

Corporations, Social Media, & Advertising: Deceptive, Profitable, or Just Smart Marketing

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I. INTRODUCTION

Companies promote their products through advertising, and for decades, celebrities

* To my parents, thank you for always encouraging me to learn, explore, ask questions, and use common sense. Because of those values, I know that I have the strength to achieve my goals no matter what obstacles come into my path. I'll be forever grateful for your support.

have played an integral part of advertising products to consumers. For example, millions of kids purchased Nike shoes in the 1990s to “be like Mike.” Pepsi hired Britney Spears to promote its soda; and Armani and H&M both hired David Beckham to promote their clothes.¹ Celebrity endorsements span all types of products similar to how advertising spans different kinds of marketing mediums including social media. Social media platforms—such as Facebook, Instagram, Snapchat, and Twitter—have all been used by companies and celebrities to promote products.

As the platforms for advertising have evolved, the Federal Trade Commission (FTC) has tried to regulate advertisements to prevent deceptive information from negatively impacting the consumer. The FTC’s newest regulation in advertising has extended into social media advertisements. This Note addresses the FTC’s attempted regulation of celebrity social media advertisements and how those regulations impact the companies that hire celebrities and social media influencers² to promote their products and the consumers who follow the celebrities on social media. In Part II, this Note will examine several areas. First, this Part will explore the financial growth of social media via company spending. Second, this Part will lay out the meanings of “deceptive” and “endorsement” as those terms relate to advertising. Third, this Part will delve into the FTC’s regulation of other advertising mediums such as radio, newspapers, and television to lay a framework of the FTC’s past regulation of deceptive advertising to show why those same regulations could not be applied to social media. Finally, this Part will examine the FTC’s impact on companies’ profits from deceptive advertisements.

In Part III, this Note will examine how the FTC’s current guidance is perplexing to companies, celebrities, and influencers who want to truthfully advertise on social media. It will also analyze the financial impact on companies who have been found guilty of deceptive advertising. Finally, in Part IV, this Note will recommend that the FTC change its guidelines to (1) create a clear definition for “read and comprehend,” (2) require advertising notifications at the beginning and end of social media posts, and (3) define what qualifies as a celebrity sponsor and social media influencer sponsor. There will also be a recommendation that the FTC implement a standard formula for fines that will be used to punish companies, celebrities, and social media influencers who participate in deceptive advertisements on social media.

1. Sarah Bellman, *15 Most Iconic Celebrity Endorsements* (Sept. 29, 2014, 1:00 PM), <http://www.whosay.com/articles/4317-15-most-iconic-celebrity-endorsements>.

2. A social media influencer is a social media user “who has established credibility in a specific industry. . . [and] has access to a large audience and can persuade others by virtue of their authenticity and reach.” *What is a Social Media Influencer?*, PIXLEE, <https://www.pixlee.com/definitions/definition-social-media-influencer> (last visited Dec. 13, 2017). Social media influencers often use their platforms to reach out to their followers by posting created-content that has a business’ product either as a part of the content, sponsoring the content, and/or a giveaway of the product within the content. Laura Forer, *The Lowdown on Social Media Influences* [Infographic], *MARKETINGPROFS* (Feb. 22, 2017), <https://www.marketingprofs.com/chirp/2017/31547/the-lowdown-on-social-media-influencers-infographic>. Because influencers can span across various areas such as beauty, fashion, fitness, cooking, travel etc., FTC regulation is a necessity to protect consumers. See Clare O’Connor, *Forbes Top Influencers: Meet the 30 Power Players Making a Fortune on Social Media*, *FORBES* (Apr. 10, 2017, 6:55AM), <https://www.forbes.com/sites/clareoconnor/2017/04/10/forbes-top-influencers-meet-the-30-power-players-making-a-fortune-on-social-media/#35c140c413c8> (discussing the inaugural Forbes Top Influencers List). For purposes of this Note, the words “social media influencer” and “influencer” are used interchangeably.

II. BACKGROUND

A. Social Media Marketing Spending by the Numbers

Social media marketing is a marketing medium in which billions of dollars are spent every year in the U.S. and around the world.³ Projections show that businesses will spend \$13.51 billion in 2017, \$15.36 billion in 2018, and \$17.34 billion in 2019 on social media marketing in the United States.⁴ Because of its global growth at 20% per year, projections also show that social media advertising will be worth \$50.2 billion by 2019, and social media platforms, like Twitter, will comprise 20% of internet advertising in the world.⁵ Influencer marketing is already a \$500 million industry that will likely grow to at least \$5 billion by 2020.⁶ The amount of money that a business will spend on celebrity and influencer endorsements likely contributes to these numbers.⁷

A celebrity or social media influencer who has between three and seven million followers can charge businesses the following prices: \$30,000 per post on Twitter, \$75,000 per post on Instagram or Snapchat, \$93,750 per post on Facebook, and \$187,500 per post on YouTube.⁸ A celebrity who has over seven million followers can earn the most on YouTube by charging \$300,000 per post.⁹ Social media influencers also earn good money on social media. Bloggers with over 500,000 monthly impressions can earn between \$1,000-\$5,000 per post.¹⁰ Instagram influencers with over 500,000 followers can earn over \$3000 per post.¹¹ Vloggers with over 500,000 subscribers can earn \$3,000-\$5,000 per video.¹² Because of the amount of money businesses pay celebrities and influencers to promote their products and services on social media and the billions of dollars projected to be spent on social media marketing,¹³ the FTC has an obligation to American consumers to provide clear guidelines on deceptive advertising on social media.

3. Arjun Kharpal, *Social media advertising spend set to overtake newspapers by 2020: Research*, CNBC (Dec. 5, 2016, 3:50 AM), <http://www.cnbc.com/2016/12/05/social-media-advertising-spend-set-to-overtake-newspapers-by-2020-research.html>.

4. Forrester Research & Business 2 Community, *Social media marketing spending in the United States from 2014 to 2019 (in billion U.S. dollars)*, STATISTA, <https://www.statista.com/statistics/276890/social-media-marketing-expenditure-in-the-united-states/> (last visited Dec. 13, 2017) [hereinafter Forrester Research].

5. Kharpal, *supra* note 3 (projecting social media spending).

6. *Influencer Marketing To Be A \$5-\$10 Billion Market Within Next 5 Years*, MEDIKIX, <http://mediakix.com/2015/12/influencer-marketing-5-10-billion-dollar-market/#gs.U5nTa44> (last visited Dec. 13, 2017).

7. See Kharpal, *supra* note 3 (projecting social media marketing spending); see Forrester Research, *supra* note 4 (projecting social media marketing in the United States).

8. The Data Team, *Celebrities' endorsement earnings on social media*, THE ECONOMIST (Oct. 17, 2016), <http://www.economist.com/blogs/graphicdetail/2016/10/daily-chart-9>.

9. *Id.*

10. Kristy Sammis et al., *Influencer Marketing for Dummies Cheat Sheet*, DUMMIES, <http://www.dummies.com/business/marketing/influence-marketing/influencer-marketing-for-dummies-cheat-sheet/> (last visited Dec. 13, 2017).

11. *Id.*

12. *Id.*

13. See Forrester Research, *supra* note 4 (referencing social media marketing spending statistics).

B. FTC Regulations of Deceptive Advertising and Endorsements

The FTC was founded in 1914¹⁴ to regulate businesses using deceptive and unreasonable practices in commerce that affected the consumer.¹⁵ Since its inception, the FTC has regulated advertisements in various mediums including radio, television, and social media. The FTC's crackdown on deceptive advertising began in 1938, when the Wheeler-Lea Act was added as an amendment to Section 5 of the FTC Act.¹⁶ The Act added the language "unfair or deceptive acts and practices in commerce" to section 5.¹⁷ After the Act's creation, the FTC's common law definition of deception was "any representation that had a tendency or capacity to mislead or deceive a prospective purchaser."¹⁸

According to the FTC Policy Statement on Deception, the elements of deception are the following: (1) a misleading representation or omission to the consumer, (2) how the reasonable consumer would react to the deceptive advertisement, and (3) whether the misleading representation or omission is material.¹⁹ For the first requirement, the FTC will look at a whole advertisement because "[T]he issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception."²⁰ For the second requirement, a seller is in danger of deceiving the consumer if the advertisement sends more than one message to the reasonable consumer.²¹ However, a seller is not being deceptive when the representation is the intended message²² or when the non-reasonable consumer misunderstands an advertisement's representation.²³ For the final requirement, materiality can be presumed in a variety of ways, including when a corporation willingly promotes its products to the consumer, when false information is knowingly given to the consumer, or when there is an intent to differentiate products or services through an implied claim in the advertisement.²⁴

In addition to overseeing deceptive advertising, the FTC also regulates unfair advertising. The FTC's definition of unfair has changed over the years. In 1964, an advertisement was unfair if it: (1) violated common law, public policy, or statutes, (2) was "immoral, unethical, oppressive, or unscrupulous," and (3) "causes substantial injury to

14. The Federal Trade Commission was created under the FTC Act. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006).

15. *Id.*

16. Robert Freer, Chairman, FTC, Address at Annual Convention of the Proprietary Association (May 17, 1938).

17. *Id.*

18. *Advertising Law Guide Explanations*, ¶210, *Definition of "Deception,"* WOLTERS KLUWER L. & BUS., http://www.wkcheetah.com/?window=document#/read/AllContent/09013e2c826d276c!csh-da-filter!WKUS-TAL-DOCS-PHC-%7B675007FE-276D-4925-80AB-92EF1A243EE5%7D—WKUS_TAL_4484%23teid-31?searchItemid=17102012143812c382fba8b60d442e83af87f767da1966!000000000!09013e2c826d276c&da=WKUS_TAL_4484 (last visited Dec. 13, 2016).

19. *See FTC Policy Statement on Deception*, FTC (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (discussing the FTC's elements of deception).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *See FTC Policy Statement on Deception*, *supra* note 19 (discussing the FTC's presumption of materiality).

consumers (or competitors or other businessmen).”²⁵ By 1980, the FTC’s Unfairness Policy Statement required unfairness to the consumer to be (1) “substantial,” (2) “not outweighed by an offsetting consumer or competitive benefits that the practice produces,” and (3) reasonably unavoidable.²⁶

Because businesses often advertise their products and services using endorsements from public figures, deceptive and unfair advertising can have a relationship to endorsements. Endorsements are addressed under section 5 of the FTC Act.²⁷ An endorsement is:

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.²⁸

Product endorsers must give their “honest opinion” of a product or service.²⁹ To give an honest opinion, “[T]he endorser must have been a bona fide user of [the product] at the time the endorsement was given.”³⁰

As an example, a famous celebrity makes an infomercial for a blender that could perfectly blend anything in five seconds, but during filming, the celebrity could not even make a smoothie with the blender.³¹ Thanks to TV magic, the celebrity perfectly blends the smoothie in five seconds on the infomercial that consumers see on television.³² The reasonable consumer would believe that the blender works.³³ However, the FTC would consider the infomercial false advertising because the celebrity did not give an honest opinion as a bona fide user.³⁴

Prior to the FTC’s regulation of infomercials, the FTC filed a complaint against a singer and his family for promoting an acne product in television and magazine advertisements.³⁵ The singer and his family endorsed the product without having reasonable medical evidence that the product actually worked.³⁶ Likewise, some of the singer’s family had never used the product prior to the endorsement.³⁷ The singer, his

25. *Advertising Law Guide Explanations*, ¶ 250, *Definition of “Unfairness,”* WOLTERS KLUWER L. & BUS., http://www.wkcheetah.com/?window=document#/read/AllContent/09013e2c826d2783!csh-da-filter!WKUS-TAL-DOCS-PHC-%7B675007FE-276D-4925-80AB-92EF1A243EE5%7D—WKUS_TAL_4484%23teid-798?searchItemId=17102012143812c382fba8b60d442e83af87f767da1966!000000000!09013e2c826d2783&da=WKUS_TAL_4484 (last visited Dec. 13, 2017).

26. *Id.*

27. *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255.0 (2009)

28. *Id.*

29. 16 C.F.R. § 255.1 (2009).

30. *Id.*

31. *See id.* (referencing Example 4).

32. *Id.*

33. *Id.*

34. 16 C.F.R. § 255.1 (2009).

35. M.M. Jennings, *In the Matter of Cooga Mooga & Charles E. Boone*, 17 AM. BUS. L.J. 531, 533 (1980) (discussing the Pat Boone false advertising case).

36. *Id.*

37. *Id.*

family, and the company were held liable for the false advertisement.³⁸ Consequently, the singer and the company were ordered to pay restitution.³⁹ The singer's restitution was twenty-five cents pro rate share per bottle sold during the time that the advertisements were run in the media.⁴⁰

Advertised endorsements are also required to disclose any material connection between the endorser and company that would affect the "credibility of the endorsement."⁴¹ If advertised endorsements have deceptive or false representation, then the company and the endorser can be held liable.⁴² The FTC gives the example of a tennis player who has surgery at a clinic and mentions the clinic by name on social media.⁴³ Because social media provides a more personal connection between the celebrity and the consumer, the reasonable consumer might not discern that the tennis player actually has an endorsement deal with the clinic.⁴⁴ The endorsement deal with the clinic would constitute a material connection.⁴⁵ Once again, the celebrity and the clinic would be held liable for deceptively advertising to the consumer.⁴⁶

C. FTC Regulation in Various Marketing Mediums

Throughout the decades, marketing mediums have expanded. With the expansion of marketing, the FTC has come to regulate radio, newspaper, television, and is now shifting its focus to social media. To properly analyze FTC action on social media and why its past enforcement and guidelines in other marketing mediums cannot be applied to social media, its enforcement background in the other marketing mediums needs to be further explored.

1. FTC Regulation of Radio Advertisements

The FTC's regulation of radio started shortly before the enacting of the Wheeler-Lea Act.⁴⁷ Because false advertising was costing consumers \$500 million in the early 1930s, the FTC wanted to crack down on radio advertisements.⁴⁸ The FTC asked for radio stations' advertisement continuities,⁴⁹ so they could evaluate the advertisements.⁵⁰ If the advertisements were questionable, the FTC would further investigate the advertisements and take subsequent legal action if necessary.⁵¹

38. *Id.*

39. *In the Matter of Cooga Mooga et al.*, 92 F.T.C. 310, 321 (1978).

40. *Id.*

41. 16 C.F.R. § 255.5 (2009).

42. 16 C.F.R. § 255.1 (2009).

43. *See* 16 C.F.R. § 255.5 (2009) (referencing Example 3).

44. *Id.*

45. *Id.*

46. *Id.*

47. Henry Maturo, *Radio Ad Continuities Swamp FTC, but Plan is Reported Doing Okeh*, THE BILLBOARD, Aug. 11, 1934, at 8.

48. Ewin L. Davis, *Regulation of Radio Advertising*, 177 ANNALS AM. ACAD. POL. & SOC. SCI. 154, 155 (1935).

49. An advertisement continuity is the "timing of media insertions for the period of time an advertising campaign will run." *Continuity Advertising*, ALL BUS., https://www.allbusiness.com/barrons_dictionary/dictionary-continuity-advertising-4965397-1.html (last visited Dec. 13, 2017).

50. Davis, *supra* note 48, at 156.

51. *Id.* at 157.

2. FTC Regulation of Newspaper Advertisements

While the FTC regulated newspaper advertisements prior to regulating radio advertisements,⁵² it was not until the 1960s that the FTC regulated print advertisements that looked like news.⁵³ When a restaurant advertisement's content in a newspaper column appeared as a restaurant review, the FTC felt that it misled consumers.⁵⁴ To combat the misleading nature of the advertisement, the FTC recommended that "ADVERTISEMENT" be placed next to the advertisement to notify consumers that it was an advertisement.⁵⁵

3. Clear and Conspicuous Standard in Television

In 1970, the FTC created the "clear and conspicuous" (CCS) standard for television advertisement disclosures.⁵⁶ The CCS standard for television commercials is as follows: (1) the disclosure has to be divulged in audio and video; (2) the video disclosure has to have reasonably sized letters; (3) the color of the reasonably sized letters has to contrast with the advertisement's background; (4) the video disclosure background should be one color; (5) the video disclosure should appear for a reasonable amount of time; (6) the audio disclosure should be the only sound during the disclosure; (7) the disclosures should follow the related representation and appear when the representation is made during the commercial; and (8) the disclosure should be tailored to the company's target consumer.⁵⁷ The FTC evaluates a company's compliance with the aforementioned CCS standard by looking at the prominence, proximity, placement, presentation, distraction, repetition, and scrawling and crawling.⁵⁸

4. FTC Regulation of Infomercials and the Internet

By the 1980s, the FTC started regulating infomercials on television and radio because it feared consumers would mistake infomercials for actual news programs or talk shows.⁵⁹ Infomercials could have easily been mistaken as news programs or talk shows because they would have the equivalent of a news headline or format on one of the platforms.⁶⁰ The FTC's various actions for deceptive infomercials culminated in the "PAID ADVERTISEMENT" at the beginning of or during an infomercial.⁶¹

When the use of the internet search was on the rise in the early 2000s, the FTC began

52. *Id.*

53. *Enforcement Policy Statement on Deceptively Formatted Advertisements*, FTC https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf (last visited Dec. 13, 2017) [hereinafter *Enforcement Policy Statement*].

54. *Id.*

55. *Id.*

56. Marica Grubbs Hoy & J. Craig Andrews, *Adherence of Prime-Time Televised Advertising Disclosures to the "Clear & Conspicuous" Standard: 1990 Versus 2002*, 23 J. PUB. POL'Y & MKT. 170, 171 (2004).

57. *Id.* at 178-79.

58. *Id.* at 179 (defining scrawling and crawling as when key information to the consumer is hidden in a fast moving horizontal crawl across the screen or in the middle of a long statement that quickly scrolls vertically on the screen).

59. *See Enforcement Policy Statement*, *supra* note 53, at 4 (discussing FTC's concern about the blurred line between advertising and non-promotional content).

60. *Id.*

61. *Id.*

to regulate online advertisements embedded in search results.⁶² When a consumer would conduct an online search, product or service advertisements related to the search would appear higher within the search results.⁶³ However, the search engine or company would not disclose that some of the higher results were actually advertisements.⁶⁴ Because of this non-disclosure, the FTC found such practices misleading and subsequently required companies to disclose the paid advertisements.⁶⁵

5. FTC's View on Celebrity and Influencer Social Media Advertising

With the rise of social media and digital platforms in the last decade, such as Facebook, Instagram, Snapchat, Twitter, and YouTube, the FTC has issued guidelines for endorsements on social media.⁶⁶ However, the FTC admits that it needs to crackdown on celebrity and influencer social media endorsements.⁶⁷ In April 2017, the FTC sent over 90 warning letters to celebrities, influencers, and companies to remind them that any posts should “clearly and conspicuously” disclose any material connection to the brand mentioned in their post.⁶⁸ In Fall 2017, the agency sent more warning letters to almost two dozen unnamed influencers about their posts on social media platforms.⁶⁹ The agency would like celebrities and influencers to not only use “#ad,” “#paid ad,” “#promotion,” “#sponsored,”⁷⁰ but it wants celebrities and social media influencers to make it clear whether or not they have been paid for the advertisement.⁷¹ Because social media users can only see the first several lines of a post on a platform such as Instagram, the FTC would like celebrities and social media influencers to disclose any material connections in the first three lines of the post.⁷² The FTC guidelines for endorsements apply to social media posts that are “made on behalf of a sponsoring advertiser.”⁷³ If an energy drink

62. *Id.* at 6.

63. *Id.*

64. See *Enforcement Policy Statement*, *supra* note 53, at 6 (discussing the issue of paid ads in search results).

65. *Id.*

66. *.Com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FTC (Mar. 2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> (last visited Dec. 13, 2017) [hereinafter *.Com Disclosures*].

67. Sarah Frier & Matthew Townsend, *FTC to Crack Down on Paid Celebrity Posts that aren't Clear Ads*, BNA (Aug. 10, 2016), <https://www.bloomberglaw.com/document/X68U5V68000000?jsearch=bnb%2520A0J9F8U1N7#jcite>; see Alexandra Steigrad, *The Federal Trade Commission to Scrutinize Media Companies*, WWD (Mar. 30, 2017), <http://wwd.com/business-news/media/federal-trade-commission-to-crack-down-on-media-companies-native-advertising-10784810-10784810/>.

68. Press Release, FTC, *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship* (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>.

69. Kellen Beck, *Scandal prompts FTC to crack down on social media influencers*, MASHABLE (Sept. 8, 2017), <http://mashable.com/2017/09/08/ftc-counter-strike/#Zq5A8nIaFqqM>.

70. *The FTC Endorsement Guides: What People are Asking*, FTC, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (last visited Dec. 13, 2017) [hereinafter *What People are Asking*].

71. See Frier & Townsend, *supra* note 67 (discussing FTC's desire to crackdown on celebrity advertising tweets).

72. Press Release, FTC, *supra* note 68.

73. See *Enforcement Policy Statement*, *supra* note 53, at 9.

company pays a celebrity to tweet about their product, the celebrity or influencer would likely have to put “#ad,” “#paid ad,” “#sponsored,” or “#promotion” at the beginning of their tweet, as shorthand, to disclose to their fans and potential consumers that the tweet is an ad.⁷⁴ However, a celebrity or social media influencer does not have to put a “#” identification if they paid for the product or service themselves and simply want to promote the product of their own volition.⁷⁵ The FTC also ambiguously recommends disclosure of whether a social media post is an ad or not if a celebrity or social media influencer’s followers would not be able to distinguish whether the post was an advertisement.⁷⁶

A celebrity or influencer simply thanking a brand in their post would not be good enough to communicate whether the celebrity or influencer has a sponsorship, partnership, or any other type of relationship with a company; the celebrity or influencer would be required to use at least “sponsored” or “ad” in their post.⁷⁷ Simply using “#ambassador” or “XYZ Ambassador” is likely not enough of a disclosure because some consumers may not understand or know the company, so the FTC recommends that a celebrity or influencer also disclose their relationship to the company.⁷⁸ On Snapchat and Instagram⁷⁹ stories, a celebrity or influencer has to superimpose the disclosure over the posted image or story.⁸⁰ For YouTube videos and blog reviews, the FTC requires a celebrity or influencer to disclose when they’ve gotten paid for a review or if the content is sponsored by a company.⁸¹

If the companies’ advertisements do not enforce the disclosures to consumers, the FTC is likely to bring lawsuits against the offending companies and perhaps the celebrity or social media influencer.⁸² The FTC filed a complaint against now-defunct gambling site Counter-Strike: Global Offensive.⁸³ The site had a lottery where players could digitally gamble and win gambling pots.⁸⁴ Without disclosing that they owned the gambling site, YouTube vloggers Trevor Martin and Thomas Cassell posted videos of themselves winning on the site; they also allegedly paid other influencers to promote the site’s lottery without disclosing material connections to the site.⁸⁵ The FTC settled the case by requiring Martin and Cassell “to clearly and conspicuously disclose any material connections with an endorser or between an endorser and any promoted product or service.”⁸⁶ The FTC also filed a complaint against Lord & Taylor because of their “multi-dimensional ad campaign

74. *What People are Asking*, *supra* note 70 (discussing hashtags that a celebrity or influencer should put in their advertising tweet).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Instagram has its own set of promotional guidelines that are shorter than FTC guidelines but encourage compliance with rules and regulations. *Promotion Guidelines*, INSTAGRAM, <https://help.instagram.com/179379842258600> (last visited Sept. 18, 2017).

80. *What People Are Asking*, *supra* note 74 (discussing guidelines for company relationship disclosure on social media).

81. *Id.*

82. Frier & Townsend, *supra* note 67; *What People Are Asking*, *supra* note 74.

83. Beck, *supra* note 69 (discussing FTC crackdown on social media).

84. *Id.*

85. *Id.*

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

that employed (1) its own social media posts on [its] social media accounts, (2) the social media posts of a team of social media influencers, and (3) native advertising by online magazine *Nylon* . . .”⁸⁷ The company gifted dresses to social media influencers and paid them a minimum of \$1,000 to post photos wearing the dress in which the company was tagged and the hashtag “#DesignLab” was used in the text.⁸⁸ The company never required influencers to disclose the relationship to the company; allegedly, the posts were seen by over 11 million Instagram users.⁸⁹ The FTC ended up settling with Lord & Taylor—most importantly requiring them to monitor their endorsers’ posts and disclosures and provide clear instructions on disclosures to their endorsers.⁹⁰

The FTC has also been spurred to movement by watchdog groups that seek to protect consumers from deceptive advertisements. Truth in Advertising—an independent non-profit organization that seeks to fight deceptive advertising in all formats—⁹¹ has also called for the FTC crackdown on celebrity social media endorsements.⁹² Truth in Advertising alleges that high-profile celebrities, such as the Kardashians, have previously failed to disclose whether they have been paid or gifted for products in their social media posts.⁹³ Vague social media posts by celebrities and social media influencers have made the FTC and groups like Truth in Advertising push for regulation so that posts have to be “unambiguous” as to whether the posts are sponsored content.⁹⁴

D. FTC Impact on Companies’ Profits from Deceptive Celebrity and Influencer Advertisements

While a celebrity endorsement may cost a company a significant amount of money, it can also bring in a significant amount of revenue.⁹⁵ Because a celebrity advertisement has the power to evoke positive consumer reactions to the company’s product, a company can harness those emotions on various social media platforms.⁹⁶ A way to evoke those emotions in the most consumers is by having celebrities who have millions of followers, such as the Kardashians, Selena Gomez, reality television stars, or social media influencers, such as MirandaSings, promote the products.⁹⁷ When Justin Bieber had a celebrity endorsement for Calvin Klein, some of the photos earned 1.6 million Twitter mentions and

87. Meryl Bernstein, *How to avoid the FTC not “liking” your next campaign*, MANAGING INTELL. PROP. 3 (Oct. 2016), <http://www.limegreenipnews.com/files/2017/03/FTC-Social-Media-Article.pdf>.

88. *Id.* at 3.

89. *Id.* at 3–4.

90. *Id.*

91. *FAQ*, TRUTH IN ADVERTISING, <https://www.truthinadvertising.org/faq/> (last visited Dec. 13, 2017).

92. *Watchdog urges FTC to crack down on deceptive social media ads*, CBS NEWS (Aug. 31, 2016, 7:07 AM), <http://www.cbsnews.com/news/consumer-watchdog-urges-ftc-to-crack-down-on-deceptive-social-media-ads/>.

93. *Id.*

94. *Id.*

95. See Dean Crutchfield, *Celebrity Endorsements Still Push Product*, ADVERT. AGE (Sept. 22, 2010), <http://adage.com/article/cmo-strategy/marketing-celebrity-endorsements-push-product/146023/> (discussing revenue earned by companies through celebrity endorsements).

96. Rashid Saeed et al., *Impact of celebrity and non-celebrity advertisement on consumer perception*, 4 BUS. & MGMT. REV. 154, 156 (Jan. 2014).

97. CBS NEWS, *supra* note 92 (discussing the FTC’s desire to crackdown on deceptive social media ads).

increased Calvin Klein sales that year.⁹⁸

The amount of fines imposed on companies stemming from lawsuits over deceptive advertising may well be worth non-compliance for some companies. Dannon had to pay \$45 million in damages⁹⁹ to consumers and \$21 million in FTC and state investigations related to a class action lawsuit that alleged its Activia yogurt advertisements—some of which included actress Jaime Lee Curtis—were deceptive because they conveyed that the yogurt had certain health benefits when it really did not.¹⁰⁰ However, Activia earned \$505 million in supermarket sales the year before the lawsuit was settled.¹⁰¹ In another case, Skechers paid a \$50 million settlement¹⁰² related to charges and a class action lawsuit that alleged its Shape-ups—which had been endorsed by Kim Kardashian¹⁰³ and former Dancing with the Stars host Brooke Burke-Charvet¹⁰⁴—and other footwear were not supported by independent studies as the company had claimed.¹⁰⁵ However, in 2010, there were over \$1 billion in sales of the Shape-up toning shoes.¹⁰⁶

III. ANALYSIS

As the newest frontier for business marketing, social media advertising needs to be regulated.¹⁰⁷ Without regulation, companies may be inclined to put profits above the health and safety of their consumers. The FTC is well within its jurisdictional bounds to regulate social media advertisements that include celebrities and social media influencers alike.¹⁰⁸ However, the FTC's regulations for social media advertising are too ambiguous and do not do enough to make corporations—that can afford celebrity or social media influencer endorsements—stick to the guidelines. This analysis will examine the FTC's latest opinion of celebrity and social media influencer endorsement posts on social media, a celebrity's

98. Mindy Weinstein, *5 Examples of Social Media Celebrity Endorsements That Paid off Big Time*, SEARCH ENGINE J. (Feb. 25, 2016), <https://www.searchenginejournal.com/5-examples-social-media-celebrity-endorsements-paid-off-big-time/156342/>. Calvin Klein's men underwear business gaining 300 points of market share in the first quarter was an indicator of increased sales in North America. Britt Aboutaleb, *Justin Bieber & Kendall Jenner Have Boosted CK's Sales*, YAHOO STYLE (June 3, 2015), <https://www.yahoo.com/style/justin-bieber-kendall-jenner-have-boosted-cks-120616781888.html>.

99. Karlee Weinmann & Kim Bhasin, *14 False Advertising Scandals That Cost Brands Millions*, BUS. INSIDER (Sept. 16, 2011, 5:33 PM), <http://www.businessinsider.com/false-advertising-scandals-2011-9?op=1/#tivia-yogurt-1>.

100. Maureen Morrison, *Could FTC Settlement Derail Activia's Advertising?*, ADVERT. AGE (Dec. 17, 2010), <http://adage.com/article/news/ftc-settlement-derail-activia-s-advertising/147746/>.

101. *Id.*

102. Fitzpatrick et al., *A cautionary tale – recent trends show that false advertising cases are proliferating with the stakes higher than ever*, LEXOLOGY (July 23, 2012), <http://www.lexology.com/library/detail.aspx?g=ceea9615-1298-4812-bcae-f78e552e6c54>.

103. David Phillips, *Skecher's Shape-Ups Face a Flabby Future*, CBS MONEY WATCH (Apr. 26, 2011, 12:16 PM), <http://www.cbsnews.com/news/skechers-shape-ups-face-a-flabby-future/>.

104. *SKECHERS Extends Worldwide Endorsement Deal with Dancing With The Stars Co-Host Brooke Burke to 2013*, BUS. WIRE (Aug. 2, 2011, 9:05 AM), <http://www.businesswire.com/news/home/20110802005994/en/SKECHERS-Extends-Worldwide-Endorsement-Deal-Dancing-Stars>.

105. Fitzpatrick et al., *supra* note 102 (discussing the Skechers false advertising lawsuit).

106. Phillips, *supra* note 103 (discussing Skechers future after its lawsuit).

107. Saeed et al., *supra* note 96 (explaining that social media needs to be regulated).

108. *See .Com Disclosures*, *supra* note 66 (discussing FTC recommendations for making disclosures in digital advertising).

or influencer's social media promotions and the impact of the FTC's read and comprehend test, sponsored versus voluntary endorsements, and how a company is financially impacted by celebrity endorsements and FTC guidelines.

A. Celebrity Endorsements and FTC Compliance on Social Media

Celebrities and influencers often make social media endorsements for companies that can unintentionally mislead their followers and consumers. It makes sense for companies to use celebrity endorsements because they can capitalize on the consumer's overexposure to commercial images.¹⁰⁹ Selena Gomez posted a picture of herself drinking Coca-Cola on Instagram that earned her post over five million likes.¹¹⁰ Her post looked like an ad for Coca-Cola; however, it failed to have "#ad" anywhere in her post.¹¹¹ In another instance, Kylie Jenner referred to an Airbnb gift as a rental. She later edited the post in order to tell her fans that she didn't rent the property.¹¹² While these celebrities may not have intentionally meant to deceive their followers, it could have been construed by their followers that they may have received the products for free or that they were paid for those advertisements. Coca-Cola and Airbnb benefited from the high-profile exposure because Kylie's followers and Selena's followers saw the posts and may have bought a Coca-Cola or rented from Airbnb. In cases such as these, when the celebrity forgets to disclose the nature of the relationship, the FTC has the responsibility to warn the company and the celebrity that false advertising to consumers and followers can lead to serious consequences such as fines and loss of reputation.¹¹³

B. Read & Comprehend Test

Even the social media celebrity endorsement with "#ad" can be deceptive. According to the FTC, the real test is whether "consumers read and comprehend" unambiguous promotions such as "#ad" or "#sponsored" when they are reading a celebrity or social media influencer posts.¹¹⁴ While it is more than reasonable for the FTC to protect the consumer from false advertising and deceptive business practices, social media is a marketing medium in which having a "read and comprehend" test for a social media post is unrealistic.¹¹⁵ For example, FabFitFun¹¹⁶ uses reality stars to promote its products on

109. Crutchfield, *supra* note 95 (discussing revenue earned by companies through celebrity endorsements).

110. CBS NEWS, *supra* note 92 (discussing the FTC's desire to crackdown on deceptive social media ads).

111. *Id.*

112. Sapna Maheshwari, *Endorsed on Instagram by a Kardashian, but Is It Love or Just an Ad?*, N.Y. TIMES (Aug. 30, 2016), http://www.nytimes.com/2016/08/30/business/media/instagram-ads-marketing-kardashian.html?_r=1.

113. Will Heilpern, *18 false advertising scandals that cost some brands millions*, BUS. INSIDER (Mar. 31, 2016, 5:33 AM), <http://www.businessinsider.com/false-advertising-scandals-2016-3>.

114. Frier & Townsend, *supra* note 67 (discussing the FTC's "read and comprehend" test).

115. *Id.*

116. FabFitFun is an online company that has a magazine and subscription service where customers can sign up to receive seasonal boxes with beauty, fashion, fitness, and home products. *Homepage*, FABFITFUN, https://fabfitfun.com/get-the-box/?step=getbox&variant=b&utm_expid=31552852-19.WLbF57cmTMa71EBvgNxbg.1&utm_referrer=https%3A%2F%2Ffabfitfun.com%2Fget-the-box%2F%2Fstep%3Dgetbox%26variant%3Db (last visited Sept. 18, 2017).

social media. Country singer LeAnn Rimes had the following post¹¹⁷ on her Instagram:

My hubby just brought me my #fabfitfunWinter box! I am on my #loveisloveislove acoustic tour in Boston and @eddiecibrian knows how much I LovE receiving my #fabfitfun boxes, so he surprised me with it!! I am now as cozy as can be. ☺

As a #fabfitfunpartner i get to offer you guys \$10 off with the code "LEANN10." Head over to funfitfab.com to grab your Winter Box, valued at \$300 for \$39.99 when you use my code. There's everything from a @bbdakota poncho, @katlynsummerville "ExfoliKate", an adorable ceramic mug by @ayeshacurry, @thisworksofficial "Deep Sleep Wellness Spray," cozy sox, jewelry and MUCH MORE! There's so much goodness in this box. It makes a great gift too for the holidays. You'll LovE it!

#fabfitfun @fabfitfun¹¹⁸

In LeeAnn's post, "#FFFPartner" is written on a whole other line than the first few lines of her post.¹¹⁹ There is also no guarantee that all of her followers read and comprehended the entire post. There is also no guarantee that the consumer will "read and comprehend" a similar post with "#ad" at the beginning or "#sponsored" at the end.¹²⁰

Businesses send celebrities and influencers free products in hopes that the celebrity will promote the product on social media.¹²¹ While the FTC recommends disclosure of the post's nature if its undistinguishable to followers, regardless of whether the post is actually an advertisement, there has been no suggestion as to how celebrities and social media influencers are supposed to know if their social media post is distinguishable.¹²² Without more guidance on whether a post is distinguishable, a celebrity or social media influencer who promotes a company's product that they received for free is still put at risk of violating the deception elements¹²³ because there is no guarantee that the consumer will "read and comprehend" the post.¹²⁴

C. Clarity on Sponsored Endorsements & Voluntary Endorsements

A celebrity or social media influencer could reasonably have a post that is just an endorsement or is a sponsored endorsement. The FTC says that a celebrity or influencer tagging a brand that they are wearing is an endorsement and may require a disclosure; if a celebrity or social media influencer receives a product for free and then decides to

117. Accompanying the post was a picture of her posing with the open FabFitFun box. The country singer has since added "#fabfitfunpartner" right after the word "box" on the first to second line of her post. LeAnn Rimes (@leannrimes), INSTAGRAM, <https://www.instagram.com/p/BbVRSmCBOVH/?taken-by=leannrimes> (last visited Dec. 13, 2017).

118. *Id.*

119. *Id.*

120. See Frier & Townsend, *supra* note 67 (discussing the FTC's desire to crackdown on celebrity advertising tweets).

121. Diana Beyer, *How Much Do Celebrities Make on Social Media*, THE SOCIALMS (July 6, 2016), <https://blog.thesocialms.com/much-celebrities-make-social-media/>.

122. See *What People are Asking*, *supra* note 74 (recommending when a post should have relationship disclosure).

123. See *FTC Policy Statement on Deception*, *supra* note 19 (discussing the FTC's elements of deception).

124. See Frier & Townsend, *supra* note 67 (discussing FTC's "read and comprehend" test).

endorse it, under the FTC's current guidance, they would only have to put "#ad" on their post.¹²⁵ In order to require that posts have "#ad" and "#sponsor," there needs to be clarification on what a company sponsor is by FTC standards.¹²⁶ Under current FTC guidance, when a person is paid or given something of value to mention a product, they are expected to comply with the FTC guidelines; the FTC also says that if celebrity or influencer receives free products or other perks with the expectation that they will promote the products on social media, then the celebrity or influencer has to follow FTC guidance.¹²⁷ However, there has been no official clarification on whether the company and the celebrity or influencer should know that there is an expectation to promote the something of value that is the actual product. If a celebrity or social media influencer does not have clarification on whether a product constitutes something of value, then they cannot reasonably be expected to put something into the "#ad" or "#sponsored" category.

D. Application of Old Standards to New Platforms Would Fail

While applying old guidelines for other marketing mediums to social media might seem like the quickest solution to false and deceptive advertising on social media, it is not a viable option. Celebrity and social media influencer posts are similar to the problem with newspaper advertisements before they were regulated by the FTC.¹²⁸ However, applying the continuities approach that the FTC took in regulating newspaper advertisements would be problematic on social media because social media posts can be posted on a person's account indefinitely.¹²⁹ Because some social media platforms, such as Twitter, only allow a certain amount of characters,¹³⁰ having "#advertisement" at the beginning of a post and "#sponsored" at the end is a lot to ask of businesses, who only have a certain amount of characters to promote their product.¹³¹ For example, in 2013, Justin Bieber sent the following tweet about the company 1-800-FLOWERS for Mother's Day: "Everybody knows I love #MyMom! @1800flowers Mother's Day is on Sunday! Love your momma! Love u @pattiemallete <http://bit.ly/YmjAJI>."¹³² By adding "#advertisement" at the beginning of that tweet, there would be no way to finish the tweet in full and add "#sponsored" at the end of the tweet.

The adaption and application of the "clear and conspicuous" standard for television

125. See *What People are Asking*, *supra* note 74 (recommending when a post should have relationship disclosure).

126. See Part IV.A.3 (recommending a definition of sponsor).

127. *Id.*

128. See Davis, *supra* note 48 (discussing the FTC regulation of radio advertisements).

129. See Christine Roberts, *Hey, kids Facebook is forever*, NY DAILY NEWS (July 14, 2009, 4:04PM), <http://www.nydailynews.com/news/money/hey-kids-facebook-article-1.404500> (posing that Facebook posts are on the internet forever).

130. Twitter now allows 280 characters; however, it previously only allowed 140 characters. Selena Larson, *Welcome to a world with 280-character tweets*, CNN TECH (Nov. 7, 2017, 4:00PM), <http://money.cnn.com/2017/11/07/technology/twitter-280-character-limit/index.html>.

131. See Frier & Townsend, *supra* note 67 (discussing FTC's desire to crackdown on celebrity advertising tweets).

132. Justin Bieber (@justinbieber), TWITTER (May 9, 2013, 5:30 AM), <https://twitter.com/justinbieber/status/332472678835437569> (last visited Dec. 13, 2017). This example is based on when Twitter only allowed 140 characters. However, the same principle still applies, that if companies, celebrities, and influencers are required to put multiple long hashtags in the tweet, they are lessening the amount space that can actually be used to talk about the product.

advertisement disclosures¹³³ to all social media platforms would be problematic. One issue is that social media platforms, such as Snapchat, have time limits and filters that would constrain CCS standards.¹³⁴ Another issue is that any CCS standards in a platform—such as Snapchat—would likely shy the user away from actually watching the product advertised in Snapchat because the average social media user’s attention span is eight seconds.¹³⁵ While having advertising continuities for some social media platforms, such as YouTube, would be feasible, other platforms, such as Snapchat, Instagram, and Twitter, allow a post to be deleted or to stay on a person’s page or in their story forever.¹³⁶

E. Financial Profit of Celebrity Endorsements and FTC Impact on Those Profits

Companies like Dannon¹³⁷ and Skechers¹³⁸ still have far more gross profit in sales than they do in fines for the products that they falsely advertised.¹³⁹ The amount that a company pays per post to a celebrity or social media influencer could hypothetically be made back when accounting for the revenue per internet user and the amount of social media followers. Even if a celebrity does not use “#ad,” “#sponsor,” or they do use a FTC approved hashtag phrase and the consumer is still misled, this could lead to a FTC action, and a company could still make a hefty profit while participating in false and deceptive advertising. Because of a company’s ability to profit on deceptive advertisements even after being fined by the FTC, the FTC needs set financial penalty formulas to serve as deterrents to companies who consider false and deceptive advertising.

IV. RECOMMENDATIONS

Social media advertising in marketing is here to stay because it reaches the newest generations of consumers.¹⁴⁰ The FTC’s heightened regulation of social media advertising will impact how consumers differentiate celebrities’ social media ads from personal posts and how companies pay celebrities and influencers to advertise their products. The FTC can increase its social media advertising regulations to protect the consumer and give

133. See Hoy & Andrews, *supra* note 56 (discussing television’s CCS standards). The FTC’s CCS standards for online disclosures are similar to the CCS standards for television and would also be constrained on social media platforms. See *.Com Disclosures*, *supra* note 66 (discussing CCS standards for websites).

134. Snapchat allows up to ten seconds for vertical video advertisements. *Snap Ads Creative Best Practices*, SNAPCHAT, <https://businesshelp.snapchat.com/en-US/article/snap-ads-practices> (last visited Dec. 13, 2017). The ten second time limit would not be able to meet the required disclosure divulgence for television or the “Paid Advertisement” requirement for infomercials. See *supra* Part II.C.3 & Part II.C.4 (discussing CCS standards for television and infomercials).

135. John Stevens, *Decreasing Attention Spans and Your Website*, *Social Media Strategy*, ADWEEK (June 7, 2016), <http://www.adweek.com/socialtimes/john-stevens-guest-post-decreasing-attention-spans/640539>.

136. Jada Green, *Here’s What Really Happens When You ‘Delete’ Something on the Internet*, MEN’S HEALTH (Oct. 20, 2015), <http://www.menshealth.com/techlust/deleted-social-media-posts>.

137. Dannon owns the brand Activia. Troy McMullen, *Dannon to Pay \$45M to Settle Yogurt Lawsuit*, ABC NEWS (Feb. 26, 2010), <http://abcnews.go.com/Business/dannon-settles-lawsuit/story?id=9950269>.

138. Phillips, *supra* note 103.

139. See Morrison, *supra* note 100; Vanessa Ho, *Skechers to pay \$45 million over alleged butt-toning shoes*, SEATTLEPI (May 16, 2012, 11:16AM), <http://www.seattlepi.com/local/article/Skechers-to-pay-45-million-over-alleged-3563138.php>.

140. Peter Roesler, *How Social Media Influences Consumer Buying Decisions*, BUS. J. (May 29, 2015, 5:26 AM), <http://www.bizjournals.com/bizjournals/how-to/marketing/2015/05/how-social-media-influences-consumer-buying.html>.

clarity to companies and celebrities of what constitutes a deceptive advertisement. The first set of recommendations will examine the guidelines and the second set of recommendations will address the financial penalties for corporations that do not adhere to the FTC guidelines.

A. FTC Guidelines

If the FTC wants social media advertising by celebrities and social media influencers to be truthful for consumers, it must start with clarifying its own guidelines. The FTC currently has regulations for online advertisements¹⁴¹ and a question and answer piece that talks about social media advertising.¹⁴² However, there are some crucial pieces that need clarification within the FTC guidelines. The FTC needs change the following three things: (1) give a clear threshold for “read and comprehend,” (2) require advertising notifications at the beginning and end of social media posts; and (3) define what qualifies as a celebrity sponsor and partner of a social media influencer.

1. Creating a Clear Definition of Read and Comprehend

Regardless of the FTC’s guidelines, there is no guarantee that a social media user will “read and comprehend”¹⁴³ a post by a celebrity or social media influencer. The FTC needs to have a threshold for what the “read and comprehend” standard entails. “Read and comprehend” should be determined by whether a celebrity or social media influencer’s post meets the “clear and conspicuous” standard.¹⁴⁴ “Clear and conspicuous” provides a checklist of what a post needs to have in it to be non-deceiving for the consumer. Among other requirements, an online disclosure has to be: (1) “close to the claims to which they relate;” (2) “in a font easy to read;” and (3) “in a shade that stands out against the background.”¹⁴⁵ By combining these requirements with the following suggestions, there would be a strong baseline to determine whether the reasonable reader was able to “read and comprehend” the social media post.

2. Having Advertising Notifications at the Beginning and End of Social Media Posts

The first way that the FTC can hold social media advertisements to a higher standard is by requiring the social media posts to have “#ad” and “sponsored” at the beginning of the post and “#ad” or “#sp” at the end of the post and before any other hashtags at the end of the post. Social media advertisement posts that adhered to this standard would meet the FTC’s standard of “read and comprehend.”¹⁴⁶ However, there are two problems with this approach.

Character limits create the first problem. On some social media forums, such as

141. See *.Com Disclosures*, *supra* note 66 (discussing FTC guidance for online advertisements).

142. See *What People Are Asking*, *supra* note 74 (recommending when a post should have relationship disclosure).

143. The FTC has a “read and comprehend” test for deceptive advertising on social media. See Frier & Townsend, *supra* note 67 (discussing FTC’s “read and comprehend” test).

144. See *What People Are Asking*, *supra* note 74 (recommending when a post should have relationship disclosure).

145. *Id.*

146. See Frier & Townsend, *supra* note 67 (discussing FTC’s “read and comprehend” test).

Twitter,¹⁴⁷ there are character limits that can drastically reduce what a social media user wants to say on the forum. The whole point of having a celebrity or social media influencer advertise a product is to have them promote the brand and product message to their fans and possible consumers of the product.¹⁴⁸ With a word limit, it could be hard to get everything across in the social media post without leaving some things out about the product that would make the advertisement deceptive to consumers.

The second problem is the loss of reader attention on lengthy posts. On some social media forums, such as Instagram,¹⁴⁹ social media posts can be as long as a user wants them to be. For example, a post on Instagram with “#ad” at the beginning and “#partner” at the end of the post—and before any other hashtags at the end of the post—could have ten lines of text in the post. The average consumer is not likely to read the entire post; they are more likely to quickly scan the post and simply look at the picture of the post and then move on to other posts.¹⁵⁰ While the FTC has provided guidance that any material connections should be disclosed within the first three lines,¹⁵¹ loss of reader attention can still be an issue because some social media users just look at the picture and keep scrolling through their social media feeds.

3. Clearly Defining What is a Sponsor or Partner in the FTC Guidance

In order to have the proper hashtags at the beginning and end of a social media post, a celebrity or social media influencer needs to know how to classify their relationship with a company. Partnership and sponsorship need to have clear definitions. Whether it is using the common law definitions¹⁵² or enhancing the common law definitions, there needs to be clear specification on what these terms mean—whether there was payment, an exchange of services, free items sent to a celebrity or social media influencer with the expectation of promotion.¹⁵³

For purposes of social media advertising, the legal definition of sponsor should be a company that pays a celebrity, social media influencer, or blogger to advertise the company’s products on their respective forum. A sponsorship’s payment to a celebrity, social media influencer, or blogger’s payment includes cash, cash-equivalent payments,

147. *Twitter only allows 140 characters.* TWITTER, *supra* note 130.

148. Lily Bradic, *Celebrity Endorsements on Social Media Are Driving Sales and Winning Over Fans*, SOC. MEDIA WK. (Sept. 30, 2015), <https://socialmediaweek.org/blog/2015/09/brands-using-celebrity-endorsements/>.

149. Instagram allows a maximum of 2200 characters for captions. Dominique Jackson, *Know Your Limit: The Ideal Length of Every Social Media Post*, SPROUTSOC.: BLOG (May 22, 2017), <https://sproutsocial.com/insights/social-media-character-counter/#instagram>.

150. See Frier & Townsend, *supra* note 67 (discussing FTC’s “read and comprehend” test). An Instagram post cuts off the post on a user’s feed after 140 characters or the first three lines of the post. Christoph Trappe, *How Many Characters Do You Have in an Instagram Caption Before the More Button Shows?*, THE AUTHENTIC STORYTELLING PROJECT BLOG (July 11, 2016), <https://authenticstorytelling.net/how-many-characters-do-you-have-in-an-instagram-caption-before-the-more-button-shows/>.

151. Press Release, FTC, *supra* note 68.

152. The common definition of a sponsor is “a person or organization that pays the cost of an activity or event in return for the right to advertise during the activity or event.” *Sponsor*, MERRIAM-WEBSTER DICTIONARY (Current as of 2017). The common legal definition of partnership is “an association of two or more persons or entities that conduct a business for profit as co-owners.” *Partnership*, MERRIAM-WEBSTER DICTIONARY (Current as of 2017).

153. See *What People are Asking*, *supra* note 74 (recommending when a post should have relationship disclosure).

the keeping of the product by the promoter, or any free product that has been sent to the promoter. The legal definition of partnership in advertising should be an agreement between the company and the celebrity, social media influencer, or blogger in which the promoter has a minority ownership stake in the product or company for profit. By having sponsorship and partnership clearly defined, the deception in possibly mislabeled hashtags is eliminated, thereby allowing the celebrity or social media influencer follower to know exactly what kind of relationship exists between the company and poster.

B. Financial Penalties to Corporations

While there is no foolproof way to ensure that a corporation is going to follow the law, profit-maximizing corporations generally take notice of significant fines. There should be a formula to determine how much of a fine a company would pay if a company deceived consumers on social media.¹⁵⁴ The formula should be as follows:

$$\begin{aligned} \text{Company's Fine} = & \text{Amount Paid to the Celebrity or Social Media Influencer}^{155} \\ & + (\text{Number of Celebrity's or Social Media Influencer's followers}^{156} \times \text{number of} \\ & \text{posts promoting the product}) + (\text{Net Profit of the Promoted Product} \times 25\%).^{157} \end{aligned}$$

In the same vein that companies perform market analysis and ad projections, it would be reasonable for a company to project a fine. Prior to a company having a celebrity or social media influencer promote a product, there is no absolute way to predict how much their promotion of the product will affect a company's sales in a positive way. The biggest problem with this approach is that it is an *after-the-fact* solution. However, a company would be more likely to think twice about deceiving a customer through social media if it could project how much it would cost the company if it did.

C. Financial Penalties to Celebrities and Influencers

The FTC also needs to bring financial penalties against celebrities and influencers who are partners in the company and who knowingly deceive consumers. The formula for celebrity and influencer fines should be as follows:

$$\text{Celebrity's/Influencer's Fine} = \text{the Greater of 50\% of the Amount earned off of}$$

154. In other areas of law, such as corporate crimes, fines to companies are used as deterrents against committing the harmful conduct in the future. See Michael Volkov, *Measuring Deterrence: How Big a Fine Will Deter Corporate Crime?*, VOLKOV L. BLOG (July 26, 2012), <http://blog.volkovlaw.com/2012/07/measuring-deterrence-how-big-a-fine-will-deter-corporate-crime/> (discussing potentially deterrent effects of fines on corporations).

155. If the celebrity or social media influencer was given a free product instead of paid, the amount paid to the social media influencer could be substituted for the worth of promoted product sent with expectation of promotion.

156. In the event that a court would be using this calculation, the number of followers considered would be at the time the action is brought against the transgressing company or celebrity if the post was still on their social media page. If the post was deleted prior to the action being brought, the number of followers at the time of post deletion would be used.

157. The user of this formula would also need to take into account the company size. If in the course of finishing litigation and determining restitution or a settlement the fine is determined to be more than half of the company's net profits, then the 25% could be lowered at the discretion of the court or the FTC.

the product or [50% of Amount Invested in the Company or Product + (Number of Celebrity or Social Media Influencer's followers x number of posts promoting the product)]

If the product was successful, then the celebrity or influencer should be fined 50% of the total amount that they earned off of the product. If the product were moderately successful or a failure, then having the calculation is more reasonable. This formulation would be used after the deception has been found and either as a recommendation to the Court or as part of a settlement. It would serve as a deterrent to the celebrity/influencer and the company in the future.

A celebrity or social media influencer who promotes an ad on their social media as a part of a sponsorship deal would not be subject to a fine. A sponsorship deal with a company would lean towards the celebrity or social media influencer being an employee of the company. A company is ultimately responsible for its employees.¹⁵⁸

V. CONCLUSION

Corporations creating deceptive advertisements and using celebrities in or for those advertisements is nothing new, and the FTC has made efforts to crack down on those deceptive advertisements. However, the use of social media and the different aspects of social media have made it hard for the FTC to give clear guidelines and formidable punishment to companies who purposefully deceive consumers. Social media is the newest marketing medium for advertising, and by all indications,¹⁵⁹ it will become even more popular until the next marketing medium is created to take its place. It is ultimately the responsibility of the FTC to provide more clarification and stricter guidance for celebrity endorsements on social media, so that the American consumer is protected.

158. Under the doctrine of respondeat superior, an employer is legally responsible for the acts of its employees if the wrongful acts occur within the scope of an employee's employment. *Respondeat Superior*, BLACK'S LAW DICTIONARY (10th ed. 2014).

159. See *supra* Part II.A (discussing projections of social media advertising spending).