AT YOUR DISCLOSURE: HOW INFLUencers’ ENDORSEMENTS WILL BE PUT TO THE TEST BY THE F.D.A. AND F.T.C.

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I. Introduction

For months during the COVID-19 pandemic, we have moved from the bedroom, to the kitchen, the work-from-home office, and most frequently to the social media platforms on our phones.¹ The global health crisis has fostered the need for both entertainment and

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¹ See Travis M. Andrews, Our iPhone weekly screen time reports are through the roof, and people are ‘horrified’, THE WASH. POST (Mar. 24, 2020), archived at https://perma.cc/3UF8-JUZ7 (discussing a common trend in increased screen time while people are at home during the pandemic). One user stated that prior to the pandemic, she did not want to be distracted and during the pandemic she wants to be distracted. Id. See also Suzin Wold, COVID-19 is changing how, why and when we’re using social media, DIGIT. COM. 360 (Sept. 16, 2020), archived at https://perma.cc/56HK-5RXB (stressing that with COVID-19, society is not only online attending school and catching up with friends, but also making essential purchase decisions online); Eli Pacheco, COVID-19’s Impact on Social Media Usage, THE BRANDON AGENCY (Sept. 2020), archived at https://perma.cc/H9X3-VHQZ (highlighting that with the coronavirus, “attractive displays and full-scale, in-store incentives,” have had to undergo a new digital format); Alexandra Samet, 2020 US SOCIAL MEDIA USAGE: How the Coronavirus is Changing Consumer Behavior, BUS. INSIDER (June 9, 2020), archived at https://perma.cc/WFA9-DPF2 (explaining a study conducted in mid-2020 that found that adults in the United States were using social media more often). Known as “The Harris Poll,” the study found that “between 46% and 51% of US adults were using social media more since the [coronavirus] outbreak began.” Samet, supra. In a recent study conducted in May, “51% of total respondents—60% of those ages 18 to 34, 64% of those ages 35 to 49, and 34% of those ages 65 and up—reported increased usage on certain social media platforms.” Id.
reassurance during a continuous wave of the unknown. As citizens who once sought the advice of sales associates at their go-to stores or doctors at their local walk-in clinic, people often resort to the Internet to make day-to-day decisions. With the time consumers now spend online, they have discovered new brands through an abundance of social media accounts, often referred to as social media influencers.

The rise in consumer engagement on social media influencers’ promotional posts during the COVID-19 pandemic have become a particular worry for the Federal Drug Administration (“FDA”), and the Federal Trade Commission (“FTC”). Brands have been taking advantage of consumers’ longing for a coronavirus cure by promoting products that falsely claim to mitigate or cure the virus. These same...

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2 See Wyatt Koma et al., One in Four Adults Report Anxiety or Depression Amid the COVID-19 Pandemic, KFF (Oct. 9, 2020), archived at https://perma.cc/H9X9-R6UC (discussing the virus’ negative impact on mental health); Speaking of Psychology: Coronavirus Anxiety (Part 1), AM. PSYCH. ASSOC. (Feb. 2020), archived at https://perma.cc/L4E5-55GC (describing the fears that are likely to appear as a result of the unknowns of the virus and social disruptions).

3 See Andrews, supra note 1 (describing the story of one user who purposefully uses social media platforms to seek out content that makes her laugh). “She appreciates getting the news through Twitter, which is “peppered with comedic outlooks. Anything that makes you laugh is valuable right now.” Id.

4 See Kaleigh Moore, Influencers’ currency has increased during Covid-19 crisis, VOGUE BUS. (Apr. 13, 2020), archived at https://perma.cc/3S9Y-B9EP (highlighting that consumers are leaning into social media influencers during the pandemic). Influencers are creating authentic relationships with their following because consumers perceive them “as a voice of authority.” Id. See also Werner Geyser, What is an Influencer? – Social Media Influencers Defined, INFLUENCER MKTG. HUB (Jan. 4, 2022), archived at https://perma.cc/6C2D-KK92 (explaining what an influencer is). “An influencer is someone who has: the power to affect others’ purchasing decisions because of their authority, knowledge, position, or relationship with their audience.” Id. There are three types of influencers: (1) mega-influencers, many known as celebrities whose fame has been gained offline and have more than 1 million followers; (2) macro-influencers, known as online personas with high profiles that have from 40,000 to 1 million followers; and (3) micro-influencers, known as “ordinary people” with close relationship with their followers, which range from 1,000 and 4,000 on a platform. Id.

5 See Kelly Lienhard, Lawyers: FDA Closely Watching Online Food, Supplement Products Claim, INSIDE HEALTH REFORM, INSIDE WASH. PUBLISHERS (2020) (discussing how the FDA is paying closer attention to how companies advertise their products on social media). “As consumers spend more time online during COVID-19 lockdowns, regulatory lawyers say FDA is paying closer attention to how food and dietary supplement companies promote their products on social media and through celebrity sponsorships.” Id.

6 See Victor Synder, What Marketers Need to Know About People’s Social Media Patterns During the Pandemic, BUSINESS.COM (Aug. 10, 2020), archived at
brands, coupled with the effectiveness of influencer marketing, have led the two agencies to study the impact of advertisement features on an influencer’s endorsement post and the effectiveness of current endorsement regulations. While the studies are in the face of a global pandemic, it is essential that the FDA and the FTC modernize how pharmaceutical products are advertised online to protect consumers beyond COVID-19 as consumer decisions will increasingly continue to rely on access to health-related information online.

https://perma.cc/XZ3K-QZBG (highlighting how brands should use consumers’ need for connection and comfort in their marketing strategies); Kristen Shipley & Abbey Loar, Crisis marketing: How brands are addressing the coronavirus, THINK WITH GOOGLE (Apr. 2020), archived at https://perma.cc/EY28-FXQN (detailing the new strategies that brands have put in place to address customer needs, pivot marketing campaigns as companies that have met global-scale crises in the past, and to keep consumers and companies together as they stay safely apart, as a result of pandemic); Caitlin Mullen, Did big food, beverage companies take advantage of pandemic?, BIZWOMEN (Sept. 18, 2020), archived at https://perma.cc/ZKG6-PDL2 (explaining that a report from the Non-Communicable Disease Alliance found that some “food and drink manufacturers have used the pandemic to build influence and push unhealthy foods, soft drinks or alcohol, threatening public health.”);

Christopher Elliot, Pandemic predators: How travel companies take advantage of you during COVID-19, USA TODAY (June 19, 2020), archived at https://perma.cc/YFB6-SX4Q (discussing how some “pandemic predators” have been profiting from the confusion that arises from the pandemic and the uncertainties associated with traveling abroad); Chuck Murphy, Branding During a Pandemic – The Cost of Going Dark, BOSTON DIG. (Apr. 28, 2020), archived at https://perma.cc/E9LL-3253 (highlighting how especially during a pandemic, “[c]onsumers look to have a personal connection with their personal go to brands.”).

See Raqiyah Pippins, As Influencer Marketing Evolves, Regulatory Agencies are Taking Notice, 94 NATL. L. J. 8 (2020) (describing the announcement of the FDA’s and FTC’s investigations on social media endorsements).

8 See Reena Jain & Carly Kessler, FDA Should Follow FTC For Influencer Health Post Rules, LAW360 (Aug. 11, 2020), archived at https://perma.cc/LP7F-763A (discussing the need for the FDA to be more explicit in its standard guidelines for pharmaceutical endorsements given that the current standards do not explicitly regulate social media endorsements); Beth Snyder Bulik, How influential are influencers? FDA plots study to measure power of Instagram celebs, FIERCE PHARMA (Jan. 29, 2020), archived at https://perma.cc/N36Q-KJ9V (emphasizing that although direct-to-consumer advertising has been criticized in pharmaceutical products, they remain extremely popular to “draw a connection between the [user] and a condition or specific drug or simply to draw attention to the condition or brand.”); Christian Zilles, It’s Time to Crack Down on Influencers Endorsing Prescription Drugs, SOC. MEDIA HQ (Apr. 17, 2020), archived at https://perma.cc/Y3WB-DYRL (hypothesizing the negative impact that reckless endorsements of pharmaceutical products or medicinal cures would have on consumers and public health); James Hale, The FDA is Studying Influencers Who Endorse Healthcare Products, TUBE FILTER (Jan. 31, 2020), archived at
This Note will analyze the findings of the studies proposed by the FDA and the FTC as well as their impact on the marketing industry going forward. While the FTC takes a strong regulatory role with social media influencers, the FDA lacks appropriate regulatory oversight in online advertising. Given the historical impact of influencer marketing, the results of the FDA’s studies coupled with the FTC’s responses to its request for public comment will play a key role in determining any future regulatory updates to social media endorsements. Additionally, the FDA and FTC’s investigations will have significant implications on the current contracts’ influencers have with brands and will broaden consumer rights, brands’ obligations, and influencers’ obligations. Companies should be prepared to follow government regulations which go beyond mere “guidelines” because proper disclosure statements are no longer just a marketing tactic used by companies, but rather, they are the epicenter of consumer purchases.

II. History

A. The Evolution of the FTC: From Pro-Business to Pro-Consumer

The FTC, which was established by the Federal Trade Commission Act, was created because of the inadequacies of the Sherman Act and the FTC’s predecessor, the Bureau of Competition. Policies under the Sherman Act were so broad that judges—not the

https://perma.cc/77BV-HAVA (describing how the infamous pharmaceutical endorsement by Kim Kardashian of a morning sickness medication led the FDA to question its regulation efforts).

9 See Sherman Antitrust Act, 15 U.S.C. § 1 (1890) (detailing the purpose of the act). The Sherman Act prohibits “[e]very contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” Id. See also The Antitrust Laws, FED. TRADE COMM’N (Oct. 17, 2020), archived at https://perma.cc/Q6B5-3MVF (emphasizing that the main purpose of the antitrust laws is to protect the process of competition and business practices for the benefit of consumers). The main objective of the antitrust laws is to ensure “there are strong incentives for business to operate efficiently, keep prices down, and keep quality up.” Id. See also Our History, FED. TRADE COMM’N (Oct. 16, 2020), archived at https://perma.cc/SQ5E-J45Q (describing that The Bureau of Corporations was created by the Roosevelt Administration on February 14, 1903); Fed. Trade Comm’n, FTC History: Bureau of Economics Contributions to Law Enforcement, Research, and Economic Knowledge and Policy 9 (Sept. 4, 2003) [hereinafter FTC History] (indicating that the Bureau of Corporations was not established as a law enforcement group, but rather created as an investigatory group).
Bureau of Competition—assessed whether trade restraints were reasonable or not.10 While the judicial branch went beyond the economic purposes intended by the legislative branch in its application of the Sherman Act, it did so in order to prevent limitations on the economy.11 As businesses continued to grow exponentially following the Industrial Revolution, the public became increasingly concerned with unfair competition and large monopolistic trusts.12 Almost ten years after its enactment, the Sherman Act’s application on inter-company cooperation and operation remained unclear because of its broad application established by the Supreme Court’s opinion in *Standard Oil Co. of New Jersey v. United States*.13 The Supreme Court held that whether the Sherman Act applied to companies depended on the context and fairness of their contracts, a decision that the Court

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10 *See* Chris Jay Hoofnagle, *Federal Trade Commission Privacy Law and Policy* 3 (2016) (explaining that the Supreme Court found that it was best for any evaluation of monopoly-like behavior to be conducted by the courts rather than the government—the FTC—because the Court felt that having a universal standard was too limiting on the economy at the time).

11 *See id.* (highlighting that critics of the Bureau often found it necessary to maintain common law principles in the Bureaus and the Federal Trade Commission’s activities). Many critics were concerned that if the Bureau had full power under the Sherman Act, the Bureau would unreasonably restrain certain trade activities. *Id.* at 7. However, others with opposing views believed that whether the Bureau’s power would result in unreasonable restraints was not the point of the Sherman Act or the Bureau’s power to act on it. *Id.*

12 *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *Antitrust L. J.* 1, 3 (2003) (questioning how the government during the early years of the Sherman Act could protect consumers if businesses were growing due to unfair competition).

13 *See* Lauryn Harris, *Too Little, Too Late: FTC Guidelines on “Deceptive and Misleading” Endorsements by Social Media Influencers*, 62 *How. L. J.* 947, 959 (2019) (detailing that despite the Sherman Act, unfair trade and monopolies continued to occur, thereby creating doubt in the broad reasonableness standard set in Supreme Court cases). In *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 63 (1911), the Supreme Court held that the Sherman Act is not applicable to every restraint of trade. *Id.* Rather, the Sherman Act is applicable if the concerted conduct is reasonable, which is dependent on the context of the conduct and its potential or actual impact on competition. *Id.* *See also* Winerman, supra note 12, at 7–8 (summarizing the broad effect of the Sherman Act). Antitrust law, generally speaking then, “protected both consumers and competitors from economic harm and, in protecting small dealers from economic harm, simultaneously averted social harm.” *Id.* at 8. When the decision in *Standard Oil* came out, law scholars criticized the case’s “standard of reason.” *Id.* at 12–14. In particular, critics viewed *Standard Oil* as “judicial legislation” that would question each restraint “by the economic standard which the individual members of the court may happen to approve,” suggesting that each Justice would be acting with their “individual opinion as an economist or sociologist.” *Id.* at 14.
claimed could not be made by the government.\textsuperscript{14} Over time, concerns regarding the Sherman Act’s predictability and enforcement arose.\textsuperscript{15}

In an effort to provide businesses and law enforcement with clearer guidance, Congress created the Bureau of Corporations (‘‘the Bureau’’).\textsuperscript{16} As part of the Department of Commerce and Labor, the Bureau’s intended purpose was to make recommendations about regulating industries through documentation and investigations.\textsuperscript{17} Despite Congress’ efforts, the Bureau was ultimately unsuccessful due to its partisan governance.\textsuperscript{18} As political parties began establishing

\textsuperscript{14}See Harris, supra note 13, at 959 (describing the effect of the Supreme Court’s decision on all activities in the restraint of trade). The Court emphasized that it is the courts, not the FTC, that has the responsibility of determining whether the conduct under the Sherman Act is reasonable “by evaluating the nature of the conduct, its context, and its actual or probable effects on competition.” \textit{Id.} See also \textit{Hoofnagle}, supra note 10, at 6 (explaining how the Supreme Court’s decision was a “watershed moment for the creation of the FTC.”). Since judges would decide what acts were deemed reasonable or not under the Sherman Act, those judges that were more conservative were more likely to find trusts acceptable, thereby “leading to a general unraveling of antitrust policy.” \textit{Id.}

\textsuperscript{15}See Winerman, supra note 12, at 15 (detailing that due to the Sherman Act’s broad applications and its negative reactions in particular, antitrust issues consequently became a hot topic during the 1912 presidential race). See also Harris, supra note 13, at 959 (emphasizing that businesses also became concerned with reasonableness standard set).

\textsuperscript{16}See FTC History, supra note 9, at 10 (highlighting some of the traditional roles of the Bureau that continue to exist today). The Bureau continues to focus on economic report writing and research, which over the years have had a prominent role in policymaking by Congress, federal agencies, and other state and legislative authorities. \textit{Id.}

\textsuperscript{17}See \textit{id.} at 142 (specifying that the Bureau did an enormous amount of data collection). During this conversation with former directors, it was also discussed that because the Bureau had such a great amount of data to collect, sometimes the Bureau was overwhelmed, and efforts could have been better used elsewhere for more important matters. \textit{Id.} See also Harris, supra note 13, at 964 (highlighting the three bureaus of the FTC). While the FTC includes the Bureau of Consumer Protection, the Bureau of Competition, and the Bureau of Economics, the most relevant one for the FTC in terms of endorsements is the Bureau of Consumer Protection. \textit{Id.} The Bureau of Consumer Protection’s duty is to collect information on “complaints received, suits against companies, the development of trade regulation and rules, and consumer education” that can help prevent “unfair, deceptive, and fraudulent business practices.” \textit{Id.}

\textsuperscript{18}See FTC History, supra note 9, at 10 (explaining the evolution of the Economics Bureau which came as a result of the Bureaus dissolving). When the FTC took over the Bureau, data collection remained an essential task that shifted over to the Economic Division, predecessor to the Bureau of Economics. \textit{Id.} Given the rise in antitrust issues during the mid-20\textsuperscript{th} century, the Bureau of Economics was created in 1934 to expand the review of those issues. \textit{Id.} Eventually as the consumerism wave hit during the 1970s, the Bureau of Economics became regularly involved in consumer protection work. \textit{Id.}
economic power, consumers began to grow concerned over the parties’ ability to create monopolies deemed as an affront to political freedom, and which consequently influenced the country to advocate more for the employee over the corporation. As a result, the Federal Trade Commission Act created the FTC.

The FTC’s goal was to address issues that the Sherman Act and the Bureau could not. The FTC was created to prevent “unfair methods of competition” and “unfair or deceptive acts or practices” in commerce for the protection of consumers. Contained in Section 5 of the Federal Trade Commission Act, the FTC has both the power and the authority to sue private companies even if there is no evidence of injury to an actual or potential consumer. Since the FTC’s establishment, there has been a growing and robust body of administrative law that determines whether a practice is an unfair or

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19 See Hoofnagle, supra note 10, at 7–8 (discussing the political framework at a time where concerns of monopolies and economic powers in the United States were in conflict with each other). Although the Supreme Court in Standard Oil held that the company violated criminal provisions in the Sherman Act, the Republican Administration failed to invoke such provisions. Id. at 7. Condemning the Administration for their failure to act, the Democratic Platform of 1912 expressed its support for legislation enactment “which will restore to the statute the strength of which it has been deprived by such interpretation.” Id.

20 See About the FTC, Fed. Trade Comm’n (Oct. 17, 2020), archived at https://perma.cc/8DKR-HVC7 (describing how the agency was established).

21 See id. (noting how trust busting was present at the time the FTC was created). The FTC was created in 1914, during a time where there was a battle to “bust the trusts.” Id. See also Trust-busting: A Response to Business Concentration, U-S-HIST. (Feb. 2021), archived at https://perma.cc/KLJ5-P4CW (implying that “bust the trusts” often referred to government intrusion and regulation for the purpose of preventing monopolies and trusts between businesses).

22 See Federal Trade Commission Act, 15 U.S.C. § 41 (2018) (setting out the basic standards for the FTC Act). See also About the FTC, supra note 20 (detailing the agency’s mission). The mission of the FTC Agency is “[p]rotecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.” Id.

23 See R. E. Freer, Commissioner, Fed, Trade Comm’n, Address before the Annual Convention of the Proprietary Association (May 17, 1938) (explaining how the FTC’s authority to bring claims without evidence of injury came into existence). The Supreme Court in F.T.C. v. Raladam held that the FTC did not have the power to prevent a business’ use of unfair practice unless the practice proved to cause actual injury, but was overruled as per the Wheeler-Lea Act of 1938. Id. The Wheeler-Lea Act amended the FTC Act in Section 5 by not only declaring “unfair methods of competition” unlawful, but also declaring “unfair or deceptive acts and practices in commerce” unlawful, thereby making it unnecessary for the agency to establish actual injury to a competitor or consumer. Id.
deceptive method of competition.\textsuperscript{24} As commercial practices have evolved, so have the FTC’s regulations.\textsuperscript{25}

Particularly during the 1970s, the FTC expanded its scope of authority to accommodate consumer needs.\textsuperscript{26} As companies restricted consumers choices with their business practices, Congress authorized the FTC to identify unfair competitive practices that harm consumers.\textsuperscript{27} The Supreme Court granted the FTC the power to take action against companies involved in unfair practices whose acts did not necessarily impair competition.\textsuperscript{28} Ultimately, as the FTC continued to evolve, both judicial decisions from the Supreme Court and criticism from Congress led to the current standard of unfair practices under today’s Section 5 regulations.\textsuperscript{29}

\textsuperscript{24} See Harris, supra note 13, at 961 (discussing both Section 5 of the FTC Act and the FTC’s new Endorsement Guidelines relative to online advertisements). See also Laura E. Bladow, Worth The Click: Why Greater FTC Enforcement is Needed to Curtail Deceptive Practices in Influencer Marketing, 59 WM. & MARY L. REV. 1123, 1134 (2018) (outlining how the FTC’s Endorsement Guidelines in particular describe the agency’s approaches to enforcing unfair and deceptive practices).

\textsuperscript{25} See id. (detailing the evolution of the FTC’s policies surrounding advertisement regulations).

\textsuperscript{26} See HOOFNAGLE, supra note 10, at 3 (discussing the FTC’s shift from broader antitrust issues to specific consumer protection issues). As businesses grew exponentially in the United States due to industrialization, so did the uncertainty on the information industry. Id. The FTC prioritized its oversight efforts on the consumer issues brought by developing technology and quickly established that “clear disclosures and affirmative consent are necessary” in order to monitor information problems. Id. at xv. The first issues the FTC reported on concerned false advertisements. Id. at xvii. The FTC and the U.S. advertising agency found that there were many advertisements that asserted deceiving information directly to consumers, which harmed competition. Id.

\textsuperscript{27} See Harris, supra note 13, at 950 (demonstrating how deceptive practices in particular can harm consumers).

\textsuperscript{28} See Freer, supra note 23 (highlighting how prior to the Supreme Court’s grant, the FTC was only allowed to take action against those who engaged in deceptive acts if there was an actual harm to competitors); Harris, supra note 13, at 951 (detailing the historical significance of the FTC’s broad enforcement powers).

\textsuperscript{29} See FTC Policy Statement on Unfairness, FTC POL’Y STATEMENTS (Dec. 17, 1980) [hereinafter Policy Statement on Unfairness], archived at https://perma.cc/V52R-6BX5 (describing the present understanding of the policy). The FTC considers three factors when applying “the prohibition against consumer unfairness . . . (1) whether the practice injures consumers; (2) whether it violates established public policy; (3) whether it is unethical or unscrupulous.” Id. But see Thomas Harvey, Marketing your Brand with Influencers? Make Sure the FTC Hits the “Like” Button, RECORDER (Sept. 27, 2016), archived at https://perma.cc/8X2N-HADL (explaining how the current standard of unfair practices is applied to hypothetical scenarios but nonetheless, brands are still grappling with the question of how to disclose material connections). In fact, even
While actions considered “unfair” under Section 5 of the Act are often also considered “deceptive” under the Act, determining whether an act is deemed an unfair practice or a deceptive practice involves evaluating the act under two different standards.\textsuperscript{30} The FTC considers an act or practice unfair if it: (1) causes consumers substantial injury, that is (2) not outweighed by any countervailing benefits to consumers or competition that the practice produces; and if the act (3) offends public policy as established by statute, the common law, or otherwise.\textsuperscript{31} On the other hand, an act or practice is considered deceptive if it misleads a reasonable consumer, in a way that puts the consumer at risk.\textsuperscript{32} These standards are especially important as they form the foundation for the FTC’s Endorsement Guidelines that direct unfair and deceptive practices on social media by influencers.\textsuperscript{33}

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those brands that have retained counsel still struggle with trying to figure out how they can format endorsements to meet the FTC’s standard. \textit{Id.}
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\textsuperscript{30} See \textit{In re Figgie Int’l}, 107 F.T.C. 313, 373 (1986) (noting the differences between unfair practices and deceptive practices). \textit{See also FTC Policy Statement on Deception, FTC POL’Y STATEMENTS (Oct. 14, 1983)} [hereinafter Policy Statement on Deception], archived at https://perma.cc/6GVE-82JR (describing the present understanding of the deception policy). The FTC has specified that there must be certain elements to find a practice deceptive:

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First, there must be a representation, omission or practice that is likely to mislead the consumer.
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... [s]econd, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines the reasonableness from the perspective of that group. Third, the representation, omission, or practice must be a “material” one. The basic question is whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception.
\end{quote}

\textit{Id.}

\textsuperscript{31} See \textit{Policy Statement on Unfairness, supra} note 29 (stating the various factors that set the unfairness standard).

\textsuperscript{32} See \textit{Policy Statement on Deception, supra} note 30 (stating the various factors that set the deceptive standard). The FTC deems a practice to be deceptive “if there is a representation, omission, or practice likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.” \textit{Id.}

\textsuperscript{33} See \textit{Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(a)} (2020) (outlining various Guidelines proposed relative to endorsement advertisements online and when the Guidelines are applicable).
B. The Rise of the Endorsement Guidelines

Over the past thirty years, commercial practices have advanced alongside the technological advancements of radio, television, and the Internet.\textsuperscript{34} These mediums have led to the widespread distribution and access of advertisements to consumers.\textsuperscript{35} Given the particular vulnerability of online consumers to deceptive practices, the FTC has shifted its focus over the years to advertising agencies.\textsuperscript{36} Online consumers became more susceptible to deceptive influences with the development of the Internet.\textsuperscript{37} This allowed for anonymity and less resources to set up store-fronts; consequently, this made it harder for consumers to verify the truthfulness of claims.\textsuperscript{38} In advocating for

\textsuperscript{34} See Mark Goodrich & Jason Howel, Influencers: What Every Brand and Legal Counsel Should Know, BEST OF ABA SEC., INTELL. PROP. L., 36 GPSOLO 60, 60 (Sept./Oct. 2019) (discussing the relevancy of the FTC’s Endorsement Guidelines in endorsements compliance). \textit{See also} Bladow, supra note 24, at 1133 (emphasizing how the FTC’s efforts to develop the endorsements has taken e-commerce and the rise of social media platforms into consideration).

\textsuperscript{35} See id. at 1130 (describing how influencers leverage their audience from more than just one social media platform). \textit{See also} Vanessa G. Rijo, Sipping the (Detox) Tea: The Rising in Advertisements for Non-FDA Approved Supplements on Social Media & Regulations (or Lack Thereof) That Govern, 5 ADMIN. L. REV. ACCORD, 153, 155 (2020) (detailing how dietary supplements in particular are advertised on various platforms). \textit{See also} Tiffany Hsu, These Influencers Aren’t Flesh and Blood, Yet Millions Follow Them, THE N.Y. TIMES (June 18, 2019), archived at https://perma.cc/KZ9F-CN67 (describing how technology has created what are known as “virtual influencers” and their online reputation); Ana Andjelic, Move Over Influencers, Here Come Curators, MEDIUM (Mar. 4, 2020), archived at https://perma.cc/7BWZ-VYDV (discussing that so-called influencers need to do more than promote products on their platforms to establish credibility among their following).


\textsuperscript{37} See Isabel P. Riquelme & Sergio Roman, The Influence of Consumers’ Cognitive and Psychographic Traits on Perceived Deception: A Comparison Between Online and Offline Retailing Contexts, 119 J. BUS. ETHICS 405, 418 (2013) (analyzing how consumers’ perceived deception differ when they shop on the Internet and in physical stores and finding that those trustworthy of information on the Internet are nonetheless likely to be deceived).

\textsuperscript{38} See Bo Xiao & Izak Benbasat, Product-Related Deception in E-Commerce: A Theoretical Perspective, 35 MGMT. INFO. SYS. Q. 169, 170 (2011) (detailing the unique characteristics of the Internet that impact consumers’ ability to detect deceptive practices online). From its inception as a digital environment, the Internet allowed companies that sell and/or advertise online to “create and change
consumer protection, the FTC produces guidelines known as Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Guidelines”), that demonstrate how advertisers should comply with Section 5 of the Act.  

First known as the 1980 Guidelines, they originally intended to share how the FTC views marketing tactics involving endorsements. Specifically, the Guidelines intended to provide both advertisers and influencers with a better understanding of how Section 5 may apply to marketing activities that they and their consumers may engage in. The 1980 Guidelines described the general considerations that advertisers should take into account when using endorsements, gave a broad overview of sponsored posts, and described “disclosures of material organizations.” Given the adaptation of marketing strategies since 1980, the FTC has revised its guidelines to explicitly require social media influencers to disclose whether they are being paid for their endorsements.
C. The Role of the FTC Endorsement Guidelines in Influencer Marketing Today

1. The Makeup of a Social Media Influencer

The “social media influencer” is a product of social media advertising that emerged during the “social era” of digital advertising, when Facebook began its “social ads” to promote credit card companies.\(^4\) As companies began targeting specific audiences on exchange for the endorsement clearly enough. \(Id.\) The third example in the 2009 Guidelines states:

During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of her career and during this time she has risen to her highest level ever in the rankings. She responds by attributing the improvement in her game to the fact that she is seeing the ball better than she used to, ever since having laser vision correction surgery at a clinic that she identifies by name. She continues talking about the ease of the procedure, the kindness of the clinic’s doctors, her speedy recovery, and how she can now engage in a variety of activities without glasses, including driving at night. The athlete does not disclose that, even though she does not appear in commercials for the clinic, she has a contractual relationship with it.[1]

\(Id.\) In this example, the contract the athlete has with the clinic says that she is paid for endorsing the surgery publicly. \(Id.\) Consequently, a consumer watching the interview may believe that the athlete is making genuine remarks about the surgery and the clinic and, in consequence, is motivated by her authentic impressions to make such comments rather than by the fact that she is being paid to do so. \(Id.\) “Without a clear and conspicuous disclosure that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive.” \(Id.\) See also Bladow, supra note 24, at 1129 (noting that traditional advertising companies have re-invested their advertising efforts in “the power of influencers.”); Anns Shin, FTC Moves to Unmask Word-of-Mouth Marketing, THE WASH. POST (Dec. 12, 2006), archived at https://perma.cc/88SC-CEVY (emphasizing that even if a social media influencer simply discusses a product without visually placing the product in a post or story, the influencer must still disclose the brand relationship);

FTC Publishes Final Guides Governing Endorsements, Testimonials: Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements, FED. TRADE COM’N (Oct. 5, 2009), archived at https://perma.cc/3RBA-75PY (highlighting that the FTC Guidelines specifically include non-celebrity social media influencers).

\(^4\) See Jennifer L. Schmidt, Blurred Lines: Federal Trade Commission’s Differential Responses to Online Advertising and Face to Face Marketing, 19 J. HIGH TECH. L. 442, 453–55 (2019) (discussing the rise of regulatory action from traditional advertising to advertising in the age of social media). See also Peter
social channels, companies realized that some consumers on social media have a loyal following that meets their target audience. Consequently, the FTC closely monitors social media influencers because of the significant impact that their actions and opinions have on their followers. Many influencers differ from traditional celebrities. Well-known celebrity-influencers on social media platforms, like Kim Kardashian, typically have more than one million followers. However, many social media users that do not rise to celebrity fame and have significantly less followers are nonetheless

Suciu, History of Influencer Marketing Predates Social Media By Centuries – But Is There Enough Transparency In The 21st Century?, FORBES (Dec. 7, 2020), archived at https://perma.cc/6HXB-PN4Q (explaining that influencers predate social media and that although they emerged as early as ancient Rome, royalty in Europe were often influencers themselves).
45 See Schmidt, supra note 44, at 455 (highlighting the different companies that also began engaging in the type of advertising practices that companies like Facebook did on its own websites). “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.” Id.
46 See 16 C.F.R. § 255.0(b) (2017) (defining “influencer”). The FTC considers an influencer an endorser in particular because they provide “advertising message[s] . . . that consumers are likely to believe [reflect] the opinions, beliefs, findings, or experiences of [the influencer, and not] the sponsoring advertiser.” Id. See also Influencer, DICTIONARY.COM (Oct. 16, 2020), archived at https://perma.cc/6CZJ-MV82 (defining what an “influencer” is). See also Geyser, supra note 4 (describing an influencer, whether a celebrity influencer or a non-celebrity influencer, as someone “who ha[s] the power to affect purchase decisions of others because their (real or perceived) authority, knowledge, positions, or relationship.” Id. See Bladow, supra note 24, at 1128 (discussing the impact of endorsement reviews on consumers). In a study of influencers on Twitter, 49% of consumers claimed to rely on recommendations by influencers when they make purchasing decisions. Id. See also Schmidt, supra note 44, at 455–56 (indicating that the FTC acknowledged uncertainty between traditional and modern forms of advertisement, especially in regard to those advertisements on social media). After Facebook participated in promoting advertisements on its site, the FTC recognized a blurred line as advertisements “would seamlessly appear as content within news articles and social media websites.” Id. at 455. See also Marty Swant, Twitter Says Users Now Trust Influencers Nearly as Much as Their Friends, ADWEEK (May 10, 2016), archived at https://perma.cc/6V26-DH9F (finding that forty percent of consumers who viewed a product endorsement on social media immediately purchased the product after).
47 See Ava Farshidi, Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger, 9 HARV. J. OF SPORTS & ENT. L. 185, 201 (2018) (highlighting why some endorsements by social media influencers are harder to notice than endorsements the public may deem to be “obvious”).
48 See Kim Kardashian (@kimkardashian), INSTAGRAM (Apr. 2021), archived at https://perma.cc/FK7Q-SLZU (displaying the 213 million followers the famous influencer has).
subject to the FTC’s regulations. The FTC does not simply assume that a reasonable consumer understands that an influencer is being paid for his or her posts. This is because non-celebrity influencers are perceived as more authentic and relatable due to their seemingly humble regard and thus establish—intentionally or not—more trust with their audience.

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49 See Justin Timberlake (@justintimberlake), Instagram (Feb. 2021), archived at https://perma.cc/S6P2-XK8M (demonstrating that the famous actor and singer has 59.7 million followers); Ariana Grande (@arianagrande), Instagram (Feb. 2021) archived at https://perma.cc/8DGN-ACUQ (showing that the famous singer has 224 million followers); Jennifer Garner (@jennifer.garner), Instagram (Feb. 2021) archived at https://perma.cc/ML5P-VCE5 (displaying the famous actress’ 10.3 million followers); Tom Brady (@tombrady), Instagram (Feb. 2021) archived at https://perma.cc/B6MG-5KBP (showing that the seven-time Super Bowl champion has 9.4 million followers). See also Sina (@happigreylucky), Instagram (Feb. 2021) archived at https://perma.cc/32HR-GZZZ2 (displaying that a mom-blogger who shares her passion for design and motherhood has 420 thousand followers); Sammy Robinson (@sammyrobinson), Instagram (Feb. 2021), archived at https://perma.cc/8T3Y-UHFG (showing that a makeup blogger and clothing line owner has 649 thousand followers).

But see Dwayne Johnson (@therock_), Instagram (Feb. 2021) archived at https://perma.cc/7WVB-8NQK (displaying that the famous actor and fitness guru only has 158 thousand followers); Rickey Thompson (@rickeythompson), Instagram (Feb. 2021), archived at https://perma.cc/QV2M-PDNG (showing that the YouTube and Vine comedic-content creator has 5.3 million followers on Instagram).

50 See Farshidi, supra note 47, at 186–87 (discussing that because fashion influencers typically start off as bloggers before they shift their presence to platforms like Instagram, many of their followers that follow them through this transition simply believe it is a new medium, rather than a platform focused on producing content for social media).

51 See BRIAN SOLIS, THE INFLUENCER MARKETING MANIFESTO: WHY THE FUTURE OF INFLUENCER MARKETING STARTS WITH PEOPLE AND RELATIONSHIPS NOT POPULARITY 1 (2016) (discussing the difference in marketing tactics between celebrities and non-celebrity influencers that brands should consider). See also Bladow, supra note 24, at 1128 (distinguishing non-celebrity influencers from celebrity influencers because of how they are perceived by their audiences). Described as “ordinary people,” non-celebrity influencers are often perceived as more relatable, authentic, and transparent than traditional celebrities. Id. But see Sofia Martinez-Guasch, Instagram Influencers Have More “Influence” Than You Think, Medium (Feb. 28, 2019), archived at https://perma.cc/S5M3-GPL4 (noting that in an interview with a consumer, some celebrity influencers can be relatable to the everyday consumer depending on the context of their post). In the case of a celebrity who posted a skin care product meant to help with jet lag, the consumer had difficulty relating to both the celebrity and the brand because she does not travel as much as the celebrity. Id. Similarly, consumers who follow celebrity influencers, like supermodel Bella Hadid who posts many endorsements of luxury fashion or beauty brands, do not relate to the influencers because they often cannot afford the same lifestyle or products. Id.
In sharing their daily lives online—which has been heightened as a result of the COVID-19 pandemic—influencers engage with their audience beyond the nine-to-five work hours. Influencers leverage their perceived authenticity as credibility by sharing their home-cooked meals, outfits-of-the-day, the progression of the change in their hair color, and being vulnerable as they discuss topics such as ongoing skin issues on their “live” stories. What may seem like a mere hobby is actually a full-time job for professional influencers. In fact, as influencer marketing has become more prominent, the most creative users may end up relying on the profits from their social media activity as their main source of income.

2. The Nature of Influencer Marketing with a Focus on Instagram

As e-commerce continues to grow, an influencer’s high screen time and consumer engagement is an attractive strategy for brands to promote products. When a brand believes that an influencer has a

52 See Bladow, supra note 24, at 1129 (highlighting how the profitability of influencer marketing “allows many influencers to pursue being an influencer as a full-time job.”).
53 See Martinez-Guasch, supra note 51 (demonstrating various products influencers promote on Instagram). Devin Brugman, Co-Founder of A-Bikini-A-Day, often shares her skincare routine on her Instagram stories by taking a picture of the products set out on a table and “mentioning” the brand’s Instagram account next to the product. Id.
54 See Farshidi, supra note 47, at 187 (discussing how many traditional bloggers that write and share their lives as a hobby are now moving towards shifting their hobby into a full-time job).
55 See id. at 186 (discussing that the impact of social media influencers’ persuasive position in the retail industry allows them to live off endorsements and partnerships like a full-time job). See also Akshay Varma Varma, Anyone can make Money on Instagram (Without 10K Followers) the smart way, MEDIUM (Sept. 19, 2020), archived at https://perma.cc/98WW-TFW6 (discussing how micro-influencers can make money quite easily and in no time).
56 See Bladow, supra note 24, at 1128 (discussing the functionalities of influencer marketing). Endorsements from influencers are “often equivalent to a peer recommendation and can carry significant weight with her followers.” Id. See also Sujan Patel, How You Can Build a Powerful Influencer Marketing Strategy in 2020, ECOMMERCE MKTG. (Oct. 17, 2020), archived at https://perma.cc/P5SD-BTGY (detailing the various methods of influencer marketing); Instagram Marketing, HUBSPOT (2020), archived at https://perma.cc/QBK8-JNC3 (explaining the business benefits of using Instagram’s marketing features and capabilities). There are twenty-five million business profiles on Instagram and is the second most accessed network behind Facebook. Instagram Marketing, supra. As of 2020, 80% of Instagram users have made a purchase based on a brand, item, user, or service they have discovered on the platform. Id.
high-quality relationship with their followers, it will often message the influencer directly and ask to collaborate.\textsuperscript{57} Typically this involves the brand offering to send the influencer one of its products in exchange for a review.\textsuperscript{58} While most influencers that appear on users’ social media feeds are paid to promote a product on their post or story, influencers that are newly establishing their online presence and reputation are often not compensated.\textsuperscript{59} Nonetheless, this has been a common expectation for users such as bloggers striving to become “mega influencers” and become widely recognized across a platform.\textsuperscript{60} In a set of interviews with influencers, it was common knowledge that “beginner influencers” tend to agree to most of the partnership requests they receive from brands to establish a larger

\textsuperscript{57} See Stacey McLachlan, 35 Instagram Stats That Matter to Marketers in 2021, HOOTSUITE (Jan. 18, 2022), archived at https://perma.cc/Y64Q-83UW (explaining that an influencer has a high-quality relationship with followers when the user has high engagement rates with their audience). Even for influencers with a small number of followers compared to traditional celebrity-influencers, influencers are likely to have more potential for higher return on investment (ROI) because their engagement rate is high, they embody an authentic voice, and they have robust influence in their own niche that stands out to brands. \textit{Id. See also} Interview with Sophie Baird regarding Brand Partnerships (Feb. 2019) [hereinafter Interview with Sophie Baird] (explaining that most influencers that are starting out typically get messaged directly from smaller brands).

\textsuperscript{58} See Geyser, supra note 4 (explaining that brands are more likely to message a micro-influencer directly). \textit{See also} Jenn Chen, What is influencer marketing: How to develop your strategy, SPROUT SOCIAL (Sept. 17, 2020), archived at https://perma.cc/T48K-ZBBQ (discussing that for small or start-up businesses, a practical marketing strategy is to reach out to the influencer directly). \textit{But see} Branded Content Tools on Instagram, INSTAGRAM BUS. (Feb. 3, 2021), archived at https://perma.cc/QUc6-HDBP (discussing the realistic implications and limitations of using the Paid Partnership tool on Instagram). Advertisers can use the Paid Partnership tool to track the metrics of a sponsored posts and the tool includes a pre-approval process between the brand and the influencer. \textit{Id. This feature allows brands to approve the sponsored post on Instagram before the post by the influencer is posted. Id. However, many of the advertisement features on Instagram are not available to all Instagram users and have recently only been tested on celebrity-influencers. Id.}

\textsuperscript{59} See Interview with Sophie Baird, supra note 57 (detailing a partnership she had with one particular brand, where despite an agreement between the two of them, the brand never paid her for her Instagram post endorsing the brand’s service).

\textsuperscript{60} See Interview with Mikayla Kuhen regarding Brand Partnerships (Mar. 2019) (stating that although she tries to work with brands who will compensate her for her post, she often agrees to work with brands who do not offer payment because she knows she has to build her audience before). \textit{See also} Patel, supra note 56 (highlighting the effective use of micro-influencers).
following and influencer-like feel to their social media accounts.\textsuperscript{61} Wider already established “macro-influencers” on the other hand, are often a part of a marketing or advertising agency.\textsuperscript{62} These agencies have pre-established relationships with certain brands and work to develop brand partnerships between the influencer and the brand.\textsuperscript{63}

\textbf{D. The FTC’s and FDA’s Conjoined Efforts to Prevent Unfair and Deceptive Practices}

Throughout the 1930s, the FDA and the FTC each wanted to regulate advertising for medicinal products because the advertisements often over-promise the products’ effect and were detrimental to consumers’ safety.\textsuperscript{64} During this time when the ownership of

\textsuperscript{61}See Interview with Sophie Baird, \textit{supra} note 57 (discussing how she started “influencing”). Baird noted that when she began to work with brands, she often reached out to mentors—established influencers with a higher following—who advised her to accept most brand partnerships and to even reach out to brands herself in order to establish her presence and market her outreach. \textit{Id.}

\textsuperscript{62}See Bladow, \textit{supra} note 24, at 1127 (describing why working with a marketing agency is appealing for influencers with a large following and brands seeking to partner with them). \textit{See also} Interview with Ashley D’Mello regarding Brand Partnerships (Mar. 2019) (explaining the types of brand partnerships she receives from working with a marketing agency).

\textsuperscript{63}See Bladow, \textit{supra} note 24, at 1137 (detailing the value of establishing relationships between influencer and brand). \textit{See also} Joel Matthew, \textit{Understanding Influencer Marketing And Why It Is So Effective}, \textit{FORBES} (July 30, 2018), \textit{archived at} https://perma.cc/6ZR5-C2CQ (explaining how influencer marketing works because creators care about their curated reputation, and therefore they take time to cultivate organic content which then successfully reaches targeted consumers). These partnerships, whether through an agency or not, are typically established for the one-time promotion of a single product or for a campaign, which is a long-term promotion of a particular product or set of products. \textit{Id. See also} Margot Whitney, \textit{The Complete Guide to Advertising on Instagram}, \textit{THE WORLD STREAM BLOG} (Sept. 21, 2020), \textit{archived at} https://perma.cc/GW9K-U7RE (listing the several different strategies brands can implement to market their goods or services on the platform); Jasmine Garsd, \textit{Instagram Advertising: Do You Know It, When You See It?}, \textit{NHPR} (June 24, 2019), \textit{archived at} https://perma.cc/PK66-9GW4 (questioning the effectiveness of Instagram’s various advertising tools); Interview with Maddie Orlando regarding Brand Partnerships (Mar. 2019) (describing the various brand promotions she and her siblings have been a part of).

\textsuperscript{64}See HOOFNAGLE, \textit{supra} note 10, at 32 (detailing the historical competition between the two regulating agencies). Much of the competition between the agencies was due to the troubling advertising that arose during the 1930s, in which the advertisement’s content created conflict in assigning responsibility to the FDA or the FTC given their designated roles. \textit{Id.} at 36. The responsibilities and goals of the two agencies were in conflict when the same advertisement depicted a non-food or non-drug product but was additionally advertised as a treatment alternative, the
advertising regulations was at issue, advertisers purposefully lobbied the FTC because it was considered less effective than the FDA. Advertisers went as far as considering the FTC the easier agency to influence because unlike the FDA, the FTC itself was not in charge of approving products such as drugs. Nonetheless, Congress did not believe the FTC had enough power to regulate food, drug, and cosmetic advertising. In recognizing the threat that the abuses of the medicine industry put on consumer protection, despite the FTC’s and the FDA’s existence, it was clear to Congress that advertising laws needed strengthening. The enactment of the Wheeler-Lea Act initially gave the FTC and the FDA broader and distinct powers, which despite the Wheeler-Act’s well-meant intentions, was soon at the expense of providing consumers with the most effective protection possible.

Two decades later, the FTC and the FDA recognized that working together could maximize the effectiveness of a collective public interest goal. Under the 1971 Memorandum of

same way medicinal drugs are. Id. For example, some advertisements “included recommendations that Lysol, the household cleaner, be used as a vaginal douche and that the mouthwash Listerine could be used to prevent tuberculosis.” Id. at 32. See id. at 34 (discussing the distinct roles of the FDA). At the time, the FDA was avoiding participating in regulatory action against advertisements because there was a concern that their regulatory efforts in the area would reflect the agency’s efforts surrounding prescription drugs and their strict approval process. Id.

See HOOFNAGLE, supra note 10, at 37 (highlighting the reputation of the FTC at the time). In comparison with the FDA, the FTC at the time was recognized as the agency more motivated by the government’s present economic and political landscape. Id. As a result, politicians were more likely to influence the FTC and had more success to influencing regulators in hopes of meeting their economic goals. Id. See also Schmidt, supra note 44, at 448 (highlighting the difficulties that may arise for the FTC in meeting its mission and purpose). The agency with a mission to “promote business and competition . . . while protecting consumers from the practices that businesses might use to gain an edge in the marketplace,” often struggles balancing the two “without unduly burdening business activity . . . when they act in both the interests of consumers and corporations.” Id.

See HOOFNAGLE, supra note 10, at 38 (emphasizing that given the nuance of print advertising at the time, it was already enough for the FDA to regulate labels and oversee the approval process for prescription drugs).

See id. at 36 (discussing that advertisers took advantage of the regulatory discrepancy between the two agencies).

See id. (highlighting that although the FDA and the FTC both strive to protect consumers, many of their initial responsibilities conflict with one another, thereby leaving many issues unresolved).

See id. at 37 (noting how the FDA and the FTC realized that they would meet their goals to protect consumers by setting their differences aside). The Wheeler-
Understanding, the FDA and FTC may operate together and agree to collaborate in instances where the “same, or similar claims are found in both labeling and advertising” or where “material may be construed as either advertising or labeling or both.”71 With certain non-prescription drugs, the FDA continues to resort to the FTC to regulate advertisements and endorsements.72 The FDA approves prescription drugs and regulates their advertisements, but is not responsible for regulating over the counter (“OTC”) drug advertisements.73 However, the FTC may only act against OTC drugs and other health-related products once they are already in the market and harming consumers.74

Given that most influencers typically rely on the brand to share product information—which the brand often does not—influencers often promote pharmaceutical products without disclosing potential side effects.75 The consequences of the COVID-19 pandemic in particular heightened the negative impact that influencers have on

Lea Act originally gave the FTC broader powers to regulate “unfair and deceptive practices” in advertisements and gave the FDA power to regulate the labels of prescription drugs. Id.

71 See U.S. FOOD & DRUG ADMIN., MOU-225-71-8003, MOU WITH FEDERAL TRADE COMMISSION CONCERNING EXCHANGE OF INFORMATION (FDA-225-71-8003) (1971) [hereinafter MOU WITH FEDERAL TRADE COMMISSION] (detailing the boundaries surrounding the agreement between the FTC and the FDA). See also Jain & Kessler, supra note 8 (emphasizing that the FDA and the FTC continue to often operate under the 1971 memo of understanding, particularly when online advertising “may be subject to both FDA and FTC oversight . . . .”).

72 See Prescription Drug Advertising | Questions and Answers, PRESCRIPTION DRUG ADVERTISING (2015) [hereinafter Prescription Drug Advertising], archived at https://perma.cc/WKP4-QFR3 (discussing the regulatory activities that the FDA is both responsible and not responsible for relative to pharmaceutical products). See also Rijo, supra note 35, at 168 (describing the role of the FDA in pharmaceutical advertising).

73 See Prescription Drug Advertising, supra note 72 (emphasizing that the FDA does not oversee the advertising of OTC drugs and leaves that responsibility to the FTC).

74 See Rijo, supra note 35, at 167 (explaining the difference between the FDA’s regulations of prescription and OTC drugs). Prescription drugs are highly regulated by the FDA via an in-depth process that pharmaceutical companies have to go through before the drugs can be both prescribed and advertised. Id. “If a pharmaceutical company wants to advertise a prescription drug, the FDA requires that the advertisement include the drug’s generic name, at least one approved use for the drug, as well as all the risks associated with using the drug.” Id. at 167–68.

75 See id. at 167 (discussing the lack of regulation the FDA has on social media endorsements of pharmaceutical products). While the FTC is the agency responsible for regulating advertisements and endorsements, there are no requirements from the FTC nor from the FDA requiring influencers to disclose that the product they are promoting has not been approved by the FDA. Id.
consumers given their failure to disclose key product information.\textsuperscript{76} The COVID-19 pandemic has increased both online consumer engagement and health concerns, making consumers more inclined than ever before to resort to influencers for product reviews.\textsuperscript{77}

\textit{E. How the Endorsement Guidelines Function for Today’s Social Media Influencers}

With social interactions between Instagram users from across the globe of various ages, and from different economic markets, the FTC has acknowledged the importance of accurately informing consumers on platforms like Instagram.\textsuperscript{78} In treating an influencer’s opinion as a trusted source of information, the FTC has recognized that brand-relationship disclosure is necessary to ensure consumers can

\textsuperscript{76} See Kate Bratskeir, \textit{How ‘COVID-washing’ became the new greenwashing}, FAST CO. (Aug. 17, 2020), archived at https://perma.cc/D77R-KL3R (discussing the rise of pseudoscientific products advertised online that claim to help “mitigate, treat, or cure coronavirus”). “COVID-washing” is a marketing strategy used to “draw[] in consumers by conveying the false impression that a certain product can cure or repel COVID-19.” \textit{Id.} One of the products that the FDA has taken notice of during the pandemic has been dietary supplements. \textit{Id.} Vivify Holistic Clinic, a company that offers both supplements and teas, “promoted antiviral benefits; some claimed to prevent infection from the coronavirus.” \textit{Id.} Another company, NeoLife, promoted a “daily phytonutrient pack” called “My Corona Defense,” asserting it could “help boost immunity to fight COVID-19 pandemic situation.” \textit{Id.}

\textsuperscript{77} See Consumer behavior in the age of Coronavirus: Global review trends by industry, TRUSTPILOT BUS. BLOG (May 21, 2020), archived at https://perma.cc/UBS4-V7T5 (revealing an in-depth investigation of consumers’ purchasing decisions during the coronavirus). One research study in particular has identified six purchasing phases as a result of the COVID-19 pandemic: (1) proactive health-minded buying; (2) reactive health managements; (3) pantry preparations; (4) quarantined living preparation; (5) restricted living; and (6) living a new normal. \textit{Id.} See also Amanda Perelli et al., \textit{How the coronavirus is changing the influencer business, according to marketers and top creators on Instagram and Youtube}, BUS. INSIDER (Sept. 1, 2020), archived at https://perma.cc/H9N9-K5RL (stating that during the pandemic, engagement on an influencers’ social media posts was “higher than normal” as consumers were spending more time in isolation); Bratskeir, supra note 76 (claiming that many companies have taken advantage of consumers’ concern over the pandemic).

\textsuperscript{78} See Bladow, supra note 24, at 1132 (indicating that as platforms like Instagram have become more prevalent in e-commerce, the FTC has recognized the importance of becoming familiar with such platforms). See also The Rodman Law Group, \textit{FTC Sues Company for Unsubstantiated Claims}, MEDIUM (May 4, 2020), archived at https://perma.cc/P7FL-LNTN (noting that the FTC has also acknowledged the importance of preventing brands from preying or capitalizing on consumers’ fear of the COVID-19 pandemic).
accurately evaluate an influencer’s endorsement. The FTC set out this standard in its supplemental regulations to the Guidelines that is meant to provide advertisers with a better understanding of compliance. In 2017, the FTC took actions against social media influencers who failed to disclose their brand relationships. The FTC has particularly targeted brands that oversell their own products through deceptive means. More recently in 2020, the FTC acted

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79 See 16 C.F.R. § 255.0(b) (2017) (explicitly stating the type of endorsements that require compliance with the Endorsement Guidelines). The Endorsement Guidelines describe that 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.” Id.
80 See Bladow, supra note 24, at 1132 (stating that the FTC requires influencers to disclose “any material connection between themselves and a brand that consumers might not reasonably expect”). A point of emphasis in the Endorsement Guidelines is that the disclosure must be “made clearly and conspicuously.” Id. at 1136. The FTC requires influencers to disclose the relationship between themselves and the brand because it is a relationship that “consumers might not reasonably expect.” Id. at 1132. For brands and social media influencers, it is the FTC Endorsement Guidelines and “The FTC’s Endorsement Guides: What People are Asking” (FAQs) that establish these general principles. Id. at 1139. See also THE FTC’S ENDORESEMENT GUIDES: WHAT PEOPLE ARE ASKING, FTC (Aug. 24, 2020) [hereinafter The FAQs], archived at https://perma.cc/FD2R-4MR6 (detailing several explanations relative to the Endorsement Guidelines and example scenarios where the Endorsement Guidelines may apply); 16 C.F.R. § 255.0(a) (2017) (emphasizing that the Endorsement Guides are distinct from the FTC’s regulations rules). The Endorsement Guides differ in their enforcement from traditional trade regulation rules because they only provide “the general principles that the Commission will use in evaluating endorsements and testimonials.” Id. See also Goodrich & Howel, supra note 34 (explaining that when the Endorsement Guides and FAQs are taken together, they embody a common set of principles that should be followed relative to endorsements). The two documents embody three principles: “(1) endorsements must reflect the honest opinions, findings, beliefs, and experiences of the endorser; (2) advertisers must not make claims through endorsements that would be false, misleading, or unsubstantiated if made directly; and (3) influencers and advertisers must disclose material connections.” Id.
81 See id. (discussing the recent developments in the influencer endorsement scheme). In April 2017, the FTC took its first action in warning influencers and brands and sent 90 educational letters “reminding them that they must disclose material connections.” Id. A study following the influencers’ online activity found that several influencers did nothing to comply with the FTC letter they had received. Id. Consequently, the FTC sent follow-up warning letters to 21 influencers, further notifying them of their “potential failures to disclose their material connections with brands.” Id.
82 See Complaint at 2, In Matter of Sunday Riley Modern Skincare, LLC, No. C-192-3008 (FTC, 2019) (detailing the company’s course of conduct in violation of Section 5 of the FTC Act). In 2019, in In the Matter of Sunday Riley Modern Skincare, the FTC acted against the skincare company for deliberately posting
against Teami LLC, a detox-tea company, for failing to require influencers endorsing a Teami-brand product to accurately disclose their relationship with the brand.\textsuperscript{83} In \textit{F.T.C. v. Teami LLC}, the FTC found that although influencers had noted the brand-relationship in their Instagram post captions, the disclosure was inadequate because it hid in the caption beyond a follower’s initial view of the post.\textsuperscript{84} Thus, while the FTC explicitly recognizes that disclosures must be clear and conspicuous in text, they must also be readily apparent in their form and placement.\textsuperscript{85}

\textbf{III. Premise}

\textbf{A. The FDA Study}

Tension between the responsibilities of the FDA and the FTC in regulating advertisements and endorsements of health-related online reviews using fake accounts. \textit{Id}. Sunday Riley sold its skincare products through Sephora, at its stores and on its website. \textit{Id}. Between November 2015 and August 2017, managers at Sunday Riley created fake Sephora accounts and posted reviews of the brand’s cosmetic products on the website. \textit{Id}. When it was not the manager or the CEO writing the reviews themselves, it was the employees writing the reviews at the request of the managers. \textit{Id}. See also Rijo, \textit{supra} note 35, at 168 (implicating how the FTC’s action against Teami LLC, among other related actions, calls for a restructure of the Endorsement Guidelines in order to clarify what is considered a deceptive practice).

\textsuperscript{83} See Complaint at 16--18, F.T.C. v. Teami LLC., No. 8:20-cv-518 (11th Cir. 2020) (detailing the tea company’s violations against Section 5 of the FTC Act). The FTC charged Teami with two counts: (1) false or unsubstantiated efficacy claims; and (2) deceptive failure to disclose material connection. \textit{Id}. The FTC found that although the contracts between paid influencers and Teami required the influencers to attain approval for their Instagram posts from the company, the influencers’ Instagram posts nonetheless failed to comply with the company’s own social media policy. \textit{Id}. at 13.

\textsuperscript{84} See \textit{id}. (explaining the truncated perspective of an influencer’s caption on a follower’s Instagram feed). The FTC noted in its complaint that when an Instagram caption is viewed in a follower’s feed, “the caption is truncated such that at most three lines of text are visible unless the follower clicks on a link labeled ‘more.’” \textit{Id}. at 14–15.

\textsuperscript{85} See \textit{id}. at 18 (suggesting that in order to satisfy Section 5 of the FTC Act, influencers and brands must do more than disclose the brand-relationship via plain language text). See also Rijo, \textit{supra} note 35, at 166 (emphasizing that simply noting the brand-relationship in a caption of an Instagram endorsement post is not enough). Not only must influencers disclose a material connection to the brand in text, but they must also disclose a signal “to followers that he or she has a relationship with a brand.” \textit{Id}. 
products have caught the FDA’s attention. 86 Before COVID-19, FDA Commissioner, Scott Gottlieb, M.D., announced a plan to restructure the FDA’s oversight of dietary supplements. 87 More prevalently, in January 2020, the FDA announced the agency’s Office of Prescription Drug Program (“OPDP”) will be conducting studies on the impact of endorsements and direct-to-consumer promotion. 88 The purpose of the

86 See Press Release, FTC, FDA Send Warning Letters to Seven Companies about Unsupported Claims that Products Can Treat or Prevent Coronavirus (Mar. 9, 2020) (on file with author) (detailing various companies the two agencies sent warning letters to in order to prevent the advertising of products falsely claiming to prevent Coronavirus). FDA Commissioner, Stephen M. Hahn, M.D., in particular announced,

[t]he FDA considers the sale and promotion of fraudulent COVID-19 products to be a threat to the public health. We have an aggressive surveillance program that routinely monitors online sources for health fraud products, especially during a significant public health issues such as this one . . . we will continue to aggressively pursue those that place the public health at risk and hold bad actors accountable.

Id. See also Lesley Fair, FTC-FDA warning letters: Influential to influencers and marketers, FTC BUS. BLOG (June 7, 2019), archived at https://perma.cc/7GZ4-JNJY (discussing a set of warning letters that the FTC and FDA sent to sellers of e-liquid used in vaping which were promoted on social media platforms). As per the FDA, the social media posts in question are “ads or labeling on behalf of the companies receiving the warning letters.” Id. See also Goodrich & Howell, supra note 34 (emphasizing the FTC’s efforts to regulate endorsement compliance in recent years).

87 See Press Release, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D., on the agency’s new efforts to strengthen regulation of dietary supplements by modernizing and reforming FDA’s oversight (Feb. 11, 2019) (on file with author) (commenting on recent concerns regarding the regulation of supplements and how the FDA is going to address those concerns going forward). The FDA announced five steps the agency intends to take to achieve consumer access to lawful supplements and to protect the public from harmful and unlawful products: (1) “communicating to the public as soon as possible when there is a concern about a dietary supplement on the market;” (2) “ensuring that [the FDA’s] framework is flexible enough to adequately evaluate product safety while also promoting innovation;” (3) “continuing to work closely with our industry partners;” (4) “developing new enforcement strategies;” and (5) “continuing to engage in a public dialogue to get valuable feedback from dietary supplement stakeholders.” Id.

88 See Agency Information Collection Activities; Proposed Collection; Comment Request; Endorser Status and Explicitness of Payment in Direct-To-Consumer Promotion, REGULATIONS.GOV (Jan. 28, 2020) [hereinafter FDA Comment Request: Endorser Status], archived at https://perma.cc/K2H2-NGBS (discussing the background of the proposed study). The FDA has authority to conduct the proposed study under Section 1701(a)(4) of the Public Health Service Act. Id. The OPDP has conducted research using scientific evidence over the years to ensure that the FDA’s policies related to the promotion of prescription drugs do benefit
investigation is to understand how disclosure of an endorser’s payment status persuades a consumer’s reaction. 89

Experts in the field believe that the FDA’s study is one of the agency’s first attempts at modernizing its regulatory advertisement standards at a time of technological development. 90 The Commissioner’s announcement included that the agency would focus on implementing new enforcement strategies. 91 While the FDA’s announcement was independent from the FTC, the FTC quickly announced that it was requesting public comment on the FTC’s consumers. Id. Through the office’s previous research, three main topics have been of particular focus: (1) advertising (including the content and format); (2) target populations; and (3) research quality. Id. Through the evaluation of advertising features [OPDP] assess[’] how elements such as graphics, format, and disease and product characteristics impact the communication and understanding of prescription drug risks and benefits; focusing on target populations allows [OPDP] to evaluate how understanding of prescription drug risks and benefits may vary as a function of audience; and [the office’s] focus on research quality aims at maximizing the quality of research data through analytical methodology development and investigation of sampling and response issues.

Id. See also Pippins, supra note 7 (announcing that the FDA will begin to focus its regulatory efforts on influencer marketing).

89 See FDA Comment Request: Endorser Status, supra note 88 (providing background information of the agency’s study, including the study’s methodology and proposed goals). The first study will focus on advertising features, specifically payment disclosures in endorsements posts of pharmaceutical products. Id. “Study A will manipulate endorser type (three levels: Celebrity, physician, patient) and payment disclosure (two levels: Present, absent) within a print DTC ad for a fictitious acne product.” Id. The second study will be an extension of the first study, focusing primarily on social media influencers. Id. “In Study B we will also manipulate endorser type, examining a patient and an internet influencer, one who provides online content to a number of followers.” Id.
90 See Pippins, supra note 7 (describing how the FDA’s proposed study is a new step the agency has taken to modernizing its policies). Previously, the FDA has applied a “reasonable consumer standard” in reviewing promotions and advertisements. Id. “Initially, [the] research was striking because it suggested the agency could be taking steps to modernize its understanding of the ‘reasonable consumer’ in a manner that diverged from the regulatory standards for disclosures set in place by the FTC.” Id. Additionally, the scope of the FDA’s study is important for the marketing industry because the study overlaps with policies of Section 5 of the FTC Act and the FTC’s Endorsement Guidelines. Id.
91 See Guides Concerning the Use of Endorsements and Testimonials in Advertising, REGULATIONS.GOV (Feb. 21, 2020) [hereinafter FTC Comment Request: Endorsement Guidelines], archived at https://perma.cc/7P9V-98C4 (detailing the types of comments and data the FTC explicitly requests from the public relative to the Endorsement Guidelines).
Endorsement Guidelines. However, given the FDA’s current lack of jurisdiction to regulate standards of non-prescription drug advertisements, it is likely that the potential policies that will arise from the FDA’s study will be from the conjoined effort of both the FDA’s and FTC’s findings.

The FDA’s current investigation consists of two separate studies, both which examine four types of endorsers: celebrity, physician, patient, and influencer. The two studies also examine two levels of payment disclosure within a print direct-to-consumer (“DTC”), advertisement for a fictional skincare product. The first

92 See Pippins, supra note 7 (detailing the type of comments the FTC has explicitly requested from the public). See also FDA 101: Dietary Supplements, U.S. FOOD & DRUG AMN. (Oct. 17, 2020), archived at https://perma.cc/2N8B-FKFQ (detailing how the FDA describes dietary supplements and how the agency interprets fair use of the products).

93 See Pippins, supra note 7 (emphasizing the importance of following both the FDA’s findings and the FTC’s findings for those in the marketing industry). See also Dietary Supplements: An Advertising Guide for Industry, FED. TRADE COMM’N (2001), archived at https://perma.cc/3WDR-XWTT (describing considerations pharmaceutical companies should take when promoting dietary supplements).

94 See FDA Comment Request: Endorser Status, supra note 88 (detailing the background of the two proposed studies). While the first study focuses on celebrity influencers and the second study focuses on Instagram influencers, both studies are meant to provide a better understanding “in the role of endorsement and payment status on participants’ recall, benefit and risk perceptions, and behavioral intentions.” Id. See also Raqiyah Pippins et al., All Eyes on Influencers: FDA and FTC Examination of Endorser Advertising Signals Global Focus on Social Media, ARNOLD & PORTER (Feb. 25, 2020) [hereinafter All Eyes on Influencers], archived at https://perma.cc/5TQY-LFM3 (highlighting the subject and purpose of the FDA’s proposed studies). The study is being conducted by the FDA’s Office of Prescription Drug Products (OPDP), which previously has conducted DTC advertising research. Id. While previous research has been conducted on celebrity endorsements, the FDA is “‘endorsing’ the importance of the ‘patient story’ in product development.” Id. In fact, the importance of patient influencers, advocates, and partners is only likely to increase around the endorsement of pharmaceutical products. Id. One of the studies’ purposes is to “develop evidence that informs prescription drug promotion policies.” Id.

95 See FDA Comment Request: Endorser Status, supra note 88 (explaining the types of disclosure language the studies will examine). The studies will examine both “direct” and “indirect” disclosure language. Id. “Direct” disclosure language refers to obvious language such as “paid ad.” Id. “Indirect” disclosure language refers to non-obvious language such as hashtags like “#sp” which is short for sponsored. Id. See also All Eyes on Influencers, supra note 94 (detailing the type of followers the FDA intends to recruit for the study). For Study A, the FDA intends to recruit an Instagram influencer with more than 500,000 followers who has previously posted about endometriosis. Id. See also FDA Comment Request:
study examines endorsements made by celebrities, physicians, and patients, with and without payment disclosures.\textsuperscript{96} The second study examines endorsements made by influencers and patients, with direct payment disclosures and indirect payment disclosures and those endorsements without any payment disclosures.\textsuperscript{97} Disclosures are direct when they use explicit language such as “paid advertisement”, while disclosures are indirect when they use vague language such as “#sp” for “sponsored”.\textsuperscript{98} Through this research, the FDA is particularly looking to extend previous investigations that found no relationship between the credibility of an endorser and the endorser’s intention to pursue the drug product.\textsuperscript{99}

\textbf{B. Comments Received in Response to the FDA’s Proposed Study}

While the FDA deems that its study will provide a deeper understanding of how the agency should regulate drug advertising and promotion, pharmaceutical companies believe otherwise.\textsuperscript{100} In

\begin{quote}
\textit{Endorser Status, supra} note 88 (noting that the FDA is recruiting around 654 consumers from the general population that are required to be familiar with the Instagram influencer.
\textsuperscript{96} See \textit{FDA Comment Request: Endorser Status, supra} note 88 (providing a background of the first study). The first study will focus solely on celebrity, physician, and patient influencers and their endorsements—both direct and indirect—as they are perceived by the public. \textit{Id.} While a real celebrity will be used for the first study, the FDA will use stock photos to depict both a physician and a patient in experimental conditions. \textit{Id.}
\textsuperscript{97} See \textit{id.} (providing a background of the second study). The second study will focus primarily on an Instagram influencer that is a non-celebrity. \textit{Id. See also All Eyes on Influencers, supra} note 94 (emphasizing the FDA’s interest in the impact of Instagram influencers in regard to the second study).
\textsuperscript{98} See \textit{FDA Comment Request: Endorser Status, supra} note 88 (explaining the type of payment disclosures the FDA is using as part of its study). The second study “partially replicates Study A and extends it by further tweaking the explicitness of payment as another manipulated variable and using a different set of endorser types and in a different promotional setting.” \textit{Id.}
\textsuperscript{99} See \textit{id.} (noting that with these two studies, the agency’s efforts are to extend previously conducted research of endorsements that either limited the type of endorsers or the type of disclosure). The FDA proposes “to extend previous research by examining four types of endorsers in two separate studies (celebrity, physician, patient, influencer) and examining whether the presence of a disclosure of their payment status influencers participant reactions.” \textit{Id.}
\textsuperscript{100} See \textit{All Eyes on Influencers, supra} note 94 (highlighting that the FDA believes its proposed studies will improve DTC advertising for consumers).
\end{quote}

A driving force behind the proposal of these studies is FDA’s awareness of the widespread use of endorsers in DTC drug
response to the FDA’s request for public comments, pharmaceutical companies expressed doubts that the research will yield practical results with its current proposed plan. The Pharmaceutical Research and Manufacturers of America (“PhRMA”), is going as far as recommending that the FDA cancel its proposed research. Most leaders across the pharmaceutical industry seem to be reiterating their long held belief that regulating drug endorsements should remain a responsibility of the FTC because many consumers would be impacted

advertising and prior social science research in this area, and a desire to improve FDA’s understanding of how features utilized in advertising affect consumers’ understanding of prescription drug risks and benefits.

Id. See also Letter from Kelly Falconer Goldberg & Ryan Kaat, PhRMA to Endorser Status and Explicitness of Payment in Direct-to-Consumer Promotion (Mar. 30, 2020) (on file with author) [hereinafter Letter from Kelly Falconer Goldberg & Ryan Kaat to FDA] (stressing that the FDA’s proposed study is both unnecessary and impractical); Letter from Todd Paporello, Bayer AG to Endorser Status and Explicitness of Payment in Direct-to-Consumer Promotion (Mar. 9, 2020) (on file with author) [hereinafter Letter from Todd Paporello to FDA] (stating that any comments relative to endorsements should be gathered from the FTC and not the FDA). In response to the FDA’s proposed study, Bayer AG, a global pharmaceutical and life sciences company, commented that “alignment and input should be obtained from the [FTC] regarding the design of the study and usability of the results.” Letter from Todd Paporello to FDA, supra. See also Letter from Michele Sharp, Eli Lilly and Company, to Endorser Status and Explicitness of Payment in Direct-to-Consumer Promotion (Mar. 20, 2020) (on file with author) [hereinafter Letter from Michele Sharp to FDA] (detailing various parts of the proposed study that are likely to cause “potential bias and respondent confusion”).

101 See Letter from Kelly Falconer Goldberg & Ryan Kaat to FDA, supra note 100 (stating that the proposed study will not be practical in use). PhRMA in particular is concerned that the “proposed research will lack practical utility.” Id. The global pharma believes the unnecessary nature of the study is because (1) its “duplicative of information other reasonably accessible to FDA;” (2) it “will yield unreliable results . . . because the design of the proposed studies appears insufficiently rigorous;” and (3) “it is unduly focus on—may be skewed by—the influencer of a particular celebrity.” Id. See also Letter from Michele Sharp to FDA, supra note 100 (making numerous recommendations to specific questions of the proposed study that otherwise may not be answered accurately by participants); Letter from Todd Paporello to FDA, supra note 100 (critiquing the studies’ participants). Bayer AG is concerned with potential biases of the studies’ participants because “recruiting participants that follow the influencer or know the celebrity may [favor] endorser pieces over the patient and/or physician pieces.” Letter from Todd Paporello to FDA, supra.

102 See Letter from Kelly Falconer Goldberg & Ryan Kaat to FDA, supra note 100 (indicating that due to previously conducted research, the FDA should cancel its proposed research). PhRMA in particular “recommends that FDA cancel the proposed research if it finds that published studies already answer its research questions.” Id.
by a strict and long approval process that prescription drugs require.¹⁰³ Other large healthcare companies believe that the FDA’s efforts to regulate endorsements should be aligned with the FTC’s efforts and receive its input for this particular study.¹⁰⁴

Contrary to the interests of pharmaceutical companies, individual consumers are more concerned with the intentions of the online personalities endorsing the drug product.¹⁰⁵ Consumers are often concerned with an endorser’s monetary incentive to promote the drug product.¹⁰⁶ However, oftentimes the endorser’s incentive—even if perceived negatively be a consumer—is irrelevant to a purchase

¹⁰³ See id. (implicating that the FTC is the agency most appropriate to investigate endorsements). “The proposed research is unnecessary to the proper performance of FDA’s functions because the FTC takes the lead on regulating endorsement[s].” Id. Nonetheless, whether through the FTC or through its own agency, the FDA’s study is criticized for not addressing why its study is distinctive from investigations that the FDA could access. Id. PhRMA notes two previous studies that appear relevant to the FDA’s proposed study: “Christensen (1997), which studied the effects of endorser expertise, subject’s interest, and the content of the promotional message; and Limbu (2012), which studied endorsements from experts and celebrities in direct-to-consumer prescription-drug advertisements.” Id.

¹⁰⁴ See Letter from Todd Paporello to FDA, supra note 100 (implicating that the FDA and the FTC should work together to gather the best results for the proposed FDA study); Letter from Kelly Falconer Goldberg & Ryan Kaat to FDA, supra note 100 (reasoning that the FDA is not in the best position to regulate endorsements and advertising on social media because it mainly focuses on regulating prescription drugs). See also Jain & Kessler, supra note 8 (implicating that the FTC has a better understanding of payment disclosures in social media endorsements than the FDA).

¹⁰⁵ See Letter from Jessie Morgan to Endorser Status and Explicitness of Payment in Direct-to-Consumer Promotion, FDA (Jan. 30, 2020) (on file with author) [hereinafter Letter from Jessie Morgan to FDA] (emphasizing that consumers need to know the intentions of an endorser who is not a medical professional). See also Andrew Hutchinson, New Study Shows Celebrities Are Key Distributors of COVID-19 Misinformation on Social Media, SOC. MEDIA TODAY (April 9, 2020), archived at https://perma.cc/F24D-DKA5 (indicating that disclosures should be made even when the endorsement is in a non-text form such as a retweet or a like); Martinez-Guasch, supra note 41 (highlighting that consumers often want to know the intentions of an influencer to establish a level of relatedness); Jessica DeFino, Beauty Is Meaningless (Or, A Brief History Of Empty Marketing Language), MEDIUM (Feb. 24, 2021), archived at https://perma.cc/ZG9E-BFEV (stressing the marketing problems of the beauty industry and that despite labels such as “science-backed,” or “clinically-tested,” products are often nonetheless unregulated).

¹⁰⁶ See Letter from Jessie Morgan to FDA, supra note 105 (emphasizing that monetary consideration should always be disclosed to consumers). From a consumer’s perspective, it is particularly important for the amount of money exchanged to be collected and disclosed “because many of the [endorsers] do not have educational or professional credentials to make the claims that are being made.” Id.
decision. Since influencers are now often the resource for the latest health information, consumers are feeling more inclined to resort to an influencer’s review of a drug product as opposed to their own doctor.

C. Comments Received by the FTC in Response to Public Request

Compared to the handful of comments received in response to the FDA’s proposed study, the FTC has received around one hundred comments to its Endorsement Guidelines. Unlike the FDA, the FTC

107 See Kofi Osei-Frimpong et al., The Impact of Celebrity Endorsement on Consumer Purchase Intention: An Emerging Market Perspective, 27 J. OF MKTG. THEORY AND PRACTICE 103, at 1 (Jan. 29, 2019) (finding that the negative publicity of a celebrity endorser “had no moderation effect on consumer purchase intention.”).

108 See Eric Dahan, Capitalise on Influencer Trust and Validation This Holiday Season, TALKING INFLUENCE (Oct. 21, 2020), archived at https://perma.cc/C543-CZ8U (discussing the continuing rise of e-commerce and consumers need of reliable and trustworthy products during the ongoing pandemic holiday season). See also Rijo, supra note 35, at 171 (highlighting the high exposure influencers have online and how such a high level of exposure, when health-related products are being promoted, is at the risk of consumers, especially those of a young age that may be more susceptible to manipulation). In fact, on Instagram alone, seventy-two percent of teenagers that range from thirteen to seventeen years are active. Id. Additionally, “there are over half a million accounts on Instagram categorized as influencers.” Id. “These statistics, in addition to the vulnerability of adolescents to advertisements of attractive influencers marketing [health-related products] on Instagram, underlie the concerns surrounding teenagers’ consumption” of health-related products. Id.

109 See FTC Comment Request: Endorsement Guidelines, supra note 91 (listing the types of comments the FTC is seeking and has received). The FDA only received six comments from both private and public companies, and consumers. Id. The FTC on the other hand received 110 comments. Id. See also All Eyes on Influencers, supra note 94 (listing the various components of the Endorsement Guidelines that the FTC is seeking comment on). The FTC is looking for the public to help the agency consider:

whether disclosures of material connections are necessary; whether consumers understand that persons promoting products on social media are likely being compensated; whether current disclosure of material connections are adequate . . . how advertisers use incentives to encourage non-influencer consumers to leave positive product reviews; whether review websites should be required to disclose how reviews are solicited and generated; and whether the Endorsement Guided should address how endorsers are using affiliate links—links through which consumers can purchase endorsed products.

Id.
received more comments because it is the governing body for endorsements that consumers and organizations have been familiar with for years—something that the FDA is not well-known for. Many of those comments are by consumer advocacy organizations that are stressing the need to update and review the Guidelines more frequently. Consumer advocates are putting their attention on disclosures and emphasizing that the Guidelines should specify both where and how disclosures are made. Without specific directions, consumers worry that influencers and brands will continue deceiving

110 See id. (explaining the differences between the FDA’s and FTC’s studies and in particular, what the FDA and FTC each are requesting from public comments). It is important to note that the FDA study did not ask for comments on any potential new regulation, but rather on the method of its proposed studies. Id. The FDA asked the public to comment “ways to enhance the quality, utility and clarity of the information to be collected, and how to reduce the burden of information collection on the respondents.” Id. In contrast, the FTC’s request for public comment was directly about the FTC’s existing endorsement policies on social media, reflected in its Guidelines—something that already exists and is easier to comment on than the FDA’s study. Id. See also Jain & Kessler, supra note 8 (emphasizing that although the FDA and the FTC both have issued guidelines for advertisements on social media, the FDA’s guidelines do not specifically address influencers and seem to only target manufacturers, packers, and distributors).

111 See Letter from Edgar Dworsky, Founder of Consumer World to Regulatory Review of Guides Concerning The Use of Endorsements and Testimonials in Advertising, FTC (April 7, 2020) (on file with author) [hereinafter Letter from Edgar Dworsky to FTC] (discussing the need for the FTC to update its Guidelines given the various avenues available to consumers to purchase products online). Today, there are more non-traditional forms of advertisement than tradition forms, where influencers play a crucial role. Id. Therefore, “it is more important than ever to have clear disclosure of any financial connections that may exist between them and marketers.” Id. See also Letter from Justin Brookman to Regulatory Review of Guides Concerning The Use of Endorsements and Testimonials in Advertising, FTC (June 22, 2020) (on file with author) [hereinafter Letter from Justin Brookman to FTC] (stressing that the Endorsement Guidelines should be updated in order to make consumers feel more confident in the efforts of the federal agency). In fact, “only about 25% of consumers claim that government regulations help consumers feel confident about their purchases.” Id.

112 See Letter from Edgar Dworsky to FTC, supra note 111 (urging the FTC to amend its guidelines to clearly define when and how disclosures should be made). Even if the FTC deems it unnecessary to define the application of disclosures too clearly, consumer advocates believe that the agency should at least “specify that a clear disclosure of the financial connection should be made at the top—at the beginning—of the story/feature, and not via a link.” Id. But see Letter from Qianna Smith Bruneteau, American Influencer Council (AIC) to Regulatory Review of Guides Concerning The Use of Endorsements and Testimonials in Advertising, FTC (April 20, 2020) (on file with author) [hereinafter Letter from Qianna Smith Bruneteau to FTC] (proposing that the FTC should define disclosure standards for the big six social media platforms).
their followers because the Guidelines are routinely ignored.113 However, while consumer organizations want a more narrow standard for disclosures, the organizations also want the Guidelines to be extended more broadly to include various forms of social media promotions.114

Additionally, consumer organizations recommend that the FTC implement stronger initiatives to ensure employers are enforcing the Guidelines on influencers.115 That is, consumer organizations suggest that the Guidelines should explicitly state a company’s obligation to monitor its endorsers for practices non-compliant to Section 5.116 Other organizations also believe that the FTC’s regulations should be added in the language of a company’s standard

113 See Letter from Edgar Dworsky to FTC, supra note 111 (discussing the implications if the FTC Guidelines are not defined more clearly). The consequences of failing to define the FTC Guidelines in more detail stems beyond consumer endorsements, social media influencers, and advertising agencies. Id. For example, publishers of articles often include first person testimonials written by several different individuals, which include a tiny fine print disclosure at the end of the article that most readers will never see. Id. Consequently, without any clear directions from the FTC about the placement and appearance of a financial connection, publishers and products will still be able to take advantage of consumers who typically do not take the time to read small print disclosures. Id.

114 See Letter from Justin Brookman to FTC, supra note 111 (explaining why the FTC Guidelines need to be extended and applied on a broader level). The FTC in particular should extend its endorsement guidelines beyond the common social media endorsement seen in captions through hashtags. Id. For one, the Guidelines “should clearly state the incentives to ‘like’ a brand or post are prohibited, as in the vast majority [of] cases, there is no meaningful way to indicate that the like was made for consideration.” Id.

115 See id. (emphasizing that the FTC also needs to employ stronger enforcement mechanisms relative to its Guidelines); Letter from Qianna Smith Bruneteau to FTC, supra note 112 (noting that in order for influencers to comply with the endorsement Guidelines, the companies that influencers work with must clearly understand what is required of their advertisements on social media, to relay that information directly back to the influencers). See also All Eyes on Influencers, supra note 94 (suggesting the level of engagement monitoring companies should take if they use social media influencers to market their products). “[A]ny company that uses social media influencers to promote its product—but particularly those promoting FDA-regulated or other health-related products—should be careful to ensure that influencers are in compliance with all disclosure requirements.” Id.

116 See Letter From Justin Brookman to FTC, supra note 111 (stressing companies’ obligations to “monitor its network of endorsers”). In particular, companies recommend that the FTC should adapt the following principle into the Guidelines: “The FTC should state that a marketer’s failure to reasonably monitor social media influencers and promoters is an unfair business practice under Section 5 of the FTC Act—just as a failure to monitor third parties’ data practices may give rise to a Section 5 claim.” Id.
contract with influencers to assist with accountability. As the FTC begins to think of establishing civil penalties for non-compliance with the Guidelines, some organizations emphasize that penalties should be issued with caution, especially to small businesses.

The comments received by for-profit companies demonstrate that large corporations such as Amazon and Lego are satisfied with the current state of the FTC’s Guidelines. In fact, many large organizations that gather a large portion of their revenue from influencer marketing believe the Guidelines are clear enough. Through this perspective, the Guidelines are deemed appropriate because determining whether a disclosure requires a context-

117 See Letter from Qianna Smith Bruneteau to FTC, supra note 112 (highlighting how disclosure standards that do not follow the FTC Guidelines are often set by companies in their contracts with endorsers). See also Farshidi, supra note 47, at 205 (noting that even when advertising companies may be held liable under Section 5 of the FTC Act, that “the only repercussion that [influencers] may face for violation is a reputational from the [ ] companies”).

118 See Letter from Quianna Smith Bruneteau to FTC, supra note 112 (discussing its support for civil penalties and simultaneously being wary of the negative impact penalties can have on small businesses). While in support of administrating civil penalties if need be, the American Influencer Council recommends that before going ahead with stricter regulations, the FTC should encourage “education and incentivizing individual influencers and businesses to participate in an FTC-certified influencer disclosure/misinformation development program e.g. authorizing the creation of an occupational certification.” Id. See also Michael Yaghi & Suzanne Trivette, FTC Guidelines: Possible Civil Penalties to Deter Deceptive Influencer Marketing, CROWELL (Mar. 2, 2020), archived at https://perma.cc/WF4V-PXJL (discussing the advertising industries’ concern for a regulatory framework by the FTC that imposes civil penalties on both advertisers and social media platforms). Id. It is suggested that the FTC Commissioner Chopra’s tweet is a possible indication that the FTC is not concerned with smaller influencers or businesses. Id.

119 See Letter from Amazon.com Inc., to Regulatory Review of Guides Concerning The Use of Endorsements and Testimonials in Advertising, FTC (June 22, 2020) (on file with author) [hereinafter Letter from Amazon.com Inc. to FTC] (discussing its satisfaction with the current Endorsement Guidelines, last updated in 2018); Letter from R. Scott Slifka, The LEGO Group, to Regulatory Review of Guides Concerning The Use of Endorsements and Testimonials in Advertising, FTC (June 22, 2020) (on file with author) (indicating that the current Guidelines are sufficient enough because they allow companies to regulate their own disclosure standards as they should be allowed to).

120 See Letter from Amazon.com Inc. to FTC, supra note 119 (explicitly stating that the Guidelines should not undergo any updates at this time). To companies like Amazon, the Guidelines provide appropriate guidance and direction to businesses that are in the practice of using both endorsements and testimonial forms of advertising. Id. Amazon is of the belief that the current Guidelines provide enough consumer protection “while leaving room for advertisers and endorsers to provide value to consumers and businesses.” Id.
dependent analysis. Many of the large corporations believe that if disclosures are required, decisions of form and placement should be placed explicitly with the advertisers and endorsers in order to accommodate various types of audiences across various platforms.

IV. Analysis

A. Key Implications: A Breakdown

In accordance with the FDA’s and the FTC’s efforts to learn how the public is impacted by social media endorsements, both agencies will likely use their findings to heighten regulatory efforts. Given the abundance of social media platforms used to endorse products and services directly to consumers, both agencies will also refine their efforts to regulate advertisers and influencers based on the services each social media platform provides. More importantly, the implications on consumers makes it clear that the FDA and the FTC should explicitly work together to tackle the issue of social media endorsements and direct-to-consumer payment disclosures.

121 See Letter from Delara Derakhshani, Entertainment Software Association to Regulatory Review of Guides Concerning The Use of Endorsements and Testimonials in Advertising, FTC (June 22, 2020) (on file with author) [hereinafter Letter from Delara Derakshani to FTC] (discussing the benefits of the Guidelines being very fact-dependent in principle). See also Letter from Amazon.com Inc. to FTC, supra note 119 (highlighting the implications of having strict endorsements on innovation and technology).

122 See Letter from Delara Derakshani to FTC, supra note 121 (stressing the flexibility for companies to self-regulate endorsements because companies are often experts in their industry); Letter from Amazon.com Inc. to FTC, supra note 119 (emphasizing that the benefits of the current Guidelines are that companies have more freedom to make strategic advertising decisions, thereby allowing them to be more innovative).

123 See Jain & Kessler, supra note 8 (emphasizing the even more heightened need for the FDA and the FTC to work together, especially since the FDA’s power “is silent on whether the agency’s power extends to social media posts”).

124 See Letter from Qianna Smith Bruneteau to FTC, supra note 112 (suggesting that the FTC should create standardized endorsement disclosure among platforms on social media); Rijo, supra note 35, at 181 (recommending that the FDA and the FTC issue joint guidance relative to consumer endorsements on social media platforms); Pippins, supra note 7 (noting that given the FTC’s recent concern about the promotion of children’s health products, both the FDA and the FTC are anticipated to reinforce influencer marketing of health products on social media platforms); All Eyes on Influencers, supra note 94 (emphasizing that because the FDA and the FTC have issued warning letters to companies posting their products through misleading posts on different social media platforms, it is no surprise that the two agencies will work together to enforce actions across various platforms).
particularly in the food and drug industry where influencers are highly active.\textsuperscript{125}

1. Stronger Combined Efforts by FDA and the FTC

Comments in response to the FDA and FTC’s studies demonstrate that the two organizations will need to be aligned in response to the current and future endorsement landscapes.\textsuperscript{126} The FDA’s efforts to regulate advertisements have been strictly focused on a product’s physical label, failing to consider proper labelling of pharmaceutical products on social media.\textsuperscript{127} On the other hand, the

\textsuperscript{125} See Rijo, \textit{supra} note 35, at 181 (highlighting the necessity for the FDA and the FTC to work together to protect consumers from misleading claims in the healthcare and drug industry). It would be in the best interests of the FDA to take advantage of the FTC’s resources and expertise in consumer endorsements, “especially because of the influx of social media platforms where influencers are profiting from posting on behalf of popular unapproved products.” \textit{Id.} See also \textit{All Eyes on Influencers}, \textit{supra} note 94 (highlighting that the FDA and the FTC may encounter international pressures to work together, given that regulatory agencies in other countries such as Germany and the UK regulate food and drug advertising on social media much more closely).

\textsuperscript{126} See MOU WITH FEDERAL TRADE COMMISSION, \textit{supra} note 71 (detailing the updates to the memorandum of understanding between the two agencies from 1954 and 1958). Despite the agencies’ distinct roles, both the FDA and the FTC “will be utilized to the maximum effectiveness in the public interest, each agency will designate a liaison officer” for exchange of complete information between the two agencies. \textit{Id.} See also Jain & Kessler, \textit{supra} note 8 (emphasizing the FDA’s outdated social media advertisement guidelines in comparison to the FTC). “While the FTC released a new publication for online influencers in November 2019, the FDA’s guidance on social media advertising is from June 2014 – six years ago.” \textit{Id.}

\textsuperscript{127} See \textit{id.} (discussing the extent of the FDA’s efforts in the social media environment and summarizing several case studies of paid partnerships between influencers and pharmaceutical companies that, despite any regulatory changes, have been brought to the attention of the FDA). While the FDA does have some guidance about the endorsement of pharmaceutical products on social media, the FDA only suggests that manufacturers, packers, and distributors should consider (1) “any advertising that makes representations about the use of a firm’s prescription drug must include certain risk information;” (2) “prescription drug advertisements must present a fair balance between information relating to risk and information relating to benefit;” and (3) “risk information should be comparable in content and prominence to benefit claims within the product promotion.” \textit{Id.} In July 2015, Kim Kardashian shared a paid endorsement about Diclegis, “a prescription drug used to treat morning sickness in pregnant women.” \textit{Id.} While Kardashian’s post made several claims on the products efficacy, her statement failed to include any risk information, limitations of use, and “failed to provide material information regarding the drug, particularly about the consequences that
FTC has prioritized spotting endorsements that appear to deceive or be unfair to consumers, which explains a greater response to its investigations compared to the FDA. Consequently, in addition to the findings the FDA gathers from its two studies, the FDA will likely continue to work with the FTC under its 1971 memorandum of understanding to address the issue of deceptive endorsements of pharmaceuticals.

An influencer’s endorsement of a pharmaceutical product is likely to display the product’s packaging in a shared photograph, highlighting the product’s logo and brand. However, when consumers rely on an influencer’s caption to inform themselves of the benefits and potential side-effects of a product, the protection that the FDA claims to provide is nearly nonexistent because the label’s font is too small to be read in the photograph, let alone in compliance with the necessary regulations. Given the impact social media...
endorsements can have on consumers’ purchasing decisions, regulating a product’s label under the FDA should go beyond the text of the stick-on paper on a product’s packaging and extend to the digital text attached to a promotional social media post. Thus, while the FDA’s and FTC’s investigation will have an impact on how the two agencies work together to regulate products and their published content, the investigation may also incentivize the FDA to ask for broader label regulation powers from Congress to provide consumers with the utmost protection. It would be in the best interest of the FDA to seek broader regulation powers in order to re-establish its regulatory credibility and re-establish the significance of “FDA-Approved”.

marketplace—the agency’s relationship with supplements is one that is reactive rather than proactive.” Id. See also Bladow, supra note 24, at 1132 (discussing the importance of endorsement enforcement in influencer marketing). If consumers cannot see a product’s label to the extent social media platforms allow them, they should be able to inform themselves of the products information and whether that information is relevant is often determined by effective disclosure. Id. Consumers are likely “wary of placing as much value on the [influencer’s] opinion because the consumer knows that the economic benefit that comes from making the sale motivates the [influencer’s] endorsement.” Id. at 1132–33.

See Harris, supra note 10, at 955 (discussing the growing impact of social media influencers on consumers).

See Pippins, supra note 7 (anticipating that the two agencies will undertake a potential shift in their enforcement policies); Letter from Golberg & Kaat to FTC, supra note 100 (criticizing the FDA’s studies claiming that the sample sizes were not realistic). See also Rijo, supra note 35, at 169–71 (discussing how the FDA should hold drugs such as supplements to a higher degree because the lack of regulations have led key actors in the production and manufacturing of such drugs to be untruthful about drug products, which poses a huge risk to consumers). Manufacturers, in particular, have a history of “being untruthful about their products’ ingredients.” Id. at 169. Between 2008 and 2013, 70% of supplement companies violated FDA rules and as for dietary supplements specifically, over 700 warnings were issued for products containing “unapproved and hazardous ingredients.” Id.

See DeFino, supra note 105 (discussing how marketing language in the food, drug, and cosmetic industry has virtually lost its worth and meaning). In fact, many of the labels companies include on their packaging and advertisements, such as “clean,” “FDA-approved,” “Anti-aging,” “Hypoallergenic,” and “Non-comedogenic,” are not regulated by the FDA and thereby virtually meaningless. Id. “The FDA simply does not have the resources to regulate that many marketing terms in any real way, and even if they did, brands would find ways around it, coming up with new unregulated labels to slap on a bottle.” Id.
2. The One Size Fits All Standard Debate

The FTC Guidelines have been broad in nature to address the various forms of endorsements and will likely continue to embody a similarly wide standard in a future update. However, unlike the standard that corporations like Amazon hope stays intact, because the current standard gives advertisers the ability to provide value to businesses, the Guidelines’ standard is likely to be broader in how the standards can be satisfied specifically on different social media platforms. Nonetheless, it is clear that the FTC will have to balance providing consumers with better protection against endorsements and refraining from narrowing standards in a way that would restrict competition among diverse businesses.

The public comments to the FTC’s endorsement Guidelines stress the consideration of broadening the Guidelines’ application across social media platforms. Rather than outlining a standard for

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135 See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(a) (2020) (stating the latest standard of the Guidelines as of 2017); Harris, supra note 13, at 969 (generalizing the current standard of the FTC Guidelines). The overall goal of the Guideline’s standard “is for the FTC to give insight into what the FTC thinks about various marketing activities involving endorsements and how Section 5 of the [FTC] Act might apply to those activities.” Harris, supra note 13, at 969.

136 See Letter from Amazon.com Inc. to FTC, supra note 119 (responding to the FTC’s request for public commenting by emphasizing that the Guidelines have proven flexible enough as the consumer landscape evolves). See also Hale, supra note 8 (discussing why the FTC’s request for public comment combined with the FDA’s studies are especially important this time around). Influencer marketing experts and attorneys have acknowledged that the FDA’s studies are likely going to have some sort of broader impact on the FTC’s Guidelines. Id. A partner at Frankfurt Kurnit Klein & Selz stated that the FTC “has issued very specific guidance and very specific opinions about what they believe will be effective” when it comes to endorsement disclosures. However, he said, “One of the things that has been starkly missing from the FTC’s guidance is empirical evidence.” It appears the FDA is now attempting to gather that empirical evidence.

137 See discussion infra Section III (discussing the comments received by the FTC from corporations and consumer organizations alike).

138 See Letter from Edgar Dworsky to FTC, supra note 111 (indicating the FTC should specify how disclosures should be made); Letter from Qianna Smith Bruneteau to FTC, supra note 112 (emphasizing that the Guidelines should be broad enough to address how influencers can make proper disclosures across each of the leading social media platforms accordingly); Letter from Justin Brookman to FTC, supra note 111 (stressing that consumer protection as to social media
payment disclosures on social media generally, as the current Guidelines do, organizations are pushing the FTC to standardize sponsored content per platform.\textsuperscript{139} When disclosures are made, their placement, appearance, prominence, and effectiveness vary across platforms, leaving most consumers incapable of distinguishing between endorsement posts and non-endorsement posts.\textsuperscript{140} Consumers are presented with an overwhelming variety of disclosure statements that are not only hard to keep track of, but also hides the truthful information necessary for making smart purchases.\textsuperscript{141} While most consumers may look at referrals and reviews on social media, the majority likely do not take the additional time to compare disclosure

\textsuperscript{139}See Letter from Qianna Smith Bruneteau to FTC, supra note 112 (explaining that the FTC needs to encourage some form of partnership between each social media platform). In summarizing their suggestion for the FTC’s Guidelines, the American Influencer Council emphasized that “the variance in copy disclosure prominence and positioning from social platform to platform doesn’t allow for universal regulations with regards to sponsored advertisements on ‘influencer’ pages.” Id.

\textsuperscript{140}See id. (highlighting that some consumers “have been condition to spot a Sponsored post.”). See also Bladow, supra note 24, at 1138–41 (noting that many influencers have been linking their endorsements on social media to third-party marketing affiliates—also known as affiliate links—as a way to “disclose” their material connection to the advertiser, which is likely not enough under the FTC’s standard). Affiliate links are considered endorsements even when an influencer may not explicitly promote a product on their social media pages “because an influencer’s followers are likely to attribute the influencer’s recommendation of a product and inclusion of a link to purchase that product to the influencer, not the brand.” Id. at 1138–39. The clear and conspicuous disclosure of an influencer’s use of an affiliate link is crucial to meet FTC endorsement standards given that “the link allows both the influencer and the brand to profit from an influencer’s personal recommendation to her followers that a particular product is worth purchasing, and that connection may materially affect the weight of a consumer gives to the influencer’s endorsement.” Id. at 1139.

\textsuperscript{141}See id. at 1130 (explaining that one way to make disclosure statements is through affiliate marketing, which is essentially made through a link attached to an influencer’s post). See Farshidi, supra note 47, at 206 (emphasizing that the use of the FTC’s recommended disclosure hashtag causes consumer confusion). By recommending influencers to use “#ad” to make disclosure statements, consumers are only being more confused because the same hashtag is being overused and collected into a page full of overwhelming posts shared with the same tag. Id. It is highly unlikely that a consumer will search through thousands of posts with a variety of language and differing characteristics to differentiate non-endorsements and endorsements. Id.
statements between posts.\textsuperscript{142} Countries like the UK provide advertisers and influencers with guidance on making proper payment disclosures on particular social media platforms, which is the type of update that both the FTC and the FDA are capable of making to uphold their missions to protect consumers.\textsuperscript{143}

As a result, a pro-consumer approach by the FTC would perhaps entail standardized disclosure standards for the big social media platforms.\textsuperscript{144} The FTC could ease consumer confusion by explicitly distinguishing how and where disclosures are made on each particular social media platform.\textsuperscript{145} This would provide advertisers and influencers with a clearer understanding of how they can use each platform’s features to make proper disclosures.\textsuperscript{146} However, the FTC would have to ensure that the standard for each platform is broad

\textsuperscript{142} See Letter from Justin Brookman to FTC, supra note 111 (highlighting that fake reviews are an issue in online consumer reviews). One study found that “for at least some products up to 30% of reviews are fake.” \textit{Id.} Research from early 2020 also found that “nearly half of reviews for clothes and apparel are faked—and, on average across all product lines, 39% of the reviews are false.” \textit{Id.}

\textsuperscript{143} See Farshidi, supra note 47, at 201–03 (discussing how the UK’s mechanism of regulating endorsements can serve as a model to renew the FTC’s Guidelines). For one, regulators in the UK conduct reviews of their own endorsement guidelines much more frequently, which is something that the FTC and the FDA could both benefit from. \textit{Id.} at 201. \textit{See also} All Eyes on Influencers, supra note 94 (discussing how both the FTC and the FDA have in recent years expanded their enforcement efforts to “encompass advertising and promotion occurring on social media platforms.”).

\textsuperscript{144} See Letter from Qianna Smith Bruneteau to FTC, supra note 112 (responding that if the FTC wants to keep its mission of protecting consumers, it should keep up to date with recent leading social media platforms and potential user design experiences on those platforms).

\textsuperscript{145} See Letter from Edgar Dworsky to FTC, supra note 111 (requesting that the FTC take measures to specify how influencers and brands should be making disclosures of endorsements). Speaking for Consumer World Reports, the author notes that “the ‘when’, ‘where,’ and ‘how’ of any disclosures need to be explicitly specified because without that producers and publishers will likely continue to obscure and hide the truth from their viewers and readers.” \textit{Id.}

\textsuperscript{146} See Letter from Justin Brookman to FTC, supra note 111 (emphasizing that in order to ensure that influencers and other markets have a deep understanding of the Guidelines, the FTC should “look to find ways to promote the [Guidelines] to marketers, who in many cases may be simply ignorant of the FTC’s interpretation of its Section 5 authority.”). \textit{But see} Bladow, supra note 24, at 1140–41 (explaining that the FTC focuses its enforcement efforts on advertising agencies because as intermediaries, they have more direct access to influencers and brands and thus, like brands, are also “responsible for educating influencers on adequate disclosures and implementing a reasonable monitoring program to ensure influencers make adequate disclosures.”).
enough to apply to diverse businesses.\textsuperscript{147} For this reason, applying a universal cross-platform visual standard for sponsored content would likely be problematic, especially when many of the advertisers are small businesses.\textsuperscript{148} Keeping these considerations in mind, it is clear that with the rise and success of influencer marketing and the constant development of UX design of social channels that the FTC should shorten its regulatory review to every three years instead of every ten years.\textsuperscript{149}

\textbf{B. What to Expect}

As consumers continue to immerse themselves into the online health industry through e-commerce, it is likely that regulators will realize the importance of creating safe digital environments.\textsuperscript{150} This is especially important for consumers making purchasing decisions so that consumers are informed of the appropriate health risks and

\textsuperscript{147} See id. at 1127 (explaining that many start-up companies can leverage the use of influencer marketing at the outset because it allows them to “monitor the return on their investment and reap the benefits of working with influencers to promote their products,” which is often much cheaper than traditional forms of digital marketing). \textit{But see} Rijo, supra note 35, at 172 (discussing that sometimes consumers that purchase products such as supplements often want these products to be less-regulated because then companies can easily alter products based on consumers’ needs).

\textsuperscript{148} See Letter from Qianna Smith Bruneteau to FTC, supra note 112 (recommending that the FTC should “spark a partnership” with leading social media platforms for a standardized approach to disclosure statements). The American Influencer Council recommends that the “FTC spark a partnership with the ‘Big 6’ social media platforms (Facebook, Instagram, YouTube, Twitter, TikTok, Snapchat) to help establish a cross-platform visual standardization for sponsored content.” \textit{Id. See also} Bladow, supra note 24, at 1140 (highlighting that when the FTC has taken action under its power granted by Section 5, it has typically done so on brands and their advertising agencies).

\textsuperscript{149} See Letter from Qianna Smith Bruneteau to FTC, supra note 112 (discussing the advantageous positions the FTC would be placed in if the agency would be on trend with user experience design and also strongly emphasizing that the FTC should conduct reviews of its Guidelines every three years, rather than the agency’s current ten year review); Letter from Edgar Dworsky to FTC, supra note 111 (implicating that the FTC needs to conduct regulatory review processes much more stringently).

\textsuperscript{150} See Zilles, supra note 8 (noting that if social media endorsements continue to go without stronger regulations, social media feeds would turn into the equivalent of infomercials for the pharma industry). While social media users may have more control to read through an influencer’s caption compared to the thirty seconds running through a drug’s potential side effects in a commercial, users’ attention spans are not long enough to search and absorb for that information during a first look at an endorsement post. \textit{Id.}
benefits before drug consumption. Consumer organizations will only continue to advocate for better protections on social media platforms, which will likely lead the FTC to strengthen its enforcement mechanisms and consequently heighten the compliance requirements for influencers and pharma companies.

1. Consumer Rights Impact

Some industries may influence the FTC to narrow the Guideline’s disclosure requirements to reduce consumer confusion. The goal of narrowing the Guideline’s disclosure requirements would be to provide influencers with a clear sense of the FTC’s endorsement requirements so that those who do not comply can be held accountable. Given the impact endorsements can have on industries such as fashion or healthcare, transparency is key to protect

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151 See Rijo, supra note 35, at 175 (discussing how the lack of pre-market approval for non-prescription drugs leads to negative health impacts since consumers cannot inform themselves of the risks or benefits until after they have consumed the product).

152 See discussion infra Section III.B–C (describing the responses both the FDA and the FTC received from consumers). Interesting enough, the majority of the responses received by the FDA were from pharmaceutical companies, whereas the majority of responses received by the FTC were from consumer organizations. Id. See also Pippins, supra note 7 (laying out what brands should consider as they await findings from the FDA’s studies and any proposed changes by the FTC to its Guidelines). As an initial matter, it should be expected that the FTC will use the FDA’s findings to learn more about consumer understanding of risk information in its decision to make any changes to its Guidelines. Id. For instance, the FDA’s studies “may impact the FTC’s perspective on effective presentation of disclaimers, including the effectiveness of hyperlinks and other mediums.” Id.

153 See Jain & Kessler, supra note 8 (predicting that the FTC and the FDA are likely to work even closer together as a result of their ongoing studies with a focus on regulating social media influencers in “health care and particularly prescription drugs.”). See also Rijo, supra note 35, at 175 (discussing how the nature of product approval in the over-the-counter drug industry is problematic for consumers). For example, supplements in particular are available to the public without FDA approval, “and it is only after the products hit the shelves that the FDA reacts to any and all issues that arise with the dietary supplements.” Id. This in itself can be a big problem for consumers’ health, given the negative history that some supplements have like detox teas, which is likely to influence any revisions of the FTC’s Guidelines. Id.

154 See Letter from Gianna Smith Bruneteau to FTC, supra note 112 (emphasizing that platform standardization and accountability are two of the most important goals that the FTC should strive for). In regard to accountability specifically, the American Influencer Council states that “[t]he brands and agencies contracting social media influencers need to take more stringent measures of adding the FTC’s regulations to their standard contract language to keep both sides accountable and mold influencer behavior with regards to sponsored content.” Id.
consumers. One way the FTC could accomplish this is by implementing uniform disclosure language among industries. However, to not over restrict businesses, the FTC may be more inclined now than in prior years to allow companies to implement their own uniform disclosure language. For example, rather than use the FTC’s current suggested “#ad” disclosure language, brands could create a unique hashtag or coined disclosure phrase that clearly designates a relationship to the influencer. Of course, this would only be successful if the FTC ensures that companies monitor and enforce the use of their unique hashtag or phrase so that a repeated pattern could be identified by consumers. Despite the fact that advertising companies should already be monitoring influencers they use to promote their products—and it’s clear that they are not—the responses from the studies demonstrate that the FTC is likely going to rely more on consumers to report non-compliance behavior by companies.

155 See Rijo, supra note 35, at 170 (discussing that many endorsed non-prescription drug products fail to disclose the products’ potential side effects). Although there are some products that are FDA-approved, the same approved products are often not approved for use over an extended period of time; yet there are detox teas that recommend consumers drink them twice a day for twenty-eight days straight . . . [t]he human body can build up a tolerance to laxatives and recent studies have shown a link between high dosages of laxative teas and colorectal cancer. Id. at 170–71.

156 See Letter from Qianna Smith Bruneteau to FTC, supra note 112 (suggesting the need for a uniform disclosure standard across all “[b]ig 6” social media platforms); Farshidi, supra note 47, at 206 (suggesting that individual brands in the fashion industry create their own hashtag for influencers they employ to use).

157 See All Eyes on Influencers, supra note 94 (suggesting that the FTC has long valued the insights of companies and likely wishes to uphold this value).

158 See Farshidi, supra note 47, at 206 (putting forth examples of the type of disclosure language fashion brands have attempted to standardize). Michael Kors used the hashtag “#ThanksMK,” Stuart Weitzman uses “InOurShoes,” and Sam Edelman uses “SamsGirls.” Id. However, it is unclear whether these brands’ individual hashtags would be explicit enough under the FTC’s current Guideline standards. Id. at 206.

159 See id. (emphasizing that consumers would “grow to realize what the [companies’] hashtag meant” if companies properly monitor and enforce influencers to use the hashtag).

160 See Letter from Justin Brookman to FTC, supra note 111 (emphasizing the need for the FTC to continue its efforts to ensure companies have monitoring programs in place for influencers and endorsements). If anything, the FTC should put more effort to ensure companies hold the influencers they work with accountable through their own internal programs because “[o]nline platforms do not have sufficient incentives to police for fraudulent promotion.” Id. In fact, online platforms
Where the failure to disclose paid endorsements may be more likely to harm consumers, the FTC and the FDA may consequently provide consumers more rights. Influencers who endorse products that would otherwise be promoted or sold by professionals with accreditation should be required to disclose the monetary value of their partnership with a brand. Consumers should be afforded more protection when endorsed social media statements influence purchase decisions that may impact their health, finances, or relationships.

actually “artificially amplify the metrics by which they are judged by users and investors” via “fake reviews, views, accounts, and other social engagement” methods. Id. See also All Eyes on Influencers, supra note 94 (noting that many companies seem to forget monitoring the influencers they use to promote products because both the FTC and the FDA have to remind them of their responsibility to ensure influencers are complying with the Guidelines). When the FTC and the FDA issued warning letters to four e-liquid companies, the two agencies reminded them “that social media influencers have to clearly and conspicuously disclose material connections to the brands they are promoting, and noting that brands should inform influencers of their disclosure responsibilities.” Id.

161 See id. (emphasizing that the agencies’ pro-consumer efforts are only going to be increasing). “The importance of patient influencers, advocates, and partners is only likely to increase in this area.” Id. See also Pippins, supra note 7 (suggesting that the FTC’s and FDA’s efforts are shifting to consumers of “vulnerable populations” susceptible to the influencer marketing of health-related products). The FDA in particularly is increasingly learning about how consumers understand risk information, especially in the advertising and endorsement of health-related products. Id.

162 See Letter from Jessie Morgan to FDA, supra note 105 (noting the importance of differentiating between a medical professional’s opinion and a non-medical professional influencer’s opinion in the endorsements of drugs on social media to the FDA); Rijo, supra note 35, at 179 (suggesting that the FDA also implement third-party review programs to conduct safety audits and issue certifications for foreign entities that want to introduce products into the market). The FDA is familiar with these programs as it currently has a third-party program in place for medical device manufacturers. Rijo, supra note 35, at 178. These third-party programs “assess product compliance more frequently since the third-party relationship is developed for that exact reason” and allow “the FDA [to] obtain results of technical tasks that allow for pre-market approval.” Id.

163 See Letter from Jessie Morgan to FDA, supra note 105 (stressing that payment disclosure is a large factor to weigh in an influencer’s credibility as to the endorsement of a health-related product). See also Rijo, supra note 35, at 179 (highlighting the benefits of using a third-party review program to help regulate products and protect consumers from dangerous products). “[T]he greater the compliance, the greater reduction in illnesses, deaths, and other associated costs.” Id. at 180. But see Defino, supra note 105 (implicating that it is not just social media statements that impact consumer purchase decisions, but also advertisers and federal agencies such as the FDA). Industries regulated by the FDA are built on “fear-mongering” because the labels they use to market their products to establish credibility and safety imply that products marketed without the labels are
When consumers are confronted with an influencer’s opinion about medical and health-related products—without the proper credentials that a doctor would have—consumers should have access to whether an influencer was paid for an endorsement and the amount.\(^{164}\) With the skepticism to visit doctor offices and hospitals likely to continue after the COVID-19 pandemic—especially with the rise of telehealth—consumers are resorting to online reviews for vitamins, over-the-counter drugs, and other health-related products.\(^{165}\) Thus, it is in the best interest of the FTC to weigh the level of harm endorsements in each industry can have on consumers and review its Guidelines accordingly.\(^{166}\)

2. Higher Scrutiny for Influencers and Pharma Companies

Given the seriousness of potential harm that drug endorsements can have on consumers, it is highly likely for the FDA and FTC to use joint efforts to regulate disclosure statements in the healthcare industry specifically.\(^{167}\) For example, it would be a good use of the FDA and FTC’s resources to combine perspectives in orders to refine the standard for effective presentation of disclaimers, particularly in regards to food, drug, and children’s products.\(^{168}\) Despite criticism of the FDA study’s methodology, it is anticipated that the FDA’s findings dangerous to consumers. *Id.* Often, these labels such as “cosmeceutical” used on beauty products and “FDA-approved” are purposely vague so that brands advertising these products are not flagged. *Id.* For example, “‘Science-Backed’ implies everything on the market isn’t backed by science and therefore, is not as safe.” *Id.* “‘Anti-aging’ implies the natural process of aging is wrong/ugly/something that must be stopped. It’s fear-mongering.” *Id.*

\(^{164}\) See Letter from Jessie Morgan to FDA, supra note 105 (emphasizing that as consumers should have the right to access health care, that includes having the right to full disclosure of any side effects, benefits, or risks a medication may have when encountering a health-related product on social media).

\(^{165}\) See Rijo, supra note 35, at 154–55 (discussing the significant promotion of supplements and other dietary drugs on social media platforms such as YouTube, TikTok, and Instagram).

\(^{166}\) See Jain & Kessler, supra note 8 (recommending that the FDA partner up with the FTC to “examine how consumers respond to endorsers and payment disclosures in relation to the promotion of pharmaceuticals . . . on social media . . .”).

\(^{167}\) See All Eyes on Influencers, supra note 94 (advising advertising companies what they should expect from the FDA’s and the FTC’s ongoing investigations).

\(^{168}\) See Pippins, supra note 7 (detailing the key ways that companies will be impacted from the FDA’s and FTC’s announcements). “First, it should be expected that the [FDA and FTC] will share learnings form their respective information collection activities.” *Id.* See also All Eyes on Influencers, supra note 94 (proposing three main implications that will arise from increased regulator interest in social media endorsements on a global scale).
and comments received by the FTC will shift both organizations’ priorities. More likely is that there will be higher scrutiny on the endorsements of health-related products, especially those targeted at “vulnerable populations.”

In addition to updating the FTC’s Guidelines, the FTC and the FDA should jointly issue a new in-depth rule or guideline focusing on endorsements of health-related products that go beyond prescription drugs. Since food, drug, and cosmetic companies must already follow FDA regulations, complying with refined disclosure standards set out by both the FDA and the FTC is not hard to imagine. Especially when consumer protection in the health-industry is at risk, health-related companies should be held to a higher standard as to where, when, and how, disclosures are made on social media. This is not to say that a pre-approval process for marketing such products on social media should be required. Keeping consumer interests in mind, this type of regulation would interfere with products that

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169 See id. (advising advertising companies what they should expect from the FDA’s and the FTC’s ongoing investigations). See Pippins, supra note 7 (stressing that companies should anticipate the FTC and the FDA to shift their perspectives and priorities going forward). As many of the public’s comments to the FTC’s request emphasize that the Guidelines should also consider how disclosures are made on other platforms and via developing marketing strategies (such as affiliate links), the effectiveness of hyperlinks and other mediums will likely be evaluated more closely. Id.

170 See id. (indicating that the agency’s shift to focus on vulnerable populations is inferred by the FTC’s request for public comment). The FTC’s request for public comment “specifically mentions the promotion of children’s products.” Id.

171 See Rijo, supra note 35, at 169 (suggesting that standards for regulating non-prescription drugs should be set at a higher standard).

172 See Jain & Kessler, supra note 8 (expecting pharmaceutical companies to be monitored more frequently); All Eyes on Influencers, supra note 94 (expecting that pharmaceutical companies and their marketing be evaluated with higher scrutiny following the agencies’ investigations).

173 See Letter from Edgar Dworsky to FTC, supra note 111 (discussing the minimal requirements the FTC’s Guidelines should entail). “At a minimum, the guides should specify that a clear disclosure of the financial connection should be made at the top – at the beginning – of the story/feature, and not via a link.” Id.

174 See Rijo, supra note 35, at 182–83 (counterarguing the need for more regulatory intrusion by the government). Requiring companies to include a certain phrase in their products’ advertisements has the risk of being considered too intrusive, especially given previous defenses companies have claimed against strict restrictions by the FDA. Id. In Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011) and in U.S. v. Caronia, 703 F.3d 149 (2d Cir. 2012), the pharmaceutical companies “invoked First Amendment defenses to combat FDA restrictions placed on prescription drug advertisements.” Id.
consumers consume as part of their daily lives. Nonetheless, companies and advertisers need to be careful about how influencers are marketing a product’s benefits, risks, and relevant information.

The FDA and the FTC should mitigate this potential conflict by requiring companies in the health-industry to use uniform disclosure mechanisms. Primarily, a uniform hashtag disclosure should be implemented for all health-related products to be displayed at the beginning of an influencer’s written or oral statement. For example, a hashtag such as “#TruthForDrug” would have an immediate impact on consumers by alluding that the creator of the post is required to disclose truthful information of the product because the creator has a material connection with the brand. Further, the FDA and the FTC should categorize payment levels into classes that influencers would also be required to include in their statements.

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175 See Rijo, supra note 35, at 182 (highlighting the consumer interests that could be at risk if non-prescription drugs like supplements had more government interference). For example, while influencer marketing poses its issues, it also opens the door to alternatives to prescription medication. Id.  
176 See All Eyes on Influencers, supra note 94 (noting that companies need to take appropriate steps to make sure they are complying with all the necessary endorsement and drug-regulatory requirements). One law firm advised that “companies engaged in either category of marketing reevaluate current and pending social media campaigns against the agencies’ focus on ensuring effective communication risk.” Id.  
177 See Rijo, supra note 35, at 183 (recommending that the FDA update its regulations to account for endorsements). For example, the FDA and the FTC could require companies to include disclosure language in their social media advertisements, including endorsements made by influencers, such as “#nonFDAapproved.” Id. While previous cases involving pharma companies and advertising regulations concerned prescription drugs, requiring such disclosure language for other health-related products is “no different than requiring supplement labels that bear statements of dietary support to prominently display a prescribed advisory statement” as per the Dietary Supplement Health and Education Act. Id.  
178 See Farshidi, supra note 47, at 206 (implicating that uniform disclosure standards would benefit across industries rather than all of commerce).  
179 See id. at 206–07 (suggesting how industry-specific companies should be creative when creating disclaimers). Companies, like pharma companies, should use a universal hashtag among the industry which would act similar to a service mark – a phrase that creates an association with companies within a particular industry. Id.  
180 See Letter from Jessie Morgan to FDA, supra note 105 (indicating that money disclosures can be made on an influencer’s page by both benefiting the consumer and without limiting businesses’ advertising practices). For example, payments could be classified by range (i.e. Class A: $100-$1000; Class B: $1000-10,000; Class C: $10,000-40,000; Class D: $40,000-100,000; Class E: $100,000+) to notify consumers how much the influencer was possibly paid, thereby providing consumers with the information necessary to make smart purchasing decisions. Id.
The wide range of these class payments would ensure that businesses in the health-industry continued to compete, while protecting consumers.\textsuperscript{181}

V. Conclusion

With e-commerce and online engagement only increasing, consumers have a clear desire to be well-informed in order to make safe and healthy purchasing decisions. The lack of effective enforcement up to date by both the FTC and the FDA especially has left consumers disposed to the control of influencers and brands. While the FDA continues to conduct empirical research on direct-to-consumer payment in pharmaceutical product endorsements, one thing is clear: whatever the results, influencers and brands are going to be subject to more stringent guidelines. Brands and influencers will need to be more careful when making endorsements going forward, especially those promoting any foods, drugs, or cosmetics. Endorsements threaten consumer protection when it’s at the disposal of brands and influencers and far out of reach from the federal authorities–necessitating the FDA and the FTC to claim back oversight power.

\textsuperscript{181} See id. (noting that payment disclosure is not meant to disregard the marketing efforts of brands); Rijo, supra note 35, at 173 (noting that consumers benefit from being able to easily access non-prescription drugs that contribute significantly to their daily lives).