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AN INCENTIVE FOR TRUTH IN INFLUENCER ADVERTISING: ENHANCING REPORTING BY AWARDING CONSUMERS FOR INFORMATION THAT LEADS TO A SUCCESSFUL ENFORCEMENT ACTION

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I. INTRODUCTION

Individual consumers and "influencers"[1] review products on the internet and social media.[2] Influencers inspire and guide the purchasing decisions of others,[3] but the reputations of influencer reviewers as honest and unbiased are critical to their success and gaining large followings.[4] Through their social media following, influencers have an enhanced ability to communicate messages about their personal brand and advertise for other brands.[5] Experts estimate that the influencer market could be worth up to $15 billion in 2022.[6] Consumers turn to the internet for product reviews from influencers who they trust, admire, or may even mistake for peers.[7] Influencers

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1. *Influencer*, MERRIAM WEBSTER (11 ed. 2021), https://www.merriam-webster.com/dictionary/influencer [https://perma.cc/79V6-CCRM] (last visited Aug. 31, 2021) ("[A] person who is able to generate interest in something (such as a consumer product) by posting about it on social media[.]").
2. *See* Shira Ovide, *You Are Being Influenced*, N.Y. TIMES (Apr. 28, 2020), https://www.nytimes.com/2020/04/28/technology/digital-influencers-coronavirus.html [https://perma.cc/M98Q-3JK3] ("People who say they don't follow influencers might have scrolled through updates from an Instagram mommy blogger, taken a cruise after seeing someone's YouTube review or bought needlepoint kits from a person they follow online. Those are probably all influencers!").
3. *See id.*
4. Julia Brucculieri, *Beauty Influencers Who Give Brutally Honest Product Reviews*, HUFFPOST (May 2, 2019, 5:45 AM), https://www.huffpost.com/entry/beauty-influencers-instagram-honest-reviews_l_5cc9bdd5e4b0d123954d2c3e [https://perma.cc/3XF7-KQ7G].
5. *See* Sapna Maheshwari, *Endorsed on Instagram by a Kardashian, but Is It Love or Just an Ad?*, N.Y. TIMES (Aug. 30, 2016), https://www.nytimes.com/2016/08/30/business/media/instagram-ads-marketing-kardashian.html [https://perma.cc/LA26-DUBP]; *Influencer Marketing: Social Media Influencer Market Stats and Research for 2021*, BUS. INSIDER (July 27, 2021), https://www.businessinsider.com/influencer-marketing-report [https://perma.cc/CS8X-JLTZ].
6. Cat Carstens, *Worth up to $15-billion by 2022—Why Influencer Marketing Is Still Effective*, TOP WOMEN (Feb. 16, 2021), https://www.topbusinesswomen.co.za/worth-up-to-15-billion-by-2022-why-influencer-marketing-is-still-effective/ [https://perma.cc/52ZT-P2RG].
7. *See* Caroline Forsey, *These Influencers Are Computer-Generated: The Future of Marketing, or Untrustworthy Advertising?*, HUBSPOT, https://blog.hubspot.com/marketing/virtual-influencers [https://perma.cc/CFD6-BQ45] (Nov. 19, 2019) ("[T]here's something to be said for brands that find real people to promote their

can build a career by reviewing certain product categories because brands send free products for public relations purposes, connecting with influencers, and often contracting for paid sponsorship or endorsement deals in the future.[8] Through advertising revenue and sponsored content, influencers can gross anywhere from a few thousand dollars to six figures in annual income.[9]

Advertisers use influencer marketing to engage social media followers so that they can sell almost anything on the internet.[10] Influencers frequently portray their reviews as unbiased, even though they may have been paid or received free products for their reviews.[11] If an influencer was paid to endorse a product or may benefit from product purchases, consumers should be informed so that they can evaluate the credibility of the endorsement.[12] The Federal Trade Commission Act (FTCA) reflects this desire for transparency by requiring influencers to disclose any "material connection"[13] they have to an endorsed product or brand.[14]

The regulatory guidelines have resulted in various disclosure strategies across social media platforms as brands and influencers—each representing their own interests—invented ways to inform

products or services to other *real* people. Sure, there's risk involved—but that risk is the same component that enables audiences to trust, listen to, and connect with those influencers in the first place.").

8. *See* Maheshwari, *supra* note 5 ("Brands such as Jack in the Box and Red Bull have proved willing to pay thousands of dollars per social media mention to people like the Kardashians and other so-called influencers who command big, loyal followings on services like Instagram, Snapchat and YouTube."). Smaller sponsorship deals happen frequently. *See id.*

9. *See* Joline Buscemi, *Here's How Much Money These 7 Influencers Actually Make, and How*, HUFFPOST, https://www.huffpost.com/entry/how-much-influencers-make_l_5dee68a6e4b05d1e8a556bbc [https://perma.cc/38RZ-VU2T] (Dec. 19, 2019) ("We spoke to seven influencers from six different accounts, with followers ranging from a seemingly attainable 12,000 to six figures, about how much money they're making and where it all comes from."). The influencers interviewed have been successful, but none of them make millions like the few celebrity influencers that often come to mind. *See id.*

10. *See* Ovide, *supra* note 2 ("Some of you must be thinking: People make money that way? And who cares? Yes, and you should. These 'influencers' are shaping our habits, even during a pandemic and even if we're clueless about it.").

11. *See* Brucculieri, *supra* note 4.

12. *See The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking [https://perma.cc/FQ6U-H8H3] (Aug. 27, 2021) [hereinafter *What People Are Asking*].

13. *See infra* notes 54–60 and accompanying text.

14. *See What People Are Asking*, *supra* note 12.

consumers on disclosures.[15] Many influencers and the brands they endorse continue to look for the line between when they must disclose a connection and when business dealings can remain hidden from view.[16]

In November 2019, the Federal Trade Commission (FTC) published *Disclosures 101 for Social Media Influencers* to enhance its educational outreach on the importance of disclosing brand endorsements.[17] In February 2020, the FTC voted to reevaluate its enforcement of the regulatory guidelines against the influencers and the companies that profit from influencer advertising.[18] The FTC filed a request for public comment on the Endorsement Guides on February 21, 2020.[19]

Under the FTC's current enforcement structures,[20] influencers and advertising brands lack incentive to comply with endorsement disclosure requirements.[21] Moreover, consumers lack both the

15. *See* Sophie C. Boerman et al., *Sponsored Blog Content: What Do the Regulations Say? And What Do Bloggers Say?*, 9 J. INTELL. PROP., INFO. TECH., & ELEC. COM. L. 146, 151–52, 159 (2018) (describing considerable variation in disclosure practices among influencers). For example, influencers have used #AD and #Sponsered across social media platforms to indicate a paid partnership. *See* Paolo Zialcita, *FTC Issues Rules for Disclosures of Ads by Social Media Influencers*, NPR (Nov. 5, 2019, 4:57 PM), https://www.npr.org/2019/11/05/776488326/ftc-issues-rules-for-disclosure-of-ads-by-social-media-influencers [https://perma.cc/J25L-9WFZ].
16. *See* Boerman et al., *supra* note 15, at 159; Maheshwari, *supra* note 5 (quoting Jaclyn Johnson, president of a firm connecting brands to influencers: "Brands are 'toeing this line of how to make it come across as authentic but also in line with the legalese of social media endorsements[.]'").
17. *See* FED. TRADE COMM'N, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS (2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [https://perma.cc/9KBM-GPZS] [hereinafter DISCLOSURES 101].
18. FED. TRADE. COMM'N, STATEMENT OF COMM'R ROHIT CHOPRA: REGARDING THE ENDORSEMENT GUIDES REVIEW COMM'N FILE NO. P204500 (2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf [https://perma.cc/9KBM-GPZS].
19. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 FED. REG. 10104, 10105-07 (proposed Feb. 21, 2020) (to be codified at 40 C.F.R. pt. 255). *See also* Press Release, Fed. Trade Comm'n, FTC Extends Comment Deadline for Endorsement Guides Review to June 22 (Mar. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/03/ftc-extends-comment-deadline-endorsement-guides-review-june-22 [https://perma.cc/NP26-ZKYC]. As of this Comment, the FTC has not published any response to the public comments it received.
20. *See infra* Section II.A.
21. *See* Boerman et al., *supra* note 15, at 159 ("Additional arguments in favor of concentrating on advertisers is that here the incentives to comply are probably the lowest (as disclosure can have a potentially adverse effect on the advertising

knowledge and incentive to file complaints, except where violations are flagrant.[22] The FTC has limited enforcement resources and powers to regulate endorsement disclosure violations,[23] and the lack of compliance is a market failure that could be corrected by creating an incentive for reporting, thereby inducing influencer compliance.[24] Congress should enable the FTC to grant awards to consumers who provide original information that results in successful enforcement actions because consumer awards would serve as an efficient means of enhancing reporting and enforcement.[25]

Part II describes existing FTC authority,[26] limits to that authority,[27] and the challenges associated with regulating endorsement disclosures.[28] Part III, Section A begins by describing previously proposed solutions while further examining the practical limitations of the FTC's enforcement capabilities.[29] Part III, Section B examines whistleblower awards granted by the Securities and Exchange Commission (SEC) and Internal Revenue Service (IRS) as an effective enforcement tool and a model that the FTC could use to develop a similar consumer awards program.[30] Part III, Section C argues that by incentivizing more and improved reporting by individual consumers, watchdog groups, and social media platforms, the FTC could regulate influencer endorsement disclosure on social media more efficiently.[31] Further, it argues that Congress should enable the FTC to issue consumer awards in combination with other previously proposed solutions because a multifaceted approach is needed to effectively regulate endorsement disclosure in the global online marketplace.[32]

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outcomes), as well as the potential invasiveness and privacy-intrusiveness of monitoring compliance on the side of users."); Megan K. Bannigan & Beth Shane, *Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry*, 64 N.Y.L. SCH. L. REV. 247, 259–60 (2019–2020) (discussing the conflict between the risk of irreparable harm to influencers' reputations versus the fear that they will alienate their audience by disclosing material connections).

22. *See infra* notes 131–36 and accompanying text.
23. *See infra* Section II.A.
24. *See infra* notes 131–44 and accompanying text.
25. *See infra* Section III.C.
26. *See infra* Section II.A.
27. *See infra* Section II.B.
28. *See infra* Section II.B.
29. *See infra* Section III.A.
30. *See infra* Section III.B.
31. *See infra* Section III.C.
32. *See infra* Section III.C.

II. FTC ENDORSEMENT DISCLOSURE EDUCATION, RULE-MAKING, AND ENFORCEMENT ACTIONS

Congress empowered the FTC to regulate unfair and deceptive trade practices and make rules to which industries must adhere.[33] The agency's multifaceted efforts involve preventative education for consumers, influencers, and brands.[34] The FTC's communication with consumers is essential because consumer complaints are the primary means by which the agency can enforce the endorsement disclosure rules in court.[35]

A. As Part of Implementing its Consumer Protection Mission, the FTC Regulates and Enforces Endorsement Disclosure Rules Through Limited Congressionally Delegated Authority.

The FTC began its consumer protection mission after the Wheeler-Lea Amendments in 1938.[36] Through the FTCA, Congress granted the FTC the authority to gather information and discipline unfair and deceptive trade practices.[37] The Consumer Protection Division of the FTC regulates unfair, deceptive, and fraudulent business practices by collecting consumer complaints, filing suits against companies, developing trade regulation and rules, and educating consumers.[38] Through its extraordinary powers, the FTC can "bring cases against individual companies, partnerships, individuals, the professions, trade associations, successors to dissolved corporations, and, in some

33. 15 U.S.C. § 45(a)(2) (2018) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."); *Rules*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/rules [https://perma.cc/UZ8Y-9PYT] (last visited Aug. 29, 2021).
34. *See, e.g.*, DISCLOSURES 101, *supra* note 17, at 2 (providing an educational resource for influencers that describes their duty to disclose material connections with brands they endorse); FTCvideos, *The FTC's Endorsement Guides – Business Tips*, YOUTUBE (Dec. 18, 2012), https://www.youtube.com/watch?v=D6SQOy1ukDQ [https://perma.cc/P5G8-6VQB].
35. *See* Lauryn Harris, Comment, *Too Little, Too Late: FTC Guidelines on "Deceptive and Misleading" Endorsements by Social Media Influencers*, 62 HOW. L.J. 947, 982 (2019). The complaint-based system has been criticized for putting the burden on consumers to report disclosure violations. *Id.* at 950 ("In regard to detection, the Guidelines are vague and minimal in the policing of social media influencers. Ultimately, they place the responsibility on consumers to file complaints rather than the FTC to implement effective detection measures proactively.").
36. CHRIS HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 3 (2016).
37. 15 U.S.C. § 41 (2018). *See also Federal Trade Commission Act*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act [https://perma.cc/DLK4-H6FF] (last visited Sept. 3, 2021).
38. HOOFNAGLE, *supra* note 36, at 90.

situations, nonprofits, and even government agencies" by filing administrative complaints in federal court.[39]

The FTC can bring an administrative complaint if it "ha[s] reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce" and finds that on its face, the proceeding is in the interest of the public.[40] Because of the FTC's authority to prevent violations of the FTCA, the agency "can sue to prevent practices even where they are commonplace in the market" and even "where the public has not yet been injured . . . ."[41] After charges are brought through an administrative proceeding, the FTC may issue a consent agreement so a respondent can chose to settle or contest the charges at a trial-type proceeding before an administrative law judge (ALJ).[42]

If the respondent contests the charges, the ALJ will issue a decision that can be appealed in any United States Court of Appeals that has jurisdiction over the respondent and the claim. The Commission will then issue an order from the ALJ's decision.[43] "If a respondent violates a final order, it is liable for a civil penalty for each violation."[44] To enforce an order and impose a penalty, the FTC must file suit in federal district court.[45]

After the Commission enters an administrative order, the agency may seek redress in federal district court for consumers who were injured by the respondent.[46] The FTC must show that a reasonable man would have known under the circumstances that the conduct for which the respondent was found liable for by the Commission's order was dishonest or fraudulent.[47] The FTC must prove actual damages; punitive and exemplary damages are not allowed.[48]

39. *Id.* at 98.
40. 15 U.S.C. § 45(b) (2018).
41. HOOFNAGLE, *supra* note 36, at 99.
42. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (Oct. 2019), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [https://perma.cc/PB86-ANB4].
43. *Id.* (citing 15 U.S.C. § 45(c)).
44. *Id.* (citing 15 U.S.C. § 45(*l*)).
45. *Id.* (A federal judge "may also issue 'mandatory injunctions' and 'such other and further equitable relief' as is deemed appropriate.").
46. *Id.*
47. 15 U.S.C. § 57b(a)(2) (2018) ("If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man

The FTC may enforce an order against nonrespondents "who thereafter violate the standards articulated by the Commission" through civil penalties.[49] However, the agency must prove to a federal court that the nonrespondent had "'actual knowledge that such act or practice is unfair or deceptive and is unlawful' under Section 5(a)(1) of the FTC Act."[50] The FTC can also file actions in federal court without first determining through an ALJ decision that the conduct was unlawful.[51] The FTC must show it has "reason to believe" a party is violating or will violate any provision of law the FTC enforces.[52] Most often, the relief requested is injunctive, but the FTC also requests monetary equitable relief such as restitution and rescission of contracts.[53] In conclusion, the FTC has several options for enforcing the endorsement regulations through its administrative procedures and actions in federal court.

B. The FTC Enforces Section 5 of the FTCA in Endorsement Disclosure Cases.

The FTC files endorsement disclosure violation actions in federal court using Section 5 of the FTCA, "which generally prohibits deceptive advertising."[54] The FTC views advertising and promotional messages as deceptive "if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself."[55] Deceptive online advertising content "distorts the online

would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).").

48. 15 U.S.C. § 57b(b) (2018) ("Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.").
49. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 42.
50. *Id.* (quoting 15 U.S.C. § 45(m)(1)(B)). "To prove 'actual knowledge,' the Commission typically shows that it provided the violator with a copy of the Commission determination about the act or practice in question, or a 'synopsis' of that determination." *Id.* Meaning, the FTC has to be aware of a nonrespondent's potential for violations, and the Commission must inform them of the recent order to impose a civil penalty in federal court. *See id.*
51. *See id.*; 15 U.S.C. § 53(b) (2018).
52. *See* 15 U.S.C. § 53(a) (2018).
53. *See A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 42.
54. *What People Are Asking*, *supra* note 12.
55. FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS (2015), https://www.ftc.gov/system/files/documents/

marketplace, preventing consumers from making informed purchasing decisions and creating an uneven playing field for those that follow the rules."[56] There are three key elements of a deception case: "There must be (1) a representation, omission or practice that is likely to mislead a consumer; (2) the interpretation of that act or practice is considered from the perspective of a reasonable consumer; and (3) the representation must be material."[57]

The public has struggled to understand what the law means in practice.[58] In short, influencers must disclose "material connections" to companies for whom they endorse in a clear and conspicuous manner.[59] "[I]f there's a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be disclosed."[60] The FTC describes clear and conspicuous disclosure as:

> [C]lose to the claims to which they relate; in a font that is easy to read; in a shade that stands out against the background; for video ads, on the screen long enough to be noticed, read, and understood; for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand.[61]

The FTC directs influencers to disclose connections when they have "any financial, employment, personal, or family relation with a brand."[62] The agency encourages influencers to disclose even if they think their reviews are unbiased or followers are already aware of the connection.[63] Under the "clear and conspicuous" standard, influencers should always disclose in any type of social media post in

public_statements/896923/151222deceptiveenforcement.pdf [https://perma.cc/NN2R-5M4V].

56. Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Keynote at the ANA/BAA Marketing Law Conference: The FTC and the Digital Marketplace: Highlights from the Last Year 6–7 (Nov. 5, 2019) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/1553177/phillips_-_ana_remarks_11-5-19.pdf [https://perma.cc/59WM-5QBE]).
57. HOOFNAGLE, *supra* note 36, at 123.
58. *See* Boerman et al., *supra* note 15, at 159.
59. *See What People Are Asking*, *supra* note 12.
60. *Id.*
61. *Id.*
62. *See* DISCLOSURES 101, *supra* note 17, at 3.
63. *Id.* In video endorsements, the disclosure should be in the video, not just the description below, and during live streamed video, the disclosure should be repeated periodically. *Id.* at 4.

a way that is "hard to miss" or in the body of the endorsement.[64] The Endorsement Guides provide an overview of FTC regulatory standards, and influencer practices inconsistent with the Guides can result in enforcement actions alleging violations of Section 5 of the FTCA.[65]

The FTC can enforce against only some who violate regulations, even if competitors engage in the same practices.[66] The agency "is entrusted with great discretion in matter selection and priority setting."[67] The brands paying influencers to endorse a product are responsible for informing the influencers of the endorsement disclosure requirements.[68] The FTC has focused on filing complaints against brands, ad agencies, and public relations firms rather than individual influencers,[69] except where influencers violate the regulations repeatedly.[70]

Once a violation is reported, the FTC has broad investigative authority to substantiate its claims on behalf of consumers through compulsory processes.[71] Under Section 6 of the FTCA, the agency has the authority "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce."[72] Therefore, even without a consumer complaint, the FTC can investigate endorsement disclosure activity on social media.[73]

The FTC "lacks 'aiding and abetting'[74] authority, except where granted by statute (e.g., in telemarketing and spam enforcement

64. *Id.*
65. *See What People Are Asking*, *supra* note 12.
66. HOOFNAGLE, *supra* note 36, at 99.
67. *Id.* at 100.
68. Zialcita, *supra* note 15.
69. *Id.* ("[I]n terms of our own law enforcement activities, our focus so far has been on advertisers or their ad agencies and public relations firms.").
70. *See id.* ("The consumer watchdog agency's first-ever complaint against social media influencers came in 2017, when it charged two popular YouTubers with failing to disclose that they own an online gambling service they were endorsing.").
71. HOOFNAGLE, *supra* note 36, at 102–03.
72. 15 U.S.C. § 46(a) (2018).
73. *See What People Are Asking*, *supra* note 12.
74. *See* SEC v. Apuzzo, 689 F.3d 204, 206 (2d Cir. 2012). In order for a defendant to be liable as an aider and abettor in a civil enforcement action, the SEC must prove: "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *Id.*

matters)[,]"[75] but "at least two courts have imposed liability for aiding and abetting frauds."[76] Congress has refused to grant the FTC authority to bring Section 5 cases against those who "'knowingly or recklessly' . . . provide substantial assistance to another[,]"[77] but the FTC has used a "means and instrumentalities" theory in cases where there is contributory liability[78] because the respondent facilitated an unfair or deceptive trade practice.[79]

In a Section 5 case regarding failure to disclose a material connection, a court is unlikely to impose liability on a brand unless there was an effort to mislead consumers on the part of the brand or its agents, such as ad agencies or public relations firms.[80] However,

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75. HOOFNAGLE, *supra* note 36, at 98.
76. *Id.*
77. *Id.*
78. *Id.*
79. *See, e.g.*, Seena Gressin, *FTC Challenges Bloated Weight-Loss Claims*, FED. TRADE COMM'N (Apr. 21, 2017, 11:05 AM), https://www.ftc.gov/news-events/blogs/business-blog/2017/04/ftc-challenges-bloated-weight-loss-claims [https://perma.cc/L6N7-AZJ5].

> [T]he complaint alleged the defendants gave their licensees and franchisees the means to deceive consumers by giving them training, support, and marketing materials that contained the deceptive claims and contracts with the gag clause. This count is a reminder that, when appropriate, the FTC will seek to hold companies responsible not only for their deceptive practices, but also for giving others the "means and instrumentalities" to commit deceptive and unfair practices.

Id.

80. *See* HOOFNAGLE, *supra* note 36, at 124–25; *e.g.*, Lesley Fair, *FTC's Teami Case: Spilling the Tea About Influencers and Advertisers*, FED. TRADE COMM'N (Mar. 6, 2020, 11:22 AM), https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers [https://perma.cc/P2YQ-XBK8].

> The complaint alleges the defendants took in more than $15 million by deceptively claiming their array of teas could cause rapid and substantial weight loss, "fight against cancerous cells," decrease migraines, unclog arteries, and prevent colds and flu. What's different is the "how." The defendants advertised primarily through a massive social media campaign. Also notable is the "who" – a roster of celebrities and influencers, some of whom have now been sent warning letters reminding them of their legal obligation to disclose their connections to the products they promote.

Id.

the FTC does not need to establish an intent to deceive as an element of a deception case.[81] Without further authorization from Congress, the FTC has limited authority to enforce the endorsement disclosure regulations against advertisers.[82]

III. AN ENFORCEMENT TOOL TO ENHANCE REPORTING AND THEREBY INCREASE COMPLIANCE

The FTC has the "formidable job" of enforcing the endorsement disclosure regulations in "the social media age[.]"[83] The FTC has limited tools, however, to accomplish this task in the global internet marketplace.[84] Various proposed solutions relate to clarifying the regulations, encouraging partnership within the industry, and increasing penalties.[85] The SEC uses whistleblower awards as an enforcement tool to encourage reporting of securities fraud violations,[86] and the FTC could do something similar to encourage reporting of endorsement disclosure violations.[87] Congress should enable the FTC to award consumers for information resulting in successful enforcement action.[88] Nevertheless, the FTC should take a tailored approach to using consumer awards,[89] and the enforcement tool may work best in conjunction with other previously proposed solutions.[90] Additionally, the FTC should partner with nongovernmental entities and individual consumers to enhance enforcement,[91] and the agency could use consumer awards as an effective method of encouraging more frequent and more thorough reporting.[92]

A. Other Proposed Solutions Could Enhance FTC Enforcement.

Numerous proposals have surfaced in the last several years regarding endorsement disclosure regulation.[93] Most proposals

81. HOOFNAGLE, *supra* note 36, at 124–25. A court is less likely, however, to find a social media platform liable for facilitating nondisclosure in some form. *See id.* at 98.
82. *Id.*
83. Tyler Fredericks, Note, *Not Content with Content Influencers: How the FTC Should Promote Advertisement Disclosure*, 19 VA. SPORTS & ENT. L.J. 29, 29 (2019).
84. *See supra* Section II.B.
85. *See infra* Section III.A.
86. *See infra* Section III.B.
87. *See infra* Section III.B.
88. *See infra* Section III.C.
89. *See infra* notes 122–30 and accompanying text.
90. *See infra* Section III.A.
91. *See infra* notes 150–56 and accompanying text.
92. *See infra* notes 169–74 and accompanying text.
93. *See infra* notes 96–115 and accompanying text.

concern influencer education on proper compliance with the Endorsement Guide.[94] The solutions provide an overview of potential gaps in the FTC's regulatory structure and approach to endorsement disclosure violations.[95]

The FTC is concerned with regulating the clarity and sufficiency of endorsement disclosures so that they are "clear and conspicuous" for the public.[96] For example, others have suggested that the FTC could adopt an emoji or series of emojis as a disclosure tool that would leverage a popular method of communication.[97] Emoji use could increase public trust and compliance by easing the burden on influencers:[98]

> In fact, there may already be demand for one-character disclosure emojis. One YouTube influencer created a self-made symbol system to quickly show which products she bought herself, which are sponsored, and which she received from a company. Influencers who are creating such symbols themselves are a great example of why quick, easy-to-spot disclosures are important. These disclosure emojis would be even more effective if they were standardized across influencers, so that individual influencers did not have to take self-help measures to design their own emojis and prescribe meaning to them. This is an area where the FTC could lead and adopt a twenty-first century solution to the problem of influencer disclosures.[99]

The FTC would need to educate the public and influencers about emoji usage for endorsement disclosure,[100] but the simplicity of

94. *See infra* notes 95–106 and accompanying text.
95. *See* Boerman et al., *supra* note 15, at 150, 158 (remarking on the shortcomings of FTC regulations); *see also infra* notes 114–15 and accompanying text.
96. *See Big Print. Little Print. What's the Deal?*, FED. TRADE COMM'N (June 2000), https://www.ftc.gov/tips-advice/business-center/guidance/big-print-little-print-whats-deal [https://perma.cc/V7NQ-RPXS].
97. Christina Sauerborn, Note, *Making the FTC ☺: An Approach to Material Connections Disclosures in the Emoji Age*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 571, 626–28 (2018) ("Since the interface of every social media platform is different, there is no uniform disclosure method that works across all of them. Emoji can easily be incorporated into Instagram captions, tweets, Facebook posts, and on-screen text in YouTube videos."); Fredericks, *supra* note 83, at 47–48 (citing *id.* at 626–27).
98. *See* Sauerborn, *supra* note 97, at 576–77; Fredericks, *supra* note 83, at 47–48.
99. Fredericks, *supra* note 83, at 48.
100. *See id.*

communicating through emojis could decrease the burden of communicating the disclosure requirements and complying with them.[101]

FTC regulations could more explicitly guide influencers on how to disclose in a "clear and conspicuous" manner.[102] Attempts have been made before: in 2017, the FTC sent letters directly to influencers and brands reminding them of their disclosure obligations,[103] and also published *Disclosures 101 for Social Media Influencers*.[104] Proposals have suggested that the FTC could work with social media platforms to flag violators and educate influencers, businesses, and celebrities.[105] Platforms could require users to view a disclosure tutorial before accessing their accounts[106] while consumer advocacy groups could help police the digital sphere with specialized knowledge.[107]

Others have suggested that the FTC hold brands doing business with influencers more accountable.[108] The FTC could collaborate

101. *See id.* at 47 ("Since disclosures are costly in themselves, if the FTC provided a way to minimize these costs to influencers, it might see additional compliance.").

102. *See, e.g.*, Ashley Luong, Note, *All that Glitters Is Gold: The Regulation of Hidden Advertisements and Undisclosed Sponsorships in the World of Beauty Social Media Influencers*, 11 WM. & MARY BUS. L. REV. 565, 592, 595 (2020) (proposing changes to the endorsement disclosure regulations that mirror Germany's approach, which provides specific guidance on when and how to disclose in particular scenarios).

103. *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMM'N (Apr. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose [https://perma.cc/5MS4-V5EN] ("After reviewing numerous Instagram posts by celebrities, athletes, and other influencers, [FTC] staff recently sent out more than 90 letters reminding influencers and marketers that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media."); *see also* Luong, *supra* note 102, at 581–82 (describing the details of the warning letters and criticizing their effectiveness).

104. *See* Zialcita, *supra* note 15.

105. Vanessa Chan, Article, *When #AD is #BAD: Why the FTC Must Reform Its Enforcement of Disclosure Policy in the Digital Age*, 13 OHIO ST. BUS. L.J. 303, 326–27 (2019) ("Instagram has also begun sending in-app notifications to users who are flagged by the system for making a post that it believes is branded without disclosure."); *see also* Luong, *supra* note 102, at 598–600.

106. Chan, *supra* note 105, at 321–22.

107. *Id.* at 329. "The FTC should also consider working with some outside groups with specialized knowledge, as outside policing is an additional resource that may help with catching influencers who otherwise slip through the cracks." *Id.* For example, "[a]fter criticizing the FTC for their passive enforcement of disclosure policy, Public Citizen conducted its own survey on influencer disclosure and was largely responsible for initiating the FTC's warning letters." *Id.*

108. *Id.* at 327–28 ("[B]usinesses should be required to monitor sponsored posts for compliance, and if they find a violation, businesses should get into contact with the

with brands who would notify influencers of endorsement regulations with their public relations packages.[109] In addition, brands could have the option to revise their contracts with influencers to explicitly outline FTC disclosure guidelines by including a clause allowing them to terminate the relationship if influencers fail to disclose endorsements appropriately.[110] This voluntary industry-led approach may help supplement regulatory efforts.[111]

Others have argued that the FTC should more frequently use monetary punishment and suspension of social media accounts to deter violations.[112] Even further, the FTC could pursue enforcement against micro-influencers, instead of targeting top influencers.[113] Ultimately, advertising brands should bear the burden of compliance "as the least cost avoiders[.]"[114]

To avoid "patchwork fixes," previous proposals have emphasized that the FTC must communicate the endorsement disclosure requirements so that the standards for compliance are clear to the influencer marketing industry.[115] However, the focus should be on whether enforcement tools are efficient for compelling compliance. The FTC can take action to enforce regulations, but if consumer complaints do not represent the true number of violations, those actions may have a diluted effect on increasing compliance.[116] As proposed below, the FTC should partner with individual consumers and watchdog groups by providing an incentive for reporting violations.[117]

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influencer as soon as possible to either take down the post or to add a proper disclosure to the post.").

109. Luong, *supra* note 102, at 601 ("Simply placing notices and resources in PR packages raises more awareness to the laws than simply monitoring influencers and sending strongly worded letters.").

110. Elizabeth Casale, Article, *Influencing the FTC to Update Disclosure Rules for the Social Media Era*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1, 21–22 (2019).

111. *See id.* at 22.

112. Chan, *supra* note 105, at 324 ("Enforcing monetary punishments can serve to deter other influencers once they see that the policy is actually being enforced.").

113. Fredericks, *supra* note 83, at 29–30.

114. *Id.* at 30. Advertisers can more readily spread the cost of complying with the endorsement guides, and they are in the best position to inform influencers of the standards for compliance. *Id.* at 51–52.

115. *See* Fredericks, *supra* note 83, at 29–30.

116. *See* Boerman et al., *supra* note 15, at 159.

117. *See infra* Section III.B.

B. The FTC Should Issue Awards to Encourage Disclosure Violation Reporting.

Enforcement agencies have developed whistleblower[118] award programs to "incentivize whistleblowers with specific, timely and credible information" to report violations.[119] Whistleblower awards are granted when a nongovernment entity or individual reports a violation to an agency and the complaint results in an enforcement action against the defendant.[120] For example, the SEC has issued awards since 2012 from "an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators."[121] Whistleblowers may receive an award ranging from "10[%] to 30[%] of the money collected when the monetary sanctions exceed $1 million" if they "voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action."[122] The IRS has a similar whistleblower or informant award program for tax evasion reports.[123]

The FTC should similarly offer awards to consumers for information resulting in a successful enforcement action. The FTC could grant awards based on a percentage of the monetary sanctions obtained in an enforcement action.[124] In addition, awards might only be granted for complaints that provide the first report containing original information.[125]

118. *Whistleblower*, BLACK'S LAW DICTIONARY (11th ed. 2019). Whistleblowers are typically employees in a company. *Id.* The term would not apply to an award issued to a consumer. This Comment will refer to awards the FTC would grant as "consumer awards."

119. *See, e.g.*, *Whistleblower Awards Over $900 Million*, SEC. EXCH. COMM'N, https://www.sec.gov/page/whistleblower-100million [https://perma.cc/LD89-X97W] (June 4, 2020).

120. *See id.*; *see also* Press Release, Sec. Exch. Comm'n, SEC Issues Record $114 Million Whistleblower Award (Oct. 22, 2020), https://www.sec.gov/new/press-release/2020-266 [https://perma.cc/LD89-X97W].

121. Press Release, SEC Issues Record $114 Million Whistleblower Award, *supra* note 120.

122. *Id.*

123. *See Whistleblower Office*, IRS, https://www.irs.gov/compliance/whistleblower-office#rules [https://perma.cc/NTX2-K3XX] (June 8, 2021). The IRS issues awards on a percentage basis depending on the amount of unpaid taxes collected. *Id.* Whistleblowers who are denied an award or feel they should have been given more can appeal to the Tax Court. *Id.*

124. *See, e.g.*, *id.*; *see also* Press Release, SEC Issues Record $114 Million Whistleblower Award, *supra* note 120.

125. *See generally* Press Release, SEC Issues Record $114 Million Whistleblower Award, *supra* note 120.

The FTC should revise the complaint process without making it too onerous.[126] If a consumer or consumer advocacy group were to file a complaint expecting to obtain an award, the FTC could charge an administrative fee. Court costs are incurred when a plaintiff files a complaint with a federal district court.[127] Similarly, the FTC could institute a processing fee to cover the cost of investigating and substantiating complaints.[128] The FTC could refund the fee if the complaint is found to be credible and keep the fee if the complaint is found to be false. After three or more false reports, the FTC could opt to no longer allow the complainant to collect an award. The FTC should have the discretion to deny the opportunity to collect an award. An administrative appeal process could be available for complainants who are denied the future ability to collect an award.[129]

The FTC could benefit from streamlining the complaint process for disclosure violations through an online reporting platform and requiring specific details on how the disclosure violation occurred.[130] The agency has already created an online platform for consumers to report fraud,[131] and the FTC could create a similar online reporting

126. *See* Harris, *supra* note 35, at 980–81.

127. *District Court Miscellaneous Fee Schedule*, U.S. CTS., https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule [https://perma.cc/TH2M-DVG9] (last visited Sept. 6, 2021).

128. For example, the FTC can charge an administrative fee when its records are requested under the Freedom of Information Act (FOIA). *Will I Be Charged Fees*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/foia/will-i-be-charged-fees [https://perma.cc/GW3K-XCN7] (last visited Sept. 6, 2021) (citing 16 C.F.R. § 4.8(b)) ("If we estimate that the fees for processing your request will exceed $25, we will not begin to process it without your permission. Fees are determined based on the type of requester you are (commercial use, news media/education/non-commercial scientific institution, and all others, including members of the general public) . . . .").

129. *See What Happens to a Claim for an Informant Award (Whistleblower)*, IRS, https://www.irs.gov/compliance/what-happens-to-a-claim-for-an-informant-award-whistleblower [https://perma.cc/G6Y3-4UZZ] (Mar. 22, 2021).

130. *See Streamlining*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/strategy/streamlining/ [https://perma.cc/RFV2-YYKF] (last visited Aug. 29, 2021); *Whistleblower Office, supra* note 123 (noting that whistleblower claims require specific details and explanations for the submission).

131. Press Release, Fed. Trade Comm'n, FTC Announces New Fraud Reporting Platform for Consumers: ReportFraud.ftc.gov (Oct. 22, 2020), https://www.ftc.gov/news-events/press-releases/2020/10/ftc-announces-new-fraud-reporting-platform-consumers [https://perma.cc/3RDQ-7SZ5] (on file with author). The FTC saw a significant uptick in fraud during the COVID-19 pandemic. *See* Press Release, Fed. Trade Comm'n, FTC Data Shows Big Jump in Consumer Reports About Scams Originating on Social Media (Oct. 21, 2020), https://www.ftc.gov/news-events/press-releases/2020/10/ftc-data-shows-big-jump-consumer-reports-about-scams-originating

platform for disclosure violations that would serve as a more efficient reporting mechanism.[132] Adding an incentive to encourage reporting is likely to increase the volume of reporting, so a tailored approach to the reporting process is essential for implementation.

C. To Resolve the Market Failure, Congress Should Enable the FTC to Award Consumers for Information in Conjunction with Other Solutions.

Influencer endorsement is one of the best ways for brands to access consumers in the most seemingly authentic way.[133] Positive influencer endorsements can have a significant effect on the success of a product, and the more "honest" a review, the more likely consumers will purchase the product.[134] Researchers have struggled to estimate how many endorsement disclosure violations go unreported,[135] and there may be significantly more violations than are apparent and reported.[136] Influencers may be unaware that they are violating the endorsement disclosure regulations,[137] or they may feel that they lack an incentive to disclose material connections with brands.[138]

Brands and influencers may risk irreparable harm to their reputation from failure to disclose because consumers expect transparency; however, they also fear reputational harm even if they disclose a sponsorship.[139] Advertisers know that sponsored content labeled with #AD or #Sponsored incurs significantly less engagement on social media platforms.[140] In their quest to convey authenticity,

[https://perma.cc/5ERD-LM4A] (on file with author). This reporting system was a response to the increased need. *See* FED. TRADE COMM'N, PROTECTING CONSUMERS DURING THE COVID-19 PANDEMIC: A YEAR IN REVIEW 5 (2021), https://www.ftc.gov/system/files/documents/reports/protecting-consumers-during-covid-19-pandemic-year-review/covid_staff_report_final_419_0.pdf [https://perma.cc/5ERD-LM4A].

132. *See* Harris, *supra* note 35, at 980–81 ("[T]he FTC should add a specific category labeled 'Social Media Endorsement Violations,' so that the process is easier for consumers to create timely complaints for deceptive advertising violations.").
133. *See* Maheshwari, *supra* note 5.
134. *See* Brucculieri, *supra* note 4.
135. *See* Boerman et al., *supra* note 15, at 159.
136. *See id.* at 158.
137. *See id.* at 159.
138. Bannigan & Shane, *supra* note 21, at 259. Researchers have considered numerous factors to assess the lack of compliance. *See* Boerman et al., *supra* note 15, at 157–59.
139. Bannigan & Shane, *supra* note 21, at 259–60.
140. Maheshwari, *supra* note 5.

brands and influencers may risk the liability associated with inventing ways around endorsement disclosure.[141]

In practice, many influencers and product reviewers try to mention all connections they may have with a brand.[142] Some are explicit about whether they received a product for free,[143] and many are quick to inform consumers that they paid for a product with their own money.[144] However, influencers and brands who violate endorsement disclosure rules demonstrate that reputational effects have not eliminated the market failure.[145] Consumers have the right to know about material connections because this knowledge allows consumers to rationally select from marketplace options without the interference of misrepresentation.[146] Congress should correct the market failure by enabling the FTC to grant consumer awards as an enforcement tool that will enhance reporting.

The FTC potentially has the authority to make rules that allow consumer awards for information on endorsement disclosure violations.[147] However, such trade regulation rules are rarely drafted because of arduous procedural processes.[148] In addition, some commissioners have argued against broad rulemaking authority,

> Audiences "have a very visceral reaction to '#ad' or '#spon' or whatever it is, where they don't want to know people are getting paid for stuff even if they are," said Jaclyn Johnson, president of creative services at Small Girls PR, where she connects brands like L'Oréal Paris and Urban Decay cosmetics to influencers who have large social media followings. "A few bloggers we work with say, 'I want you to know, my engagement on posts that are tagged "#ad" or "#spon" get lower engagement than if that wasn't there.'"

Id.

141. *See* Bannigan & Shane, *supra* note 21, at 258–61. However, "recent reexaminations of consumer attitudes toward sponsored content suggest both the brand and the consumer stand to benefit from transparency." *Id.* at 261.
142. *See* Boerman et al., *supra* note 15, at 158–59.
143. *See id.* at 158–59.
144. *See, e.g.*, Brucculieri, *supra* note 4.
145. *See* Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1241–45 (2019).
146. *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 721–22, 742 (1997).
147. *See* 16 C.F.R § 1000.1; *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 42; Barbara Cohen, Comment, *Substantive Rulemaking and the FTC*, 42 FORDHAM L. REV. 178, 180–81 (1973).
148. HOOFNAGLE, *supra* note 36, at 101.

specifically related to new privacy legislation.[149] Similar opposition is possible if the FTC took a rule-making approach for consumer awards. Congress could draft legislation creating a fund for the awards to be issued from, as they did for the SEC awards in 2012.[150] Other solutions may be necessary in conjunction with consumer awards as an enforcement tool.[151]

Awarding consumers for information would be an efficient enforcement tool because the cost of obtaining information on complaints could decline if the FTC had more thorough and complete information from various sources.[152] The FTC could focus its efforts on investigating complaints and filing enforcement actions. Meanwhile, social media platforms, watchdog groups, and individual consumers could monitor compliance and develop cases against repeat violators.[153] Watchdog groups already exist as consumer protection nonprofits.[154] These groups have the expertise to monitor endorsement disclosure as well as hold advertisers and influencers accountable in partnership with the FTC.[155] A market could develop to find and report violations beyond the scope of the FTC's abilities. By offering consumer awards, the FTC could enhance the monitoring capacity of individual consumers and watchdog groups.

In addition, social media platforms may have an incentive to monitor their sites more closely for violations if the FTC offered an award for reporting disclosure violations.[156] The FTC could more effectively enforce against repeat violators by granting an award to

149. *See* John Hendel & Cristiano Lima, *FTC Chairman Tells Congress: Don't Give Me Too Much Power*, POLITICO (May 8, 2019, 5:33 PM), https://www.politico.com/story/2019/05/08/ftc-chairman-congress-rulemaking-authority-1418237 [https://perma.cc/34G3-5EXH].
150. *Cf.* Press Release, SEC Issues Record $114 Million Whistleblower Award, *supra* note 120.
151. *See supra* Section III.A.
152. *Cf.* Press Release, Sec. Exch. Comm'n, SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020), https://www.sec.gov/news/press-release/2020-219 [https://perma.cc/CRR9-FZJ8] ("The SEC's whistleblower program was created to incentivize individuals to report high-quality tips to the Commission and assist the agency in its efforts to combat wrongdoing and, as a result, better protect investors and the marketplace.").
153. *See supra* notes 105–07 and accompanying text.
154. *See, e.g.*, *Our Mission*, TRUTH IN ADVERTISING, https://www.truthinadvertising.org/about/ [https://perma.cc/NTZ5-JN8F] (last visited Sept. 6, 2021); *see also Consumer Protection Organizations*, THE PUBLIC VOICE, https://thepublicvoice.org/issues_and_resources/consumer-protection-organizations/ [https://perma.cc/7726-GA52] (last visited Sept. 6, 2021) (listing watchdog groups from around the world).
155. *See supra* note 107 and accompanying text.
156. *See supra* notes 105–06 and accompanying text.

social media platforms.[157] Social media platforms may be in the best position to report violations, especially since they have access to the content containing the violations, even if it is unlisted.[158]

The FTC frequently enters into consent agreements where no civil penalty is enforced unless there are additional violations after the Commission issues an administrative order.[159] In addition, Congress should consider proposals to allow the FTC to impose civil penalties through administrative processes.[160] Some have been hesitant to add this enforcement power because of concerns related to due process.[161] However, the FTC's efforts are crippled by the need to enter into toothless settlement agreements.[162] The Commission should have the discretion and authority to issue fines, even for first-time violations. The administrative hearing process provides due process protections, and respondents have the option to appeal the decision.[163]

A consumer is unlikely to recover in a civil suit against an influencer who misguided them because proving any damages beyond nominal would be challenging in most cases.[164] Therefore, when a consumer has been lied to, the consumer relies on the enforcement efforts of the FTC for redress.[165] Although the amount of money would be substantially less significant than the multimillion-dollar awards that the SEC grants,[166] Consumer awards could act as a small, supplementary form of redress for consumers.

Notably, the FTC frequently struggles to recover damages in enforcement actions.[167] Therefore, consumer awards could be rare.

157. *See supra* notes 105–06 and accompanying text.
158. *See supra* notes 105–06 and accompanying text.
159. Harris, *supra* note 35, at 973–78.
160. *See supra* note 112 and accompanying text.
161. HOOFNAGLE, *supra* note 36, at 117 ("The FTC has extraordinarily broad jurisdiction and an impressive set of legal tools to address unfair and deceptive practices. Concerns about due process problems have prevented the Commission from obtaining a general civil penalty power.").
162. *See* Harris, *supra* note 35, at 973–78 ("The repeated warning letters and previous settlement agreements demonstrate how the FTC is just giving social media influencers and companies endless chances to comply with its guidelines, but without any serious repercussions when they fail to do so.").
163. *See supra* note 43 and accompanying text.
164. *See supra* notes 46–48 and accompanying text.
165. *See supra* notes 46–48 and accompanying text.
166. *See, e.g.*, Press Release, SEC Issues Record $114 Million Whistleblower Award, *supra* note 120.
167. HOOFNAGLE, *supra* note 36, at 94 ("[T]he FTC has to engage in significant investigation and garnishments in order to fully collect.").

However, many FTC cases claim fraud, and the defendants are already insolvent.[168] In cases involving influencers, and potentially brands, the defendants are more likely to be capable of paying their judgments than scammers.[169] By establishing a consumer protection fund for awards, Congress could ensure that the money is available when an enforcement action is successful.[170]

Congress should consult the FTC and watchdog experts on the most efficient methods of enforcement. Consumer awards would provide an incentive to report violations,[171] and the FTC needs to include this incentive as part of a multifaceted approach to enforcement, especially as the internet marketplace rapidly evolves.[172] Congress should recognize that the FTC has limited resources,[173] and by partnering with consumers, advocacy organizations, and social media platforms, the FTC could bolster its efforts to regulate the influencer advertising market through private sector reporting initiatives.[174]

IV. CONCLUSION

For there to be "truth in advertising" and transparency in product reviews, the FTC needs enforcement tools that have the potential to keep pace with the global internet marketplace on social media.[175] Influencers and advertisers are undeterred by legal and reputational effects.[176] Influencers and brands currently have little incentive, aside from fostering good will, to comply with disclosure requirements.[177] Congress should enact legislation which creates a fund for consumer awards.[178] By offering an incentive to report, the FTC would

168. *See id.*
169. *See supra* notes 165–66 and accompanying text.
170. *Cf.* Press Release, SEC Issues Record $114 Million Whistleblower Award*, supra* note 120.
171. *Cf. Frequently Asked Questions*, *Office of the Whistleblower*, SEC. EXCH. COMM'N, https://www.sec.gov/whistleblower/frequently-asked-questions [https://perma.cc/8MBY-83UY] (Dec. 10, 2021).
172. *See supra* notes 131–44 and accompanying text.
173. FED. TRADE COMM'N, STRATEGIC PLAN: FISCAL YEAR 2018 THROUGH FISCAL YEAR 2022, at 6, https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf [https://perma.cc/KZ5T-A75Q] ("[The FTC] must make effective use of limited resources by targeting its law enforcement and education efforts to achieve maximum impact and by working closely with federal, state, international, and private sector partners in joint initiatives.").
174. *See supra* notes 150–58 and accompanying text.
175. *See supra* notes 131–58 and accompanying text.
176. *See supra* notes 137–45 and accompanying text.
177. *See supra* notes 137–43 and accompanying text.
178. *See supra* notes 168–72 and accompanying text.

encourage consumers, watchdog groups, and social media platforms to join the enforcement effort.[179] Until consumers have an incentive to report frequently and accurately, the FTC cannot effectively enforce endorsement disclosure requirements, and influencers will not have an incentive to comply.[180]

179. *See supra* notes 150–56 and accompanying text.
180. *See supra* notes 131–55 and accompanying text.