



Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger

Ava Farshidi¹

I. INTRODUCTION

Fashion influencer Chiara Ferragni brings in at least \$8 million a year as a full-time fashion blogger documenting her every move on social media and her personal blog.² Her income comes from a personal shoe line, advertising and brand partnerships, and collaborations.³ To date she has 12.8 million Instagram followers and has worked with fashion companies such as Louis Vuitton, Nike, Calvin Klein, and Cartier.⁴ Harvard Business School has used her at the center of a case study for its luxury marketing course.⁵ She may be one of the most successful fashion bloggers, but she is certainly not the only one who has been able to monetize her style. Fashion companies

¹ Ava Farshidi is an in-house attorney at David Yurman. Her works ranges in commercial contracts, real estate, corporate governance, privacy, and compliance. The author would like to thank Uri Minkoff for conversations that led to the exploration of this topic. The views and opinions expressed in this Article are entirely hers and not an expression of the views of David Yurman.

² See Meghan Blalock, *You Won't Believe How Much Money The Blonde Salad Will Make This Year*, WHO WHAT WEAR, (Sept. 9, 2014), <http://www.whowhatwear.com/the-blonde-salad-millions>, [<https://perma.cc/AA7Q-9ASG>].

³ See Rachel Strugatz, *The Blonde Salad's Chiara Ferragni Talks Fifth Anniversary and Footwear Launch*, WOMEN'S WEAR DAILY, (Sept. 9, 2014), <http://www.wwd.com/media-news/digital/the-blonde-salads-chiara-ferragni-talks-fifth-anniversary-and-footwear-launch-7888047>, [<https://perma.cc/JD8P-K3L9>].

⁴ See Chiara Ferragni (@chiaraferragni), INSTAGRAM, <https://instagram.com/chiaraferragni/>, [<https://perma.cc/B7DG-RAQU>] (last visited Mar. 26, 2018).

⁵ Rachel Strugatz, *The Blonde Salad at Harvard*, WOMEN'S WEAR DAILY, (Feb. 12, 2015), <http://www.wwd.com/media-news/digital/the-blonde-salad-at-harvard-8172610>, [<https://perma.cc/AH3R-DPDQ>] (“It’s the first case study that Harvard has done on a blogger and explores nearly every aspect of Ferragni’s growing and global business.”).

have noticed the impact of fashion bloggers for marketing and advertising and are willing to pay up to \$50,000 for a sponsored post.⁶ Unlike traditional forms of advertising, fashion bloggers have a unique relationship with followers who respect the bloggers and believe that the bloggers are being authentic to their personal style and beliefs.⁷ In their capacity as spokespeople for certain brands, bloggers are considered endorsers by the Federal Trade Commission (“FTC”) and must be transparent about the financial relationship they have with companies.⁸ However, whether or not fashion bloggers have been complying with the FTC’s rules, the FTC has yet to take enforcement action against a fashion blogger.

This paper will look at the shift in advertising in the fashion industry and suggest a modification of the current regulatory scheme with respect to fashion blogger accountability. Part II will provide a background to the current United States regulation of blogging and enforcement actions that have been taken with respect to bloggers. Part III will look at the United Kingdom’s approach to regulating bloggers. Finally, Part IV will provide a recommendation to revise the current United States rules, to hold bloggers liable for non-compliance, and to consider creative means to comply with the FTC’s rules.

II. THE CURRENT UNITED STATES REGULATION OF ENDORSEMENTS HAS FAILED TO ENFORCE ANY SANCTIONS AGAINST FASHION BLOGGERS

A. *Fashion Bloggers are a Recent Phenomenon That Have Used Social Media to Supplement Their Ability to Serve as Advertising Channels for the Retail Industry*

Using public figures to promote products is not a new phenomenon. Dan Marino and Janet Jackson have endorsed a weight loss system, Nutrisystem. Jessica Simpson and Vanessa Williams promised flawless skin if you, too, used Proactive acne products. George Foreman even slapped his name on his grill. What all of these individuals have in common is that their fame as athletes, singers, or actors is what led these companies to pay

⁶ See Milena Veselinovic, *Cash a la mode: How style bloggers are turning social savvy into six-figure salaries*, CNN, (Oct. 5, 2014), <http://www.cnn.com/2014/10/01/world/europe/bloggers-six-figure-salaries/>, [https://perma.cc/5893-7VH9].

⁷ See *id.*

⁸ See 16 C.F.R. § 255, Example 5 (2009), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>, [https://perma.cc/8UBX-XQBN].

these individuals to support their products. Today companies continue to use celebrities on their personal social media platforms to provide endorsements for brands and their products. Celebrities using social media to promote products are also identified as social media influencers—mainly, they use social media as a way to reach a large audience.⁹ Influencers can range in size from micro to major. Celebrities such as Shay Mitchell, Kim Kardashian, and Kayla Itsines are considered social media influencers, even though they have celebrity that originated outside of their popularity on social media.

Separately, fashion bloggers are individuals who are known for their blogs, which are generally photo-based and often include images of the blogger in fashion outfits.¹⁰ Fashion bloggers first emerged over a decade ago, and they use their blog, a form of social media, to demonstrate a point of view.¹¹ The rise of Instagram has moved many of these fashion bloggers to focus on producing content for social media rather than their personal blogs, which has converted them to social media influencers. Simply put, a fashion blogger is a social media influencer, but a social media influencer is not always a fashion blogger. For the avoidance of doubt, any use of social media influencer throughout this paper shall be used to exclude fashion bloggers, which will be referenced as such. This paper will focus on this new phenomenon of endorsements through fashion bloggers, rather than social media influencers as a whole. Part II.C. of this paper will discuss recent actions taken by the FTC against a group of social media influencers, none of which is a fashion blogger.

B. The Lanham Act Is Used by Competitors to Prevent False Endorsement or Unfair Competition in Advertising

To promote healthy competition, companies in the United States are able to use the Lanham Act to protect themselves against false or misleading advertising from their competition.¹² Under the Lanham Act, it is also

⁹ See Laura Forer, *The Lowdown on Social Media Influencers (Infographic)*, MARKETINGPROFS, (Feb. 22, 2017), <https://www.marketingprofs.com/chirp/2017/31547/the-lowdown-on-social-media-influencers-infographic> [<https://perma.cc/4DMR-GYF7>].

¹⁰ See Ella Alexander, *What Is the Difference Between a Fashion Influencer and Blogger?*, HARPER'S BAZAAR, (Jun. 6, 2017), <http://www.harpersbazaar.com.au/fashion/fashion-influencer-blogger-definition-13357> [<https://perma.cc/YV7C-2GU3>].

¹¹ See *id.*

¹² See Lanham Act, 15 U.S.C. § 1125 (2012). (“Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false design-

against the law for a person to falsely endorse any goods or services that are likely to cause confusion as to the relationship between the person and the goods.¹³ This is a form of false advertising and generally individuals who are falsely associated with a company in advertising bring these claims. There is not an established uniform test for false endorsement under the Lanham Act and different circuits have applied different factor tests.¹⁴

The Second Circuit looks to see if the defendant “(1) made a false or misleading representation of fact; (2) in commerce; (3) in connection with goods or services; (4) that is likely to cause consumer confusion as to the origin, sponsorship, or approval of the goods or services.”¹⁵ The Ninth Circuit has reworded the likelihood of confusion factors as “(1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant’s product is intended; (2) the relatedness of the fame or success of the plaintiff to the defendant’s product; (3) the similarity of the likeness used by the defendant to the actual plaintiff; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant’s intent on selecting the plaintiff; and (8) likelihood of expansion of the product lines.”¹⁶ In the Third Circuit, to prove false endorsement there needs to be proof that a false message is being conveyed.¹⁷ However, competitors are not the ones bringing claims against other fashion companies for using endorsers; rather, the FTC has been investigating potential instances of unfair competition related to bloggers.

nation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”)

¹³ See *id.*

¹⁴ See *Beastie Boys v. Monster Energy Co.*, 66 F.Supp.3d 424, 448–49 (S.D.N.Y. 2014).

¹⁵ *Id.* at 448 (citing *Burck v. Mars, Inc.*, 571 F.Supp.2d 446, 455 (S.D.N.Y. 2008)).

¹⁶ *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*, 109 Cal.Rptr.3d 143, 169 (Cal. Ct. App. 2010) (citing *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007–08 (9th Cir. 2001)).

¹⁷ See Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADE-MARK REP. 1202 (2004).

C. *Consumers Are Protected Against Unfair or Deceptive Business Methods and False Advertisement by the FTC*

The Federal Trade Commission Act (“FTCA”) gives the FTC the authority to protect consumers against injurious conduct based on unfair methods of competition by conducting investigations and providing recommendations to Congress.¹⁸ Competitors may make complaints to the FTC, but that is unlikely because they risk having their own practices scrutinized.¹⁹ More often, the FTC begins its own investigations as part of its regulatory power.²⁰ Additionally, the FTC has enforcement authority if it has “reason to believe” that the law is being violated.²¹ In 2009 the FTCA was amended to include the updated Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guidelines”) as a direct response to changes in advertising, particularly the advent of social media.²² The Endorsement Guidelines were subsequently updated most recently in September 2017 as a response to the shift in advertising through social media.²³ Under the Endorsement Guidelines, any advertising message that seems to reflect the honest opinions or experiences of a party other than the advertiser itself is considered an endorsement.²⁴ Advertisers can be found in violation of the Endorsement Guidelines for any false statements made by their endorsers, or if the material connection between the advertiser and the endorser is not made clear; however, endorsers may also be found in violation for their false statements.²⁵ If there is a material connection, the en-

¹⁸ See *Federal Trade Commission Act*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/enforcement/statutes/federal-trade-commission-act> [<https://perma.cc/M2ZR-WHCC>] (“Under this Act . . . the Commission is empowered, among other things, to (a) prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe trade regulation rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress.”).

¹⁹ See 1 REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASES AND MATERIALS* 102–03 (2d ed. 2014).

²⁰ See *id.*

²¹ 15 U.S.C. § 45(b) (2012).

²² See 16 C.F.R., *supra* note 7, at § 255.

²³ See *The Federal Trade Commission Answers Common Influencer-Specific Questions*, THE FASHION LAW, (Sept. 20, 2017), <http://www.thefashionlaw.com/home/the-ftc-answers-common-influencer-specific-questions> [<https://perma.cc/QE8M-92GF>].

²⁴ See 16 C.F.R., *supra* note 7, at §§ 255.0(b), 255.1(a).

²⁵ See *id.* at § 255.1(d).

dorser must clearly and conspicuously disclose the payment or intent to receive payment from the advertiser in exchange for the endorsement.²⁶ The FTC also places responsibility on advertisers to monitor their bloggers who are paid to promote their products and services to be sure that they are not engaging in deceptive practices.²⁷ Until more recently, the FTC held the position that it was not monitoring bloggers and their compliance.²⁸ However, in 2017 the FTC began sending letters to individuals reminding them of the Endorsement Guidelines, and even took its first enforcement action against a social media influencer.²⁹ The standard of deceptiveness is if an advertisement misleads a “significant minority” of consumers.³⁰ Any relationship between a blogger and advertiser where the blogger receives payment with the intention that they will promote the advertiser’s products is considered an endorsement.³¹ If it is commonly understood by the consumer that there is an endorser that has such a role, they are not required to disclose this in every post or promotion.³²

In April 2017, the FTC sent ninety letters to influencers, including Jennifer Lopez, Allen Iverson, and Kourtney Kardashian, and marketers such as Chanel and Adidas.³³ The FTC reminded influencers that if they have a material connection to a company, they must disclose their relationship clearly and conspicuously.³⁴ However, an exception is that if a celebrity posts about something that they purchased on their own without getting compensated in any way, a disclosure is not necessary.³⁵ The letters further

²⁶ See *id.* at § 255.5.

²⁷ See *id.* at § 255.1(d), Example 5.

²⁸ See *The FTC’s Revised Endorsement Guides: What People are Asking*, LAW PUBLISH, (June 2010), <http://www.lawpublish.com/ftc-endorsement-guides-information.html> [<https://perma.cc/CCR5-SZL5>] (“We’re not monitoring bloggers and we have no plans to. If concerns about possible violations of the FTC Act come to our attention, we’ll evaluate them case by case. If law enforcement becomes necessary, our focus will be advertisers, not endorsers – just as it’s always been.”).

²⁹ See *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FEDERAL TRADE COMMISSION, (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/P7LY-E9WH>].

³⁰ LAW PUBLISH, *supra* note 27.

³¹ See *id.*

³² See *id.*

³³ See FEDERAL TRADE COMMISSION, *supra* note 28; Alexandra Steigrad, *FTC Issued Warnings to 45 Celebrities Over Unclear Instagram Posts*, WOMEN’S WEAR DAILY, (May 8, 2017), <http://wwd.com/business-news/media/ftc-issued-warnings-to-45-celebrities-over-unclear-instagram-posts-10883342/> [<https://perma.cc/3ZVV-83LT>].

³⁴ See *id.*

³⁵ See *id.*

clarified that a disclosure should be featured in the first three lines of the caption and not hidden underneath the “more” link.³⁶ Additionally, they discourage using multiple hashtags, which muddle the connection between endorser and advertiser, and vague hashtags such as “#sp,” “Thanks [Brand],” and “#partner.”³⁷ In September 2017, the FTC sent another twenty-one warning letters to individuals that were contacted in April including Lindsay Lohan and Naomi Campbell, which required influencers to show how they will abide by the Endorsement Guidelines in the future.³⁸ Additionally, these letters came in conjunction with the first enforcement action against an individual influencer, and a new version of the Endorsement Guidelines was released.³⁹ The FTC had previously focused its attention on advertisers, but the updated Endorsement Guidelines indicate that action might be taken “if the endorser has continued to fail to make required disclosures despite warnings.”⁴⁰ Further, social media posts only need to be marked with a disclosure if they are promoting a blogger’s opinion.⁴¹ However, getting a paid trip and accommodations does prompt a disclosure.⁴² Further, the Endorsement Guidelines now clarify that one must disclose on Snapchat or Instastory just as on any other platform.⁴³ The FTC continues to hold that #ad or #sponsored are appropriate disclosures with no room for creativity in indicating a financial relationship with an advertiser.⁴⁴

³⁶ See *id.*

³⁷ *Id.*

³⁸ See *New Instagram Influencer Warning Letters*, PUBLIC CITIZEN COMMERCIAL ALERT, (2017), <http://commercialalert.org/federal-trade-commission-sends-warning-letters-to-21-instagram-influencers/>, [https://perma.cc/A7T9-NZAA]; Franklin Graves, *FTC Releases Names of 21 Instagram Warning Letter Recipients*, FRANKLIN GRAVES, (Sept. 18, 2017), <http://franklingraves.com/2017/09/ftc-releases-names-of-21-instagram-warning-letter-recipients/>, [https://perma.cc/32MP-SAVA]; see generally *The FTC’s Endorsement Guides: What People Are Asking*, FEDERAL TRADE COMMISSION, (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftc-endorsement-guides-what-people-are-asking>, [https://perma.cc/N8U5-T8PK].

³⁹ See FEDERAL TRADE COMMISSION, *supra* note 37; *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FEDERAL TRADE COMMISSION, (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [https://perma.cc/YX57-WPL3].

⁴⁰ FEDERAL TRADE COMMISSION, *supra* note 37.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

D. *Fashion Related Investigations That Have Led to Limited Enforcement Actions*

1. Ann Taylor LOFT

In 2010 the FTC launched its first investigation under the Endorsement Guides against Ann Taylor LOFT for providing gifts to bloggers that attended a preview of its summer collection but failed to disclose the material connection between the bloggers and LOFT.⁴⁵ Bloggers who attended the event and covered it in a blog post were awarded gift cards ranging between \$50 to \$500.⁴⁶ Even though the LOFT had included a sign at the event that the bloggers should disclose the gifts they were given in their respective blog posts, the FTC noted that it was not clear that bloggers were made aware of the sign.⁴⁷ Despite the investigation the FTC did not take enforcement action and merely issued a closing letter to LOFT.⁴⁸ While closing letters are publicly available on the FTC's website and generally receive press, they are merely a warning with an explanation of the FTC's investigation and decision to close the investigation.⁴⁹ In the LOFT letter the FTC reasoned that the violation had occurred at only one event, the event was attended by a small number of bloggers, and LOFT had since adopted a policy about disclosing material connections between bloggers and the LOFT with respect to gifts.⁵⁰

⁴⁵ See *AnnTaylor Stores Corp.*, FTC File No. 102-3127, FEDERAL TRADE COMMISSION, (Apr. 20, 2010), http://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf [<https://perma.cc/SGW8-B3GY>].

⁴⁶ See Sarah L. Bruno & Anthony V. Lupo, *The FTC closes its first investigation against Ann Taylor under the endorsement guides*, LEXOLOGY, (June 9, 2010), [<http://www.lexology.com/library/detail.aspx?g=609d8d8d-e168-428e-9f09-b0e297b5bbd0>] [<https://perma.cc/LUG2-YYGT>].

⁴⁷ See FEDERAL TRADE COMMISSION, *supra* note 44.

⁴⁸ See *id.*

⁴⁹ See *Consumer Protection Law Developments*, A.B.A. SEC. OF ANTITRUST L. 306 (2009).

⁵⁰ See FEDERAL TRADE COMMISSION, *supra* note 44.

2. Nordstrom Rack Boise Store Opening

In 2012 the FTC launched an investigation against Nordstrom Rack for its promotional event at its Boise, Idaho store opening.⁵¹ The event entitled “TweetUp” gave social media influencers gifts including a \$50 gift card for attending the event.⁵² However, Nordstrom failed to tell the attendees that they had to disclose that they had been given gifts for attending when they wrote about the event.⁵³ Because of the lack of disclosure of the material connection between the parties, the FTC found this to be a violation. However, much like in the LOFT investigation, the FTC issued a closing letter to Nordstrom Rack for this lack of disclosure because Nordstrom had limited the event’s occurrence, some influencers had posted about their gifts, and Nordstrom had revised its social media policies.⁵⁴

3. Cole Haan Wandering Sole Pinterest

In 2014, the FTC launched an investigation against Cole Haan for its Pinterest “Wandering Sole” contest.⁵⁵ The contest rules required entrants to make a pin board entitled “Wandering Sole” with five shoe images from Cole Haan’s Pinterest board, include five photos of the entrant’s favorite “places to wander,” and use the “#wanderingsole” hashtag in relation to each pin for a chance to win a \$1000 shopping spree for the most creative entry.⁵⁶ Entrants were not instructed to mention the contest or the potential prize associated with the Pinterest activities. The FTC found that this type of marketing was an endorsement, and the hashtag had not “adequately communicate[d] the financial incentive—a material connection—between contestants and Cole Haan.”⁵⁷ Since this was the first time the FTC had encountered an issue like this, the contest only involved a small group of people with a limited duration, and Cole Haan had updated its social media

⁵¹ See *Nordstrom Rack*, FTC File No. 122-3167, FEDERAL TRADE COMMISSION, (Feb. 22, 2013), http://www.ftc.gov/sites/default/files/documents/closing_letters/nordstrom-rack/130222nordstromrackletter.pdf [<https://perma.cc/GGV4-62QX>].

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *Cole Haan*, FTC File No. 142-3041, FEDERAL TRADE COMMISSION, (Mar. 20, 2014), http://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf [<https://perma.cc/G3FE-HBPW>].

⁵⁶ See *id.*

⁵⁷ *Id.*

policies, the FTC did not pursue enforcement action against the leather goods company.⁵⁸

4. Lord & Taylor's Design Lab Collection

In 2016, the FTC opened an investigation against Lord & Taylor for its Design Lab Instagram Campaign.⁵⁹ Lord & Taylor gifted fifty fashion influencers the Paisley Asymmetrical Dress and paid the influencers to post on Instagram one photo of themselves in the dress during the weekend of March 27–28, 2015.⁶⁰ The influencers could style the dress to their liking, but they were required to use specific hashtag and handles, none of which disclosed their financial relationship with Lord & Taylor nor were required to by Lord & Taylor in their contractual arrangement.⁶¹ Accordingly, following the FTC's investigation, Lord & Taylor's advertisements were found to be deceptive.⁶² The FTC finalized a twenty year consent order against Lord & Taylor prohibiting it from misrepresenting endorsements in the future and requiring it to adequately disclose any material relationship between it and its endorsers.⁶³ This is the only action to date taken against a fashion company.

III. THE UNITED KINGDOM, WHOSE APPROACH IS SIMILAR TO THE UNITED STATES' REGULATORY SETUP, HAS BEEN MORE WILLING TO TAKE A STRONG STANCE AGAINST DECEPTIVE PRACTICES BETWEEN SOCIAL MEDIA INFLUENCERS AND ADVERTISERS

A. *Consumer Protection from Unfair Trading Regulations 2008*

In the United Kingdom ("UK"), the Consumer Protection from Unfair Trading Regulations ("CPUTR") prohibit unfair commercial practices that

⁵⁸ See *id.*

⁵⁹ See Complaint, Lord & Taylor, LLC, No. 152 3181 (F.T.C. Mar. 15, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160315lordandtaylcmpt.pdf> [<https://perma.cc/K4VD-9YR2>].

⁶⁰ See *id.*

⁶¹ See *id.* at 2.

⁶² See Decision and Order, Lord & Taylor, LLC, No. C-4576 (F.T.C. May 20, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf> [<https://perma.cc/73NF-3RWC>].

⁶³ See *id.* at 4.

may materially affect the purchasing decision of a consumer.⁶⁴ The law went into effect in 2008 to help consolidate the UK's approach to unfair practices based on the European Union's standard.⁶⁵ The CPUTR also prohibits using advertorials, which are editorial content that do not make it clear that the person promoting the product or service was paid for the promotion.⁶⁶ Up until April 2014 the Office of Fair Trading ("OFT") was responsible for enforcing the CPUTR and protecting consumers in the marketplace.⁶⁷ Since its close, OFT's responsibilities to enforce the law have been transferred to various other bodies including the Competition and Markets Authority as the Financial Conduct Authority.⁶⁸

B. *Advertising Standards Authority*

The UK advertising regulatory system has two components: self-regulation for non-broadcast advertising and co-regulation for broadcast advertising.⁶⁹ The Committee of Advertising Practice ("CAP") has written the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing ("CAP Code"), and the Broadcast Committee Practice has written the UK Code of Broadcast Advertising.⁷⁰ The Advertising Standards Authority ("ASA") is a self-regulating body that has set the industry standard for advertising in the UK and enforces the two codes.⁷¹ The ASA allows consumers to make complaints that will be investigated,⁷² as can other advertisers.⁷³ Competitors who wish to make a complaint must first show that they have

⁶⁴ See *The Consumer Protection from Unfair Trading Regulations 2008*, No. 1277, <https://www.legislation.gov.uk/ukxi/2008/1277/contents/made> [<https://perma.cc/YA8F-4A4F>].

⁶⁵ See *Consumer Protection from Unfair Trading Regulations*, OUT-LAW.COM, (Dec. 2010), <http://www.out-law.com/page-9050> [<https://perma.cc/XDM4-YLW5>].

⁶⁶ See *id.*

⁶⁷ See *OFT's Work and Responsibilities After 31 March 2014*, OFFICE OF FAIR TRADING, (Mar. 31, 2014), <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/about-the-offt/work-and-responsibilities> [<https://perma.cc/WTW5-4DK8>].

⁶⁸ See *id.*

⁶⁹ See *About Regulation*, ADVERT. STANDARDS AUTHORITY, <http://asa.org.uk/About-ASA/About-regulation.aspx> [<https://perma.cc/DCS4-V2KG>] (last visited Mar. 26, 2018).

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *Make a Complaint*, ADVERT. STANDARDS AUTHORITY, <http://asa.org.uk/Consumers/How-to-complain.aspx> [<https://perma.cc/HTJ4-GZH6>] (last visited Mar. 26, 2018).

⁷³ See *id.*

made reasonable efforts to resolve their complaints with their competitor before the ASA will review it.⁷⁴ If the ASA believes that there has been a potential violation of the CAP Code, an investigation by the CAP or ASA may be initiated.⁷⁵ Informal investigations have little negative impact on the advertiser and are often resolved when the advertiser agrees to remove the advertising, but formal investigations are taken on by the ASA and reports are published on the ASA's website.⁷⁶

The CAP Code requires that endorsers only provide testimonies that are true and provide full disclosure as to who is making the endorsement.⁷⁷ Additionally, endorsements should be interpreted as fact and not be likely to mislead the consumer.⁷⁸ For a disclosure to be required in an endorsement, two factors must be present: the endorser needs to be in agreement to be compensated for their service and the advertiser needs to be in control of the endorsement.⁷⁹ Payment and control require a disclosure, but lacking one factor does not require the disclosure. Payment can be in the form of monetary compensation, a free gift, or another perk included in an advertisement style post. Control is found when the advertiser has control over timing of messages and requires the blogger to publish a key message or for a particular purpose. The ASA does not require formal labeling of disclosures, and they can match the blogger's style so long as they are clear. These guidelines have been developed to ensure that there is a clear message that these people have been compensated for their opinions and support.⁸⁰

⁷⁴ See *id.*

⁷⁵ See *Non-broadcast Complaint Handling Procedures*, ADVERT. STANDARDS AUTHORITY, (Jan. 2017), <https://www.asa.org.uk/asset/171EB506-B4EF-4FEC-BDCEC62DC49E0BE2.1759E419-AD92-452B-865FC913C62CE312/>, [<https://perma.cc/9Q6W-S35Y>].

⁷⁶ See *id.*

⁷⁷ See *The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing*, Rule 3.45, ADVERT. STANDARDS AUTHORITY, (Sept. 1, 2010), <https://www.asa.org.uk/uploads/assets/uploaded/e75b867d-3872-4370-aec955b80a83f45e.pdf> [<https://perma.cc/Y5NT-CHBG>].

⁷⁸ See *id.* at 3.47.

⁷⁹ See *New Words on the Blog*, ADVERT. STANDARDS AUTHORITY, (Mar. 19, 2014), <https://www.asa.org.uk/news/new-words-on-the-blog.html#.VSIW4yg4FU0> [<https://perma.cc/M8BL-THAU>] (“ASA requires bloggers who are paid (directly or in kind) by a third party to write reviews or comments about a product or service and who cede editorial control of the blog to that third party to be up-front with their followers by making clear that it’s advertising.”).

⁸⁰ See *IAB – ISBA Guidelines on the Payment for Editorial Content to Promote Brands within Social Media*, INTERNET ADVERTISING BUREAU UK, (July 2012), <http://www.iabuk.net/sites/default/files/IAB%20ISBA%20Guidelines%20on%20the%20>

While these rules set a clear standard for disclosure, there is still gray area with many scenarios that fashion bloggers participate in. For example, companies will often provide an all-expense paid trip for bloggers in exchange for the blogger's coverage on social media and their website. In scenarios like this there is no fee paid for the blogger's services, but they are getting some sort of benefit. Additionally, the advertiser does not control the content that the blogger posts. In fact, these types of appearances are the ones that separate the most successful bloggers from the mediocre ones and are the key to marketing during fashion weeks, music festivals, and art events. Stretching the definition of control will be explored further in Part IV.

C. *Enforcement Actions Taken for Violating These Restrictions*

1. Handpicked Media

In 2008 the OFT launched an investigation against Handpicked Media for its engagement of bloggers and lack of disclosures.⁸¹ Handpicked Media owns a portfolio of websites and blogs that allows its clients to pay to have promotional blogs on Handpicked Media's site. The OFT took action when it noticed Handpicked Media was using bloggers to promote its client's activities, but there was no indication that these bloggers were being paid to make these statements. Statements were included on both the website blogs and social media. The OFT found Handpicked Media to be liable under Unfair Trading Regulations 2008 for a potential misleading omission by not disclosing the financial relationship underlying the endorsement strategy, which constituted unfair commercial practices.⁸² As a result of the violation, Handpicked Media was required to stop this type of conduct in the future prohibiting "any future promotion that does not clearly identify, in a manner prominently displayed with the editorial content such that it would be unavoidable to the average consumer, that the promotion has been paid for

Payment%20for%20Editorial%20Content%20-%20July%202012.pdf [https://perma.cc/QSZ8-GN4Q].

⁸¹ See *Investigation into inadequate disclosures in respect of commercial blogging activity*, OFFICE OF FAIR TRADING, (Dec. 13, 2010), http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/handpicked_media/ [https://perma.cc/E6TX-KEZJ].

⁸² See David Flint & Valerie Surgenor, *OFT- office of fair tweeting?*, LEXOLOGY, (Jan. 28, 2011), <http://www.lexology.com/library/detail.aspx?g=10e54ceb-b5cb-42be-8caf-12f1848a4598> [https://perma.cc/Y7EB-DDZ3].

or otherwise remunerated.”⁸³ While the body and rules that govern this type of advertising has now changed, this enforcement action is significant because it was the first of its kind to involve bloggers and to take a real enforcement action against a company. Additionally, it made advertisers aware that disclosure rules apply to the online space including social media; these forums had never been discussed or determined before.

2. Nike and Wayne Rooney

The ASA acted against a Twitter campaign for the first time in 2012 when Manchester United player Wayne Rooney and Arsenal player Jack Wilshere posted tweets with links related to Nike.⁸⁴ Rooney tweeted, “My resolution- to start the year as a champion, and finish it as a champion. . . #makeitcount gonike.me/makeitcount,” while Jack Wilshere tweeted, “In 2012, I will come back for my club- and be ready for my country gonike.me/Makeitcount.”⁸⁵ The ASA found that because Nike sponsored the two footballers, they had a duty to disclose their relationship with the sports brand. Nike tried to defend itself stating that the link in the tweet was sufficient to show that there was a connection between Nike and the tweeters. However, the ASA did not find this to be persuasive given the context of how quickly people go through social media; followers would not likely look at the tweet long enough to make it “obviously identifiable” as a sponsored post.⁸⁶ Nike’s failure to ensure that the tweeters had included a disclaimer such as “#ad” in the tweet was a violation of the CAP Code because the footballers were paid for their social media posts and the content to be tweeted was determined by the advertiser. The Nike campaign was banned as a result.

Later in 2013, Rooney found himself in trouble again with the ASA when he tweeted, “The pitches change. The killer instinct doesn’t. Own the turn, anywhere @NikeFootball #myground.”⁸⁷ Again Rooney had failed to include a disclaimer in the tweet indicating his advertising relationship with Nike. However, in this instance the ASA felt that even if all viewers were

⁸³ OFFICE OF FAIR TRADING, *supra* note 80.

⁸⁴ See *Nike’s Twitter football advertising campaign banned*, BBC, (June 20, 2012), <http://www.bbc.com/news/technology-18517668> [<https://perma.cc/9F8Y-X8E3>].

⁸⁵ *Id.*

⁸⁶ Nike (UK) Ltd., ASA Complaint Ref. A12-183257 (2012), *available at* [http://asa.org.uk/Rulings/Adjudications/2012/6/Nike-\(UK\)-Ltd/SHP_ADJ_183247.aspx#.VSrUkSg4FU0](http://asa.org.uk/Rulings/Adjudications/2012/6/Nike-(UK)-Ltd/SHP_ADJ_183247.aspx#.VSrUkSg4FU0) [<https://perma.cc/TX5E-4W55>].

⁸⁷ *Wayne Rooney @NikeFootball tweet escapes ban*, CAMPAIGN (Sept. 4, 2013), <https://www.campaignlive.co.uk/article/wayne-rooney-nikefootball-tweet-escapes-ban/1210270> [<https://perma.cc/893J-KWM9>].

not aware of the sponsorship Nike was clearly identified in the tweet, which in its overall context could indicate there was a marketing relationship. Additionally, this particular tweet was different than any of Rooney's other tweets, which further suggested that it was not a typical personal tweet but one with a different context.⁸⁸ Based on this repeated incident, it is evident that advertisers should make it very clear to their spokespeople how the message should be displayed precisely. As will be discussed in Part IV, this also supports the need to hold spokespeople liable for their neglect particularly in a situation such as Rooney's where he repeated his mistake.

3. Oreo Lick Race

In late 2014 Mondelez, the parent company of Oreo, was under investigation by the ASA for an "Oreo Lick Race" promotion on YouTube. The campaign featured famous British YouTube stars who included statements such as "Thanks to Oreo for making this video possible."⁸⁹ However, the ASA found that this was not transparent enough and the commercial relationship had not been disclosed.⁹⁰ While the "thank-you" message to Oreo may have implied it was a marketing campaign, it did not meet the "obviously identifiable" standard. The ads were to be removed from YouTube and any future ads were required to have clear disclosures about prior decided arrangements. This decision made other video bloggers aware that the ASA would be monitoring them, and they should reconsider how to make disclaimers clearer despite pushback from advertisers to make the videos feel less "overtly commercial."⁹¹

⁸⁸ See Adam Sherwin, *Style over substance: Wayne Rooney cleared of Nike Twitter plug*, THE INDEPENDENT, (Sept. 3, 2013), <http://www.independent.co.uk/news/media/advertising/style-over-substance-wayne-rooney-cleared-of-nike-twitter-plug-8797109.html> [<https://perma.cc/9KRR-JNE7>] (comparing Rooney's typical tweets with those under his Nike campaign).

⁸⁹ Mark Sweney, *YouTubers ads for Oreo banned for not making clear purpose of videos*, THE GUARDIAN, Nov. 26, 2014, <http://www.theguardian.com/media/2014/nov/26/youtube-ad-oreo-banned-advertising-lick-race> [<https://perma.cc/YP9X-WFQ2>].

⁹⁰ See Mondelez UK Ltd., ASA Complaint Ref. A14-275018 (2014), available at http://asa.org.uk/Rulings/Adjudications/2014/11/Mondelez-UK-Ltd/SHP_ADJ_275018.aspx#.VSrZ_Sg4FU0 [<https://perma.cc/JL4S-T4M6>].

⁹¹ Alison Lynch, *ASA rules top vloggers like Zoella must tell fans when they're being paid to advertise*, METRO, (Nov. 26, 2014), <http://metro.co.uk/2014/11/26/asa-rules-top-vloggers-like-zoella-must-tell-fans-when-theyre-being-paid-to-advertise-4963669/> [<https://perma.cc/8GKB-4WAJ>].

4. Flat Tummy Tea

In 2017 the ASA cracked down on makeup blogger Sheikhbeauty's promotion of Flat Tummy Tea on Instagram with a post stating "@flattummytea 20% off guys!!!! If you've been following me you'll know i used this and I genuinely feel less bloated and a flatter tummy . . . oh yesssss."⁹² There was a financial arrangement for Sheikhbeauty's post and Flat Tummy Tea had control over the content.⁹³ By not disclosing with the hashtag #ad or a similar disclosure, there was a violation of CAP Code rule 2.1 because the Instagram post amounted to marketing communication.⁹⁴ In this case Flat Tummy Tea did not indicate to Sheikhbeauty what should be in her post nor is there reason to believe that the post was approved by the advertiser before it went live; however, the beauty blogger was required to post a key message regarding the advertiser's discount and had to upload the post on certain dates and times.⁹⁵

IV. NON-COMPLIANCE WITH THE GUIDELINES MEANS THAT TRANSPARENCY SHOULD BE A PRIORITY, WHICH CAN BE ACCOMPLISHED THROUGH CLEAR RULES, ACCOUNTABILITY, AND CREATIVITY

A. *The Current Endorsement Guidelines Should Be Interpreted to Address Social Norms in Conjunction with Transparency*

On March 11, 2015, the ASA's Chief Executive, Guy Parker, addressed the growing concern of advertising regulators working with bloggers to promote transparency with the bloggers' engagements.⁹⁶ Parker highlighted that bloggers want to comply with the rules but have difficulty knowing where to draw the line and how broad the transparency rule reaches.⁹⁷ These comments allude to certain situations where there is no monetary compensa-

⁹² Nomad Choice Pty Ltd t/a Flat Tummy Tea, ASA Complaint Ref. A16-366862 (2017), *available at* <https://www.asa.org.uk/rulings/nomad-choice-pty-ltd-a16-366862.html> [<https://perma.cc/XNZ6-FN3Z>].

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See id.*

⁹⁶ *See ASA Chief Exec's speech to ISBA conference*, ADVERT. STANDARDS AUTHORITY, (Mar. 11, 2015), <http://asa.org.uk/News-resources/Media-Centre/2015/ASA-Chief-Exec-speech-to-ISBA-conference.aspx#.VSiN6Sg4FU0> [<https://perma.cc/J8J7-HBB4>].

⁹⁷ *See id.* ("This is not an easy line to draw. PRs have long sent freebies to journalists in the hope of positive coverage . . . But the internet, and especially social media, has cranked it up a level.").

tion but an endorser has been given something of value in exchange for their support.⁹⁸

The Endorsement Guidelines have generally held that celebrity endorsers do not need to disclose their paid relationship with a company because it is usually obvious to the consumer that celebrities are paid to engage in these types of advertisements.⁹⁹ For example, when Tiger Woods was signed on to endorse Nike products, his consistent support of Nike made it clear to consumers that he was endorsed by Nike without having to disclose this every time he put on a Nike cap. This type of “obvious” standard can be used to analyze certain circumstances where bloggers are not required to disclose payment because it is common within the industry. The simplest example is New York Fashion Week, where it is well-known within the fashion industry that bloggers and celebrities are paid to attend designers’ shows and are given their clothes to wear to the show in the hopes that they will use social media to promote the show or get photographed in the designer’s clothing.¹⁰⁰ In such situations disclosures should not be required. Fashion bloggers may be provided a seat and outfit to attend a show with no requirements to post on social media; however, the posting becomes organic because it is in the nature of the fashion blogger to document every moment in their lives particularly at a fashion-based event. When applying the CAP Code, the fashion brand’s lack of control over the endorser shows that this type of financial arrangement still does not warrant a disclosure.

B. The UK’s Enforcement Mechanism Can Serve as a Model to Update the Endorsement Guidelines

While the Endorsement Guidelines were more recently updated since their inception in 2009, technology and the world of fashion blogging continue to change at a rapid pace. As a result, the rules do not adequately address the many scenarios involving fashion bloggers and would benefit from a more recent review such as the UK has been actively doing for the past few years. For example, many fashion bloggers are invited to attend fashion shows for a fee and are often given an outfit from the designer’s

⁹⁸ See *id.*

⁹⁹ See LAW PUBLISH, *supra* note 27 (“If they know he’s a paid endorser, no disclosure is needed. But if a significant number of his readers don’t know that, a disclosure would be needed.”).

¹⁰⁰ See Meghan Blalock, *How Much People REALLY Get Paid to Go to Fashion Shows: A Ranked Guide*, WHO WHAT WEAR, (Feb. 24, 2015), <http://www.whowhatwear.com/how-much-celebrities-get-paid-to-go-to-fashion-shows> [https://perma.cc/ER7C-4Y8C].

collection to wear. However, they are not always required to post on social media; rather they organically end up posting because their business is documenting their every move. In a case like this, the fashion blogger should not have to disclose the compensation in a social media post. However, the Endorsement Guidelines indicate that a trip that is paid for by an advertiser should be revealed to consumers.¹⁰¹ Further, it's common knowledge that fashion editors and celebrities have always received free products and gifts from fashion and beauty companies in hopes that the celebrity would be caught by the paparazzi wearing a handbag or an editor would write about a new anti-aging cream in an article.¹⁰² These days fashion bloggers are gifted endless things even without a financial arrangement to post. Sometimes they will include a mention to the brand, likely to maintain their positive relationship with the brand. This is often done in a Snapchat or Instastory, both of which last at most for ten seconds.¹⁰³ In these instances, under the CAP Code, fashion bloggers would not be required to post anything; however, the Endorsement Guidelines put the same level of disclosure on the blogger. Further, the format of a Snapchat or Instastory makes the post non-permanent and is so quick that it is unlikely that a consumer would spend enough time looking at a post to be confused or deceived by the contents.¹⁰⁴

However, the CAP Code could use some clarification with the control component. In the situation of Sheekhbeauty and Flat Tummy Tea, Flat Tummy Tea controlled the timing and key component of the message. However, there are situations where a blogger is given something and paid to post about it without specific timing guidelines or message requirements. Is there control in these situations? To further flesh out the definition of control, we can look at a fiduciary. A fiduciary is one who undertakes to act on behalf of and primarily for the benefit of another.¹⁰⁵ If a fashion blogger is a fiduciary acting for the primary benefit of a fashion company, there is an exercise of control. The ecommerce company, Revolve, can best display this. Revolve has put together several all-expense paid trips for groups of fashion

¹⁰¹ See FEDERAL TRADE COMMISSION, *supra* note 37.

¹⁰² See Liza Darwin, *The Shockingly Small Amount Fashion Editors Really Pay For Their Clothes*, REFINERY29, (Dec. 25, 2014), <http://www.refinery29.com/fashion-editors-pay-for-clothes> [https://perma.cc/SUL6-YR7S].

¹⁰³ See Christopher Heine, *Instagram Just Debuted Snapchat-Like 'Stories' That Disappear After 24 Hours*, ADWEEK, (Aug. 2, 2016), <http://www.adweek.com/digital/instagram-just-debuted-snapchat-stories-disappear-after-24-hours-172767/> [https://perma.cc/2XBY-NC66].

¹⁰⁴ See *id.*

¹⁰⁵ See RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

bloggers to places like Mexico, the Hamptons, and Italy.¹⁰⁶ Beyond any potential contractual obligations that may exist between the fashion bloggers and Revolve to post on their social media, which would require a disclosure, there are many instances where the fashion bloggers are posting images such as a scenic view of the Italian landscape that is not required by Revolve. This post cannot be seen as producing a primary benefit for Revolve because it is in fact in the blogger's benefit to be traveling around the world and producing new content for their audience. In those instances, without the primary benefit being for the advertiser, there is not enough control to warrant a disclosure.

C. Endorsers, Not Just Advertisers, Should Be Held Liable for Their Violations

Often fashion bloggers carelessly do not comply with certain clauses in their agreements with advertisers knowing there will be no major repercussions for their behavior. Rooney's first Twitter offense was a result of Nike's lack of compliance with the CAP Code because Nike had control over the content that was posted. However, it remains unclear if the second violation was again because of Nike's lack of disclosure or if Rooney himself was to blame. In other instances, bloggers purposely fail to include disclaimers to promote a certain image about their content. Bloggers understand that readers may lose respect for the blogger, or that the blogger's opinion may depreciate in value if readers eventually realize that most items worn, photographers used, and shooting locations chosen have been paid for by a third party.¹⁰⁷ Fashion blogger, Bryan Grey Yambao, one of the original fashion bloggers behind the fashion blog, BryanBoy, has been very vocal about the FTC disclosures. In April 2017 he tweeted, "The resort shows are coming up next month. Who's disclosing what? I'm disclosing that Prada,

¹⁰⁶ See Chrissy Rutherford, *I Lived Like a Fashion Blogger For a Week*, HARPER'S BAZAAR, (July 11, 2017), <http://www.harpersbazaar.com/culture/travel-dining/a10268172/fwr-d-ibiza-influencer-trip/>, [<https://perma.cc/2TE3-SNZL>]; see also Molly Creeden, *When Did Revolve Become a Thing?*, RACKED, (Nov. 22, 2016), <https://www.racked.com/2016/11/22/13575110/revolve-explainer-kardashian-social>, [<https://perma.cc/Z32X-XEJB>].

¹⁰⁷ See Rachel Strugatz & Karen Robinovitz, *To Pay or Not to Pay: A Closer Look at the Business of Blogging*, WOMEN'S WEAR DAILY, (June 5, 2012), <http://wwd.com/fashion-news/digital/a-closer-look-at-the-business-of-blogging-5942163/> [<https://perma.cc/WH7G-KYHF>] ("On the one hand, bloggers want to be considered journalists but forging partners with leading brands and designers creates what some believe to be a conflict of interest.").

Vuitton and Gucci will subsidize my travel.”¹⁰⁸ Yambao has also said that the disclosures have not hurt his business or lost him followers; rather, he finds that his followers appreciate the transparency,¹⁰⁹ even in a world where following the FTC’s rules are an exception. It shows that fashion bloggers are aware of the Endorsement Guidelines, and do not feel that following the rules hurts their personal brands. Interestingly, to date the FTC has chosen not to go after fashion bloggers. Not one fashion blogger was included in the ninety letters the FTC sent out in 2017; rather, the letters were sent to other types of celebrities that already have notoriety and fame outside of their social media accounts and lifestyle blogs.¹¹⁰

Fashion companies and bloggers do not have corresponding employer and employee roles but have more like an independent contractor relationship. However, under the Endorsement Guidelines, holding the businesses that are paying the bloggers liable is similar to the legal theory of *respondeat superior*. Common law *respondeat superior* is based on the theory that the “master” should be held liable for the torts committed by its “servant.” If simplified it holds the superior person in the relationship, often between employers and employees, liable for the conduct of the inferior person.¹¹¹ Policy reasons behind the rule are that the employer is profiting from the employee’s work and should bear the responsibility of negative implications of the employee’s work in the course of the employment because the employer has a better ability to absorb the costs associated with the harm.¹¹² The difference in financial compensation between companies and bloggers in endorsements is not similar to typical *respondeat superior* relationships. Blog-

¹⁰⁸ Julie Zerbo, *Fashion’s Full Disclosure – or Not*, THE NEW YORK TIMES, July 6, 2017, <https://www.nytimes.com/2017/07/06/fashion/federal-trade-commission-sponsored-travel.html> [<https://perma.cc/4DZ5-GXWM>]; see also Kali Hays, *Influencers Still Can’t Get Behind Disclosing Paid Posts*, WOMEN’S WEAR DAILY, (Oct. 12, 2017), <http://wwd.com/business-news/media/influencers-the-12ish-style-scout-sixteen-hummingbird-high-still-cant-get-behind-disclosing-paid-posts-11026614/> [<https://perma.cc/YR7L-WZ59>].

¹⁰⁹ See Zerbo, *supra* note 107.

¹¹⁰ See C. Ryan Barber, *Who Got Those Social ‘Influencer’ Letters From the FTC? Read the Full List*, THE NATIONAL LAW JOURNAL, (May 5, 2017), <http://www.national-lawjournal.com/id=1202785302263/Who-Got-Those-Social-Influencer-Letters-From-the-FTC-Read-the-Full-List> [<https://perma.cc/U5UQ-BKLZ>].

¹¹¹ See RESTATEMENT (SECOND) OF AGENCY § 219 cmt. d (AM. LAW INST. 1958); see also W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 500 (5th ed. 1984).

¹¹² See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 471 (3d ed. 1964) (“The losses caused by the torts of employees . . . are placed upon that enterprise itself, as a required cost of doing business.”).

gers are paid immense amounts of money for their services.¹¹³ The profit that companies receive is comparable to the compensation that the blogger is receiving from their blog or social media post. The blogger will obtain profit beyond the one-time fee the company pays the blogger because of affiliate programs that can help boost how much a blogger makes for a particular post. Affiliate programs give bloggers commissions between 3 to 20% on sales to clothing that they link to online retail stores.¹¹⁴ Any visitor to the blogger's site or social media who shops from the links provided to the clothing, provided by the company, featured in the post will be putting even more money into the blogger's pockets. Considering the high value of some of the clothing bloggers wear, the commission could make a big difference in the blogger's annual earnings.¹¹⁵ The blogger's financial gains should be considered in the FTC's decision to pursue action against companies exclusively.

At this time, the only repercussion that endorsers may face for violation is a reputational harm from the fashion companies that they may be putting in danger of a violation. Fashion companies will continue using bloggers and social media influencers because of their persuasive position in the industry. Accordingly, endorsers should too be held liable for their actions whether it is through means of a fine for their violation or a discontinued relationship with the advertiser. Holding both the advertiser and the endorser liable will help both components in the relationship work together to comply with the Endorsement Guidelines.

D. Fashion Companies Should Use Creativity When Creating Disclaimers

While bloggers can be blamed for failing to properly disclose their endorser status, communications departments of advertisers often worry about the aesthetic appeal of including disclaimers in social media. Hashtags

¹¹³ See Veselinovic, *supra* note 5, ("On the high end, people are charging \$50,000 for a sponsored post.").

¹¹⁴ See generally Elizabeth Holmes, *How Style Bloggers Earn Sales Commissions, One Click at a Time*, WALL STREET JOURNAL, Feb. 11, 2015, <http://www.wsj.com/articles/how-style-bloggers-earn-sales-commissions-one-click-at-a-time-1423693911> [<https://perma.cc/EX3R-ZVDC>].

¹¹⁵ See Meghan Blalock, *Find Out Which Fashion Bloggers are Making Millions*, WHO WHAT WEAR, (Oct. 9, 2016), <http://www.whowhatwear.com/how-do-bloggers-make-money> [<https://perma.cc/6Q4K-PLXE>] (reporting that blogger Rachel Parcell made \$1 million through her relationship with Nordstrom); see also *Affiliate Marketing Is Making All Fashion Blogs Look the Same*, INDEPENDENT FASHION BLOGGERS, (Sept. 15, 2014), <http://heartifb.com/2014/09/15/affiliate-marketing-is-making-all-fashion-blogs-look-the-same/> [<https://perma.cc/4LWV-S7DB>].

such as “#ad” and “#sponsored” have been promoted by the FTC as well as ASA because of the limited number of characters taken to include the disclaimer and because the disclaimer is very clear. However, if companies were able to be creative with their disclaimers they could still be compliant without sacrificing the content or message. In fact, the ASA has been clear that disclosures do not have to be formal and can be in line with the blogger’s voice.

Before the FTC had clarified its Endorsement Guidelines requiring posts to be disclosed with #ad or #sponsored and indicating that ambassador mentions or thanking a brand are not appropriate, many brands used creative hashtags to disclose a relationship with a fashion blogger. For example, Michael Kors used the hashtag “#ThanksMK” with its posts. Additionally, Stuart Weitzman uses “InOurShoes” and Sam Edelman uses “SamsGirls.” Michael Kors seems to be the most explicit message by expressing gratitude implying possible payment or remuneration. The Stuart Weitzman and Sam Edelman hashtags have an inclusive feel indicating those images with the hashtag are part of the same campaign. It is not clear if these hashtags would be clear enough based on the criticism in the Oreo decision that found the thank you message to not be explicit enough.

However, creating a uniform industry standard that is not as strict but implicit enough could be the solution to convincing advertisers to comply with the rules. In late March 2015 the UK’s Financial Conduct Authority (“FCA”) revised its previous stance on social media posts using “#ad” to identify promotional content.¹¹⁶ The FCA noted the consumer confusion that could occur when the hashtag was clicked on because other communications with a different purpose may be using that hashtag.¹¹⁷ The key must be consistency. Companies can make it clear that certain posts are sponsored if they maintain the same hashtag for all those posts and only those posts. Uniformity is necessary to provide transparency to the consumer and prevent the consumer confusion that is suggested by the FCA with the use of “#ad.” Contrary to the FTC’s position that #thanks[brand] is not sufficient, if a brand used a unique hashtag indicating relationship with bloggers for all social media posts that require a discloser and closely monitored and enforced this hashtag, consumers would grow to realize what the hashtag meant.

¹¹⁶ See FINANCIAL CONDUCT AUTHORITY, FG15/4, SOCIAL MEDIA AND CUSTOMER COMMUNICATIONS: THE FCA’S SUPERVISORY APPROACH TO FINANCIAL PROMOTIONS IN SOCIAL MEDIA, 4.2 (2015), available at <https://www.fca.org.uk/your-fca/documents/finalised-guidance/fg15-04> [<https://perma.cc/8NG8-RAHQ>].

¹¹⁷ See *id.* at 4.3.

V. CONCLUSION

The changes in the fashion blogging industry necessitate a change in the FTC's standards in monitoring fashion blogger behavior. Following some of the changes the UK has made in its policies on the matter, holding bloggers and advertisers both accountable for their actions, and using creative means to help disclaim endorsement relationships are key to facilitating transparency as this form of advertising continues to expand in the coming years.

