

FASHION STATEMENTS TURNED ENDORSEMENTS

HOW FTC ENFORCEMENT COULD CRIPPLE THE INTERNET'S TRENDSETTERS

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CONTENTS

| | |
|---|-----|
| INTRODUCTION | 484 |
| I. FTC'S INFLUENCE OVER FASHION INFLUENCERS: FASHION BLOGGERS..... | 485 |
| II. HOW THE ENDORSEMENT GUIDES IMPACT BLOGGERS..... | 488 |
| A. <i>Fashion Statement or Endorsement?</i> | 489 |
| B. <i>The FTC Enforcement of the Fashion Industry Does Impact Bloggers</i> | 491 |
| III. REGULATION FORECAST: FIRST COME THE RETAILERS, THEN COME THE BLOGGERS | 492 |
| A. <i>FTC's Response to Fashion Brands and Retailers Using Social Media</i> | 493 |
| B. <i>What Enforcement by the FTC Looks Like</i> | 495 |
| IV. A PREDICTION OF TRENDING ENFORCEMENT: BLOGGERS..... | 498 |
| A. <i>The Anticipated Course of Enforcement Action Against Fashion Bloggers</i> | 498 |
| B. <i>Fashion Bloggers Could Easily Fall Victim to Enforcement Action for an Otherwise Honest Post Under the Standards that Determine a Violation</i> | 499 |
| V. DECEPTIVE SPEECH SHOULD FOCUS ON THE CONTENT, NOT THE DISCLOSURE | 500 |
| A. <i>Regulating Outfit Posts Would be at Odds with the Purpose of FTC Regulation</i> | 500 |
| B. <i>The FTC Should Consider Limiting its Enforcement to Retailers Because of the High Volume of Content Generated by Fashion Bloggers and Entities Subject to FTC Scrutiny Would be Liable for Third Party Actions</i> | 503 |
| C. <i>There Should be a Framework that Bloggers Could Use to Ensure Compliance</i> | 505 |
| CONCLUSION..... | 507 |

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INTRODUCTION

Brooke, a fashion blogger, spent the past five years building a lifestyle blog brand called “Brooke & Fabulous.” After five years of sharing personal content, she built a following of approximately 200,000 readers who subscribed to her blog, 250,000 followers on her Instagram account, and 100,000 followers on Twitter. Originally, Brooke started her lifestyle blog as a creative outlet while working in the marketing field. As her blog grew, so did her opportunities to develop partnerships that could benefit her financially, as well as her readers. As a result, she dropped her career and made her lifestyle blog a full-time job. Keeping up with the latest innovations, Brooke was invited to use a popular affiliate marketing site, which provides bloggers the convenience of creating direct links that point readers to particular pieces that they featured in an outfit post. Along with the added convenience of a link for readers and followers, this offered Brooke an additional source of income, as it provided a percentage of the sales derived from readers who purchase the pieces through that particular link. She wore and posted about pieces from different fashion retailers. These posts were primarily posts of outfits she wore or how some of her favorite pieces were on sale.

Months later, she received a scathing letter from the federal government, specifically the Federal Trade Commission (FTC). The letter informed her that she violated the FTC Act by failing to disclose her connection with particular retailers in her social media posts that utilized affiliate marketing links. Brooke does not have a legal education; she’s a twenty-something with a college education. What does she do now?

This Note seeks to predict the FTC’s enforcement actions against bloggers like Brooke, in light of recent enforcement actions taken against fashion retailers and brands, and explains how the scope of FTC’s regulation in the fashion industry, specifically, should be limited to retailers and affiliate marketing companies, and not extend to fashion bloggers like Brooke. First, it will give a brief description of the source of the FTC’s enforcement power, the FTC Act,¹ and the particular Federal Regulations (the “Endorsement Guidelines” or the “Guides”) that are pertinent to this Note.² Then, there will be a brief discussion of how fashion blogs operate, distinguishing posts bloggers produce and how compensation works, touching upon how posts like the posts of Brooke are subject to the FTC’s enforcement authority. This Note will then dis-

1. 15 U.S.C. § 45 (2012).

2. See FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255–255.5 (2017).

cuss the evolving enforcement focus in the fashion industry, including several investigations and the most recent enforcement actions against Lord & Taylor and Machinima, all of which involve a company's sponsorship of endorsers³ or influencers⁴ to advertise or promote a product or brand of products.⁵ In light of past enforcement actions, including one as recent as April 2017, and the Endorsement Guidelines, this Note seeks to predict what enforcement could look like at the individual level and takes the position that the FTC should limit its authority, with respect to individual fashion bloggers, to sponsored outfit posts rather than unsponsored outfit posts that incorporate affiliate marketing links.⁶

I. FTC'S INFLUENCE OVER FASHION INFLUENCERS: FASHION BLOGGERS

Fashion blogger speech is subject to FTC oversight and regulation.⁷ The FTC regulates speech that affects commerce and protects consumers from deceptive speech through regulatory channels such as investigations and enforcement actions.⁸ Relevant to this Note, the FTC promulgated a group of regulations called the Endorsement Guides,

3. "[A]n individual or organization that provides an Endorsement." Warner Bros. Home Entertainment Inc., File No. 152 3034, at 3 (F.T.C. July 11, 2016) [hereinafter Warner Bros. Agreement], <https://www.ftc.gov/system/files/documents/cases/160711warnerbrosagree.pdf> (agreement containing consent order).

4. *Id.*

5. See Lord & Taylor, LLC, No. C-4576, at 3–7 (F.T.C. May 20, 2016) [hereinafter Lord & Taylor Decision and Order], <https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf> (decision and order); Machinima, Inc., No. C-4569, at 3–7 (F.T.C. Mar. 17, 2016) [hereinafter Machinima Decision and Order], <https://www.ftc.gov/system/files/documents/cases/160317machinimado.pdf> (decision and order).

6. It is uncertain how many fashion blogs do exist. As one journalist mentioned, "[t]here are hundreds of thousands (millions?) of bloggers out there." Hayley Phelan, How Personal Style Bloggers are Raking in Millions, *Fashionista* (Aug. 10, 2013), <https://fashionista.com/2013/08/how-personal-style-bloggers-are-raking-in-millions>. Additionally, fashion bloggers may supplement their platform on their sites with additional social media platforms posting related content on Instagram, SnapChat, Twitter, and Facebook. See, e.g., The Brown Leather Skirt, Something Navy (Sept. 22, 2017), <http://somethingnavy.com/brown-leather-skirt/> (displaying posts published on Instagram, which also provides additional posts from the blogger).

7. Federal Trade Commission Act § 3, 15 U.S.C. § 43 (2012); Federal Trade Commission Act § 5, 15 U.S.C. § 45; 16 C.F.R. §§ 255.0 ex.8, 255.1 ex.5 (2017). It was not until 2010 that the FTC included bloggers in its examples regarding consumer endorsements. Compare 16 C.F.R. §§ 255.0–255.5 (2009) (no examples mentioning bloggers), with 16 C.F.R. §§ 255.0–255.5 (2012) (two examples specifically mentioning bloggers). Section 46 authorizes the FTC "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce" Federal Trade Commission Act § 6, 15 U.S.C. § 46(a).

8. See 16 C.F.R. §§ 255.0–255.5 (2017).

which cover the use of endorsements and testimonials in advertising.⁹ These Guides require endorsers¹⁰ (such as fashion bloggers) to disclose a connection between an endorser and the seller of the advertised product, which might materially affect the weight or credibility of the endorsement (a material connection).¹¹ These regulations serve to protect consumers from deceptive commercial speech.¹²

The fundamental principles of the FTC are to hold businesses accountable and to protect consumers from deception.¹³ In an effort to protect consumers, the FTC has paid special attention to commercial speech through the different methods companies use to advertise their products or services.¹⁴

The FTC has authority to “prevent *persons*, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce,¹⁵ and unfair or deceptive acts¹⁶ or practices in or affecting

9. See *id.* § 255.0(a).

10. *Id.* § 255.0(b) (“For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.”).

11. *Id.* § 255.5.

12. *What We Do*, FTC, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Dec. 1, 2017) (“The FTC protects consumers by stopping unfair, deceptive or fraudulent practices in the marketplace. We conduct investigations, sue companies and people that violate the law, develop rules to ensure a vibrant marketplace, and educate consumers and businesses about their rights and responsibilities.”).

13. See Jessica Rich, Dir., Bureau of Consumer Prot., FTC, Speech at the Association of National Advertisers: Consumer Protection 2016.0: Challenges in Advertising 2 (Apr. 7, 2016) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/944423/160407digitalrevolutionadvertising.pdf) (“[T]he FTC’s goal is to make clear that despite and amidst the vast changes we’re seeing in the marketplace, the fundamental principles of consumer protection still apply: Tell the truth, the *full* truth. In your businesses decisions, weigh any harms you might impose on consumers very carefully. Don’t help others deceive or harm consumers. These principles are timeless, and we expect companies to abide by them across all of their business models—old and new.”).

14. Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22,596 (Apr. 18, 2016).

15. Defining “commerce” as

commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

15 U.S.C. § 44 (2012).

commerce.”¹⁷ The regulations promulgated by the FTC require anyone utilizing commercial speech to disclose “material connections”¹⁸ to consumers “clearly and conspicuously.”¹⁹ Through its authority under Section 5 of the FTC Act, the FTC has imposed particular sanctions and oversight on businesses found to have violated these principles.²⁰

As technology has evolved, so have the methods of advertising for commercial businesses, including retailers.²¹ Information has become readily available to consumers in the palms of their hands through smartphones.²² In an effort to draw consumers to their products, retailers have utilized relevant platforms such as social media to advertise to consumers.²³ Utilizing social media platforms provides retailers an op-

16. Defining an unfair or a deceptive act or practice as one that

causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

Id. § 45(n).

17. *Id.* § 45(a)(2) (emphasis added); *id.* § 45(a)(4)(A)–(B) (“For purposes of subsection (a), the term ‘unfair or deceptive acts or practices’ includes such acts or practices involving foreign commerce that—(i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States. (B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.”).

18. Material connections are defined in the Endorsement Guidelines as any connection “that might materially affect the weight or credibility of the endorsement.” 16 C.F.R. § 255.5 (2017).

19. Warner Bros. Agreement, *supra* note 3, at 2–3 (“Clearly and Conspicuously means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers . . . any communication using an interactive electronic medium, such as the internet or software, the disclosure must be unavoidable.” (internal quotation marks omitted)).

20. *See, e.g., id.* at 5–6.

21. Rich, *supra* note 13, at 1; *see The Dirty Advertising Practices of the Industry’s Biggest Brands, Bloggers*, FASHION LAW (May 25, 2016), <http://www.thefashionlaw.com/home/aimee-song-lands-500k-beauty-deal-is-likely-violating-the-ftc-act-already> [hereinafter *The Fashion Law Exclusive*] (“While the introduction of social media advertising and native content is relatively novel, the FTC has done an outstanding job of adapting with its development and widespread use, and has provided guidance as to how to abide by the FTC Act in such a medium.”).

22. AARON SMITH & DANA PAGE, U.S. SMARTPHONE USE IN 2015, at 3 (Pew Res. Ctr. 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/> (“[F]or a number of Americans, smartphones serve as an essential connection to the broader world of online information.”); Rich, *supra* note 13, at 2.

23. *See, e.g., Rich, supra* note 13, at 1–2.

portunity to make advertisements seem native, meaning not produced by a retailer but rather by a person using the platform.²⁴ This leads consumers to believe what was intended to be an advertisement by the retailer, instead to be a truthful, unbiased representation of a retailer's product.²⁵

Pursuant to its enforcement authority, the FTC can monitor Endorsements and Influencer Campaigns handled by businesses such as retailers.²⁶ As a guidepost for retailers, the FTC introduced Endorsement Guides to prevent deception.²⁷ First introduced in 1975, the Guides were only updated once until 2009.²⁸ Since then, however, the Guides have been updated more frequently as advertisers continue to utilize endorsements on social media and other platforms.²⁹ However, the reach from monitoring direct relationships between the endorser/influencer and the advertiser/retailer extends to influencers and anyone that engages to conduct an advertisement campaign.³⁰

II. HOW THE ENDORSEMENT GUIDES IMPACT BLOGGERS

One of the premises of fashion blogs is to discuss the latest fashion trends hitting the runways and how to incorporate those trends into a personal wardrobe.³¹ Fashion bloggers accomplish this by purchasing pieces that emulate trends from different retailers to create a look to

24. See Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22,596, 22,596 (Apr. 18, 2016).

25. *Id.* "The Commission has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself." *Id.*

26. See, e.g., Warner Bros. Agreement, *supra* note 3, at 3 ("Endorsement means any advertising message (including but not limited to verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser." (internal quotation marks omitted)).

27. 16 C.F.R. § 255.5 (2017).

28. 40 Fed. Reg. 22416 (May 21, 1975); 45 Fed. Reg. 3870 (Jan. 18, 1980); 74 Fed. Reg. 53,124 (Oct. 15, 2009). For further support, see the FTC's website at <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials..>

29. See, e.g., Rich, *supra* note 13, at 5.

30. *The FTC'S Endorsement Guides: What People Are Asking*, FTC (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [hereinafter Endorsement Guides FAQ].

31. See, e.g., Lauren Ashley Patao, *About*, FASHIONISTA'S DIARY, <http://thefashionistasdiary.com/about/> (last visited Dec. 26, 2017).

photograph and produce an outfit post for their blog.³² While discussing other life events, bloggers discuss the fit, the price, and whether alterations were needed to achieve the look they created.³³

As fashion blogs have become more relevant to fashion designers and retailers, fashion bloggers have become a critical part of fashion designers' and retailers' marketing efforts as demonstrated by FTC's monitoring of AnnTaylor, Nordstrom Rack, and Lord & Taylor, which will be discussed in detail later in this Note.³⁴ Designers and retailers develop partnerships, campaigns, and compensate fashion bloggers for speaking engagements to generate interest and ultimately sales.³⁵

A. Fashion Statement or Endorsement?

Generally, fashion blogs with significant followings range in subject matter, from affordable fashion to high end couture, but observation reveals that the content could be divided into two types of posts: outfit posts and sponsored posts.

Outfit posts spotlight outfits worn by bloggers. For convenience, some bloggers include a direct link to the sites selling the particular pieces mentioned in posts utilizing an affiliate marketing site or to alert readers that a certain product featured previously is on sale.³⁶ Affiliate marketing links provide bloggers a tool to direct readers to the products or pieces utilized to achieve the look featured in an outfit post by creating a direct link to those products.³⁷ Rather than being approached by a business to endorse a product in exchange for compensation (regardless of the outcome), fashion bloggers create another regulation opportunity

32. *Id.*

33. Lauren Ashley Patao, *Comfy Joggers*, FASHIONISTA'S DIARY (Jan. 4, 2017), <http://thefashionistasdiary.com/comfy-joggers/>.

34. Cate T. Corcoran, *Moment 89: Clicking Through*, WOMEN'S WEAR DAILY 100 YEARS 278 (Nov. 1, 2010), https://pmcwwd.files.wordpress.com/2010/11/wwd_100_ebook.pdf; Rachel Strugatz, *The Blogger Will See You Now*, WOMEN'S WEAR DAILY, 52–53 (Aug. 8, 2016), <http://wwd.com/business-news/marketing-promotion/beauty-blogger-lauder-loreal-10500798/>.

35. Carey Dunne, *How Top Style Bloggers Are Earning \$1 Million A Year*, FAST COMPANY (June 8, 2014, 2:00 PM), <https://www.fastcodesign.com/3032096/how-top-style-bloggers-are-earning-1-million-a-year>.

36. *Id.* ("RewardStyle, an invite-only affiliate marketing network that helps bloggers . . . monetize their content by making commissions off the items they write about, keeps tabs on top performers, who they say can make more than \$80,000 a month from affiliate sales alone."); Lauren Ashley Patao, *Rust Sweater 50% Off!*, FASHIONISTA'S DIARY (Nov. 23, 2016), <http://thefashionistasdiary.com/rust-sweater-50-off/> [hereinafter Rust Sweater Blog].

37. See Rust Sweater Blog, *supra* note 36; *End User License Agreement and Terms of Service Agreement*, LIKE TO KNOW IT, <https://www.liketoknow.it/tos> (last visited Dec. 26, 2017) [hereinafter LTK Service Agreement].

for the FTC by simply mentioning where he or she purchased a piece he or she is pictured wearing in a post with a link to that piece to purchase online.³⁸ “In exchange for its own fee or percentage, a network provides the necessary technology to create links and track purchases, and writes commission checks. It verifies whether a blogger is worth doing business with, and brokers new relationships and deals.”³⁹

Affiliate marketing sites, not retailers, facilitate the connection between the retailer and the blogger by providing a unique link to products featured in a post, which could result in compensation by the retailer should readers purchase directly from the link posted.⁴⁰ Should readers purchase those particular items using that specific link included in the post, bloggers receive compensation, which is a small percentage of the sale.⁴¹ Since compensation is contingent on readers purchasing products through that particular link, the guarantee of compensation is absent.⁴² Compensation potential ranges from hundreds of dollars a month to thousands of dollars.⁴³ This particular conduct is subject to FTC regulation.⁴⁴

Sponsored posts, on the other hand, involve fashion retailers approaching specific bloggers to promote a brand in exchange for com-

38. Ceri Heathcote, *How Affiliate Marketing Can Drive Sales for Fashion Brands*, STARTUP FASHION (May 2, 2013), <https://startupfashion.com/affiliate-marketing/>.

39. Elizabeth Holmes, *How Style Bloggers Earn Sales Commissions, One Click at a Time*, WALL ST. J. (Feb. 11, 2015), <http://www.wsj.com/articles/how-style-bloggers-earn-sales-commissions-one-click-at-a-time-14236911> (“Terms of the deals typically are based on how many readers a blog has, and how much interaction it gets. Commissions range from 3% to more than 20% of sales. For bloggers, also known as ‘influencers,’ whose readers are loyal and eager to shop, there is real money to be made. Hundreds of bloggers earn tens of thousands of dollars a year from affiliate relationships, people familiar with the industry say.”).

40. *Id.*; LTK Service Agreement, *supra* note 37 (“[R]ewardStyle, Inc.’s . . . provides and operates an online websites . . . and operates various external applications, such as Like to Know It . . . that create technological and commercial relationships between third-party retailers, advertisers and other businesses associated with rewardStyle (‘Merchants’), individuals and entities with websites, blogs, social media presence, agents or agencies, digital publishers and other content platforms (‘Influencers’) and consumers (‘You’, ‘Your’ and ‘Users’) to facilitate sales (‘Sales’) of products and services (collectively, ‘Products’) and the promotion of Merchants (collectively, the ‘Services’).”).

41. Leanne Regalla, *Affiliate Marketing: The Most Complete Guide Ever*, SMARTBLOGGER (Dec. 8, 2016), https://smartblogger.com/affiliate-marketing/#what_is_affiliate_marketing.

42. *Id.*

43. Sabrina Fenster, *How to Choose a Fashion Affiliate Network*, SHELF (Sept. 13, 2014), <http://www.theshelf.com/the-blog/2014/9/13/how-to-choose-a-fashion-affiliate-network>; Holmes, *supra* note 39; Phelan, *supra* note 6.

44. *See, e.g.*, 16 C.F.R. § 255.5 ex.7 (2017).

pensation.⁴⁵ Fashion bloggers and retailers typically enter written agreements, which do require that bloggers disclose that the post is sponsored.⁴⁶ Fashion retailers or brands have a more direct role in the crafting and directing the content bloggers publish, and typically provide bloggers a flat fee.⁴⁷ Retailers have more control over the content to ensure that the messaging is on brand by selecting bloggers to sponsor.⁴⁸ Fashion bloggers style pieces provided to them by retailers or brands and use their own voice to convey their satisfaction in the retailer or brand's products.⁴⁹ Prior to posting, some bloggers provide retailers an opportunity to review the content prior to posting.⁵⁰ Once the content is reviewed and cleared by the retailer, bloggers post the content onto their blogs for their readers.⁵¹ Like outfit posts incorporating affiliate marketing links, sponsored posts are subjected to the same FTC regulations.⁵²

B. The FTC Enforcement of the Fashion Industry Does Impact Bloggers

The Guides, along with the FTC's most recent enforcement actions made pursuant to the Guides, are binding on persons and entities subject to enforcement.⁵³ The Administrative Procedure Act provides that agencies, like the FTC, must publish proposed rules in the Federal Register.⁵⁴ Although the Endorsement Guides are published in the Code of Federal Regulations, the Guides nonetheless carry the force of law within the agency's enforcement framework. Fashion bloggers, who may not follow this area of law, are supposed to be aware of the agency's posi-

45. See *Affiliate or Sponsored Influencer Marketing: What's Better for You?*, GRAPEVINE (Apr. 11, 2016), <http://blog.grapevinelogic.com/affiliate-or-sponsored-influencer-marketing-whats-better-for-you/> [hereinafter Grapevine].

46. See *Lord & Taylor, LLC*, No. C-4576, at 2 (F.T.C. Mar. 15, 2016) [hereinafter *Lord & Taylor Complaint*], <https://www.ftc.gov/system/files/documents/cases/160315lordandtaylcmpt.pdf> (complaint).

47. *Id.* at 2; Grapevine, *supra* note 45.

48. *Lord & Taylor Complaint*, *supra* note 46, at 1–2; Grapevine, *supra* note 45.

49. *Lord & Taylor Complaint*, *supra* note 46, at 2; Grapevine, *supra* note 45.

50. See *Lord & Taylor Complaint*, *supra* note 46, at 2.

51. Grapevine, *supra* note 45.

52. See 16 C.F.R. § 255.5 (2017).

53. See Administrative Procedure Act, 5 U.S.C. § 553(b) (2012); see also *Fed. Trade Comm'n v. Garvey*, 383 F.3d 891, 903 (9th Cir. 2004) (“The FTC acknowledges that the Guides lack the force of law but contends that they are entitled to deference because of their persuasiveness. Indeed, the Supreme Court has made clear that where, as here, an agency pronouncement is not necessarily entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), . . . the pronouncement’s persuasiveness may nevertheless entitle it to respect.”).

54. 5 U.S.C. § 553(b).

tion and comply with the Guides.⁵⁵

The Endorsement Guides provide, “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.”⁵⁶ The Guides were further clarified by a guidance document, published by the FTC, which stated that blogger posts that include an embedded affiliate marketing link are subject to oversight.⁵⁷ Specifically, the FTC distinguished bloggers who get compensated by embedding affiliate marketing links from bloggers who post links to the product and do not get compensated for a percentage of the purchases derived from the link.⁵⁸ The FTC said that the bloggers who are not compensated are not required to disclose a material connection.⁵⁹ Even though it is unlikely,

the FTC can require advertisers to pay redress or disgorge profits in the event of real harm to consumers (especially if the challenged act or practice was dishonest or fraudulent to consumers), under Section 5 of the FTC Act, the commission generally does not have the power to seek other monetary damages as part of a consent order.⁶⁰

III. REGULATION FORECAST: FIRST COME THE RETAILERS, THEN COME THE BLOGGERS

The anticipated regulation forecast stems from a recent case, *Lord & Taylor*, which involved a brand launch in 2015.⁶¹ In that decision, the FTC hinted at the possibility that individuals could be regulated in the future.⁶² This is not the first time the FTC has alluded to enforcement action and followed through years later.⁶³ Prior to the *Lord & Taylor*

55. *See id.*; *Auer v. Robbins*, 519 U.S. 452, 462–63 (1997); *Chevron*, 467 U.S. at 842–43.

56. 16 C.F.R. § 255.5.

57. ENDORSEMENT GUIDES FAQ, *supra* note 30.

58. *Id.* at 19.

59. *Id.*

60. Allison Fitzpatrick & Paavana L. Kumar, *Why FTC’s Action Against Lord & Taylor Was More Than Slap on Wrist*, CORP. COUNS. (Apr. 4, 2016), <https://www.law.com/corpcounsel/almID/1202753998687/>.

61. *See generally* *Lord & Taylor Decision and Order*, *supra* note 5; *Lord & Taylor Complaint*, *supra* note 46, at 1.

62. *See* *Lord & Taylor Decision and Order*, *supra* note 5, at 1.

63. *See* FTC Closing Letter from Mary K. Engle, Assoc. Dir. for Advert. Practices, to Kenneth A. Plaven, Counsel for AnnTaylor Corp. (Apr. 20, 2010) [hereinafter *Loft Letter*], https://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf; *see also* FTC Closing Letter from Mary K. Engle, Assoc. Dir. for Advert. Practices, to Aaron Hendleman and Lydia Parnes, Counsel for

decision, the FTC regulated the fashion industry in previous years, through investigations and closing letters that insinuated enforcement action.⁶⁴ A similar trend was observed in the video gaming industry.⁶⁵ This suggests that similar enforcement could be anticipated at a micro level.⁶⁶ Although, to date, the FTC has not sought enforcement action against individual fashion bloggers.⁶⁷

A. FTC's Response to Fashion Brands and Retailers Using Social Media

As early as 2010, the fashion industry was placed on notice for deceptive advertising practices on social media when utilizing endorsers, like fashion bloggers.⁶⁸ In the summer of 2010, AnnTaylor hosted a preview event for a group of people the company identified as bloggers to visit a store and preview the fashion company's subsidiary brand, LOFT's, summer collection.⁶⁹ AnnTaylor gave attendees a gift bag filled with items and posted a sign at the event that notified attendees planning on blogging about the event or posting about the event on social media to disclose that they received a gift from AnnTaylor.⁷⁰ Since there was some expectation that the fashion bloggers were expected to post content on their respective social media platforms, the FTC investigated whether AnnTaylor violated Section 5 of the FTC Act.⁷¹ At the

Nordstrom, Inc. (Feb. 22, 2013) [hereinafter Nordstrom Rack Letter], https://www.ftc.gov/sites/default/files/documents/closing_letters/nordstrom-rack/130222nordstromrackletter.pdf.

64. See Loft Letter, *supra* note 63; Nordstrom Rack Letter, *supra* note 63.

65. See, e.g., Machinima Decision and Order, *supra* note 5, at 3–5.

66. The Fashion Law Exclusive, *supra* note 21 (“Given the high stakes at hand, all signs point to indications of what is to come, namely, that the FTC will likely change its tune and begin treating bloggers as parties in such actions. Legal experts in the field certainly seem to think so. According to Lustigman, it is likely only a matter of time. I would expect that the FTC will go after individuals.” (internal quotation marks omitted)).

67. The FTC has provided a letter warning “influencers” of the need to disclose material connections. Lesley Fair, *Influencers, are your #materialconnection #disclosures #clear-andconspicuous?*, FTC (Apr. 19, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/04/influencers-are-your-materialconnection-disclosures>; Gary Hailey, “New Media” Provisions of Revised FTC Endorsement and Testimonial Guides, VENABLE LLP (Oct. 2009), <https://www.venable.com/new-media-provisions-of-revised-ftc-endorsement-and-testimonial-guides-10-20-2009/>.

68. See Loft Letter, *supra* note 63; see also John P. Feldman, *FTC Issues Closing Letter in Gift to Blogger Case*, AD LAW BY REQUEST (Apr. 21, 2010), <https://www.adlawbyrequest.com/2010/04/articles/regulatory/ftc-issues-closing-letter-in-gift-to-blogger-case>.

69. Loft Letter, *supra* note 63.

70. *Id.* (“Depending on the circumstances, an advertiser’s provision of a gift to a blogger for posting blog content about an event could constitute a material connection that is not reasonably expected by readers of the blog.”).

71. *Id.* (“As you know, the staff of the Federal Trade Commission’s Division of Advertising Practices has conducted an investigation into whether your client, AnnTaylor Stores

close of its investigation, the FTC declined to pursue enforcement action because there were a limited number of bloggers who posted about the event (several disclosed the gifts on their posts) and AnnTaylor adopted a written policy a month after the event.⁷² The FTC made clear to AnnTaylor and the rest of the fashion industry that retailers should monitor blogger compliance with written policies implemented.⁷³

Similarly, in 2012 the FTC investigated a “Tweetup” hosted by Nordstrom, Inc. to promote the opening of a Nordstrom Rack store in Boise.⁷⁴ Nordstrom, Inc. invited fashion influencers to attend a preview event and gave a fifty-dollar gift card, among other gifts.⁷⁵ Fashion influencers who attended and posted on social media failed to disclose the event was specifically for fashion influencers to attend and preview the store before it opened to the general public.⁷⁶ This failure to disclose the material connection between the blogger (the endorser) and Nordstrom Inc. (the advertiser) gave cause for the FTC to investigate the event and Nordstrom’s policies, despite ultimately deciding against enforcement action.⁷⁷ Notably, the FTC expressed it was

concerned that Nordstrom did not tell the social media influencers whom it invited to the “TweetUp” that, when they posted or wrote about the event, they should disclose they had received gifts for attending. . . . Depending on the circumstances, an advertiser’s provision of a gift to social media influencers for attending an event could constitute a material connection that is not reasonably expected by readers and followers of the social media influencers who write about the event.⁷⁸

Although the FTC decided against enforcement action, like AnnTaylor, the FTC placed monitoring responsibility on the retailers to ensure blogger compliance.⁷⁹

Not so long after, in 2014, the FTC warned Cole Haan of its con-

Corporation, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in connection with providing gifts to bloggers who the company expected would post blog content about the company’s LOFT division.”).

72. *Id.* (deciding not to pursue enforcement action, but emphasizing lack of action should not be interpreted as a violation not occurring).

73. *Id.* (“The FTC staff expects that LOFT will both honor that written policy and take reasonable steps to monitor bloggers’ compliance with the obligation to disclose gifts they receive from LOFT.”).

74. Nordstrom Rack Letter, *supra* note 63.

75. *Id.*

76. *See id.*

77. *Id.*

78. *Id.*

79. Nordstrom Rack Letter, *supra* note 63.

cerns after Cole Haan hosted a Pinterest contest.⁸⁰ Entrants were required to use the social platform, Pinterest, and “pin to win” by having entrants repost a pin from Cole Haan’s Pinterest board titled “Wandering Sole,” along with five images of the entrant’s favorite places to wander with the hashtag “#wanderingsoul” accompanying each post.⁸¹ The most creative entrant’s compilation won a one-thousand-dollar gift card from Cole Haan.⁸² This was the first time the FTC addressed whether a Pinterest contest entry was considered a material connection that required disclosure. Like Nordstrom Inc., the FTC decided against enforcement action due to the number of participants and Cole Haan’s subsequent remedial measures that aligned with the FTC’s concerns.⁸³

B. What Enforcement by the FTC Looks Like

The *Lord & Taylor* settlement, released in a policy statement, marked the first enforcement action under the Guides by the FTC.⁸⁴ To promote its private label “Design Lab,” Lord & Taylor developed a marketing campaign that included a social media campaign in March 2015.⁸⁵ Included in its social media plan, Lord & Taylor paid fifty fashion influencers to wear and post on Instagram photos of a paisley asymmetrical dress, which was given to each influencer to style and promote.⁸⁶ The bloggers who were selected to promote the brand and style of the dress were obligated to exclusively mention the company using the “@lordandtaylor” Instagram user designation, and the cam-

80. FTC Closing Letter from Mary K. Engle, Assoc. Dir. for Advert. Practices, to Christie Grymes Thompson, Counsel for Cole Haan, Inc. (Mar. 20, 2014) [hereinafter Cole Haan Letter], https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320_colehaanclosingletter.pdf; see Allison Fitzpatrick et. al, *Contest Entrants’ Pins’ Raise FTC Endorsement Concerns*, INSIDE COUNSEL (June 2014), <http://www.insidecounsel.com/2014/06/03/contest-entrants-pins-raise-ftc-endorsement-concer>.

81. Cole Haan Letter, *supra* note 80.

82. *Id.*

83. *Id.*; see Julie Zerbo, *Versace’s Recent Instagram Contest was Probably Illegal*, FASHION L. (Aug. 16, 2016), <http://www.thefashionlaw.com/home/versaces-recent-instagram-contest-was-probably-illegal?rq=FTC%20endorsement> (FTC observed a similar violation by Versace with an Instagram contest).

84. C. Ryan Barber, *Warner Bros. Smacked for Deceptive Video Game Promotions*, NAT’L L. J. (July 11, 2016), <https://www.law.com/nationallawjournal/almID/1202762242943/>.

85. Lord & Taylor Complaint, *supra* note 46, at 1.

86. *See id.* at 1–2 (“The campaign was comprised of Lord & Taylor-branded blog posts, photos, video uploads, native advertising editorials in online fashion magazines, and use of a team of fashion influencers recruited for their fashion style and extensive base of followers on social media platforms, all focused on a single article of clothing, the Design Lab Paisley Asymmetrical Dress.”).

paign hashtag “#DesignLab” in the photo caption.⁸⁷ The bloggers were not required to post that Lord & Taylor compensated them, or disclose that they were compensated.⁸⁸ Before the posts were published by bloggers on Instagram, Lord & Taylor preapproved each blogger’s proposed post without adding a disclosure that they were compensated.⁸⁹ Additionally, Lord & Taylor sponsored an Instagram post and article published by fashion magazine, *Nylon*, which appeared to be an independent review of the private label, and failed to disclose the connection between Lord & Taylor and *Nylon*.⁹⁰

The FTC found that “Lord & Taylor violated Section 5 of the FTC Act by misrepresenting that the Instagram images and captions reflected the independent statements of impartial fashion influencers, when, in fact, the postings were created as part of an advertising campaign for Lord & Taylor.”⁹¹ Not only were the posts misleading, but also the failure to “disclose that the fashion influencers were paid endorsers” constituted a Section 5 violation.⁹² “The Design Lab Instagram campaign reached 11.4 million individual Instagram users, resulted in 328,000 brand engagements with Lord & Taylor’s own Instagram user handle (such as likes, comments, or re-postings), and the dress subsequently sold out.”⁹³

After finding that Lord & Taylor violated Section 5, the FTC enforced particular sanctions as a form of injunctive relief.⁹⁴ Among the numerous sanctions, Lord & Taylor had to institute a strict oversight program that involved an agreement signed by endorsers, which required that they disclose their connection with Lord & Taylor and their agreement to comply, along with a monitoring program that reviewed the posts and communications published by endorsers, like bloggers, to ensure compliance with the agreement.⁹⁵ Moreover, Lord & Taylor was required to terminate relationships with endorsers who failed to comply with the signed agreement or misrepresented their individual impartiali-

87. *Id.* at 2.

88. *Id.*

89. *Id.* (“None of the Instagram posts presented to Respondent for pre-approval included a disclosure that the influencer had received the dress for free, that she had been compensated for the post, or that the post was a part of a Lord & Taylor advertising campaign. Respondent Lord & Taylor did not edit any of the [fifty] posts to add such disclosures.”).

90. Lord & Taylor Complaint, *supra* note 46, at 2.

91. Analysis of Proposed Consent Order to Aid Public Comment, 81 Fed. Reg. 15,523, 15,524 (Mar. 23, 2016).

92. *Id.*

93. Lord & Taylor Complaint, *supra* note 46, at 2.

94. *Id.*

95. *See* Lord & Taylor Decision and Order, *supra* note 5, at 4.

ty.⁹⁶ These sanctions remain in effect for twenty years.⁹⁷

In March 2016, the FTC sought enforcement action against Machinima, Inc., a video entertainment company that produces and distributes content relating to video games and gaming culture using a multi-channel network of video game publishers and developers, and game-play videos produced by individual gamers.⁹⁸ To promote Microsoft's new gaming platform, the Xbox One and new video games, Machinima approached Microsoft with a proposal to promote both the Xbox One and new videogames.⁹⁹

After Microsoft hired Machinima, Machinima executed a two-phase program utilizing its multichannel network of video game influencers.¹⁰⁰ In the first phase of its plan, Machinima selected and instructed influencers from the company's network to upload two videos each that involved a review of the game to generate early buzz surrounding the launch on YouTube.¹⁰¹ Prior to uploading their video reviews, influencers had their videos prescreened by Machinima, Microsoft, and Starcom, the game developer.¹⁰² None of the videos uploaded by the videogame influencers disclosed that they were compensated in exchange for the production of the videos, and Machinima did not require them to disclose that relationship after approving the videos and compensating the influencers.¹⁰³ In the second phase of its program, Machinima opened the opportunity to promote Xbox One and a video game by offering influencers within its network to upload videos that reviewed the game console and video game for compensation if they signed a Video Campaign Agreement.¹⁰⁴ Influencers who signed the agreement agreed to upload two videos reviewing the games console and game and compensation of \$1.00 for every 1,000 views at a cap of

96. *Id.* (“*Provided, however, that Respondent may provide an endorser with one notice of a failure to disclose and an opportunity to cure the disclosure prior to terminating the endorser if Respondent reasonably concludes that the failure to disclose was inadvertent; Respondent shall inform any endorser to whom it has provided a notice of a failure to disclose a material connection that any subsequent failure to disclose will result in immediate termination.*”).

97. *Id.* at 7.

98. Machinima, Inc., No. C-4569, at 1–2 (F.T.C. Mar. 17, 2016) [hereinafter Machinima Complaint], <https://www.ftc.gov/system/files/documents/cases/160317machinimacmpt.pdf> (complaint).

99. *Id.* at 2.

100. *Id.* at 2–3.

101. *Id.* at 2.

102. *Id.* at 3.

103. Machinima Complaint, *supra* note 98, at 3.

104. *Id.*

\$25,000.¹⁰⁵ More than three hundred videos were created, which generated thirty million views.¹⁰⁶ Like the influencers in the first phase, none of the influencers disclosed their compensation in the second phase.¹⁰⁷

The influencers' failure to disclose their relationship with Machinima, specifically, led the FTC to pursue enforcement action.¹⁰⁸ Since the videos did not reflect the influencers' own opinions, the FTC found the statements made by the influencers to be false and misleading.¹⁰⁹ Like Lord & Taylor, the FTC required Machinima to implement and maintain a system of monitoring influencers within its network, provide written agreements that outline Machinima's monitoring policy and requirement of disclosure, conduct reviews of content before they are uploaded or made publicly accessible, how to handle influencers who fail to disclose their relationship with Machinima, and other requirements to ensure company compliance.¹¹⁰ Like Lord & Taylor, the provisions of the enforcement agreement are binding for twenty years.¹¹¹

Since this particular speech is subject to regulation, the FTC's Endorsement Guides combined with recent enforcement trends suggest individual scrutiny in the future.¹¹² Currently, the FTC's stance on individual speech will not be investigated unless that speech is brought to the agency's attention.¹¹³ Even though the FTC's current stance suggests a "hands off" approach in regulating individuals, the Endorsement Guides require bloggers to disclose relationships with retailers not only when posts are sponsored by retailers, but also when they use affiliate marketing links for organic content.¹¹⁴

IV. A PREDICTION OF TRENDING ENFORCEMENT: BLOGGERS

A. *The Anticipated Course of Enforcement Action Against Fashion Bloggers*

The potential consequences, based on the recent trend in enforce-

105. *Id.*

106. *Id.* at 4.

107. *Id.*

108. See Machinima Complaint, *supra* note 98, at 4–5.

109. *Id.* at 5.

110. Machinima Decision and Order, *supra* note 5, at 3–6.

111. *Id.* at 6.

112. See ENDORSEMENT GUIDES FAQ, *supra* note 30; see also The Fashion Law Exclusive, *supra* note 21 (“While the FTC does, in fact, have the authority to take action against bloggers, it has thus far chosen to focus its energies entirely on the advertisers, which it deems to be more responsible for such potentially illegal behavior.”).

113. ENDORSEMENT GUIDES FAQ, *supra* note 30.

114. *Id.*; 16 C.F.R. § 255.2(c) (2017).

ment, suggest that it will mirror that of the fashion retailers.¹¹⁵ Like Nordstrom, fashion bloggers would initially receive a scathing letter from the FTC about the suspicious conduct of blogging about particular outfits that provide a significant income to their blog.¹¹⁶ FTC action would stem from the failure to disclose a material connection between an endorser and advertiser.¹¹⁷ Indeed, the FTC has already taken steps in that direction as of April 2017 when it sent letters to influencers reminding them of their duty to disclose material connections per the Endorsement Guides.¹¹⁸ At first, the FTC may decide to not pursue enforcement action based on the blogger's diligence in updating prior posts, or a blogger's practice in disclosing sponsored posts.¹¹⁹ Eventually, where a blogger's posts cause a product to sell out, then the FTC might pursue enforcement action, like in *Lord & Taylor*, to make an example of someone in the field.¹²⁰

Once the FTC reaches the enforcement phase, the effects of possible enforcement discourage the very purpose of the FTC's oversight. If a consequence of violating the enforcement actions order is to sever the relationship between a fashion brand or retailer like Machinima and Lord & Taylor, then bloggers will be discouraged to post outfit posts, and will rely solely on sponsored posts to mitigate their risk of liability.¹²¹ This would discourage commerce since consumers cannot rely on the credibility of honest content like outfit posts. The effects of enforcement will likely chill bloggers from posting content on their page that is not sponsored by retailers or brands.

B. Fashion Bloggers Could Easily Fall Victim to Enforcement Action for an Otherwise Honest Post Under the Standards that Determine a Violation

If the failure to disclose constitutes a violation of the FTC Act, enforcement would be easy, and the effects could prevent honest content. Deception could easily be satisfied

once the FTC shows (1) that a reasonably prudent person would rely

115. See, e.g., Fair, *supra* note 67.

116. See *id.*

117. See *id.*

118. *Id.* However, the FTC did not identify any specific influencers, so it is uncertain whether the FTC sent letters to fashion bloggers concerning this specific type of content.

119. See Nordstrom Rack Letter, *supra* note 63; see also Loft Letter, *supra* note 63.

120. Lord & Taylor Complaint, *supra* note 46, at 1–2; Lord & Taylor Decision and Order, *supra* note 5, at 1.

121. Machinima Decision and Order, *supra* note 5, at 3–6; Lord & Taylor Decision and Order, *supra* note 5, at 4.

on the deceptive advertisements, (2) that these advertisements were widely disseminated, and (3) that consumers purchased the product, ‘the burden then shifts to the defendants to prove that the representations were not relied upon by the consumers.’¹²²

Deception involves failing to disclose a material connection.¹²³ Just as the FTC relied on the influencer’s failure to disclose that they were compensated, bloggers could be accused of violating the FTC Act by failing to disclose the possibility of compensation in their outfit posts.¹²⁴ Walking through the elements, readers—the consumers in this instance—would reasonably rely on the outfit posts to make a purchase decision.¹²⁵ In some cases, the content disseminated by bloggers is widespread, since some bloggers have a significant following ranging from tens of thousands to millions.¹²⁶ With a significant following, consumers might purchase featured products as a result of the post. Once the burden shifts to a fashion blogger, it would be difficult and counter-intuitive for a blogger to refute that consumers relied on the bloggers’ representations.¹²⁷

V. DECEPTIVE SPEECH SHOULD FOCUS ON THE CONTENT, NOT THE DISCLOSURE

A. *Regulating Outfit Posts Would be at Odds with the Purpose of FTC Regulation*

Un-sponsored fashion blog posts should not be subject to regulation by the FTC because the material connection between un-sponsored posts lack the same motivation as sponsored posts. Sponsored posts without the proper disclosures clearly present the risk of deceiving consumers into believing that a fashion blogger is in fact posting the content on their sites without an alternative motive. Fashion bloggers who were approached by the retailer for compensation to write about their prod-

122. See *Fed. Trade Comm’n v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988) (quoting *Fed. Trade Comm’n v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985)).

123. 16 C.F.R. § 255.5 (2017) (“When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed.”).

124. *Lord & Taylor Complaint*, *supra* note 46, at 3.

125. ENDORSEMENT GUIDES FAQ, *supra* note 30 (“Under the law, an act or practice is deceptive if it misleads ‘a significant minority’ of consumers. Even if some readers are aware of these deals, many readers aren’t. That’s why disclosure is important.”).

126. See *Strugatz*, *supra* note 34, at 52–53.

127. See ENDORSEMENT GUIDES FAQ, *supra* note 30.

ucts in their blog should be subject to oversight because there is a clearer motivation behind sponsored posts and other conduct that directly involves the retailer and the blogger.¹²⁸ Compensation is guaranteed regardless of the outcome or response a post generates,¹²⁹ Especially when the fashion brand or retailer is directing the voice of the content to include certain phrases, hashtags, or pieces to feature in a post. In accordance with the driving principles of the FTC, such posts should continue to be subject to enforcement action or other consequences.

However, this motivation is not as clear from an unsponsored outfit post incorporating an affiliate marketing link. Fashion bloggers post regularly, incorporating pieces from various retailers of their own volition, free from the control of fashion retailer or brand involvement. If the premise of regulation is to protect consumers from being misled, commercial speech regulation should not hinge on the *possibility* of compensation.¹³⁰ Outfit posts, which include affiliate marketing links, have a different meaning to readers because most of these posts are blogger generated content.¹³¹ A key feature of outfit posts generated by bloggers is that it is an “unedited perspective.”¹³² Another advantage, as one journalist wrote, “[s]hoppers see the advice that bloggers dispense as independent and unbiased.”¹³³ Blogger generated outfit posts do just that for bloggers, and this sort of speech should be encouraged by the FTC.¹³⁴

While some bloggers make thousands of dollars through affiliate marketing links, the deception allegedly caused by failing to disclose the connection, the *possibility* of compensation, is at odds with the purpose of protecting consumers in the first place. The content that bloggers generate about different outfits and the pieces that are featured are not dishonest or deceptive. Posts primarily feature the blogger wearing the piece and provide the size information to help readers determine the

128. See Grapevine, *supra* note 45 (concluding one of the perks of sponsored marketing compared to nonsponsored marketing is the blogger will be paid for their time with the brand).

129. *Id.* (claiming that sponsors can pay bloggers a flat fee and for their time with the product regardless of sales).

130. Dunne, *supra* note 35 (listing examples of the ways fashion bloggers are compensated).

131. Emily Schuman, *Saved by the Bell*, CUPCAKES & CASHMERE (June 8, 2017), <https://cupcakesandcashmere.com/fashion/saved-by-the-bell> (showing an example outfit post).

132. Holmes, *supra* note 39.

133. *Id.*

134. *Id.*; ENDORSEMENT GUIDES FAQ, *supra* note 30 (“The Guides, at their core, reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.”).

fit. The affiliate marketing links feature the piece and provide pricing, and information regarding other aspects of the clothing. The content of an outfit post also mentions the blogger's opinion of the piece, sometimes providing a justification for purchasing the piece from a particular retailer. Consumers make their decisions based on that information, not whether the blogger possibly gets compensated. If that information was deceptive, then that language and content should be the subject of FTC regulation, since that content needs to be reliable to protect consumers (the readers) from injury. If the purpose of the disclosure is to allow consumers to give an endorsement proper weight, then that should be uninterrupted when the motivation to create an outfit post does not stem from a retailer's sponsorship, but instead a genuine opinion of the pieces featured. Regardless, bloggers are asked about where they purchase pieces when they publish outfit posts and this potential for compensation should not disrupt a reader's perception of the post.¹³⁵

Holding bloggers accountable for deceptive speech should stem from the content of their posts, not their failure to disclose an attenuated connection between their blog and the retailer through the use of an affiliate marketing link. Hinging deception on the failure to disclose undermines the honest content generated by bloggers. Bloggers utilize affiliate marketing links for the convenience of readers and because it is common for readers to ask bloggers where they purchased their outfits.¹³⁶ If the FTC moves toward enforcement action on fashion bloggers and outfit posts, the FTC will focus on the wrong aspect to ensure consumers are seeing genuine content. Focusing on the possibility of compensation strays away from one of the main principles of the FTC, which is to ensure honesty within commercial speech.

Moreover, this requirement of disclosure is not a common practice among fashion bloggers.¹³⁷ When using affiliate marketing links in posts that are not sponsored by a fashion retailer, the majority of blog-

135. Holmes, *supra* note 39 (“Julia Engel, a 24-year-old San Francisco resident with a style blog called Gal Meets Glam, says she thinks her readers understand how affiliate marketing works and don’t mind. ‘People are always going to ask me where something is from, and I’m always going to answer,’ says Ms. Engel. ‘So if I can be credited for that purchase, it’s a win-win situation.’”).

136. *Id.*

137. See Updated: *Why Does the FTC Keep Ignoring Endorsement Violations?*, FASHION L., <http://www.thefashionlaw.com/home/why-does-the-ftc-keep-ignoring-endorsement-violations?rq=FTC%20endorsement> (last updated June 20, 2016) [hereinafter *The Fashion Law Endorsement Violation*] (arguing that the Kardashian family often evades disclosing they are being sponsored).

gers fail to disclose a material connection.¹³⁸ The FTC suggests that bloggers notify readers after every post.¹³⁹ The proposed language the FTC recommended interrupts a reader's perception of an otherwise honest and "unedited" opinion post by disclosing the possibility of compensation.¹⁴⁰ In reality, adding disclosure to an honest post confuses consumers by implying that the motivation behind an outfit post is the possibility of compensation, and not a genuinely held opinion or belief.¹⁴¹

B. The FTC Should Consider Limiting its Enforcement to Retailers Because of the High Volume of Content Generated by Fashion Bloggers and Entities Subject to FTC Scrutiny Would be Liable for Third Party Actions

Another consideration is how unreasonable it would be for retailers who are already under FTC scrutiny to oversee this activity.¹⁴² Under the enforcement action decision and order outlined in *Lord & Taylor*, fashion retailers are supposed to monitor influencers as part of their network to ensure compliance.¹⁴³ This would include monitoring bloggers who participate in affiliate marketing programs. Since bloggers are acting on their own and directing the content surrounding outfit posts, it would be burdensome on retailers to oversee this activity.¹⁴⁴

By including this activity within the scope of enforcement, retailers are more vulnerable to enforcement action or additional enforcement action.¹⁴⁵ Requiring enforcement action regarding honest content, which is distinct from the posts and actions surrounding *Lord & Taylor*, is counterintuitive to the agency's purpose.¹⁴⁶ Unlike in *Lord & Taylor*, retail-

138. The Fashion Law Exclusive, *supra* note 21 ("[T]he practice of failing to uphold the tenants of the FTC Act is extremely rampant among the fashion industry's most successful bloggers and the brands with which they partner.").

139. ENDORSEMENT GUIDES FAQ, *supra* note 30 (concluding a disclosure in the home page of a blogger such as, 'I get commissions for purchases made through links in this post[]' insufficient).

140. Holmes, *supra* note 39.

141. 16 C.F.R. § 255.5 (2017); ENDORSEMENT GUIDES FAQ, *supra* note 30.

142. See Andrew B. Lustigman & Safia A. Anand, *Legal Pitfalls for Fashion Brands in Social Media*, N.Y. L. J. (Sept. 12, 2016).

143. *Id.* ("The disclosure obligation applies whether or not the brand has dictated the influencer's posting.").

144. *Id.*

145. See *Lord & Taylor Decision and Order*, *supra* note 5, at 3–5; *Machinima Decision and Order*, *supra* note 5, at 3–5; ENDORSEMENT GUIDES FAQ, *supra* note 30.

146. *Lord & Taylor Complaint*, *supra* note 46, at 2; FTC, *What We Do*, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Dec. 26, 2017) ("The FTC protects consumers by stopping unfair, deceptive or fraudulent practices in the marketplace.").

ers do not play a role in the conception and execution of the outfit posts published by bloggers.¹⁴⁷ Retailers do not screen the content before publishing, do not compensate bloggers regardless of the results of the posts that feature their products, and do not oblige bloggers to post in order to receive compensation.¹⁴⁸ Since it is a regular practice for bloggers to not disclose the material connection when the posts are not sponsored, Lord & Taylor would have countless violations because of fashion bloggers' outfit posts that feature items from Nordstrom.¹⁴⁹

From a practical standpoint, individual regulation would be too cumbersome on the FTC as well as the retailers who are subject to oversight.¹⁵⁰ There is already an outcry from people in the fashion retail world about how the FTC's enforcement regulations pose significant obstacles in ensuring compliance.¹⁵¹ However, despite this outcry, there is a solution and framework that retailers can implement to ensure compliance.¹⁵² Retailers have the capacity to draft and implement programs to ensure compliance on projects, where the retailers work and directly recruit fashion bloggers. Given the countless number of outfit posts generated by bloggers within the United States alone, it may be impossible for retailers to monitor that activity.

The FTC should limit its regulatory authority to retailers because the implications of regulating individuals like fashion bloggers present more issues on the regulatory level and because of the chilling effect that regulation could have on fashion bloggers in producing organic content for readers.¹⁵³ Retailers are on notice of what is required by the FTC to ensure compliance and prevent consumers from injury, as

147. Holmes, *supra* note 39.

148. *Id.*

149. *See generally* The Fashion Law Endorsement Violation, *supra* note 137 (describing the lack of FTC action to enforce advertising regulations in fashion industry social media posts).

150. *New Ways to Share in the Moment*, INSTAGRAM (Nov. 21, 2016), <http://blog.instagram.com/tagged/instagram+news/page/2>. The amount of content generated not only on a blog, but also on static social media platforms such as SnapChat and Instagram using the stories feature make the monitoring of individual posts unduly burdensome. *700 Million*, INSTAGRAM (Apr. 27, 2017), <http://blog.instagram.com/post/160011713372/170426-700million> [hereinafter Instagram 700 Million].

151. *See* Allison Grande, *FTC's Lord & Taylor Action Shows Perils of New Ad Strategies*, LAW360 (Mar. 15, 2016, 10:55 PM), <https://www.law360.com/articles/771971/ftc-s-lord-taylor-action-shows-perils-of-new-ad-strategies>; *see also* Lustigman & Anand, *supra* note 142.

152. Grande, *supra* note 151; Lustigman & Anand, *supra* note 142.

153. Fashion bloggers not only craft blog posts for their blog website, but produce content throughout the day on different social media platforms such as Instagram. Arielle Noa Charnas (@somethingnavy), INSTAGRAM, <https://www.instagram.com/somethingnavy/> [hereinafter Something Navy Instagram].

demonstrated by *Lord & Taylor* and *Machinima*.¹⁵⁴ Sponsored posts have a formal framework in place to ensure compliance by all parties.¹⁵⁵ The FTC requires retailers to have written agreements that set forth the expectations of the retailer and the language required to ensure compliance.¹⁵⁶ For the most part, compensation is fixed and could be contingent on compliance.¹⁵⁷ In sponsored post situations, bloggers are placed on notice to disclose the sponsorship to readers through the existing framework established by fashion retailers and FTC enforcement.¹⁵⁸ Since there is an existing formal process and framework set in place for regulation of sponsored posts, it should be limited to sponsored content.¹⁵⁹

Since retailers are also responsible for overseeing individuals they create sponsor relationships with, the only thing that should be reported by retailers is when a blogger consciously omits a sponsor relationship to readers when publishing sponsored posts.¹⁶⁰ This aligns with the purpose of the FTC policy without overcomplicating regulations for the parties involved.¹⁶¹

C. There Should be a Framework that Bloggers Could Use to Ensure Compliance

Not all bloggers are aware that they are required to disclose the possibility of compensation when publishing outfit posts featuring a retailer's products or pieces. Practitioners have developed solutions for retailers and corporate counsel, but what sort of safeguards are in place for a community of people who may not have a legal background or an

154. See *Machinima Decision and Order*, *supra* note 5, at 3–6; see also *Lord & Taylor Decision and Order*, *supra* note 5, at 4.

155. See *Grapevine*, *supra* note 45.

156. *Machinima Decision and Order*, *supra* note 5, at 4; *Lord & Taylor Decision and Order*, *supra* note 5, at 4.

157. *Grapevine*, *supra* note 45 (“For influencers, working with a sponsored model means they’re required to disclose their content is sponsored.”).

158. *Lustigman & Anand*, *supra* note 142.

159. *Grapevine*, *supra* note 45; see *Machinima Decision and Order*, *supra* note 5, at 3–6; see also *Lord & Taylor Decision and Order*, *supra* note 5, at 4.

160. *Fair*, *supra* note 67.

161. ENDORSEMENT GUIDES FAQ, *supra* note 30; SHANNON GREENWOOD ET. AL, SOCIAL MEDIA UPDATE 2016, at 9 (PEW RES. CTR. 2016), http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/11/10132827/PL_2016.11.11_Social-Media-Update_FINAL.pdf (“Roughly three-quarters (76%) of Facebook users report that they visit the site daily (55% visit several times a day, and 22% visit about once per day) . . . Roughly half (51%) of Instagram users access the platform on a daily basis, with 35% saying they do so several times a day. And 42% of Twitter users indicate that they are daily visitors, with 23% saying they visit more than once a day.”).

idea that these disclosures are required and enforceable?¹⁶² Corporate counsel practitioners have a community that provides them with the information needed to stay informed and compliant with current legal trends.¹⁶³

Should the FTC insist on oversight, the best solution to ensure bloggers are receiving information and are on notice would be to require affiliate marketing companies to disseminate guidelines and information relevant to a blogger's practices. Since the deception hinges on the use of affiliate marketing links, as the source of a blogger's vulnerability to liability, it might be best to utilize affiliate marketing legal resources to draft and disseminate that information.¹⁶⁴ Another line of communication could be through the online communities bloggers join to share resources and education.¹⁶⁵

Additionally, the affiliate marketing links could include a disclosure somewhere that is clear and conspicuous to inform consumers of the blogger's ability to be compensated. Presently, when readers select an affiliate marketing link from a blogger's site, the link directs the reader to the retailer that sells the piece—it appears the same way as a person shopping the site and selecting the same product.¹⁶⁶ If there is a

162. Lesley Fair, *FTC's Lord & Taylor Case: In Native Advertising, Clear Disclosure is Always in Style*, FTC (Mar. 15, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2016/03/ftcs-lord-taylor-case-native-advertising-clear-disclosure>; Ronald R. Urbach & Aaron Taylor, *How to Avoid a Challenge*, INSIDE COUNS. (Sept. 8, 2016), <https://www.law.com/insidecounsel/2016/09/08/how-to-avoid-a-challenge/>; Adam Weiss, *What You Need to Know About Compliance in the Affiliate Marketing Industry*, MARKETING LAND (Apr. 14, 2017), <http://www.marketingland.com/compliance-affiliate-marketing-industry-211439>.

163. Urbach & Taylor, *supra* note 162.

164. ENDORSEMENT GUIDES FAQ, *supra* note 30. See generally LTK Service Agreement, *supra* note 37 (setting forth the terms of service in a legally binding agreement for users of rewardStyle, Inc.'s apps and websites). While affiliate marketing sites have yet to create disclosure tools for influencers, social media platforms have already created tools for influencers like fashion bloggers to disclose their connections to followers. Madeline Buxton, *Instagram's Latest Update is Introducing Some Much-Needed Transparency*, REFINERY29 (June 14, 2017), <http://www.refinery29.com/2017/06/158917/how-to-use-instagram-paid-partner-tag>; *Branded Content Policies*, FACEBOOK (Aug. 29, 2017), <http://www.facebook.com/policies/brandedcontent>; *Paid Product Placements and Endorsements*, YOUTUBE (Oct. 4, 2016), <http://support.google.com/youtube/answer/154235?hl=en>.

165. *How to Start a Fashion Blog*, INDEP. FASHION BLOGGERS, <https://heartifb.com/how-to-start-a-fashion-blog/> (last visited Dec. 27, 2017); Emanuella Grinberg, *Style Bloggers to Follow in Any Season*, CNN (Feb. 20, 2013), <http://www.cnn.com/2013/02/20/living/nyfw-fashion-bloggers/> (explaining that many bloggers attend meetings and summits, including an annual conference during New York Fashion Week).

166. For example, see ATLANTIC-PACIFIC, <http://the-atlantic-pacific.com/> (follow "Outfits" hyperlink; then select an outfit post; toward the end of the post select one of the hyperlinks to the pieces featured in the post [while the link is loading, a rewards style web address

way to display a message somewhere in the page that states “by purchasing the product featured through this link, the influencer (blogger) that directed you to this site will receive a commission from a purchase you make through this link,” that removes the deception from the post and links embedded.

CONCLUSION

Despite the above-mentioned ambiguity and near impossibility of regulating individual bloggers there is a way to move forward: at the micro level, the FTC should limit its authority to regulate sponsored posts by bloggers. By removing this aspect from enforcement action and oversight, it relieves the burden on the FTC, retailers subject to oversight, and prevents the chilling consequences of enforcement action.¹⁶⁷ There are countless bloggers who post more outfit posts on a weekly basis, using several social media platforms such as Instagram, their blog websites, SnapChat, and Facebook to post and promote their content.¹⁶⁸ At the agency level, that would be overwhelming to track since these posts are done at the discretion and direction of the blogger, not the affiliate marketing site or the retailer.¹⁶⁹

The same rationale could be applied to retailers, who do not have a direct role in executing the content published by bloggers who feature the retailer’s products in an outfit post.¹⁷⁰ Removing this type of post from enforcement action reduces the amount of content subject to oversight and prevents retailers from being subject to negative consequences for actions of third parties.¹⁷¹ As it stands now, retailers would be sub-

will appear in the address bar of the browser, which eventually disappears once the retailer’s page is loaded]).

167. Lord & Taylor Decision and Order, *supra* note 5, at 3–5; Machinima Decision and Order, *supra* note 5, at 3–6.

168. *About*, WORDPRESS, <https://wordpress.com/about/> (last visited Dec. 27, 2017) (“[T]he WordPress.com network welcomes more than 409 million people viewing more than 15.5 billion pages each month. Our users publish about 41.7 million new posts and leave 60.5 million new comments each month.”); Instagram 700 Million, *supra* note 150; *Why We’re Standing with Apple*, SNAP INC. (Mar. 3, 2016), <https://www.snap.com/en-US/news/page/2/> (“Over 100 million people use Snapchat every day because they feel free to have fun and express themselves.”).

169. Lustigman & Anand, *supra* note 142 (“The disclosure obligation applies whether or not the brand has dictated the influencer’s posting. While the FTC does not dictate the specific language or that it include a hashtag, it has recommended ‘ad’ or ‘sponsored’ be used at the beginning of the post and has frowned on using abbreviations such as ‘spon’ or ‘sp.’”).

170. *Id.*

171. *See* Lord & Taylor Decision and Order, *supra* note 5, at 3–5; *see also* Machinima Decision and Order, *supra* note 5, at 4–5.

ject to countless violations because of the actions of third party bloggers who post and style pieces on their own.¹⁷²

Additionally, this “hands off” approach by the FTC encourages the flow of honest content. While bloggers can monetize their honesty through affiliate marketing links, this possibility of compensation should not be disrupted by a disclosure that confuses a consumer into believing that the purpose of an unsponsored outfit post is financial gain.¹⁷³ Limiting enforcement to content that retailers have a direct role in executing furthers the FTC’s goals in maintaining honest content, providing meaningful disclosures to protect consumers from deception, and providing the rights that bloggers deserve.¹⁷⁴

172. See *Something Navy Instagram*, *supra* note 153; *The Fashion Law Endorsement Violation*, *supra* note 137.

173. Holmes, *supra* note 39; Phelan, *supra* note 6.

174. Grapevine, *supra* note 45.