UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rohit Chopra

# STATEMENT OF
# COMMISSIONER ROHIT CHOPRA

*Regarding the Endorsement Guides Review*
*Commission File No. P204500*

*February 12, 2020*

## Summary


- Advertisers and social media platforms are seeking big returns from influencer marketing, which can allow paid advertising to seem more authentic.
- When companies launder advertising by paying an influencer to pretend that their endorsement or review is untainted by a financial relationship, this is illegal payola.
- Misinformation is plaguing the digital economy, and recent no-money, no-fault FTC settlements with well-known retailers and brands to address fake reviews and undisclosed influencer endorsements may be doing little to deter deception.
- The FTC will need to determine whether to create new requirements for social media platforms and advertisers and whether to activate civil penalty liability.


American families and small businesses are rightfully skeptical of traditional advertising, which is clearly designed to persuade or manipulate us. In an effort to make advertising appear more authentic, companies are increasingly pouring marketing dollars into social media influencers: the individuals who promote products, services, and brands to those who follow them online.

Facebook's Instagram and Google's YouTube are major vehicles for influencer marketing campaigns, with China-based TikTok also growing rapidly. Social media platforms promote and profit from influencer marketing in many ways. For example, under a new policy announced in 2019, advertisers can now pay Facebook to promote "organic" influencer posts on Instagram.[1] These paid promotions amplify the reach of an astroturf marketing campaign to a broader audience who may be unfamiliar with the influencer and even less likely to discern the commercial arrangement. And by generating more data about the content users engage with, influencer marketing also helps these platforms successfully target specific ads to specific people. Each new data point improves the accuracy of the predictive algorithms that fuel their surveillance-based advertising businesses.

[1] Press Release, Instagram, New: Branded Content Ads on Instagram, (June 4, 2019) https://business.instagram.com/blog/branded-content-ads-on-instagram

Advertisers see big returns in promoting seemingly genuine grassroots endorsements and reviews. According to one estimate, companies spent $8 billion on advertising through social media influencers in 2019. Due to its perceived effectiveness, spending on influencer marketing is projected to increase to $15 billion by 2022.[2] But, there is a harmful dark side of this approach. Fake accounts, fake likes, fake followers, and fake reviews are now polluting the digital economy, making it difficult for families and small businesses looking for truthful information. Tech companies may have little incentive to address this misinformation. The FTC will need to be forward-looking to stop fraud from festering.

**Focus on Advertisers, not Small Influencers**

When individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern. But when companies launder advertising by paying someone for a seemingly authentic endorsement or review, this is illegal payola.[3] If these companies are also pressuring influencers to post in ways that disguise that their review or endorsement is paid advertising, those advertisers especially need to be held accountable.

I am concerned that companies paying for undisclosed influencer endorsements and reviews are not held fully accountable for this illegal activity. I agree with my colleague, Commissioner Noah Joshua Phillips, who noted that "[p]osting deceptive or inaccurate information online, or engaging in other deceptive conduct like selling fake followers, distorts the online marketplace, preventing consumers from making informed purchasing decisions and creating an uneven playing field for those that follow the rules."[4] When we do not hold lawbreaking companies accountable, this harms every honest business looking to compete fairly.

**Recent Enforcement**

While the FTC has pursued enforcement actions against popular brands for disguising their advertising, it is not clear whether our actions are deterring misconduct in the marketplace, due to the limited sanctions we have pursued. For example, Lord & Taylor paid fifty social media influencers focused on fashion thousands of dollars each to post an image with the influencer wearing a particular dress on Instagram or another platform. The dress quickly sold out. In its contracts with influencers, the company required that posts include the company's Instagram handle and a specific hashtag, but did not require that the influencers disclose they were paid. In

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[2] Audrey Schomer, Influencer Marketing: State of the Social Media Influencer Market in 2020, BUSINESS INSIDER (2019), https://www.businessinsider.com/influencer-marketing-report.

[3] As articulated in the Commission's Enforcement Policy Statement on Deceptively Formatted Advertisements, "[t]he Commission has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself." Fed. Trade Comm'n, *Enforcement Policy Statement on Deceptively Formatted Advertisements*, (December 22, 2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

[4] Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Keynote at the ANA/BAA Marketing Law Conference: The FTC and the Digital Marketplace: Highlights from the Last Year (November 5, 2019), https://www.ftc.gov/system/files/documents/public_statements/1553177/phillips_-_ana_remarks_11-5-19.pdf.

2016, the FTC charged Lord & Taylor with deceiving the public by failing to disclose the company's connections with these influencers. [5]

The FTC wisely pursued Lord & Taylor rather than spending time and resources targeting individual influencers, but the Commission settled the matter for no customer refunds, no forfeiture of ill-gotten gains, no notice to consumers, no deletion of wrongfully obtained personal data, and no findings or admission of liability.

More recently, Ms. Sunday Riley and her eponymous cosmetics company were caught ordering employees to write fake reviews on Sephora.com. The fake reviews were, of course, positive. Riley even gave employees a directive on how to avoid detection. The FTC charged Sunday Riley and her company with deceiving the public about the material connections between the company and the reviewers. Studies have shown how reviews can lead to an increase in sales, but the FTC proposed another no-money, no-fault order.[6]

Going forward, we need to seek tougher remedies for companies that are illegally astroturfing or disguising their advertising as an authentic endorsement or review.

**Next Steps for the Commission**

I support a close and careful review of the FTC's non-binding Endorsement Guides and a self-critical analysis of the agency's enforcement approach. After reviewing the public's comments, I hope the Commission will consider taking steps beyond the issuance of voluntary guidance, including:

- Developing requirements for technology platforms (e.g. Instagram, YouTube, and TikTok) that facilitate and either directly or indirectly profit from influencer marketing;
- Codifying elements of the existing endorsement guides into formal rules so that violators can be liable for civil penalties under Section 5(m)(1)(A) and liable for damages under Section 19;[7] and
- Specifying the requirements that companies must adhere to in their contractual arrangements with influencers, including through sample terms that companies can include in contracts.

The FTC will need to take bold steps to safeguard our digital economy from lies, distortions, and disinformation. I welcome broad participation during the public comment period to help us chart our path forward.

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[5] Press Release, Fed. Trade Comm'n, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers", (March 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through.

[6] *See* Rohit Chopra, Commissioner, Fed. Trade Comm'n, Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Sunday Riley, (October 21, 2019), https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_final_rc_statement_on_sunday_riley.pdf.

[7] 15 U.S.C. §§ 45(m)(1)(A); 57b. These remedies would go beyond the relief available under Section 13(b).