
BLURRED LINES: FEDERAL TRADE COMMISSION'S
DIFFERENTIAL RESPONSES TO ONLINE ADVERTISING AND
FACE TO FACE MARKETING

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I. Introduction

Commercialism in America rose steadily throughout the 20th century and continues to expand into the everyday lives of Americans today.¹ In times of economic prosperity, shopping boosts capitalism while Americans try to keep up with their peers on the latest trends seen in magazines, television, film and social media.² To assist with economic growth, Americans are exposed to advertising in a variety

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¹ See GARY S. CROSS, AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA 128, 220 (Colum. U. Press 2000) (describing American commercialism beginning in the 1930's with the expansion of advertising and rapidly rising with the inflation of the 1970's).

² See JAMES J. FARRELL, ONE NATION UNDER GOODS: MALL AND THE SEDUCTION OF AMERICAN SHOPPING 2 (Smithsonian Books 2010) (estimating that American malls served 196 million customers each month and generate more than a trillion dollars in annual sales); see also Josh Sandburn, *America's Malls and Department Stores Dying Off*, TIME (2019), archived at <https://perma.cc/BF9Q-5QDN> (detailing how malls such as the Great Mall of America, despite their growth and success in the late 1900s and early 2000s, suffered a drop in mall visits in light of online shopping and the Great Recession).

of forms; many of which are hidden and not immediately apparent to the average consumer.³ Most notably, there are the ever familiar television commercials and print publication advertisements dispersed throughout magazines.⁴ In addition, most people can think of a slogan they recognize from a radio jingle.⁵ However, without consumer knowledge, hidden articles exist within magazines highlighting specific products without disclosing that the company is paying for that spot.⁶ Similarly, with the invention of social media, influencers now receive paid compensation and are sent free products to endorse companies on American's newsfeeds.⁷ As time moves on, the lines between reality and advertising are blurring, and the Federal Trade Commission ("FTC") attempts to catch up with these advancing advertising methods.⁸ However, this endeavor quickly became a game

³ See Sydney Ember, *F.T.C. Guidelines on Native Ads Aim to Prevent Deception*, N.Y. TIMES, Dec. 23, 2015, at B1 (highlighting the use of native advertising as one of the many examples of covert marketing used by companies); see also *Blurred Lines Between Branded Video Content and Ads*, THINKWITHGOOGLE.COM (Dec. 2014), archived at <https://perma.cc/A578-3ZKF> (exposing the "need for content and new customer experiences" as a top priority for marketing and advertising companies and the importance of authenticity in these ads).

⁴ See Walter D. Scott, *The Psychology of Advertising*, ATLANTIC (Jan. 1904), archived at <https://perma.cc/BW95-RJ6M> (showcasing the first print advertisement run in Harper's Magazine in 1864 and the large increase in advertising since then); see also John Plunkett, *TV Advertising Skipped by 86% of Viewers*, GUARDIAN (Aug. 24, 2010), archived at <https://perma.cc/FLY5-E9YY> (observing most people fast forward through television advertising yet it continues to be the most memorable form of advertising).

⁵ See Press Release, Federal Trade Commission, Enforcement Policy Statement on Deceptively Formatted Advertisements (Dec. 22, 2015) (on file with author) (detailing Federal Trade Commission scrutiny placed upon advertorials which create a false impression upon readers that a journalist has tried the product).

⁶ See J.B. Wilkinson et al., *Reader Characterization of a Controversial Communication: Advertisement Versus Editorial*, 14 J. PUB. POL'Y & MKT. 245, 249 (1995) (explaining hidden advertising methods such as advertorials where companies pay for space in magazines for advertisements that look more like editorial content).

⁷ See AJ Agrawal, *Why Influencer Marketing Will Explode in 2017*, FORBES (Dec. 27, 2016), archived at <https://perma.cc/Y4T9-SVYM> (defining influencer marketing as a "grey territory between an official testimonial and a subtle product mention, which is done almost in passing").

⁸ See Federal Trade Commission, *What We Do* (Oct. 25, 2017), archived at <https://perma.cc/J9NN-49G2> (outlining the FTC's authority to attempt to address issues with advertising practices such as conducting investigations and collecting complaints) [hereinafter FTC, *What We Do*].

of cat and mouse as companies develop new methods of advertising at a rate faster than the FTC can keep up.⁹

While the FTC begins to attack individual influencers on social media, rather than the companies that send them the products, companies adopt new methods to reach consumers.¹⁰ Some of these methods implemented by companies such as Apple, Google, and Microsoft include sending brand ambassadors into public spaces and having them place and utilize products into the everyday lives of Americans.¹¹ As another method, brands such as the fashion houses of Chanel, Gucci, Louis Vuitton, and Dior provide potential critics with lavish lodging and perks to attend events.¹² This is all done in the hope of receiving a glowing review.¹³ As a result, the reviewer receives an incredible life experience, and the company receives great reviews at the expense of the misled consumers who buy the

⁹ See Julie Zerbo, *Fashion's Full Disclosure - Or Not*, N.Y.TIMES (July 7, 2017), archived at <https://perma.cc/D7EC-8EXV> (exemplifying the fashion industries use of influencers on various social media platforms in a manner that is not clear and conspicuous).

¹⁰ See Katie Notopolous, *21 Celebrities Just Got a Harsh Warning About Instagram Ads*, BUZZFEED (Sept. 14, 2017), archived at <https://perma.cc/67F6-B4WF> (highlighting warning letters from the FTC to twenty-one celebrities about their improper disclosure of a sponsorship relationship with the content in their posts); see also Natasha Singer, *Silicon Valley Courts Brand-Name Teachers: Raising Ethics Issues*, N.Y.TIMES, Sept. 2, 2017, at A1 (demonstrating the methods by tech companies to assist public school teachers while they gain acknowledgement of their products by children); see also Leticia Miranda, *Lord & Taylor Paid Prominent Instagrammer As Much As \$4,000 for Undisclosed Ads*, BUZZFEED (Mar. 18, 2016), archived at <https://perma.cc/DQ9W-8TEN> (providing an example of how Lord and Taylor utilized social media influencers to advertise products on their respective feeds); see also Zerbo, *supra* note 9 (explaining the actions of various fashion houses including Chanel, Prada, and Dior to supply influential writers and celebrities with free vacations or clothing to promote their brands on the national stage).

¹¹ See Singer, *supra* note 10 (introducing the practice of Silicon Valley companies sending technology into public school classrooms through teachers who act as brand ambassadors). These teachers conduct quasi-market research on the children by utilizing specific apps and reporting back information about the apps to the tech company. *Id.*

¹² See Zerbo, *supra* note 9 (discussing how fashion houses sponsor publications and influencers to attend various events held in venues such as the Blenheim Palace in England).

¹³ See Zerbo, *supra* note 9 (emphasizing how the lack of transparency between media professionals, fashion houses and the public hurts the consumer's trust in both the producer and influencer).

company's products due to the positive reviews of these undisclosed relationships.¹⁴

Recently, Silicon Valley companies such as Google, Microsoft, and Apple began sending technology to public school teachers in order to have them implement their products in the classroom.¹⁵ While this may appear to benefit students, it also primes an entire generation to grow up using a specific type of technology.¹⁶ As if the new tech weren't enough, public high schools will rent out advertising spaces within the school or on cafeteria menus to companies in exchange for financial payment.¹⁷ Even other government infrastructures accept this form of commercialism by allowing logos and advertisements to be placed in parks and buildings.¹⁸ The hope of the company is that students and young adults continue to use that brand into adulthood, since they grew up being taught how to use it or recognized the brand name from a childhood location that they often visited.¹⁹ While regulating the advertising content that appears on social media as unsponsored posts is important, the FTC has completely ignored this new practice of face to face marketing that is arguably a step further

¹⁴ See Zerbo, *supra* note 9 (reinforcing the notion that media professionals do not disclose their relationship to fashion companies when they report on the success of previews or fashion shows).

¹⁵ See Singer, *supra* note 10 (providing a specific example of advertising entering the lives of public school students without their knowledge or consent of the parents). Google, Apple, and Microsoft provide classroom technology such as tablets, apps, and computers to assist teachers in navigating interactive methods of teaching the next generation of students. *Id.*

¹⁶ See Jack Nicas & Natasha Singer, *Apple Unveils New iPad to Catch Google in the Classroom*, N.Y. TIMES, Mar. 27, 2018, at B7 (stating that "Apple, Google and Microsoft are each aiming to accustom schoolchildren to their operating systems to win the next generation as lifelong customers.").

¹⁷ See MARK BARTHOLOMEW, ADCREEP: THE CASE AGAINST MODERN MARKETING 33 (Stan. Univ. Press, eds., 1st ed. 2017) (providing examples of public schools renting out bus spaces, hallways, score boards, and even athletic team jerseys to corporations for advertising space). "More than 80 percent of American public school students witness some form of overt non-school-related advertising every school day." *Id.*

¹⁸ See *id.* (utilizing the example of government's signing away state and national park sponsorship within forests, roads, trails and concession buildings in exchange for funding from companies).

¹⁹ See Singer, *supra* note 10 (describing the dangers of blurring the lines between reality and advertisement, specifically within the context of children and the conflict with a teacher's obligation to the schools).

into unfair business practices relating to advertising.²⁰

This note will begin with a history, highlighting the rapid changes in advertising laws and how the United States has attempted to place regulation on this practice.²¹ It will then describe the recent rise of social media, and the relationships that individuals have with companies to become “influencers” and brand ambassadors.²² Additionally, it will describe the FTC’s attempts to catch up with the new forms of advertising that are being created by these companies.²³ This note will go into detail regarding other professions that have had restrictions placed upon their ability to advertise, such as lawyers and optometrists.²⁴ Furthermore, this note will zero-in on disclosure and why it is necessary in the advertising-ambassador relationship.²⁵ This note will analyze which entity will have the authority to address the problem of blurring lines between advertising and reality.²⁶ Finally, this note will conclude that it is necessary to adjust the regulations on advertising in order to protect the public from lack of disclosure and hidden advertising.²⁷

²⁰ See Bloomberg News, *Digital Celebrities Rely on New Trade Group to Set Ad Rules*, ADAGE (June 22, 2017), archived at <https://perma.cc/N9UL-3CNQ> (commenting on the inability for the FTC to regulate social media posts from companies who provide inconsistent guidance to their influencers on how to properly disclose and common issues with proper disclosure on these forums); see also Tim Peterson, *What the FTC’s Latest Endorsement Disclosure Actions Mean for Marketers*, MARTECH: SOCIAL (Sept. 14, 2017), archived at <https://perma.cc/C8TZ-QX8G> (demonstrating the focus on social media disclosure and how despite FTC action towards brands and influencers, it has been unsuccessfully adapted); see also Zerbo, *supra* note 9 (reporting the FTC first step towards regulation by sending ninety letters to celebrities, influencers, and brands warning them from creating “undisclosed sponsored content”).

²¹ See *infra* Part II.

²² See *infra* Part II.

²³ See *infra* Part II.

²⁴ See *infra* Part II.

²⁵ See *infra* Part III.

²⁶ See *infra* Part IV.

²⁷ See *infra* Part V.

II. History

A. *The Federal Trade Commission*

In 1914, President Woodrow Wilson signed legislation creating the FTC to enforce “the law of unfair advertising to protect consumers from unjust business practices.”²⁸ Congress created the regulatory authority in response to Congressional disappointment by the Supreme Court’s interpretation of the Sherman Act.²⁹ The comprehensive Federal Trade Commission Act (“FTC Act”) is purposefully broad to avoid further misinterpretation by the Supreme Court in the FTC’s powers to regulate commerce.³⁰ The FTC Act was originally created as a way to combat the new invention of trusts throughout the Progressive Era.³¹ However, as of late, Congress

²⁸ See Shannon Byrne, Article, *The Age of the Human Billboard: Endorsement Disclosures in New Millennia Media Marketing*, 10 J. BUS. & TECH. L. 392, 393 (2015) (providing a general timeline for the rise of social media advertising limitations and regulations); see also Federal Trade Commission, 15 U.S.C. §§ 41-58 (2012) (putting forth the criteria for adoption of the Federal Trade Commission). The Federal Trade Commission Act established the FTC which is comprised of five members appointed by the President of the United States and approved by the Senate. *Id.* at §41. This Commission is statutorily bipartisan with members who serve seven year terms. *Id.*

²⁹ See Neil W. Averitt, Article, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 230-31 (1980) (describing the decision in *Standard Oil Co. v. United States*, 221 U.S. 1 at 60, which construed powers taken by Congress through the Sherman Act as an “undue restraint” on interstate or foreign commerce). The Court’s interpretation of the Sherman Act took judgment on commerce issues away from Congress. *Id.*; see also Federal Trade Commission, *The Antitrust Laws* (2018), archived at <https://perma.cc/7DPP-2B9Z> (describing the scope of the Sherman Antitrust Act as it “outlaws ‘every contract, combination, or conspiracy in restraint of trade,’ and any ‘monopolization, attempted monopolization, or conspiracy or combination to monopolize.’”). The statute’s scope has been limited to only apply to “unreasonable” restraints of trade, not all restraints of trade. *Id.* With its ability to regulate “unfair and deceptive business practices,” the Federal Trade Commission is able to bring cases under the FTC Act that would also violate the Sherman Antitrust Act, granting the regulatory agency a broader scope of claims to pursue. *Id.*

³⁰ See Averitt, *supra* note 29, at 233 (describing the Congressional fear of antitrust policy being placed in the hands of the judiciary and the need for stronger legislation to remove any chance of granting power to the courts in this respect).

³¹ See Andrew Glass, *Woodrow Wilson creates Federal Trade Commission*, Sept. 26, 1914, POLITICO (Sept. 26, 2012), archived at <https://perma.cc/HK4G-D8CF> (providing a general background for the creation of the Federal Trade Commission

passed laws granting the FTC with increased powers to combat new anticompetitive practices.³²

The FTC's mission is both to promote business and competition within the United States while protecting consumers from the practices that businesses might use to gain an edge in the marketplace.³³ On the consumer protection front, the FTC develops regulations, educates consumers about their rights, and sues companies and individuals that violate their laws.³⁴ In terms of business promotion, the FTC enforces antitrust laws, challenges anticompetitive mergers and other business practices that may harm consumers, and monitors business practices.³⁵ The FTC attempts to balance its missions without unduly burdening business activity, however this proves to be difficult when they act in both the interests of consumers and corporations.³⁶

Generally, the FTC is responsible for "identifying illegal practices, taking action against illegal practices through law enforcement, preventing consumer injury through education of consumers and businesses, and protecting American consumers globally."³⁷ The FTC Act provides a clear background for the

and highlighting the nature of empowering the commission to issue cease-and-desist orders to large corporation to curb unfair trade practices).

³² See *id.* (providing a general background for the creation of the Federal Trade Commission and highlighting the nature of the commission to change duties with time).

³³ See FTC, *What We Do*, *supra* note 8 (describing the unique dual mission of the Federal Trade Commission to protect consumers and promote competition).

³⁴ See FTC, *What We Do*, *supra* note 8 (elaborating upon the methods utilized by the FTC to carry out part of their mission).

³⁵ See FTC, *What We Do*, *supra* note 8 (continuing to discuss the utilities and methods the FTC used to carry out their partial mission including policy and research tools through hearings, workshops, and conferences).

³⁶ See Federal Trade Commission, *The Federal Trade Commission's (FTC) Mission* (Dec. 2012), archived at <https://perma.cc/F6YW-HS8B> (describing the mission of the FTC and the challenges associated with balancing consumer interests and business practices).

³⁷ See *id.* (breaking down the duties of the FTC in relation to its mission to identify illegal practices, stop and take action against illegal practices through law enforcement, prevent consumer injury through education of consumers and businesses, enhance consumer benefit through research, reports, and advocacy, and protect American consumers globally).

investigative and enforcement authority of the FTC.³⁸ Section 9 of the FTC Act grants the FTC the power to subpoena witnesses for testimony or attendance in relation to an investigation.³⁹ Section 20 of the same act allows the FTC to seek enforcement of those subpoenas.⁴⁰ Furthermore, Section 6 grants power to the FTC to issue special and annual reports to serve as a guide for businesses to update their practices in order to accord with the regulations put forth by the FTC.⁴¹

The Consumer Protection Clause located in Section 5 of the FTC Act provides enforcement power of disclosure by declaring unfair or deceptive acts or practices “unlawful when affecting commerce.”⁴² The FTC Bureau of Consumer Protection works alongside the Bureau of Economics in order to investigate cases and initiate civil enforcement actions to enforce consumer protection violations.⁴³ Section 5 is often cited to in regards to the issue at hand because a lack of disclosure in an endorsement or advertising context is typically the offense exercised by companies and endorsers on social media.⁴⁴ This

³⁸ See 15 U.S.C. §§ 41-58 (putting forth the exact parameters by which the FTC may act on behalf of the United States against the business and advertising practices of companies).

³⁹ See Documentary Evidence; Depositions; Witnesses, 15 U.S.C. § 49 (2017) (describing the methods available to the FTC to conduct investigations through ordering testimony to be taken by deposition in any proceeding or investigation pending under this subchapter at any stage of such proceeding or investigation).

⁴⁰ See Separability clause, 15 U.S.C. § 57 (2017) (describing the enforcement powers granted to the FTC in carrying out its investigations). These subpoenas are utilized regularly in order to gain existing documents or oral testimony in order to investigate unfair business practice or other antitrust violations. *Id.*

⁴¹ See Additional powers of Commission, 15 U.S.C. § 46 (2017) (highlighting the resources available to businesses to ensure compliance with FTC standards such as (a) whether the requesting agency has agreed to provide or will provide reciprocal assistance to the Commission (b) whether compliance with the request would prejudice the public interest of the United States; and (c) whether the requesting agency’s investigation or enforcement proceeding conference acts or practices that cause or are likely to cause injury to a significant number of persons).

⁴² See Unfair methods of competition unlawful; prevention by Commission, 15 U.S.C. § 45 (2017) (describing where the FTC gains authority to address disclosures and investigate claims for lack of disclosure).

⁴³ See FTC, *What We Do*, *supra* note 8 (recognizing the official capacity of the FTC).

⁴⁴ See Purpose and definitions, 16 C.F.R. § 255.0 (b) (defining an endorsement as “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are

section is enforced through settlements in response to complaints or administrative trials conducted by the FTC's complaint counsel, where the losing party may seek appeal through the Supreme Court of the United States.⁴⁵

B. Emergence of Advertising and Legal Limits Placed Upon Advertising in Early Years

Advertising can be traced back to painted walls and signs found by archaeologists in the ruins of ancient civilizations.⁴⁶ The first modern sign of advertising began in the 1600's in the United Kingdom during the bubonic plague.⁴⁷ In 1704, the first newspaper advertisement ran in the "Boston News-Letter."⁴⁸ Benjamin Franklin started the rise of print advertising by running published pages of advertisements in the "Pennsylvania Gazette and General Magazine."⁴⁹ In 1843, the first advertising agency opened in Philadelphia by Volney Palmer, and the first convention of advertising agents was held in New York thirty years later.⁵⁰ In 1893, Munsey's

identical to those of the sponsoring advertiser."); *see also* David Ingram and Diane Bartz, *FTC Demands Endorsement Info from Instagram 'Influencers'*, REUTERS (Sept. 13, 2017), *archived at* <https://perma.cc/9SN6-RKXA> (describing more recent actions taken by the FTC to make influencers accountable for knowing disclosure law when they post on behalf of companies); *see also* Miranda, *supra* note 10 (describing a Section 5 violation for the company Lord & Taylor in its social media advertising campaigns).

⁴⁵ *See* FTC, *What We Do*, *supra* note 8 (describing the methods the FTC may use when attempting to bring claims against a company for violating disclosure regulations).

⁴⁶ *See* Alan Sharavsky, *Great Moments in Advertising History*, THE BALANCE (Feb. 14, 2017), *archived at* <https://perma.cc/4JX2-74WT> (describing the advertisements found in Pompeii from 79 A.D.).

⁴⁷ *See* *Advertisement for Medicine to Cure the Plague*, THE BRITISH LIBR. BD. (Feb. 24, 2018), *archived at* <https://perma.cc/Z4CL-MCXM> (acknowledging the start of print advertising with remedy advertisements during the bubonic plague and its usage to spread false information to unknowing consumers during a worldwide health crisis).

⁴⁸ *See* *Ad Age Advertising Century: Timeline*, ADAGE (Mar. 29, 1999), *archived at* <https://perma.cc/F77A-APZX> (noting the first print advertisement which sought a buyer for a property in Oyster Bay, Long Island).

⁴⁹ *See id.* (indicating the original "classifieds" page located in a print newspaper under Benjamin Franklin's career with the printing press).

⁵⁰ *See id.* (marking the growth in advertising by the development of the first agencies shortly after the introduction of advertising in print mediums).

Magazine became the first magazine to sell at stand value less than the subscription cost, thus keeping the magazine running through advertising revenue.⁵¹

During the 1920s, radio emerged as a mass communication technology, utilizing voice broadcasting to deliver entertainment to listeners worldwide.⁵² Radio began as a hobby for Americans who survived through the economic depression with enough money to purchase this new device.⁵³ Then, it quickly became a staple in homes as the economy began to regenerate.⁵⁴ Originating with a public service financial model, stations were quickly bought out with direct advertising for commercial messages – meeting concern from consumers and a threatened newspaper industry.⁵⁵ In 1929, American Tobacco Co. spent the largest amount of money that any company has ever spent on advertising for a single product, resulting in a \$12.3 million advertisement on Lucky Strikes.⁵⁶ In 1938, radio officially surpassed magazines as the largest generator of advertising revenue.⁵⁷ However, in 1956, a videotape recording gave companies a new

⁵¹ See *id.* (describing the first example of the use of revenue from advertisements opposed to newsstand sales to sustain a magazine).

⁵² See History: 1920's, ADAGE (Sept. 15, 2003), *archived at* <https://perma.cc/6BML-Z2EL> (crediting the Netherlands with the first radio broadcast in 1919, but noting that by the 1920's radio became a primary form of mass communication). By 1926, one in six households owned a radio receiver. *Id.*

⁵³ See Carole E. Scott, *The History of the Radio Industry in the United States to 1940*, ECON. HIST. ASS'N (Feb. 24, 2018), *archived at* <https://perma.cc/7L2D-7546> (noting how during World War 1, the radio was introduced to America through Marconi radio); see also Linda Alchin, *1920's Radio*, SITESEEN LTD. (Jul. 1, 2014), *archived at* <https://perma.cc/A6W5-TDVY> (indicating that a typical radio in the 1920's cost approximately \$150 and were often purchased through credit agreements).

⁵⁴ See History: 1920's, *supra* note 52 (crediting David Sarnoff's classification of the radio as a "household appliance" for the radio's introduction into mainstream America). Despite its eventual success, early on in its development Americans were wary of the radio serving as a symbol of consumerism. *Id.*

⁵⁵ See History: 1920's, *supra* note 52 (showcasing the evolution of radio from a public service model of financing to advertisement model). The first commercial advertisement was in 1922 on for Queensboro Corp. trying to sell apartments in Queens, New York. *Id.* The commercial led to sales of multiple apartments and commercials became a promising method of direct advertising. *Id.*

⁵⁶ See *Ad Age Advertising Century: Timeline*, *supra* note 48 (chronicling the amount of growth that the advertisement industry had gained through the cost of ads).

⁵⁷ See *Ad Age Advertising Century: Timeline*, *supra* note 48 (finding newer, more lucrative places for advertising to the general public). For reference, two years earlier Life Magazine became the first magazine to earn \$100 million in advertising annually. *Id.*

method of advertising with the rise of television and the ability to prerecord commercials.⁵⁸

In 1942, the War Advertising Council organized to prepare \$350 million of voluntary, public service advertising campaigns during World War II.⁵⁹ Before 1976, United States courts drew a sharp distinction between the right to political speech and the right to advertise, as commercial messages could be controlled by governmental intrusion, whereas political speech could not.⁶⁰ The idea that advertising could be regulated was reinforced in *Valentine v. Chrestensen*,⁶¹ when the Supreme Court ruled that commercial speech could be regulated by the city of New York and is not protected by the First Amendment.⁶²

There was a major switch in the 1970's when advertisements became both political and commercial in nature.⁶³ At this point, the Supreme Court started to rule that while state or federal agencies could prohibit false or deceptive advertising, they could not prohibit truthful

⁵⁸ See *Ad Age Advertising Century: Timeline*, *supra* note 48 (introducing TV as a new form of technology to be utilized by advertisers).

⁵⁹ See *Ad Age Advertising Century: Timeline*, *supra* note 48 (discussing the use of advertising to increase morale and participation in wartime efforts).

⁶⁰ See *Ad Age Advertising Century: Timeline*, *supra* note 48 (weighing the importance of social responsibility against 1st amendment speech protections).

⁶¹ See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that the distribution of "commercial or business advertising matter" on the streets of New York was constitutional).

⁶² See *id.* at 55 (distinguishing that the leaflets were of a commercial nature, which violated a city ordinance, rather than of a political nature or protest, which did not).

⁶³ See *Bigelow v. Virginia*, 421 U.S. 809, 830 (1975) (Rehnquist, J., dissenting) (finding that advertisements relating to accredited New York hospitals and clinics which would administer abortions was considered political speech while also being commercial for advertising its low cost but regardless it is protected by the first amendment); see also *Virginia State Bd. of Pharma. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 (1976) (holding that advertising of prescription drug prices by pharmacists may not be forbidden advertising despite Virginia's efforts to do so). The Court distinguishes the Virginia statute as going too far when Justice Blackmun states, "[w]hatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely." *Id.* at 771. The Court opines that commercial speech is not entirely resistant to regulation by governmental entities so long as they are reasonable. *Id.* For example, untruthful speech has never been protected. *Id.* at 771.

advertising about lawful products.⁶⁴ This led to the rise of the time, place, and manner restriction placed upon advertisements, but the regulations had to be content neutral and narrowly tailored to meet a compelling government interest.⁶⁵

C. The Emergence of Regulatory Action Towards Advertising in the Age of Social Media

As the FTC Act began to regulate the ability of business entities to advertise to their consumers, it further adapted to the rise of technology.⁶⁶ The endorsements that were previously found in print and on television were transported to newer smartphone technology and popular websites through the invention of social media.⁶⁷ The practice of social media advertising exponentially increased a company's potential to fine tailor their advertisements toward specific

⁶⁴ See *Bigelow*, 421 U.S. at 827 (finding that commercial speech is afforded protections in the state of New York); see also *Virginia State Bd. of Pharmacy*, 425 U.S. at 773 (finding that commercial speech may be regulated but states must tread lightly with reasonable restrictions).

⁶⁵ See *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 (ruling that time, place, and manner restrictions can be used but only in specific instances for commercial speech).

⁶⁶ See FEDERAL TRADE COMMISSION, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (Mar. 2013) (providing oversight for this new form of advertising).

⁶⁷ See Leah Feinman, Note, *Celebrity Endorsements Fail in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up With the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 100-01 (2011) (indicating growth in the advertising industry with modernization); see also *About, FACEBOOK* (Feb. 8, 2018), archived at <https://perma.cc/KG74-AW8E> (introducing Facebook as a social media platform founded in 2004 with the purpose of connecting people); *About, TWITTER* (Feb. 25, 2018), archived at <https://perma.cc/3Z27-GMHC> (highlighting what Twitter aims to deliver by showing “[w]hat’s happening in the world and what people are talking about right now.”); *About, INSTAGRAM* (Feb. 25, 2018), archived at <https://perma.cc/77AA-D94R> (introducing Instagram as a “home for visual storytelling for everyone from celebrities, newsrooms and brands, to teens, musicians and anyone with a creative passion.”); *Snapchat Support: How to Use Snapchat*, SNAPCHAT (Feb. 25, 2018), archived at <https://perma.cc/43KX-EGTS> (describing Snapchat’s home screen as a place to capture photo or video snaps and share them with friends); *About, YOUTUBE* (Feb. 25, 2018), archived at <https://perma.cc/77MS-PFVX> (defining YouTube’s mission “to give everyone a voice and show them the world.”).

audiences.⁶⁸ As never before, companies can assess personalities and traits of the users who interact with their advertisements based on information collected from the social nature of the forum where they place their ads.⁶⁹

In 1993, five million users were able to “get online” with the invention of the Internet.⁷⁰ By 1999, Internet advertising grew to a \$3 billion industry.⁷¹ Digital advertising with the invention of the Internet can be categorized into five eras: the banner era, channel era, social era, native era, and the modern era.⁷² Throughout the banner era, websites featured advertisements above their content through a medium that consumers could click and be brought directly to the sponsor’s webpage.⁷³ In response to this form of advertisement, the first ad blocker appeared, which operated as a piece of plastic covering the predictable advertisement placement at the bottom of user’s computer monitors.⁷⁴ By 1996, DART technology developed in order for companies to track the number of clicks each advertisement received.⁷⁵ This allowed companies to tailor their campaigns and investigate user behavior to see what advertisements are the most

⁶⁸ See Ankit Oberoi, *The History of Online Advertising*, ADPUSHUP (July 3, 2013), archived at <https://perma.cc/V9HF-7YTB> (discussing the functionality of “Ad Revenue Optimization” which allows companies to track the success and interaction that consumers have with their ads).

⁶⁹ See *id.* (introducing new analytics emerging as social media grows in popularity).

⁷⁰ See *Ad Age*, *supra* note 48 (observing the emerging market of new consumers and potential opportunities to advertise with the invention of the internet).

⁷¹ See *Ad Age*, *supra* note 48 (setting forth data to understand the massive growth of the advertising industry with new tech methods introduced).

⁷² See Christopher Heine, *20 Years of Digital Advertising: From Banner Ads to Sponsored Snapchats*, ADWEEK (Oct. 27, 2014), archived at <https://perma.cc/LM7B-3QKV> (dividing digital advertising into distinct eras).

⁷³ See *id.* (introducing the concept of banner advertising and showcasing some of the shortcomings of the technology); see also Oberoi, *supra* note 68 (referencing the first successful banner advertisement premiered by the online magazine “Hotwired” for AT&T receiving a click rate of 44%).

⁷⁴ See Oberoi, *supra* note 68 (explaining that this ad blocker displayed only what the user wanted to see on the screen and enhanced the user experience).

⁷⁵ See Oberoi, *supra* note 68 (explaining the innovation of Data Advertising Reporting and Targeting (“DART”) to track user interaction and success of campaigns).

successful.⁷⁶ The channel era resulted in advertising entering mediums other than computer modems, such as mobile internet and streaming services, including but not limited to Napster.⁷⁷ The social era began with Facebook's "social ads" that were first used to promote J.P. Morgan Chase credit cards.⁷⁸ This practice was replicated on numerous social media channels to bring advertisements to its loyal users.⁷⁹ For example, YouTube began to use a method for advertisements similar to commercials on television, where users must watch the ad prior to viewing content on the website.⁸⁰ Advertisements began to appear more conspicuously throughout the native era, where they would seamlessly appear as content within news articles and social media websites.⁸¹ The lines begin to blur even further in the modern era as companies begin to explore more inventive methods of advertising.⁸²

In response to this blurring of advertising at the start of the native era, the FTC identified two different forms of endorsements: expert endorsements and consumer endorsements.⁸³ Consumer endorsements consist of statements made "by one or more consumers about that performance of an advertised product or service."⁸⁴ If the consumer endorser achieved extraordinary results, such as an excessive amount of weight loss, the endorsement must include the

⁷⁶ See Oberoi, *supra* note 68 (describing the effectiveness of pop up advertising compared to banner ads and in conjunction with new technology allowing companies to track interactions with the ad).

⁷⁷ See Heine, *supra* note 72 (elaborating upon the early development of advertisement expanding across technological mediums).

⁷⁸ See Heine, *supra* note 72 (providing an example of one specific type of advertising implemented on early social media sites).

⁷⁹ See Heine, *supra* note 72 (showcasing advertising methods on YouTube, Snapchat, Instagram, Twitter, Facebook, and more).

⁸⁰ See Aric Jenkins, *YouTube Will Stop Playing 30-Second Ads You Can't Skip*, FORBES (Feb. 17, 2017), archived at <https://perma.cc/6QL8-SBFU> (cautioning that while YouTube has made a vow to discontinue ads users are unable to skip, it still has yet to implement the change in 2019).

⁸¹ See Heine, *supra* note 72 (discussing the introduction of advertising on Instagram, Twitter, and Truth/Slant).

⁸² See Heine, *supra* note 72 (showcasing the evolution of digital advertising and its newly developed methods throughout the 21st century).

⁸³ See Consumer endorsements, 16 C.F.R. § 255.2 (2017) (defining "consumer endorsements"); see also Expert endorsements, 16 C.F.R. § 255.3 (2017) (defining "expert endorsements").

⁸⁴ See 16 C.F.R. § 255.2 (a) (elaborating upon the criteria for consumer endorsements).

average results from the product.⁸⁵ Expert endorsements consist of statements made by someone who has expertise in relation to the product that they are endorsing.⁸⁶ An expert endorser may comment on aspects of the product that do not require their expertise, such as taste or smell.⁸⁷ Additionally, the expert endorsement must be supported by experience with the product and expertise relating to an examination or testing of the product.⁸⁸

The FTC has numerous ways to correct defective advertising when these types of endorsements do not meet the criteria.⁸⁹ The most basic form of correction is to send cease and desist letters to the company that violated the rules, urging them to remove the advertisement and stop advertising in this deceptive way.⁹⁰ Secondly, the FTC can order companies to issue corrective advertising in order to remedy any false notions given to consumers about their products.⁹¹ Finally, the FTC may order civil penalties to be paid for the deceptive

⁸⁵ See 16 C.F.R. § 255.2 (b) (highlighting limitations upon the ability to use a specific instance as a full product endorsement).

⁸⁶ See 16 C.F.R. § 255.3 (a) (defining “expert endorsements”).

⁸⁷ See 16 C.F.R. § 255.3 (b) (providing specific examples of successful means to expertly endorse). For example, a hospital might choose to use a product due to convenient packaging. *Id.* Yet, relaying that reasoning to the public is prohibited because it is “neither relevant nor available to consumers.” *Id.* Another example would be if the president of a “commercial ‘home cleaning service,’” in a public advertisement, conveys the company’s preference of a specific cleaning brand over others. *Id.* This would be considered deceptive, because the president could be viewed as someone with superior knowledge. *Id.* Thus, the statement would constitute an “expert endorsement.” *Id.*

⁸⁸ See 16 C.F.R. § 255.3 (b) (requiring that an “endorsement must be supported by an actual exercise of” the endorser’s “expertise in evaluating product features or characteristics with respect to which he or she is an expert.”). Further, the features and characteristics must be “relevant to an ordinary customer’s use of or experience with the product” and be “available to the ordinary customer.” *Id.*

⁸⁹ See PAMELA JONES HARBOUR, COMMISSIONER, ALI-ABA COURSE OF STUDY ON PROD. DISTRIBUTION AND MKTG., ADVERTISING AND UNFAIR COMPETITION: FEDERAL AND STATE ENFORCEMENT 2-3 (Mar. 18, 2005) (analyzing actions available by administrative agencies to enforce their rules). For example, as evidenced in the *KFC* case, the FTC may seek permanent injunctive relief. *Id.*

⁹⁰ See *id.* at 11 (highlighting the purpose of this administrative remedy is to stop the behavior and prevent it from happening in the future).

⁹¹ See *id.* at 12 (showcasing that simply removing a deceptive advertisement may not be sufficient to correct the wrong committed against consumers). Instead, advertisers may need to redress “any harm the consumer actually may have suffered as a result of the deceptive ads.” *Id.*

advertising.⁹²

Celebrities and “influencers” often attempt to mislead their followers by not disclosing their relationships with particular brands for their posts.⁹³ In previous years, the FTC has sent cease and desist letters to companies warning them against endorsements lacking disclosure.⁹⁴ However, more recently, the FTC has targeted celebrities and brand ambassadors directly with cease and desist letters.⁹⁵ This change represents a new responsibility placed upon individuals and their social media accounts, raising major concerns for influencers and average social media users.⁹⁶

Many people use social media in order to show friends and followers an insider perspective of their lives.⁹⁷ If a person genuinely

⁹² See *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, F.T.C. (July 2008), archived at <https://perma.cc/25SR-2A2C> (highlighting the investigative authority of the FTC). “The Commission may ‘prosecute any inquiry necessary to its duties in any part of the United States’ (FTC Act Sec. 3, 15 U.S.C. Sec. 43).” *Id.*

⁹³ See Paul Fletcher, *Report: Nearly 40% of Publishers Ignore FTC's Native Advertising Rules*, FORBES (Mar. 19, 2017), archived at <https://perma.cc/5PAC-539T> (discussing the obvious lack of disclosure despite the FTC attacking companies and influencers in recent years); see also Global Yodel, *What is Influencer Marketing?*, HUFFPOST: THE BLOG (Dec. 6, 2017), archived at <https://perma.cc/QG5N-W9V9> (defining influencers as people who have “the capacity to have an effect on the character of a brand.”). Marketers utilize these influencers in campaigns by having them promote and sell products on various digital mediums. *Id.*

⁹⁴ See Miranda, *supra* note 10 (exemplifying times when the FTC targeted a company for lack of disclosure on an influencer's post). For example, the FTC and Lord and Taylor reached an agreement, “prohibit[ing] the company from further misrepresenting that an endorser is an ordinary consumer.” *Id.* Lord and Taylor was further subjected to the FTC's monitoring and review of its endorsement campaigns. *Id.* The FTC also recently reached a settlement with Machinima for the company's alleged use of YouTube influencers to promote Microsoft's Xbox One. *Id.* The FTC alleged that there was a lack of disclosure that the influencers were paid for this promotion. *Id.*

⁹⁵ See Notopolous, *supra* note 10 (referencing “educational” letters sent from the FTC to celebrities in late 2017 warning them that they are legally required to disclose their sponsors when their posts are ads).

⁹⁶ See Federal Trade Commission, *FTC's Endorsement Guides: What People Are Asking* (Sept. 2017), archived at <https://perma.cc/CWN2-EJSZ> (identifying that the responsibility for disclosure of a material connection “rests with the influencer and the brand – not the platform.”) [hereinafter *FTC's Endorsement Guides: What People Are Asking*].

⁹⁷ See Tammy Erickson, *Why We Use Social Media In Our Personal Lives – But Not For Work*, HARV. BUS. REV. (Feb. 16, 2012), archived at <https://perma.cc/5H9S->

uses a product in their daily routine and wishes to share it with their friends, will they receive backlash from a governmental organization?⁹⁸ Likely not, because the FTC is mainly concerned with having disclosures of only material relationships aired out publicly.⁹⁹ By only buying a product without receiving anything from the company in return, an individual is simply a consumer and if they wish to tell their friends about how great that product is then they may do so without regulatory action.¹⁰⁰ Threat of backlash from regulatory authorities will only come into play when that individual has some sort of relationship with the company beyond only buying their product and is told by that company to endorse it.¹⁰¹

For the purposes of Section 5 of the FTC Act, an endorsement is “any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”¹⁰² An endorsement and a testimonial are treated equally in respect to FTC

LAFT (analyzing personal social media use as typically used to “share photos, stay up-to-date on a club’s activities, or develop a personal reputation.”).

⁹⁸ See *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 96 (indicating that the FTC will only seek action regarding “endorsements made on behalf of a sponsoring advertiser.”).

⁹⁹ See *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 96 (focusing on the importance of “disclos[ing] . . . material connections”).

¹⁰⁰ See *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 96 (addressing concerns from bloggers that they may no longer be able to give reviews of products that they enjoy to their followers without receiving support from the company that they are reviewing).

¹⁰¹ See *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 96 (declaring disclosure to matter only in the context of a “material connection” between companies and consumers); see also Federal Trade Commission, *Native Advertising: A Guide for Businesses* (Dec. 2015), archived at <https://perma.cc/CR4K-ZAAS> (providing specific examples to dictate the behavior of corporations and demonstrate when disclosure is necessary for native advertising). [hereinafter *Native Advertising: A Guide for Businesses*] For example, native “advertisers cannot use ‘deceptive door openers’ to induce consumers to view advertising content.” *Id.* Instead, the content being advertised must be clearly identifiable to the consumer. *Id.*

¹⁰² See Purpose and definitions, 16 C.F.R. 255.0 (b) (2019) (defining endorsements for the purposes of FTC regulatory oversight). Any advertising message including but not limited to a “name, signature, likeness or seal of an organization” can constitute an endorsement. *Id.* Whenever a consumer could be mistaken that the individual’s actions or statements, that is considered an endorsement. *Id.*

regulation.¹⁰³ Any fictional depiction of a real life situation, while considered advertising, is not considered an endorsement for the purposes of the FTC guidelines.¹⁰⁴ Endorsements by well-known individuals do not even need to be verbal.¹⁰⁵ For example, one can endorse a product by appearing with that product in an advertisement.¹⁰⁶ In *Federal Trade Commission v. Garvey*¹⁰⁷, the court found that endorsements must be the endorser's "honest reflection of opinions, findings, beliefs, or experience; must be free of any deceptive representations; and must not contain representation that could not be substantiated if made by the advertiser directly."¹⁰⁸ Depending on the phrasing of the message, an endorsement may only be valid so long as the endorser is a bona fide user of the product, otherwise the message is deceptive in purpose.¹⁰⁹

The FTC clearly provides their expectations for disclosure in their endorsement guides and subsequent Frequently Asked Questions response document.¹¹⁰ In evaluating the effectiveness of a disclosure,

¹⁰³ See 16 C.F.R. § 255.0 (c) (highlighting the relationship of endorsements and testimonials); see also Lauren Myers, *A Picture is Worth A Thousand Material-Connection Disclosures: Endorsers, Instagram, and the Federal Trade Commission's Endorsement Guides*, 66 DUKE L.J. 1371, 1380 (2017) (distinguishing advertisements needing disclosure as those where the endorser has a "material connection" with the company).

¹⁰⁴ See 16 C.F.R. § 255.0 (providing a counter example for advertisements that are not considered endorsements under the FTC guidelines).

¹⁰⁵ See 16 C.F.R. § 255.0 (describing the ability for endorsements to be in writing or solely by actions).

¹⁰⁶ See 16 C.F.R. § 255.0 (utilizing specific examples to demonstrate how non-verbal endorsements appear in reality).

¹⁰⁷ See *FTC v. Garvey*, 2001 U.S. Dist. LEXIS 25060 *1, *20 (CD Cal. Nov. 8, 2001) (concluding that the FTC is not required to present evidence that a reasonable consumer would view the statements of a spokesperson as an endorsement).

¹⁰⁸ See *Garvey*, 2001 U.S. Dist. LEXIS at *17 (quoting the court's decision).

¹⁰⁹ See General considerations, 16 C.F.R. § 255.1(c) (setting forth that "when the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given."). "Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product." *Id.*

¹¹⁰ See 16 C.F.R. § 255 (introducing one of many documents provided to guide online entities in disclosure); see also Mandell et al., *Recent Developments in Media, Privacy, Defamation, and Advertising Law*, 52 TORT & INS. L.J. 531 (2017) (alluding to the FTC's heightened interest in combating the problem of nondisclosure with the publishing of a revised Endorsement Guide FAQ in 2015); see also *FTC's*

there are four factors considered by the FTC: prominence, presentation, placement, and proximity.¹¹¹ To meet these requirements, the disclosure must essentially be large or loud enough for the viewer to understand, in the same language as the original post, and within the same post as the endorsement.¹¹²

In the social media context, these conditions may be easily satisfied by an influencer adding “#sponsored” or “ad” to their post on any major social media platform.¹¹³ If the platform is a video site, such as YouTube, or in the story function of Snapchat or Instagram, then the influencer must clearly state that they are sponsored by that company.¹¹⁴ Despite clear FTC guidelines, social platforms have attempted to create their own ways to disclose.¹¹⁵ For example, Instagram recently introduced a feature where influencers could

Endorsement Guides: What People Are Asking, *supra* note 96 (referencing materials supplied to guide companies in formatting native advertising).

¹¹¹ See Leslie Fair, *Full Disclosure*, FED. TRADE COMM’N (Sept. 23, 2014), archived at <https://perma.cc/FPU7-Q974> (providing a blueprint for “The 4 Ps” essential to provide proper disclosure). “The 4 Ps” stand for “Prominence,” “Presentation,” “Placement,” and “Proximity.” *Id.*

¹¹² See *id.* (simplifying the FTC requirements for disclosure in order to better inform influencers and companies by allowing advertisers to control the specifics of their ad campaign).

¹¹³ See *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 96 (discussing social media disclosure etiquette and stating that the FTC does not mandate specific words for disclosure so long as people get the information that they need to evaluate a sponsored statement and determine that it is an advertisement). They further state, “The words ‘Sponsored’ and ‘Promotion’ use only 9 characters. *Id.* ‘Paid ad’ only uses 7 characters. Starting a tweet with ‘Ad:’ or ‘#ad’ – which takes only 3 characters – would likely be effective.” *Id.*

¹¹⁴ See *FTC’s Endorsement Guides: What People Are Asking*, *supra* note 96 (evaluating the effectiveness of disclosure on video platforms where the disclosure can clearly be missed or skipped over). The FTC warns influencers to put multiple disclosures if possible when they are utilizing a video or live stream format. *Id.*

¹¹⁵ See Benjamin Chacon, *Everything You Need to Know About Instagram’s New Paid Partnership Feature*, LATER (Oct. 15, 2017), archived at <https://perma.cc/VQ4J-3FVC> (reporting a new attempt by Instagram to make disclosure easier for influencers while also offering perks to companies who can now track these advertisements through Facebook’s insights tool); see also Issie Lapowsky, *Facing Prospect of Regulation, Twitter Plans New Ad Disclosures*, WIRED (Oct. 24, 2017), archived at <https://perma.cc/5SGG-XVRC> (adapting advertising methods on Twitter after backlash regarding political advertisements during the 2016 election to make consumers more aware of where advertisements come from).

directly put “in paid partnership” and include the sponsors name directly above their post.¹¹⁶ While this makes it easier for influencers to disclose, and allows users to have a streamlined place to look for disclosure from their favorite bloggers, it also tiptoes the line of unclear presentation.¹¹⁷ The location and placement of this disclosure is located above the post in arguably small typeface.¹¹⁸ Additionally, it does not allow disclosure of multiple relationships and makes it possible for influencers to disclose one relationship but not others.¹¹⁹ If this much reluctance is shown in disclosing relationships for your virtual persona, disclosure in the real world will likely be met with equal resistance.¹²⁰

III. Facts

The distinction between real life and advertising has become blurred to the point where it seeps into the everyday lives of children.¹²¹ The *New York Times* recently released an article outlining the practice of Silicon Valley tech companies sending technology to public school teachers who act as their ambassadors.¹²² These companies take advantage of the lack of public school funding and the benefits of technology in teaching by having teachers incorporate their

¹¹⁶ See Anthony Ha, *Instagram is Testing a New Way for Celebrities and Influencers to Identify Their Sponsored Posts*, TECH CRUNCH (Jun. 14, 2017), archived at <https://perma.cc/EQ88-YRNW> (highlighting the innovations of tech in compliance with disclosure law); see also Katie Notopolous, *Social Media Platforms' In-App Ad Tools Aren't Good Enough for the FTC*, BUZZFEED (Sept. 20, 2017), archived at <https://perma.cc/3WT3-XQ2F> (indicating direct feedback from the FTC regarding the failures of built in disclosure tools on Facebook, YouTube, and Instagram).

¹¹⁷ See Ha, *supra* note 116 (referencing where new innovations in disclosure fall short of proper form).

¹¹⁸ See Chacon, *supra* note 115 (highlighting the FTC presentation requirements for disclosure and potential presentation problems with Instagram's new feature).

¹¹⁹ See Chacon, *supra* note 115 (analyzing the problems associated with Instagram's new disclosure features and how they may not properly disclose according to FTC standards).

¹²⁰ See Mandell et al., *supra* note 110 (suggesting a possible noncompliance with further FTC regulation for nondisclosure outside of the digital realm).

¹²¹ See Singer, *supra* note 10 (describing guerilla marketing in schools, where Apple, Google, and Microsoft select teachers to attend a conference where they help the companies create new education software, which they hope will be implemented into the teacher's curriculum).

¹²² See Singer, *supra* note 10 (introducing a specific instance of non-disclosure in the real world resulting in quasi-marketing through teacher brand ambassadors).

technology into the classroom while using these children as quasi market research.¹²³ The teachers report back to the companies on how these apps or products could be improved based upon how the children are using it.¹²⁴ Furthermore, an entire generation will now grow up using a specific brand of technology in their classrooms, essentially priming future generations on a particular brand of smart technology.¹²⁵

Admittedly the priming, while dangerous, may naturally arise from the general use of technology in the classroom rather than the advertising relationship.¹²⁶ For example, one of the teachers who takes advantage of this relationship with Silicon Valley utilizes app technology, which allows both teachers and parents to review and comment on a child's work from their homes.¹²⁷ While not able to exist without the ambassador relationship, some teachers are able to completely refurbish their classrooms due to their advertising relationship with particular brands, bringing much needed renovations to a school district that cannot afford it.¹²⁸ As evidenced from these examples, brand ambassador advertising differentiates itself from

¹²³ See Singer, *supra* note 10 (highlighting the dangerous practices of advertising, such as incentivizing underpaid teachers and administrators with perks like travel expenses and products, that stem from DART technology first adapted for internet advertisements).

¹²⁴ See Singer, *supra* note 10 (exemplifying real-world quasi-marketing practices used in the classroom, such as the Seesaw teacher ambassador program). Seesaw, a student portfolio platform used by educators, offers the ability for teachers to use their tech products for free in the classroom in exchange for sharing feedback directly with the company and attend company workshops. *Id.*

¹²⁵ See Singer, *supra* note 10 (showcasing potential problems, such as state or school conflict-of-interest rules governing public employees, associated with this new trend in advertising).

¹²⁶ See Singer, *supra* note 1010 (demonstrating the advantages that technology can bring to the classroom, such as technology with 3D printers which can bring creativity to less creative subjects). However, it is difficult to say that this technology would exist in the classroom if the advertisers were not supplying the teachers with it for some sort of gain in the form of feedback or advertising to others. *Id.*

¹²⁷ See Singer, *supra* note 1010 (describing the app Seesaw which acts as a portfolio connecting children, parents, and teachers).

¹²⁸ See Singer, *supra* note 10 (showcasing the ethical issues, such as providing improper benefits to teachers creating a conflict of interest, that arise when teachers in districts with low budgets are courted by tech companies and other retailers in exchange for an advertising relationship and the benefits that this relationship can bring to their classrooms).

older forms due to the direct benefits that it can bring to consumers.¹²⁹ While older forms, such as televised advertising, have sustained without FTC intervention despite children's particular susceptibility to deceptive practices, the direct relationship to advertising in modern forms may cause a change in policy.¹³⁰

Extensive research exists in every discipline regarding the negative outcomes of advertising to children.¹³¹ Children and adolescents are aggressively targeted by advertising because "they spend billions of their own dollars annually, influence how billions more are spent throughout household food purchases, and are future adult consumers."¹³² Accordingly, studies document that the understanding of advertising intent usually does not develop for humans until ages 7-8, making children vulnerable to misleading advertising.¹³³ Furthermore, the use of advertising in public schools has increased within the past decade due to a desire to generate brand

¹²⁹ See Singer, *supra* note 10 (opining that influencer marketing brings new products to schools such as interactive software, 3D printers, and furnishings). Although these perks provided to teachers ultimately benefit students' educational experience, the inherent ethical and conflict of interest issues make these partnerships problematic. *Id.*

¹³⁰ See BARTHOLOMEW, *supra* note 17, at 20 (introducing the failure of the FTC's "Kid-Vid Rule" in the late 1970's). The FTC attempted to ban targeted television advertising to children however, Congress felt that government intervention should not occur in an area "that could be adequately addressed by parents and the private market." *Id.* Part of this fear stemmed from the already failing economy at the time. *Id.*

¹³¹ See Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 1 INT'L J. OF BEHAV. NUTRITION & PHYSICAL ACT., 1, 2 (2004), archived at <https://perma.cc/4TP9-2X27> (attributing the prevalence of U.S. youth obesity to food marketing channels); see also *Children, Adolescents, and Advertising*, American Academy of Pediatrics, 118 PEDIATRICS 2563, 2563 (2006) (highlighting the disparities between how the US treats advertising towards children versus other countries). "This targeting occurs because advertising is a \$250 billion/year industry with 900 000 brands to sell, 2 and children and adolescents are attractive consumers: teenagers spend \$155 billion/year, children younger than 12 years spend another \$25 billion, and both groups influence perhaps another \$200 billion of their parents' spending per year." *Id.*

¹³² See Story & French, *supra* note 131, at 3 (estimating that over \$1 billion is spent on media advertising to children, over \$4.5 billion is spent on youth-targeting promotions, and roughly \$3 billion is spent on packaging specifically designed for youth consumption).

¹³³ See Story & French, *supra* note 131, at 5 (describing the reliance upon scientific finding of children's cognitive development that advertiser's may use when determining what populations to advertise to).

loyalty, the ability to reach children in a contained setting, and the financial vulnerability of public schools.¹³⁴ In a study regarding the effectiveness of disclosures, researchers reference that advertisers and marketers prefer nondisclosure especially in programs because endorsements are most effective when the consumer is not aware of the advertiser's influence.¹³⁵ While teachers may not be "celebrities" advertising products, a teacher's opinion may be even more persuasive than that of a celebrity when advertising to children because it is coming from someone that they trust.¹³⁶

Adults see a similar form of advertising every day, and similar to children, they most likely do not notice that it is, in fact, advertising.¹³⁷ Fashion houses such as Chanel, Gucci, and Prada often host runway shows in exotic locales that fashion writers often cannot afford to attend, such as Rio de Janeiro, Havana, Florence, or Japan.¹³⁸ These companies will pay for major publications to send their editors and writers to stay in these locations and attend the shows, leading to a possible bias in how the writers critique the fashion shows.¹³⁹ On a similar note, Harvey Weinstein, the previous CEO of Weinstein Productions, would have his actresses wear Marchesa for at least one

¹³⁴ See Story & French, *supra* note 131, at 8 (finding that 77% of the public schools researched had a contract with the soft drink company for their vending machines). Additionally, this article cites incentives for contracting with companies in public schools because "92% of these schools receive a specified percentage of the soft drink sales revenues and about 40% receive incentives such as cash awards or donated equipment once revenues total a specified amount." *Id.*

¹³⁵ See Kim Dekker & Eva A. Reijmersdal, *Disclosing Celebrity Endorsements in a Television Program to Mitigate Persuasion: How Disclosure Type and Celebrity Credibility Interact*, 19 J. OF PROMOTION MGMT. 224, 227 (Apr. 2013) (finding that disclosure ensures resistance to persuasion and may negatively impact the consumers' evaluation of the brand).

¹³⁶ See Fiona Seth-Smith, Student Thesis, *How Do Teachers Influence Children's Emotional Development?*, 1 D. CLIN. PSY. THESIS 1, 10 (2006) (putting forth evidence that teachers have the ability to become attachment figures in a child's life and influence their behavior).

¹³⁷ See Zerbo, *supra* note 9 (referencing the ability for companies to appeal to adults through advertisements wholly unknown to the adults that see them).

¹³⁸ See Zerbo, *supra* note 9 (positing the expensive runway shows that consumers see in fashion house advertisements).

¹³⁹ See Zerbo, *supra* note 9 (providing a real-world example of non-disclosure and how it impacts consumer behavior). Companies provide writers with unique experiences in order to garner positive feedback in print magazines and online materials. *Id.*

red carpet event that they used to promote their upcoming projects.¹⁴⁰ The problem with this approach is that his wife, Georgina Chapman, is the CEO and owner of Marchesa.¹⁴¹ This company has never advertised and only became well known when it started to appear on these same red carpets.¹⁴²

This practice does not occur only in the world of fashion or public schools.¹⁴³ Social media influencers are paid or sent free products on the condition that they promote either the brand, service, or products to their followers covertly every day.¹⁴⁴ In 2017, the failed Fyre Festival garnered large crowds to the Bahamas due to a guerilla social media campaign hiring influential celebrities with high follower counts on Instagram to promote the festival with no knowledge as to the event.¹⁴⁵ Often, influencers will filter their content so that brand

¹⁴⁰ See Maeve McDermott, *Can Marchesa, Georgina Chapman's Fashion line, ever recover from Harvey Weinstein?*, USA TODAY (Feb. 22, 2018) (showing that Weinstein had actresses wear Marchesa, promoting his wife's fashion line); see also Nikki Ogunnaike, *Not Asking "Who Are You Wearing?" On the Golden Globes Red Carpet was a Missed Opportunity*, ELLE (Jan. 8, 2018), archived at <https://perma.cc/H3ZQ-5BZA> (showcasing the ritual of asking "who are you wearing?" on the red carpet as a form of advertising broadcast on cable television for viewers before major awards shows).

¹⁴¹ See Marchesa Label Overview, THE CUT (Feb. 15, 2019), archived at <https://perma.cc/RH2F-CSV3> (introducing the brand Marchesa).

¹⁴² See Friedman, Bernstein & Schneier, *Fashion Breaks Its Silence on Harvey Weinstein Scandal*, N.Y. TIMES (Oct. 13, 2017), archived at <https://perma.cc/PYL3-A6RC> (showcasing the inappropriate behavior of influential individuals to garner income).

¹⁴³ See Agrawal, *supra* note 7 (summarizing other examples of influencer marketing in reality, such as Kylie Jenner partnering with Fashion Nova and utilizing her Instagram page as a vehicle for advertising).

¹⁴⁴ See Russell Wilde Jr., *Taking a Look at Hello Fresh's Influencer Strategy*, JULIUS (Nov. 14, 2017), archived at <https://perma.cc/PGZ5-S396> (articulating that the influencers sent products by Hello Fresh showcase the product in an authentic manner which adds a more personal element to the advertising potential on social media); see also John Siegel, *How 8 LA-based startups use influencer marketing, and what they expect in the future*, BUILT IN L.A. (Oct. 13, 2016), archived at <https://perma.cc/C3B5-FNRF> (highlighting the attitude of Vive Lifestyle Inc. towards the practice of guerilla marketing and how it helps their business).

¹⁴⁵ See Vanessa Friedman, *The Rise and (Maybe) Fall of Influencers*, N.Y. TIMES, May 11, 2017, at D2 (showcasing the power of influencers to "sell" their promotional content on a professional and personal level – the lines blur between their professional capacity as an influencer and their personal opinions). The organizers of the festival and a number of Jane Doe's (assumed to be the influencers) are facing a class action lawsuit for the fraudulently promised luxury experience of the Fyre Festival. *Id.*

endorsed posts seamlessly meld with their unsponsored materials.¹⁴⁶ For example, the most successful influencer Instagram posts often contain very specific “brands” such as fitness, health, business, food, or travel.¹⁴⁷ Manny Gutierrez, also known as MannyMua, was an employee at a Sephora who became a household name from starting his niche account of male makeup and gaining influencer status, resulting in his contract as a brand ambassador for Maybelline.¹⁴⁸ In the governmental sphere, state government offices are often in the practice of making exclusive deals with specific companies in order to gain something valuable to give to their constituents.¹⁴⁹ In other circumstances, government offices make decisions to incorporate corporate messages or logos to encourage commercialism without gaining much in return.¹⁵⁰ Government spaces and other traditionally

¹⁴⁶ See Jelle Fastenau, *Under the Influence: The Power of Social Media Influencers*, CROBOX (Mar. 6, 2018), archived at <http://perma.cc/4DJY-6SBE> (highlighting the success of influencer campaigns under the framework of social identity theory). Social identity theory argues that people view themselves as belonging to a group of similar individuals and base part of their identity on membership of that group, thus they trust the opinions of members of that group more than they would of others. *Id.* Under this scenario, people trust the opinions of influencers who they choose to follow on social media because they feel a part of that influencer’s community through their sharing of their intimate life experiences and their advertisements. *Id.*; see also Brian Rashid, *15 Top Instagram Influencers You Should Follow*, FORBES (June 17, 2017), archived at <https://perma.cc/857S-WYTY> (prompting readers to follow specific influencers on Instagram for high quality, niche advertising content on successfully branded pages).

¹⁴⁷ See *The Top 6 Types of Instagram Influencers Who Are Defining Content On The Platform*, MEDIKIX (Aug. 1, 2017), archived at <https://perma.cc/7SZS-Q6WA> (listing 6 highly successful “types” of influencer accounts on Instagram – the Icon, the Adventurer, the Instructor, the Guru, the Creator, and the Entertainer).

¹⁴⁸ See *Manny Gutierrez*, FORBES (Jan. 31, 2019), archived at <https://perma.cc/RU2B-9NS9> (expanding on Manny Gutierrez’s online presence and how his audiences are around 7 million followers); see also Faith Cummings, *The Brave Reason Manny Gutierrez Gave Up Medical School for a Beauty Career*, TEEN VOGUE (June 20, 2016), archived at <https://perma.cc/9V3M-DZSW> (outlining how Manny Gutierrez, an employee, of a makeup store became a celebrity through his social media presence); see also Mannymua733, INSTAGRAM (Jan. 31, 2019), archived at <https://perma.cc/ZUV9-LSVY> (showcasing Manny’s 4.6 million followers on Instagram and his various sponsored posts).

¹⁴⁹ See BARTHOLOMEW, *supra* note 17, at 33 (utilizing the example of the government’s signing away of state and national park sponsorship within forests, roads, trails and concession buildings in exchange for funding from companies).

¹⁵⁰ See BARTHOLOMEW, *supra* note 17, at 27 (criticizing the U.S. Postal Service’s decision to release marketed special addition stamps based upon Coca-Cola,

ad-free spaces now run rampant with this type of marketing, normalizing this practice at the expense of Americans.¹⁵¹

IV. Analysis

A. *Does This Type of Practice Qualify as “Speech” to be Regulated by the FTC?*

Consistent debate exists in the legal community regarding the ability of the FTC to regulate commercial speech through endorsements due to First Amendment speech protections.¹⁵² Real life advertising may only be regulated by the FTC if it is considered to be an endorsement or a testimonial.¹⁵³ Without first deciding whether this form of advertising constitutes an endorsement, it is impossible to judge whether the practice is subject to FTC nondisclosure regulation at all.¹⁵⁴ In the public school context highlighted earlier, the lines are blurred as to whether the teachers who act as company influencers for tech products are making commentary regarding the effectiveness of these products to children, or if they are simply utilizing the tech in the classroom as they would any other product.¹⁵⁵ If the teacher is providing commentary regarding the effectiveness of the product, then this would absolutely constitute an endorsement by FTC standards due

Kentucky Fried Chicken, Barbie, and more because the Postal Service needed to “. . . change its focus to stamps that are more commercial.”)

¹⁵¹ See BARTHOLOMEW, *supra* note 17, at 28 (criticizing advertising’s colonization of the few traditionally ad-free spaces remaining in America).

¹⁵² See Myers, *supra* note 103, at 1374-75 (questioning the ability of the FTC to regulate testimonials because they’re protected by the First Amendment). *But see* Byrne, *supra* note 28, at 393 (recognizing the importance of regulation for the practice of non-disclosure).

¹⁵³ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (pointing to the specific circumstances under which commercial speech may be regulated).

¹⁵⁴ See Myers, *supra* note 103, at 1373-74 (suggesting that FTC regulation of nondisclosure is beyond the scope of their authority because this practice should be afforded First Amendment protection). The Federal Trade Commission is given narrow authority due to the importance of First Amendment speech protections. *Id.*

¹⁵⁵ See Singer, *supra* note 10 (questioning whether the practice utilized by public school teachers who are also brand ambassadors requires disclosure). While it is especially troubling that teachers are specifically endorsing to susceptible populations such as children, it would also be best practice for teachers need to disclose their relationship to fellow teachers and parents as well if they were recommending specific products. *Id.*

to the material connection between the company and the teacher.¹⁵⁶ However most, if not all, of these teachers are not disclosing any of their relationships with these companies and are acting without transparency for how they run their classrooms.¹⁵⁷

If the influencer is using the product exclusively in their classroom, but not making explicit statements to students regarding the effectiveness of that product, it is less clear whether this would constitute a testimonial or an endorsement.¹⁵⁸ An endorsement for the purposes of FTC regulation is “any advertising message” and may include verbal statements but also non-verbal cues, such as demonstrations.¹⁵⁹ Therefore, in acting as a brand ambassador for the company in the first place and then exclusively using that form of technology within the classroom, a material connection does exist and even without explicit statements, the implied statements through everyday use of the product may be enough to require disclosure of that material connection.¹⁶⁰

A similar issue exists in the context of Harvey Weinstein requiring actresses to wear Marchesa gowns at premieres.¹⁶¹ The attire

¹⁵⁶ See 16 C.F.R. § 255.0(b) (defining an endorsement requiring disclosure as a verbal statement made by an individual with a material connection to the company from which that product is created). This work establishes clear examples of disclosure of material connections which require clear and conspicuous statement of the relationship. *Id.*

¹⁵⁷ See Singer, *supra* note 10 (quoting James E. Tierney, a former Attorney General of Maine, who asserts, “Any time you are paying a public employee to promote a product in the public classroom without transparency, then that’s problematic.”). It does not show examples of disclosure anywhere within this article and the subject is seldom discussed in literature elsewhere due to a larger focus on ethical concerns for teachers as contracting government employees. *Id.*

¹⁵⁸ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (providing guidelines for businesses to conduct native advertising without discussing the methods which would be applied for less obvious techniques).

¹⁵⁹ See FTC, *supra* note 44 (defining an endorsement for the purposes of application in native advertising).

¹⁶⁰ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (declaring that demonstrations may deceptively be an endorsement).

¹⁶¹ See Zerbo, *supra* note 9 (describing the practices of the fashion industry and media non-disclosure, which includes the “common practice of fashion brands footing the bill for select publications and influencers to attend and cover preseason collection”); see also Friedman, Bernstein & Schneier, *supra* note 142 (showcasing the inappropriate behavior of influential individuals, such as the Mr. Weinstein, to garner income).

worn to red carpets for premieres and awards shows are often showcased in print after the event, but also televised for viewers at home to enjoy the fashion and interviews.¹⁶² Many actresses in Hollywood criticize being questioned about their looks on the red carpet instead of their work on screen, yet they are continually asked, “who are you wearing?”¹⁶³ This question gives infinite exposure to designers when women are flipping through magazines or watching broadcasts to see the best dresses.¹⁶⁴ The designers worn on red carpets are often the newest high end brands, and once a celebrity wears it, a consumer will want to buy it to keep up with modern trends.¹⁶⁵

This relationship is difficult to determine as a material connection because the actress is not receiving anything in return from the brand for their endorsement on the red carpet.¹⁶⁶ Instead, the actress is being given a part in a performance with an attached salary, and the attire for red carpets is a term of their employment.¹⁶⁷ In the Harvey Weinstein and Georgina Chapman scenario, there is a material connection between the owner of the company and her husband which should be disclosed to the actresses required to wear Marchesa on the red carpet.¹⁶⁸ However, it may not be necessary for the actress to disclose a relationship to the brand, because her relationship to the

¹⁶² See Ogunnaike, *supra* note 140 (providing an example of a typical awards show red carpet article). This article in particular recognizes that the questions asked on the red carpet typically revolve around what brands the celebrities are wearing. *Id.*

¹⁶³ See Ogunnaike, *supra* note 140 (discussing the “who are you wearing” question and how it may influence designers’ brands).

¹⁶⁴ See Ogunnaike, *supra* note 140 (specifying brand names such as Dior Haute Couture, Prada, and Miu Miu that were worn by celebrities Natalie Portman, Sally Hawkins, Michelle Pfeiffer, Jessica Biel, and Elisabeth Moss).

¹⁶⁵ See Zerbo, *supra* note 9 (focusing on the influencers, bloggers, and writers who get sponsored by high end, luxury brands for the trips and expenses they go on).

¹⁶⁶ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (considering possible gaps of explanation in FTC materials, which, if not clear, would appear deceptive to consumers).

¹⁶⁷ See Zerbo, *supra* note 9 (articulating the distinction between acting as an endorser for a brand and fulfilling an employment condition stipulating the use of a particular product).

¹⁶⁸ See Friedman, Bernstein & Schner, *supra* note 142 (clarifying the relationship between Chapman, Weinstein, and actresses). “We all knew celebrities were asked to wear Marchesa if they were in a Weinstein movie...They were supposed to wear it at least once. We all knew that cycle.” *Id.*

brand only stems from the requirements of her job.¹⁶⁹ If anything, the ethical method would be to disclose the relationship however, it may not meet the standards of a material connection requiring disclosure.¹⁷⁰

In other contexts, this problem is much less convoluted.¹⁷¹ With the fashion houses who send writers on lavish vacations to attend shows or parties, the writing that is later published is in relation to that benefit and due to the writer's material connection with the company.¹⁷² The memorialization of these verbal endorsements in print is an extremely concrete example of when a disclosure of a material connection must occur due to FTC regulation.¹⁷³ It is not entirely taxing on a publication to include a note within the writing itself highlighting that this trip and experience was paid for by the company who sent the author.¹⁷⁴ The only reason to dissuade this type of disclosure is to deceive consumers as to the nature of this experience, which is exactly why these regulations exist in the first place.¹⁷⁵

B. The Dangers of Face to Face Marketing Contrasted to Digital Advertising

Research shows that native advertising appears more authentic and original, therefore marketers trying to sell a product are more likely to utilize this method.¹⁷⁶ While this research proves positive for

¹⁶⁹ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (demonstrating the ways in which the native advertising guide may not cover the intricacies associated with modern business relationships).

¹⁷⁰ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (furthering the need for disclosure for ethical reasons, even if the material connection may not fall under the exact language of the FTC regulations).

¹⁷¹ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (discussing when the disclosure requirement applies and when it does not).

¹⁷² See Zerbo, *supra* note 9 (exposing the fashion industry for its lack of adherence to FTC regulations).

¹⁷³ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (applying guidelines created by regulatory authorities to govern corporations' marketing behaviors).

¹⁷⁴ See Zerbo, *supra* note 9 (suggesting that the fashion industry can do more to make its consumers aware of endorsements and material connections).

¹⁷⁵ See *Native Advertising: A Guide for Businesses*, *supra* note 101 (describing why the endorsement guides are necessary for FTC consumer protection).

¹⁷⁶ See *Blurred Lines Between Branded Video Content and Ads*, *supra* note 3 (recognizing the reasoning why marketers select native advertising techniques).

marketers attempting to strategize new techniques, it explains why deceptive practices exist.¹⁷⁷ Marketers utilize the employ of influencers on social media because of the connection felt by consumers with the influencer who they follow.¹⁷⁸ In this digital age, individuals have the ability to follow friends, companies, and complete strangers on social media, leading to a feeling of connection to that person because followers are shown glimpses into the everyday lives of others.¹⁷⁹ Often times, average influencers can reach celebrity status through their cult following.¹⁸⁰ Through a utilization of posted photos and videos, followers are able to build a stronger, more intimate connection with influencers.¹⁸¹ This is especially true for influencers who post in niche markets where followers can feel even closer to the influencer due to their shared, unique interest.¹⁸² Companies take advantage of this digitally synthesized sense of connection by having followers “friends” recommend products to them.¹⁸³ However, with heightened scrutiny over this practice, many savvy social media users have become skeptical of online advertising in general, therefore marketers must adopt new techniques of deceptive marketing.¹⁸⁴

The technique of non-disclosure is extremely dangerous in print advertising and the digital realm, however those dangers are

¹⁷⁷ See Feinman, *supra* note 67, at 101 (indicating that newly adopted practices benefitting a company’s sales may harm consumers).

¹⁷⁸ See Feinman, *supra* note 67, at 102 (rationalizing the use of native advertising on app technology).

¹⁷⁹ See Feinman, *supra* note 67, at 113 (noting the rationale behind introducing advertisements onto digital media).

¹⁸⁰ See Cummings, *supra* note 148 (providing an in depth background for MannyMua’s rise to fame from his humble beginnings as an employee at makeup chains to influencer celebrity status).

¹⁸¹ See Cummings, *supra* note 148 (quoting MannyMua discussing his friendship with his idol and another Instagram influencer). When referencing Instagram beauty guru, Patrick Starr, Mua states, “[i] was a fan of his work, so when I finally met him I was ecstatic and couldn’t wait to be friends.” *Id.*

¹⁸² See *The Top 6 Types of Instagram Influencers Who Are Defining Content On The Platform*, *supra* note 147 (showcasing the prevalence and success of niche topic pages for influencers such as DIY, travel, and fitness).

¹⁸³ See *The Top 6 Types of Instagram Influencers Who Are Defining Content On The Platform*, *supra* note 147 (highlighting the possible ethical issues when influencers have hundreds of million fans, aimed at specific niches of hobbies and interests).

¹⁸⁴ See BARTHOLOMEW, *supra* note 17, at 29 (explaining why marketers have adopted new methods of guerilla advertising in civil spheres).

expanded when relationships are not disclosed in real life.¹⁸⁵ When reading an article or viewing a post that appears to overly promote a product, it is easy to become skeptical of the speaker's intent and motivations behind the post.¹⁸⁶ When a friend, teacher, or acquaintance discusses the benefits of a product, it is much more difficult for consumers to question the intentions of the speaker.¹⁸⁷ Additionally, by utilizing this technique of guerilla marketing, consumers are unable to utilize their established mental and physical methods of evading commercial messages, such as changing the channel toward actual content or talking to others during commercial breaks as a distraction.¹⁸⁸ By breaking down consumers defenses to anticipated advertising techniques, guerilla advertising and native advertising purposefully make advertising a hidden, subconscious aspect of consumers' every day routines.¹⁸⁹

C. The Possibility of Regulation Expansion from Digital Marketing to Deceptive Practices in Consumers' Real Lives

The FTC's Endorsement Guides demonstrate the agency's strong stance against deceptive advertising by influencers on social media platforms.¹⁹⁰ Two of the largest final orders by the FTC to reduce this form of misleading social media advertising were conducted against Lord & Taylor or Machinima, where the material connection between the brand and the influencer was not disclosed at all.¹⁹¹ Under those orders, the brands were simply required to monitor

¹⁸⁵ See BARTHOLOMEW, *supra* note 17, at 31 (stating that stealth marketing is "harder to detect and less likely to trigger consumer protest.").

¹⁸⁶ See BARTHOLOMEW, *supra* note 17, at 29 (observing the ability of consumers to utilize defenses when advertising occurs in a familiar advertising space such as radio or television).

¹⁸⁷ See *Blurred Lines Between Branded Video Content and Ads*, *supra* note 3 (stating that consumers are more likely to trust opinions of what that they know more of).

¹⁸⁸ See BARTHOLOMEW, *supra* note 17, at 29 (defining guerilla marketing as "advertising in previously 'commercially dormant zones.'").

¹⁸⁹ See BARTHOLOMEW, *supra* note 17, at 29 (analyzing the dangers of bringing advertising into civic spaces).

¹⁹⁰ See Mandell et al., *supra* note 110 (highlighting guidelines released by the FTC that gives best practices regarding influencer disclosure).

¹⁹¹ See Mandell et al., *supra* note 110 (describing two specific actions taken by the FTC to remedy material nondisclosure).

the influencer's statements and remind them to disclose their connections to the marketer.¹⁹² Despite this small infraction placed upon companies who conduct their marketing in a deceptive manner, it appears that change is occurring on social media platforms.¹⁹³ This recent spur of action taken against companies on behalf of non-disclosure by influencers demonstrates a strong response from the FTC in the arena of consumer protection.¹⁹⁴

Adapting the material connection disclosure requirements to include not only the digital disclosures, but also disclosures in civic spaces would not be a large feat for the FTC to tackle. The FTC would likely need to update the disclosure guides in order to update marketers on their savviness to guerilla marketing tactics and their negative effects on consumers.¹⁹⁵ Additionally, they would likely need to release a new FAQ discussing the intricacies of material disclosures in civil spaces to address problems raised earlier, such as the Marchesa and Weinstein example.¹⁹⁶ After warning marketers of this new expansion to the digital disclosure requirements and highlighting this new interpretation of the agency's statutorily given authority, the FTC could utilize similar methods by bringing cases against companies who do not comply.¹⁹⁷ Guerilla and native advertising are extremely

¹⁹² See Mandell et al., *supra* note 110 (providing an example of a small penalty placed upon Machinima for lack of disclosure). Lord & Taylor marketers were also required to terminate influencers who did not disclose the relationship and withhold their pay. *Id.*

¹⁹³ See Notopolous, *supra* note 116 (inferring that although social media companies could make disclosure easier on their apps, the FTC has said that "it's not enough to rely on the built-in features provided by Facebook, Instagram, and YouTube to indicate if something is a sponsored post.>").

¹⁹⁴ See Miranda, *supra* note 10 (showcasing the FTC's previous actions against companies for nondisclosure on social media platforms); see also Notopolous, *supra* note 10 (highlighting new FTC methods of holding influencers directly responsible by sending warning letters to twenty-one celebrities who did not properly disclose their sponsored relationship with the content regarding their post).

¹⁹⁵ See *FTC's Endorsement Guides: What People Are Asking*, *supra* note 96 (providing clear rules for disclosing material connections).

¹⁹⁶ See *FTC's Endorsement Guides: What People Are Asking*, *supra* note 96 (explaining answers to frequently asked questions by consumers and corporations regarding endorsements and disclosures); see also Friedman, Bernstein & Schneier, *supra* note 142 (employing an example of unclear endorsements when Harvey Weinstein requires actresses to wear his wife's gowns on the red carpet).

¹⁹⁷ See Peterson, *supra* note 20 (articulating that FTC action will continue in a similar direction after the FTC penalized corporations such as Lord & Taylor, Sony, Warner Bros., and Machinima for non-disclosure).

dangerous practices for consumers, and it is important that the FTC continues to use its congressionally gifted oversight power to “protect from unfair business practices” on behalf of America’s consumers.¹⁹⁸

D. Why FTC Disclosure Regulation is Especially Necessary for Vulnerable Populations

The practice of guerilla and influencer marketing is arguably much more deceptive than the previously rejected “kid-vid rule” that the FTC proposed in the 1970’s.¹⁹⁹ Back then, advertisements selling specifically to children would air during children’s programming.²⁰⁰ Now, these advertisements are coming into their classrooms and being pushed onto children by teachers and administrators that they trust.²⁰¹ This all occurs while they believe that they are inadvertently learning and their advertising defenses are much lower.²⁰² Recent studies have shown that freedom within our spaces directly corresponds to the formation of our independent selves, however we are not free when advertisers infiltrate our educational spaces in attempts to persuade.²⁰³ Specifically within the classroom environment, it has been proven that teachers assist in our formation of emotional intelligence and normative behavior.²⁰⁴ When a child is taught that even their attachment figures will try to advertise to them, it normalizes the practice for their defenses to be down in the future. Influencer advertising encourages individuals to frame themselves as commodities and blurs the lines even further between “who is being genuine, who is trying to sell to us, and where the difference lies.”²⁰⁵

In their daily lives, excluding the deceptive advertising that

¹⁹⁸ See BARTHOLOMEW, *supra* note 17, at 29 (demonstrating the dangers of hidden advertising through decreased consumer defenses).

¹⁹⁹ See BARTHOLOMEW, *supra* note 17, at 20 (contrasting the old FTC proposed and rejected rules with the allowable restrictions regarding disclosure).

²⁰⁰ See BARTHOLOMEW, *supra* note 17, at 20 (describing the kid-vid FTC proposals).

²⁰¹ See Singer, *supra* note 10 (describing guerilla marketing in schools).

²⁰² See BARTHOLOMEW, *supra* note 17, at 28 (describing how marketers prefer this approach because children have lower cognitive defenses).

²⁰³ See BARTHOLOMEW, *supra* note 17, at 5 (discussing the impact of advertisers influencing the formation of identity for youth when they infiltrate these spaces).

²⁰⁴ See Seth-Smith, *supra* note 135, at 13 (finding that emotional and behavioral socialization are inherently within the function of a school environment).

²⁰⁵ See BARTHOLOMEW, *supra* note 17, at 7 (identifying the issues surrounding micro-celebrity and the normalization of undisclosed relationships).

they are exposed to in schools, children view more than 3000 ads per day on television, radio, and in magazines.²⁰⁶ According to extensive research, “even if an audience has sophisticated knowledge about media and advertising, endorsement in a television program may not activate this knowledge because it masks the persuasive intent.”²⁰⁷ This further proves that children’s defenses are at an all-time low regarding the persuasion of their teachers who act as influencers in the classroom without explicit and constant disclosure.²⁰⁸ Even if it were not found necessary to require disclosure for all face-to-face marketing in the modern age, it may be necessary to consider the practice to be enforced when the deceptive practice is occurring through targeting vulnerable populations such as children.²⁰⁹

V. Conclusion

As technological advancements increase, advertisers would be naïve not to seize the opportunities presented to them.²¹⁰ However, it is the responsibility of lawmakers and regulators to reign in possible predatory behavior in business practice for the sake of the public.²¹¹ The FTC possesses the regulatory power to change deceptive business

²⁰⁶ See *Children, Adolescents, and Advertising*, *supra* note 131, at 2563 (identifying that brands attempt to establish a “brand-name preference” in individuals starting at a young age). Pediatricians in this time are skeptical of “tie in” promotions where one product would appear in television or film and act as advertising. *Id.* at 2564. They call for a clear separation of content and advertising. *Id.* However, unlike the behavior occurring within previously private spaces, children watching television can at least expect to be targets of advertising. *Id.* at 2564-65.

²⁰⁷ See Dekker & Reijmersdal, *supra* note 135, at 229 (describing the issues when advertising is not self-evident such as adults not understanding advertising messages without disclosure).

²⁰⁸ See Dekker & Reijmersdal, *supra* note 135, at 230 (finding that “when people think the celebrity endorser is very credible, but the disclosure states that the endorsement is commercial rather than chosen by the celebrity, they are likely to resist the disclosure.”). Many students look up to their teacher as their own real life celebrity and the practice of not disclosing the relationship they have with the company is unethical. *Id.*; see also SINGER, *supra* note 10 (citing multiple ethical concerns when teachers act as brand ambassadors in public school classrooms).

²⁰⁹ See FTC, *What We Do*, *supra* note 8 (describing the power of the FTC to require disclosure).

²¹⁰ See FTC, *What We Do*, *supra* note 8 (chronicling the historical advancements upon advertising made possible through technological innovations).

²¹¹ See Dekker & Reijmersdal, *supra* note 135, at 237 (calling upon lawmakers to exercise their duty to regulate predatory behavior).

practices as technology continues to advance.²¹² The FTC has attempted to combat the ethical dilemma regarding native advertising over social media and other platforms created with the rise of the Internet.²¹³ However, as the FTC catches up to the problematic methods created by marketers, companies develop new methods to escape the grasp of regulatory authority.²¹⁴ As these companies move towards a new wave of face-to-face marketing, the FTC needs to keep a watchful eye for potential disclosure issues and deceptive business practices. For this reason, the same restrictions which are placed upon companies for their deceptive digital practices should be used with guerilla marketing tactics that infiltrate the everyday lives of consumers. While America's economy relies heavily upon the notion of consumerism, native advertising may come at too great a cost to the American consumer, and our regulatory authorities must take action to protect them. In a time where Americans are held as captive audiences and forced to watch commercials in their elevators and gas station fueling centers, we need to maintain our civic spaces through non-intrusive methods, especially the requirements of disclosure.²¹⁵

²¹² See FTC, *What We Do*, *supra* note 8 (articulating the power of the FTC to combat these issues in the future).

²¹³ See Ember, *supra* note 3 (providing a background for why the FTC has targeted native advertising as of late).

²¹⁴ See BARTHOLOMEW, *supra* note 17, at 29 (demonstrating new methods of face-to-face marketing).

²¹⁵ See BARTHOLOMEW, *supra* note 17, at 30 (suggesting that advertising is impossible to avoid).