

**TROUBLE IN *PARADISE*: REGULATION OF INSTAGRAM
INFLUENCERS IN THE UNITED STATES AND THE
UNITED KINGDOM**

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INTRODUCTION

As social media has become a more pervasive force in society, regulatory bodies have struggled to manage the influx of “influencer” advertising. Influencers are people with significant followings on social media platforms who are compensated by companies for publishing posts that advertise or endorse the companies’ products or services. While anyone with a social media account and a number of followers can become an influencer, some of the most famous examples include Kim Kardashian, Kendall Jenner, and Selena Gomez. Although no country has been entirely successful in enforcing advertisement disclosure requirements for influencers, the United Kingdom has thus far been more successful in eliciting advertisement disclosures from influencers than the United States. The United States would be more successful if it incentivized company involvement, like the United Kingdom. Furthermore, the United States would be more successful if it took more direct action against influencers, which would signal to influencers and advertisers alike that they are being monitored and that compliance is expected. Finally, the United States would be more successful if it had an independent agency focused solely on advertising.

In Part I, this Comment will introduce the agencies that are responsible for regulating the behavior of social media influencers in the United States and the United Kingdom and will examine when disclosures should be made and the proper way to do so in each country. In Part II, this Comment will look to notable actions taken against those in violation of the regulations in each country, with particular emphasis on the consequences of those violations. In Part III, this Comment will look to the behaviors of comparable pop culture influencers in each country to examine when disclosures are and are not made. In Part IV, this Comment will examine the effectiveness of the guidelines and enforcement actions in the United States and the United Kingdom. Finally, in Part V, this Comment will argue that the British regulatory body, the Advertising Standards Agency, has been more effective in regulating the behavior of social media influencers.

I. REGULATORY AGENCIES

As technology has changed, so too have the means by which consumers see advertisements. Advertisements have evolved as technology has allowed them to be disseminated in different ways, from

print and radio advertising to television and now, digital advertising. In 2016, the online advertising market outpaced the TV advertising market by \$15 billion,¹ demonstrating the importance of the digital advertising market.

The rise of digital advertising has presented a new problem: the rise of ad-blocking software.² Ad-blocking software is an add-on that prevents the user from viewing advertisements.³ Ad-blocking software was first only available for use on desktop computers but has since become available on mobile devices as well.⁴ The use of ad-blocking software has grown rapidly, moving from 26 million active users of desktop ad-blocking software in 2010 to 236 million at the end of 2019, with an additional 527 million users of mobile ad-blocking software.⁵ As consumers install ad-blocking software, they are less likely to see traditional digital advertisements. This has led advertisers to turn to new methods of advertising, like brand sponsored posts, which are not blocked by ad-blocking software.

Brand-sponsored posts, or influencer advertisements, grew on social media from 3.6 million posts in 2015 to 24.2 million posts in 2018.⁶ While influencer advertisements have increased on all social media platforms, this paper will focus on the use of influencer advertising on Instagram.

Instagram has experienced meteoric growth over the past few years, growing from 100 million active monthly users in February 2013 to one billion active monthly users in June 2018.⁷ The use of influencer

¹ *US Online and Traditional Media Advertising Outlook, 2017-2021*, MARKETINGCHARTS (July 10, 2017), <https://www.marketingcharts.com/television-79007> [<https://perma.cc/DP2U-7FX3>].

² See PageFair, *The State of the Blocked Web: 2017 Global Adblock Report*, <https://marchewebmarketing.it/wp-content/uploads/2019/10/PageFair-2017-Adblock-Report.pdf> [<https://perma.cc/G5P8-8UD>] (last visited Oct. 3, 2020).

³ Dan Shewan, *The Rise of Ad Blockers: Should Advertisers Be Panicking?(!)*, WORDSTREAM, <https://www.wordstream.com/blog/ws/2015/10/02/ad-blockers> [<https://perma.cc/4AE7-R8LB>] (last visited Mar. 8, 2020).

⁴ See PageFair, *supra* note 2.

⁵ PageFair, *Growth of the Blocked Web: 2020 PageFair Adblock Report*, BLOCKTROUGH, 4, 6, https://s3.amazonaws.com/media.mediapost.com/uploads/2020-PageFair_Blockthrough-Adblock-Report.pdf [<https://perma.cc/Z3S8-YC9T>] (last visited Oct. 3, 2020).

⁶ *The Remarkable Rise of Influencer Marketing*, INFLUENCER MARKETING HUB, <https://influencermarketinghub.com/the-rise-of-influencer-marketing/> [<https://perma.cc/R9LH-JFXV>] (last visited Oct. 20, 2019).

⁷ Josh Constine, *Instagram Hits 1 Billion Monthly Users, Up from 800M in September*, TECH CRUNCH, (June 20, 2018, 1:58 AM) <https://techcrunch.com/2018/06/20/instagram-1-billion-users/> [<https://perma.cc/S649-LLFD>].

advertising has increased along with the number of people using the platform.⁸ One study found that the number of posts using certain hashtags to identify the posts as advertisements increased from 1.3 million posts in 2016 to 3.7 million in 2018, with projected increases to 5 million in 2019 and 6.1 million in 2020.⁹

A. REGULATION IN AMERICA: THE FEDERAL TRADE COMMISSION (FTC)

1. Mandate, authority, and history

In the United States, advertising is regulated by the Federal Trade Commission (FTC).¹⁰ The FTC was created in 1914 when President Woodrow Wilson signed the Federal Trade Commission Act (FTC Act) into law.¹¹ Under the FTC Act, the FTC protects consumers against false or deceptive advertising practices.¹² The FTC considers a representation or practice “deceptive” if it is “likely to mislead customers and affect consumers’ behavior or decisions about the product or service.”¹³ Additionally, the FTC deems an act “unfair” if the “injury it causes, or is likely to cause, is substantial, not outweighed by other benefits, and not reasonably avoidable.”¹⁴ In 2009, during the rise of online advertising, the FTC created Endorsement Guides to show brands and influencers how to comply with FTC regulations in online advertising.¹⁵

⁸ See *Instagram Influencer Marketing Is a 1.7 Billion Dollar Industry*, MEDIAXIX, <https://mediakix.com/blog/instagram-influencer-marketing-industry-size-how-big/> [<https://perma.cc/R2KW-C57L>] (last visited Oct. 20, 2019).

⁹ *Id.*

¹⁰ *What We Do*, FED. TRADE COMMISSION, <https://www.ftc.gov/about-ftc/what-we-do> [<https://perma.cc/73LN-K4TA>] (last visited Oct. 19, 2019).

¹¹ See Federal Trade Commission Act, Pub. L. No. 111-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 45 et seq. (2012)); *Our History*, FED. TRADE COMMISSION, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/A9NU-GLWG>] (last visited Oct. 19, 2019).

¹² 15 U.S.C. §§ 45, 52 (2012).

¹³ *Advertising and Marketing on the Internet: Rules of the Road*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road#laws> [<https://perma.cc/3Y7Z-MWLD>] (last visited Oct. 20, 2019).

¹⁴ *Id.*

¹⁵ 16 C.F.R. § 255.5 (2019).

2. *When do you need to disclose, and what is the proper way to do it?*

The Endorsement Guides provide that a disclosure must be made when there is a “material connection” between an endorser and an advertiser.¹⁶ A material connection means any connection that might affect the weight or credibility that consumers give the endorsement and may include monetary payment, a business or family relationship, or the gift of a free product.¹⁷

When a material connection exists, the endorser (or influencer) must make a clear and unambiguous disclosure of this connection.¹⁸ There are several standards that the influencer must follow in order to comply with the clear and unambiguous disclosure standard.¹⁹

First, the influencer must include some sort of language that makes the material connection obvious to the audience.²⁰ While this may sound overly simplistic, the FTC has elaborated on what is and is not included.²¹ For example, the influencer could include a sentence, like “Company X gave me this product to try . . .”²² Or, the influencer could include certain terms, such as “Sponsored,” “Promotion,” “Paid ad,” or “Ad.”²³ These terms could also be used as hashtags, such as “#ad” or “#sponsored.”²⁴

However, the FTC has described several terms or hashtags that are not sufficient. For example, an influencer could not include the word “ad” at the end of another hashtag, like “#companyxad,” because it is unlikely that a consumer would notice or understand the significance of the word.²⁵ Additionally, an influencer thanking a company (“thank you, Company

¹⁶ *Id.* The Endorsement Guides are codified at 16 C.F.R. § 255 (2019).

¹⁷ *Id.*

¹⁸ Lesley Fair, *Influencers, Are Your #materialconnection #disclosures #clearandconspicuous?*, FED. TRADE COMMISSION (April 19, 2017, 11:13 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2017/04/influencers-are-your-materialconnection-disclosures> [<https://perma.cc/5YDM-XXTR>].

¹⁹ *See id.*

²⁰ *The FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/K3R2-M7MR>] (last visited Oct. 20, 2019).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

X”) does not sufficiently communicate to the audience that there is a material connection. Furthermore, the FTC cautions against the use of the term “ambassador” because it is ambiguous and confusing, although “#CompanyX_Ambassador” could be permissible.²⁶ Moreover, the FTC mandates that the disclosure cannot be buried in the text of the post so as to render it not noticeable to the consumer.²⁷ For example, if the influencer chooses to use “#ad” to disclose the material connection with the brand, the influencer cannot include “#ad” in a string of other, unrelated hashtags.

While the FTC does not mandate that disclosures like “#ad” appear at the beginning of a post, such as a caption on Instagram, it suggests this is the safest course of action as the disclosure is less likely to be effective in the middle or at the end of the post.²⁸

Finally, the FTC has stated that built-in disclosure features on different social media platforms may give insufficient notice to the consumer.²⁹ Specific to Instagram, a disclosure placed above a photo on a platform designed to show people eye-catching images is not likely to attract people’s attention and therefore may not be sufficient.³⁰

The FTC has created one rule specific to Instagram. On Instagram, captions longer than two lines are truncated. Only the first two lines are shown, and, in order to read the rest, the viewer must click a “more” button. An influencer who is advertising on Instagram must place the disclosure above the “more” button so that a viewer can see the disclosure without an additional click.³¹

B. REGULATION IN THE UK: THE ADVERTISING STANDARDS AUTHORITY (ASA)

1. *Mandate, authority, and history*

In the United Kingdom, advertising is regulated by the Advertising Standards Authority (ASA).³² Originally, non-broadcast

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Our History*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/about-asa-and-cap/our-history.html> [<https://perma.cc/VUE5-96KV>] (last visited Oct. 20, 2019).

advertising was regulated by the Committee of Advertising Practice (CAP), which included agencies, media, and advertisers, and produced the first British Code of Advertising Practice in 1961.³³ CAP established the ASA in 1962 as the independent advertising regulator under the new Code.³⁴ The ASA did not have authority to refer problematic advertisers for legal action until 1988.³⁵ The ASA regulates social media influencers according to the rules in the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code).³⁶

Since 2004, the ASA has had authority over broadcast advertising.³⁷ In 1995, the ASA was granted authority over non-broadcast electronic media, which included “paid-for-space” online, such as banner ads, display ads, and sponsored searches.³⁸ It wasn’t until 2010 that the ASA gained control over non-“paid-for-space,” such as on social networking sites.³⁹

A major difference between the United States and the United Kingdom is that the ASA is a self-regulatory body funded by the advertising industry, while the FTC is a publicly funded government agency.⁴⁰ The ASA receives no government funding, but instead receives funds through a voluntary levy on the cost of advertising space (such as billboard sites and newspapers).⁴¹ For example, “where an ad cost £1,000 to appear on a billboard, £1 of that would be collected and go towards funding the ASA.”⁴²

The advertising industry writes the advertising rules (the CAP Code) through the Committee of Advertising Practice, which are then enforced by the ASA.⁴³ The ASA primarily responds to consumer complaints but can also independently monitor and resolve cases on its

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See About the ASA and CAP*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/about-asa-and-cap/about-regulation/about-the-asa-and-cap.html> [<https://perma.cc/WAZ5-R6B7>] (last visited Feb. 16, 2020).

³⁷ *Our History*, *supra* note 32.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See About the ASA and CAP*, *supra* note 36.

⁴¹ *Our Funding*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/about-asa-and-cap/about-regulation/our-funding.html> [<https://perma.cc/A9V9-EZ3D>] (last visited Feb. 16, 2020).

⁴² *Id.*

⁴³ *Id.*

own initiative.⁴⁴ The CAP Code does not have the force of law.⁴⁵ With this unique funding structure and narrow focus, the ASA has the resources to handle around thirty thousand consumer complaints each year.⁴⁶

2. *When do you need to disclose, and what is the proper way to do it?*

The ASA mandates that a post is an ad when the brand has control over the content of the post and rewards the influencer with payment, free gifts, or other perks.⁴⁷ The ASA suggests that posts where commercial intent is unclear should be labeled as an ad so as not to mislead consumers.⁴⁸

The ASA considers several categories of posts as advertisements subject to regulation. First, the ASA includes posts with discount codes or affiliate links as advertisements.⁴⁹ Because the influencer will be compensated for “click-throughs” and sales through that link, it becomes part of the ASA’s mandate.⁵⁰ Next, like the FTC, the ASA considers “own advertisements”—someone selling his or her own products or services—as advertising subject to regulation.⁵¹ This applies if the influencer is using his or her own channel to promote the products, and also applies to prize draws and giveaways of the products.⁵² Additionally, the ASA’s regulations apply to sponsored or promoted posts on social media.⁵³

⁴⁴ *Id.*

⁴⁵ *Scope of the Code*, ADVERT. STANDARDS AUTHORITY, https://www.asa.org.uk/type/non_broadcast/code_folder/scope-of-the-code.html [https://perma.cc/S2P7-49CR] (last visited Oct. 3, 2020).

⁴⁶ *About the ASA and CAP*, *supra* note 36.

⁴⁷ *Blog: Online Influencers - Is It an #ad?*, ADVERT. STANDARDS AUTHORITY (Aug. 21, 2017), <https://www.asa.org.uk/news/online-influencers-is-it-an-ad.html> [https://perma.cc/EA92-XFQG].

⁴⁸ *Id.*

⁴⁹ *ABC Cheatsheet for Love Island Contestants, Celebs and Influencers*, ADVERT. STANDARDS AUTHORITY (July 25, 2019), <https://www.asa.org.uk/resource/abc-cheatsheet-for-love-island.html> [https://perma.cc/QV7S-65UH].

⁵⁰ *Online Affiliate Marketing*, ADVERT. STANDARDS AUTHORITY (Dec. 10, 2019), [asa.org.uk/advice-online/affiliate-marketing.html](https://www.asa.org.uk/advice-online/affiliate-marketing.html).

⁵¹ *Influencers’ Guide to Making Clear That Ads Are Ads*, ADVERT. STANDARDS AUTHORITY 1, 6, <https://www.asa.org.uk/uploads/assets/9cc1fb3f-1288-405d-af3468ff18277299/INFLUENCERGuidanceupdatev6HR.pdf> [https://perma.cc/3YLH-GL2W] (last visited Oct. 3, 2020) [hereinafter *Influencer’s Guide*].

⁵² *Id.* at 3, 12.

⁵³ *Id.* at 2.

Importantly, the ASA only considers other paid posts as advertisements when a brand or promoter has paid the influencer *and* the brand or promoter has had some form of editorial control over the content (including final approval).⁵⁴ This differs from the FTC requirements, which make no mention of brand control over the content.

The ASA has also defined what qualifies as “payment.” First, and most obviously, if an influencer is paid a specified amount of money to create or post a piece of content, this is payment.⁵⁵ Additionally, if an influencer has a commercial relationship with the brand, including as an ambassador, or if the brand is providing the influencer with free products, gifts, or services, it qualifies as payment.⁵⁶

Additionally, the ASA has provided guidelines for what qualifies as “control” by the brand. A brand has control if it tells the influencer that they must include certain words, phrases, themes, key messages, or hashtags in a post.⁵⁷ A brand also has control if it has specified what needs to be in the image posted.⁵⁸ This can include specific actions to be taken in videos or specific types of content to be created, like review videos.⁵⁹ In addition, a brand has control if it specifies details such as the date, time, or number of times an influencer must post about a product.⁶⁰ Finally, if a brand has approval rights over a post, the brand has control.⁶¹

Posts with “payment” but without “control” are not regulated by the ASA.⁶² However, these posts may be regulated by the Competition and Markets Authority.⁶³

The ASA has provided guidelines for making advertisements “obviously identifiable as such.”⁶⁴ The ASA prefers influencers to use obvious disclosures, such as “ad,” “advert,” “advertising,” and

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.*

⁵⁷ *Id.* at 11.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.* at 10.

⁶³ *Id.* The Competition and Markets Authority (CMA) is the United Kingdom’s “primary consumer competition and consumer authority” and works to promote competition in the UK and beyond. *Id.* at 1. More information about the CMA can be found at their website, <https://www.gov.uk/government/organisations/competition-and-markets-authority>.

⁶⁴ *Id.* at 6.

“advertisement.”⁶⁵ The ASA suggests that influencers avoid disclosures like “sponsored,” “#spon,” “#sp,” “in association with,” “thanks to Company X,” “affiliate,” “#aff,” and “@” mentioning the brand, as they fail to make obvious the connection between the brand and the influencer.⁶⁶

Furthermore, the disclosures must be upfront (before people have to click or engage with the post), prominent (so people notice it), and suitable for all devices (meaning it works on mobile devices).⁶⁷ In order to comply with this, the ASA suggests placing the disclosure at the beginning of any post so that it will not be buried in a string of hashtags or hidden below the “more” button.⁶⁸

In total, the requirements of the FTC and the ASA are overwhelmingly similar. Both agencies require influencers to make clear when there is a connection between them and the brand sponsoring the post. Both agencies prefer that influencers use language bordering on the obvious to disclose these connections. Both agencies prefer that these disclosures be placed near the beginnings of the sponsored posts. The biggest difference between disclosure requirements for the FTC and the ASA is the ASA’s requirement that an influencer be paid for the post *and* the brand sponsoring the post have some sort of editorial control over the content of the post.

II. ACTIONS AND ENFORCEMENT

A. NOTABLE FTC ACTIONS AND ENFORCEMENT

The FTC has taken several actions against influencers who fail to adequately disclose their material connection to a brand.⁶⁹ These actions have varied, from sending warning letters to filing administrative complaints against parties.⁷⁰

⁶⁵ *Id.*

⁶⁶ *Id.* at 7; #Ad(vice) – Making Clear That an Ad Is an Ad, ADVERT. STANDARDS AUTHORITY (Feb. 6, 2020), <https://www.asa.org.uk/news/ad-vice-making-clear-that-an-ad-is-an-ad.html> [<https://perma.cc/3WQU-LZQV>].

⁶⁷ *Influencer’s Guide*, *supra* note 51, at 8.

⁶⁸ *Id.*

⁶⁹ Lesley Fair, *Three FTC Actions of Interest to Influencers*, FED. TRADE COMMISSION (Sept. 7, 2017, 11:11 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers> [<https://perma.cc/L4AD-A8DU>].

⁷⁰ *Id.*

One notable example came in 2017 when the FTC took action against Trevor Martin and Thomas Cassell, owners of CSGO Lottery, an online gambling site.⁷¹ Martin and Cassell made repeated posts on Twitter and YouTube touting their winnings from the site.⁷² However, the pair, both of whom were widely followed in the online gaming community, failed to disclose that they were the president and vice president, respectively, of the company.⁷³ Furthermore, Martin and Cassell paid thousands of dollars to other well-known influencers to promote the website, but failed to require those influencers to disclose those payments in their social media posts.⁷⁴ This action was the FTC's first action against individual social media influencers, and the agency entered into a settlement order with Martin and Cassell.⁷⁵

Also in 2017, the FTC sent more than ninety warning letters to influencers and marketers reminding them that they needed to conspicuously disclose their relationships to the brands they were promoting.⁷⁶ The letters were intended to be educational—they went into detail about what constitutes a material connection and how influencers should disclose those connections.⁷⁷ Importantly, the letters addressed one point specific to Instagram: that the disclosure should be at the beginning of a post so that it is not hidden by the “more” button.⁷⁸ The FTC did not disclose which influencers received the letters.⁷⁹

In 2019, the FTC, along with the Food and Drug Administration (FDA), sent warning letters to manufacturers of e-cigarette liquids whose

⁷¹ CSGO Lotto, Inc., File No. 1623184, Complaint (Fed. Trade Comm'n 2017) https://www.ftc.gov/system/files/documents/cases/1623184_csgolotto_complaint.pdf [<https://perma.cc/SQ89-CX55>].

⁷² *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMMISSION (Sept. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [<https://perma.cc/M97Q-C4J3>].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ CSGO Lotto, Inc., File No. 1623184, Decision and Order (Fed. Trade Comm'n, Nov. 28, 2017) https://www.ftc.gov/system/files/documents/cases/1623184_csgolotto_agreement_and_decision_and_order.pdf [<https://perma.cc/P5EX-M94T>].

⁷⁶ *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMMISSION (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/8SPC-ZCZB>].

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

products were advertised on other people's social media accounts.⁸⁰ The FDA was concerned that the advertisements did not include the required warning that the products contain nicotine, an addictive substance, and the FTC was concerned that the failure to disclose would mislead consumers.⁸¹ Furthermore, the posts by influencers did not conform to the FTC's guidelines for clear and conspicuous disclosures.⁸² The letters instructed the manufacturers to notify the agencies of actions taken to address the agencies' concerns.⁸³ The FTC encouraged companies to learn from this instance of enforcement, and to put into place social media policies.⁸⁴

While the FTC has the ability to bring administrative complaints, the agency seems to have demonstrated a preference for sending warning letters to influencers. This may be attributable to the fact that influencers are often individuals, and the FTC may feel its time is better spent pursuing administrative complaints against corporations.

B. NOTABLE ASA ACTIONS AND ENFORCEMENT

As opposed to the FTC's tendency to send warning letters, the ASA's enforcement actions are generally done in the form of formal rulings.⁸⁵ Such rulings are made against individual entities and influencers, and the facts and rulings are made available to the public. Additionally, the ASA's enforcement actions usually originate from a consumer complaint.

One such ruling centered around a post made in March 2019 by a fashion influencer.⁸⁶ The image showed him being measured for a suit and was accompanied by the caption "A man in a well Made to Measure suit will always have a better attitude. Get 25% off your #madetomeasure

⁸⁰ Lesley Fair, *FTC-FDA Warning Letters: Influential to Influencers and Marketers*, FED. TRADE COMMISSION (June 7, 2019, 11:59 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/06/ftc-fda-warning-letters-influential-influencers-marketers> [<https://perma.cc/T2TC-Q4NT>].

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *Rulings*, ADVERT. STANDARDS AUTHORITY, <https://www.asa.org.uk/codes-and-rulings/rulings.html#rulings> [<https://perma.cc/XKB8-D4GH>] (last visited Oct. 25, 2020).

⁸⁶ *ASA Ruling on Brooks Brothers UK Ltd*, ADVERT. STANDARDS AUTHORITY (Sept. 18, 2019), <https://www.asa.org.uk/rulings/brooks-brothers-uk-ltd-A19-565992.html> [<https://perma.cc/QTK7-Z2KC>].

experience at @brooksbrothers.unitedkingdom in Regent Street until March 31st. #brooksbrothers #madetomeasure #timelessclassics @brooksbrothers.unitedkingdom.”⁸⁷

The issue at hand was whether the post was obviously identifiable as a marketing communication.⁸⁸ Although Brooks Brothers and the influencer both argued that the post was an organic post and was not an advertisement, the ASA disagreed and ruled that the post was an advertisement, bringing it within the jurisdiction of the CAP Code.⁸⁹ Brooks Brothers and the influencer had an agreement that stipulated certain language to be used in paid posts, and although that language was not used, the influencer had used the hashtags that the agreement required for that specific month and had tagged the brand in the image and the caption.⁹⁰ This gave the brand sufficient control over the content of the post, which, in addition to the financial relationship between the two, made it an advertisement.⁹¹ Once the post had been ruled an advertisement, the ASA ruled that the hashtags were insufficient to ensure the post was obviously identifiable as an advertisement.⁹² Brooks Brothers and the influencer were instructed to ensure that all future ads are obviously identifiable by including, for example, “#ad” at the beginning of a post.⁹³

Another ruling by the ASA concerned a post by an influencer promoting a weight loss food supplement in an Instagram post that depicted the influencer sitting at a table in a bikini and socks holding a mug, accompanied by the caption

I’ve been staying in shape with my go to @skinnycaffe products. I love the Coffee’s [sic], Hot Chocolate’s [sic] and the Thermosyn capsules are amazing! I love to use them as me and some of the girls have been seeing great results and they work with or without exercise. You can lose up to 7lbs in 7 days with Thermosyn. Right now you can claim your first packet of Thermosyn free by clicking here.⁹⁴

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *ASA Ruling on the White Star Key Group t/a Skinny Caffe*, ADVERT. STANDARDS AUTHORITY (July 31, 2019), <https://www.asa.org.uk/rulings/the-white-star-key-group-ltd-G19-1019812.html> [<https://perma.cc/SRC8-8ADW>].

Skinny Caffe argued that the influencer was a personal friend who made the post as a favor, and it was therefore not an ad.⁹⁵ The ASA ruled that in addition to the personal relationship, there was also a commercial relationship that brought the post within the mandate of the ASA.⁹⁶ Skinny Caffe provided the influencer with the products and the wording they wanted her to include in her post, which gave them sufficient control over the content to be considered a marketing communication.⁹⁷ Because the post lacked a clear and prominent identifier, such as “#ad,” it was not obviously identifiable as a marketing communication and was therefore in breach of the CAP Code.⁹⁸

Finally, the ASA recently took action against a former *Love Island* star.⁹⁹ Molly Mae Hague posted a picture of herself wearing a coat, with the caption “A/W, I’m ready_□” with the Instagram account for Pretty Little Thing, @prettylittlething, tagged in the image.¹⁰⁰ Pretty Little Thing (PLT) and Molly Mae argued that the post was organic and unrelated to the existing brand ambassador relationship between the two, and therefore not a marketing communication.¹⁰¹ The ASA disagreed, holding that the existing financial relationship between the brand and the influencer along with the inclusion of a PLT product and a tag to the PLT Instagram account gave PLT the requisite amount of control for the post to fall under the ASA’s authority.¹⁰² Once the ASA had established that the post was within its bounds, it was clear that the post had not been obviously identified as an advertisement. This post still appears on Molly Mae’s Instagram page, but now includes the “paid partnership with” tag.¹⁰³

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *ASA Ruling on Prettylittlething.com Ltd t/a Prettylittlething.com*, ADVERT. STANDARDS AUTHORITY (Jan. 8, 2020), <https://www.asa.org.uk/rulings/prettylittlething-com-ltd-cas-571543-k2w7h6.html> [<https://perma.cc/HR8Z-JUVM>].

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Molly-Mae Hague (@mollymaehague), INSTAGRAM (Sept. 26, 2019), <https://www.instagram.com/p/B24jQsZlZVM/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

III. INFLUENCERS

To understand whether the United States or the United Kingdom is more successful in regulating Instagram influencer advertisement disclosures, it is helpful to look at the accounts of comparable influencers in each country. While it may be tempting to look to the accounts of the most famous celebrities in each country, this is not likely to yield an accurate representation of regulation. For one, the most famous celebrities who have the highest follower counts are more likely to be noticed (and therefore potentially sanctioned) by the regulatory bodies in each country. Additionally, major celebrities are more likely to fall under the regulations of other countries. For example, a major British celebrity advertising an American product is subject to FTC regulations.¹⁰⁴

For these reasons, I have chosen to focus on influencers whose significant Instagram followings are a result of their participation on reality television shows, specifically the popular reality dating shows *Bachelor in Paradise* and *Love Island*. These reality shows are popular with younger viewers,¹⁰⁵ making their audiences ideal targets for advertisers, particularly those advertising on social media. This Part analyzes a set of three posts each for three contestants from the two shows to demonstrate how posts vary in the adequacy of their disclosures. I have determined whether each post is “properly disclosed,” “improperly disclosed,” or “not disclosed” as an advertisement, based on the requirements of each regulatory scheme.

A. AMERICAN INFLUENCERS: THE CAST OF *BACHELOR IN PARADISE*

Bachelor in Paradise is an American reality show in which contestants travel to a beachside resort in Mexico, where they are

¹⁰⁴ *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers> [<https://perma.cc/K5RP-3FPC>] (last visited Nov. 24, 2019) (“If posting from abroad, U.S. law applies if it’s reasonably foreseeable that the post will affect U.S. consumers. Foreign laws might also apply.”).

¹⁰⁵ *Compare* Matthew Smith, *What Kind of Person Watches Love Island?*, YOUGOV (July 29, 2019), <https://yougov.co.uk/topics/entertainment/articles-reports/2019/07/29/what-kind-person-watches-love-island> (stating that 43 percent of *Love Island* viewers are under the age of thirty), *with* Mitch Metcalf *ShowBuzzDaily Tuesday Network Scorecard – 9.3.2019*, SHOWBUZZDAILY, <http://www.showbuzzdaily.com/articles/the-sked-tuesday-network-scorecard-9-3-2019.html> [<https://perma.cc/Ry3Q-SFVT>] (last visited Nov. 24, 2019) (showing that *Bachelor in Paradise* earned a rating of .8 with viewers eighteen to thirty-four, meaning that .8% of people in that age category watched the show, roughly 1.024 million people).

instructed to couple up in the search for love. New contestants are regularly introduced into the resort, and in weekly ceremonies contestants who are not successfully coupled up are removed from the resort. *Paradise* contestants are usually people who have previously competed on *The Bachelor* or *The Bachelorette*, where they (unsuccessfully) vied for the heart of the lead. Contestants for *Paradise* are often selected because they gained popularity (or infamy) during their season of *The Bachelor* or *The Bachelorette*. In examining posts from *Paradise* contestants, I have identified each post as properly disclosed, improperly disclosed, or not disclosed.

One contestant who frequently makes sponsored posts is Hannah Godwin.¹⁰⁶ She was one of the final contestants in the summer 2019 season of *Paradise* and became engaged to her boyfriend Dylan Barbour in the final episode.¹⁰⁷ She has recently shared several sponsored posts. One such post, a picture of her and Dylan holding game cards published on November 22, 2019, is captioned

I may not be able to pronounce gnocchi. . . but TRUST ME, I can rack up some major points in game night. We laughed so so hard trying to guess what each other were drawing all night long using our new fave game #PictionaryAir! Plus an excuse to give Dylan a contour didn't hurt either. ☐ @Mattel #ad¹⁰⁸

The @mattel account is tagged in the photo. When viewed on mobile, this caption is truncated after “We laughed so so hard trying to...”

This sponsored post was improperly disclosed as an advertisement per FTC regulations. While Hannah appropriately disclosed the existence of a material connection between herself and Mattel by using “#ad,” this disclosure appears at the very end of the caption.¹⁰⁹ Furthermore, a user viewing the post on mobile must click the “more” button in order to read the full caption, including disclosure itself.¹¹⁰

¹⁰⁶ See Hannah Godwin (@hannahg11), INSTAGRAM, <https://www.instagram.com/hannahg11/?hl=en> (last visited Nov. 24, 2019).

¹⁰⁷ Devon Ivie, *So, Did All of Bachelor in Paradise's Couples Get a Happy Ending?*, VULTURE (Sept. 18, 2019), <https://www.vulture.com/2019/09/bachelor-in-paradise-where-did-the-couples-end-up.html> [<https://perma.cc/ELY4-PU7Y>].

¹⁰⁸ Hannah Godwin (@hannahg11), INSTAGRAM (Nov. 22, 2019), <https://www.instagram.com/p/B5L8GKuJnad/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹⁰⁹ *The FTC's Endorsement Guides: What People Are Asking*, *supra* note 20.

¹¹⁰ *Id.*

Another post, published on November 13, 2019, is a picture of Hannah reclining against a railing wearing black shorts and a patterned jacket, reading

Happpppy world kindness day! ☐☐ go compliment someone, do something nice, or heck- even smile back at a stranger today. Spread kindness woo! (pic: @baldwinner) — Alsoooo the #SHEINblackfriday sale is now through 12/2! Hit the link in bio and use my code ‘Hannah’ for 15% off the entire @shein_us site! Jacket: 590888 Set: 664279 @sheinofficial #ad¹¹¹

When viewed on mobile, the caption truncates after “back at a stranger today. Spread. . . .” The @shein_us and @sheinofficial accounts are also tagged in the picture, and Hannah used the “paid partnership with sheinofficial” tag above the photo. A screenshot of this post as it appears on mobile is included below.

¹¹¹ Hannah Godwin (@hannahg11), INSTAGRAM (Nov. 13, 2019), https://www.instagram.com/p/B40PND_pfi6/. A copy of this post is on file with the *Wisconsin International Law Journal*.



This sponsored post was also improperly disclosed as an advertisement per FTC regulations. While Hannah once again properly used “#ad” to disclose the existence of a material connection, it is located at the very end of the caption, where a user would not see it unless they click the “more” button and continue reading to the very end of the post.¹¹² Per the FTC’s guidelines, which state that built-in disclosure features on different social media platforms may not be sufficient to give notice to the consumer, Hannah’s use of Instagram’s “paid partnership with” tag above the post is not enough to constitute a proper disclosure.¹¹³

¹¹² *The FTC’s Endorsement Guides: What People Are Asking*, supra note 20.

¹¹³ *Id.*

Finally, on November 11, 2019, Hannah posted a picture taken in a mirror showing her sitting on the floor wearing a white jacket captioned “easy cool gal hack in the houseeee: sneaks + puffer jackets. 🖤 about to wear these everywhere now so there’s that. / snag all of these items from my newest fall collection that dropped TODAY with @justfabonline.”¹¹⁴ The @justfabonline account is tagged in the photo. This caption truncates at “/ snag all of. . . .”

This post is also improperly disclosed as an advertisement. While Hannah uses plain language describing the @justfabonline clothes as part of “her collection,” it may not be obvious to every consumer that she will benefit materially from people purchasing those items of clothing. However, even if this language was considered an adequate disclosure, it remains problematically located below the “more” button.



Another contestant who frequently publishes sponsored posts is Demi Burnett.¹¹⁵ Demi was also one of the final contestants on the summer 2019 season of *Paradise* and became engaged to her girlfriend Kristian Haggerty on the last episode, although the pair have since separated.¹¹⁶ On November 20, 2019, Demi posted a picture wearing a black sweater with white stars, captioned “Got my head in the stars 🌟 Fit from @sheinofficial , from now until Dec 2nd @shein_us is celebrating their annual Black Friday Sale! Hit the link in bio and use my code ‘MYDEMI’ for an extra 15% off the site!

¹¹⁴ Hannah Godwin (@hannahg11), INSTAGRAM (Nov. 11, 2019), <https://www.instagram.com/p/B4v4CLnAxjh/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹¹⁵ See Demi Burnett (@demi_not_lovato), INSTAGRAM, https://www.instagram.com/demi_not_lovato/?hl=en (last visited Nov. 24, 2019).

¹¹⁶ Ivie, *supra* note 107.

#SHEINblackfriday #ad Sweater: 817427 Skirt: 627272.”¹¹⁷ The @sheinofficial and @shein_us accounts are tagged in the photo and Demi used the “paid partnership with sheinofficial” tag above the photo. This caption truncates after “@shein_us is celebrating their annual Black...” As of October 9, 2020, this post has been deleted.

This post is improperly disclosed as an advertisement. While, like Hannah, Demi uses “#ad” to make clear that the post is an advertisement, this hashtag is located at the very end of the post, far below the “more” button.¹¹⁸ Again, like Hannah’s post, the use of Instagram’s “paid partnership with” tag above the image is not sufficient.¹¹⁹

A picture of Demi holding a black can posted on October 22, 2019 is captioned “My face is an actual representation of how excited I am to go dark on social media for 24 hours. I’m all about authentic conversations and making people laugh in-person! So grab a @MillerLite for you and your friend and take 24 hours to enjoy life! #itsmillertime #ad.”¹²⁰ This caption truncates at “I’m all about authentic conversations...”

Once again, this post is improperly disclosed as an advertisement. While Demi again uses “#ad” to make clear the material connection between herself and Miller, it is again located at the very end of the caption below the “more” button.

On October 3, 2019, Demi posted a picture in which she is wearing a red corduroy dress over a white long sleeve shirt, captioned “Chipped nail polish is relatable, right? •••••••••••••••• Soooo I did a thing with @katieemo where we picked out our favorites from @showmeyourmumu and created our own capsules! Swipe up on my stories to check out my picks! 🍷 📺.”¹²¹ Each bullet point is on its own line, meaning that the second part of the caption is several lines below the first part. This caption truncates after “Chipped nail polish is relatable, right. . . .” The @showmeyourmumu account is tagged in the photo.

¹¹⁷ Demi Burnett (@demi_not_lovato), INSTAGRAM (Nov. 20, 2019), <https://www.instagram.com/p/B5GpZbiAilJ/>. This post has since been deleted. A copy of this post is on file with the *Wisconsin International Law Journal*.

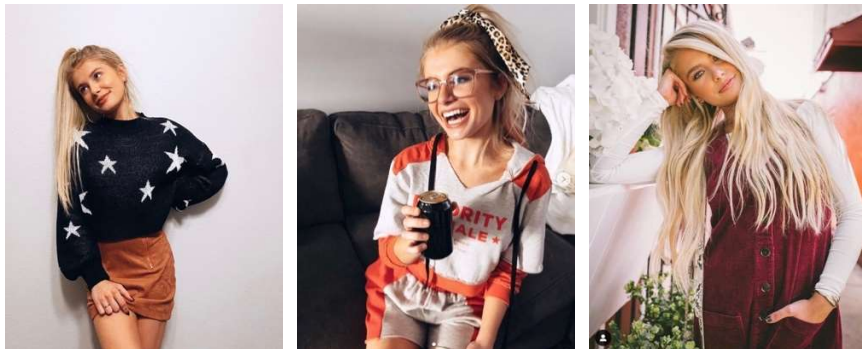
¹¹⁸ *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 20.

¹¹⁹ *Id.*

¹²⁰ Demi Burnett (@demi_not_lovato), INSTAGRAM (Oct. 22, 2019), <https://www.instagram.com/p/B377ithJMjJ/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹²¹ Demi Burnett (@demi_not_lovato), INSTAGRAM (Oct. 3, 2019), <https://www.instagram.com/p/B3KwHz0B-J8/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

This post is less clear, but I believe it includes no disclosure. Demi describes her connection to the brand as “pick[ing] out [her] favorites” to create a “capsule.” It is unclear to the viewer to what extent, if any, Demi will be benefitting materially from people’s purchases of items from the collection. Furthermore, even if the language was considered an adequate disclosure, it is located below the “more” button.¹²²



Caelynn Miller-Keyes is another *Paradise* contestant who publishes many sponsored posts.¹²³ Caelynn chose to leave the summer 2019 season of *Paradise* in the penultimate week with her boyfriend, Dean Unglert.¹²⁴ On November 18, 2019, Caelynn posted a photo of herself wearing a tan jacket captioned “Dressing for fall even if it is 80 degrees outside 🍁 fit is from @shein_us Use my code “Caelynn” for an additional 15% off! now through 12/2, @sheinofficial is holding its annual Black Friday Sale! get up to 90% off select items Bodysuit: 809164 Jacket: 624370 #SHEINblackfriday #ad.”¹²⁵ This caption truncates at “Dressing for fall even if it is 80 degrees outside . . .” The @sheinofficial and @shein_us accounts are tagged in the photo. As of October 9, 2020, this post has been deleted.

This post is improperly disclosed as an advertisement. While Caelynn did include “#ad” to make clear the material connection between

¹²² *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 20.

¹²³ See Caelynn Miller-Keyes (@caelynnmillerkeyes), INSTAGRAM, <https://www.instagram.com/caelynnmillerkeyes/?hl=en> (last visited Nov. 24, 2019).

¹²⁴ Ivie, *supra* note 107.

¹²⁵ Caelynn Miller-Keyes (@caelynnmillerkeyes), INSTAGRAM (Nov. 18, 2019), <https://www.instagram.com/p/B5CFfg6H5sn/>. This post has since been deleted. A copy of this post is on file with the *Wisconsin International Law Journal*.

her and Shein, like Hannah and Demi, the hashtag is placed at the very end of the caption, far below the “more” button.¹²⁶

On November 8, 2019, Caelynn posted a picture in which she is sitting at a table with a Louis Vuitton purse on the table. The caption reads “I love supporting businesses run by women, especially @theladybaglv ✨ Rarely do I splurge on myself, but I feel better about it shopping with them because they have discounted vintage and luxury bags!”¹²⁷ @theladybaglv is tagged in the photo. This caption truncates at “Rarely do I splurge on myself, but I feel better about it. . . .”

This post is unclear but seems to include no disclosure. Caelynn describes her relationship to The Lady Bag as “supporting,” suggesting that she simply purchases from them. However, it seems unlikely that Caelynn would post about this shop, tag them in both the image and the caption, and tout their “discounted vintage and luxury bags” without being compensated for it. Because this caption lacks any language suggesting this post is sponsored, the post contains no disclosure.

Caelynn posted a photo of herself wearing a blue romper on November 4, 2019 captioned “Last chance to shop my edit! This was so much fun, and such a dream come true, thank you @boohoo 🍷#boohooxcaelynn.”¹²⁸

This post is not disclosed as an advertisement. Caelynn describes her relationship with Boohoo as an “edit,” and does not make clear whether she will benefit materially from people purchasing items from this edit. No additional language that would disclose this post as an advertisement is included.

In sum, the examined posts by American influencers either contained no disclosure or were improperly disclosed as advertisements.

¹²⁶ *The FTC’s Endorsement Guides: What People Are Asking*, supra note 20.

¹²⁷ Caelynn Miller-Keyes (@caelynnmillerkeyes), INSTAGRAM (Nov. 8, 2019), <https://www.instagram.com/p/B4n6gfUnH0F/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹²⁸ Caelynn Miller-Keyes (@caelynnmillerkeyes), INSTAGRAM (Nov. 4, 2019), https://www.instagram.com/p/B4doYubn-Kk/_A. A copy of this post is on file with the *Wisconsin International Law Journal*.



B. BRITISH INFLUENCERS: THE CAST OF *LOVE ISLAND*

Love Island is a British reality show in which contestants travel to a villa in Majorca, where they are instructed to couple up in the search for love. New contestants are regularly introduced into the villa, and in weekly ceremonies contestants who are not successfully coupled up are removed from the villa. *Love Island* contestants are chosen through an application process that takes into account social media presence, among many other things.¹²⁹ *Love Island* differs from *Bachelor in Paradise* in that it is a competition. The final couple, as voted by the British public, wins £50,000. In examining posts from *Love Island* contestants, I have identified each post as properly disclosed, improperly disclosed, or not disclosed. A unique challenge of identifying whether a post is an advertisement regulated by the ASA or not turns on whether the brand has control over the content posted.¹³⁰ This information is not easily accessible to the public, so I have used instinct in identifying posts as advertisements.

Amber Gill was one half of the winning couple in the summer 2019 season of *Love Island*.¹³¹ While she and her co-winner, Greg O'Shea, have since split, Amber has succeeded as an influencer on Instagram.¹³²

¹²⁹ Olivia Blair, *Here's how to apply to summer Love Island 2021*, COSMOPOLITAN UK (Nov. 11, 2020), <https://www.cosmopolitan.com/uk/entertainment/a9976629/love-island-how-to-apply-cast-itv/> [https://perma.cc/A3KP-8VQT].

¹³⁰ *Influencer's Guide*, *supra* note 51, at 10.

¹³¹ Jon O'Brien, *Love Island 2019: Where Are They Now and Who Is Still Together?*, DIGITALSPY (Nov. 14, 2019), <https://www.digitalspy.com/tv/reality-tv/a29796253/love-island-2019-where-are-they-now/> [https://perma.cc/QT7M-EUPL].

¹³² See generally Amber Rose Gill (@amberosegill), INSTAGRAM, <https://www.instagram.com/amberosegill/?hl=en> (last visited Nov. 13, 2020). A copy of this post is on file with the *Wisconsin International Law Journal*.

On November 24, 2019, Amber posted a picture of herself holding a shoebox that reads “Amber X SportFX” along with the caption

INTERNATIONAL GIVEAWAY! #WIN 1 of 5 Amber X SportFX boxes with @SportFXCosmetics and @BrndBx ★ TO ENTER: FOLLOW @sportfxcosmetics + @BrndBx AND FILL IN your details in the link in my bio 📌 The box contains a HUGE range of high endurance, PETA certified, cruelty free cosmetics 🐾🌸 These amazing products are lightweight, water proof, sweat proof, breathable AND enriched with SPF and skin nourishing ingredients 🌿🌸 The giveaway will run for 7 days and winners will be contacted + announced on the #BrndBx instagram after the competition closes at 6PM on Sunday December 1st! Good luck!! Love Amber 🌸
[#http://bit.ly/AmberXSportFX](http://bit.ly/AmberXSportFX) #SPORTFX #AD.¹³³

This caption truncates at “Amber X SportFX boxes with @SportFXCosmetics and @BrndBx. . .” As of October 25, 2020, this post has been deleted.

This post is an improperly disclosed advertisement. While Amber has included “#ad” to make the post obviously identifiable as an advertisement, the hashtag is at the very end of the caption, meaning the disclosure is not upfront, prominent, and suitable for all devices.¹³⁴

Amber posted a photo of herself wearing a gold dress and drinking a glass of champagne on November 20, 2019 with the caption “My LUSH launch dinner with @misspap Thank you for all the love so far for my second collection & all my beautiful attendees that wore my pieces and just generally all the support I’ve received so far LOVE YOU ALL 🌸 #amberxmisspap.”¹³⁵ Amber used the “paid partnership with misspap” tag above the photo. This caption truncates at “Thank you for all the love so far for my. . .”

This post is an improperly disclosed advertisement. Amber used the hashtag “#amberxmisspap” and language describing her collection with the brand to make the post obviously identifiable as an advertisement.¹³⁶ While the language is arguably clear and concrete, it

¹³³ Amber Rose Gill (@amberrosegill), INSTAGRAM (Nov. 24, 2019), <https://www.instagram.com/p/B5QhcTunBrq/>. This post has since been deleted. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹³⁴ *Influencer’s Guide*, supra note 51, at 8.

¹³⁵ Amber Rose Gill (@amberrosegill), INSTAGRAM (Nov. 20, 2019), <https://www.instagram.com/p/B5GNnQHnn9v/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

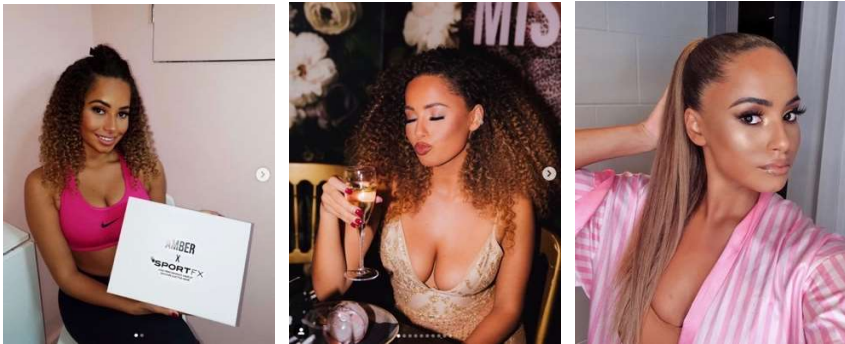
¹³⁶ *Influencer’s Guide*, supra note 51, at 6.

appears below the “more” button, meaning the disclosure is not upfront, prominent, and suitable for all devices.¹³⁷

However, it is possible that Amber’s use of the “paid partnership with misspap” tag could render this post properly disclosed. While the FTC has clearly stated that the use of this tag is not sufficient to disclose a material connection,¹³⁸ the ASA has not spoken directly to this issue. It seems clear that the tag would make the post obviously identifiable as an advertisement—it describes the post as a paid partnership and identifies the brand partner. However, questions remain about whether this disclosure is upfront, prominent, and suitable for all devices.

On November 15, 2019, Amber posted a picture of herself wearing a pink striped shirt captioned “GLOW ✨ The camera on my new #galaxys10+ has me feelin’ myself #ad #withgalaxy @samsunguk.”¹³⁹ Amber included a “paid partnership with samsunguk” tag above the photo.

This is a properly disclosed advertisement. Amber uses “#ad” to make the post obviously identifiable as an advertisement, and a user does not have to interact with the post (by clicking a “more” button) in order to see the disclosure, meaning it is upfront, prominent, and suitable for all devices.¹⁴⁰



¹³⁷ *Id.* at 8.

¹³⁸ *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 20.

¹³⁹ Amber Rose Gill (@amberrosegill), INSTAGRAM (Nov. 15, 2019), <https://www.instagram.com/p/B45a1TqHcGB/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹⁴⁰ *Influencer’s Guide*, *supra* note 51, at 8.

Tommy Fury made up one-half of the *Love Island* summer 2019 second-place couple. He and his girlfriend, Molly Mae Hague, have stayed together since the end of the show.¹⁴¹ Tommy has also found success after the show as an influencer.¹⁴² Per his Instagram biography section, Tommy is a brand ambassador for the boohooMAN brand.¹⁴³ On November 22, 2019, Tommy posted an image of himself wearing a white shirt and grey pants captioned “King of my castle. Trousers @boohoomanofficial Discount code ‘TOMMY30’.”¹⁴⁴ Tommy used the “paid partnership with boohoomanofficial” tag above the image.

Based on the caption, this post contains no disclosure. Tommy failed to use any language making the post obviously identifiable as an advertisement. Because it seems that Tommy would benefit from each sale associated with his discount code, the post is affiliate marketing and must be adequately disclosed.¹⁴⁵ However, similar to Amber’s post above, Tommy’s use of the “paid partnership with @boohoomanofficial” tag could potentially render this post properly disclosed.

On September 30, 2019, Tommy posted a picture of himself wearing an orange sweatshirt, holding a bag of Cheetos. The image is captioned “Who else loves @cheetos . . . also guys use code TOMMY30 on boohooMAN.com for 30% off #AD #TOMMY30.”¹⁴⁶

This is a properly disclosed advertisement. Tommy used “#ad” to make the post obviously identifiable as an advertisement, and the user does not have to interact with the post or the caption to see the disclosure, meaning it is upfront, prominent, and suitable for all devices.¹⁴⁷

Tommy posted a picture in which he is seen holding a box of McNuggets while wearing a yellow sweatshirt, captioned “Night in with Molly, my McMerch [sic] and a sharebox of McNuggets 🍷 Order a McDelivery using @UberEats_UK between 5-7pm and you could get

¹⁴¹ O’Brien, *supra* note 131.

¹⁴² See Tommy Fury (@tommytntfury), INSTAGRAM, <https://www.instagram.com/tommytntfury/?hl=en> (last visited Feb. 16, 2020).

¹⁴³ *Id.*

¹⁴⁴ Tommy Fury (@tommytntfury), INSTAGRAM, (Nov. 22, 2019), <https://www.instagram.com/p/B5L0stCnRDS/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹⁴⁵ *Influencer’s Guide*, *supra* note 51, at 5.

¹⁴⁶ Tommy Fury (@tommytntfury), INSTAGRAM, (Sept. 30, 2019), <https://www.instagram.com/p/B3Cz-WMHgAd/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹⁴⁷ *Influencer’s Guide*, *supra* note 51, at 8.

some UNREAALLLLLLL Big Mac socks with your food whilst stocks last. Get using MCDELIVERYUK for free delivery #AD.”¹⁴⁸ Viewed on mobile, this caption truncates at “between 5-7pm and you...”

This post is improperly disclosed as an advertisement. Tommy used #ad to make the post obviously identifiable as an advertisement, but because the hashtag is below the “more” button it is not upfront, prominent, and suitable for all devices.¹⁴⁹



One of the other finalists on the summer 2019 season of *Love Island*, India Reynolds, has also developed a post-show career as an influencer.¹⁵⁰ India came in third place with her partner Ovie Soko, from whom she has since parted ways.¹⁵¹ On November 22, 2019, India posted a picture of herself wearing a gold sequined dress with the caption “Be right back. . . . sequin blazer dress is @boohoo - I wear a 10 - link in highlights ♥ use LOVEINDIA for 25% off.”¹⁵² The caption truncates at “Be right back...” The @boohoo account is tagged in the photo. India used the “paid partnership with boohoo” tag above the image.

Based on the caption alone, this post is not disclosed as an advertisement. India uses no language that makes the post obviously identifiable as an advertisement. However, once again, India’s use of the

¹⁴⁸ Tommy Fury (@tommytnfury), INSTAGRAM, (Sept. 19, 2019), <https://www.instagram.com/p/B2mbm6XH1Or/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

¹⁴⁹ *Influencer’s Guide*, *supra* note 51, at 8.

¹⁵⁰ See India Reynolds (@lovefromreyn), INSTAGRAM, <https://www.instagram.com/lovefromreyn/?hl=en> (last visited Nov. 24, 2019).

¹⁵¹ O’Brien, *supra* note 131.

¹⁵² India Reynolds (@lovefromreyn), INSTAGRAM, (Nov. 22, 2019), <https://www.instagram.com/p/B5LjBEjgFil/>. A copy of this post is on file with the *Wisconsin International Law Journal*.

“paid partnership with boohoo” tag could render this post properly disclosed.

India posted a photo of herself holding a bottle of VK on November 14, 2019, along with the caption

Starting to feel SO christmassy!! 🍷🍷🍷 Name a better way to celebrate the season than with VK's newest limited edition flavour, VK Candy Cane?! It's available in their Christmas mixed packs which you can pick up at @tescofood. There's also a chance to win a Christmas jumper if you find a golden ticket in your pack! Head to @vkdrink for more info and more chances to win! #WEAREMERRY #WEAREVK #AD¹⁵³

This caption truncates at “. . . than with VK's newest limited edition flavour, VK. . .” The @vkdrink account is tagged in the photo. As of February 16, 2020, this post has been deleted.

This post is an improperly disclosed advertisement. India used #ad to make the post obviously identifiable as an advertisement. However, because India included the hashtag at the very end of the caption, it is not upfront, prominent, and suitable for all devices.

On November 4, 2019, India posted a picture in which she is holding a bottle that clearly reads “Starpowa. Hair. Skin. Nails. Vitamin gummies” along with the caption “So happy with how healthy my hair & skin have been since been using @starpowagummies #AD.”¹⁵⁴ As of February 16, 2020, this post has been deleted.

This is a properly disclosed advertisement. India uses “#ad” to make the post obviously identifiable as an advertisement, and because the user does not need to interact with the post (such as by clicking the “more” button), the disclosure is upfront, prominent, and suitable for all devices. In sum, the examined posts by British influencers were more often improperly or properly disclosed as advertisements, though a few posts contained no disclosure.

¹⁵³ India Reynolds (@lovefromreyn), INSTAGRAM, (Nov. 14, 2019), <https://www.instagram.com/p/B423iFrABa3/>. This post has since been deleted.

¹⁵⁴ India Reynolds (@lovefromreyn), INSTAGRAM, (Nov. 4, 2019), <https://www.instagram.com/p/B4dKMy6gRov/>. This post has since been deleted.



IV. EFFECTIVENESS

A. EFFECTIVENESS OF FTC GUIDELINES AND ENFORCEMENT

The American influencers discussed in Part III generally do not properly disclose their sponsored posts.

All three of Hannah Godwin's posts contained improper disclosures. Although Hannah included language that suggests she intended to disclose the posts as advertisements, such as "#ad," she did not incorporate such language in the correct way.

Of the three posts examined, Demi Burnett made two posts with improper disclosures and one with no disclosure. Demi made two posts with language, like "#ad," that suggests she intended to disclose the posts as advertisements. However, Demi also made one post with no attempt to disclose the material connection between her and the brand.

Finally, of Caelynn Miller-Keyes's three posts, one contained an improper disclosure and two contained no disclosure. One of Caelynn's posts contained language suggesting she intended to disclose the material connection between herself and the advertiser. However, two of Caelynn's posts made no attempt to disclose this connection.

Based on my research, American influencers attempt to disclose posts as advertisements, but do not understand the regulations and mechanics necessary to ensure that the disclosures are FTC-compliant. Several of the posts above show that the influencer recognized the need for disclosure by including disclosing language, such as "#ad," but failed to make the disclosure in the right way.

Furthermore, it seems that the influencers may be overly reliant on brands to provide disclosure language. Hannah, Demi, and Caelynn each published a post advertising for Shein clothing, and each of those

posts contained an improper disclosure, with “#ad” appearing at the end of the post. The similar language in the posts (such as “hit the link in my bio”) suggests that the language was provided directly by Shein. This indicates that companies themselves may be unaware of the FTC requirements and therefore do not provide compliant language. While it is worth noting that Shein’s parent company is incorporated in Hong Kong,¹⁵⁵ any advertisement that is likely to be viewed by American consumers must comply with FTC regulations.¹⁵⁶

While the FTC has taken enforcement actions against influencers, those actions have not been effective in spurring broader compliance. Most recently, enforcement actions have been limited to warning letters sent to unnamed individuals or individual companies.¹⁵⁷ Perhaps the low level of enforcement from the FTC signals to influencers, advertisers, and companies that failure to comply with FTC regulations will not result in significant punishment.

Based on these influencers, the FTC’s guidelines and enforcement actions have not been effective in encouraging compliance from the cast members of *Bachelor in Paradise*.

B. EFFECTIVENESS OF ASA GUIDELINES AND ENFORCEMENT

The British influencers discussed in Part III generally do properly disclose their sponsored posts.

Of Amber Gill’s three posts, one contained an improper disclosure, one contained a disclosure that bordered from improper to proper, and one contained a proper disclosure. Of Amber’s improperly disclosed posts, one contained “#ad,” suggesting she intended to disclose the post as an advertisement, and the other used the “paid partnership with” tag, which may properly disclose the post as an advertisement.

Of Tommy Fury’s posts, one contained a disclosure that could either be nonexistent or proper, one contained a proper disclosure, and one was improperly disclosed. Tommy’s post that bordered between no disclosure and properly disclosed used the “paid partnership with” tag, which may or may not properly disclose the post as an advertisement,

¹⁵⁵ *Privacy and Cookie Policy: The Controller of Your Personal Data*, SHEIN (Nov. 8, 2019), <https://us.shein.com/Privacy-Security-Policy-a-282.html> [<https://perma.cc/696H-G2F7>].

¹⁵⁶ *The FTC’s Endorsement Guides: What People Are Asking*, *supra* note 20.

¹⁵⁷ See *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, *supra* note 76; Fair, *supra* note 18.

based on whether or not this tag is considered upfront, prominent, and suitable for all devices.

Finally, India Reynolds' three posts included one improper disclosure, one disclosure that could either be improper or proper, and one containing a proper disclosure. India's improperly disclosed post still contained #ad, and the post bordering between improper and proper used the "paid partnership with" tag.

Like the American influencers, the British influencers attempted to disclose posts as advertisements. Even when the influencers did not properly disclose the posts as advertisements, the posts often contained language such as "#ad" or the "paid partnership with" tag. Once again, this suggests that influencers were not aware of the full requirements for proper disclosure. Notably, Tommy Fury has a significant number of posts advertising boohooMAN clothing. Each post either contains "#ad" or uses the "paid partnership with @boohoomanofficial" tag. This suggests that Tommy believes that the use of "paid partnership with" tag is equally effective to disclose an advertisement as the use of #ad.

Based on these cases, the ASA's guidelines and enforcement actions have been more effective in encouraging compliance from the cast members of *Love Island*.

V. LOOKING AHEAD

A. CONCLUSION

Based on a comparison of former contestants from *Bachelor in Paradise* and *Love Island*, the British influencers are more compliant with the requirements set out by their respective enforcement agency. Certain features of the ASA, such as its element of company control, its more regular and significant enforcement actions against influencers, and its narrower mandate appear to encourage higher compliance from influencers, like those from *Love Island*.

First, the ASA's company control requirement evidently leads to better compliance from influencers because it encourages compliance from companies. Company control can be as hands-off as a company telling an influencer that they need to make some sort of post, and as hands-on as a company telling an influencer exactly what to post and when to post it. Company control, in combination with a higher level of enforcement, encourages companies to be more compliant when advertising with influencers. Companies in the UK, unlike those in the

United States, are aware that enforcement is a possibility and are aware of the potential public relations repercussions that result. Furthermore, because ASA enforcement actions begin from a consumer complaint, it is possible that companies are more inclined to comply so as to avoid ill will from consumers.

Second, the ASA's willingness to take direct enforcement action against influencers, such as Molly Mae Hague, appears to encourage compliance. Influencers, advertisers, and companies are aware that they are monitored by the ASA and that any consumer who comes across one of their posts may report it to the ASA for examination. This signals to these actors that they must comply with the rules at all times to prevent being sanctioned by the ASA.

Finally, and perhaps most importantly, the ASA is more effective at regulating influencer advertising because it has a much narrower mandate. While the ASA focuses solely on advertisements, this is only one piece of the FTC's purview. The FTC broadly regulates many things relating to protecting consumers and promoting competition.¹⁵⁸ Advertising is only one small part of the FTC's mandate, and in the face of larger problems, such as preventing the merger of major corporations to prevent a monopoly, it may not be a priority. In fact, a study showed that 93 percent of sponsored posts from the fifty most followed Instagram accounts did not meet FTC disclosure regulations.¹⁵⁹ The ASA's narrower mandate allows it to be more flexible and responsive to advertisements in any form that they take, which has allowed for greater control over the rise of influencer advertising.

Together, these three factors explain why the ASA's regulatory scheme has encouraged higher compliance by reality television influencers than the FTC's regulatory scheme.

¹⁵⁸ *What We Do*, FED. TRADE COMMISSION, <https://www.ftc.gov/about-ftc/what-we-do> [<https://perma.cc/3EWQ-WL5M>] (last visited Feb. 16, 2020).

¹⁵⁹ *93% of Top Celebrity Social Media Endorsements Violate FTC Guidelines*, MEDIKIX, <https://mediakix.com/blog/celebrity-social-media-endorsements-violate-ftc-instagram/> [<https://perma.cc/BYW4-J9FN>] (last visited Feb. 16, 2020).

B. FORTHCOMING FTC CHANGES

In February 2020, the FTC announced that it was seeking comment on its Endorsement Guides.¹⁶⁰ The FTC reviews and updates the Endorsement Guides approximately every ten years, and the Guides were last updated in 2009.¹⁶¹ In its February announcement, the FTC was particularly concerned with comments relating to, among other things, the effectiveness of the Guides, how well material connections were being disclosed on social media, and whether children are capable of understanding disclosures.¹⁶² While comments were originally due on April 21, 2020, the deadline was extended to June 22, 2020 due to the COVID-19 pandemic.¹⁶³ Because the FTC will be reviewing its Endorsement Guides, it may remedy some of the problems addressed in this Comment.

I am hopeful that the FTC's changes will allow it to more effectively regulate Instagram influencers. The last time the Endorsement Guides were updated in 2009, Instagram did not yet exist.¹⁶⁴ This update will allow the FTC to take into account comments from advertisers and influencers alike and to create a clear and comprehensible framework, which should allow for more consistent and correct disclosures. In addition to public comments, the FTC would do well to examine successful regulatory schemes in other countries, like the United Kingdom, and incorporate their actions into its new framework.

¹⁶⁰ *FTC Seeks Public Comment on Its Endorsement Guides*, FED. TRADE COMMISSION (Feb. 12, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-seeks-public-comment-its-endorsement-guides> [<https://perma.cc/SZ3Z-U6UU>].

¹⁶¹ Lesley Fair, *Endorsement Guides: The FTC Wants Your Feedback*, FED. TRADE COMMISSION (Feb. 12, 2020, 10:32 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2020/02/endorsement-guides-ftc-wants-your-feedback> [<https://perma.cc/FR4F-K2FX>].

¹⁶² *FTC Seeks Public Comment on Its Endorsement Guides*, *supra* note 160.

¹⁶³ Lesley Fair, *FTC Extends Comment Deadline for Endorsement Guides Review to June 22*, FED. TRADE COMMISSION (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/92FK-VBVC>].

¹⁶⁴ Eudaimonia, *How Instagram Started*, MEDIUM (Jan. 26, 2017), <https://medium.com/@obtaineudaimonia/how-instagram-started-8b907b98a767> [<https://perma.cc/8QHD-2FVL>] (Instagram launched on October 6, 2010).