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MEGAN K. BANNIGAN AND BETH SHANE

Towards Truth in Influencing:  
Risks and Rewards of Disclosing Influencer  
Marketing in the Fashion Industry

64 N.Y.L. SCH. L. REV. 247 (2019–2020)

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## INFLUENCER MARKETING IN THE FASHION INDUSTRY

### I. INTRODUCTION

Companies are increasingly looking to leverage the status and visibility of social media influencers to promote brand awareness and drive sales.<sup>1</sup> Social media influencers are individuals with influence over potential buyers. As a form of “native advertising,” influencer advertising allows companies to mask, or at least soften, the commercial nature of their message, often by replicating the style and form of the publisher’s editorial content<sup>2</sup> and playing on consumers’ fascination with, and emotional investment in, social media personas.<sup>3</sup> Influencers appeal to consumers’ emotions by equating a brand with fun and memorable, crave-worthy products and experiences.

Widespread investment in influencer marketing speaks to its effectiveness; the influencer industry is set to be worth \$15 billion by 2022.<sup>4</sup> Eclipsing Facebook, Instagram has become the most popular platform of many platforms that contain sponsored content, including Twitter, YouTube, Pinterest, Snapchat, and TikTok.<sup>5</sup> The radiating success of influencer programs has led brands to increasingly invest in influencers and fund their Instagram-worthy lifestyles, recruiting influencers with cash, free products, and even all-expense paid luxury vacations.<sup>6</sup> For example, fashion company Revolve regularly provides influencers with VIP access to the Coachella Valley Music and Arts Festival as part of its #RevolveFestival campaign.<sup>7</sup> Another

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1. Jennifer Ortakales, *The Entrepreneur’s Ultimate Guide to Influencer Marketing on Instagram, From Micro-Influencers to Brand Ambassadors, and Everything in Between*, BUS. INSIDER (Feb. 26, 2020), <https://www.businessinsider.com/entrepreneurs-guide-to-influencer-marketing-on-instagram-brand-ambassador>.
  2. Native advertising does not look like traditional advertising because it generally matches the form and function of the platform on which it is published. Raul Ferrer Conill, *Camouflaging Church as State, An Exploratory Study of Journalism’s Native Advertising*, 17 JOURNALISM STUD. 904, 909 (2016).
  3. See Bianca Harms et al., *Digital Native Advertising: Practitioner Perspectives and a Research Agenda*, 17 J. INTERACTIVE ADVERT. 80, 85 (2017) (discussing how consumers are especially receptive to emotional content conveyed through digital native advertising for a product).
  4. Audrey Schomer, *Influencer Marketing: State of the Social Media Influencer Market in 2020*, BUS. INSIDER (Dec. 17, 2019), <https://www.businessinsider.com/influencer-marketing-report>.
  5. See *id.*
  6. See Lexie Carbone, *Here’s Why Brands Are Taking Instagram Influencers on Vacation*, LATER (Apr. 15, 2018), <https://later.com/blog/instagram-influencer-vacations/> (“Companies like Revolve, Benefit, and Boohoo are taking small, highly curated groups of Instagram influencers on vacations to benefit from their significant and relevant followings.”); Michelle Scanga, *What It’s Really Like to Go on a Revolve Trip*, WHO WHAT WEAR (May 19, 2017), <https://www.whowhatwear.com/revolve-around-the-world-trip-turks-and-caicos/slide5> (outlining the daily itinerary of a five day Revolve influencer trip to Turks and Caicos).
  7. See Dhani Mau, *Revolve’s Coachella Influencer Activation “Broke the Budget,” But it Was a Worthy Investment*, FASHIONISTA (Apr. 17, 2018), <https://fashionista.com/2018/04/revolve-clothing-influencers-festival-coachella-2018> (explaining how Revolve invests significant sums of money for influencers to attend the Coachella festival because, in exchange, the influencers promote the brand on their social media pages, inspiring their followers to buy Revolve clothing); see also RETRO READ: *Revolve has Built a Billion Dollar Brand Based on Influencer Marketing*, THE FASHION L. (June 7, 2019), <http://www.thefashionlaw.com/home/the-business-of-influence-revolvearoundthefc> (“[M]ore than five billion press and social impressions were generated during Coachella, where the retailer outfitted more than 700 influencers.”); Taylor Mims, *#REVOLVEfestival Announces Lineup Including TDE Stage*, BILLBOARD (Apr. 4, 2019),

fashion company, Amaryllis Apparel, has paid for influencers to travel and stay in the Turks and Caicos Islands and Paris, France as part of the #AmaryllisAbroad campaign.<sup>8</sup>

Companies often hire celebrity influencers—individuals whose social media accounts have at least one million followers<sup>9</sup>—to broadcast sponsored content, but this level of popularity is not strictly necessary to garner brand interest. Brands also seek out certain individuals with fewer than one thousand followers, known in the industry as “nanoinfluencers,” to promote their products.<sup>10</sup> In 2018, the *New York Times* detailed the rise of nanoinfluencers, explaining that their relative lack of fame is attractive, because “[w]hen they recommend a shampoo or a lotion or a furniture brand on Instagram, their word seems as genuine as advice from a friend.”<sup>11</sup> Studies demonstrate just that: the psychology of social influencer marketing differs from traditional forms of advertising because consumers develop relationships with their favorite influencers, the social dynamics of which resemble a friendship.<sup>12</sup>

While beneficial to brands, influencer marketing has raised concerns among regulators seeking to ensure that influencer advertisements adhere to long-established truth-in-advertising principles by disclosing material connections between the brand and the influencer.<sup>13</sup> In its guidance, *Disclosures 101 for Social Media Influencers*, the

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<https://www.billboard.com/articles/business/8505719/revolvefestival-announces-lineup-including-tde-stage> (“#REVOLVEfestival is a week-long curation of style, beauty and entertainment experiences, brand partnership activations, special guest appearances and surprise performances surrounding the first weekend of the Coachella music festival.”).

8. Sarah Levin, *A Ridiculous Influencer Trip Is Happening This Weekend*, BETCHES (June 21, 2019), <https://betches.com/a-ridiculous-influencer-trip-is-happening-this-weekend/>; Sarah Levin, *Why Are All The ‘Bachelor In Paradise’ People In Paris Right Now?*, BETCHES (Sept. 24, 2019), <https://betches.com/why-are-all-the-bachelor-in-paradise-people-in-paris-right-now/>. #AmaryllisAbroad is both a fashion collection and marketing campaign, which took eight influencers on an “immersive travel experience” to “network, grow their brands, cultivate relationships and create lasting memories” while promoting the Amaryllis Apparel collection. *Id.*
9. *Influencer Tiers for the Influencer Marketing Industry*, MEDIKIX, <https://mediakix.com/influencer-marketing-resources/influencer-tiers/> (last visited Mar. 17, 2020).
10. See, e.g., *From Fans to Nano Influencers, a Look at the Evolution of Influencer Marketing*, THE FASHION L. (Feb. 8, 2019), <http://www.thefashionlaw.com/home/fans-and-micro-micro-influencers-the-answer-to-growing>; 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>.
11. Maheshwari, *supra* note 10.
12. Kyle Wong, *The Explosive Growth of Influencer Marketing and What it Means for You*, FORBES (Sept. 10, 2014), <https://www.forbes.com/sites/kylewong/2014/09/10/the-explosive-growth-of-influencer-marketing-and-what-it-means-for-you/#2d249d8952ac>. As Facebook CEO Mark Zuckerberg explained: “Nothing influences people more than a recommendation from a trusted friend” and that “[a] trusted referral is the Holy Grail of advertising.” *Fralely v. Facebook, Inc.*, 830 F. Supp. 2d 785, 808–09 (N.D. Cal. 2011).
13. In November 2019, the Federal Trade Commission (FTC) issued guidance explaining when and how online influencers should disclose relationships with sponsors. *The FTC’s Endorsement Guides: What People Are Asking*, FTC, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (last visited Mar. 7, 2020) [hereinafter *Endorsement Guides*]. This 2019 guidance reinforces the FTC’s influencer guidelines published in 2017 and underscores the fundamental principle that, whether in the context of new media or traditional advertising, the FTC endorsement

## INFLUENCER MARKETING IN THE FASHION INDUSTRY

Federal Trade Commission (FTC) is explicit that influencers must disclose “any financial, employment, personal, or family relationship with a brand.”<sup>14</sup> In other words, if the nature of the brand-influencer relationship could impact how consumers evaluate the product endorsement, consumers have a right to know.<sup>15</sup> And the FTC does not present the only legal risk—brands and influencers alike are subject to potential legal actions from State Attorneys General, consumers, and business competitors who have been misled regarding the source of the social media content.<sup>16</sup>

Concerns about disclosure are not unfounded. Studies show that, at least in the past, only about 25 percent of Instagram influencers provided sponsorship disclosures that were FTC compliant.<sup>17</sup> In the worst cases, brands intentionally concealed ties with influencers to manipulate the market for their product.<sup>18</sup> But more frequently, failure to properly disclose sponsorship stems from confusion surrounding sufficient disclosure or the desire to preserve the organic and spontaneous quality of social media advertising and avoid alienating followers.<sup>19</sup>

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guides all “reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading.” *Disclosures 101 for Social Media Influencers*, FTC (Nov. 2019), [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf) [hereinafter *Disclosures 101*]. On February 21, 2020, the FTC filed a request for public comment on whether to make changes to the *Endorsement Guides*. See *Guides Concerning Use of Endorsements and Testimonials in Advertising*, FTC (Feb. 21, 2020), <https://www.ftc.gov/policy/federal-register-notices/16-cfr-part-255-guides-concerning-use-endorsements-testimonials>.

14. *Disclosures 101*, *supra* note 13.

15. *Endorsement Guides*, *supra* note 13.

16. Each state has enacted consumer protection statutes, known as “Little FTC Acts,” that generally contemplate enforcement by the State Attorney General in addition to providing private rights of action to injured consumers. See Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 *FORDHAM URB. L.J.* 1903, 1910–11 n.36–37 (2013) (collecting enforcement provisions under state consumer protection statutes). Injured parties may also bring a false advertising claim under the Lanham Act, 15 U.S.C. § 1125(a), if they can show an injury to a commercial interest in reputation or sales that was proximately caused by defendant’s misrepresentations. See *infra* Part II (C).

17. See James Harrison, *The Monetization of Opinions: Consumer Responses to Covert Endorsement Practices on Instagram*, 6 *J. PROMOTIONAL COMM.* 395, 397 (2018).

A May report from U.K.-based photo-printing shop Inkifi looked at 800 Instagram accounts from the United States, United Kingdom and Canada that could have reached U.S. audiences and had posted about collaborations with brands and recommended items. Of those accounts, 71.5 percent disclosed their monetary partnerships, but only 25 percent did so in a way that was compliant with the FTC’s recommendations.

*Id.* See also Sam Sabin, *A Year After Major Actions, FTC’s Influencer Marketing Guidelines Still Overlooked*, *MORNING CONSULT* (Oct. 4, 2018), <https://morningconsult.com/2018/10/04/a-year-later-ftcs-influencer-marketing-guidelines-still-largely-ignored>.

18. See Lindsay Stein, *One in Four Influencers Asked Not to Disclose Paid Promotion*, *ADAGE* (Aug. 10, 2016), <https://adage.com/article/cmo-strategy/influencers-asked-disclose-arrangement/305389/> (reporting that based on responses from 347 influencers, 25 percent of those surveyed said brands explicitly asked them not to disclose the sponsorship).

19. See Sabin, *supra* note 17 (explaining that many experts believe the guidelines are too ambiguous to adequately enforce or follow, causing confusion even among brands and influencers motivated to comply).

This instinct against disclosure is misguided. Potential market gains from concealing material commercial relationships are outweighed by the legal and reputational costs associated with undisclosed sponsorships,<sup>20</sup> and brands and influencers will likely witness diminishing returns for deceptive advertising strategies and may be increasingly incentivized toward transparency. Part II of this article examines the legal framework governing influencer marketing on social media, outlining the legal risk associated with influencer campaigns under the FTC Act, state consumer protection laws, and the Lanham Act. Part III explores the reputational risks of non-disclosure, examines theories of consumer response to covert marketing techniques, and concludes that brands and influencers should not shy from disclosure. Brands and influencers will find they are best served not by attempting to mask the commercial nature of their advertisements, but by moving towards truth in influencer advertising. Finally, Part IV summarizes best practices for any brand or influencer looking to engage in influencer advertising.

## II. LEGAL RISKS OF NON-DISCLOSURE

The relevant legal framework for deceptive advertising comes from three primary bodies of law: (A) the FTC Act, (B) a composite of state consumer protection statutes commonly referred to as Little FTC Acts, and (C) the Lanham Act. While there is currently a sizable gap between policy and practice, legal risk remains a real possibility.

### *A. FTC Enforcements Action under Section 5(a)*

The FTC is a federal agency tasked with consumer protection, including through the enforcement of Section 5(a) of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”<sup>21</sup> In general, “endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser . . . and may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”<sup>22</sup> If the advertisement indicates that the endorser uses the product, the endorser must actually be using the product when the endorsement is published.<sup>23</sup> And if there is a material connection between an endorser and an advertiser, that connection should be clearly and conspicuously disclosed, which means using plain and unambiguous language, and making sure the disclosure grabs the reader’s attention.<sup>24</sup>

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20. *See infra* Parts II-III.

21. 15 U.S.C. § 45(a)(1) (2020).

22. 16 C.F.R. § 255.1(a) (2020). *See also Endorsement Guides*, *supra* note 13, which provide clarification on the application of Section 5 with respect to the use of endorsements.

23. 16 C.F.R. § 255.1(c) (2020).

24. *Id.* § 255.5.

## INFLUENCER MARKETING IN THE FASHION INDUSTRY

An advertisement is considered deceptive if “it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers’ decisions.”<sup>25</sup> In other words, an ad is deceptive if it impacts how “a significant minority of reasonable consumers” interact with the sponsored content, either by “leading consumers to give greater credence to advertising claims or to interact with advertising with which they otherwise would not have interacted.”<sup>26</sup> Even if certain disclosures, including through widely-used hashtags, make it clear to industry insiders that the content is sponsored, the disclosure may still fail to fully comply with FTC guidelines if a “significant minority” of individuals less conversant in Instagram, for example, fail to comprehend the significance of the disclosure.<sup>27</sup>

Lord & Taylor’s paisley dress campaign garnered the company the unwanted distinction of being the first and only fashion company to date subject to agency action for deceptive advertising involving social media influencers. In March 2016, the FTC alleged that Lord & Taylor “gave 50 select fashion influencers a free Paisley Asymmetrical Dress and paid them between \$1,000 and \$4,000 each to post a photo of themselves wearing it on Instagram or another social media site.”<sup>28</sup> Under the terms of the contract, influencers were given creative license to style the dress as they chose, but were required to tag the post “@lordandtaylor” and “#DesignLab.”<sup>29</sup> Influencers were also required to submit their content to Lord & Taylor for review before publication, but the company failed to require any disclosure of sponsorship on previewed posts.<sup>30</sup> The FTC’s settlement with Lord & Taylor resulted in a twenty-year consent decree that prohibits the company from failing to disclose sponsored social media content in future promotional campaigns and requires the company to install a monitoring and review program to ensure future marketing campaigns comply with FTC guidelines.<sup>31</sup> While FTC enforcement actions are often resolved through similar settlements,<sup>32</sup> it is worth noting that for the most recalcitrant

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25. 16 C.F.R. § 260.2 (2020).

26. See Letter from James C. Miller III, Chairman, FTC, to Hon. John D. Dingell, Chairman, House Comm’n on Energy & Commerce (Oct. 14, 1983), reprinted in Clifford Assocs. Inc., 103 F.T.C. 110 (1984) (citing Heinz W. Kirchner, 63 F.T.C. 1282 (1963)) (explaining that, when an advertisement is directed at a particular group, a “significant minority” of reasonable consumers are used to examine the advertising practice, rather than the majority of consumers) [hereinafter Miller Letter]; *Enforcement Policy Statement on Deceptively Formatted Advertisements*, FTC (Dec. 22, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/896923/151222deceptiveenforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf).

27. Miller Letter, *supra* note 26.

28. *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers”*, FTC (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through>.

29. *Id.*

30. *Id.*

31. *Id.* See also Lord & Taylor, LLC, 81 Fed. Reg. 15, 523 (FTC Mar. 23, 2016).

32. See *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FTC (July 2008), <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

offenders, the FTC has the power to seek disgorgement and pursue civil penalties.<sup>33</sup> Beyond the legal ramifications, Lord & Taylor's paisley dress issues were widely documented in the popular press as the FTC's landmark enforcement action against a brand for a deceptive influencer campaign,<sup>34</sup> becoming a cautionary tale in the history of influencer marketing and leaving Lord & Taylor to reestablish consumer trust.

In 2017, the FTC updated its guidelines to respond to the rise of social media marketing, signaling the agency's interest in preventing influencers from skirting foundational principles of fair advertising.<sup>35</sup> The same year, the FTC made waves by sending over ninety letters to various celebrities, athletes, and brands to remind influencers of their obligation to adhere to the "clear and conspicuous standard" for disclosures,<sup>36</sup> and commencing an enforcement action against individual influencers for deceptive marketing.<sup>37</sup> These actions marked the first time the FTC directly contacted social media influencers to provide and enforce guidance on sponsorship disclosure, broadcasting the agency's serious intention to police deceptive influencer campaigns.<sup>38</sup>

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33. See 15 U.S.C. § 45(m)(1)(B) (2020) (agency may seek disgorgement or civil penalties against repeat offenders or third parties who have "actual knowledge that such act or practice is unfair or deceptive and is unlawful").
  34. See Hadley Malcolm, *Lord & Taylor Settles FTC Charges Over Paid Instagram Posts*, USA TODAY (Mar. 15, 2016), <https://www.usatoday.com/story/money/2016/03/15/lord--taylor-settles-ftc-charges-over-paid-instagram-posts/81801972>; see also *infra* note 68.
  35. See Lesley Fair, *Three FTC Actions of Interest to Influencers*, FTC (Sept. 7, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers> (outlining three developments regarding FTC's regulation of social media influencers, including updating FTC's Endorsement Guides); *Endorsement Guides*, *supra* note 13.
  36. *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FTC (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>. The list of celebrities who received a letter from the FTC includes Jennifer Lopez—who posted a picture of herself captioned "birthday weekend in Vegas!!" against a backdrop of Beluga vodka—Allen Iverson, Lindsay Lohan, and Heidi Klum. See Ryan Barber, *Who Got Those Social 'Influencer' Letters from the FTC? Read the Full List*, L. (May 4, 2017), <https://www.law.com/sites/almstaff/2017/05/04/who-got-those-social-influencer-letters-from-the-ftc-read-the-full-list/>.
  37. See CSGOLotto, Inc., FTC File No. C-4632 (Nov. 28, 2017). The FTC alleged that Trevor Martin (TmarTn) and Thomas Cassell (Syndicate) published endorsements of the online gambling site CSGO Lotto without disclosing ownership of the company; the complaint was ultimately settled through a twenty-year consent decree. This action makes clear that future FTC enforcement activity will target both brands and individual influencers. See *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, FTC (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against>.
  38. *This Just In: FTC Takes Action Against Influencers, Marketers Over Sponsored Posts*, THE FASHION L. (Apr. 19, 2017), <http://www.thefashionlaw.com/home/this-just-in-ftc-takes-action-against-influencers-marketers-over-sponsored-posts>; see also *Tea Marketer Mised Consumers, Didn't Adequately Disclose Payments to Well-Known Influencers, FTC Alleges*, FTC (Mar. 6, 2020), <https://www.ftc.gov/news-events/press-releases/2020/03/tea-marketer-mised-consumers-didnt-adequately-disclose-payments> (announcing settlement, imposing \$15.2 million judgment settled for \$1 million, with Teami LLC, a maker of teas and skincare products, and highlighting allegedly misleading Instagram posts by Cardi B, Jordin Sparks, and other influencers; warning letter also sent to influencers). While not in the fashion context, as the *Teami* case shows, the FTC is continuing to take this issue very seriously.



## INFLUENCER MARKETING IN THE FASHION INDUSTRY

In November 2019, the FTC published “Disclosures 101 for Social Media Influencers,” highlighting the agency’s continued interest in influencer marketing.<sup>39</sup> The guide emphasizes that individual influencers are responsible for understanding disclosure obligations, signaling that reliance on bad advice from a brand will not shield influencers from potential legal liability. The guide also contains practical advice on how to “clearly and conspicuously” disclose material connections on various social media platforms; these strategies are detailed below in our summary of best practices. As the relationship between brands and influencers continues to evolve, the FTC has consistently indicated its investment in preserving the same truth-in-advertising principles across new media platforms. And as the Lord & Taylor matter demonstrates, real legal and reputational consequences may flow from this kind of deceptive conduct.<sup>40</sup>

### *B. State Law Remedies for Non-FTC Compliant Influencer Marketing*

For individuals or competitor businesses seeking legal remedies against brands and influencers who fail to disclose sponsorship connections, there is a body of state law modeled after the FTC Act that, unlike the federal statute, provides a private right of action against brands for engaging in deceptive influencer marketing tactics.<sup>41</sup> For example, New York General Business Law § 349 (“GBL § 349”) broadly prohibits “[d]eceptive acts or practices in the conduct of any business.”<sup>42</sup> To date, there have been relatively few private actions brought under state consumer protection statutes against companies for failing to disclose sponsored influencer marketing. A lawsuit brought by California-based footwear and apparel company Vans against a down market competitor in the Eastern District of New York might have clarified the usefulness of state consumer protection statutes in this space, but the parties recently settled the dispute before the issue was fully litigated.<sup>43</sup> Vans, most famous for the “Old Skool” and “Sk8-Hi” shoes featuring their protected “Side Stripe,”<sup>44</sup> sued Primark, a fashion retailer, for producing “knock-off” Vans.<sup>45</sup> Among other things, Vans alleged that Primark employed influencers to promote the “fake Vans”

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39. *Disclosures 101*, *supra* note 13.

40. *See supra* notes 28, 31; *infra* note 68.

41. *See* *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris U.S.A., Inc.*, 818 N.E.2d, 1140, 1143 (2004) (explaining that N.Y. GEN. BUS. LAW § 349 includes a private right of action “allowing [consumers] to bring suit on their own behalf without relying on the Attorney General for enforcement”); *see also* *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 997 (D.C. Cir. 1973) (holding that consumers are not afforded a private right of action under Section 5 of the FTC Act).

42. N.Y. GEN. BUS. LAW § 349 (McKinney 2020).

43. *See* *Complaint at 27–28*, *Vans, Inc. & VF Outdoor, LLC v. Primark Stores Ltd.*, No. 18-CV-07214 (E.D.N.Y. Dec. 18, 2018); *Order Granting Motion to Adjourn Conference*, *Vans, Inc. & VF Outdoor, LLC*, No. 18-CV-07214 (E.D.N.Y. March 17, 2020).

44. *Complaint*, *supra* note 43, at 4–5.

45. *Id.* at 16.

on social media without requiring influencers to disclose corporate affiliation and compensation in violation of GBL § 349.<sup>46</sup>

To establish a claim under GBL § 349, “a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.”<sup>47</sup> The plaintiff must also show that the deceptive “acts or practices have a broader impact on consumers at large.”<sup>48</sup> The usefulness of GBL § 349 to plaintiffs like Vans depends, in part, on how narrowly the court construes that last requirement. There has been some debate among district courts within the Second Circuit over whether satisfying the “broader impact on consumers” element requires the plaintiff to show that the defendant’s conduct affects the public interest or poses “potential danger to the public health or safety.”<sup>49</sup> At least two recent decisions suggest at the very least that plaintiffs may not have to meet this heightened requirement when pleading their case.<sup>50</sup> In each case, the court allowed the plaintiff’s claims to proceed against the defendant for failure to adequately disclose affiliate marketing relationships, even though the plaintiff did not expressly plead that the defendant’s actions either impacted the public interest or posed a potential danger to the public.<sup>51</sup>

In *Casper Sleep, Inc. v. Mitcham*,<sup>52</sup> mattress company Casper brought claims against the proprietor of MattressNerd.com, Jack Mitcham, for not adequately representing his commercial affiliations with competitor brands when providing mattress reviews and recommending products.<sup>53</sup> Mitcham’s website disclosed that he worked as an “affiliate for many different companies” and received commission for

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46. *Id.* See also Answer at 12–13, *Vans, Inc. v. Primark Stores, Ltd.*, No. 18-CV-07214 (E.D.N.Y. June 10, 2019) Primark filed an Answer on June 10, 2019, denying all allegations under N.Y. GEN. BUS. LAW § 349. *Id.*

47. *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) (quoting *Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675, 675–76 (N.Y. 2012)).

48. *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744 (N.Y. 1995).

49. See *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, No. 08-CV-0442, 2014 WL 4723299, at \*5 (S.D.N.Y. Sept. 23, 2014) (rejecting N.Y. GEN. BUS. LAW § 349 claim because, despite defendants having engaged in misleading conduct that injured plaintiff’s business by diverting online traffic to their sponsored site, there is no evidence that the “public health or safety were injured”); see also *Lokai Holdings, LLC v. Twin Tiger USA, LLC*, 306 F. Supp. 3d 629, 642–43 (S.D.N.Y. 2018) (quoting *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003)) (rejecting the party’s claim “because the public harm is too insubstantial to satisfy the pleading requirements of § 349”).

50. See *Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 643 (S.D.N.Y. 2016) (citing *Giordano v. City of New York*, 274 F.3d 740, 754 (2d Cir. 2001) (holding that “the elevated requirements that some district courts have apparently engrafted onto the ‘consumer-oriented’ element of § 349 claims lack a basis in governing New York law”); see also *Casper Sleep, Inc. v. Hales*, No. 16-CV-03223, 2016 WL 6561386, at \*8 (S.D.N.Y. Oct. 20, 2016) (rejecting defendant’s argument that plaintiff’s claim fails for insufficient allegations in the pleading).

51. *Hales*, 2016 WL 6561386, at \*8; *Mitcham*, 204 F. Supp. 3d at 643.

52. 204 F. Supp. 3d 632 (S.D.N.Y. 2016).

53. *Id.* at 635.

## INFLUENCER MARKETING IN THE FASHION INDUSTRY

purchases made through the links provided,<sup>54</sup> but Casper alleged that the disclosures inappropriately caused consumers to believe “that The Mattress Nerd reviews [we]re independent and unbiased, when in fact, they [we]re intended to sell mattresses made by Mitcham’s affiliates.”<sup>55</sup> The court denied Mitcham’s motion to dismiss, finding that these allegations were enough to adequately plead Mitcham’s violation of the New York consumer protection statute.<sup>56</sup>

Similarly, in *Casper Sleep, Inc. v. Hales & Halesopolis LLC*,<sup>57</sup> Casper alleged that Derek Hales’s website, Sleepopolis.com, “contained untrue statements about the impact of Hales’s marketing relationships on his mattress reviews.”<sup>58</sup> Following *Mitcham*, the court rejected Hales’s argument that Casper failed to state a claim because the complaint did not allege facts showing that Hales’s actions “harmed the public at large or that they related to public health and safety.”<sup>59</sup> Although the two Casper cases do not involve influencer marketing per se, they provide helpful precedent for potential plaintiffs seeking remedy against influencer advertising campaigns that fail to disclose material commercial affiliations. If other courts follow the Southern District of New York’s more expansive construction of the New York consumer protection statute, plaintiffs situated similarly to Vans might prevail further against competitors under GBL § 349 for deceptive use of social influencer marketing.

### *C. False Advertising and Endorsement under the Lanham Act*

To secure federal jurisdiction, plaintiffs will often bring claims under the Lanham Act and state consumer protection statutes in tandem. The Lanham Act is a federal statute governing trademarks, service marks, and unfair competition, but its reach is somewhat constrained when it comes to addressing the concealment of sponsorship in influencer advertisements because, in contrast to the FTC guidelines and New York consumer protection laws, the Lanham Act imposes no affirmative duty to disclose sponsorship.<sup>60</sup> It is well-established that “[w]hat constitutes false advertising under [the FTC] Act does not necessarily constitute violation of [the] Lanham

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54. *Id.*

55. *Id.* at 636.

56. *Id.* at 644.

57. No. 16-CV-03223, 2016 WL 6561386 (S.D.N.Y. Oct. 20, 2016).

58. *Id.* at \*7.

59. *Id.* at \*8.

60. *See, e.g.*, *Clark Consulting, Inc. v. Fin. Solutions Partners, LLC*, No. 05-CV-06296, 2005 WL 3097892, at \*3 (S.D.N.Y. Nov. 17, 2005) (“[T]he [Lanham] Act imposes no affirmative duty of disclosure . . . and a claim cannot be based on the failure to disclose a fact.”); *McNeilab, Inc. v. Am. Home Prod. Corp.*, 501 F. Supp. 517, 532 (S.D.N.Y. 1980) (“[A] failure to inform consumers of something, even something that they should know, is not per se a misrepresentation actionable under section 43(a) of the Lanham Act.”). It is also worth noting that standing under the Lanham Act requires “a plaintiff [to] plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 140 (2014). This nullifies its usefulness to consumer advocacy organizations like Truth in Advertising and Public Citizen which might otherwise bring claims against businesses for deceptive

Act.”<sup>61</sup> To be liable under the latter, the deceptive conduct must go beyond merely concealing sponsorship.<sup>62</sup> A Lanham Act plaintiff must demonstrate “by extrinsic evidence, that the challenged [advertisements] tend to mislead or confuse consumers” and “that a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement.”<sup>63</sup>

To date, no plaintiff has successfully alleged that by failing to disclose sponsorship, the brand or influencer misled consumers to a point actionable under the Lanham Act. For example, in 2018, the court in *Lokai Holdings, LLC v. Twin Tiger USA, LLC* dismissed Twin Tiger’s argument that Lokai violated the Lanham Act by failing to disclose that it made “payments of money and giveaways of free bracelets to celebrities in exchange for their wear[ing] Lokai product and/or post[ing] about Lokai on social media.”<sup>64</sup> The court explained that “the Lanham Act requires an affirmative misrepresentation or an omission that renders an affirmative statement false or misleading—not a failure to disclose something material.”<sup>65</sup>

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influencer campaigns. *See generally* TRUTH IN ADVERTISING, <https://www.truthinadvertising.org/> (last visited Mar. 16, 2020); PUBLIC CITIZEN, <https://www.citizen.org/> (last visited Mar. 16, 2020).

61. *L & F Prod. v. Procter & Gamble Co.*, 845 F. Supp. 984, 1001 (S.D.N.Y. 1994).

62. *Id.*

63. *See id.* (citing *Johnson & Johnson-Merck Consumer Pharm. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 297–98 (2d Cir. 1992)). In general, to establish a prima facie case under § 43(a)(1)(B) for false misrepresentation, the plaintiff must show that the defendant

- (1) Uses a false or misleading
  - (A) Description of fact or
  - (B) Representation of fact;
- (2) In interstate commerce;
- (3) And in connection with goods or services;
- (4) In commercial advertising or promotion;
- (5) Which misrepresents the nature, qualities, or geographic origin of
  - (A) The defendant’s goods, services or commercial activities or
  - (B) The goods, services or commercial activities of another person;
- (6) And the plaintiff has been or is likely to be damaged by these acts

MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:24 (5th ed. 2020).

64. 306 F. Supp. 3d 629, 638 (S.D.N.Y. 2018).

65. *Id.* at 639–40. Along the same lines, although not dealing with influencers, the court in *Mitcham* dismissed in substantial part Casper’s Lanham Act claims because “many of the statements in question are simply not false or plausibly misleading,” and Lanham Act imposes “no affirmative duty to disclose affiliate marketing relationships.” *Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 638 (S.D.N.Y. 2016). *Lokai* is the only published decision in the United States to address whether a social media influencer’s failure to disclose sponsorship connections is actionable under the Lanham Act. *See generally Lokai*, 306 F. Supp. 3d at 629. In other contexts, courts have split on whether § 43(a)(1)(B) requires an affirmative misrepresentation. Some courts have simply held that “the Lanham Act proscription against the false representations impos[es] no affirmative duty of disclosure.” *Int’l Paint Co., Inc. v. Grow Group, Inc.*, 648 F. Supp. 729, 731 (S.D.N.Y. 1986). Many courts have articulated a rule in line with *Lokai*, that “the Lanham Act requires an affirmative misrepresentation or an omission that renders an affirmative statement false or misleading—not a failure to disclose something material.” 306 F. Supp. 3d at 639–40. The District Court of Utah remains an outlier in articulating a more expansive view of § 43(a)(1)(B), by allowing a claim against a competitor for manipulating Amazon reviews to proceed under § 43(a)(1)(B) on the theory that the defendant used a false or misleading “device” in commercial advertising. The Utah court found that

## INFLUENCER MARKETING IN THE FASHION INDUSTRY

If a plaintiff can demonstrate that an influencer campaign falsely indicated sponsorship or concealed sponsorship and mislead consumers, the conduct may be actionable. As influencer campaigns continue to increasingly populate the social media landscape, brands should be wary of allowing influencers to promote their brand without carefully monitoring the content to avoid potential liability under the Lanham Act.

### III. REPUTATIONAL RISKS OF NON-DISCLOSURE

Concealing sponsorship not only exposes brands to legal liability, but can also irreparably damage brand perception among consumers.<sup>66</sup> To avoid disclosure is to misunderstand the psychology of influencing; just like a friendship, followers expect transparency from influencers, and, in turn, are willing to make allowances for paid endorsements because they come from a source they trust.<sup>67</sup> If a brand violates that trust, as illustrated by the proliferate press coverage of Lord & Taylor's paisley dress FTC enforcement action, it risks bad publicity and damage to consumer goodwill.<sup>68</sup>

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"NatureWise's use of the device for voting on the helpfulness of customer reviews on Amazon misrepresented the nature, characteristics, or qualities of NatureWise's goods or its commercial activities." *Vitamins Online, Inc. v. HeartWise, Inc.*, 207 F. Supp. 3d 1233, 1244 (D. Utah 2016), *order vacated in part on reconsideration*, No. 2:13-CV-982, 2017 WL 2733867 (D. Utah May 11, 2017); see also Alexandra J. Roberts, *False Influencing*, 109 *Geo. L.J.* (forthcoming 2020).

66. See *infra* note 68.

67. See Lisa J. Abendroth & James E. Heyman, *Honesty is the Best Policy: The Effects of Disclosure in Word-of-Mouth Marketing*, 19 *J. MARKETING COMM.* 4, 245–46 (2012) (demonstrating that upfront, transparent disclosure of sponsorship generates more positive responses to the sponsored content). For example, a recent empirical study shows that consumers respond more negatively when they encounter undisclosed sponsored content than when they encounter disclosed sponsored content from an influencer they trust. Harrison, *supra* note 17 at 407; see also *Why Do Influencers Really Need to Tell Audiences That They're Getting Paid?*, *THE FASHION L.* (Oct. 25, 2019), <https://www.thefashionlaw.com/do-influencers-really-need-to-tell-audiences-that-theyre-getting-paid/> (citing to a recent study indicating that consumers' purchasing intentions are virtually unaffected by sponsorship disclosure).

68. See, e.g., *Lessons Learned from Lord & Taylor's Run-In With the FTC*, *ADWEEK* (May 18, 2016), <https://www.adweek.com/digital/brendan-lattrell-grapevine-guest-post-lord-and-taylor-ftc/> ("Remember, it's not just your business or brand reputation that's at stake here. If customers feel that a brand has duped them with unclear influencer advertising, customer loyalty can also be seriously compromised."); Nathalie Tadena, *Lord & Taylor Reaches Settlement with FTC Over Native Ad Disclosures*, *WALL STREET J.* (Mar. 15, 2016), <https://www.wsj.com/articles/lord-taylor-reaches-settlement-with-ftc-over-native-ad-disclosures-1458061427>. An example of reputational harm can also be seen through the recent Sunday Riley FTC enforcement action for manipulation of product reviews. Although not an influencer situation, it showcases the bad press a brand may experience as a result of an enforcement action. There, Ms. Riley instructed her employees to open multiple user accounts on the Sephora website so that they could post positive reviews and "dislike" negative reviews of Sunday Riley products with the hope of inflating the positive and discrediting the negative. The FTC settlement resulted in a twenty-year consent decree, requiring the brand to implement certain heightened record keeping with regard to advertising content and personnel, and install compliance-monitoring systems. A plethora of negative press coverage followed, showing deceptive influencer reviews have the potential to undercut consumer confidence in crowd-sourced product reviews more broadly. See, e.g., Sandra E. Garcia, *Sunday Riley Settles Complaint That It Faked Product Reviews*, *N.Y. TIMES* (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/us/sunday-riley-fake-reviews.html>; *Sunday Riley, CEO Settle FTC Charges That Employees Posted Fake Online Reviews at CEO's Direction*, *FTC* (Oct. 21, 2019), <https://www.ftc.gov/>

Fear of alienating followers and undercutting the effects of the native advertisement may lead brands and influencers to avoid sponsorship disclosure. For example, Katie Sturino, the influencer behind @katiesturino,<sup>69</sup> explains that she hesitates to disclose sponsorships because “immediately it just feels like, ‘Ugh, she’s just getting a paycheck.’”<sup>70</sup> These views are consistent with traditional theories on covert marketing, which argue it is effective because it allows the brand to bypass consumer resistance triggered by the recognition of the commercial nature of brand-related content.<sup>71</sup> The idea is that individuals develop cognitive strategies that operate as defense-mechanisms—like increased skepticism and cognitive resistance—that are triggered by encounters with certain types of “persuasive communications,” including advertisements.<sup>72</sup> If an individual does not recognize the message as an advertisement, he or she may be more receptive, more easily persuaded by the product suggestion, and less likely to respond defensively to the content.<sup>73</sup> On the flip side, if the individual effectively recognizes the content as an advertisement, he or she will respond with increased skepticism.<sup>74</sup>

In line with these theories, brands may resist disclosure for fear of losing the marketing advantages that go along with obfuscating the commercial nature of the published content. But these traditional theories rest upon two unstable premises. First, they implicitly assume that influencers can effectively disguise the commercial nature of their message, ignoring the fact that consumers have become increasingly well-versed in various emergent forms of native advertising. Second, the evidence does not support the presumption that individuals consistently respond negatively to sponsorship disclosure. Rather, if people trust the endorser, they may continue to credit the endorsement even after sponsorship is disclosed.

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news-events/press-releases/2019/10/devumi-owner-ceo-settle-ftc-charges-they-sold-fake-indicators; Sunday Riley Modern Skincare, LLC, FTC File No. 192-3008, at 9 (Oct. 21, 2019).

69. Katie Sturino is a popular “body-positive” fashion blogger. She is the face behind “The 12ish Style” and the founder of Megababe Beauty, a line of all-natural personal care products. Tyler McCall, *How Katie Sturino Went From Working in PR to Becoming An Influencer-Entrepreneur*, FASHIONISTA: CAREERS (Sept. 17, 2019), <https://fashionista.com/2019/09/katie-sturino-stitch-fix-megababe>.

70. Kali Hays, *Influencers Still Can’t Get Behind Disclosing Paid Posts*, WWD (Oct. 12, 2017), <https://wwd.com/business-news/media/influencers-the-12ish-style-scout-sixteen-hummingbird-high-still-cant-get-behind-disclosing-paid-posts-11026614/>.

71. Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. CONSUMER RES. 1, 3 (1994).

72. *Id.*

73. See, e.g., Nathaniel J. Evans, *Disclosing Instagram Influencer Advertising: The Effects of Disclosure Language on Advertising Recognition, Attitudes, and Behavioral Intent*, 17 J. OF INTERACTIVE ADVERT. 2 (2017); Eva A. Van Reijmersdal, *Effects of Disclosing Sponsored Content in Blogs: How the Use of Resistance Strategies Mediates Effects on Persuasion*, 60 AM. BEHAV. SCIENTIST 1458, 1469 (2016).

74. See Reijmersdal, *supra* note 73, at 1461.

## INFLUENCER MARKETING IN THE FASHION INDUSTRY

As some influencers recognize, concealing sponsorship relationships may indeed do more damage to an influencer's credibility than adopting a transparent approach.<sup>75</sup> Because influencer advertising is a relatively new social phenomenon, there is not an overwhelming amount of research available regarding whether awareness of an influencer's "material connections" to a particular brand impacts consumer response.<sup>76</sup> Preliminary studies suggest, however, that if consumers have grown to trust an influencer, they may not balk at sponsored content.<sup>77</sup> If an individual has sufficiently bonded with a particular endorser, the individual may continue to place stock in the influencer's opinion regardless of whether they learn the influencer was paid for the endorsement.<sup>78</sup> As one survey participant explained after encountering a sponsored post that identified itself as such:

I really do respect [the influencer's] opinion, even though that's an ad, I would still think well I trust her and . . . she would only agree to promote that product, I would like to think, because she actually likes the product. So therefore, I would take that as gospel really and I would probably go out and give that moisturizer a go.<sup>79</sup>

By contrast, when consumers recognize the commercial nature of undisclosed sponsored posts, they are likely to become alienated from the influencer and respond negatively to the brand.<sup>80</sup> Mirroring the way one might respond to a friend who had

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75. For example, celebrity influencers Chiara Ferragni and Aimee Song conspicuously disclose sponsored posts without any marked impact on the response to the associated content. *Brands and Influencers Are Split When it Comes to Sponsorship Disclosures*, THE FASHION L. (Aug. 4, 2017), <http://www.thefashionlaw.com/home/how-are-brands-and-influencers-responding-to-the-ftcs-warning>. Other influencers, including Bryan Grey Yambao, known among his followers as "BryanBoy," have also made a point of consistently disclosing corporate affiliations. Yambao told the *New York Times*: "A lot of my followers appreciate the disclosures. They are thankful that I disclose, especially because there are very few influencers who follow the rules." Julie Zerbo, *Fashion's Full Disclosure—or Not*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/fashion/federal-trade-commission-sponsored-travel.html>.

76. See Evans, *supra* note 73, at 9 (noting that while there is significant research regarding consumer response to sponsorship disclosure in traditional media contexts, "attempts to empirically examine [consumer response] in the context of social media influencer advertising executions are lacking").

77. See *How Audiences Perceive Influencer Sponsored Content*, MEDIKIX, <https://mediakix.com/blog/how-audiences-perceive-influencers-sponsored-content/> (last visited Mar. 16, 2020).

78. To the contrary, consumers were more likely to view the endorsement as a form of self-expression or altruistic presentation of information. See, e.g., Ganga S. Dhanesh & Gaelle Duthler, *Relationship Management through Social Media Influencers: Effects of Followers' Awareness of Paid Endorsement*, 45 PUB. REL. R. 3, 11 (2019) (finding that sponsorship disclosures led the consumers to perceive the influencer as honest and transparent, boosting trust and causing consumers to respond more favorably to the content); Oliver C. Robinson, *Sampling in Interview-Based Qualitative Research: A Theoretical and Practical Guide*, 11 QUALITATIVE RES. PSYCHOL. 1, 25–41 (2013); Yoori Hwang & Se-Hoon Jeong, "This is a Sponsored Blog Post, but all Opinions are My Own": *The Effects of Sponsorship Disclosure on Responses to Sponsored Blog Posts*, 62 COMP. HUM. BEHAV., 528–35 (2016) (finding that sponsorship disclosures in a blog post that emphasized the honest nature of the endorsement offered did not trigger a negative or skeptical reaction in the reader).

79. Harrison, *supra* note 17, at 407.

80. See Caleb T. Carr & Rebecca A. Hayes, *The Effect of Disclosure of Third-Party Influence on an Opinion Leader's Credibility and Electronic Word of Mouth in Two-Step Flow*, 14 J. INTERACTIVE ADVERT. 1, 38–50

failed to be forthcoming about their motives in recommending a particular product, one consumer complained after encountering a sponsored post where sponsorship was not disclosed: “It’s kind of like they don’t appreciate us . . . to be that honest with us, it’s like they’re lying to us. And there’s no need for that because we respect them. It kind of makes you feel like I’m just a number, just to make them some money.”<sup>81</sup> Indeed, these recent reexaminations of consumer attitudes toward sponsored content suggest both the brand and the consumer stand to benefit from transparency.<sup>82</sup>

#### IV. BEST PRACTICES FOR DISCLOSING SPONSORED INFLUENCER CONTENT

If you are a business considering engaging in influencer advertising or an influencer, it is important to recognize that if compensation has been exchanged, whether it be monetary payment, free products, or a trip to Paris for endorsing a brand or product, the relationship must be disclosed.<sup>83</sup> A key factor to consider is whether “knowing about that gift or incentive would affect the weight or credibility your readers give to your recommendation.”<sup>84</sup> Even if readers are likely to give less stock to the endorsement knowing what the influencer received in exchange for the favorable review, disclose.

Whether an advertisement is misleading is a fact-based inquiry. The FTC considers the “net impression” produced by the advertisement when evaluating whether an advertisement is likely to mislead consumers.<sup>85</sup> Four factors should be considered when determining whether the contemplated disclosure is sufficient: (1) the context in which the advertisement is disseminated and any reasonable expectations created by the advertising format; (2) the target audience of the advertisement; (3) the nature of the message, and (4) any qualifying information contained in the advertisement.<sup>86</sup>

With respect to the manner of disclosure, FTC guidelines are quite specific:

- **Disclosures should be clear and conspicuous.** Disclosures should be prominent, and appear at the onset (prior to the consumer

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(2014) (noting that disclosure of sponsorship positively effects the perception of source expertise, as the payment signifies a brand’s recognition of the source as knowledgeable).

81. Harrison, *supra* note 17, at 407.

82. See, e.g., Walter J. Carl, *The Role of Disclosure in Organized Word-of-Mouth Marketing Programs*, 14 J. MARKETING COMM. 225, 237 (2008); Callum Chapple & Fiona Cownie, *An Investigation into Viewers’ Trust in and Response Towards Disclosed Paid-for-Endorsements by YouTube Lifestyle Vloggers*, 5 J. PROMOTIONAL COMM. 2, 123 (2017) (noting that in the world of lifestyle vlogging, “transparency has a positive influence, the earlier and more obvious the disclosure, the more positively accepted the message”); Mirjam Tuk et al., *Sales and Sincerity: The Role of Relational Framing in Word-of-Mouth Marketing*, 1 J. CONSUMER PSYCHOL. 19, 38 (2009).

83. As Jennifer Lopez can attest, even posting a picture with a sponsored product in the background triggers disclosure requirements under FTC guidelines. See Barber, *supra* note 36.

84. *Endorsement Guides*, *supra* note 13.

85. See *Enforcement Policy Statement on Deceptively Formatted Advertisements*, FTC (Apr. 18, 2016), [https://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2016/04/160418enforcementpolicyfrn.pdf](https://www.ftc.gov/system/files/documents/federal_register_notices/2016/04/160418enforcementpolicyfrn.pdf).

86. *Id.*



## INFLUENCER MARKETING IN THE FASHION INDUSTRY

clicking on the link) near the headline of the native advertisement.<sup>87</sup> Once the advertisement is accessed, the disclosure should appear in the top left above the byline or near the advertisement's focal point.<sup>88</sup>

- **No orphans.** The disclosure should “follow” the advertisement if the advertisement is republished on other platforms, such as in search results or social media.<sup>89</sup>
- **Consistency across platforms.** The disclosure should be visible on all devices and platforms in which the consumer might view the advertisement.<sup>90</sup>
- **Clear statements.** The disclosures should employ the term “Advertisement” (or variants thereof, such as “Paid Advertisement” or “Sponsored Advertising Content”), while the terms “Promoted” or “Promoted Stories” should be avoided as ambiguous and potentially misleading.<sup>91</sup>
- **Avoid shorthand.** Company names or logos on their own are insufficient to identify that content is commercial content.<sup>92</sup>
- **Have the facts.** Certain objective assertions about a product such as “reduces wrinkles” or “helps you lose weight” must be supported by reliable scientific evidence.<sup>93</sup>
- **Speak from experience.** Do not promote a product you have not tried.<sup>94</sup>
- **Sponsored content.** Terms such as “Presented by [X],” “Brought to You by [X],” “Promoted by [X],” or “Sponsored by [X]” may

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87. 16 C.F.R. § 255.5 (2020) (explaining that all material connections should be “clearly and conspicuously” disclosed). See also *Native Advertising: A Guide for Businesses*, FTC (Dec. 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> (explaining that “advertisers are responsible for ensuring that native ads are identifiable as advertising before consumers arrive at the main advertising page”).

88. See 16 C.F.R. § 255.5 (explaining that bloggers and social media influencers must “clearly and conspicuously disclose” sponsored content); *Native Advertising: A Guide for Businesses*, *supra* note 87 (explaining that disclosures “should appear near the ad’s focal point” or “immediately in front of or above a native ad’s headline”).

89. *Native Advertising: A Guide for Businesses*, *supra* note 87.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Disclosures 101*, *supra* note 13.

94. *Id.*

be acceptable if the company did not create or influence the content.<sup>95</sup>

If there is any doubt, advertisers should err toward disclosure or consult legal counsel.

## V. CONCLUSION

When making decisions about sponsorship disclosure, brands should be cognizant of both the legal risks of non-disclosure and how consumer response to influencer marketing diverges from consumer response to traditional forms of advertising. Social influencer marketing is effective because the relationship between an influencer and their followers approximates a friendship. Unlike traditional advertising, consumers will often give influencer endorsements the benefit of the doubt regardless of sponsorship. Influencers may lose followers if their voice is subsumed by sponsored messages, but they also risk disaffecting followers by avoiding transparent disclosure of corporate sponsorships and being slapped with an FTC action or civil lawsuit.

Transparency about sponsorship relationships may insulate brands and influencers against both legal risk and negative responses triggered by traditional modes of advertising and covert forms of marketing. Where the consumer's relationship with the influencer is sufficiently strong, not only is the consumer less likely to be put off by sponsorship disclosure, but they may even be inclined to place more stock in the endorsement since it comes from a trusted source—regardless of compensation exchanged. In short, deceptive social influencer marketing is risky business and increasingly likely to prove bad for the bottom line as individuals become more adept at weeding out undisclosed sponsored content from spontaneous endorsements.

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95. *Id.*

