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## #DISCLOSED? NAVIGATING THE REGULATORY DIVIDE IN SOCIAL MEDIA MARKETING

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## I. INTRODUCTION

Checking your phone has likely become a seamless part of your daily routine, often within the first ten minutes of waking up.<sup>1</sup> While you catch up on your various social media applications, you are exposing yourself to numerous advertisements, possibly without even knowing.<sup>2</sup> Perhaps the advertisement is shared from an account you trust based off the mere fact you feel connected to the person posting it.<sup>3</sup> 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.<sup>4</sup>

Consumers of media have been subject to multiple forms of influencing long before the term ‘influencer’ “became an entry in modern lexicons.”<sup>5</sup> Throughout history, influential figures have utilized traditional media forms such as newspapers, radio, and television to sway public opinion.<sup>6</sup>

Today, brands increasingly capitalize on the prominence and influence of social media influencers to drive consumer purchases and boost awareness of their brand.<sup>7</sup> Posting on social

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<sup>1</sup> 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).

<sup>2</sup> *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).

<sup>3</sup> *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).

<sup>4</sup> *Id.*

<sup>5</sup> *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).

<sup>6</sup> *See id.*

<sup>7</sup> 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)).

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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> With the rapidly evolving and growing industry, several international bodies have begun practices for regulation.<sup>11</sup> 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.”<sup>12</sup> As a result, influencers, and brands they work with, may engage in misleading or unfair practices that hinder consumers from making well-informed choices.<sup>13</sup>

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

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<sup>8</sup> 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/>.

<sup>9</sup> *Id.*

<sup>10</sup> 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).

<sup>11</sup> *Cheat Sheet For Influencer Regulation in 16 Different Markets*, HELLO PARTNER (May 18, 2020), <https://hellopartner.com/2020/05/18/influencer-regulation-different-markets/>.

<sup>12</sup> Hovie, *supra* note 7, at 74.

<sup>13</sup> *Id.*

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.

## **II. DEVELOPMENT AND EVOLUTION**

### **A. History of Consumer Protection Law in the United States**

#### **1. The Creation of the Federal Trade Commission<sup>14</sup>**

The desire to protect consumers in the United States has existed as early as the country itself.<sup>15</sup> This desire grew and emerged simultaneously with the United States developing into a consumer society.<sup>16</sup> In response, President Woodrow Wilson established the FTC by passing the Federal Trade Commission Act (“FTCA”) in 1914.<sup>17</sup>

Initially, the FTCA prohibited “unfair methods of competition,” but in the 1930s, its focus expanded to also protecting consumers “from false or deceptive advertising practices.”<sup>18</sup> The FTC’s role continued to develop during President Kennedy’s term when he delivered a speech to Congress requesting the passage of legislation to protect fundamental consumer rights.<sup>19</sup> In response to the rise of social media influencers and their increasing role in business marketing, the FTCA’s scope has expanded to encompass advertising on social media

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<sup>14</sup> *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history> (last visited Oct. 11, 2024) (providing origin of the FTC).

<sup>15</sup> Hovie, *supra* note 7, at 77.

<sup>16</sup> *Id.* (citing D. Wes Sullenger, *Only We Can Save You: When and Why Non-Consumer Businesses Have Standing to Sue Business Competitors Under the Tennessee Consumer Protection Act*, 35 U. MEM. L. REV. 485, 489-91 (2005) (detailing rise of consumer protection laws in America)).

<sup>17</sup> FED. TRADE COMM’N, *supra* note 14.

<sup>18</sup> Hovie, *supra* note 7, at 78.

<sup>19</sup> Hovie, *supra* note 7, at 79, n.15.

platforms.<sup>20</sup> Today, the FTC’s mission is simply “to protect consumers and promote competition.”<sup>21</sup>

## 2. The Endorsement and Testimonial Guides

The FTC has established Endorsement Guides (“Guides”) that reflect the basic “truth-in-advertising” principle that “endorsements must be honest and not misleading.”<sup>22</sup> The Guides serve as an “official interpretation” of Section 5 of the FTCA, which “forms the basis of the FTC’s authority to regulate advertising.”<sup>23</sup> Furthermore, the Guides provide that an endorsement must reflect the true opinion of the endorser and cannot be used to convey statements or representations the product’s advertiser could not make.<sup>24</sup>

The Guides have mirrored the evolution of social media.<sup>25</sup> In 2009, “the FTC revised their Endorsement and Testimonial Guides to cover ‘consumer-generated media’ such as blogs and other internet media forms.”<sup>26</sup> Prior to the revisions in 2009, the Guides had not been updated or modified since 1980, long before consumer-generated media.<sup>27</sup> The revised Guides clarified the established principle that “material connections” between advertisers and endorsers require disclosure.<sup>28</sup> Under these revisions, an endorsement exists when payment or free products

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<sup>20</sup> Hovie, *supra* note 7, at 78-79.

<sup>21</sup> FED. TRADE COMM’N, *supra* note 14.

<sup>22</sup> *The FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N (June 2023), <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking> [hereinafter FTC Endorsement Guides].

<sup>23</sup> *See Internet Law – Advertising and Consumer Protection – FTC Extends Endorsement and Testimonial Guides to Cover Bloggers* – 74 *Fed. Reg.* 53,124 (Oct. 15, 2009) (To Be Codified at 16 C.F.R. Pt 255), 123 HARV. L. REV. 1540, 1540-41 (2010).

<sup>24</sup> FTC Endorsement Guides, *supra* note 22 (explaining that if a company cannot legally make certain claims in their own advertising, they also cannot have influencers or endorsers make those same claims on their behalf).

<sup>25</sup> *See Internet Law – Advertising and Consumer Protection – FTC Extends Endorsement and Testimonial Guides to Cover Bloggers* – 74 *Fed. Reg.* 53, 124 (Oct. 15, 2009) (To Be Codified at 16 C.F.R. Pt 255), 123 HARV. L. REV. 1540, 1540-41 (2010) (describing FTC’s revisions to Endorsement and Testimonial Guides).

<sup>26</sup> *Id.* at 1540.

<sup>27</sup> *Id.*

<sup>28</sup> Fed. Trade Comm’n, *FTC Publishes Final Guides Governing Endorsements, Testimonials*, (Oct. 5, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>.

are provided to endorsers, and endorsers must disclose any material connection with the seller.<sup>29</sup> Furthermore, the Guides specify that paid endorsements containing false or misleading claims are considered deceptive.<sup>30</sup>

The latest version of the Guides was revised in 2023.<sup>31</sup> This revision provides new and/or modified principles, examples, and definitions, including a new definition of “clearly and conspicuously” disclosing for both advertisers and endorsers.<sup>32</sup> This revision serves as a response to public comments on proposed updates to the Guides.<sup>33</sup> The FTC was seeking feedback on ways to improve the Guides to reflect the ways advertisers reach consumers through social media and reviews.<sup>34</sup> After taking the public’s comments into consideration, the final 2023 revision of the Guides made a total of six revisions along with updated answers to frequently asked questions about the Guides.<sup>35</sup>

3.     The History of Advertising Disclosure Methods in the United States  
Federal regulation of advertising disclosure in the United States began with the 1912 Newspaper Publicity Act, which required publications to identify paid content disguised as editorial material.<sup>36</sup> This legislation addressed concerns about consumers being misled by

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> FTC Endorsement Guides, *supra* note 22.

<sup>32</sup> FTC Endorsement Guides, *supra* note 22.

<sup>33</sup> *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FED. TRADE COMM’N (June 29, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements> [hereinafter FTC Updated Advertising Guides].

<sup>34</sup> *Id.*; *see also* FTC Endorsement Guides, *supra* note 22. Examples of some of the FAQ include: “What is the legal basis for the Guides?”; “I’m an influencer and a company sent me a free product which I posted about. If I buy more of the product with my own money and continue using it, can I post about it without disclosing that the company once sent it to me for free?”; and “In my social media posts, I mention or show products I use. If I say nothing positive about a product, is the post an endorsement covered by the FTC Act?”.

<sup>35</sup> FTC Updated Advertising Guides, *supra* note 33.

<sup>36</sup> Hovie, *supra* note 7, at 80.

advertising messages presented as objective content.<sup>37</sup> These regulatory concerns extended into the 1920s, particularly regarding testimonials in cigarette advertising.<sup>38</sup>

The FTC began prosecuting companies for false testimonials in the 1930s, but this enforcement approach changed after the United States Court of Appeals for the Second Circuit expressed skepticism about consumer susceptibility to unpaid endorsements.<sup>39</sup> The FTC did not establish comprehensive guidelines until 1975, when it issued its Guides for expert and organizational endorsements.<sup>40</sup> The regulatory framework was modernized in 2009 through FTCA amendments, which established that celebrities could be held liable for failing to disclose material connections that consumers would not reasonably expect.<sup>41</sup>

This historical emphasis on case-by-case enforcement and industry self-regulation continues to influence the FTC's current approach to social media oversight. Rather than implementing comprehensive monitoring systems, the FTC has maintained its traditional role of providing guidance while relying primarily on voluntary compliance and targeted enforcement actions. This strategy, rooted in decades of practice, stands in marked contrast to Australia's more centralized regulatory framework.

#### 4. Past Enforcement Actions by the Federal Trade Commission

The basic statute enforced by the FTC is Section 5(a) of the FTCA.<sup>42</sup> Under Section 5(a), the FTC has the power to investigate and prevent “unfair methods of competition” and “unfair or deceptive acts or practices affecting commerce.”<sup>43</sup> The statute gives the FTC authority to explore

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (citing Ross D. Petty, *From Puffery to Penalties: A Historical Analysis of US Masked Marketing Public Policy Concerns*, 5 J. HIST. RSCH. IN MKTG. 10, 12-13 (2013) (examining U.S. history of practices masking marketing content of advertisements).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *What the FTC Does*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/what-ftc-does>.

<sup>43</sup> *Id.*



seeking relief for consumers, including injunctions and restitution, and in some severe instances, civil penalties.<sup>44</sup>

In 2017, the FTC filed its first-ever complaint against individual social media influencers.<sup>45</sup> The complaint was filed against Trevor Martin (“Martin”) and Thomas Cassell (“Cassell”), two social media influencers who have gained a following in the online gaming community.<sup>46</sup> The charges stated Martin and Cassell deceptively endorsed the online gambling service CSGO Lotto, while failing to disclose they jointly owned the company as president and vice president, respectively.<sup>47</sup> Furthermore, Martin and Cassell paid other well-known influencers “thousands of dollars” to promote their site without requiring them to disclose they were receiving payment in their social media posts.<sup>48</sup> The FTC Acting Chairman Maureen Ohlhausen stated, this action “should send a message that such connections must be clearly disclosed so consumers can make informed purchasing decisions.”<sup>49</sup>

The same day the FTC brought charges against Martin and Cassell, it also announced that “staff has both sent warning letters to 21 social media influencers it contacted earlier this year regarding their Instagram posts,” and “updated staff guidance for social media influencers and endorsers.”<sup>50</sup> The purpose of the warning letters was to inform and remind the influencers of the responsibilities they have under the FTC’s Guides, such as needing to conspicuously disclose

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<sup>44</sup> *Id.*

<sup>45</sup> *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM’N (Sept. 7, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against-individual-social-media-influencers>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

their relationship to the brand being promoted.<sup>51</sup> Earlier in the same year, the FTC had sent out more than 90 letters to influencers with the same purpose, while also detailing where the disclosure of the connection between influencer and brand needs to be placed in the endorsement.<sup>52</sup>

The FTC seems to favor issuing warning letters over initiating administrative complaints.<sup>53</sup> 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.”<sup>54</sup>

## **B. History of Consumer Protection Law in Australia**

An early-dated instance of consumer disclosure requirements in Australia emerged in the late 19<sup>th</sup> century in 1905 with the Commerce (Trade Descriptions) Act.<sup>55</sup> This law primarily focused on requiring proper labeling of imported goods to protect consumers from misrepresentation, and was one of Australia’s first federal attempts to ensure proper disclosure to consumers.<sup>56</sup> This early legislation laid the groundwork for Australia’s robust consumer protection framework, establishing a precedent for transparency in commercial transactions.

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<sup>51</sup> *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMM’N (Apr. 19, 2017), [https://www.ftc.gov/system/files/attachments/press-releases/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship/influencer\\_template.pdf](https://www.ftc.gov/system/files/attachments/press-releases/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship/influencer_template.pdf).

<sup>52</sup> *Id.* (explaining it needs to be above the “more” button in the caption of posts).

<sup>53</sup> See Grace Stewart, *Trouble in Paradise: Regulation Instagram Influencers United States and United Kingdom*, 38 WIS. INT’L L.J. 138, 149 (2021). (Omits some articles/prepositions. Unsure if this is an issue).

<sup>54</sup> *Id.*

<sup>55</sup> *Labelling Requirements to Import Goods*, AUSTL. BORDER FORCE (last updated: Sep. 22, 2024), <https://www.abf.gov.au/importing-exporting-and-manufacturing/importing/how-to-import/requirements/labelling>.

<sup>56</sup> *Id.* (noting that today, the Commerce Trade Descriptions Act of 1905 is implemented alongside the Commerce Trade Descriptions Regulation 2016).

1. The Development of Competition and Consumer Law in Australia<sup>57</sup>

The ACCC is the independent statutory authority that enforces the legislation for consumer protection in Australia.<sup>58</sup> The former principal source of consumer protection under Australian law was the Trade Practices Act (“TPA”).<sup>59</sup> The TPA was enacted in 1974, leading to the establishment of the Trade Practices Commission (“TPC”) that same year.<sup>60</sup> The TPA provided significant consumer protections through several key provisions.<sup>61</sup> Among its six main sources of direct consumer protection, two were particularly notable: the prohibition of “misleading or deceptive” conduct and other unfair practices, and the establishment of a comprehensive enforcement regime administered by the ACCC.<sup>62</sup>

In 2010, the Australian Parliament considered the Australian Consumer Law Bill (the “Bill”), which proposed significant reforms to consumer protection legislation.<sup>63</sup> The Bill’s primary purpose was to replace the consumer protection provisions of the TPA with an expanded framework titled the Australian Consumer Law (“ACL”).<sup>64</sup> As part of the proposed changes in the Bill, the TPA would be renamed the Competition and Consumer Act 2010 (“CCA”).<sup>65</sup> While retaining and revising the six main sources of direct consumer protection from the TPA, the ACL incorporated them into its new structure.<sup>66</sup> These changes emerged from extensive stakeholder consultation and multiple review reports.<sup>67</sup>

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<sup>57</sup> *ACCC Milestones*, AUSTL. COMPETITION & CONSUMER COMM’N, <https://www.accc.gov.au/about-us/accc-role-and-structure/about-the-accc/accc-milestones>.

<sup>58</sup> *Legislation We Enforce*, AUSTL. COMPETITION & CONSUMER COMM’N, <https://www.accc.gov.au/about-us/accc-role-and-structure/legislation-we-enforce>.

<sup>59</sup> J W Carter, *The Commercial Side of Australian Consumer Protection Law*, 26 J. CONT. L. 221 (2010).

<sup>60</sup> AUSTL. COMPETITION & CONSUMER COMM’N, *supra* note 58, (noting the TPC enforces the TPA).

<sup>61</sup> Carter, *supra* note 59.

<sup>62</sup> *Id.* at 5. (numbered as provisions (1) and (6) in the original text).

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 5.

<sup>67</sup> J W Carter, *The Commercial Side of Australian Consumer Protection Law*, 26 J. CONT. L. 221, 5 (2010).

Following the Bill's passage, the ACL took effect in January 2011, establishing a unified consumer protection framework that applies consistently across all Australian states and territories.<sup>68</sup> The CCA replaced the TPA, with one of its primary objectives being to enhance Australian's welfare by "protecting consumers in their dealings with business."<sup>69</sup>

In 2021, for the 10<sup>th</sup> anniversary of the CCA, ACCC Chair Rod Sims delivered a speech at the Monash University National Commercial Law Seminar to reflect on the new era in Australian consumer protection.<sup>70</sup> Sims called the CCA a "game changer" that allowed the ACCC and state and territory regulators to "collaborate much more easily," by introducing "a single national consumer law and civil penalties."<sup>71</sup> When addressing the civil penalties the ACL enforces, Sims stated "Australia's civil pecuniary penalties are now the highest in the world for contraventions of consumer protection laws."<sup>72</sup>

The evolution of Australian consumer protection law reflects a consistent movement toward unified, national standards and strong central enforcement authority. This historical development helps explain the ACCC's current ability to conduct a systemic monitoring of social media influencers across multiple jurisdictions. Unlike the U.S. system's reliance on state-level enforcement and voluntary compliance, Australia's consolidated regulatory framework enables more comprehensive oversight of digital marketing practices.

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<sup>68</sup> *Id.*; see also AUSTL. COMPETITION & CONSUMER COMM'N, *supra* note 58.

<sup>69</sup> *Compliance and Enforcement Priorities*, AUSTL. COMPETITION & CONSUMER COMM'N, <https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-priorities>.

<sup>70</sup> Rod Sims, *Reflections on the 10th Anniversary of the Competition and Consumer Act 2010*, AUSTL. COMPETITION & CONSUMER COMM'N (Mar. 3, 2021), <https://www.accc.gov.au/about-us/news/speeches/reflections-on-the-10th-anniversary-of-the-competition-and-consumer-act-2010-speech>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

2. Past Enforcement Actions by the Australian Competition and Consumer Commission

The widespread occurrence of misleading or deceptive behavior online caught the ACCC's attention, leading to ongoing government scrutiny of unlawful practices.<sup>73</sup> In October 2015, the ACCC joined a coalition of 34 nations to tackle consumer issues in e-commerce, including online scams.<sup>74</sup> Australia received 2,036 consumer complaints in 2014, which was the second highest number globally, following the 8,749 complaints from the United States.<sup>75</sup>

Complaints submitted to the ACCC's Facebook page prompted its investigation into influencer conduct.<sup>76</sup> These reports served as the "spearhead" for the ACCC to investigate and prosecute a range of online platforms, extending beyond influencers to address how brands and marketing and advertising agencies should not assume to be exempt from investigations.<sup>77</sup> The ACCC's focus on online platforms is not limited to those based onshore in Australia; any platform that targets Australian consumers faces ACCC investigations and enforcement actions.<sup>78</sup>

In 2020, as a response to Trivago breaching the ACL by providing "misleading conduct in its advertising and on its website," the ACCC prosecuted Trivago in Australian Federal Court.<sup>79</sup> The prosecution focused on Trivago claiming that Australian consumers could use its platform to find the best hotel deals or lowest rates.<sup>80</sup> The Federal Court found that Trivago's

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<sup>73</sup> Francina Cantatore & Brenda Marshall, *Navigating the Australian Consumer Law in the digital marketplace: Hazards for commercial entities*, 23 COMM. & CONSUMER L.J. 232, 234.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 235 (noting that when adjusted for population differences (318.9 million in the U.S. versus 23.13 million in Australia), the complaint rates suggest either higher vigilance among Australian consumers or greater dissatisfaction with e-commerce transactions in Australia).

<sup>76</sup> *ACCC Crackdown on Influencers – Are You in Their Crosshairs?*, WATSON FARLEY & WILLIAMS (Mar. 14, 2023), <https://www.wfw.com/articles/accc-crackdown-on-influencers-are-you-in-their-crosshairs/>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

algorithm promoted and highlighted hotel listings based on the highest commission Trivago would receive, rather than presenting the lowest available prices to consumers.<sup>81</sup> In addition, the Trivago platform misrepresented savings by comparing different types of hotel rooms.<sup>82</sup> Ultimately, Trivago received a fine of AU \$44.5m for violating the ACL, and its appeal was subsequently dismissed in 2022.<sup>83</sup>

A key aspect of the Trivago ruling was the emphasis on holding online platforms accountable for the content they display, and ensuring clear, transparent disclosures about content that could influence consumer choices.<sup>84</sup> Trivago, like other online platforms, functions as a marketplace where consumers can purchase products using the platform's payment system.<sup>85</sup> Although influencer content on social media does not follow the same transactional model, lawyers speculated that, following the Trivago prosecution, the ACCC's would likely extend its focus to influencers and social media platforms, applying similar principles of online transparency and consumer protection.<sup>86</sup>

### **C. Historical Legacies Shaping Modern Regulation**

These distinct historical trajectories have shaped how each nation approaches influencer regulation today. The U.S. system, built on a foundation of case-specific enforcement and state-level consumer protection laws, continues to favor advisory guidelines and targeted actions. Meanwhile, Australia's development of a unified national consumer law framework has enabled the ACCC to implement more systematic monitoring and enforcement strategies. As both nations

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<sup>81</sup> *Id.*

<sup>82</sup> *ACCC Crackdown on Influencers – Are You in Their Crosshairs?*, WATSON FARLEY & WILLIAMS (Mar. 14, 2023), <https://www.wfw.com/articles/accc-crackdown-on-influencers-are-you-in-their-crosshairs/>.

<sup>83</sup> *Id.* (noting this is equivalent to approximately around US \$29.9 million).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

confront the challenges of regulating social media influencers, these historical differences help explain their contrasting regulatory approaches.

### III. CURRENT ENFORCEMENT OF REGULATORY APPROACHES

#### A. The Regulatory Approaches

The effectiveness of each nation's regulatory approach becomes clear when examining their current enforcement strategies. While the FTC has issued advisory guidelines requiring influencers to disclose promotional relationships, enforcement and clarity surrounding these guidelines have been inconsistent, often relying on case-specific actions.<sup>87</sup> Meanwhile, the ACCC's systemic monitoring has revealed widespread non-compliance across multiple sectors, leading to more comprehensive enforcement strategies.<sup>88</sup>

These contrasting approaches significantly impact how effectively each nation can protect consumers from misleading influencer marketing practices. When enforcement relies primarily on individual cases and voluntary compliance, problematic practice can persist across platforms and sectors without the governing agency addressing it.

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<sup>87</sup> *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N (Nov. 2019), [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf) [hereinafter *Disclosures 101 for Social Media Influencers*]; see also *Sava v. 21st Century Spirits, LLC*, No. 1:22-cv-06083 (N.D. Ill. June 25, 2024).

<sup>88</sup> *Social Media Influencer Testimonials and Endorsements: Findings of the ACCC's Internet Sweep of Testimonials and Endorsements by Influencers*, AUSTL. COMPETITION & CONSUMER COMM'N (Dec. 2023), <https://www.accc.gov.au/system/files/social-media-influencer-testimonials.pdf> [hereinafter *Social Media Influencer Testimonials and Endorsements*].

## **B. Current Regulation in the United States and the Federal Trade Commission:**

### **Reactive Enforcement**

The FTC’s approach to influencer marketing regulation centers on its published guidelines that outline influencers’ responsibilities when posting promotional content.<sup>89</sup> Despite the guidelines, the agency’s enforcement strategy has largely focused on addressing individual violations rather than implementing systemic oversight. *Sava v. 21st Century Spirits, LLC* exemplifies this case-by-case approach, where claims of misleading endorsements highlighted the challenges in maintaining consistent enforcement standards.<sup>90</sup>

#### **1. *Sava v. 21st Century Spirits, LLC*<sup>91</sup>**

The company 21st Century Spirits, LLC (“21st Century”) produces, distributes, and markets Blue Ice Vodka (“Blue Ice”).<sup>92</sup> The company hired several women to serve as influencers to promote Blue Ice on their social media platforms.<sup>93</sup> After viewing these promotional posts and marketing materials, consumers Mario Sava (“Sava”) and Alin Pop (“Pop”) purchased Blue Ice.<sup>94</sup> Claiming the product failed to meet advertised promises, Sava and Pop filed a putative class action against both 21st Century and its influencers.<sup>95</sup>

The influencers shared with their millions of social media followers various claims about the product on their social media, viewed by Sava and Pop as being “deceptive and

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<sup>89</sup> Disclosures 101 for Social Media Influencers, *supra* note 87.

<sup>90</sup> *Sava*, No. 1:22-cv-06083. Similar patterns are evident in ongoing litigation against fashion retailer Revolve Group, Inc., alleging failure to require adequate influencer disclosure of sponsored content. *See* Ligia Negreanu v. Revolve Group, Inc., No. 2:25-cv-03186 (C.D. Cal. filed Apr. 11, 2025) (order granting defendants’ motion to compel arbitration and strike class claims, and directing periodic status reports on arbitration).

<sup>91</sup> *Sava*, No. 1:22-cv-06083.

<sup>92</sup> *Id.* at \*1.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (alleging violations of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., the state consumer protection statutes of Florida, Illinois, and California, and each of those state’s common law theories of unjust enrichment, negligent misrepresentation, and breach of express warranty).



misleading.”<sup>96</sup> The influencers collectively promoted Blue Ice as being “handcrafted,” containing between “52 and 57 calories per ounce,” and marketed it as “fit-friendly,” claiming it aids in personal fitness and weight management.<sup>97</sup>

To avoid consumers knowing that 21st Century paid influencers to promote Blue Ice, 21st Century and the influencers “devised a scheme” in which the influencers endorse or promote Blue Ice products while pretending to be ordinary consumers.<sup>98</sup> Subsequently, in their social media posts, the influencers did not disclose that they received compensation for promoting Blue Ice.<sup>99</sup>

21st Century argued that the influencers are not “legally required to disclose any material connection to 21st Century or Blue Ice.”<sup>100</sup> The company further argued that Sava and Pop cannot rely on the FTC’s social media advertising guidelines to support their claim that the influencers misled them by failing to disclose their “material connections” to 21st Century.<sup>101</sup> According to the defendants, these guidelines are not legally binding and are merely “advisory in nature.”<sup>102</sup>

The district court found the issue with the defendants’ argument is that it focuses exclusively on federal regulations and guidelines without considering how various state statutes incorporate those regulations and guidance.<sup>103</sup> This distinction prevents the court from making

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<sup>96</sup> *Id.*

<sup>97</sup> Sava v. 21st Century Spirits, LLC, No. 1:22-cv-06083, \*3 (N.D. Ill. June 25, 2024).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*17.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Sava v. 21st Century Spirits, LLC, No. 1:22-cv-06083, \*17–18 (N.D. Ill. June 25, 2024).

broad conclusions about whether the alleged failures to disclose are in fact deceptive.<sup>104</sup> Instead, the court must analyze the matter within the framework of each individual state statute.<sup>105</sup>

The *Sava* case highlights several systemic issues in the U.S. approach to influencer regulation. First, the court’s focus on state-specific statutory frameworks underscores the fragmented nature of U.S. enforcement, creating potential inconsistencies across jurisdictions. This fragmentation is evident in how the court must analyze the matter within the framework of each individual state statute, rather than applying a unified federal standard. Second, the defendants’ argument that the FTC guidelines are merely “advisory” reveals the limitations of a regulatory system that emphasizes voluntary compliance over mandatory standards. These limitations become particularly apparent when compared to Australia’s more centralized approach to enforcement.

### **C. Current Enforcement Strategy by the Australian Competition and Consumer Commission: Proactive Monitoring**

In contrast to the FTC enforcement approach, the ACCC employs a more comprehensive and proactive enforcement strategy. The ACCC demonstrated this systematic approach through a comprehensive internet sweep (the “sweep”) of social media influencers conducted between January and February 2023.<sup>106</sup> The sweep directed the ACCC to analyze content from 118 individual influencer accounts across six major digital platforms, ranging from traditional social media sites to livestreaming services.<sup>107</sup> This investigation targeted seven consumer sectors where influencer marketing significantly impacts consumer purchasing decisions, including fashion, beauty, food and beverage, travel, health and fitness, parenting, and gaming

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Social Media Influencer Testimonials and Endorsements, *supra* note 88.

<sup>107</sup> *Id.* at 5. (noting the six digital platforms examined included Instagram, TikTok, Snapchat, YouTube, Facebook, and the livestreaming service Twitch).

technology.<sup>108</sup> The ACCC incorporated public input to assist in the review process by collecting over 150 consumer reports of potentially misleading influencer content.<sup>109</sup> Adequate disclosure of commercial arrangements such as payments, gifted products, or other incentives were the focus of the examination.<sup>110</sup> While the investigation primarily examined “prominent Australian influencers,” it also analyzed content from creators with smaller followings to understand how promotional strategies differed between large and small content creators.<sup>111</sup> This comprehensive approach revealed widespread non-compliance with consumer protection standards across all examined sectors.<sup>112</sup>

#### 1. Issues Found During the Sweep

Of the 118 influencers analyzed in the sweep, 81% of influencers identified raised concerns with their posts.<sup>113</sup> Across all examined sectors, influencers consistently failed to disclose when they received compensation or incentives for promoting “brands, products or services” in posts.<sup>114</sup> Comment sections on these posts show how effectively influencers drive sales, with followers frequently sharing their purchases or plans to buy recommended products.<sup>115</sup> The sweep found influencers strengthened their impact by responding to followers’ questions and adding pressure to buy quickly by highlighting limited stock.<sup>116</sup> These influencers

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (explaining that examples provided by the public focused on non-disclosure of commercial relationships in posts made by social media influencers).

<sup>110</sup> *Id.* (focusing on “would the ordinary consumer” understand from the post that there were incentives encouraging the post).

<sup>111</sup> *Id.* (noting that brands, advertisers and marketing firms were also a focus of the sweep given their role in facilitating influencer posts which may potentially include misleading testimonials and endorsements).

<sup>112</sup> *Findings of the ACCC’s Internet Sweep of Testimonials and Endorsements by Influencers: Social Media Influencer Testimonials and Endorsements*, AUSTL. COMPETITION & CONSUMER COMM’N (Dec. 2023), <https://www.accc.gov.au/system/files/social-media-influencer-testimonials.pdf>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 7.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

created a more persuasive sales pitch than traditional advertising through this direct encouragement or communication.<sup>117</sup>

Beyond simple non-disclosure, influencers often employed vague terminology and utilized deceptive formatting techniques to conceal promotional relationships.<sup>118</sup> The sweep found disclosures hidden in lengthy captions, embedding them within many hashtags, or using hard-to-read fonts.<sup>119</sup> Other troubling practices the investigation revealed included false claims about purchasing products that brands gifted and misleading statements about product experiences.<sup>120</sup>

## 2. Sector Observations

Among all sectors analyzed, fashion influencers posted the highest proportion of concerning content at 96%, with influencers frequently using Instagram and TikTok to promote fast fashion brands to young consumers through “get ready with me” content.<sup>121</sup> Home and parenting influencers followed at 81%, notably failing to disclose sponsorships for household goods while often featuring children in promotional content.<sup>122</sup>

Travel and lifestyle influencers came in at 79% of influencers frequently omitting disclosures about complimentary or incentivized trips, with prevalence among micro-influencers promoting local businesses.<sup>123</sup> At 78%, the health and fitness sector raised unique concerns, including the promotion of multi-level marketing schemes and predatory advertising targeting

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<sup>117</sup> *Id.*

<sup>118</sup> *Findings of the ACCC’s Internet Sweep of Testimonials and Endorsements by Influencers: Social Media Influencer Testimonials and Endorsements*, AUSTL. COMPETITION & CONSUMER COMM’N (Dec. 2023), <https://www.accc.gov.au/system/files/social-media-influencer-testimonials.pdf>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 9. (“get ready with me” is when an influencer films themselves getting ready for the day while catching followers up to date with their lives or with a music overlay).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 10.

body image insecurities.<sup>124</sup> Beauty and cosmetic resulted in 75% of influencers often failing to disclose gifted products in tutorial-style content, while food and beverage influencers similarly at 75%, frequently embedded undisclosed promotions within broader travel content.<sup>125</sup>

Gaming and technology, while showing the lowest rate at 73%, still presented significant issues particularly regarding undisclosed product placement during livestreams and sponsored pre-release game events targeting younger audiences.<sup>126</sup> This pervasive pattern of inadequate disclosure across sectors suggests a systemic issue in influencer marketing transparency.

### 3. The Australian Consumer and Competition Commission's Next Move

The ACCC's sweep revealed widespread concerns about influencer practices, prompting a multi-faceted response from the agency. This response includes developing new educational resources and compliance guidelines for influencers, brands, and advertisers.<sup>127</sup> Beyond that, the ACCC plans to engage directly with businesses and industry groups to improve their understanding of ACL requirements.<sup>128</sup> The agency will also help consumers better recognize influencer marketing tactics through targeted educational campaigns.<sup>129</sup> Where specific influencer posts have raised concerns during the sweep, the ACCC will assess whether the posts constitute violations; particularly posts that fail to adequately disclose commercial relationships.<sup>130</sup>

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<sup>124</sup> *Findings of the ACCC's Internet Sweep of Testimonials and Endorsements by Influencers: Social Media Influencer Testimonials and Endorsements*, AUSTL. COMPETITION & CONSUMER COMM'N (Dec. 2023), <https://www.accc.gov.au/system/files/social-media-influencer-testimonials.pdf>.

<sup>125</sup> *Id.* at 10

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 11; see also Anthony J Cordato, *ACCC sweep finds 81% of influencer posts may be misleading*, CORDATO PARTNERS (May 5, 2023), <https://www.lexology.com/library/detail.aspx?g=c27372b1-5bc6-48d3-bd9a-78c6e3f7e133> (explaining the ACCC is following the same playbook in investigating influencers, as it is following in investigating businesses for "greenwashing" – businesses making vague or unclear environmental claims).

<sup>128</sup> *Findings of the ACCC's Internet Sweep of Testimonials and Endorsements by Influencers: Social Media Influencer Testimonials and Endorsements*, AUSTL. COMPETITION & CONSUMER COMM'N (Dec. 2023), <https://www.accc.gov.au/system/files/social-media-influencer-testimonials.pdf>.

<sup>129</sup> *Id.* at 11.

<sup>130</sup> *Id.*

The ACCC's investigation extends beyond mere disclosure issues. The agency is scrutinizing potentially misleading posts and examining broader ACL breaches identified during the sweep.<sup>131</sup> This scrutiny encompasses various participants in online marketing, including the role of brands, advertisers, marketing firms, and platforms in facilitating problematic conduct.<sup>132</sup>

Building on insights from its Digital Platform Services Inquiry Report 6, the ACCC continues to refine its enforcement strategy.<sup>133</sup> The agency encourages both consumers and businesses to report potential violations through the ACCC website, or Infocentre.<sup>134</sup> These reports assist in the investigations, enforcement actions, compliance programs, and broader policy initiatives.<sup>135</sup>

#### **D. Cross-Border Implications**

As social media platforms continue to blur national boundaries, the differing regulatory approaches of the United States and Australia create both challenges and opportunities for international coordination. Both agencies signed two landmark agreements in 2000 that established the foundation for cross-border consumer protection enforcement.<sup>136</sup> The Internet's emergence has led consumers to engage in cross-border transactions more extensively than ever

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (noting the report focused on social media services and influencer advertising).

<sup>134</sup> *Findings of the ACCC's Internet Sweep of Testimonials and Endorsements by Influencers: Social Media Influencer Testimonials and Endorsements*, AUSTL. COMPETITION & CONSUMER COMM'N (Dec. 2023), <https://www.accc.gov.au/system/files/social-media-influencer-testimonials.pdf>; *see also Service Charter*, AUSTL. COMPETITION & CONSUMER COMM'N, <https://www.accc.gov.au/about-us/accc-role-and-structure/service-charter> (providing information about contacting the ACCC's Infocentre).

<sup>135</sup> *Findings of the ACCC's Internet Sweep of Testimonials and Endorsements by Influencers: Social Media Influencer Testimonials and Endorsements*, AUSTL. COMPETITION & CONSUMER COMM'N (Dec. 2023), <https://www.accc.gov.au/system/files/social-media-influencer-testimonials.pdf> (noting broader policy initiatives include education initiatives, industry engagement, advocacy, and research).

<sup>136</sup> *United States and Australia Sign Two Agreements to Enhance Cooperation on Consumer Protection Matters*, FED. TRADE COMM'N (Jul. 20, 2000), <https://www.ftc.gov/news-events/news/press-releases/2000/07/united-states-australia-sign-two-agreements-enhance-cooperation-consumer-protection-matters> [hereinafter U.S. Australia Agreements].

before, creating a greater need for cross-border law enforcement cooperation.<sup>137</sup> These agreements enable both agencies to better combat fraudulent, misleading, and unfair commercial conduct in each other's jurisdiction.<sup>138</sup>

The first agreement, called the FTC-ACCC Cooperation Agreement, focuses on enhancing law enforcement cooperation. Under this "best efforts" agreement, both agencies will try to notify each other of consumer protection enforcement activities affecting their mutual interests and assist in gathering information.<sup>139</sup>

The second agreement allows the ACCC to participate in the FTC's Consumer Sentinel system, a consumer complaint database used by over 250 law enforcement agencies.<sup>140</sup> Through this system, the ACCC can both obtain and enter information, strengthening both countries' ability to prosecute consumer fraud.<sup>141</sup>

#### **IV. CHALLENGES IN REGULATORY CONVERGENCE OR ADOPTION**

As influencer marketing continues to evolve in both the United States and Australia, the contrast between regulatory approaches becomes increasingly significant. Australia's structured, proactive framework demonstrates the potential benefits of systemic oversight, while the U.S. system's case-by-case approach offers flexibility but lacks comprehensive coverage. These differences raise important questions about the feasibility and desirability of regulatory convergence or adoption. Understanding these differences and their underlying causes is crucial for policymakers considering the future of influencer marketing regulation.

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<sup>137</sup> *Id.*; see also *Guidelines On Consumer Protection In The Context Of Electronic Commerce*, OECD (Mar. 9, 2000), [https://www.oecd.org/en/publications/2000/03/guidelines-for-consumer-protection-in-the-context-of-electronic-commerce\\_g1gh2530.html](https://www.oecd.org/en/publications/2000/03/guidelines-for-consumer-protection-in-the-context-of-electronic-commerce_g1gh2530.html) (acknowledging the need for cross-border law enforcement cooperation).

<sup>138</sup> U.S. Australia Agreements, *supra* note 136.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (noting Australia became the second country to join this information-sharing system, following Canada).

### A. Barriers to Comprehensive Influencer Regulation in the United States

Before examining the structural challenges of regulating social media influencers, it is important to understand the First Amendment context shaping U.S. regulatory approaches.<sup>142</sup> While concerns about restricting social media content have sparked free speech debates, “the First Amendment only protects individuals’ speech from U.S. governmental oppression.”<sup>143</sup>

Traditional approaches to social media regulation have largely fallen short because social media is “fundamentally different” from traditional media.<sup>144</sup> Unlike traditional media with centralized editorial oversight, social media platforms offer “essentially infinite bandwidth” with millions of accounts “that can each target much narrower audiences.”<sup>145</sup> These platforms function primarily as a channel for user-generated content subject to “much less moderation,” making content supervision more difficult than in traditional media.<sup>146</sup>

The profit-driven business models of social media platforms further complicate regulatory efforts. While traditional media’s limited bandwidth and editorial oversight generally incentivizes companies to reach broader markets, the social media business model relies on “leveraging individual users’ data to push highly personalized content in order to maximize scroll time, incentivizing more customized, and thus, potentially more extremist content.”<sup>147</sup>

Analyzing these platform dynamics in the context of influencer marketing suggests obstacles to systemic monitoring in the U.S. Where regulators once only needed to oversee a limited number of traditional advertising channels, they now face a landscape where

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<sup>142</sup> U.S. CONST. amend. I.

<sup>143</sup> Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan 14, 2021), <https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation>. (explaining this means there should not be anything illegal about platforms or brands requiring influencers to follow specific guidelines).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*



influencer content splits into countless targeted streams based on user interests. These dramatic changes in how advertising reaches consumers through social media platforms possibly contribute to why the United States continues to rely on case-by-case enforcement, rather than attempting to implement comprehensive monitoring like Australia’s approach.

## **B. Judicial Reluctance to Intervene in Social Media Regulation**

The Supreme Court’s 2024 decision in *Murthy v. Missouri* demonstrates the judiciary’s hesitance to intervene in government oversight of social media content.<sup>148</sup> In *Murthy*, the Court threw out a lawsuit seeking to limit government communications with social media companies about content moderation, finding the plaintiffs lacked standing because they could not establish a “concrete link” between government officials’ conduct and platform moderation decisions.<sup>149</sup>

Even when examining what it considered the strongest claim, where Facebook restricted a user’s account, Justice Barrett emphasized that Facebook was already moderating the user’s content before most government communications occurred.<sup>150</sup> By setting such a high bar for proving government influence over platform decisions, the Court signaled a clear reluctance to insert itself into questions of social media content regulation. This judicial hesitance to intervene may suggest why the United States has not moved toward a more systematic approach to regulating influencer content, as implementing such oversight could face significant scrutiny from courts wary of government involvement in social media moderation.

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<sup>148</sup> Amy Howe, *Justices side with Biden over government’s influence on social media content moderation*, SCOTUSBLOG (June 26, 2024), <https://www.scotusblog.com/2024/06/justices-side-with-biden-over-governments-influence-on-social-media-content-moderation/>; *See also* *Murthy v. Missouri*, 603 U.S. 43 (2024).

<sup>149</sup> Howe, *supra* note 148.

<sup>150</sup> *Id.*

### C. Emerging Focus on Platform-Level Regulation

Recent regulatory actions suggest the United States is pursuing a different approach than Australia's content monitoring system. In July 2024, the FTC took unprecedented action by banning the social media platform "NGL: ask me anything" from offering services to users under 18.<sup>151</sup> This action marked the first time the FTC has ever implemented such an age restriction on a social media platform.<sup>152</sup> Additionally, the U.S. Senate recently passed the Children and Teens' Online Privacy Protection Act ("COPPA 2.0"), which would ban targeted advertising to children and teens, and prevent companies from collecting personal data from children under 17 without consent.<sup>153</sup> The Senate also passed the Kids Online Safety Act ("KOSA"), which would provide children and parents with tools and safeguards to protect against online harms.<sup>154</sup>

These developments suggest the U.S. regulatory framework is evolving to focus on platform-wide restrictions rather than specific content monitoring. Where Australia has implemented comprehensive monitoring of influencer posts, the U.S. appears to favor broader structural limitations on how platforms can operate, particularly regarding young users. This approach may reflect both the practical challenges of content monitoring in the U.S. market, as well as the judiciary's reluctance to intervene in content moderation decisions.

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<sup>151</sup> Juliana Gruenwald Henderson, *FTC Order Will Ban NGL Labs and Its Founders From Offering Anonymous Messaging Apps to Kids Under 18 and Halt Deceptive Claims Around AI Content Moderation*, FED. TRADE COMM'N (July 9, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-order-will-ban-n-gl-labs-its-founders-offering-anonymous-messaging-apps-kids-under-18-halt>; *see also* Megan Reschke, *How New Regulations Are Reshaping Social Media Advertising*, BASIS (Sept. 27, 2024), <https://basis.com/blog/how-new-regulations-are-reshaping-social-media-advertising>.

<sup>152</sup> Reschke, *supra* note 151 (explaining that it was not the first time the FTC had taken action against a social-media company).

<sup>153</sup> *Id*; *see also* Press Release, *Senate Overwhelmingly Passes Children's Online Privacy Legislation*, U.S. SENATE COMM. ON COMMERCE, SCI., & TRANSP. (July 24, 2024), <https://www.commerce.senate.gov/index.php/2024/7/senate-overwhelmingly-passes-children-s-online-privacy-legi>

<sup>154</sup> U.S. SENATE COMM. ON COMMERCE, SCI., & TRANSP., *supra* note 153.

#### **D. State-Level Regulatory Fragmentation**

The U.S. regulatory landscape is further complicated by individual states implementing their own social media regulations. In 2023, several states enacted legislation focusing on protecting minors by requiring age verification and parental consent to access social media platforms.<sup>155</sup> More recently, in 2024, Texas now requires social media platforms to provide transparency about their algorithmic practices, and implement parental controls.<sup>156</sup> Similarly, New York has enacted legislation specifically targeting the addictive nature of social media, prohibiting certain algorithmic features for young users and implementing strict data protection measures.<sup>157</sup>

Once again, this state-by-state approach to social media regulation that the U.S. takes presents a stark contrast to Australia's unified regulatory framework. Where Australia can implement comprehensive monitoring through a single federal agency, the U.S. faces a patchwork of varying state requirements. This fragmented landscape suggests another reason why moving towards a monitoring approach like Australia's could be challenging in the U.S. Social media platforms operating across state lines must navigate different and potentially conflicting state regulations, making it difficult for a uniform monitoring system given the lack of a centralized regulatory authority.

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<sup>155</sup> Bill Kramer, *Age Verification is the Latest State Policy Challenge for Big Tech*, MULTISTATE (Dec. 12, 2023), <https://www.multistate.us/insider/2023/12/12/age-verification-is-the-latest-state-policy-challenge-for-big-tech> (noting legislation enacted in Arkansas, Louisiana, Mississippi, Montana, Texas, Utah, and Virginia); *see also* Reschke, *supra* note 151.

<sup>156</sup> Reschke, *supra* note 151; *see also* *Securing Children Online Through Parental Empowerment ("SCOPE") Act*, TEX. OFF. OF THE ATT'Y GEN. (Sept. 1, 2024), <https://www.texasattorneygeneral.gov/consumer-protection/file-consumer-complaint/consumer-privacy-rights/securing-children-online-through-parental-empowerment>.

<sup>157</sup> Reschke, *supra* note 151; *See also* Press Release, Governor Hochul Joins Attorney General James and Bill Sponsors to Sign Nation-Leading Legislation to Restrict Addictive Social Media Feeds and Protect Kids Online, NEW YORK STATE (June 20, 2024), <https://www.governor.ny.gov/news/governor-hochul-joins-attorney-general-james-and-bill-sponsors-sign-nation-leading-legislation>.

### **E. Platform Self-Regulation**

Major social media platforms have begun implementing their own advertising restrictions, particularly regarding young users. TikTok has announced limitations on advertisement targeting for users under 18 years of age, while Facebook and Instagram have already implemented restrictions on demographic targeting for teenage users.<sup>158</sup>

This movement toward voluntary platform restrictions demonstrates that oversight of social media advertising practices in the United States extends beyond government regulation. As platforms develop and enforce their own guidelines for advertising content, an additional layer of content moderation that operates alongside state and federal regulations gets created. This industry self-regulation contributes to the current U.S. approach to overseeing influencer marketing.

### **F. Scale and Scope Disparities**

The immense scale of the global influencer market presents significant challenges for a comprehensive monitoring approach. The global influencer market is currently valued at USD \$9.89 billion, with projected growth to USD \$30.25 billion by 2032, which demonstrates the vast scope of content requiring oversight.<sup>159</sup> North America represents a mature and fiercely competitive market encompassing diverse niches across lifestyle, beauty, fashion, and technology.<sup>160</sup> Additionally, brands in North America have rapidly adopted influencer

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<sup>158</sup> Reschke, *supra* note 151. TikTok's limitation was a response of the potential ban and the Facebook and Instagram restriction restricts targeting of gender, locations smaller than cities, interests, and behaviors as well as demographics.

<sup>159</sup> *Influencer Market Size, Share, Growth, and Industry Analysis, By Type (Solution Platform, and Services Platform) By Application (Search and Discovery, Campaign Management, Influencer Relationship Management, and Analytics and Reporting), Regional Forecast*, BUS. RSCH. INSIGHTS, <https://www.governor.ny.gov/news/governor-hochul-joins-attorney-general-james-and-bill-sponsors-sign-nation-leading-legislation>.

<sup>160</sup> *Id.* at § Influencer Market Regional Insights.

partnerships as a key marketing strategy, allocating substantial marketing resources to work with content creators.<sup>161</sup>

The differences in market scale between the U.S. and Australia becomes evident in global market analyses, where North America dominates a share of the influencer marketing platform market.<sup>162</sup> Notably, while regions like Europe, South America, Asia Pacific, and even the Middle East and Africa warrant detailed market analysis, Australia's market is not individually highlighted in global reports, suggesting a significantly smaller scale.<sup>163</sup> This dramatic size disparity helps explain why Australia's approach to monitoring social media influencers could face substantial implementation challenges in the U.S. market. Perhaps, the ACCC's successful strategy was designed for a market that represents a fraction of North America's influencer ecosystem.

## **V. FUTURE TRAJECTORIES IN INFLUENCER REGULATION**

As social media platforms and influencer marketing continue to evolve, both the U.S. and Australian regulatory frameworks face unprecedented challenges. This section examines emerging technologies, platform evolution, and changing consumer behaviors that will likely reshape the regulatory landscape in both nations.

### **A. Emerging Technologies Reshaping Regulatory Challenges**

#### **1. Artificial Intelligence and Generated Content**

The rise of AI-generated content presents novel regulatory challenges for both the

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<sup>161</sup> *Id.*

<sup>162</sup> *Influencer Marketing Platform Market Size, Share & Industry Analysis*, FORTUNE BUS. INSIGHTS (Oct. 20, 2025), <https://www.fortunebusinessinsights.com/influencer-marketing-platform-market-108880>.

<sup>163</sup> *Id.*

FTC and ACCC.<sup>164</sup> Synthetic influencers are computer generated personalities with growing follower bases that represent brand partnerships while existing outside traditional regulatory frameworks.<sup>165</sup> For U.S. regulators, determining liability for deceptive claims made by AI influencers becomes complex: does responsibility rest with the AI developer, the brand, or the platform? Australia's systematic monitoring approach similarly requires adaptation to identify potentially deceptive practices in AI-generated content.

## 2. Virtual and Augmented Reality Environments

Immersive technologies create promotional spaces that challenge traditional disclosure frameworks. Research indicates that augmented reality will significantly transform the influencer marketing environment due to its ability to create novel relationships between consumers and brands.<sup>166</sup> As these technologies evolve, regulatory frameworks must adapt to new promotional contexts where consumer attention functions differently than in traditional media. This immersive nature of augmented reality creates a unique challenge for implementing disclosure standards. Both U.S. and Australian regulatory systems will need to reconsider how existing marketing disclosure requirements translate when consumers engage with influencer content through augmented reality-enhanced platforms.

## 3. Blockchain and Tokenized Influence

Web3 are introducing new models of creator compensation and audience

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<sup>164</sup> The FTC has noted that “Consumers are encountering AI systems and tools, whether they know it or not” and that the agency is “increasingly taking note of AI’s potential for real-world instances of harm; from incentivizing commercial surveillance to enabling fraud and impersonation to perpetuating illegal discrimination.” *AI and the Risk of Consumer Harm*, FED. TRADE COMM’N, (Jan. 3, 2025), [https://data.aclum.org/storage/2025/01/FTC\\_www\\_ftc\\_gov\\_policy\\_advocacy-research\\_tech-at-ftc\\_2025\\_01\\_ai-risk-consumer-harm.pdf](https://data.aclum.org/storage/2025/01/FTC_www_ftc_gov_policy_advocacy-research_tech-at-ftc_2025_01_ai-risk-consumer-harm.pdf).

<sup>165</sup> *AI Influencer*, SYNTHESIA (last visited Nov. 17, 2025), <https://www.synthesia.io/glossary/ai-influencer#:~:text=An%20AI%20influencer%20is%20a,to%20say%20and%20do%20anything>.

<sup>166</sup> Mudita Sinha & Mallika Srivastava, *Augmented Reality: New Future of Social Media Influencer Marketing*, VISION: THE J. OF BUS. PERSPECTIVE, (June 13, 2023), <https://journals.sagepub.com/doi/abs/10.1177/09722629221147124>.

relationships that present challenges for regulatory frameworks. Blockchain enables “new models of ownership and monetization” where creators can offer “fractional ownership to their audience” through tokenization and smart contracts.<sup>167</sup> When influencers receive compensation through “non-fungible tokens (NFTs)” which represent “digital assets that represent ownership,” the nature of promotional relationships becomes more complex.<sup>168</sup> Both the U.S. and Australian systems will need to address disclosure requirements for decentralized promotional arrangements where traditional brand-influencer relationships are replaced by community-driven promotional systems.

4. Platform Evolution and Regulatory Implications: Integration of Commerce and Content

Social commerce is the practice of purchasing and selling products directly through a social media platform, in comparison to a dedicated website.<sup>169</sup> Social commerce blurs interactions and transactions, “leveraging the power of social networks to drive sales, grow creator and influencer brands, and encourage customer engagement.”<sup>170</sup> Both the FTC and ACCC as regulatory bodies must adapt oversight to address the blurred boundaries created between content, influence, and commerce through platforms adopting social commerce.

5. Evolving Consumer Awareness and Behavior: Consumer Literacy Regarding Promotional Content

Consumer understandings of influencer marketing continue to evolve,

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<sup>167</sup> Julian Durand, *Web3 and the Future of Media: Empowering Creators in a Decentralized Ecosystem*, FORBES (Sept. 4, 2024), <https://www.forbes.com/councils/forbestechcouncil/2024/09/04/web3-and-the-future-of-media-empowering-creators-in-a-decentralized-ecosystem/>.

<sup>168</sup> *Id.*

<sup>169</sup> Kristi Kates, *What is Social Commerce and Why is it Important for Creators?*, FOURTHWALL (May 15, 2024). Some examples of social commerce include Instagram Shopping, Facebook Marketplace, Pinterest, TikTok Shop, and YouTube Shopping.

<sup>170</sup> *Id.*

affecting how regulators approach disclosure requirements. Both the FTC and ACCC may need to reassess what constitutes adequate disclosure as younger, more marketing-savvy demographics become the primary audience for influencer content.

The FIU Digital Commons research supports this by documenting Generation Z's (Gen Z) enhanced media literacy skills.<sup>171</sup> The study found that 78% of Gen Z participants believe they learn applicable skills through social media, with 60% acknowledging that "actively participating in social media increases their media literacy skills."<sup>172</sup>

FIU's research revealed that Gen Z can "separate their experiences online from their experiences in the offline world," demonstrating media awareness.<sup>173</sup> Additionally, nearly 96% of participants recognize that social media affects people's perspectives, indicating awareness of media's influence.<sup>174</sup> These combined findings suggest that younger audiences possess the media literacy skills to identify promotional content in influencer marketing, potentially even without explicit disclosures.

## 6. Trust Dynamics in Influencer-Audience Relationships

Research indicates consumers increasingly distinguish between different tiers of influencers, placing greater trust in micro-influencers with smaller, more engaged communities than in celebrity influencers.<sup>175</sup> The FTC's approach, which has historically targeted higher-profile cases, may need recalibration if micro-influencers with higher trust levels pose greater

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<sup>171</sup> Ester Meyer Nunes, *How Prolonged Social Media Use Affects Generation Z and their New Media Literacy Skills*, FIU DIGITAL COMMONS (Nov. 25, 2022), <https://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=1005&context=gsc>.

<sup>172</sup> *Id.* at 20.

<sup>173</sup> *Id.* at 11.

<sup>174</sup> *Id.* at 17.

<sup>175</sup> Forbes reports that micro-influencers "have stronger relationships built on expertise and trust with their followers" and demonstrate "up to a 60% increased engagement rate compared to macro-influencers." Further, micro-influencers "are more likely to partner with brands they actually love," creating higher trust levels. See Kelly Ehlers, *Micro-Influencers: When Smaller is Better*, FORBES (June 2, 2021), <https://www.forbes.com/councils/forbesagencycouncil/2021/06/02/micro-influencers-when-smaller-is-better/>.



potential for deceptive influence despite smaller individual reach. The ACCC's investigation methodology, which includes both prominent influencers and smaller creators, provides valuable insight into how disclosure practices vary across different influencer tiers.

## **VI. CONCLUSION**

Social media influencers have transformed modern advertising, creating new challenges for consumer protection frameworks worldwide. This Note has examined how the United States and Australia have developed distinct regulatory approaches to address these challenges, shaped by their unique legal histories and institutional structures.

The historical development of consumer protection in both nations reveals divergent paths that continue to influence their current approaches. While the United States built its system on case-by-case enforcement through the FTC's guidelines and targeted actions, Australia established a more centralized framework through the ACCC with comprehensive monitoring capabilities. These different approaches reflect not only regulatory philosophy but practical considerations including market size, constitutional frameworks, and institutional resources.

The FTC's reactive approach, illustrated in cases like *Sava v. 21st Century Spirits*, demonstrates both the flexibility and limitations of a system that relies primarily on individual enforcement actions and voluntary compliance.<sup>176</sup> This approach allows adaptability to specific circumstances but may struggle to address widespread non-compliance across multiple sectors. In contrast, the ACCC's proactive monitoring, exemplified by its comprehensive sweep of influencer content, enables systematic identification of problematic practices while presenting challenges in scalability and resource allocation.

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<sup>176</sup> *Sava v. 21st Century Spirits, LLC*, No. 1:22-cv-06083 (N.D. Ill. June 25, 2024).

These regulatory differences create a complex landscape for international influencers and brands operating across borders. Despite cooperative agreements between the FTC and ACCC, the practical implementation of consistent standards remains challenging in a global digital environment in which content flows freely across jurisdictional boundaries.

As both systems face the future of influencer marketing, emerging technologies including AI-generated content, immersive media, and blockchain-based compensation models will present novel regulatory challenges. Evolution in platform algorithms and business models will continue to blur the boundaries between organic and promotional content, while changing consumer literacy and trust dynamics will reshape what constitutes effective disclosure.

The contrasting approaches of the United States and Australia illustrate there is no single optimal solution to regulating influencer marketing. Each system reflects a complex balance of legal tradition, market realities, and institutional capabilities. As social media continues to evolve, both regulatory frameworks will need to adapt to address emerging challenges while maintaining their core consumer protection missions. The ongoing development of these regulatory approaches will significantly impact the future of transparent marketing practices in an increasingly digital global marketplace.