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NO IFS, ANDS, OR JUULS ABOUT IT: WHY INFLUENCERS MUST BE HELD ACCOUNTABLE

*Krystina Dorta**

In an era where nicotine addiction rates among minors have skyrocketed, partially as a result of flavored electronic cigarettes, the public is left wondering why it has taken the death of sixty-four individuals for the Federal Trade Commission (“FTC” or “Commission”) to address its lack of regulations for electronic cigarette advertisements.¹ Electronic cigarette companies use various advertising methods, but the most common includes reliance on independent third parties who endorse products (“influencers”).² Influencers have their own platform, can promote any product they like, and connect to any type of audience they can attract.³ Most influencers focus on niche industries such as fashion, beauty, travel, health, and technology.⁴ However,

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¹ *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping*, CTRS. FOR DISEASE CTL. & PREVENTION (Nov. 14, 2019), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (As of February 18, 2020, sixty-eight deaths have occurred relating to the EVALI [“[E]-cigarette or [V]aping use [A]ssociated [L]ung [I]njury”] outbreak, which has been strongly linked to vitamin E acetate product samples in patient lung-fluid samples tested by the CDC. There has been a decline in the reports of hospitalization for patients with lung injuries associated with e-cigarettes as a result of reporting lag from January 12 to 26, 2020.).

² Dimira Teneva, *11 Proven Marketing Channels to Promote Your Vape Shop Online*, METRILO, <https://www.metriilo.com/blog/marketing-channels-vape-shop> (last visited Mar. 18, 2021).

³ Zahara Jade, *List of Influencer Marketing Niches*, HIREINFLUENCE (Nov. 8, 2016), <https://hireinfluence.com/blog/list-of-influencer-marketing-niches/>.

⁴ *Id.*

there is a category of influencers whose electronic-cigarette niche has cultivated a new generation of nicotine addiction. Under the FTC's current Endorsement Rules, the specific relationship that an advertising company, intermediary, or social media influencer has with a brand being advertised aids the FTC in determining if those parties are liable for the products they advertise.⁵

Electronic cigarettes ("e-cigarettes") were introduced to the United States with qualms surrounding the stigma surrounding the safety of traditional cigarettes.⁶ As e-cigarettes began to beat the battle against the stigma of cigarettes, different social media platforms began to implement a new form of paid advertisements: brand endorsements.⁷ With the dominant wave of social media advertisements came the need to monitor potential deceptive statements made by influencers on behalf of brands. The FTC, in an effort to promote competition while preventing the public from deceptive advertisements, released an Endorsement Guide describing what would be considered violations.⁸

E-cigarettes and advertisements by social media influencers soon meshed, creating an advertising environment that helped companies significantly expand their audiences. This practice, however, was rife with deceptive practices as to the relationship between influencers and brands, as well as false health claims regarding e-cigarettes.⁹ Now that e-cigarettes have caused deaths,¹⁰ the FTC is beginning to investigate the advertising practices of e-cigarette companies.¹¹ If its main goal is to deter such deceptive activity, the FTC should conclude its investigations by bringing a formal complaint against e-cigarette companies. The FTC recently settled cases against major companies, like CSGO Lotto, Inc., but to date, has not filed a formal complaint

⁵ *E-Cigarette Ads and Youth*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vitalsigns/ecigarette-ads/index.html> (last visited Mar. 18, 2021).

⁶ CTRS. FOR DISEASE CONTROL & PREVENTION, *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: A REP. OF THE SURGEON GEN.* 10, 33 (2016).

⁷ Edward Timke, *Social Media and Advertising*, 18 *ADVERT. & SOC. Q.* 2 (2017).

⁸ 15 U.S.C. § 45(a)(2) (2006); *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

⁹ Allie Conti, *This 21-Year-Old Is Making Thousands a Month Vaping on YouTube*, VICE (Feb. 5, 2018), https://www.vice.com/en_ca/article/8xvjmk/this-21-year-old-is-making-thousands-a-month-vaping-on-youtube.

¹⁰ Althea Ulin & Celina Tebor, *Death and Injury Caused by e-Cigarettes*, USD VISTA (Oct. 10, 2019), <https://uofsdmedia.com/death-and-injury-caused-by-e-cigarettes/>.

¹¹ *FTC to Study E-Cigarette Manufacturers' Sales, Advertising, and Promotional Methods*, FED. TRADE COMM'N (Oct. 3, 2019), <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-e-cigarette-manufacturers-sales-advertising-promotional>.

against an e-cigarette company for deceptive practices.¹² If an e-cigarette company were to be found liable for violating the FTC's advertising regulations,¹³ it would create the precedent necessary to put pressure on other companies to comply with the agency's standards.

This article will analyze how the FTC's Endorsement Guide regulating the advertising of e-cigarette products should be applied to social media influencers. The article will also show how the Commission's ultimate decision regarding the regulation of these products' advertisement via social media influencers will affect an entire generation of young individuals who smoke these products. This article first reviews the rise and fall of traditional cigarette consumption and advertisements in American history, as well as the creation of e-cigarettes and their advertising. This article further analyzes the struggle to regulate e-cigarettes by the Food and Drug Administration ("FDA") and later the FTC. This article explains the different social media platforms, discussing how the FTC investigates different advertising methods and analyzes different examples of e-cigarette influencers, who either comply with or neglect the FTC's Endorsement Guide. Moreover, this article evaluates the federal government's reaction to the e-cigarette health crisis, followed by a review of the FTC's previous actions addressing Endorsement Guide violations, along with the consequences on other companies' marketing strategies. Finally, this article reviews influencer liability standards for Endorsement Guide violations and develops recommendations to improve those standards.

I. THE RISE OF E-CIGARETTES

A. Decline of Traditional Cigarettes

Tobacco has been a global commodity for centuries, dating back to 6,000

¹² *In re Warner Bros. Home Entm't, Inc.*, 152 F.T.C. 3034 (2016); *see also Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos*, FED. TRADE COMM'N (July 11, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>; *In re CSGOLotto, Inc., Trevor Martin, and Thomas Cassell*, 162 F.T.C. 3184 (2017).

¹³ 15 U.S.C. § 45. The "regulation" will be used in referring directly to the Endorsement Guide. The FTC does not have codified formal regulations in the Code of Federal Regulations regarding the disclosure of material relationships between influencers and companies. The guides published by the FTC do not have the same force or effect as a statute or law; they are simply guidance for companies, and the FTC has the general authority under the Federal Trade Commission Act. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last revised Oct. 2019).

BC.¹⁴ Since then, users have found various ways to ingest and inhale tobacco.¹⁵ As the industrial revolution gained momentum, cigarette sales began to soar with James Bonsack's invention of the cigarette-making machine.¹⁶ In the twentieth century, sales especially escalated in the United States during wartime after military forces sent millions of packs of cigarettes to soldiers in their C-rations,¹⁷ packages containing food and supplies, creating an entire market of addicted consumers.¹⁸ In the mid-1940s, cigarettes were extremely common and were a part of daily life, like a cup of coffee; cigarette companies went so far as to actually include alleged health benefits of smoking their brand in advertisements.¹⁹ For example, "[s]mokers of Camels were even encouraged to smoke a cigarette between every course of a Thanksgiving meal—as an 'aid to digestion.'"²⁰ Although there was a spike in lung and other cancers, medical professionals were not able to fully establish the link between cigarettes and lung cancer, as well as other illnesses. It was not until 1954 that the American Cancer Society released a study that showed there was enough evidence to associate smoking and disease.²¹ Society initially resisted the theory that cigarettes caused cancer.²² For example, in 1966, 27 percent of Americans agreed that cigarettes were only a minor cause of illness.²³ But by the 1970s and 1980s, attitudes toward smoking hardened, and smoking frequency began to slowly decline.²⁴ As more medical evidence illuminated the dangers of

¹⁴ *History of Tobacco*, TOBACCO FREE LIFE, <https://tobaccofreelife.org/tobacco/tobacco-history/> (last visited Mar. 19, 2021).

¹⁵ *Cigarettes and Other Tobacco Products*, NAT'L INST. ON DRUG ABUSE (Jan. 2020), <https://www.drugabuse.gov/publications/drugfacts/cigarettes-other-tobacco-products>.

¹⁶ *History of Tobacco*, *supra* note 14.

¹⁷ David Vergun, 'C-Rats' Fueled Troops During and After World War II, U.S. DEP'T OF DEF. (Aug. 13, 2019), <https://www.defense.gov/Explore/Features/story/Article/1933268/c-rats-fueled-troops-during-and-after-world-war-ii/> (defining "C-rations" as boxes of prepackaged food and produced for soldiers during World War II).

¹⁸ *History of Tobacco*, *supra* note 14.

¹⁹ Martha N. Gardner & Allan M. Brandt, *The Doctors' Choice is America's Choice: The Physician in US Cigarette Advertisements, 1930–1953*, 97 AM. J. PUB. HEALTH 222, 222 (2006).

²⁰ K. Michael Cummings & Robert N. Proctor, *The Changing Public Image of Smoking in the United States: 1964–2014*, 23 CANCER EPIDEMIOLOGY, BIOMAKERS & PREVENTION 32, 32 (2014) ("[Including other] explicit health claims, such as 'They don't get your wind' (Camel, 1935), 'gentle on my throat' (Lucky Strike, 1937), 'play safe with your throat' (Philip Morris, 1941). . .").

²¹ ROBERT N. PROCTOR, *GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION* 234 (University of California Press ed. 2012).

²² *Id.* at 308.

²³ Cummings & Proctor, *supra* note 20, at 33.

²⁴ *Id.* at 33; *see generally* ALLAN M. BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* (Perseus Books Grp. ed. 2007); *see also* PROCTOR, *supra* note 21, at 308.

smoking, Congress passed federal laws prohibiting smoking in closed areas, cigarette advertising regulations became more stringent, and released health disclosures on second-hand smoking.²⁵ The stigma surrounding cigarettes snowballed; prevention campaigns were created for children, the FDA required Surgeon General warnings to be disclosed on packages,²⁶ and society accepted that cigarettes indeed caused cancer.²⁷

B. Modern Cigarettes and Components

With the decline and stigmatization of traditional smoking, 2006 saw the introduction of a modern, “cleaner” type of cigarette: e-cigarettes.²⁸ Patents were granted in reference to an e-cigarette as early as the 1930s, but the first commercialized version of an e-cigarette was not created until 1979.²⁹ Although this version reached retailers, physician Norman Jacobson considered it a failure for its lack of delivery of evaporated nicotine.³⁰ The world’s first successful e-cigarette was created by Hon Lik in 2003 in Beijing, China.³¹

E-cigarettes, also known as vaporizers and “vapes,” contain several different components.³² Although e-cigarettes come in different sizes, makes and models, they all include four main parts: a battery, an atomizer or cartomizer, a cartridge, and a mouthpiece.³³ The battery gives power to the machine itself, making it “electronic.”³⁴ The cartridge is the container that holds the nicotine liquid (e-liquid), while the mouthpiece is what the consumer puts to their lips to inhale the vapor.³⁵ The e-liquid is the juice that is poured into the cartridge that contains the nicotine and flavoring. It is made of two main ingredients: propylene glycol (“PG”) and vegetable glycerin (“VG”), otherwise known as “e-juice” or “vape juice.”³⁶ PG is an organic substance and is “deemed to be

²⁵ Cummings & Proctor, *supra* note 20, at 33.

²⁶ CTRS. FOR DISEASE CONTROL AND PREVENTION, 2000 SURGEON GENERAL’S REPORT HIGHLIGHTS: WARNING LABELS (2015).

²⁷ See Cummings & Proctor, *supra* note 20, at 33.

²⁸ *Historical Timeline of Vaping & Electronic Cigarettes*, CONSUMER ADVOCATES FOR SMOKE-FREE ALTS. ASSOC., <http://www.casaa.org/historical-timeline-of-electronic-cigarettes/> (last visited Mar. 18, 2021).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Vaping Devices (Electronic Cigarettes)*, NAT’L INST. ON DRUG ABUSE (Jan. 2020), <https://www.drugabuse.gov/sites/default/files/drugfacts-vaping-devices.pdf>.

³³ Christina Matthews, *Vaping – A Journey Through Its History*, VAPING DAILY (Feb. 23, 2017), <https://vapingdaily.com/what-is-vaping/vaping-history/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Dray Moorman, *What Is E-Liquid?*, MIGVAPOR (Apr. 1, 2019),

safe for human ingestion.”³⁷ PG is more commonly used as the liquid that creates onstage smoke effects at some live events or at Halloween.³⁸ VG is a “thick, viscous substance . . . extracted from the palm plant”³⁹ and is the ingredient that creates the voluminous smoke that is exhaled.⁴⁰ In today’s market, a bottle of e-juice is composed of slightly less than 50% PG and 50% VG, with the rest comprised of flavoring and nicotine.⁴¹ The artificial flavoring in the e-liquid is food-grade and is available in a variety of appealing flavors, including “bakery & cereal,” “milk & cream,” “tobacco,” and more.⁴² The nicotine included is pharmaceutical-grade⁴³ and comes in different percentages, giving the consumer the ability to choose the strength of nicotine they would like to purchase.⁴⁴

The atomizer is attached to the battery and turns the e-liquid into a vapor.⁴⁵ As the battery heats up a coil inserted in the machine, the liquid begins to vaporize and the nicotine within the vapor is then inhaled.⁴⁶ Some models do not include an atomizer and instead have a cartomizer, which also heats the e-liquid to a temperature that triggers vaporization.⁴⁷

C. Battle for Regulation

The modern e-cigarette was introduced to the United States in 2006, and the agency with jurisdiction over it is the FDA, which had authority over tobacco products from the Center for Drug Evaluation and Research.⁴⁸ Disputes over the FDA’s jurisdiction arose after it directed the US Customs and Border Protection to reject any entry of the products into the country because it was

<https://www.migvapor.com/ecig-news/what-is-e-liquid/>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*; see also *Vape Juices*, MIGVAPOR, <https://www.migvapor.com/vape-juice> (last visited Mar. 18, 2021).

⁴³ *E-Juice/E-Liquid Product Testing Analysis & Safety Information*, AVOMEEN, <https://www.avomeen.com/lifesciences-e-juice-e-liquid-product-testing-analysis-safety-information/> (last visited Mar. 18, 2021) (stating pharmaceutical grade nicotine must require the product to be created under “Good Manufacturing Practices” and must be “98-99.7% pure”).

⁴⁴ Moorman, *supra* note 36.

⁴⁵ *Id.*

⁴⁶ Matthews, *supra* note 33.

⁴⁷ *Id.*

⁴⁸ *Historical Timeline of Vaping & Electronic Cigarettes*, *supra* note 28.

listed as an “unapproved drug delivery device[.]”⁴⁹ E-cigarette industries quickly challenged the FDA’s authority to regulate the products beginning in 2009, which resulted in regulatory rulings that the FDA can “only regulate e-cigarettes as a tobacco product, unless therapeutic claims are made.”⁵⁰ However, as these lawsuits began in 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act, which granted the power to and established the FDA as the leading agency to regulate the tobacco industry.⁵¹ By 2011, the FDA was given authority to regulate e-cigarettes as it did with other tobacco products, yet explained that any advertisements or beneficial health claims would be more strictly regulated.⁵² By 2016, the FDA had sent fifty-five warning letters to retailers selling the product to minors.⁵³ By that time, it was becoming apparent that kid-friendly, childlike e-juice flavors were more appealing to minors than the tobacco and menthol flavors of traditional cigarettes.⁵⁴

D. Involvement of the Federal Trade Commission

While the FDA was battling for authority to regulate the importation and sale of e-cigarettes, the FTC began its combat against misleading advertising and endorsements of e-cigarettes. In late 2013, six senators advocated for an investigation into the advertising practices of the industry, which prompted the FTC to become involved with e-cigarettes.⁵⁵ The FTC has jurisdiction over e-cigarette advertisements, as it is “empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts of practices in or affecting commerce.”⁵⁶ The FTC is authorized to publish guides for the voluntary

⁴⁹ *Id.*

⁵⁰ *Id.*; see *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 891 (D.C. Cir. 2010).

⁵¹ *Historical Timeline of Vaping & Electronic Cigarettes supra* note 28.

⁵² *Id.*; see Press Release, Senators Boxer, Blumenthal, Durbin, Harkin, Brown and Markey Urge the Federal Trade Commission to Investigate E-Cigarette Marketing Practices (Dec. 18, 2013), <https://www.markey.senate.gov/news/press-releases/boxer-blumenthal-durbin-harkin-brown-and-markey-urge-the-federal-trade-commission-to-investigate-e-cigarette-marketing-practices> (acknowledging that advertising and marketing tactics pose a risk of misleading consumers regarding the perceived benefits of e-cigarettes without careful government regulation) (henceforth known as “Press Release, Senators”).

⁵³ Harold Bishop, *FDA Warns 55 Retailers About E-Cigarette, E-Liquid, and Cigar Sales to Minors*, WOLTERS KLUWER L. & BUS. (Sept. 19, 2016), <http://health.wolterskluwerlb.com/2016/09/fda-warns-55-retailers-about-e-cigarette-e-liquid-and-cigar-sales-to-minors/>.

⁵⁴ *Id.*

⁵⁵ The Commission, 16 C.F.R. § 0.1 (2019); *Historical Timeline of Vaping & Electronic Cigarettes, supra* note 28; see also Press Release, Senators, *supra* note 52.

⁵⁶ 15 U.S.C. § 45(a)(2) (2006).

regulation of endorsements of products, which “set forth the general principles that the Commission will use in evaluating endorsements and testimonials.”⁵⁷ Under the FTC’s guide, an endorsement is defined as:

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.⁵⁸

Further, a sponsor or advertiser “must reflect the honest opinions, findings, beliefs, or experience of the endorser.”⁵⁹ Additionally, “an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”⁶⁰ The FTC has authority to hold advertisers or sponsors liable for failing to disclose the relationship between the advertiser and the sponsor.⁶¹ Section 5 of the Federal Trade Commission Act gives the FTC authority to gather information to occasionally investigate “the organization, business, conduct, practices, and management of any . . . whose business affects commerce . . .”⁶² and file cases requiring defendants “. . . to give up money they received from their violations and to abide by various requirements in the future.”⁶³

Examples of violations include failing to disclose the material relationship between the hired advertiser and the company, or advertising false health claims of a product.⁶⁴ Enforcement by the FTC is authorized through administrative or judicial proceedings, so long as the Commission has “‘reason to believe’ the law is being or has been violated.”⁶⁵ The FTC therefore is authorized to send warning letters to companies, file suits, or issue penalties for violations of the Endorsement Guide. An action pursued by the FTC for a violation of the guide or other statutes begins with an investigation on behalf of any member of the federal government, federal agency, or complaint by the

⁵⁷ Purpose and Definitions, 16 C.F.R. § 255.0(a) (2009).

⁵⁸ § 255.0(b).

⁵⁹ § 255.1(a).

⁶⁰ *Id.*

⁶¹ § 255.1(c).

⁶² *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 13.

⁶³ *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 8.

⁶⁴ § 255.5.

⁶⁵ *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 13.

public.⁶⁶ With the rise of social media, the Endorsement Guide has become critical, as advertisements for companies are becoming increasingly ubiquitous.

II. “SOCIAL MEDIA TAKEOVER”

The rise of social media created an entirely new environment for companies to advertise their products. As technology has become more advanced, the promotion of products on social media has developed from blogging to include video blogging (“vlogging”) and has been promoted on other social networking platforms.

A. Blogging

Blogging is a form of personal expression, where an individual can write about anything they choose and share it with the digital world.⁶⁷ The “official” start to blogging is generally considered to be a website designed by Justin Hall, a student, in the mid-1990s.⁶⁸ Actual platforms for blogs were created later in the 1990s, and by 2002, blog advertisements began.⁶⁹ Advertisements in blogs allowed popular bloggers to make a profit since “[g]ood blogs were sponsored by big brands.”⁷⁰ Still today, bloggers receive compensation and products “[i]n exchange for reviews and endorsements.”⁷¹ Blogging remains prevalent today, and companies rely on bloggers to review products. For example, *Vapor Vanity* is an e-cigarette or “vaping” blog that reviews multiple smoking products, juices, and oils. The blog provides opinion articles on smoking and products; guides on nicotine products; “how-to” articles, including how to perform tricks with vapor smoke; and updates on legal and e-cigarette-related political news.⁷² The writers on *Vapor Vanity* created an affiliate disclosure page specifically referring to FTC Disclosures and the compensations the owners of the blog receive for their reviews and advertisements.⁷³ This can be viewed as one of the many examples of a social

⁶⁶ 16 C.F.R. § 2.1 (2020).

⁶⁷ Gary Dekmezian, *Why Do People Blog? The Benefits of Blogging*, HUFFPOST (Sept. 23, 2015), https://www.huffpost.com/entry/why-do-people-blog-the-be_b_8178624.

⁶⁸ David Cross, *The Evolution of Blogging – A Brief Overview*, WEBHOSTINGMEDIA (Nov. 7, 2017), <https://webhostingmedia.net/blogging-evolution/>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² JR Reynoldson & Phil Morrisberg, *About Us*, VAPOR VANITY, <https://www.vaporvanity.com/about-us/> (last visited Mar. 18, 2021).

⁷³ JR Reynoldson & Phil Morrisberg, *Affiliate Disclosure*, VAPOR VANITY, <https://www.vaporvanity.com/affiliate-disclosure/> (last visited Mar. 18, 2021) (“Even

media influencer disclosing their relationship with brands. Bloggers have also found lucrative opportunities in video blogging through platforms such as YouTube.

B. YouTube

YouTube, a website that enables users to share uploaded video content, was established in 2005.⁷⁴ While it took more than five years for companies to realize the advertising capabilities of blogs, the first YouTube advertisement aired in 2006, only one year after its inception.⁷⁵ In late 2006, Google purchased YouTube and focused on creating the video platform into an advertising-based revenue stream.⁷⁶ YouTube creators, which are referred to as “YouTubers,” are able to upload homemade videos to their “page” and share them with the online community. As creators expand their audiences and reach more people, their subscribers consequently grow. Subscribers is the term of art for users on the YouTube platform that choose to follow a creator, and can opt in to receive notifications of newly posted videos free of charge.⁷⁷

With the emergence of extremely popular YouTubers, the platform has become a commercial hub, giving many YouTubers what they consider to be their career. In order to entice and appeal to their audiences, many YouTubers have created “filming rooms,” which are rooms with additional lighting, film equipment, and materials needed for their videos.⁷⁸ As with blogging, the more subscribers a YouTuber has, the more likely he or she is to receive endorsements from companies to advertise their products. This generational shift of creators on YouTube, realizing they can make a profit from companies based on videos made at home, has contributed to what is known as a “social media market.”⁷⁹ This new and highly popular avenue of advertising is a “rapidly growing industry that attempts to promote products or increase brand

though the owners of this website may receive affiliate compensation for reviews or advertisements, the website will always display a real person’s honest opinions, findings, beliefs, or experiences on those topics or products.”).

⁷⁴ Carsten Schwemmer & Sandra Ziewiecki, *Social Media Sellout: The Increasing Role of Produce Promotion on YouTube*, SOC. MEDIA + SOC’Y 1, 2 (2018).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *What are YouTube Subscribers and How Does It Work?*, INFLUENCERMARKETINGHUB, <https://influencermarketinghub.com/what-are-youtube-subscribers-and-how-does-it-work/> (last visited Mar. 18, 2021).

⁷⁸ Schwemmer & Ziewiecki, *supra* note 74, at 2.

⁷⁹ *Id.*; see also *Social Media Global Market Report 2021: COVID 19 Impact and Recovery to 2030*, REPORTLINKER (Jan. 28, 2021), <https://www.globenewswire.com/news-release/2021/01/28/2166050/0/en/Social-Media-Global-Market-Report-2021-COVID-19-Impact-and-Recovery-to-2030.html>.

awareness through content spread by social media users who are considered to be influential.”⁸⁰

Within YouTube and other social media platforms, both novel and mature companies seek to partner with influencers because they “reach users on social media platforms and are characterized by number of followers and engagement rates.”⁸¹ Thus, product promotion on social media platforms such as YouTube can be extremely beneficial for companies should they choose the proper endorser for their target audience. There are several ways companies can partner with a YouTuber to advertise a product, including inserting referral links, product placing, “hauls,” or creating giveaways.⁸²

Referral links send a user to an external website that is affiliated with the product that is promoted. Personal “promotion codes” are usually given to YouTubers for their subscribers to receive discounts on the products.⁸³ Once that YouTuber’s personal promotion code is used for a purchase, the YouTuber is given a certain percentage of a sale for suggesting the product.⁸⁴ Product placement is another way YouTubers promote a company’s product.⁸⁵ Different versions of paid product placements on YouTube are strategically arranged, in particular when it comes to different YouTube channel categories.⁸⁶ “Hauls,” a form of product placement, involves a brand sending a YouTuber or influencer a certain amount of product to show on video, usually intended to show viewers the brand and price of the product.⁸⁷ Giveaways are another form of advertising companies use with YouTubers and influencers. In a giveaway, a company will partner with an influencer and will usually send them products to give away to participants selected at random.⁸⁸ YouTube has specific policies that users must abide by to create a giveaway, including having an official set of rules and sole responsibility for all aspects of the contest.⁸⁹ By spreading awareness for the brand and its products through giveaways with partnered companies, YouTubers and influencers can increase

⁸⁰ Schwemmer & Ziewiecki, *supra* note 74, at 2; see Daniel Carter, *Hustle and Brand: The Sociotechnical Shaping of Influence*, SOC. MEDIA + SOC’Y 1, 2 (2016).

⁸¹ Schwemmer & Ziewiecki, *supra* note 74, at 2; see generally Carter, *supra* note 80, at 2.

⁸² Schwemmer & Ziewiecki, *supra* note 74, at 3–4.

⁸³ *Id.* at 3.

⁸⁴ *Id.*

⁸⁵ *Id.* at 4.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *What is a Giveaway?*, EASYACC (Mar. 10, 2016), <https://www.easyacc.com/media-center/what-is-a-giveaway/>.

⁸⁹ *YouTube’s Contest Policies and Guidelines*, YOUTUBE, <https://support.google.com/youtube/answer/1620498?hl=en> (last updated Apr. 8, 2020).

their number of subscribers.⁹⁰ In 2019, YouTube's advertisements reached \$15 billion in global revenues, a significant increase from the \$11 billion it generated in the 2018 fiscal year.⁹¹

Today, millennials are especially drawn to YouTube influencers for product reviews because of their ability to truly connect with their subscribers and create intimate relationships with them: 40 percent of millennial YouTube subscribers felt they had a better understanding with YouTubers than with their own friends.⁹² Millennials, also known as Generation Y, are considered to be individuals born from 1982–1999⁹³ and are “the largest consumer demographic with about \$1.3 trillion in buying power as at the end of 2015.”⁹⁴ Millennials and the following generations have been exposed to the rapid modernization of technology, leaving them susceptible to trusting social media influencers. As a result, millennials and minors under the age of eighteen, are easily drawn to products that influencers review, including e-cigarettes. Blogging, YouTube, and other social media platforms have quickly become a part of millennials' regular social lives.

C. Instagram

Instagram is a platform, launched in 2010, which allows users to post and share pictures and videos.⁹⁵ Instagram rapidly gained acceptance with users of all ages. In 2012, Facebook purchased Instagram for \$1 billion,⁹⁶ and the trend of advertisers promoting products on social platforms quickly and successfully carried over to Instagram. For example, one estimate shows that from February 2016 until September 2017, two million influencers were utilizing the platform

⁹⁰ Schwemmer & Ziewiecki, *supra* note 74, at 4.

⁹¹ Daniel Carnahan, *How Google Plans to Build on YouTube's \$15 Billion in Ad Revenue*, BUS. INSIDER (Feb. 5, 2020), <https://www.businessinsider.com/alphabet-finally-disclosed-details-about-youtubes-advertising-revenue-2020-2>.

⁹² Andrew Arnold, *Why YouTube Stars Influence Millennials More Than Traditional Celebrities*, FORBES (June 20, 2017), <https://www.forbes.com/sites/under30network/2017/06/20/why-youtube-stars-influence-millennials-more-than-traditional-celebrities/#269674ab48c6>; see generally Celie O'Neil-Hart & Howard Blumenstein, *Why YouTube Stars Influence Millennials More Than Traditional Celebrities*, GOOGLE (July 2016), <https://www.thinkwithgoogle.com/consumer-insights/youtube-stars-influence/>.

⁹³ Ruiying Xiong et al., *Generational Differences: A Comparison of Weight-Related Cognitions and Behaviors of Generation X and Millennial Mothers of Preschool Children*, 16 INT. J. ENVIRON. RES. PUB. HEALTH 1, 1 (2019).

⁹⁴ Arnold, *supra* note 92.

⁹⁵ Yuheng Hu et al., *What We Instagram: A First Analysis of Instagram Photo Content and User Types*, INT'L AAAI CONF. ON WEB AND SOC. MEDIA 595, 595 (2014).

⁹⁶ Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, N.Y. TIMES (Apr. 9, 2012), <https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/>.

for endorsement or sponsorship deals.⁹⁷ The platform itself has created tools for business users, such as companies and influencers, to maximize their target audiences. This includes “advanced analytics, shoppable Instagram posts with direct links to purchase the products posted, and new ways to drive traffic from Instagram Stories, and the new standalone video platform, IGTV,”⁹⁸ which allows users to create a longer video, much like YouTube. Instagram has become such a success that 72 percent of Instagram users base their decision to purchase products on whether they have previously seen it on Instagram.⁹⁹ Thus, social media platforms are now a very useful tool in promoting products to large audiences. Bloggers, YouTubers, and influencers have become powerful players in establishing relationships with audiences and enticing them to products that the influencers endorse or promote. Nonetheless, these influencers and the businesses they are partnering with must abide by the FTC’s established guide and regulations in disclosing their relationships.

III. FTC ENDORSEMENT GUIDE

The FTC created the Endorsement Guide to help “prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce.”¹⁰⁰ Although the FTC has not yet defined the ambiguous terms “deceptive acts or practices,” it has released multiple formal and informal statements narrowing what it considers to be acceptable disclosures of relationships between advertisers and businesses.¹⁰¹ As relevant to social media platforms, the FTC’s Endorsement Guide applies to companies or brands partnered with social media influencers to promote their products.¹⁰²

Social media influencers are considered to be “independent third-party endorser[s] who shape or influence audience attitudes through blogs, tweets, and the use of other social media . . . and use ‘tools which facilitate more connectedness and recommendations,’”¹⁰³ which will be described in further

⁹⁷ J. Clement, *Number of Active Advertisers on Instagram 2016-2017*, STATISTA (Apr. 11, 2019), <https://www.statista.com/statistics/283701/active-instagram-advertisers/>.

⁹⁸ *Instagram Marketing: The Definitive Guide (2019)*, LATER, <https://later.com/instagram-marketing/#> (last visited Mar. 18, 2021).

⁹⁹ Melissa Smith, *The Eye-Opening Influence of Instagram on Buying*, IMPACT (Sept. 6, 2020), <https://www.impactbnd.com/blog/influence-of-instagram-on-buying-infographic>.

¹⁰⁰ 15 U.S.C. § 45(a)(2) (2006).

¹⁰¹ See, e.g., *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 8; see also *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>.

¹⁰² See *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, *supra* note 101.

¹⁰³ Schwemmer & Ziewiecki, *supra* note 74, at 2; see Karen Freberg et al., *Who Are the*

detail *infra*. Authorized under the Endorsement Guide, the FTC's policy statements create clearer instructions on how to disclose a relationship on social media platforms.¹⁰⁴ It is important for an influencer to disclose its relationship with a brand because of the intimate relationship that the influencer may have with his or her audience.¹⁰⁵ The reason influencers are so popular in advertising is because of their ability to associate with their respective audience better than a celebrity could.¹⁰⁶ An influencer promoting a product, even if only through product placement, should disclose the promotional content and that they received payment for the promotion.¹⁰⁷ The FTC has specified:

consumers viewing Instagram posts on mobile devices typically see only the first three lines of a longer post unless they click 'more,' which many may not do . . . recipients . . . should disclose any material connection above the 'more' button[.] . . . [W]hen multiple tags, hashtags, or links are used, readers may just skip over them, especially when they appear at the end of a long post[.] . . . [P]articular disclosures that are not sufficiently clear . . . [include] '#sp,' 'Thanks [Brand],' or '#partner' . . .¹⁰⁸

These listed examples of appropriate signals allow a neutral social media user to understand that the influencer using the product received payment in return for promoting the item. Businesses and influencers may ask the FTC to explain key principles and situations that would require an influencer to disclose a relationship, avoid warning letters, lawsuits, and/or having their commissions retracted.¹⁰⁹ In an informal policy statement in April 2017, the FTC said that disclosure of a relationship with a brand or multiple brands applies to video content, specifying instances where a business and influencer have established a relationship.¹¹⁰ If an influencer or business violates the Endorsement Guide, the FTC may investigate and impose strict monitoring

Social Media Influencers? A Study of Public Perceptions of Personality, 37 PUB. REL. REV. 90, 90 (2011); see also Matthew C. Nisbet & John E. Kotcher, *A Two-Step Flow of Influence?*, 30 SCI. COMM. 328, 341 (2009).

¹⁰⁴ *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, *supra* note 101.

¹⁰⁵ Laura E. Bladow, *Worth the Click: Why Greater FTC Enforcement Is Needed To Curtail Deceptive Practices in Influencer Marketing*, 59 WM. & MARY L. REV. 1124, 1134 (2018).

¹⁰⁶ Arnold, *supra* note 92.

¹⁰⁷ *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, *supra* note 101.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

systems to be implemented for up to twenty years.¹¹¹

A. Development of an Investigation

The FTC encourages voluntary compliance with its regulations, but to assure endorsement arrangements are in compliance, it has a number of methods to oversee conduct, including: “surfs;” public outreach; or the FTC’s own social media presence.¹¹² “Surfs” refers to law enforcement partnering with the FTC to “surf” or search on the internet and pinpoint violations.¹¹³ Rather than file a case against an individual influencer or company, if a potential administrative violation is found, the FTC will first issue a warning letter, which “identifies the questionable practice, explains the applicable law, and provides an opportunity for the individual or company to voluntarily comply with the law.”¹¹⁴ To better educate the public on what is considered an FTC violation, the agency has held periodic public seminars “for stakeholders to engage in a productive discourse . . . and . . . provide the FTC with invaluable information to further ‘its policymaking and enforcement efforts’ and raise the profile of significant regulatory issues.”¹¹⁵ Furthermore, the FTC’s social media presence, like hosting Twitter conversations and answering compiled questions from individuals and companies, helps users engage in conversations about what constitutes appropriate conduct under the regulations.¹¹⁶

B. Method of Investigation

If any member of the federal government, agency, or the general public files a complaint,¹¹⁷ the FTC may launch an investigation into the endorsement deal between an individual and a business.¹¹⁸ In its investigation, the FTC may

¹¹¹ *In re Warner Bros. Home Entm’t, Inc.*, 152 F.T.C. 3034, at *4 (2016); *see Warner Bros. Settles FTC Charges*, *supra* note 12; *In re CSGO Lotto, Inc. et al.*, 162 F.T.C. 3134, at *8.

¹¹² Bladow, *supra* note 105, at 1144–45.

¹¹³ *Id.* at 1144.

¹¹⁴ *Id.*; *see* A.B.A. SEC. OF ANTITRUST L., FTC PRAC. AND PROC. MANUAL 220 (2d ed. 2014).

¹¹⁵ Bladow, *supra* note 105, at 1145; *see* A.B.A. SEC. OF ANTITRUST L., CONSUMER PROTECTION L. DEVS. 525 (2d ed., 2016).

¹¹⁶ *See, e.g.*, Federal Trade Commission (@FTC), TWITTER (Sept. 14, 2017), <https://twitter.com/ftc/status/908386034551062532?lang=en>; Federal Trade Commission (@FTC), TWITTER (Oct. 30, 2019), <https://twitter.com/FTC/status/1189604026117177345>; *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 8.

¹¹⁷ 16 C.F.R. § 2.1 (2020).

¹¹⁸ 15 U.S.C. § 46(a) (2006).

order individuals or businesses to file annual or special reports.¹¹⁹ The FTC may also order the individual or business to answer specific questions regarding their endorsement venture.¹²⁰ All reports or answers the FTC requests are to be made under oath.¹²¹ Should the FTC find the individual or business to not be at fault, it will release a closing letter to the public expressing its decision not to take further action.¹²² However, even if it releases a closing letter, it still reserves its right to reopen the investigation in the future; the mere issuance of the closing letter itself is not dispositive.¹²³ If the FTC decides to continue an investigation, it may seek civil penalties or injunctions in federal court.¹²⁴ To establish liability, a party need not have knowledge that they have caused injury through a violation of a rule.¹²⁵ Any party found liable for any violation faces a maximum civil penalty of \$40,000 for each violation imposed, contingent upon the party's knowledge that its acts were prohibited.¹²⁶ The FTC seeks to provide opportunities for companies to prevent a suit from being filed by releasing press releases and illustrations and hosting online Twitter conversations.¹²⁷

IV. VAPING INFLUENCERS

As previously mentioned, influencers often use social media platforms to advertise products to users. Influencers for e-cigarettes have used various platforms to promote and review products, including personal blogs, YouTube, and Instagram. These influencers are subject to the FTC's Endorsement Guide. As discussed below, some influencers have complied with the Endorsement Guide,¹²⁸ while others have blatantly violated it.¹²⁹ Additionally, there are

¹¹⁹ § 46(b).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Bladow, *supra* note 105, at 1144.

¹²³ See 16 C.F.R. § 3.72(b) (2020); Bladow, *supra* note 105, at 1143–44.

¹²⁴ Bladow, *supra* note 105, at 1143; see also *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 13.

¹²⁵ Bladow, *supra* note 105, at 1144.

¹²⁶ 15 U.S.C. § 45(m)(1)(A) (2006); 16 C.F.R. 1.98(d) (2017).

¹²⁷ Bladow, *supra* note 105, at 1144; see A.B.A. SEC. OF ANTITRUST L., *supra* note 114, at 220; *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8; Federal Trade Commission (@FTC), *supra* note 116.

¹²⁸ See generally *The Original Deals & Steals Blog*, VAPOR JOES, <http://vaporjoe.blogspot.com/> (last visited Apr. 18, 2021) (It is unknown if the owner of the blog, Joe Petner, actually complies with the FTC's Endorsement Guide as he disclosed; he does not charge vendors to be promoted on his blog but fails to disclose if he gains a material benefit from companies as "donations" or "gifts" for more favorable posts.).

¹²⁹ Conti, *supra* note 9.

social media companies, such as Instagram, which are actively taking steps to prevent violations and encourage compliance through new policies.¹³⁰

A. Bloggers

Much like *Vapor Vanity*,¹³¹ there are other prominent blogs where individuals review and share e-cigarette products with the general “vaping” community, and often make a living from their profits.¹³² For example, Joe Petner created his blog, *Vapor Joes*, to share discounts and deals on e-cigarette products.¹³³ Petner started his e-cigarette discount blog after deciding to connect with the e-cigarette community through local meetings and online.¹³⁴ Today, Petner’s blog generates “one million visitors every two weeks.”¹³⁵ In an interview with *Guide to Vaping*, Petner explained that his days consist of “liaising with vapors and vendors . . . hosting broadcasts . . . and plenty of social networking as it pertains to vaping.”¹³⁶

The content of *Vapor Joes* includes discounts and coupon codes for different companies advertising e-juices, e-cigarette batteries, and devices.¹³⁷ *Vapor Joes* has an entire page dedicated to different options for companies seeking to advertise, ranging from \$249.99 a month to \$1,000.00 a month on *Vaping Underground*, a *Vapor Joe* affiliate.¹³⁸ This disclosure is not inconsistent with the FTC’s Endorsement Guide, as Petner does not fail to disclose a material relationship for these advertisements.¹³⁹ However, Petner explicitly states that *Vapor Joes* does not charge vendors to be listed within the blog, but it has a page forwarding companies to fill out all their information if they have a deal they want to promote.¹⁴⁰ *Vapor Joes* does not disclose if the site receives donations or forms of payments as gifts for a more favorable post on the

¹³⁰ *Helping Creators Turn Their Passion into a Living*, INSTAGRAM (Dec. 18, 2019), <https://business.instagram.com/blog/helping-creators-turn-their-passion-into-a-living/>.

¹³¹ Reynoldson & Morrisberg, *supra* note 72.

¹³² Suzy Weiss, *Vape Influencers Say They’re the Real Victims of Vaping Illness Crisis*, N.Y. POST (Oct. 15, 2019), <https://nypost.com/2019/10/15/vape-influencers-say-theyre-the-real-victims-of-vaping-illness-crisis/>.

¹³³ Blake Brown, *Calling Out: Vapor Joes*, GUIDE TO VAPING (Oct. 22, 2013), <https://guidetovaping.com/2013/10/22/calling-out-vapor-joes/>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See generally *The Original Deals & Steals Blog*, *supra* note 128 (compiling various advertisements and coupons for all things related to vaping).

¹³⁸ *Advertising on VaporJoes Network*, VAPOR JOES, <http://www.vaporjoesnetwork.com/index.html> (last visited Mar. 18, 2021).

¹³⁹ *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 8.

¹⁴⁰ See *The Original Deals & Steals Blog*, *supra* note 128.

blog.¹⁴¹ If Petner receives payments or gifts for advertisements and does not disclose these arrangements, this would appear to violate the FTC's Endorsement Guide, and the blog would be subject to review.

B. YouTube

Some influencers' sole niche is the e-cigarette industry; these influencers create revenue from advertising products sent to them by e-cigarette companies. An example of one such influencer is 21-year-old Donny Karle.¹⁴² Otherwise known as "DonnySmokes," his e-cigarette review videos on YouTube earn him a monthly income of \$1,200 and additional income from companies to which he charges a flat fee for a review.¹⁴³ One company allegedly paid him \$1,000 for a single review of their vaping product.¹⁴⁴ Karle's first YouTube video was merely him unpacking a box of a new e-cigarette brand, JUUL.¹⁴⁵ Although it was only a six-minute video, 52,000 people viewed it, which tempted him to create more.¹⁴⁶ In less than a year, Karle had almost 120,000 subscribers to his YouTube channel.¹⁴⁷ However, Karle does not advertise the fact that he is getting paid to review the brands that reach out and send him their products.¹⁴⁸ This could be, on its face, perceived to be a violation of the FTC's Endorsement Guide for failing to disclose that he is getting paid for his review constitutes. Additionally, some of Karle's videos are aimed towards minors, including the headlines "How to HIDE & HIT Your JUUL at SCHOOL WITHOUT Getting CAUGHT."¹⁴⁹ Karle claims that his videos offer a "safer alternative, [to smoking]"¹⁵⁰ and ". . . underage vaping . . . [is] not something I'm promoting, and it's not something I'm saying you shouldn't do."¹⁵¹ This seems disingenuous given that minors and young adults obtaining and smoking e-cigarettes has caused an epidemic across the nation.

Amid the increase in online targeting of minors for e-cigarette products, e-cigarette and nicotine use has increased 78 percent in high-school students and

¹⁴¹ *See id.* (disclaiming charging vendors but not mentioning donations or gifts).

¹⁴² Conti, *supra* note 9.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

48 percent in middle-school students from 2017 to 2018.¹⁵² In 2018 alone, 3.62 million middle and high-school students were current users of e-cigarettes.¹⁵³ One study tested a group of 141 undergraduate students and “found that celebrity endorsements significantly increased the positive attitudes towards e-cigarettes and e-cigarette smoking intentions as compared to non-celebrity endorsements and product advertisements. These endorsements can increase nicotine addiction and smoking attitudes in youth”¹⁵⁴ As of October 1, 2019, a sudden mysterious health crisis broke out, which caused eighteen deaths and 1,080 illnesses that have been attributed to vaping by the Centers for Disease Control and Prevention.¹⁵⁵

C. Instagram

Instagram has quickly become one of the most popular platforms for influencers on social media, especially when it comes to advertising. Consequently, Facebook and all of its platforms (including Instagram) have recently updated their community guidelines.¹⁵⁶ Instagram anticipates that the new guidelines will help achieve its goal of greater protection and transparency with consumers.¹⁵⁷ Its updated policies aim to provide “clearer rules for the paid promotion of certain goods and services such as vaping, tobacco, alcohol and diet supplements.”¹⁵⁸ These updated policies go on to explain that “branded content that promotes . . . vaping [and] tobacco products . . . will not be allowed.”¹⁵⁹ The announcement further explains how Instagram has always prohibited advertising these products, but that it now plans to enforce these policies more strictly.¹⁶⁰

As a result of these updated policies, e-cigarette influencers, whose incomes depend on receiving various forms of payment for promoting products, are suffering.¹⁶¹ For example, Victoria Williams is an Instagram influencer with

¹⁵² Erika Williams, *FDA Goes After Vaping ‘Influencers’ on Social Media*, COURTHOUSE NEWS SERV. (June 7, 2019), <https://www.courthousenews.com/fda-goes-after-vaping-influencers-on-social-media/>.

¹⁵³ *Vaporizers, E-Cigarettes, and other Electronic Nicotine Delivery Systems (ENDS)*, FDA, <https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends> (last visited Apr. 18, 2021).

¹⁵⁴ Anuja Kulkarni, *Instagram and E-Cigarettes: How Celebrity Endorsements Can Influence Our Youth*, MED. NEWS BULL. <https://medicalnewsbulletin.com/instagram-e-cigarettes-celebrity-endorsements-can-influence-youth/> (last visited Apr. 18, 2021).

¹⁵⁵ Ulin & Tebor, *supra* note 10.

¹⁵⁶ *Helping Creators Turn Their Passion Into a Living*, *supra* note 130.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Ruth Reader, *Vape Influencers are Reeling from Instagram’s Crackdown on Vaping*

58,000 followers. She smokes e-cigarette products, hosts giveaways, and posts the giveaways on her page.¹⁶² Like other influencers, Williams was paid to post e-cigarette promotions on her Instagram page, which generated a profit of approximately \$3,500 per month.¹⁶³ As of October 2019, Williams only has one active contract and has suffered financially, which has resulted in her borrowing of money from family members due to the scaling back of e-cigarette marketing resulting from the updated policies and general public outrage.¹⁶⁴

It should be noted that Instagram's updated policies are geared more to preventing users from advertising prohibited products, rather than requiring influencers to disclose their affiliations with brands.¹⁶⁵ This difference arises because Instagram's interest is in protecting its own brand value, so it does not want to be associated at all with disfavored products, whereas the FTC's concern is simply that consumers of legal products, whether disfavored or not, not be deceived by influencers.¹⁶⁶

D. The Federal Government's Reaction to the Health Crisis and Violations

Federal agencies and President Trump quickly took action in response to the staggering number of youths becoming addicted to nicotine as a result of influencers. The Trump Administration, for example, supported the amendment of the Federal Food, Drug, and Cosmetic Act,¹⁶⁷ which raised the minimum age to purchase tobacco (including e-cigarettes) from eighteen to twenty-one years.¹⁶⁸ Since December 2019, the FDA has conducted more than one million compliance checks with retailers of tobacco products.¹⁶⁹ Other

Ads, FAST CO. (Dec. 23, 2019), <https://www.fastcompany.com/90446861/vape-influencers-are-reeling-from-instagrams-crackdown-on-vaping-ads>.

¹⁶² Weiss, *supra* note 132.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Matt Southern, *Instagram Has New Rules for Publishing Branded Content*, SEARCH ENGINE J. (Dec. 18, 2019), <https://www.searchenginejournal.com/instagram-has-new-rules-for-publishing-branded-content/340933/#close>.

¹⁶⁶ FTC, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS 2 (2019), <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers>.

¹⁶⁷ General Provisions Respecting Control of Tobacco Products, 21 U.S.C. § 387f (d)(5) (2019).

¹⁶⁸ *Newly Signed Legislation Raises Federal Minimum Age of Sale of Tobacco Products to 21*, U.S. FOOD & DRUG ADMIN. (Jan. 15, 2020), <https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21>.

¹⁶⁹ *Id.*

proposed legislation has been introduced to the Senate, including the Reversing the Youth Tobacco Epidemic Act of 2020.¹⁷⁰ Introduced in early January 2020, the bill would further amend the Federal Food, Drug, and Cosmetic Act regarding the advertising of tobacco products, making it illegal to advertise e-cigarettes to individuals under twenty-one or to compensate any person for advertising an e-cigarette product without clearly disclosing the relationship.¹⁷¹ The proposed bill also gives the FTC authority to enforce violations of the advertisement of e-cigarettes under the Federal Trade Commission Act.¹⁷²

Both the FDA and the FTC have sent out a multitude of warning letters to manufacturers of e-liquids, which advise them of violations of the endorsement and disclosure rules.¹⁷³ The FDA advised that social media posts promoting e-cigarettes and juices have not included nicotine warnings, even though such warnings have been mandatory since 2018.¹⁷⁴ In retrospect, both agencies were arguably slow to take action on the regulation of e-cigarettes until the public health crisis broke out.¹⁷⁵ Norman Sharpless, the Acting Commissioner of the FDA from April until November of 2019, explained, “[T]he [agency] should have acted sooner . . . [and] should have begun regulating these devices sooner.”¹⁷⁶ Scott Gottlieb, former FDA commissioner, defended the agency’s reasoning for delaying regulation, stating: “We didn’t want to sweep [the] market of e-cig[arettes] at [the] very moment we sought to regulate nicotine in cigarettes. We had to give adult smokers who still wanted to access nicotine some alternative. Our main goal was to transition adults off nicotine . . .”¹⁷⁷

¹⁷⁰ Reversing the Youth Tobacco Epidemic Act of 2020, S. 3174, 116th Cong. (2020).

¹⁷¹ S. 3174 § 201(a)(1)(A)–(B).

¹⁷² *Id.*; Unfair or Deceptive Acts or Practices Rulemaking Proceedings, 15 U.S.C. § 57a (a)(1)(B) (2012).

¹⁷³ *FTC and FDA Send Warning Letters to Companies Selling Flavored E-liquids About Social Media Endorsements without Health Warnings*, FED. TRADE COMM’N (June 7, 2019), <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-fda-send-warning-letters-companies-selling-flavored-e-liquids>.

¹⁷⁴ *Id.*

¹⁷⁵ Katie Thomas & Sheila Kaplan, *E-Cigarettes Went Unchecked in 10 Years of Federal Inaction*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/health/vaping-e-cigarettes-fda.html>; Sarah Min, *Federal Watchdogs Warn Vaping Companies Over Online Marketing Practices*, CBS NEWS (June 7, 2019), <https://www.cbsnews.com/news/ftc-and-fda-issue-warnings-to-vaping-companies-using-social-media-influencer-marketing-without-nicotine-notices/>.

¹⁷⁶ Norman E. “Ned” Sharpness M.D., U.S. FOOD & DRUG ADMIN. (Nov. 4, 2019), <https://www.fda.gov/about-fda/fda-organization/norman-sharpless>; Stephanie Ebbs, *FDA ‘Should Have Acted Sooner’ On E-Cigarettes, Vaping: FDA Chief*, ABC NEWS (Sept. 25, 2019), <https://abcnews.go.com/Politics/fda-acted-sooner-cigarettes-agency-chief/story?id=65860311>.

¹⁷⁷ Scott Gottlieb M.D., U.S. FOOD & DRUG ADMIN. (Feb. 21, 2020), <https://www.fda.gov/about-fda/fda-organization/scott-gottlieb>; Ebbs, *supra* note 176; Scott Gottlieb (@ScottGottliebMD), TWITTER (Sept. 25, 2019), <https://twitter.com/ScottGottliebMD/status/1176848528548749313?s=20>.

Stephen Hahn, the 2019–2021 FDA commissioner, pledged to closely monitor and take a stance against the youth vaping epidemic.¹⁷⁸ Hahn made clear the FDA will take further action to prevent minors from vaping if reports show minors switching to menthol flavored e-cigarettes or products.¹⁷⁹ Recently, the FDA updated its “The Real Cost” Youth E-Cigarette Prevention Campaign.¹⁸⁰ The campaign will release new videos showing “teens who [have] developed severe anxiety and depression after using e-cigarettes” and supporting research for youths who want to quit any tobacco products through therapy.¹⁸¹

For its part, the FTC is undertaking a systematic review of its rules and guides, and it is seeking public comment on questions regarding the use of endorsements in advertising under the Endorsement Guide.¹⁸² The FTC requests that those submitting comments provide “any available evidence and data, such as empirical data, consumer perception studies, or consumer complaints, that support the . . . asserted position.”¹⁸³ Questions to the public include whether the deceptive practices that are discussed within the Guide are still prevalent, whether individual enforcement under the FTC Act would be more effective than regulation, and whether incentives given to influencers in exchange for advertising products or services should still be disclosed.¹⁸⁴ The FTC has notified influencers that “it’s [their] responsibility to make these disclosures, to be familiar with the endorsement guides, and to comply with laws against deceptive ads.”¹⁸⁵

The FTC has advised that many social media posts lacking nicotine warning label disclosures have ignored the obligation to disclose endorsement

¹⁷⁸ Stephen M. Hahn M.D., U.S. FOOD & DRUG ADMIN. (Jan. 20, 2021), <https://www.fda.gov/about-fda/fda-organization/stephen-hahn>; Laurie McGinley, *New FDA Chief Vows Tougher Action on Youth Vaping If Needed*, WASH. POST (Jan. 31, 2020), <https://www.washingtonpost.com/health/2020/01/30/new-fda-chief-vows-tougher-action-youth-vaping-if-needed/>.

¹⁷⁹ McGinley, *supra* note 178.

¹⁸⁰ Stephanie Caccamo, *FDA In Brief: FDA Expands Youth E-Cigarette Prevention Campaign to Include Stories From Teenagers Addicted To Nicotine*, U.S. FOOD & DRUG ADMIN. (Jan. 21, 2020), <https://www.fda.gov/news-events/fda-brief/fda-brief-fda-expands-youth-e-cigarette-prevention-campaign-include-stories-teenagers-addicted>.

¹⁸¹ *Id.*

¹⁸² *FTC Seeks Public Comment on its Endorsement Guides*, FED. TRADE COMM’N (Feb. 12, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-seeks-public-comment-its-endorsement-guides>.

¹⁸³ *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 85 Fed. Reg. 10104, 10105 (Feb. 21, 2020).

¹⁸⁴ *Id.* at 10105–06.

¹⁸⁵ Ted Max, *FTC Disclosure Guide Signals More Influencer Scrutiny*, FASHION & APPAREL L. BLOG (Feb. 5, 2020), https://www.fashionapparelblog.com/2020/02/articles/advertising/influencer-scrutiny/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

relationships, amounting to a deceptive practice.¹⁸⁶ The FTC has also issued orders for six e-cigarette companies to provide their advertising and sales methods, including the extremely popular e-cigarette manufacturer JUUL Labs, Inc.¹⁸⁷ Among the advertising methods used, the FTC plans to review the companies' "information about e-cigarette product placement, the websites and social media accounts used to advertise or sell e-cigarettes, affiliate programs, influencer marketing, and college campus programs."¹⁸⁸ Should the FTC find a disclosure violation in its investigation, the agency's actions will set future precedence for other e-cigarette companies to comply.

VI. FTC'S PREVIOUS RESOLUTION OF DISCLOSURE VIOLATION CASES

The FTC has settled major disclosure cases before, but none have been against e-cigarette companies or affiliated advertisers. For example, in July 2016, the FTC settled *In re Warner Bros. Home Entm't Inc.* for "failing to adequately disclose that it paid online 'influencers' . . . thousands of dollars to post positive gameplay videos on YouTube and social media" for the video game, *Middle Earth: Shadow of Mordor*.¹⁸⁹ As stated in the complaint, Warner Bros. had employed an advertising agency to hire online influencers to promote the video game on multiple social media platforms, giving the influencers hefty compensation, an advance-release version of the game, and instructions on how to properly promote it.¹⁹⁰ The FTC's complaint alleges that in these instructions, Warner Bros. failed to require the influencers to disclose the relationship they had regarding the endorsement, thus amounting to deceptive practices.¹⁹¹ Further, their instructions suggested that influencers "place the disclosures in the description box appearing below the video . . . visible only if consumers clicked on the 'Show More' button in the description box . . . making it even less likely that consumers would see the sponsorship disclosures."¹⁹² As a result of the company's disregard for the FTC's endorsement regulations, its settlement required the company to present their influencers with instructions that clearly reflect the FTC regulations; establish a monitoring and reviewing system following the influencer's posts on social

¹⁸⁶ See generally *FTC and FDA Send Warning Letters*, *supra* note 172.

¹⁸⁷ *FTC to Study E-Cigarette Manufacturers' Sales, Advertising, and Promotional Methods*, *supra* note 11.

¹⁸⁸ E-CIGARETTE MANUFACTURERS ORDERED TO GIVE FTC SALES, MARKETING DATA, 33 MEALEY'S LITIG. REP. TOBACCO 11 (Oct. 16, 2019).

¹⁸⁹ *Warner Bros. Settles FTC Charges*, *supra* note 12.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

media regarding the video game, and report and terminate payment to influencers who fail to abide by the relationship disclosure regulations.¹⁹³ Additionally, under the settlement agreement, the FTC has the right to request documents related to the company's compliance with the agreement for the next five years, until 2021;¹⁹⁴ and the order will last for twenty years.¹⁹⁵

The FTC also settled its first case against social media influencers in 2017, *In re CSGO Lotto, Inc., Trevor Martin, Thomas Cassell*.¹⁹⁶ The FTC filed a complaint against two YouTube video gaming influencers, Trevor Martin and Thomas Cassell, for failing to disclose the material relationship they had with their own online gambling service, CSGO Lotto.¹⁹⁷ The complaint also alleged that the gaming influencers paid others through an "influencer program" to endorse their new website, contractually forbidding them from expressing "statements, claims or representations . . . that would impair the name, reputation and goodwill of" CSGO Lotto."¹⁹⁸ With requirements much like in *Warner Bros.*, the influencer's Final Decision and Order mandated both the owners and their company, CSGO Lotto, to disclose material connections, monitor their endorsers, file compliance reports and notices, keep records, and comply with a monitoring system implemented with the Commission for twenty years.¹⁹⁹

These companies and their influencers have had to pay serious consequences for their deceptive practices in failing to properly disclose their relationships with the brands they are advertising. Although the FTC has not yet filed a complaint against the e-cigarette manufacturers for deceptive practices, its decision will affect its ability to protect the integrity of the relationships that companies have with consumers.

A. How FTC's Decision Will Influence Other Companies

Should the FTC limit itself to sending manufacturers warning letters regarding their advertising practices, there will be no real incentive for companies to change their habits. Without an incentive to change deceptive

¹⁹³ *In re Warner Bros. Home Entm't Inc.*, 152 F.T.C. 3034, at *4–5; *Warner Bros. Settles FTC Charges*, *supra* note 12.

¹⁹⁴ *Warner Bros.*, 152 F.T.C. 3034, at *5.

¹⁹⁵ *Id.* at *6–7.

¹⁹⁶ *FTC Approves Final Consent Order Against Owners of CSGO Lotto Website*, FED. TRADE COMM'N (Nov. 29, 2017), <https://www.ftc.gov/news-events/press-releases/2017/11/ftc-approves-final-consent-order-against-owners-csgo-lotto>.

¹⁹⁷ *Id.*

¹⁹⁸ *In re CSGolotto, Inc. et al.*, 162 F.T.C. 3184, at *4; *see also FTC Approves Final Consent Order Against Owners of CSGO Lotto Website*, *supra* note 196.

¹⁹⁹ *CSGolotto*, 162 F.T.C. 3184, at *2–4.

advertising practices, the FTC would be contradicting its own principles; viewers and consumers will be at a disadvantage, and an ongoing nicotine regulation crisis will continue. Additionally, if the FTC were to file a complaint against e-cigarette companies to better regulate their advertising practices, change would likely follow for other companies as well. Nevertheless, influencers who are paid to promote the product are usually left unscathed. There is no reason that e-cigarette manufacturing companies should be the only parties involved that are forced to change. Influencers should also be held accountable to the same standards as the e-cigarette companies, even if an e-cigarette company does not inform them of the required disclosures.

VII. INFLUENCER LIABILITY STANDARDS

The difference in assigning responsibility also makes it difficult for the brands and influencers themselves to understand what and when it is necessary to disclose.²⁰⁰ The FTC has tried to clarify such differences of liability depending on the type of relationships between advertisers, intermediaries, companies, and social media influencers.²⁰¹ An advertiser's responsibilities commence when they hire a network of social media influencers or retain a public relations firm that uses social media influencers.²⁰² Essentially, once a company hires an advertising agency that finds or uses social media influencers, the advertising agency must implement monitoring systems to confirm that the influencers comply with the FTC's guidelines.²⁰³

However, the FTC understands that it would be unreasonable for advertisers to monitor each individual advertisement made. As a result, they are instead required to conduct reasonable efforts at monitoring.²⁰⁴ Under this regime, if a rogue social media influencer blatantly disregards the advertiser's regulation-abiding program, the advertiser will likely not be liable for the violation.²⁰⁵ An intermediary company has obligations and potential liabilities similar to advertisers.²⁰⁶ An intermediary is a third party who is usually paid to distribute products to the social media influencers that work for that third party.²⁰⁷ Like

²⁰⁰ Elizabeth A. Casale, *Influencing the FTC to Update Disclosure Rules for the Social Media Era*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1, 16 (2019).

²⁰¹ *See id.* at 17; *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8; Lesley Fair, *Disclosures 101: New FTC Resources for Social Media Influencers*, FED. TRADE COMM'N (Nov. 5, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/disclosures-101-new-ftc-resources-social-media-influencers>.

²⁰² *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8.

²⁰³ *Id.*; *see also* Casale, *supra* note 200, at 16.

²⁰⁴ *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8.

²⁰⁵ *Id.*; *see also* Casale, *supra* note 200, at 16.

²⁰⁶ Casale, *supra* note 200, at 16.

²⁰⁷ *See id.*; *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8.

the advertisers' duties, intermediaries must disclose to their clients (the parties paying to distribute products) and their employees (the influencers), the requirements necessary to comply with the FTC's guidelines.²⁰⁸ However, in the FTC's published guide answering individual questions regarding the disclosure regulations, the FTC did not explain what an intermediary's liability is in the event that they have a rogue social media influencer.²⁰⁹

The scope of liability for social media influencers differs significantly as between an advertiser and an intermediary.²¹⁰ Regardless of what third party a company hires to promote a product, the company is liable, including rogue statements by influencers.²¹¹ Ultimately, the FTC has decided that even if a public relations firm controls a company's marketing, that company "is responsible for ensuring that the public relations firm is training and monitoring its social media promoters."²¹² Lastly, as previously discussed, the FTC has released multiple press releases,²¹³ held online Twitter conversations,²¹⁴ released illustrations,²¹⁵ and more²¹⁶ to help influencers understand what must be disclosed. Disclosure of the relationship between the social media influencer and the brand advertised is required so long as the influencer's post relates either to a general compensation plan or to a specific sponsored campaign.²¹⁷ If the social media influencer works as an affiliate marketer, as exemplified previously, by putting a promotional code on their video or post, the relationship with the retailer has to be clearly disclosed.²¹⁸

VIII. RECOMMENDATION TO FIX STANDARDS

To effect real change in the clarity and transparency of social media influencer promotional practices, the FTC has to be clearer and more consistent overall. The endorsement regulations should consistently state the obligations and potential liabilities of advertisers, intermediaries, and influencers in the case of rogue influencers ignoring the regulations. The FTC has made efforts to communicate openly with companies and influencers, yet

²⁰⁸ *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8; *see also* Casale, *supra* note 200, at 16.

²⁰⁹ *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8.

²¹⁰ Casale, *supra* note 200, at 17–18.

²¹¹ *Id.* at 17.

²¹² *Id.* (citing *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8).

²¹³ *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8.

²¹⁴ Federal Trade Commission (@FTC), *supra* note 116.

²¹⁵ *Id.*

²¹⁶ Fair, *supra* note 201.

²¹⁷ Casale, *supra* note 200, at 10–12, 17.

²¹⁸ *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8.

many questions remain and violations continue.²¹⁹

The FTC should also be as strict in filing complaints against influencers as it is in filing complaints against advertisers and companies. When filing complaints against companies for violations of the endorsement regulations, the FTC should also file against influencers, for violations like Donny King's YouTube videos. To date, the only influencers that have been sued by the FTC for endorsement regulation violations were Trevor Martin and Thomas Cassell. However, their case significantly differs from an ordinary social media influencer situation, because the two video-game influencers were the owners of the company with which they misrepresented.²²⁰

If the FTC were to finally take the step to file complaints against social media influencers, and order an appropriate fine as a consequence, there would be an immediate deterrence effect with other influencers who regularly ignore endorsement violations, even if their hiring company did not disclose the regulations to them. If the FTC continues within the realm of sending warning letters to influencers, it is unreasonable to expect significant, proactive change.

IX. CONCLUSION

The rapid growth of the use of e-cigarettes has engendered new fears for the health of future generations in the United States. As e-commerce continues to grow in popularity, fast-changing technology has made such commerce difficult to properly monitor. The FTC's Endorsement Guide has given social media users, influencers, and companies guidelines on how to properly disclose relationships and prevent deceitful action toward their audiences.²²¹ The agency is now specifically scrutinizing e-cigarette advertisements because of a mysterious illness that has affected minors and has even led to some deaths.²²² The FTC has sent out letters to e-cigarette companies, warning them of specific advertisements that violate the Endorsement Guide and are considered to be deceptive.²²³ The agency has also initiated an investigation into the advertisement practices of these companies, and its conclusion will ultimately determine how strong of a deterrent effect will ripple onto the e-cigarette industry as a whole.²²⁴

Nonetheless, the FTC should enforce the regulations on liable independent

²¹⁹ *Id.*

²²⁰ *FTC Approves Final Consent Order Against Owners of CSGO Lotto Websites*, *supra* note 196.

²²¹ *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 8.

²²² Ulin & Tebor, *supra* note 10.

²²³ *FTC and FDA Send Warning Letters*, *supra* note 172.

²²⁴ E-CIGARETTE MANUFACTURERS ORDERED TO GIVE FTC SALES, MARKETING DATA, *supra* note 188.

social media influencers by filing cases against them for failure to properly disclose their material relationships. Substantial fees are paid to influencers to promote e-cigarettes, and the FTC has expended significant efforts in explaining to influencers that they must abide by the Endorsement Guides. A greater level of accountability for influencer liability will set an example to others and deter future deceptive activity.