Disclosure Effects in Influencer Marketing: Implications for Courts, Regulators, and Marketers

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Cover Page Footnote
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Disclosure Effects in Influencer Marketing: Implications for Courts, Regulators and Marketers

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INTRODUCTION

“@PUMA Suedes #ForAllTime”— on December 20, 2020, Selena Gomez, one of the world’s highest paid social media influencers (SMI),1 posted these 22 characters and a picture of herself wearing her PUMA sneakers under a Christmas tree on her Instagram account. As of January 2021, this post had racked up almost 5 million likes and generated almost 40,000 comments from her 195+ million followers.2 While the exact compensation for her post is unknown, industry experts estimate that Selena Gomez could make up to $900,000 for such sponsored Instagram posts,3 which is roughly 13 times the median annual household income in the United States.4

Influencer marketing, the practice of compensating social media personalities to promote a company’s products and/or brands, is a ubiquitous strategy in today’s marketplace. A 2020 Forbes report stated that 93% of U.S. firms were using influencers.5 In 2022 the industry was valued at $16.4 billion, with a revenue forecast of $143 billion in 2030.6 Over the past decade, consumers are more and more relying on social media for news, information, and entertainment exposing them to the successful tactics of influencers and their sponsoring brands.7

Many consider the proliferation of influencer marketing a concerning development.8 On social media, the boundaries between organic,
intrinsically-driven content and sponsored advertising are blurred.\(^9\) Often, it is not clear to the audience whether the influencer genuinely likes and recommends a company, brand, product or service or if they are generously compensated to spread the word.\(^10\) Despite legal obligation to do so in most markets, influencers rarely disclose that they have been sponsored out of real or perceived fear of losing their revenue. In 2022, only 7% of influencers in the United States complied with Federal Trade Commission’s (FTC) or the Competition and Markets Authority’s (CMA) rules when it comes to disclosing their commercial relationship with brands and organizations.\(^11\) At the same time, until recently, most consumers were not aware that influencers had to disclose such relationships.\(^12\)

Hence, it comes as no surprise that influencer marketing is receiving increased legal scrutiny. The European Union, in 2021, published an updated guidance document on the EU Unfair Commercial Practice Directive (UCPD) to clarify the UCPD’s application to influencer marketing.\(^13\) Individual European regulators have followed suit by updating their national consumer protection laws to specifically address influencer marketing practices.\(^14\) In the United States, this task remains with the Federal Trade Commission (FTC), which – until now - has limited itself to non-binding guidelines and relatively few light-handed enforcement actions based on section 5 of the Federal Trade Commission Act (FTCA).\(^15\) However, in July

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\(^9\) See Jennifer L. Schmidt, Blurred Lines: Federal Trade Commission’s Differential Response to Online Advertising and Face-to-Face Marketing, 19 J. HIGH TECH. L. 442, 443 (stating in SMI marketing “the lines between reality and advertising are blurring”).

\(^10\) Influencer marketing is often described as electronic Word-of-Mouth (eWOM). See generally, Ana Babić Rosario, Kristine De Valck, and Francesca Sotgiu, Conceptualizing the Electronic Word-Of-Mouth Process: What We Know and Need to Know about eWOM Creation, Exposure, and Evaluation, 48 J. ACAD. MKTG. SCI. 422 (2020).


\(^14\) E.g., Germany has amended its Unfair Commercial Practices Act (Gesetz gegen Unlauteren Wettbewerb) (UWG), and an overhaul of the French law is being discussed in the legislature, see infra part II. C. 1. As of 2022, influencers in Norway have to label retouched photos on social media, see Jeremy Gray, Norway passes law requiring influencers to label retouched photos on social media, Digital Photography Review (Jul. 9, 2021), https://www.dpreview.com/news/1157704583/norway-passes-law-requiring-influencers-to-label-retouched-photos-on-social-media.

\(^15\) See Craig C. Carpenter & Mark Bonin II, To Win Friends and Influence People:
2023, the FTC published a revised version of its so-called Endorsement Guides (Guides) that ushered in a regime of more comprehensive and demanding SMI disclosure requirements.\(^\text{16}\) Thus, if the agency follows through on calls for stricter enforcement,\(^\text{17}\) advertisers and SMI will need to prepare for higher scrutiny from the FTC.\(^\text{18}\)

Despite the economic importance of influencer marketing on the one hand, and changing regulation and enforcement practices on the other, the scholarly legal literature on the topic is surprisingly sparse and often partisan. Commentators either deplore the lack of enforcement, or they advocate for stricter disclosure rules in the interest of consumer protection and fair competition.\(^\text{19}\) Others dispute the effectiveness of disclosure or claim that influencer marketing is too new and too volatile to be tackled through hard regulation. If any, they argue, only self-regulation would provide the flexibility needed to address the quickly changing practices.\(^\text{20}\) While the FTC

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\(^{17}\) In 2020 FTC Commissioner Rohit Chopra issued a statement indicating that “the FTC will need to determine whether to create new requirements for social media platforms and advertisers and whether to activate civil penalty liability” in light of the “[m]isinformation [that] is plaguing the digital economy,” see Statement of Commissioner Rohit Chopra, Federal Trade Commission (Feb. 12, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_endorsement_guides_reg_review_chopra_stmt.pdf. In October 2021, the FTC sent a Notice of Penalty Offenses to more than 700 companies indicating that the agency is determined to crack down on advertisers using deceptive endorsements practices, see Lesley Fair, Latest FTC Notice of Penalty Offenses tells 700+ national advertisers that deceptive endorsements can lead to financial penalties, Federal Trade Commission (Oct. 13, 2021), https://www.ftc.gov/business-guidance/blog/2021/10/latest-ftc-notice-penalty-offenses-tells-700-national-advertisers-deceptive-endorsements-can-lead.

\(^{18}\) Contrary to what Commissioner Chopra suggested in his 2020 statement, the FTC has limited its current reform to the non-binding Guides. As of today, the Commission has not (yet) engaged in formal rulemaking.


\(^{20}\) See Carpenter & Bonin II, supra note 15, at 274 (2021) (arguing that “[t]oday’s consumers are accustomed to and prepared for paid content from many sources, even if disclosures are not present”).
in the past has focused its enforcement actions on sponsoring brands and does not have the authority to impose civil penalties.\textsuperscript{21} Across the Atlantic some European domestic courts have heard civil cases and imposed civil penalties on famous but also not so famous influencers, which raises the question whom enforcement should target – the influencer, the sponsoring brand, or maybe the media platform that disseminates the misleading content?

The current legal framework in the United States and abroad leaves many questions unanswered. Commentary in both camps, this article argues, is often hampered by an insufficient understanding of the economic realities and the psychological effects of advertising and disclosure mechanisms at work in various forms of influencer marketing. While regulators may overestimate the positive effect of disclosure in terms of consumer protection and underestimate the associated costs, marketers may overestimate the negative effect of disclosure on purchase intention or consumer attitude towards a brand, while underestimating positive effects of disclosure on brand recall. Considering the growing number of cases before the courts, as well as increasing regulatory and administrative action, it may be time for a more nuanced approach.

To this end, this article reviews existing marketing studies, legal literature and case law to answer the following questions: What are the effects of disclosures on consumers? To what degree and under which conditions is influencer disclosure regulation effective/ineffective? Do these findings support current application of unfair commercial practices laws and stricter disclosure regulation? How should sponsoring brands/influencers react to increasing disclosure requirements in the United States and elsewhere?

To answer these and related questions, the article proceeds as follows. It first describes the phenomenon and its effect by defining influencer marketing and identifying the different types of partnerships used in practice. It then surveys and compares influencer disclosure regulation and enforcement in two major sponsorship markets, namely, the United States, and the European Union, with Germany as a specific example. The next part explains the psychological factors that make this marketing strategy so successful. It then describes the academic findings of sponsorship disclosures on consumers’ perceptions and purchasing behavior. From there, conclusions are drawn for the application of consumer protection laws on SMI, and the extent to which consumer rights are protected in diverse legal and economic environments. Ultimately, this research also addresses the question of whether recently enacted new rules are appropriate to counter influencer marketing’s subversive effects.

I. SOCIO-ECONOMIC BACKGROUND

Influencers are social media personalities, who share information, opinions, and recommendations with their followers in various fields, such as beauty, fashion, healthcare, sports, travel, technology, toys, hobbies, and other activities of their daily lives. Influencer marketing is a rapidly growing phenomenon in various formats on all social media platforms. Its effectiveness depends on a multitude of factors linked to the influencer, follower, type of media, and the communication process itself.

A. Overview

The percentage of U.S. adults who use social media has skyrocketed over the last 15 years. While in 2005 only 5% of U.S. adults used social media to connect with friends and family, engage with news content, acquire and share information, and entertain themselves, this number has reached a staggering 72% in 2021. The number is comparable for the 12- to 15-year-olds (71%), but for the 13- to 17-year-olds it is even higher (97%). Therefore, it is not surprising that the pervasiveness of social media platforms, such as Facebook, YouTube, Instagram, Twitter, TikTok, or Snapchat, led to a monumental change in how consumers acquire and utilize information about companies, brands, products, and services. Moreover, it appears that a particularly vulnerable category of consumers – those under 18 – is heavily exposed to social media advertising in general and SMI in particular.

Influencer marketing refers to the practice of compensating a social media personality for promoting a company, brand, product, and/or service on their social media platform(s). Unlike regular social media ads, sponsored posts mimic and blend with organic, non-sponsored posts, appearing in followers’ news feeds without interrupting their social media experience. This is important for marketers, because 30% of all Internet users have ad blockers to remove distracting display ads as they access online apps and services and/or browse the Internet. It also makes the legal distinction between commercial advertising and communication of private opinions.

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26 See generally Fertik, supra note 5.
difficult, potentially affecting, for example, constitutional protection of free speech.

Against the developing legal and economic background, the ingenuity of influencers and sponsoring brands continues to evolve. Consumers increasingly expect celebrities’ social media posts to be sponsored, and they view influencer marketing more critically than when it first emerged. Therefore, companies turn to “micro” or “nano” influencers with a follower base of just a few thousand people, who cost less, but appear more genuine and trustworthy, thus further amplifying the problem. Even if something is clearly identified as sponsored content, the “intimate” relationship with or the trusted expertise of the influencer may still outweigh that disclosure. Thus, influencer marketing has the ability to distort competition to a greater extent than any other form of traditional advertising.

At the same time, consumers and competitors may not be the only ones in need of protection. With the spread of social media, not only do athletes and celebrities engage in sponsored advertising, but ordinary people also entertain blogs and publish product reviews, teens become TikTok famous, and children promote toys on YouTube. Everybody with a social media account could potentially become an influencer. This is what makes influencer marketing so attractive, but difficult to regulate and enforce in an effective and fair manner. Traditional consumer protection laws were not designed to address marketing by “peers.” On social media, not only are the lines between original and sponsored content blurred, those between advertisement and the influencer’s self-promotion can also overlap. Some influencers may even endorse products without receiving compensation in hopes of attracting a brand’s attention and landing a lucrative endorsement contract later. Obviously, in such circumstances there is no “real” relationship between the brand and the SMI that could be disclosed. However, the question remains, whether such “wanna-be” SMI marketing needs to be labeled as advertisement. After all, the SMI does not promote the

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27 Especially among younger generations, see Emma Sweeney, Margaret-Anne Lawlor & Mairead Brady, Teenagers’ Moral Advertising Literacy in an Influencer Marketing Context, 41 INT’L J. ADVERT. 54, 70–71 (2022) (concluding that 15-17 year olds recognize influencer marketing but “are choosing not to retrieve and apply the knowledge”); see also Alice Audrezet and Karine Charry, Do Influencers Need to Tell Audiences They’re Getting Paid?, HARVARD BUSINESS REVIEW (Aug. 29, 2019), https://hbr.org/2019/08/do-influencers-need-to-tell-audiences-they’re-getting-paid (“In late 2018, 88% of consumers surveyed indicated their belief that influencers in general recommend brands because they are paid to do so, implying that people simply assume that influencers are brand-sponsored whether or not there is any disclosure.”).

product or brand because they genuinely like it, but because they hope to achieve commercial success.

B. Platforms and Formats

The most important social media platforms for influencer marketing are Instagram (93%), YouTube (48%), TikTok (68%), Twitter (32%), and Facebook (68%). The more followers an influencer has, the more money they can charge for their endorsement. Table 1 provides an overview of the six different influencer categories (excluding celebrities) and how much they can earn on the different platforms.29 Given these financial incentives, it is not surprising that a recent survey by toymaker Lego found that one-third of children between 8 and 12 aspire to be either a vlogger or a YouTuber.30

<table>
<thead>
<tr>
<th>Influencer Type</th>
<th># Followers</th>
<th>Instagram</th>
<th>Youtube</th>
<th>TikTok</th>
<th>Twitter</th>
<th>Facebook</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nano</td>
<td>1k-10k</td>
<td>10-100</td>
<td>20-200</td>
<td>5-25</td>
<td>2-20</td>
<td>25-250</td>
</tr>
<tr>
<td>Micro</td>
<td>10k-50k</td>
<td>100-500</td>
<td>200-1k</td>
<td>25-125</td>
<td>20-100</td>
<td>250-1.25k</td>
</tr>
<tr>
<td>Mid-Tier</td>
<td>50k-500k</td>
<td>500-5k</td>
<td>1k-10k</td>
<td>125-1.25k</td>
<td>100-1k</td>
<td>1.25k-12.5k</td>
</tr>
<tr>
<td>Macro</td>
<td>500k-1M</td>
<td>5k-10k</td>
<td>10k-20k</td>
<td>1.25k-2k</td>
<td>1k-2k</td>
<td>12.5k-25k</td>
</tr>
<tr>
<td>Mega</td>
<td>1M+</td>
<td>10k+</td>
<td>20k+</td>
<td>2.5k+</td>
<td>2k+</td>
<td>25k+</td>
</tr>
</tbody>
</table>

In 2018, 19% of all U.S. consumers, including 36% of those under 25 years old, purchased a product or service because it was recommended to them by an influencer.32 U.S. companies have realized this opportunity and 93% utilized some sort of influencer marketing in 2020.33 Research in the social sciences has argued and shown that influencers are more effective than traditional advertising,34 which is supported by leading business publications.

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32 Audrezet & Charry, supra note 27.
33 See Fertik, supra note 5.
Forbes, for instance, reports that “influencer marketing content delivers 11x better ROI than other more traditional marketing tactics.”

The most popular influencer partnerships are shoutouts, giveaways, platform takeovers, affiliated marketing, sponsored content, product seeding or gifts, or brand ambassadors. Table 2 provides examples of different influencer partnerships.

Table 2. Types of Influencer Partnerships

<table>
<thead>
<tr>
<th>Shoutout</th>
<th>Giveaway</th>
</tr>
</thead>
<tbody>
<tr>
<td>![Shoutout Image]</td>
<td>![Giveaway Image]</td>
</tr>
</tbody>
</table>

35 See Fertik, supra note 5.
<table>
<thead>
<tr>
<th>Platform Takeover</th>
<th>Affiliate Marketing</th>
<th>Sponsored Content</th>
</tr>
</thead>
</table>

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44:207 (2024)
Product Seeding or Gifts

Brand Ambassador

Business shoutouts are paid mentionings of companies, brands, products and/or services by influencers. Giveaways are typically short-term campaigns where influencers receive something of value from their business partner, which they can offer to their followers. This strategy drives traffic to both the influencer and the partner. Takeovers are most popular on TikTok, Instagram, and Snapchat and occur when companies or brands give an influencer control of one of their social media accounts. The influencer can then create content for the brand and send their own followers to the brand’s account. Affiliate marketing refers to an influencer promoting a brand’s product and getting a commission based on sales through the influencer’s platform(s). Sponsored content can take one of two forms. Companies or brands can either create content for influencers to share or ask them to create and post their own content for the company or brand, which is typically more costly. Product seeding or gifts, as the name implies, refer to providing an influencer with a product for free in hopes that they like it and share positive feedback on their social media account(s). This strategy typically works best for nano- and micro-influencers. Brand ambassadors agree to a long-term partnership with a company, brand, product or service, and are expected to create positive word-of-mouth.

It is important to be aware of these different formats. As further described in Part III, they have implications on how messages are processed (i.e., pictures vs. text); which kind of disclosures are most suitable; and which
reaction they trigger. For example, disclosure appearing before the brand is mentioned is likely to have a different effect than an ex-post disclosure. Courts, administrative agencies, and regulators that consider the effectiveness of certain disclosure techniques used by influencers, social media platforms, or sponsoring brands, will have to take these differences into account when making decisions. Disclosure requirements on Instagram must and already do look different than those on YouTube, where disclosures come in form of a static text overlay, stating “[t]his video is sponsored by (Brand name).” Furthermore, in all but one of these partnerships, the promotional effort takes place on the social media account owned by the influencer. This impacts responsibility for misleading content on the one hand, and the contractual relationship between influencer and sponsoring brand on the other. Only in the case of takeovers does the promotion take place on the account owned by the brand. This difference may also impact the way in which content is processed. Research shows that consumers generally respond more positively to stimuli appearing within a context they like, and they may be more skeptical of content featured on the brand’s account.36 This in turn creates variations as to the need for and effect of disclosure in various formats in light of the legal requirements discussed in Part II below.

II. THE LEGAL FRAMEWORK

SMI marketing raises various legal concerns, such as unfair competition,37 false advertising,38 the contractual arrangements among sponsoring brands, influencers, and intermediaries, trademark and copyright issues,39 defamation,40 privacy and publicity rights,41 and freedom of

37 In a statement released after an FTC settlement with cosmetics company Sunday Riley Modern Skincare over fake online reviews, Commissioner Chopra argued this “false advertising [was] an unfair method of competition,” and thereby criticized the FTC’s action for failing to address the conduct as an antitrust violation and not simply a consumer protection violation. Lee Roach, The FTC Expands Section 5 Enforcement Efforts With Potentially Broad Implications, FAEGRE DRINKER BIDDLE & REATH LLP (July 12, 2021), https://www.jdsupra.com/legalnews/the-ftc-expands-section-5-enforcement-7020931/.
38 For a false advertising case, see e.g., Colgate v. Jaul Labs, Inc., 402 F. Supp. 3d 728, 740 (N.D. Cal. 2019).
40 See generally Meaghan O’Connor, Defamation in the Age of Social Media: Why North Carolina’s “Micro-influencers” Should be Classified as Limited Purpose Public Figures, 42 CAMPBELL L. REV. 335 (2020).
41 See generally Grace Greene, Instagram Lookalikes and Celebrity Influencers: Rethinking the Right to Publicity in the Social Media Age, 168 U. PA. L. REV. ONLINE 153 (2020).
speech. At the center of our attention, however, is consumer protection and the need for, or lack of, disclosure for sponsored social media content.

A. Identification of the Legal Problem

Consumer protection laws in most countries, although to different degrees, have always protected consumers from misleading advertising. What is potentially misleading in SMI marketing, however, is not the communication about the properties of the product or service that is being advertised (though sometimes these are also misrepresented), but the SMI’s motivation for and honesty of their recommendation. This phenomenon, though exacerbated in SMI marketing, is nothing new. The ability to differentiate between advertising and editorial content has always been the main regulatory and self-regulatory principle in any form of advertisement. It applies to television or ads in printed media that in most countries need to be clearly marked as such. What is new about SMI marketing is that it is not the brand directly communicating to consumers, but a private third party communicating about the brand without disclosure of doing so. Traditional advertising laws do not address this kind of false advertisement by omission, nor are they designed to protect consumers from being misled by peers, who themselves may not fully understand the regulatory requirements. Accordingly, courts and administrative agencies have struggled to apply old-fashioned consumer protection laws to influencer marketing, and outcomes have been inconsistent at best. The following sections provide an overview of the state of the law applicable to SMI marketing in the United States and the European Union, with Germany as a specific example.

B. Section 5 of the FTCA and the role of the FTC in U.S. Consumer Protection Law

In the United States, Section 5 of the FTCA broadly prohibits “persons, partnerships, or corporations” from engaging in “unfair” or “deceptive” practices that affect commerce. The statute does not further define such practices. This task is left to the FTC, the main U.S. administrative body

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42 Freedom of speech was at issue, e.g., in Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107 (9th Cir. 2021).


44 We choose Germany as an example because at the time of this writing it stands out as a country with multiple court decisions including one by the highest domestic court and a recent reform of its unfair commercial practices statute that specifically addresses SMI.

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It is in this capacity that the Commission over the recent years has issued multiple guidance documents. Regarding SMI, the most important ones are its Guides that are published in the federal register. In addition to the Guides, the FTC has issued and occasionally updated an “Influencer 101” that targets SMIs, is shorter, easier to read, and, in its latest version, illustrated with visuals and accompanied by short educational videos.

1. History and legal nature of the Endorsement Guides

The FTC promulgated its first Endorsement Guide in 1972. Obviously, the first Guides did not anticipate the rise of SMI marketing but were geared towards celebrity endorsements and testimonials in other media. It was not until 2009 that the FTC published a revised version of the Guides that for the first time took SMI practices into account, but it remained vague and limited in scope. Finally, in July 2023 the FTC again published revisions to the Guides that now specifically address influencer marketing and significantly increase the requirements for when and how to disclose.

The Guides are not legally binding. What makes them important is the fact that they indicate to advertisers and influencers which commercial practices, representations or omissions, the Commission considers unfair or deceptive under section 5 of the FTC Act. Given the agency’s enforcement powers under section 5, the Guides reflect the FTC’s interpretation of when the FTC could make use of its authority. The resulting corrective actions include cease-and-desist letters, complaints, or administrative trials conducted by the FTC’s complaint counsel. These typically result in a settlement that requires brands to oblige endorsers to disclose their material connection with the brand, and to monitor that they effectively do so. Sometimes, but rarely, brands are ordered to pay a monetary award to compensate consumers who relied on the endorsement to buy a product.

46 Sections 5(a) and 12 of the FTC Act 15 U.S.C. § 45(a), 52. For an overview of the FTC’s historical development and authority see generally Harris, supra note 19.
49 See Harris, supra note 19, at 950 (arguing that the Guides “lack the necessary mechanisms for (1) detection, (2) deterrence, (3) education, and (4) compliance”).
50 16 CFR § 255.0 states: “The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.”
51 See In the Matter of UrthBox, Inc., https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3028-urthbox-inc-matter. The FTC’s so-called disgorgement authority has been heavily impeded by a 2021 Supreme Court decision in AMG Capital Management, LLC v. Federal Trade Commission, 141 S. Ct. 1341 (2021) in which the Supreme Court held that...
While the Commission cannot impose civil penalties based on the Guides, under section 5 the Commission has the power to sue private companies even if there is no evidence of injury to an actual or potential consumer (so-called “standalone section 5 authority”), so long as a commercial practice is deemed unfair or deceptive under the FTCA. Generally, plaintiffs other than the FTC do not have standing under the FTCA--thus making the FTC the main enforcer of section 5 while also limiting enforcement to the agency’s limited resources.

Due to the advisory nature of the Endorsement Guides, the FTC has the burden of proving that a particular practice was indeed “deceptive under the law,” a question to which we will turn later. Ultimately, it is in the purview of the judicial branch to decide what is considered “unfair” or “deceptive” under section 5, as losing parties may appeal a decision by the FTC. That being said, under the Chevron doctrine, courts will generally give deference to such administrative actions, unless the FTC’s action is considered


unreasonable under the doctrine, though the doctrine is currently being challenged in *Loper Bright Enterprises v. Raimondo* pending before the Supreme Court.\(^{56}\)

2. Development of FTC policy

In the early days of influencer marketing, the FTC governed with a light hand.\(^{57}\) Even today, despite the explosion of the social media influencer industry in the last decade, few formal complaints have been brought. Some early widely publicized SMI cases include a 2016 FTC administrative decisions against Lord & Taylor regarding a social media marketing campaign in which the department store paid fashion influencers for posting pictures of themselves wearing a “paisley dress” on Instagram during a prescribed period of time without disclosing their affiliation;\(^{58}\) a Cole Haan SMI campaign inciting customers to post pictures of Cole Haan shoes and the hashtag “#WanderingSole” to Pinterest for a chance to win a $1,000 shopping spree;\(^{59}\) or a complaint against Sony for falsely advertising PlayStation features and having employees promote their product without telling consumers their affiliation with the company.\(^{60}\)

Enforcement actions by the FTC usually target the sponsoring brands. At the close of 2022, the FTC has issued only one complaint against two individual influencers, but who at the same time were the owners of the endorsed brand – the online gambling service CSGO Lotto.\(^{61}\)

In 2017, in response to petitions from consumer protection associations that were concerned with the proliferation of SMI practices, the FTC “[a]fter reviewing numerous Instagram posts by celebrities, athletes, and other influencers, […] sent out more than 90 letters reminding [marketers, but this time also influencers][ that they] should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through

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\(^{56}\) Typically, “judicial deference is appropriate where the agency’s answer was not unreasonable, so long as the Congress had not spoken directly to the precise issue at question.” *Chevron Deference*, LEGAL INFORMATION INSTITUTE (Jonathan Kim ed., 2017) https://www.law.cornell.edu/wex/chevron_deference.

\(^{57}\) See Carpenter & Bonin II, supra note 15, at 255-56 (noting “the FTC’s enforcement authority and available penalties for first-time offenders are minimal”).


social media.\textsuperscript{62}

In 2020, the agency declared that it was determined to “crack down” on false online reviews and non-disclosure in the SMI space. In a statement then commissioner Rohit Chopra announced that in light of the “misinformation [that] is plaguing the digital economy [...] the FTC will need to determine whether to create new requirements for social media platforms and advertisers and whether to activate civil penalty liability,” sending shock waves through the SMI community.\textsuperscript{63} The announcement also suggested “[d]eveloping requirements for technology platforms (e.g. Instagram, YouTube, and TikTok) that facilitate and either directly or indirectly profit from influencer marketing;” and “[s]pecifying the requirements that companies must adhere to in their contractual arrangements with influencers, including through sample terms that companies can include in contracts.” This declaration combined with the aforementioned cease-and-desist letters, and a slight increase in enforcement actions since 2017 indicate a shift in FTC policy that culminated in the most recent revision of the FTC Endorsement Guides. The major changes to the Guides are summarized in the following section.

Though most enforcement actions in the United States are based on section 5 of the FTC and target sponsoring brands, there occasionally is some overlap with other agencies, such as the Food and Drug Agency (FDA) in cases where SMIs endorse health products or drugs.\textsuperscript{64} In 2022, the Security and Exchange Commission (SEC) charged Kim Kardashian for promoting a crypto currency on her Instagram account without disclosing the $250,000 she received for the promotion. Kardashian agreed to settle the charges, pay $1.26 million in penalties, disgorgement, and interest, and cooperate with the SEC on the ongoing investigation.\textsuperscript{65}

3. Content and revisions to the Endorsement Guides

Though it is beyond the scope of this article to review the FTC Endorsement Guides in detail, this section provides an overview of FTC guidance on SMI’s disclosure obligations and highlights the most important revisions in the new Guides.


\textsuperscript{64} See generally Martínez-Guasch, supra note 52.

\textsuperscript{65} Hayes Brown, \textit{Why the SEC is Right to Make an Example of Kim Kardashian}, msnbc.com (Oct. 4, 2022) (noting that this case concerns crypto currency which qualifies as security and therefore falls under much stricter securities regulation than other forms of influencer marketing with enforcement by the Securities and Exchange Commission (SEC) as opposed to the FTC).
The Guides provide specific guidance for endorsements made by consumers (so-called “testimonials”), experts, and organizations. In addition, the new Guides indicate that an endorser may “simply appear” to be an endorser - a modification that is geared towards fabricated endorsers.66 Under the revised Guides, endorsement, is defined as “any advertising, marketing, or promotional message for a product 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.”67 The revisions clarify that tags in a social media post would constitute endorsements and therefore require disclosure.68

According to § 255.5 of the old Guides, connections between advertisers and endorsers “that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience),” needed to be “fully disclosed,” but did not specify what is considered “full disclosure” other than referencing an example and requiring disclosure to be “clear and conspicuous.”70 This lack of specification was a contentious topic in the review of the Guides. Some commentators asked the FTC for more and regularly updated guidance on “acceptable and unacceptable language and placement for disclosures of material connections and their use on particular platforms.”71 Others argued that marketers should be allowed flexibility in how and where to disclose such affiliation and hence recommended the Guides focus on “general principles.” In response to this criticism, the Commission, while following the “general principles” approach, added a footnote to § 255.0(b) that cross references detailed, non-binding staff business guidance and that will be updated more frequently than the Endorsement Guides themselves, to take quickly changing SMI practices into account.72 The revised § 255.5 further omits the ambiguous term “fully disclose” and instead specifies that “[a] disclosure of a material connection does not require the complete details of the connection, but it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.”73 § 255.5 also specifies that “[a] material connection needs to be disclosed when a

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66 16 C.F.R. § 255.0(b) (2023).
67 Id.
68 Id.
70 See id.
71 See Proposed Guides supra note 5, at IV.A. (citing CRN at 2–4; Pharmavite at 1–2; PMA at 2; and Anna Keltner at 3).
72 See id. (citing various comment letters).
73 16 C.F.R. § 255.5(a) (2023).
significant minority of the audience for an endorsement does not understand or expect the connection.” 74 and a new § 255.6 provides specific rules for SMI marketing directed to children. 75

While the revised Guides are more tailored to SMI practices, it still remains unclear under which circumstances SMIs will need to disclose—in other words, when the FTC will consider a connection between an SMI and a sponsoring brand material. The FTC, in the revised § 255.5, tries to provide guidance through a list of non-exhaustive examples. 76 “Material connection,” in the old Guides was defined as a connection that “is not reasonably expected by the audience.” 77 The revised Guides hold on to this definition, and § 255.5 now reads: “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 and that connection is not reasonably expected by the audience, such connection must be disclosed.” 78 In light of wide-spread consumer expectation that not only celebrity endorsements but also testimonials are being paid for by companies, the “reasonable expectation” criterion seems problematic. 79 A comment to the proposed Guides asking the FTC to at least recognize this fact was quickly dismissed. 80 Instead, the Commission added the phrase “that an endorser’s material connection need not to be disclosed when it is understood or expected by all but an insignificant portion of the audience.” 81 Does this mean that once the general public expects endorsements to be sponsored, disclosure becomes obsolete? It sounds like the logical consequence, but it is arguably not what the FTC had in mind when revising § 255.5. On the contrary, the agency seems to assume that consumers in general will NOT expect a connection between endorser and sponsoring brand, otherwise it would not have formulated this scenario as the exception to the rule. The list of connections that the FTC considers to “materially affect the weight or credibility of the endorsement,” and therefore triggers a disclosure obligation under the revised § 255.5 is extensive. It includes “a business, family, or personal relationship; monetary payment; the provision of free or discounted products or services to the endorser, including products or services unrelated

74 Id.
75 16 C.F.R. § 255.6 (2023).
76 See 16 C.F.R. § 255.5(a) (2023).
77 Id.
78 Id.
79 See Audrezet & Charry, supra note 27 (“In late 2018, 88% of consumers surveyed indicated their belief that influencers in general recommend brands because they are paid to do so, implying that people simply assume that influencers are brand-sponsored whether or not there is any disclosure.”); Contra Karagür et al., How, Why, and When Disclosure Type Matters for Influencers, 39 Int’l J. of Rsch. in Mkgt. (2022) (citing Firsching & Bersch, 2016 (“consumers tend to believe that influencers are acting personally rather than on behalf of brands.”)).
80 Proposed Guides, supra note 54, at IV.F. (citing NRF at 4).
81 16 CFR § 255.5(a) (2023).
to the endorsed product; early access to a product; or the possibility of winning a prize, of being paid, or of appearing on television or in other media promotions.” According to the new language, a material connection would exist even if the advertiser does not require an endorsement in exchange for renumeration or free or discounted products.82

According to § 255.1 of the old Guides, the advertiser was responsible for the disclosure of unexpected material connections. The new Guides expand that obligation to endorsers themselves,83 and to intermediaries such as marketing and public relations firms, who either fail to make disclosures themselves or fail to direct endorsers to make the necessary disclosures when they post on social media.84 This indicates a remarkable shift in FTC enforcement policy that would bring it closer to the European approach discussed in Part II.C. However, in practice, it seems unlikely that the change will lead to increased enforcement against individual influencers. Given the FTC’s limited resources, the agency will have to continue to carefully choose those enforcement actions that have the most deterrent effect, and this might not be claims against small unknown SMIs.

If the Commission’s review of its Guides leads to increased enforcement, or if the agency considers imposing civil penalties or disgorgement actions,85 courts may have a bigger role to play in interpreting section 5 of the FTCA. Public debate may also prompt the legislator to re-evaluate section 5 in the ear of SMI marketing. A key question that courts and regulators will need to answer is whether the FTC’s interpretation of “fairness” and “deception” that permeates its Endorsement Guides can be considered a reasonable interpretation of section 5 under the Chevron doctrine. It is to this question that we turn in the following parts. We will first analyze the meaning of the terms unfair and deceptive practices under section 5, then consider how findings on disclosure effectiveness should influence the legal interpretation of SMI practices under section 5.

4. Unfair and Deceptive Practices under Section 5 of the FTCA

In a 1980 policy statement, the Commission identified the following three factors that still guide its decisions on whether a commercial practice is unfair to consumers and that are equally relevant for SMI marketing: “(1) whether the practice [potentially] injures consumers;86 (2) whether it violates

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82 Id.
84 16 C.F.R. § 255.1(f) (2023).
85 See Harris, supra note 19, at 972–73 (claiming that disgorgement and civil penalties are necessary deterrence methods for the FTC).
86 There does not need to be proof of actual injury, See Letter from Michael Pertschuk, Chairman, FTC, et al., to Wendell H. Ford, Chairman, Committee on Commerce, Science, and Transportation, & John C. Danforth, Chairman, Committee on Commerce, Science, and Transportation, FTC Policy Statement on Unfairness (Dec. 17. 1980), [Hereinafter FTC Policy
established public policy; (3) whether it is unethical or unscrupulous.” 87 The document further explains each of these factors, which were confirmed by the Supreme Court in its decision in Sperry & Hutchinson (S&H). 88 Hence, the question is whether SMI marketing as it is practiced today can be qualified as either unfair or deceptive under the FTC’s own definition, to justify administrative enforcement by the FTC along the parameters expressed in the Endorsement Guides.

Regarding the first unfairness criterion, the FTC policy document states that “[u]njustified consumer injury is the primary focus of the FTC Act, and the most important of the three S&H criteria.” 89 Consumer injury “by itself can be sufficient to warrant a finding of unfairness” under section 5. 90 Accordingly, any SMI marketing campaign that results in consumer injury could be considered unfair under section 5. However, the document also indicates that not:

very consumer injury is legally ‘unfair’…To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided. 91

Substantial injury according to the FTC includes “monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services.” 92 If the harm is small but affects many people, the guidance would also qualify such harm as substantial. Hence, the decisive question is if SMIs “coerce consumers into purchasing unwanted goods”, or otherwise cause substantial harm to individual or a large group of consumers. 93 Most legal commentary seems to assume that SMI marketing leads consumers to buy products they would not buy otherwise and as such causes financial harm. However, extensive marketing research, which we will discuss in detail in part III, says otherwise.

If anywhere, SMI related unfair practices rather fall into the public policy category of S&H. Though this criterion is mostly used in addition to consumer injury, according to the FTC policy statement it can be used to “help the agency ascertain whether a particular form of conduct does in fact tend to harm consumers.” 94 The FTC policy further states that “[t]o the extent

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87 Id.
88 See id. (citing FTC v. Sperry & Hutchinson C., 405 U.S. 223, 244–45 n.5 (1972)).
89 FTC Policy Statement on Unfairness, supra note 86.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
that the Commission relies heavily on public policy to support a finding of unfairness, the policy should be clear and well-established. In other words, the policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values.\footnote{Id.} In the absence of legislation and court decisions regarding SMI marketing, no such general policy yet exists.

Finally, the third S&H element is rarely used by the FTC because it is considered duplicative of the two others. The FTC policy document assumes that “[c]onduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well.”\footnote{Id.}

While the terms that define unfair practices and deceptive practices overlap,\footnote{See Martinez-Guasch, supra note 52, at 409 (citing In re Figgie Int’l, 107 F.T.C. 313, 373 (1986) (noting the differences between unfair practices and deceptive practices).} the FTC considers a representation, omission or practice deceptive under section 5 if it is (1) likely to mislead a reasonable consumer, and (2) is material. “Material” is defined as “likely to affect the consumer’s conduct or decision with regard to a product or service.”\footnote{See Letter from James C. Miller III, Chairman, FTC, to John D. Dingell, Chairman, Committee on Energy and Commerce, FTC Policy Statement on Deception (Oct. 14, 1983), [hereinafter FTC Policy Statement on Deception], https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.} This criterion again raises the question if non-disclosure of the relationship between a SMI and the sponsoring brand indeed does affect consumer choices in the way that FTC policy and the recent legal discussion surrounding influencer marketing suggests, or if psychological decision-making processes that we will discuss in part III work in a different way that would not support “materiality” under section 5.

\section*{C. The European Approach}

The regulation of SMI marketing is an equally controversial topic in the European Union. The ways the EU regulators and individual EU member states address SMI marketing are in some parts equivalent to the U.S. approach but differ strikingly in others. The following parts give an overview of EU regulation that addresses SMI marketing and highlights some of the differences in regulation and enforcement between the United States and individual EU member States.

\subsection*{1. SMI and European consumer protection law}

As in the United States, no specific legislation regulates influencer marketing at the European Union level. Consumer fairness was at the center of a regulatory overhaul of EU consumer protection law—the so-called “New...
Deal for Consumers”—that lead to the adoption of the Directive on better enforcement and modernization of EU consumer protection in 2018. While the Directive includes provisions on transparency on online marketplaces and consumer reviews, it does not cover SMI disclosure requirements and related legal issues specifically. However, similarly to section 5, misleading commercial practices have long been prohibited in the European Union under the Unfair Commercial Practices Directive (UCPD). The EU Directive is much more specific than its U.S. counterpart, which is not surprising. Specifications under section 5 of the FTCA are left to the FTC, whose role is different from consumer protection agencies in many EU member states and whose guidance documents complement the otherwise sparse section 5 of the FTCA. Eu regulation, on the other hand, has been heavily influenced by civil law countries that make up the majority of EU member states. The legal systems of these countries rely heavily on guidance by the legislator through high level rules. Accordingly, Art. 7 of the UCPD, while more detailed than section 5 of the FTCA, nevertheless remains more abstract than the terms of the FTC Endorsement Guides. As a so-called directive, the UCPD provides a common minimum standard for EU regulation. It needs to be—and has been—transformed into domestic law by all EU member states.

To date, most EU member states use their unfair commercial practices laws to combat unfair SMI practices. In addition, some SMI practices are

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covered by media law.\textsuperscript{104} However, very few of those laws include SMI specific provisions but instead remain very broad and applicable to all forms of advertising including SMI.\textsuperscript{105} Typically, they create some kind of disclosure obligations for “paid”—although defining that is not always clear—endorsements of brands by SMIs. What type of communication and what relationship between SMI and brand specifically triggers the disclosure obligation, and what the disclosure should look like, is usually not covered in the domestic unfair commercial practices laws.

To name just a few examples, in Spain it is an illegal practice to conceal a partnership.\textsuperscript{106} According to Finnish law, “[m]arketing shall clearly indicate its commercial purpose and on whose behalf the marketing is being carried out.”\textsuperscript{107} Though this is a broad provision that is not SMI specific, it is accompanied by a remarkably clear guidance document issued by the Finnish Consumer Ombudsman in 2019.\textsuperscript{108} Italy, the Netherlands, and the United Kingdom are using a system that is essentially based on industry self-regulation. However, once an influencer has signed the voluntary code of conduct, it becomes legally binding upon them.\textsuperscript{109} In Belgium, paid influencers are considered media service providers under Belgium media law, who “need to make commercial communications recognizable as such.”\textsuperscript{110}

In 2021, the German legislature passed a law that updates the existing German Consumer Protection Act (UWG) in order to address—among other issues—SMI marketing.\textsuperscript{111} The German law is the most SMI specific regulation in Europe to date. However, even this updated statute does not

\textsuperscript{104} See generally on German law, Radtke, supra note 53 and Hans-Jürgen Ahrens, Influencer Marketing-Regulierungsrahmen und Konsequenzen seiner Anwendung (Teil 1), 120 GEWERBLICHER RECHTSCHUTZ UND URHEBERRECHT 1211 (2018) (Ger.).


\textsuperscript{106} Id.


\textsuperscript{109} See Riefa & Clausen, supra note 94, at 69–70 (describing enforcement actions). A similar approach is part of the German UWG in section 5 (2) 6 (dealing with codes of conduct).


\textsuperscript{110} Id. The Belgian approach avoids the pitfalls of consumer protection law discussed supra Section II.B.2.

provide detailed guidance to influencers or advertisers. It is a reaction to the uncertainty that had been caused by a series of conflicting court decisions by lower German courts, some of which had put a heavy burden on SMIs and led to “a scenario of ‘over-compliance’ with almost every influencer post being labeled as advertisement.” This is in stark contrast to the reality of SMI disclosure in the United States and exemplifies the unwanted consequences of increased disclosure requirements. Today, the most interesting provision in the new German law might be UWG subsection 5a of section 4, which stipulates:

A person also acts unfairly if they fail to disclose the commercial purpose of a commercial act, unless this purpose is immediately apparent from the circumstances and the failure to disclose is likely to cause the consumer or other market participant to take a commercial decision that they would not otherwise have taken. A commercial purpose does not exist in the case of an act for the benefit of another company if the person does not receive any payment or similar consideration for the act from that company or does not receive promise of such consideration. The receipt or promise of consideration is presumed, unless the acting person makes a prima facie case that they did not receive such consideration.

While the first two sentences do nothing more than transpose Art. 7 of the UCPD, which will be discussed in the following section, the last sentence is unique and clearly targets SMIs. It also underscores the differing focus in SMI related enforcement, which under German law and contrary to previous FTC practice, seems to concentrate on, or at least include, individual influencers. While FTC enforcement primarily targets marketers and well-known influencers with a big follower base, the German cases mentioned above were civil claims brought by a German consumer protection association against one famous person (the spouse of a German soccer star) but also against less famous influencers with smaller follower bases. The lawsuits resulted in diametrical opposing decisions by lower courts that

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112 Reed Smith 2020. See also Stanislaus Jaworski and Viktoria Kraetzig, GEWERBLICHER RECHTSCHUTZ UND URHEBERRECHT 302, 304 (2020) (arguing that over-compliance may be just as misleading as a lack of disclosure).

113 In 2020, only 14% of U.S. influencers were fully compliant with legal guidelines requiring disclosure, see Influencer Marketing Hub, The State of Influencer Marketing 2020: Benchmark Report, Feb. 8, 2022, influencermarketinghub.com, presumably because 28% of influencers were requested by their sponsoring brands not to disclose the partnership, see Audrezet & Charry, supra note 27.

114 Translation provided by the authors based on and adapted from www.DeepL.com/Translator (free version).

115 Though the first influencer case was directed against a marketer, see Ahrens, supra note 104, at 1213 (citing OLG Celle, 119 GRUR 2018, 11558=MMR 2017, 769 mit Anm. Sobottkal/Czernik – Hashtag #ad) (Ger.).
ultimately led to a decision by the highest German court in civil matters.\footnote{16} The German example illustrates a very different enforcement approach than that of the FTC and exemplifies a higher degree of legal scrutiny in at least some European countries compared to the United States.\footnote{17}

With the proliferation of specific SMI rules in individual EU member states, advertisers and influencers are exposed to different country-specific rules that become increasingly difficult to navigate. Accordingly, the EU regulator is considering the need for the European Union to enact new rules. In 2022, the European Commission launched a so-called “regulatory fitness check of EU consumer law on digital fairness.”\footnote{18} The public consultation closed on February 20, 2023. Until a more SMI specific framework emerges, the UCPD will continue to guide European consumer protection law including, but not limited to, SMI marketing and will be discussed in the following sections.

2. Materiality and transactional decision-making under Art. 7 of the UCPD

All current domestic consumer protection laws reflect the provisions of the UCPD. Per EU rules, domestic European laws may go beyond the standard prescribed by the UCPD, but they will always have to be interpreted in light of the directive.\footnote{19} The EU provision most relevant to SMI marketing is Art. 7 of the UCPD, which in paragraph 1 states:

A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.\footnote{20}


\footnote{17} So-called principle of harmonious interpretation, see Thomson Reuters Practical Law: Glossary, \textit{Indirect Effect (EU)}, thomsonreuters.com (last visited Apr. 30, 2023).


\footnote{19} Osborne Clarke, \textit{France leads on specific regulation for influencers and the EU may follow}, Lexology (Jan. 24, 2023), https://www.lexology.com/library/detail.aspx?g=5db6c3b6-e647-44bb-840c-4692083be902 (summarizing the main points of the French legislative proposal).

\footnote{20} UCPD, \textit{supra} note 102, Art. 7.
The text is reminiscent of FTC materiality; however, in Art 7 (1) of the UCPD, materiality refers to information that a consumer needs in order to make an “informed transactional decision.” This may include information on the nature of the relationship between endorser and sponsoring brand – as long as this information is indeed “needed” to make an “informed transactional decision.” Otherwise, the EU terminology is much broader than materiality in the FTC Endorsement Guides. The FTC Guides barely mention the disclosure’s effect on consumers’ “informed transactional decision making” that is at the heart of Art. 7 (1) UCPD. It is the connection between endorser and sponsoring brand that according to § 255.5 Endorsement Guides needs to be “material” to trigger the disclosure requirement. This is a fundamentally different perspective. That being said, while the Endorsement Guides are silent on this matter, section 5 of the FTCA does require that the unfair practice in question “causes or is likely to cause substantial injury to consumers.” Accordingly, for the FTC to substantiate any enforcement action under section 5 of the FTCA, the agency would need to prove that the non-disclosure of a material connection “caused or is likely to cause substantial injury.” We would argue that “a transactional decision that [a consumer] would not have taken otherwise” per Art. 7 (1) of the UCPD, may satisfy this requirement. Hence, section 5 of the FTCA and § 255.5 Endorsement Guides taken together have a similar effect as Art. 7 (1) of the UCPD. In conclusion, the terms of section 5 of the FTCA and its interpretation through the FTC Endorsement Guides and Art. 7 of the UCPD differ. However, depending on how they will interpret these differing terms, European courts and the FTC may come to similar results.

However, both, the terms and interpretation of section 5 of the FTCA and Art. 7 (1) of the UCPD involve whether SMI practices in general are likely to distort the transactional behavior of consumers. This is a difficult question that has been insufficiently addressed in both jurisdictions. It involves psychological processes that will be discussed in part III. In the EU context, contrary to section 5 of the FTCA that requires consumer injury, the concept of transactional decision making is interpreted broadly. It extends, for example, to the decision to enter a store. Nevertheless, Art. 7

121 Id. Art. 7(1).
122 FTCA, supra note 45, at § 5. 
123 UCPD, supra note 102, Art. 7 (1).
124 See generally Riefa & Clausen, supra note 101.
125 See supra Section II.B.4.

See also UCPD Art. 2 (k) (defining “transactional decision” as “any decision taken by a
(2) of the UCPD specifies that no disclosure is needed if the commercial intent is “already apparent from the context.” Recital 6 of the UCPD further states that “this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers’ perceptions of products and influence their behavior without impairing the consumer’s ability to make an informed decision.” Accordingly, part III will also compare current SMI practices to these so-called “established marketing practices” to determine whether common SMI practices indeed influence consumers’ transactional decisions in ways that differ from these so-called accepted “established practices.”

3. SMI as commercial practice

Unlike the FTC Endorsement Guides, the UCPD does not specify the means of disclosure, other than recognizing the communication medium’s limitations. This is especially relevant for SMI campaigns, which often are taking place on platforms with space restrictions such as Twitter or Instagram. The lack of specification is partially a result of the directives’ legal nature, but also because the UCPD, like the FTCA, predates the rise of SMI marketing. With more and more countries introducing their own specifications on how SMIs should communicate with consumers, the lack of harmonization becomes increasingly difficult to navigate for influencers and brands whose activities span across countries.

While FTC guidance focuses on the disclosure modalities regarding the material connection between endorser and sponsoring brand, Art. 7 UCPD focuses on disclosure of the commercial nature of the communication. Art. consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting”.

127 UCPD, supra note 102, Art. 7 (2).
128 UCPD, supra note 102, at Recital 6.
129 See id. at 5–6 (stating that reduction of information asymmetries is the foundation of EU consumer protection paradigm despite a growing body of literature that “has exposed the limitations of such paradigm,” citing Ex multis, Omri Ben-Shahar and Carl E Schneider, MORE THAN YOU WANTED TO KNOW. THE FAILURE OF MANDATED DISCLOSURE (2014)).
130 See Ducato, supra note 126, at 7 (citing Case C-562/15 Carrefour Hypermarchés SAS v. ITM Alimentaire International SASU (2017) ECLI:EU:C:2017:95, § 37).
131 UCPD, supra note 102, Art. 7 (3) states: “Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.”
132 Id. Art. 7, para. 2 reads: “It shall also be regarded as a misleading omission when . . . a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he
2 (d) UCPD defines commercial practice as “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.” Per Art. 2 (b), “trader” means “any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.” The latter extends the Directive’s requirements to SMIs as long as their promotional activities are “directly connected with the promotion, sale or supply of a product to consumers.” In addition, Annex I of the Directive enumerates “commercial practices which are in all circumstances considered unfair.” Such practices include advertorials and “[f]alsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.” In 2021, following the adoption of the EU “New Deal,” the European Union published a notice that clarifies only some of the contentious legal issues surrounding influencer marketing. The notice, which like the FTC Endorsement Guides is not legally binding, provides guidance to marketers, influencers and domestic courts in the European Union on the application of the UCPD to current SMI practices. It essentially represents the view of the European Court of Justice as it refers to the few decisions issued by the Court in the matter, but it lacks the specificity of the revised FTC Endorsement Guides on where and how influencers and marketers are expected to disclose.

Most importantly, the notice stipulates that influencers, despite the fact that they typically are not selling the product or service they advertise, could be considered “traders” under the UCPD. It enumerates SMI practices that would not have taken otherwise.”

133 Id. Art. 2 (d) (emphasis added). It could be argued that under Art. 2 UCPD, even if the SMI does not receive compensation, a connection between a social media post and the sale of goods may still exist if “the post has a so-called “advertising surplus.” Radtke, supra note 53, at 150.

134 UCPD, supra note 102, at Annex 1.

135 Id. at Annex I 11 (defined as “[u]sing editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer”).


137 Id. (referencing sect. 2.2 that states that SMIs “could qualify as trader if they engage in such practices on a frequent basis, regardless of the size of their audience. Alternatively, in case the persons do not qualify as traders, they could nevertheless be considered to act ‘on behalf of’ the trader whose products are promoted by the practice and therefore fall within the scope of the Directive. The obligations to be clear about the commercial communication, in
could be considered misleading practices under Articles 6 and 7 UCPD “including paid posts, affiliate content (e.g. influencer shares a discount code or link to their audience for a commission fee), retweets or tagging the trader/brand.” Finally, it specifies that Annex I (11) and (22) that deal with commercial practices which are in all circumstances considered unfair shall apply to influencers. While Annex I (11) refers to paid promotions, (22) stipulates that “[f]alsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession” always qualifies as misleading commercial practice. The latter has been interpreted in the literature as a requirement for SMIs always to disclose the commercial nature of their communication independent from the existence of a causal relationship between the SMI practice and the consumer’s transactional decision. However, this interpretation has not (yet) been vetted by the ECJ. If adopted, it would stand in stark contrast to FTC policy. Regarding current U.S. law, we would argue that such extensive disclosure requirement would be beyond the scope of section 5 of the FTCA, which clearly does require injury and contrary to EU law, does not provide for a list of commercial practices that are always considered deceptive or unfair.

Accordingly, we would argue that depending on the interpretation of Articles 6 and 7 UCPD, but at least under current U.S. law, non-disclosure of a commercial relationship between SMI and sponsoring brand can only be qualified as misleading if there is proof of a causal relationship between the non-disclosure and the consumer’s transactional decision. The following part reviews marketing studies to answer the question what – if any – effect SMI marketing has on consumers’ decision-making and therefore would require disclosure under current laws. A second related question is what effect such disclosure has on consumers’ purchase intentions. In other words, if SMIs were to disclose their relationships with brands more honestly, would that disclosure affect consumers’ purchase intentions as negatively as SMIs and brands seem to assume?

III. INSIGHTS FROM MARKETING RESEARCH

To answer these questions, we first look at the psychological process that takes place in the consumer’s mind when exposed to an influencer...
message. It is a combination of influencer and consumer characteristics that make SMI such a potentially powerful tool. Which of these characteristics is key in the transactional decision process depends on the social media context, implying that disclosure effects would not be uniform across different SMI formats. We then analyze the role and impact of disclosure on this process. The transactional decision, that is purchase intention or actual purchases by consumers, is the main behavior to analyze, especially from the U.S. legal perspective. However, apprehending other consumer reactions, such as brand attitude and brand recognition, are also of importance for sponsoring brands (but are largely absent from the legal debate).

A. The Impact of SMI on Consumers

SMI marketing involves a persuasion process in which a source (influencer) tries to shape the opinions, attitudes, and/or behaviors of receivers (followers). The effectiveness of SMI marketing is typically measured in terms of advertising recognition, brand awareness, and brand recall,\(^{141}\) attitude towards the ad and/or brand,\(^{142}\) engagement (i.e., likes,


comments, revisit intentions, and purchase intentions.

Previous literature in marketing has identified several factors that have a positive impact on these outcome variables. These can be classified into three categories. The largest set of variables relates to the source (influencer), such as likeability, familiarity, credibility, trustworthiness, attractiveness, authenticity, interactivity, sincerity, fit with the brand, fit with the followers, or language closeness and concreteness. For instance, studies find that the physical attractiveness of the SMI, among other factors, increases purchase intention. However, the effect of attractiveness and other factors in SMI marketing depends on the context. For example, the physical attractiveness of the SMI is more likely to influence purchase intentions for beauty products as opposed to automotive parts. Furthermore, these factors play a different role depending on whether the persuasion process is based on opinion leadership or a parasocial relationship (i.e., one-sided and non-reciprocal relationship between influencer and followers). In the former case,

143 See generally, e.g., Maximilian Hee Gerrath and Bryan Usrey, The Impact of Influencer Motives and Commonness Perceptions on Follower Reactions Toward Incentivized Reviews, 38 INT’L J. RESEARCH IN MKTG. 531 (2021); Hughes et al., supra note 34; Yan Shan, Kuan-Ju Chen, and Jhih-Syuan Lin, When Social Media Influencers Endorse Brands: The Effects of Self-Influencer Congruence, Parasocial Identification, and Perceived Endorser Motive, 39 INT’L J. ADVERT. 590 (2020).

144 See generally, e.g., Priska Linda Breves, Nicole Liebers, Marina Abt, and Annika Kunze, The Perceived Fit Between Instagram Influencers and The Endorsed Brand: How Influencer–Brand Fit Affects Source Credibility and Persuasive Effectiveness, 59 J. ADVERT. RESEARCH 440 (2019); Hayes et al., supra note 142; Ki & Kim, supra note 142; Lee & Watkins, supra note 142; Schouten, et al., supra note 142; Janssen & Verspaget, supra note 142; Karina Sokolova and Hajar Kefi, Instagram and YouTube Bloggers Promote It, Why Should I Buy? How Credibility and Parasocial Interaction Influence Purchase Intentions, 53 J. RETAILING & CONSUMER SERVICES 101742 (2020); Torres et al., supra note 142.

145 See generally, e.g., Breves et al., supra note 144; Jin et al., supra note 142; Jun & Yi, supra note 142, Jung Ah Lee and Matthew S. Eastin, I Like What She’s #Endorsing: The Impact of Female Social Media Influencers’ Perceived Sincerity, Consumer Envy, and Product Type, 20 J. INTERACTIVE ADVERT. 76 (2020); Michael T. Lee and Carol Theokary, The Superstar Social Media Influencer: Exploiting Linguistic Style and Emotional Contagion Over Content?, 132 J. BUS. RESEARCH 860 (2021); Chen Lou, Sang-Sang Tan, and Xiaoyu Chen, Investigating Consumer Engagement with Influencer-v.s. Brand-Promoted Ads: The Roles of Source and Disclosure, 19 J. INTERACTIVE ADVERT. 169 (2019); Chen Lou and Shupei Yuan, Influencer Marketing: How Message Value and Credibility Affect Consumer Trust of Branded Content on Social Media, 19 J. INTERACTIVE ADVERT. 58 (2019); Essi Pöyry, Matilde Pelkonen, Emma Naumanen and Salla-Maaria Laaksonen, A Call for Authenticity: Audience Responses to Social Media Influencer Endorsements in Strategic Communication, 13 INT’L J. STRATEGIC COMM. 336 (2019); Torres et al., supra note 142.

146 See, e.g., Pöyry et al., supra note 145, at 344 (2019) (noting “Both perceived authenticity and attractiveness had a positive relationship with purchase intentions”).

147 Lou Chen and Hye Kyung Kim, Fancying The New Rich and Famous? Explicating the Roles of Influencer Content, Credibility, and Parental Mediation in Adolescents’ Parasocial Relationship, Materialism, and Purchase Intentions, 10 FRONTIERS IN PSYCHOLOGY 1 (2019) (noting “Audiences often know the media personae well whereas the latter has little knowledge about the former”).

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followers would rather seek factual information, rendering physical attractiveness of the influencer less important. In the latter case, relational connection is key, and therefore social attractiveness – a key driver of the strength of the parasocial relationship– is likely to gain in importance. In this context, though beyond the scope of this article, a recent change to the Norwegian Marketing Act is remarkable. The amendment, which went into effect in 2022, requires advertisers (including SMIs) in Norway to label photos that have been retouched prior to being posted on social media and hence could falsely influence viewer’s perceptions of the SMI’s appearance. It will be interesting to observe if this change will have an impact on customers’ perceptions of certain SMIs and influence purchase intentions.

A second set of variables relates to the receiver (follower), such as online interaction propensity, empathy, self-esteem, or attachment. For instance, a 2018 study shows that empathy and low self-esteem have a positive impact on purchase intentions and electronic Word Of Mouth (eWOM). A third set of variables relates to the content provided by the SMI, such as originality, uniqueness, quality and quantity. In this respect, people have been found to be more likely to unfollow SMIs if they post too many advertisements. Marketers need to take all these variables into account when developing successful social media campaigns, as do

148 Torres et al., supra note 142, at 1267 (2019) (noting “The results show that both brand attitudes and purchase intentions are influenced by the digital influencer’s attractiveness”).


150 See generally, e.g., Kumju Hwang and Qi Zhang, Influence of Parasocial Relationship Between Digital Celebrities and their Followers on Followers’ Purchase and Electronic Word-of-Mouth Intentions, and Persuasion Knowledge, 87 COMPUTERS IN HUMAN BEHAVIOR 155 (2018); Chung-Wha Ki, Leslie M. Cuevas, Sze Man Chong, and Heejin Lim, Influencer Marketing: Social Media Influencers as Human Brands Attaching to Followers and Yielding Positive Marketing Results by Fulfilling Needs, 55 J. RETAILING & CONSUMER SERVICES 102133 (2020); Ki & Kim, supra note 142.

151 Hwang & Zhang, supra note 150 (noting “(…) partial mediation effects of parasocial relationships were observed on the relationship between empathy and purchase intention and between empathy and eWOM intention, and full mediation effects of parasocial relationships were observed on the relationship between low social self-esteem and purchase intentions and between low social self-esteem and eWOM intentions”).

152 See generally, e.g., Casaló, Luis V., Carlos Flavián, and Sergio Ibáñez-Sánchez, Influencers on Instagram: Antecedents and Consequences of Opinion Leadership, 117 J. BUS. RESEARCH 510 (2020); Elmira Djafarova and Oxana Trofimenko, ‘Instafamous’—Credibility and Self-presentation of Micro-Celebrities on Social Media, 22 INFORMATION, COMM. & SOC’Y 1432 (2019), Ki & Kim, supra note 142.

153 Djafarova & Trofimenko, supra note 152, at 1439 (2019) (noting “Some respondents stated that they prefer not to see direct advertising on Instagram profiles and often ‘unfollow’ the account which they deem to have too many advertisements”).
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regulators and courts that are trying to mediate unfair SMI practices through disclosure requirements.

B. The Impact of Disclosures on the Effectiveness of SMI

Consumer protection laws intend to protect consumers from making a purchase decision based on false or – in the context of SMIs – missing information. Accordingly, disclosures of sponsored content need to be shown to actually influence consumers’ purchase behavior or at least support their freedom of choice. Focusing on the impact of disclosure on purchase intention guaranties that disclosure regulation effectively balances conflicting interests of marketers and consumers. While SMI variables can impact advertising recognition, brand awareness, brand recall, attitude towards the ad and brand, and engagement, which as the previous section has shown are all important effects for marketers, impact on purchase intention is what matters most for consumers and potentially can qualify as unfairness under the law. Accordingly, findings on purchase intentions as the final outcome of the persuasion process should inform decisions from lawmakers and courts that need to determine if a certain SMI marketing practice is misleading consumers.

If the disclosed information impacts, for instance, brand attitude or brand recall, without any effect on the actual purchase decision, an argument could be made that disclosure requirements do not fulfill their regulatory intent and therefore the FTC acts unreasonable under section 5 of the FTCA by requiring such disclosure. Vice versa, one could argue that SMI disclosure and related regulation is detrimental to sponsoring brands only if that disclosure has an impact on purchase intention.

As indicated before, trustworthiness, credibility, and authenticity of the influencer often determine the effectiveness of SMI marketing. Nielsen Media reports that 83% of people worldwide trust recommendations from people they know more than paid advertising (63%). Admittedly, most followers do not personally know the influencer, but research in marketing and psychology has shown that these parasocial relationships can elicit similar effects. Accordingly, to be effective, disclosure requirements must address and undermine this element of unjustified trust that may blind-side followers of SMIs.

According to the persuasion knowledge model, people develop

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154 As shown in part II, the U.S. approach centers on consumer injury while the EU approach attempts to maintain freedom of choice.
158 See generally Marian Friestad and Peter Wright, The Persuasion Knowledge Model:
knowledge about persuasion tactics throughout life, and will then use this knowledge when they are subjected to persuasion attempts from advertising or sales messages. The persuasion knowledge model furthermore posits that once consumers realize that a particular message has a persuasive intent (i.e., is trying to convince them to buy something), the message is no longer perceived as a neutral message, but as a persuasion goal-directed message. People will then use their previously acquired persuasion knowledge to cope with the persuasion attempt by either attending to the persuasion or by resisting it. However, according to reactance theory, in general, people want to maintain their freedom of choice and thus avoid a feeling of being manipulated. Therefore, it is assumed that people are more likely to resist a persuasion attempt if they recognize it as such.

The role of persuasion knowledge is the reason why legal rules and guidelines about influencer marketing focus on disclosure. The foremost task of sponsorship disclosures is to inform consumers that a message is advertising, and to thereby trigger consumers’ previously acquired persuasion knowledge and coping strategies. It is also the argument for requiring stronger protection for children, as children have had lesser opportunities to build up persuasion knowledge than adults have. An argument could be made, however, that in today’s social media environment, at least teenagers and young adults might be more aware of SMI tactics than many, especially older adults, who have less experience in social media use than younger generations. It is also because of the persuasion knowledge model, that influencers and companies fear that the credibility associated with eWOM may be compromised by disclosure and hence prefer to omit it. Until recently, the rewards seemed to outweigh the risk associated with these omissions. In light of increased enforcement this may be about to change. Accordingly, it is crucial for all parties involved to understand if disclosure leads consumers to refrain from a purchase or does nothing more than trigger coping strategies without actually impacting purchase intentions.

In 2020, Martin Eisend and co-authors conducted a meta-analysis of 61 articles between 2012 and 2019 to study the impact of disclosures on various

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162 Sophie C. Boerman et al., “This Post is Sponsored” Effects of Sponsorship Disclosure on Persuasion Knowledge and Electronic Word of Mouth in the Context of Facebook, 38 *J. INTERACTIVE MKTG.* 82, 85 (2017) (noting “when a warning or label informs consumers about the persuasive intent of a message, this may trigger distrusting feelings towards the message, and thus increase consumers’ attitudinal persuasion knowledge (citation omitted)

163 See Audrezet & Charry, * supra* note 27.
measures on SMI effectiveness. They also analyzed numerous factors that moderate the relationship between disclosures and SMI effectiveness. These factors can be classified into (i) timing (e.g., does the disclosure take place before, during, or after showing the brand), (ii) duration (in seconds), (iii) modality (e.g., text or pictures), (iv) content (e.g., is the word “advertising” explicitly used), (v) awareness (e.g., are consumers aware of the disclosure), (vi) sample characteristics (e.g., age, gender, education, nationality), (vii) media characteristics (e.g., online vs. offline media), (viii) temporal context (e.g., do consumers become more used to disclosures over time), and (ix) product characteristics (e.g., familiarity and involvement with product). The authors conclude the following:

First, disclosures after the sponsored content decrease brand evaluation and credibility, and a disclosure before or during the sponsored content leads to less negative brand evaluation. Disclosures presented during the sponsored content led to higher recall and less negative credibility. Second, the disclosure duration does not have any impact on any SMI effectiveness measure. Third, visual (vs. audio) disclosures lead to higher brand recall and the effect is more pronounced if the brand is mentioned in the disclosure. Fourth, any mentioning of sponsoring intent increases credibility and persuasion knowledge (i.e., recognition of advertising), with including “advertising” as the most successful approach. Fifth, disclosures are less effective in creating persuasion knowledge for minors (vs. adults). This is an important finding, because minors are assumed most in need of unmasking sponsors. Not only do minors have more difficulties recognizing selling intent, they also lack the cognitive and affective skills to criticize advertising, especially sponsored content. Further, women show stronger brand recall and behavioral intentions than men following disclosures, the impact of disclosures on brand credibility is stronger for U.S. than for European consumers, and education level does not impact any SMI effectiveness measure. Seventh, disclosure effects are constant across online and offline media. Eighth, the negative impact of disclosures on brand evaluations has softened over time. Ninth, the effect of disclosures on brand recall is stronger for unfamiliar (vs. familiar) products and more negative for low involvement products.

Eisend and co-authors summarize disclosure effects on the various

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164 See generally, Martin Eisend et al., A Meta-Analysis of the Effects of Disclosing Sponsored Content, 49 J. ADVERT. 344 (2020).

165 Eva A. Van Reijmersdal et al., Processes and Effects of Targeted Online Advertising Among Children, 36 Int’l J. ADVERT. 396, 396 (2017) (noting “unlike adults, children do not process profile targeting on an elaborate critical level. Rather, the processing seems to be less elaborate”).

measures of SMI effectiveness as follows. Disclosures make consumers understand the persuasive content of an influencer message, and at the same time make them recognize the sponsored content. Consumers then cope with the persuasion attempt in two ways. They show resistance in the form of skepticism, feelings of deception, and critical processing. In parallel, understanding that a message has a commercial intent reduces the perceived credibility of the source. Both resistance and credibility subsequently influence brand evaluations. Resistance has a positive impact on the recall of the sponsoring brand, and a negative impact on the attitude towards it. Credibility, in turn, is positively linked to both recall and attitude. In sum, disclosures activate persuasion knowledge which, mediated by resistance and source credibility, make consumers better remember the sponsor brand but also lead to a more negative attitude towards it. However, the study also finds that disclosures do not affect purchase intent or behavioral variables. Therefore, based on almost a decade of extensive marketing research on disclosure effects, it is evident that sponsorship disclosure, while responsible for many other effects, does not have the decisive effect on purchase intention that FTC and EU policy attributes to it and that influencers and sponsoring brands fear. Accordingly, because disclosure does not affect purchase decisions, a lack thereof is incapable of causing consumer injury. If anything, SMI disclosure will activate persuasion knowledge. As such, disclosure can help maintain customers’ freedom of choice that is at the heart of the EU approach, but it is irrelevant for claims under section 5 of the FTCA that are based on consumer injury.  

CONCLUSION

The massive use of influencer marketing worldwide exacerbates the main regulatory and self-regulatory principle in advertising: the differentiation between advertising and personal opinion or editorial content. The problem is not new and has never been completely solved. But so long as brands used traditional forms of communication, especially print and television advertising, specific legal provisions such as media law allowed consumers to know in most cases who was the original source of the message. What is new about SMI marketing is that it is not the brand directly communicating to consumers, but a third private party communicating about the brand without necessarily disclosing the association and incentive to do so. In most cases, the messages originate on a social platform managed by the influencer, not the brand, which makes content control for the brand inherently difficult. The SMI might be a celebrity with an army of legal advisors, for whom SMI marketing is part of their business. Increasingly, though, SMIs are average people establishing a personal brand on social media. These nano or micro influencers are sometimes paid, sometimes not, and they might not even be aware of the commercial nature of their activity.

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167 See FTC Policy Statement on Unfairness and supra part II.B.4.
which raises questions of equitable treatment of all parties involved in SMI marketing.

The legal approach to SMI marketing centers on disclosure regulation. However, this article has shown that against widespread perception, the FTC may have a hard time proving that non-disclosure of the commercial relationship between an SMI and a sponsoring brand is deceptive under section 5 FCPA. The marketing literature reviewed in this article demonstrates that disclosure does not affect behavioral variables. Omitting disclosure does not lead to consumer injury— a condition for consumer deception according to the FTC’s own long-standing policy vetted by the Supreme Court. The revisions to its Enforcement Guides do not change this fundamental fact. Under U.S. law, a broader policy debate is needed to substantiate the legal claim that SMI disclosure is required under consumer protection law.

The regulatory framework in the EU is different. Compared to the United States, EU policy is further developed, and regulation is more detailed, though not free from inconsistencies and open legal questions. EU law, in Articles 6 and 7 UCPD, provides a list of commercial practices that are always considered misleading. EU law therefore seems to require more extensive disclosures, though the details about what and how to disclose vary from one European member state to the other, making it difficult for SMIs and sponsoring brands to comply with regulation in practice. In substance, it appears that SMIs in Europe must always disclose the commercial nature of their communication independent from the existence of a causal relationship between the SMI practice and the consumer’s transactional decision, though this interpretation has not (yet) been vetted by the ECJ. Globally operating companies – and influencers – need to accommodate these different legal standards.

As we continue debating legal requirements for SMI disclosure, it is time to acknowledge the psychological processes at work in SMI marketing. Marketing literature provides detailed insights into the processing of influencer messages and answers the question about the effects of disclosures that legal scholars and regulators have long been speculating about and that courts will need to consider when presented with SMI non-disclosure cases and challenges to FTC enforcement. On the other hand, brands and SMIs may not need to be as concerned about disclosure as they seem to be. Disclosures do not significantly affect buying intentions of consumers. Disclosures activate consumer persuasion knowledge, which, mediated by resistance and source credibility, leads to a more negative attitude towards the sponsoring brand, but also makes consumers remember the brand better. Consequently, there may be circumstances under which marketers could have an interest in disclosing the relationship with an SMI. For example, a little-known brand could use this effect to increase brand recognition, especially since the negative effects of disclosure on brand image seem to dissipate over time.
Some support disclosure statements for ethical reasons. They seek to assure that consumers are not manipulated and always capable of knowing when they are exposed to advertising. Others advocate for truth in advertising to level the playing field among competitors. Though these are arguably noble goals, there is an array of legal and practical issues that still need to be solved before we can find a truly equitable solution to the regulation of SMI. These issues were not explicitly studied in this article but will be briefly evoked below as avenues for future research.

A pressing concern is who should be responsible for disclosure? Until now, the FTC has primarily targeted marketers, though this might change under the revised disclosure guides. The German cases mentioned above were directed against famous, as well as smaller influencers with little legal knowledge or resources. Making social media platforms responsible is a third option. It could be the most practical solution and lead to increased conformity in disclosure. In any case, it would be beneficial for companies and influencers alike to have an internationally standardized approach. SMI marketing is a global phenomenon, seamlessly connecting brands and consumers from different cultures and legal systems. The current patchwork of legal requirements makes it almost impossible or at least very costly and/or time-consuming for SMIs and brands to know their obligations.

Another question concerns the adaptation of disclosures to different social media platforms. Which semantic or pictorial content would be best? SMI marketing exists in diverse formats. TikTok is fundamentally different from Twitter. Disclosure on text-based social media cannot be effective on video platforms and vice versa. Since the variety of formats will rather increase than decrease, regulation will either become overly complex or so general that it will become impossible for advertisers to comply with case-by-case decisions. For example, the word “advertising” is better suited to assure transparency and more easily recognized than “#ad”. But what effect does this word – or any other – have on consumers whose native language is not English? French law requires foreign terms in advertising to be translated. Would SMI disclosure rules require international SMI campaigns systematically translate “advertising” to “publicité” in a footnote?

What is the minimal – internationally comparable – contractual value or number of accounts to declare a message as SMI marketing? Would it be legal to inform family members on Twitter about a test drive with a fancy electric car brand? What if the driver had complimentary coffee at the dealership – or lunch? What if that person writes to 200 friends on a private Instagram account and includes a picture of the car? What if the test drive took place in the Italian Alps, included a complimentary three-night stay in a luxury resort and was shared on TikTok with both friends and family? Regulators are trying to be more transparent as evidenced by the increased number of examples provided by the FTC in the revised Guides and the SMI specific German rules, but at the same time they contribute to more regulatory complexity that becomes increasingly difficult for marketers and
SMIs to navigate.

SMI marketing is developing so fast that regulators risk always being two steps behind brands and influencers. This is not to say give up on disclosure, but it may be easier, less costly, and more effective to educate consumers to expect manipulation whenever they turn to social media, and influencer accounts in particular. Does the name – influencer – not say it all and constitute the perfect warning?