

#DISCLOSED? NAVIGATING THE REGULATORY DIVIDE IN SOCIAL MEDIA MARKETING

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Checking your phone has likely become a seamless part of your daily routine, often within the first ten minutes of waking up.[1] While you catch up on your various social media applications, you are exposing yourself to numerous advertisements, possibly without even knowing.[2] Perhaps the advertisement is shared from an account you trust based off the mere fact you feel connected to the person posting it.[3] That feeling of trust and connection combined may lead you to become a consumer of the product or item that is being promoted, without taking much convincing.[4]

Consumers of media have been subject to multiple forms of influencing long before the term 'influencer' became an entry in modern lexicons.[5] Throughout history, influential figures have utilized traditional media forms such as newspapers, radio, and television to sway public opinion.[6]

Today, brands increasingly capitalize on the prominence and influence of social media influencers to drive consumer purchases and boost awareness of their brand.[7] Posting on social media may once have been seen merely as a recreational activity for all, but it has now transitioned into a professional career choice for some.[8] The continuous rise of social media combined with the younger generational views toward the workforce shifts social media influencing into what can be viewed to be the new American Dream.[9]

The Federal Trade Commission (FTC) considers a social media influencer as an individual with a large social media following whom brands contact to promote products or services.[10] With the rapidly evolving and growing industry, several international bodies have begun practices for regulation.[11] Despite having regulatory agencies around the world, such as the FTC and the Australian Competition and Consumer Commission (ACCC), influencers continuously fail to disclose advertisements according to their country's laws and guidelines.[12] As a result, influencers, and brands they work with, may engage in misleading or unfair practices that hinder consumers from making well-informed choices.[13]

This Note explores the United States and Australia's contrasting regulatory approaches to social media influencer marketing. Part II discusses the development and evolution of consumer protection laws in both the United States and Australia, highlighting how these distinct legal histories have shaped their current regulatory frameworks. Part III examines the current enforcement strategies, contrasting the FTC's reactive, case-by-case approach with the ACCC's proactive monitoring system, and analyzes their effectiveness in the international digital marketplace. Part IV explores the challenges to regulatory convergence, including constitutional frameworks, market scale disparities, and technological innovations that complicate oversight efforts. Finally, Part V considers future trajectories in influencer regulation as emerging technologies, platform evolution, and changing consumer behaviors continue to transform the digital marketplace.

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* J.D. Candidate, Rutgers Law School, 2026.

[1] John Shumway, Study finds nearly 57% of Americans admit to being addicted to their phones, CBS News Pittsburgh (Aug. 30, 2023), <https://www.cbsnews.com/pittsburgh/news/study-finds-nearly-57-of-americans-admit-to-being-addicted-to-their-phones/> (reporting that 89% of people check their phones within the first ten minutes of waking up).

[2] Thinking vs. Feeling: The Psychology of Advertising, USC Dornsife (Nov. 17, 2023), <https://appliedpsychologydegree.usc.edu/blog/thinking-vs-feeling-the-psychology-of-advertising/> (explaining how brands are marketing themselves with advertisements on social media).

[3] Consumers Seek Influencers Who Keep It Real, Matter (Feb. 22, 2023), <https://www.matternow.com/blog/consumers-seek-influencers-who-keep-it-real/> (finding that 69% of respondents are likely to trust a friend, family member or influencer recommendation over information coming directly from a brand).

[4] Id.

[5] When Did Influencers Become a Thing? A Timeline, Influence Insider, <https://influence-insider.com/when-did-influencers-become-a-thing-a-timeline/> (noting that the transformative period in the history of influences can be pinpointed to the emergence of platforms like MySpace and the proliferation of the blogosphere in the early 2000s).

[6] See id.

[7] Kristin Hovie, That's Hot: Influencer Stars Should Not Be Blind to Properly Disclosing Social Media Advertisements, 46 Suffolk Transnat'l L. Rev. 71 (2023) (citing Megan K. Bannigan & Beth Shane, Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry, 64 N.Y.L. Sch. L. Rev. 247, 249 (2019) (describing development of sponsored content on social media sites)).

[8] Katherine Hu, The Influencer Economy Is Warping the American Dream, The Atlantic Daily (Apr. 18, 2023), <https://www.theatlantic.com/newsletters/archive/2023/04/social-media-influencers-american-economy/673762/>.

[9] Id.

[10] Craig Ganter, Disclosing Under The Influencer: How the FTC Fails to Guide Advertisers and Protect Consumers In Social Media ?Influencer? Marketing, Rutgers U.L. Rev. Comments. 47 (2019); see also Lauryn Harris, Comment, Too Little, Too Late: FTC Guidelines on ?Deceptive and Misleading? Endorsements by Social Media Influencers, 62 How. L.J. 947, 955-57 (2019) (describing categories of social media influencers recognized by scholars).

[11] Cheat Sheet For Influencer Regulation in 16 Different Markets, Hello Partner (May 18, 2020), <https://hellopartner.com/2020/05/18/influencer-regulation-different-markets/>.

[12] Hovie, *supra* note 7, at 74.

[13] Id.