URS paper

Deceptive Marketing by Social Media Influencers

A Literature Review on the FTC Guidelines for Endorsers and Testimonials in Advertising

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Abstract

The advent of social media platforms has fueled the creation of the influencer advertising industry worth billions. Yet, the existing regulatory framework requiring truthful and clear disclosure of sponsored content, the "Guides Concerning the Use of Endorsements and Testimonials in Advertising", has remained unchanged since 2009. Consequently, safeguarding consumers becomes paramount. Through a literature review of the journal publications of the past decade, this paper highlights two main issues regarding the Guidelines, enforcement and liability, and the respective solutions. These strategies encompass changes in the contracts between brands and influencers, the establishment of training and monitoring programs, collaborations with social media platforms and the creation of a uniform, universal symbol. Ultimately, the paper hopes to serve as a resource for legislators in the development of an updated version of the Guidelines, by advising them to devolve additional attention to minors, certain industries (food, health, cosmetic, fintech) and virtual influencers.

Evidence for Practice

- The rise of social media and online shopping has led to the creation of a new branch of marketing: social media influencers marketing.
- Through the "Guides Concerning the Use of Endorsements and Testimonials in Advertising" the Federal Trade Commission regulates social media influencer marketing with the intent of protecting consumers from deceptive marketing practices.
- Scholars have singled out two main issues regarding the Guidelines: their enforcement and liability, in case of breach.
- Solutions proposed by academics can be divided into four main categories: changes in the contracts between brands and influencers, the establishment of training and monitoring programs, collaborations with social media platforms, and the creation of a uniform universal symbol.
- The next draft of the Guidelines should include more protection for vulnerable groups, additional regulations for specific industries (health, food, cosmetics) and updates regarding FinTech and virtual influencers.

Keywords: Social Media Influencer Marketing, FTC, Guidelines for Endorsers and Testimonials in Advertising

Introduction

With the rise of social media and the online shopping, digital advertising has become an increasingly relevant component of businesses' marketing practices. The spike in social media usage has led to the creation of new public figures: the influencers, social media stars who base their profession on receiving products from brands for free and reviewing them, as well as creating collaborations with companies to promote products (Hudders et al., 2021, pp. 332-333). Endorsement statements made by influencers have become "the epicentre of consumer purchases" (Martinez-Guasch, 2021, p. 404), about one fifth of all the purchases made in the US are the result of an influencer's recommendation (Audrezet & Charry, 2019). The massive exposure to social media influencers has only escalated the need for higher transparency regarding endorsement relationships and better consumer protection against misleading adverting. Deceptive marketing refers to those advertising practices that mislead consumers by either making false claims, omitting relevant information, or a combination of both. Hence, legislators must both educate consumers about this new side of marketing and develop ways to properly monitor brands and influencers (Campbell and Grimm, 2019).

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Consequently, recently literature on influencer marketing has been flourishing, with five reviews published between 2020 and 2023 (Chang et al., 2020; Ye et al., 2021; Vrontis et al., 2021; Hudders et al, 2021; Tanwar et al., 2022). Yet, all these reviews engage with the topic from a social sciences perspective, leaving a gap for a paper with a legal outlook. Therefore, this review distinguishes itself by taking the legal perspective, summarising the scholarly debate on the FTC Guidelines in the context of social media influencer marketing.

In 2009, the Federal Trade Commission (FTC) updated for the last time the "Guidelines for Endorsers and Testimonials in Advertising", a document consisting of a set of guidelines targeting companies and endorsers' activities, applicable also to social media marketing practices. According to these guidelines, influencers are required to both be a "bona fide user" and to disclose any type of connection between themselves and the brand (FTCA, 2019, 255.1.c).

The paper opens with an introduction, followed by a theoretical overview of social media influencer marketing and the FTC Guidelines. After the methodology, the main section of this article consists of a part analysing the Guidelines' issues of enforcement and liability and a part providing an overview of the solutions. Before the conclusions, limitations are discussed, as well as threats and considerations that should be included in the next draft of the Guidelines.

Theory

Social Media Influencers Marketing. Influencer marketing is "the most effective and organic exposure a brand can get" (Bladow, 2017, p. 1128). Thus, it has become an easy way for firms to connect with their desired demographics, by targeting key individuals (Carpenter and Bonin, 2021; Groen, 2020), who have access to larger audiences (Fredricks, 2019, p. 32). Social media influencers are defined as "self-branded micro-celebrities, who make money from being able to attract attention" (Tokeley, 2017, p. 121) and from establishing credibility within a specific industry (Casale, 2019, p. 6), retaining in this way enough power to influence consumers' consumption's habits (Bladow, 2017, p. 1128; Sauerborn, 2017, p. 597).

What differs in social media influencer marketing, compared to other traditional forms of advertising, is the creation of "social dynamics resembling friendships" (Bannigan and Shane, 2019, p. 249). Social media influencer marketing became a key-field in business economics due to the low costs compared to reach (Chan, 2019; Groen, 2020, Tokeley, 2017) and the impressive returns (Roberts, 2020). Moreover, the personal relationship of loyalty and trust between consumers and influencers, reflects on the one formed between consumers and the brand itself, leading to an increase in sales (Casale, 2019). Due to this dynamic based on trust, disclosure regulations are essential to prevent influencers from sharing misleading messages to their unaware followers (Brown, 2016).

The Legal Framework. The Federal Trade Commission (FTC) is a "a bipartisan federal agency that champions the interests of American consumers" (FTC, n.d.), with the mission to "protect the public from deceptive or unfair business practices" (FTC, 2019). The goal of consumer law related to deceptive marketing practices is to defend the consumer's right of making a conscious and informed purchasing decisions (Bannigan and Shane, 2019; Ramirez, 2018), because this will lead, under classical economic theory, to the maximization of the consumer's utility (Tokeley, 2017, p.127). Mandating disclosure helps consumers understanding the nature of the content, allowing them to cope accordingly (Boerman et al., 2018, p.146), in particular when the average consumer might not expect an advertising content (Groen, 2020, p. 118). Gürkaynak and Kama (2018) suggest that protecting consumers from covert marketing communication, it is essential to guarantee them the choice of what to pay attention to. Regulators have the task to balance consumer protection with supporting businesses, which is why legal intervention can only be justified on basis of consumer deception (Tokeley, 2017, pp. 126-127). To assess whether an advertisement is deceiving, Cooper (2021) suggests that we should look at the "overall net impression", meaning what an average consumer would gauge from the endorsed post (pp. 94-95).

Three primary bodies of laws are relevant in assessing the legal framework of deceptive marketing: (1) the FTC ACT, (2) a composite of state consumer protection statutes (known as Little FTC Acts), and (3) the Lanham Act (Bannigan and Shane, 2019, p. 251), although for a matter of time and of relevance to the articles, only the first one is treated. The Guidelines were published in 1972 and updated in 2009. Since then, only one review process, in 2020, was open. In 2019 a practical guide on how to comply with the Guidelines considering the changes in technologies, called the "Disclosure 101 for Social Media Influencers", was published. A summary of the relevant points of the Guidelines and of the Disclosure can be found in Table 1. These guidelines provide a voluntary basis for influencers and companies to practice social media marketing in conformity with the legal requirements imposed by the Section 5 of the FTC Act (15 U.S.C. 45) which, if breached, can lead to possible disciplinary action in accordance with section 255.0 of the FTCA.

Table 1. *Summary of the Guides Concerning the Use of Endorsements and Testimonials in Advertising and the Disclosure 101 for Social Media Influencers*

Guides Concerning the Use of Endorsements and Testimonials in Advertising	**Disclosure 101 for Social Media Influencers**
• "Endorsements must reflect the <u>honest</u> opinions, findings, beliefs, or experience of the endorser" • "The endorser must have been a <u>bona fide user</u> of the product (it) at the time the endorsement was given" • "<u>Advertisers are subject to liability</u> for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. <u>Endorsers also may be liable</u> for statements made in the course of their endorsements" • "When 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 <u>fully disclosed</u>"	• Full disclosure of the "<u>material connection</u>" (= personal, family, employment, financial relationship) • It is <u>your (influencer) responsibility</u> to make disclosure and to comply with the law • The disclosure should be placed in a space where it is <u>hard to miss</u> • The disclosure should be written with <u>simple and clear</u> language

Methods

The research commenced with an investigation of scholarly publications on social media influencers marketing (appendix A), resulting in a noticeable gap in the literature reviews regarding the legal aspects. SCOPUS and Heinonline were the two search engines used to perform this research, of which the results are detailed in appendix A. Similar queries have been performed on GoogleScholar, but due to the low relevance and high amount of results, it did not provide any additional paper. Every search was restricted by the language (English), the type (Journal Article), the year(s) (2013-2023) and, foremost, by the topic: an analysis of the FTC Guidelines for social media influencer marketing. Additionally, forwards and backward methods were employed, leading to a final selection of 25 papers.

Challenges

Scholars raised two main issues regarding the Guidelines: one on their enforceability and one on who is liable in case of untruthful and unclear disclosure.

Enforcement. To increase the amount of disclosed advertising, scholars have proposed two approaches: a better enforcement of the Guidelines and educating influencers and marketers on current regulations. Yet, the current FTC focus is primarily on deterrence and on ensuring that brands do not avoid liability by delegating the advertising tasks to an outside entity (Bladow, 2017). The main issue with enforcing the guidelines is the impossibility of pursuing and monitoring every violation with the budget available, leading to the FTC's announcement of pursuing mostly advertisers and not endorsers (Boerman et al., 2018, p. 150), thus assessing the success of the Guidelines based influencers' compliance leads to disappointing results (Fredricks, 2019, p. 39). The second problem is adherence; despite around 70% of the influencers attempt to comply with the regulations, only one in four does it successfully (Fredricks, 2019, p. 34), nonetheless Terry et al. (2020) report that the level of compliance increased in recent years. Currently the FTC's enforcement methods are mainly two: issuing warning letters and pursuing legal actions, but scholars advocate for stringer punishments.

Liability. Originally, advertisements featuring endorsers were prepared by the marketing department of the company, making brands responsible for them (Bentz and Veltri, 2020, p. 185). According to section 255.1. d of the Guidelines "Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements." This suggests an equal liability between companies and endorsers, nonetheless, looking at enforcement actions, only few court cases actively pursued influencers, rather than brands, with CSGOLotto being the most prominent exception. Scholars conclude that the liability should lie in most cases with the marketers, because they have the lowest incentive to abide and the best inside position to monitor compliance (Boerman et al, 2018, p. 159). Moreover, Roberts (2020) suggests that companies are "the best positioned to know their products' features and ingredients and have a handle on any relevant studies or data supporting advertising claims" (p. 133).

On one side companies' recognise it is not in their best interest to ensure disclosure (Harris, 2018; Boerman et al., 2018) and therefore ask influencers not to disclose (Sauerborn, 2017, p. 575; Casale, 2019, p. 15); on the other side, 41% of influencers surveyed admitted that they disclose, only if they are asked to (Chan, 2019, p. 322), or because they fear a reduction in their own credibility and authenticity (Bentz and Veltri, 2020, p. 185, Davis, 2023, p. 76). Terry et al. (2020) point out that the FTC has still to find "an influencer liable solely for their role in deceiving the public as an advertising mechanism for another organization" (pp. 447-448). As a result of the CSGOLotto case (2017), the FTC has revised the Guidelines to shift the regulatory focus from solely the marketer conduct to the influencers, as a group (Groen, 2020). One of the main issues holding influencers responsible is targeting them as a united group, since everyone has a different degree of power, therefore a different degree of responsibility (Terry et al., 2020, p. 456). Additionally, targeting influencers might be seen as violating the free speech (Tokeley, 2017; Cooper, 2021; Fredricks, 2019); although sponsoring a product is usually considered as commercial speech (Bentz and Veltri, 2020, p. 192). In conclusion, it appears to be that both parties are equally at fault and holding both liable would lead to the best outcome (Chan, 2019, p. 316; Farshidi, 2018, p. 205; MartinezGuasch, 2021, p. 433), nonetheless the most cost-efficient solution is not to hold influencers liable, unless marketers have taken all the possible steps to enforce compliance on the influencers.

Solutions

Proposed solutions lead to higher disclosure of sponsorship relations, thus better consumer's protection. These propositions are categorized into two groups: those focused on enhancing compliance and those aimed at educating marketers and influencers; or as Harris (2018) summarises it, the Guidelines need to implement “the necessary mechanisms for detection, deterrence, education, and compliance" (p. 950). Since influencers sometimes choose not to comply with the Guidelines, while other times they encounter difficulties in understanding how to properly comply (Farshidi, 2018, p. 200), the FTC should reflect whether it wants to adopt a more punitive approach or to lean towards a more educational stance (Chan, 2019, p. 305).

The Guidelines need to implement “the necessary mechanisms for detection, deterrence, education, and compliance”.

Additionally, due to the budget constraints faced by the FTC compared to the magnitude of the violations (Boerman et al., 2018, p. 150), the FTC should contemplate outsourcing a portion of the policing and education responsibilities to other relevant agencies, such as the Food and Drug Administration (FDA), Federal Communications Commission (FCC), Securities and Exchange Commission (SEC), and consumer advocacy groups, as well as social media platforms (Chan, 2019, pp. 330, 333; Roberts, 2020, p. 137). Moreover, involving users and consumers themselves can help ensuring compliance and raising awareness within the influencers' community (Harris, 2018, p. 987). In the attempt of striking a balance between an educational and punitive approach, Carpenter and Bonin (2021) emphasizes the importance of a regulatory approach that is flexible and easy to understand. To summarize, scholars came up with four main different solutions (appendix B): mandate disclosure in contracts, promoting training and monitoring programs, creating partnership with social media platforms, and developing a standardized symbol for signalling sponsored content.

Contracts. The challenges regarding education and compliance can be solved by modifying the way contracts between brands and influencers are made and by increasing the control of firms on influencers (Groen, 2020, p. 128). This is possible, since companies retain the highest leverage in drafting contracts and selecting influencers (Bentz and Veltri, 2020; Cooper, 2021; Skalbania, 2022), making them the best equipped to internalize the costs of monitoring compliance (Roberts, 2020, p.133). This helps to partly lift the burden of policing from the FTC, especially if the FTC required brands to provide a list of the influencers hired by the company (Harris, 2018, pp. 980-981). Therefore, the FTC should require that every contractual agreement includes an obligation for clear and truthful disclosure (Casale, 2019; Cooper, 2021). Contracts should include obligations for influencers on how to disclose sponsorships, together with providing them, at the moment of entering the partnership the Guidelines document (Chan, 2019). Furthermore, contracts should have a termination clause, in the case influencers do not respect the disclosure Guidelines (Groen, 2020, pp. 131-132). Otherwise, since by signing the contract the influencers agree with the Guidelines, the contract could contain an indemnity clause in case of non-compliance, to protect the brand from influencers' actions (Chan, 2019; Groen, 2020). In light of these points, Skalbania (2022) recommends that the FTC provides companies with “sample contract terms”, which brands can use in their partnerships with influencers (p. 694).

Monitoring and Training Programs. Scholars recommend for the Guidelines to mandate in companies the presence of training and monitoring programs (Boerman et al., 2018; Casale, 2019; Chan, 2019). These courses should be implemented already in the hiring process, so influencers with histories of non-compliance would have to internalize the costs of their non-compliance, leading to a positive loop in the influencer's community (Fredricks, 2019, p. 51). Moreover, bringing top-influencers to court and force them to follow training programs could help creating a standard in the influencers' community (Bladow, 2017, p.1154). Chan (2019) and Ramirez (2018) emphasise the possible positive outcomes of a community-approach, where influencers, rather than outside agencies, promote these courses.

Partnership with Social Media Platforms. In light of the previous argument, platforms could implement in-app training programs with tutorials for influencers, on how to properly disclose sponsorships (Chan, 2019, p. 321). Although, ultimately the responsibility lays with endorsers and marketers, the creation and implementation of specific features and built-in tools, on the social media platforms themselves, would be a great way not only to standardize disclosure making it clearer and more understandable to users, but also to monitor more cost efficiently influencers and brands (Bernstein, 2016; Fredricks, 2019; Harris, 2018; Skalbania, 2022). In this way, platforms could become partly liable for influencers' non-compliance, thus they would have a greater incentive to monitor disclosure (Fredricks, 2019, p. 44). Additionally, this would increase deterrence, because it would stand out when an influencer purposely does not follow the

Guidelines (Harris, 2018), as the Instagram in-app notifications based on reports showed (Chan, 2019, p. 327; Skalbania, 2022, p. 693). Yet, Casale (2019) commented that the current tool is still insufficiently used and unclear to the ordinary person (pp. 18-19).

Develop a Symbol. Harris (2018) and Tokeley (2017) recommend the adoption of a uniform, standardized disclosure statement, in order both to prevent confusion regarding sponsorship posts and to create a quickly identifiable standard. Sauerborn (2017) proposes the creation of a new emoji to disclose material connections between the influencer and the brand (p. 596).

Policy Openings

The preceding discussion primarily focuses on the existing guidelines; however, it is essential to acknowledge that certain gaps persist, within the content of the guidelines themselves, necessitating further regulations for specific cases. Special attention must be given to children and teenagers, as they struggle to discern between sponsored and non-sponsored content compared to adults (Skalbania, 2022, p. 688). This challenge is exacerbated by the interactive and personalized nature of social media content (Vanwesenbeeck et al., 2016). Similarly, as suggested by the FTC, specific categories, such as health, food and cosmetics, require stricter regulations (Casale, 2019; Martinez-Guasch, 2021), considering that consumers might decide to solely rely on these recommendations, rather than seeking professional help (Davis, 2023; Roberts, 2020, pp. 100-101). Additionally, the question on jurisdiction between the FTC and the Food and Drug Administration enhance the need for clear regulations (Martinez-Guasch, 2021, p. 422). As Barry (2021) and Manfredo (2022) advocate, FinTech influencers deserve increase attention, due to the evolving technologies, as well as virtual influencers (Skalbania, 2022, p. 690).

Limitations

Together with the limitations in the choice of articles (language, years, and type of publication) and in terms of access to papers, a notable limitation is the absence of a discussion on the effects of disclosure on social media marketing campaigns. This exclusion stems from the limited attention given to this topic in the articles reviewed and a necessity for selectivity of the topics treated. Lastly, despite being a legal outlook, this paper treats only marginally in his integral version case law related to online influencer marketing.

Conclusion

The rapid growth of social media and its impact on marketing necessitate regular updates of the Guidelines for Endorsements and Testimonials in Advertising, in order to safeguard consumers from misleading practices. However, the Guidelines still need to refine their enforcement methods and address the liability issue between endorsers and influencers. This review helps breaking down social media influencers marketing by adopting a legal perspective. An updated version of the Guidelines should focus on increasing compliance, by enhancing enforcement mechanisms, and educating marketers and influencers. Proposed measures include contractual disclosure mandates, implementation of monitoring and training programs, collaboration with social media platforms, and the establishment of a standardized symbol for disclosure. Future revisions should also address specific challenges, such as provisions for minors, additional regulations for industries like health, food, and cosmetics, as well as considerations for virtual influencers. Future research could also redirect its attentions towards investigating the effects of disclosure, leading to a broader reflection on the existence of the Guidelines in the first place. Lastly, upcoming studies could summarise the court cases on social media influencer marketing.

An updated version of the Guidelines should focus on increasing compliance, by enhancing enforcement mechanisms, and educating marketers and influencers

A Note from the Author:
I am Caterina Ligabue (she/her), an Italian-woman currently living in Utrecht. I am planning on graduating in October 2024 with an Economics and Business Economics degree with a dedicated minor in Law and Global Asia studies from Utrecht University. I am currently deciding on my master and my interest in understanding the human behaviour is leading me towards the field of social and organizational psychology with a focus on gender dynamics. My thesis topic originated from my interest in marketing and my aspiration to contribute to societal well-being through a better understanding of laws and regulations.

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