com/politics/federal/four-out-of-five-influencer-posts-fail-to-disclose-advertising-ties-20230505-p5d5uf.

55. 15 U.S.C. § 45(a).

56. 15 U.S.C. § 45(a)(4)(A).

57. 16 C.F.R. § 255 (2023); *FTC's Endorsement Guides: What People Are Asking*, FTC (Jun. 2023), https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking.

disclose their relationship with companies when endorsing products, a measure aimed at protecting consumers from misleading or deceptive advertisements within the influencer sphere.[58] Notably, the FTC seemingly puts the burden on both the advertiser *and* the endorser to comply with the guidelines, explaining that both can be liable.[59] The guidelines seem to set up the perfect opportunity for the FTC to take material steps towards making the online market more honest for consumers.

V. FTC AUTHORITY

As influencing continues to command a significant share of the e-commerce market, the FTC has been generally passive in terms of enforcing guidelines on influencers despite having the authority to hold them accountable for improper disclosures in violation of the FTC guidelines.[60] This remains true even though a study by an influencer agency indicated that over ninety percent of mega–influencer sponsorships do not comply with FTC guidelines.[61] In other words, consumers are being led to believe that their idols are genuinely recommending products, when in reality their reviews are likely heavily biased. To further complicate matters, there are millions of sponsored posts created every year, with each year seeing an increased amount from the previous one.[62] This exponential surge in sponsored content presents a challenge in terms of oversight and regulation, especially when the volume of advertisements far surpasses the capacity of regulatory bodies to effectively monitor and enforce compliance. In 2023, by the time influencing had become a well-established form of product promotion, the FTC had only issued a few warning letters to two trade associations and a dozen health influencers whose content revolves around wellness.[63] Because of this lack of

58. FEDERAL TRADE COMMISSION, *supra* note 57.

59. *See* 16 C.F.R. 255.1(e) and 16 C.F.R. 255.1(d)(2023) (conveying that advertisers are "subject to liability" for failing to disclose unexpected material connections, while endorsers "may be liable" for failing to disclose unexpected material connections).

60. Christopher Terry et al., *Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers*, 29 J. OF L. & POL'Y 406, 457; 16 C.F.R. 255.1(d) (2023).

61. Rebecca Stewart, *93% of Celebrity Influencers Don't Signpost Ads Correctly on Instagram*, THE DRUM (Jun. 13, 2017), https://www.thedrum.com/news/2017/06/13/93-celebrity-influencers-dont-signpost-ads-correctly-instagram.

62. Valentina Dencheva, Number of #Ad Posts on Instagram in 2020 and 2021, STATISTA (Jan. 6, 2023), https://www.statista.com/statistics/693775/instagram-sponsored-influencer-content/#.

63. Jennifer Santos, *FTC Warns Influencers: Disclose Material Connections*, BBB PROGRAMS (Nov. 20, 2023), https://bbbprograms.org/media-center/bd/insights/2023/11/20/ftc-warning-influencers.

surveillance and evident non-confrontational approach from the FTC, false advertising has become prevalent in the influencer space.[64]

VI. DISCUSSION REGARDING HARMFUL EFFECTS OF FALSE ADVERTISING

False advertising refers to advertisements that lack proper labeling as promotional content or present misleading information about a product or service.[65] BetterHelp, a well-known online therapy platform, provides an illustrative example of false advertising in the social media space.[66] Specifically, this platform garnered widespread attention by positioning itself as an affordable provider of professional counseling services.[67] A large part of BetterHelp's marketing strategy was—and still is—to partner with popular influencers to promote its platform, providing BetterHelp with many users.[68] This partnership typically includes affiliate links in which the influencer earns money for every subscription contracted through use of their unique link.[69] However, as the platform's prominence grew, so did the controversy that shrouded its reputation. Users began to raise valid questions about the authenticity and effectiveness of the services offered by BetterHelp.[70] Claims surfaced suggesting that therapists on the platform were not adequately attentive to patients' needs or were otherwise unhelpful in addressing their concerns.[71] Further, more alarming allegations started to emerge implying that the platform may have engaged in questionable business practices, including accusations of profiting off of patients' private medical information.[72] Ultimately, the FTC commenced a case against BetterHelp alleging deceptive and unfair practices which harmed consumers.[73] Notably, no influencer who continued to promote BetterHelp was punished for endorsing the brand despite serious complaints about the company being easily accessible online.

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64. Tanveer Qureshi, *Social Media and False Advertisements – Who is Responsible?*, TQ LEGAL BARRISTER (May 2, 2019), https://www.tqlegal.co.uk/blog/general/social-media-and-false-advertisements-who-is-responsible/.

65. *See generally* Alexandra J. Roberts, *False Influencing*, 109 GEO. L. J. 81 (2020).

66. Nahomi Deltombe & Florian Bachmann, *How the BetterHelp Scandal Changed Our Perspective on Influencer Responsibility*, MAASTRICHT UNIVERSITY (Feb 8. 2021), https://www.maastrichtuniversity.nl/blog/2021/02/how-betterhelp-scandal-changed-our-perspective-influencer-responsibility.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Complaint ¶¶ 5-6, BetterHelp, Inc., FTC Docket No. C-4796 (July 7, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023169betterhelpcomplaintfinal.pdf.

73. Lesley Fair, *FTC says online counseling service BetterHelp pushed people into handing over health information – and broke its privacy promises*, FTC: BUS. BLOG (Mar. 3, 2023), https://www.ftc.gov/business-guidance/blog/2023/03/ftc-says-online-counseling-service-betterhelp-pushed-people-handing-over-health-information-broke.

Even in cases where influencers fail to disclose their ties with advertisers, which is a clear violation, the FTC has refrained from penalizing the influencer.[74] In 2018, for example, a judge imposed a $15.2 million judgment on a tea marketer for employing misleading health claims and endorsements by celebrity influencers who did not properly disclose that they were being paid by the brand.[75] Although the FTC did send warning letters to the influencers who willingly promoted the product, no enforcement actions were initiated by the agency.[76] This apparent lack of accountability for influencers within FTC enforcement raises pertinent questions about the ethical responsibilities of influencers and their partnerships with companies whose practices come under scrutiny.

VII. RELATIONSHIPS BETWEEN CONSUMERS AND INFLUENCERS

As the influencer space continues to expand, many people seek to figure out why consumers buy products simply because they are promoted by someone who is popular.[77] Realistically, influencers are strangers to consumers so why is their opinion valued so highly?

For centuries, people have shown a degree of skepticism regarding the dynamics of interpersonal relationships and the tendency to admire or worship strangers.[78] This age-old apprehension about peer pressure found its way into the works of even literary giants like William Shakespeare.[79] In his writings, Shakespeare alluded to the prevailing negativity surrounding the concept of influence and often satirized those who readily yielded to the power of influencers.[80]

This critique is not as common today since influencers are readily accepted by their audience and consumers rarely question their authenticity.[81] This acceptance may be due to the fact that the harmful effects of parasocial relationships are not all that well documented or discussed.[82] Specifically, research has indicated that parasocial

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74. *See* Press Release, FTC, *Tea Marketer Misled Consumers, Didn't Adequately Disclose Payments to Well-Known Influencers*, *FTC Alleges*, (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.

75. *Id.*

76. *See id.*

77. *See* Raphael, *supra* note 11.

78. *See* Laurence Scott, *A History of the Influencer, from Shakespeare to Instagram*, NEW YORKER (Apr. 21, 2019), https://www.newyorker.com/culture/annals-of-inquiry/a-history-of-the-influencer-from-shakespeare-to-instagram.

79. *Id.*

80. *Id.*

81. *Getting Closer: Influencers Help Brands Build More Personal Consumer Connections*, NIELSEN (May 2022), https://www.nielsen.com/insights/2022/getting-closer-influencers-help-brands-build-more-personal-consumer-connections/.

82. See Lauren Farr, *How Can Parasocial Relationships Affect Your Life*, KQED (Feb. 24, 2023), https://www.kqed.org/education/536380/how-can-parasocial-relationships-affect-your-life, where the author only wrote one paragraph about the negative effects of parasocial relationships;

relationships can "encourage isolation, create conflict, and exacerbate mental illness."[83] But, social media users do not seem to know or care about the negative effects of parasocial relationships. In fact, when there is evidence that an influencer is acting disingenuous, news outlets will write hundreds of articles dissecting the situation.[84] This response suggests that consumers are genuinely surprised when their favorite influencers use deception for financial gain from corporate partnerships. Consumers' reactions are particularly astonishing given that it is well understood that influencers are compensated for their promotional work. It is entirely logical to assume that influencers, like anyone else, might employ less-than-honest tactics to maximize the perks offered by sponsorships.[85] Overall, it seems that today many consumers approach influencers with a level of admiration bordering on worship, which prevents them from seeing influencers as people just doing their job.[86]

This admiration is vital for influencers. Consumers must have faith that the products influencers endorse genuinely deliver the results that the influencers claim.[87] Such trust is how influencer marketing remains profitable.[88] This power that influencers have over consumers and their audience starts with the artificial relationship influencers are able to build with their followers through social media.[89] Influencers are able to build trust with their followers by sharing personal details of their lives and posting often.[90] This way, followers feel that they are the influencer's friend rather than an opportunity for profit.[91] The FTC has treated influencers as passive actors in advertising, only punishing the advertiser, when influencers hold a majority of the power in commanding consumers on what to buy.

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see also Angela Haupt, *In Defense of Parasocial Relationships*, TIME (July 13, 2023), https://time.com/6294226/parasocial-relationships-benefits/ (for reassurance that the media standpoint is that "parasocial relationships aren't nearly as toxic as public perception makes them out to be." *Id.*)

83. *Friend or Faux? Are Parasocial Relationships Healthy?*, *supra* note 40.

84. *See* Moises Mendez, *A Mascara Drama Unfolding on TikTok Raises Questions About Authenticity Among Beauty Influencers*, TIME (Jan. 27, 2023), https://time.com/6250881/mikayla-nogueira-mascara-fake-eyelashes/ (affirming that the media, as well as consumers, become obsessed with social media influencers when they display any sign that they may just be doing their job for money).

85. Jaeyon Chung et al., *I Really Know You: How Influencers Can Increase Audience Engagement by Referencing Their Close Social Ties*, 50 J. CONSUMER RES. 683, 684 (2023).

86. Dara Cadzow, *Why Are We So Obsessed with Influencers?*, HER CAMPUS (Mar. 21, 2023), https://www.hercampus.com/school/fsu/culture-why-are-we-so-obsessed-with-influencers/.

87. Kalavid – Strategic Branding & Advert. Agency, *The Impact of Influencer Marketing on Consumer Behavior*, LINKEDIN (Aug. 7, 2023), https://www.linkedin.com/pulse/impact-influencer-marketing-consumer-behavior-kalaviddesignstudio/.

88. *Id.*

89. Raphael, *supra* note 11.

90. Richardson, *supra* note 5.

91. *Id.*

Consumers, especially within America, are consistently incentivized to increase their consumption rather than adopt more frugal spending habits.[92] Generally, Americans calculate their wealth based on personal belongings and compare themselves to others based on material items.[93] Thus, consumers are encouraged to purchase more to increase their social value.[94] This inclination is actively fostered by influencers who incessantly endorse hundreds of products, convincing their viewers to buy them.[95] In a broader sense, the American economy thrives on consumerism, which potentially explains the FTC's reluctance to adopt a more punitive stance.[96] If regulations cracked down on influencers failing to disclose paid promotions, the influencer marketing industry could shrink, potentially reducing product promotion and sales and thereby harming economic growth in the short term.

However, the FTC has punished influencers in very limited circumstances.[97] The first case in which the FTC brought an action against individuals was one regarding a first-person shooter game that enabled consumers to gamble.[98] In the case of CSGO Lotto, the company president and its vice president (who together owned the company) each posted YouTube videos of themselves gambling with titles such as "HOW TO WIN $13,000 IN 5 MINUTES (CS-GO Betting)," "$24,000 COIN FLIP (HUGE CSGO BETTING!) + Giveaway," and "ALL OR NOTHING! (CS:GO Betting)."[99] Additionally, CSGO Lotto paid influencers to promote their game and prohibited the influencers from speaking negatively about the game without requiring them to disclose the payments in their social media posts.[100] Notably, the FTC did not issue any fines but instead punished the company by: (1) prohibiting it from misrepresenting that any endorser is an independent user or ordinary consumer of a product or service and (2) requiring clear and conspicuous disclosures of any unexpected material connections with

92. Mary Louise Kelly et al., *Why Americans buy so much stuff: A short history*, NPR (Dec. 1, 2021), https://www.npr.org/2021/11/29/1059861668/why-americans-buy-so-much-stuff.

93. Lucy Egginton, *Materialism and Poverty in America*, UNIV. OF MANCHESTER (Apr. 29, 2021), https://sites.manchester.ac.uk/global-social-challenges/2021/04/29/materialism-and-poverty-in-america/.

94. *Id.*

95. Linda Gildenstern, *OPINION: Influencers promote destroying our planet with overconsumption*, THE SUFFOLK JOURNAL (Apr. 18, 2023), https://thesuffolkjournal.com/40396/opinion/opinion-influencers-promote-destroying-our-planet-with-overconsumption/.

96. Kelly, *supra* note 92.

97. *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, FTC (Sept. 7, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against-individual-social-media-influencers.

98. *Id.*

99. *Id.*

100. *Id.*

endorsers.[101] Notably, these requirements are already included within the FTC Guidelines.[102]

The FTC clarified that it normally cannot fine defendants on the first offense, but further explained that if CSGO Lotto violates the provisions of the order, the company can be fined up to $40,000.[103] Notably, the FTC did not discuss the possibility of punishing those who promoted the company.[104] Additionally, an employee of the FTC told a news outlet that the goal of the agency is not to be punitive, but to educate consumers about new markets.[105] It is unclear how the FTC is "educating consumers" when it has declined to significantly punish companies that disregard the FTC guidelines, which only hurts consumers. Through only having brought one action that did not even include a monetary fine, the FTC has made it clear that it is unwilling to use its power for the benefit of consumers and in turn has created a free-for-all environment where there are seemingly limitless possibilities of how brands and influencers can manipulate consumers.

VIII. DISCUSSION WHETHER OR NOT THE CONSUMER SHOULD BEAR THE BURDEN

Another approach to protecting consumers is to put the burden on them. Although the FTC's purpose is to protect consumers, perhaps it should consider consumers' own responsibility in the process of buying products recommended by people they may not know personally.[106] As previously explored in this paper, it should not be difficult to recognize an influencer as a salesperson, so why do consumers place so much value on their opinion? Part of the answer might be that influencers typically display a very lavish lifestyle and consumers want to mirror that.[107] The average consumer may correlate the products promoted by the influencer with the lifestyle they have and end up buying countless products.[108] For example, a famous influencer with purportedly perfect skin may obtain contracts with numerous skin care companies to promote their products. A consumer looking to improve their skincare regimen may then purchase these products thinking it will improve their skin. Unfortunately, the consumer's expectations are often unmet,

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101. *Id.*

102. Lesley Fair, *Full Disclosure*, FTC (Sept. 23, 2014), https://www.ftc.gov/business-guidance/blog/2014/09/full-disclosure.

103. Steve Dent, *YouTubers Avoid Fine Over Valve "CS:GO" Gambling Scam,* ENGADGET (last updated Sep. 8, 2017), https://www.engadget.com/2017-09-08-youtube-csgo-lotto-fcc-no-fine.html.

104. *Id.*

105. *Id.*

106. *FTC Mission Statement*, FTC, https://www.ftc.gov/about-ftc/mission.

107. Arya Sant, *Influencers Set Unrealistic Expectations*, TWICE-TOLD TALE (Mar. 18, 2022), https://twicetoldtale.org/925/entertainment/influencers-set-unrealistic-expectations/.

108. *Id.*

leading to disappointment. This pattern recurs with remarkable consistency: promotion, purchase, followed by buyer's remorse.[109] Consumers lack the ability to shield themselves from the negative impact that influencers can have on their purchasing decisions.[110] Furthermore, consumers are generally unaware that many seemingly unbiased posts are actually motivated by compensation.[111] Therefore, the FTC should assume this responsibility to safeguard consumers.

IX. SHOWCASING THE DIFFERENT APPROACHES FROM OTHER GOVERNMENT AGENCIES

The FTC guidelines do not consider the artificial relationships that consumers have with the people promoting products or an influencer's capability to sway consumers. The FTC has resisted enforcing their rules, when both the advertiser and the influencer bear the burden to advertise properly, enabling influencers to make enormous profits off false advertisements while companies pay the price.[112]

On the other hand, the SEC has taken a starkly different approach when it comes to penalizing influencers for improperly disclosing their relationship with a brand.[113] When Kim Kardashian failed to disclose that she was being paid $250,000 to publish an Instagram post promoting cryptocurrencies, the SEC issued a $1.26 million fine.[114] In another instance where a company failed to disclose that they paid over 200 social media influencers and online publishers to solicit advisory clients, the SEC ordered the company to pay a $250,000 civil penalty within fourteen days.[115] In addition, the SEC has fined many other celebrities and influencers for improper advertising.[116] Most notably, these examples are similar situations that the FTC declined to take action in and some also violate the FTC's Endorsement Guidelines.[117]

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109. Catie Jaffe, *When Social Media Takes Your Money: In-App Shopping and Buyer's Remorse Study*, UNIV. OF TEN. RES. AND CREATIVE EXCH. (May 2019), https://trace.tennessee.edu/utk_chanhonoproj/2270.

110. *Id.*

111. Terry et al., Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers, 29 J. of L. & Pol'Y. 406, 412 (2021).

112. See 16 C.F.R. § 255.1(e) (2023) and 16 C.F.R. § 255.1(d) (2023)(conveying that advertisers are "subject to liability" for "failing to disclose unexpected material connections," while endorsers "may be liable" for failing to disclose unexpected material connections).

113. Tami Stark et al., *The SEC Continues to Prove it is the Most Powerful Influencer: How to Avoid Touting Charges*, WHITE & CASE (May 1, 2023), https://www.whitecase.com/insight-alert/sec-continues-prove-it-most-powerful-influencer-how-avoid-touting-charges#.

114. Chris Isidore & Matt Egan, *Kim Kardashian Charged by SEC, Agrees to Pay $1.3 Million Fine*, CNN (Oct. 3, 2023), https://www.cnn.com/2022/10/03/investing/kim-kardashian-sec-fine/index.html.

115. Melanie Waddell, *SEC Fines RIA for Paying Social Media Influencers to Solicit Clients*, THINK ADVISOR (Aug. 23, 2023), https://www.thinkadvisor.com/2023/08/23/sec-fines-ria-for-paying-social-media-influencers-to-solicit-clients/.

116. Stark et al., *supra* note 113.

117. See Isidore & Egan, *supra* note 114 for evidence that the SEC took action against Kim Kardashian for an action that would also violate the FTC's Endorsement Guidelines.

The SEC's aggressive approach to combating disguised sponsored posts has demonstrated to influencers that the agency will pursue violations.

X. EXPLAINING THE REASON FOR DIFFERENT APPROACHES BY DIFFERENT AGENCIES

The SEC has not shied away from demonstrating the punishments for improper advertisements, so why has the FTC seemingly ignored their own power? One answer may lie in the SEC's mission statement. Within their mission statement, the SEC clarifies that its goal is to protect investors and to make a positive impact on the U.S. economy and capital markets.[118] Since the SEC's goal is partially to contribute to the U.S. economy, its actions have a great effect on other important aspects of the country like the gross domestic product and the unemployment rate.[119] This motivates the SEC to be more harsh in order to protect not just consumers, but the U.S. as a whole.[120]

On the other hand, the FTC's mission statement is more focused on protecting consumers and only once emphasizes the bigger picture of promoting economic growth.[121] Perhaps the FTC believes that consumers are better off using their own discernment to recognize authentic advertisements. However, it is conceivable that the FTC may hold the perspective that consumers ought to assume responsibility for their protection, only intervening in truly exceptional circumstances, and even then, meting out minimal punitive measures.[122] Yet, in adopting such a stance, the FTC appears to misinterpret the critical nature of its role in shielding consumers from the influence of influencers.[123] Given that consumers constitute a pivotal component of our economy, and influencers wield significant leverage over consumer choices, leaving consumers to navigate these dynamics independently could potentially yield adverse effects on the overall economic landscape.[124] For example, when consumers spend more money on products they do not need, less of their money goes towards savings and

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118. *FTC Mission Statement*, SEC, https://www.sec.gov/about/mission (Aug. 9, 2023).

119. See *id.* for evidence that the SEC has the ability to make a positive impact on the U.S. economy.

120. *See SEC Charges Eight Social Media Influencers in $100 Million Stock Manipulation Scheme Promoted on Discord and Twitter*, SEC (Dec. 14, 2022), https://www.sec.gov/news/press-release/2022-221 (revealing evidence that the SEC charged eight influencers for manipulating exchange-traded stocks).

121. *FTC Mission Statement*, *supra* note 118.

122. *See* Dent, *supra* note 103 (showing that the FTC does not issue material punishments even when companies clearly violate the endorsement guidelines).

123. See FTC, https://www.ftc.gov/about-ftc/mission (last visited Jan. 21, 2024), which clearly conveys that the FTC is aware of its impact on the economy.

124. See *Importance of Relatability in Influencer Marketing – With Examples*, IZEA (Oct. 23, 2023), https://izea.com/resources/importance-of-relatability-in-influencer-marketing/, for evidence that a large portion of the population bases their buying choices off of influencers.

retirement.[125] When individuals allocate less money towards savings and retirement funds due to excessive spending, they may face greater financial vulnerability in the future, which can strain social safety nets and public resources.[126] In addition, overconsumption can lead to economic damage by exacerbating scarce resources in order to keep up with consumer demand.[127] In the broader context, it is well-established that consumers, particularly those belonging to Generation Z, exhibit a notable vulnerability to social media advertising which often leads to heightened spending patterns.[128] Hence, it defies logical reasoning for the FTC to shift the responsibility of evaluating the authenticity of a person's product reviews onto consumers who, by virtue of their inherent challenges in discerning essential from non-essential products, are already grappling with the complexity of making informed purchasing decisions.[129] If the FTC remains passive in its enforcement of their own guidelines, the likelihood that the U.S. will see damage to its economy will increase.[130] This makes it imperative for the FTC to recognize the profound impact influencers can have on consumer behavior and, in turn, acknowledge the crucial role the FTC plays in preserving the economic well-being of consumers.[131] This includes a concerted effort to clarify and refine its guidelines pertaining to influencer marketing, ensuring they are comprehensive and effectively communicated to all stakeholders. Moreover, the FTC must demonstrate a willingness to enforce these guidelines rigorously, taking decisive action against influencers and brands found to be engaging in deceptive or misleading practices. By holding accountable those who have long evaded responsibility for exploiting consumers through undisclosed sponsored posts, the FTC can help foster a fair and transparent marketplace that promotes consumer confidence and sustains long-term economic prosperity.

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125. Ning Ma et al., *Impact of COVID-19 on Lifestyle and Financial Behaviour: The Implications to Research in Financial Vulnerability*, PUBMED CENTRAL(Dec. 13, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9792664/.

126. *Id.*

127. Emma Vega, The Abyss of Abundance: Consumer Overconsumption and the Road to Environmental Collapse (Apr. 30, 2024) (unpublished student thesis, Fordham University) (on file with the Fordham Research Commons, Fordham University).

128. Kyungmin Min, *Gen Z and Media – Overexposure to products leads to overconsumption*, SDNEWS (Dec. 8, 2023), https://sdnews.com/gen-z-and-media-overexposure-to-products-leads-to-overconsumption/.

129. See *id.* for evidence that consumers are spending too much money on products they do not need and are being influenced by this overconsumption lifestyle portrayed to them by influencers online.

130. *See Consequences of Overproduction and Overconsumption*, NET IMPACT (Nov. 12, 2020), https://netimpact.org/blog/overproduction-overconsumption-consequences (explaining that overconsumption harms the economy).

131. See *id.* for evidence that the FTC taking action will benefit the economy as a whole.