

THE POWER OF INFLUENCE: STANDARDIZING THE INFLUENCER MARKETING INDUSTRY THROUGH ALTERNATIVE DISPUTE RESOLUTION

*Michele Lehat**

I. INTRODUCTION

The world's obsession with social media is both enigmatic and genius; regardless of which generation you come from, it bears no surprise why over four and a half billion people are using social media globally.¹ As a result of the modernization of the Internet, and particularly the speed at which digital change occurs,² social media dips into all aspects of modern society. It dictates the choices we make in our lives, from how we dress and where we dine, to how we want to look and with whom we associate.³ In turn, social media apps like TikTok and Instagram have become

* Executive Editor, *Cardozo Journal of Conflict Resolution* (Vol. 24); J.D. Candidate 2023, Benjamin N. Cardozo School of Law; B.A. Brandeis University 2019. I would like to thank my parents Irina and Ken, my sister Sonya, David, and all of my extended family and friends for their unwavering support throughout law school. I would also like to thank all the Editors and Staff of the *Cardozo Journal of Conflict Resolution* for their hard work in preparing this Note for publication.

¹ *Global Social Media Stats*, DATA REPORTAL, <https://datareportal.com/social-media-users> [<https://perma.cc/8AWF-VPBD>] (last visited Feb. 10, 2022); see also Statista Research Department, *Social Media Usage in the United States—Statistics & Facts*, STATISTA (Feb. 8, 2022), <https://www.statista.com/topics/3196/social-media-usage-in-the-united-states/#dossierKeyfigures> [<https://perma.cc/L6ZE-K64D>] (over 70% of the U.S. population holds a social media account).

² The Internet has been described as a generative technology. See JAMES GRIMMELMANN, INTERNET LAW: CASES & PROBLEMS 51 (11th ed. 2021) (“Generativity is a system’s capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences.”).

³ See Hiram Ting, Ernest Cyril De Run, Winnie Wong Poh Ming, & Sally Lau Yin Choo, *Beliefs About the Use of Instagram: An Exploratory Study*, 2 INT’L. J. BUS. INNOVATION & RSCH. 15, 16 (2015).

centralized tools to our economy,⁴ and businesses around the globe are turning to social media influencers to remain competitive.⁵

Today, TikTok and Instagram are estimated to be worth approximately \$50 billion and \$33.48 billion, respectively.⁶ As users happily download social media apps free of charge, platforms like TikTok and Instagram earn substantial money through advertisements.⁷ Influencer marketing is a driving source of revenue for social media platforms. More than two-thirds (67.9%) of United States marketers used some form of influencer marketing in 2021, which is expected to increase to 72.5% in 2022.⁸ This may be attributed at least in part to the COVID-19 pandemic which forced people to spend more time at home and engage in more e-commerce.⁹ Consequently, by 2021, influencer marketing reached \$13.8 billion in market value, up from \$9.7 billion in 2020.¹⁰

But behind this billion-dollar influencer marketing industry are not middle-aged marketing tycoons or well-educated CEOs, but rather, young adolescent influencers who are posting carefully

⁴ Put simply, “[b]rands have historically funded media through paid advertising”, and “[i]n so doing they desire to influence content and reward production” that sustains a “buying mood.” Sophie Bishop, *Influencer Management Tools: Algorithmic Cultures, Brand Safety, and Bias*, SOC. MEDIA + SOC’Y 1, 4 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/20563051211003066> [<https://perma.cc/EY5X-36PG>] (citing B.H. BAGDIKIAN, *THE MEDIA MONOPOLY* 113 (5th ed. Beacon Press 1997)).

⁵ Ting, et al., *supra* note 3, at 18. See also BARBARA KOLSUN & DOUGLAS HAND, *THE BUSINESS AND LAW OF FASHION AND RETAIL* 701 (Carolina Academic Press 2020).

⁶ John Csiszar, *TikTok’s Net Worth: How Much is TikTok Worth Right Now?*, GO BANKINGRATES (Nov. 30, 2021), <https://www.gobankingrates.com/money/business/how-much-is-tiktok-worth/> [<https://perma.cc/6HHK-XAL2>]; Mansoor Iqbal, *Instagram Revenue and Usage Statistics*, BUS. OF APPS (Sept. 6, 2022), <https://www.businessofapps.com/data/instagram-statistics/> [<https://perma.cc/43EJ-6QJM>]; Julia Faria, *Brand value of Instagram worldwide from 2020 to 2022*, STATISTA (Jan. 6, 2023), <https://www.statista.com/statistics/1324427/instagram-brand-value/> [<https://perma.cc/VF4E-TDNC>].

⁷ See generally Tianchen Liang, *The Method of the Money Making Mechanism of TikTok*, 203 ADVANCES IN ECON., BUS. & MGMT. RSCH. 3102 (2021), <https://www.atlantis-press.com/proceedings/icemci-21/125965973> [<https://perma.cc/R3HH-2FBC>].

⁸ Christina Newberry, *Influencer Marketing Guide: How to Work with Influencers*, HOOTSUITE (Aug. 10, 2021), <https://blog.hootsuite.com/influencer-marketing/> [<https://perma.cc/A8DE-L7HE>]; see also Jasmine Enberg, *Influencer Monetization 2021*, INSIDER INTEL. (May 12, 2021), <https://www.emarketer.com/content/influencer-monetization-2021> [<https://perma.cc/8SLA-KBA5>].

⁹ Another factor is the increase in influencer engagement, as social media platforms have experienced significant growth in influence, messaging, and views. *Influencer Marketing Study*, AMRA & EMLA (2021), <https://www.amrandelma.com/effect-of-pandemic-on-influencer-marketing/> [<https://perma.cc/MWN6-4YPH>].

¹⁰ *Influencer Marketing Hub Benchmark Report 2021*, INFLUENCER MARKETINGHUB, https://influencermarketinghub.com/ebooks/influencer_marketing_benchmark_report_2021.pdf [<https://perma.cc/YL8E-A6SV>] (last visited Nov. 23, 2022).

curated photos and “get-ready-with-me”¹¹ TikToks. The majority of TikTok users and content creators are between the ages of sixteen and twenty-four years old¹², and according to Forbes, TikTok’s seven highest-earning stars are predominately twenty years old or younger.¹³ This young age is unique to the industry, due in part to the sheer accessibility¹⁴ and low barrier to entry of social media platforms. As the new faces of these marketing campaigns, influencers are principally left alone to navigate the wild west of laws regulating this industry. Namely, influencers are facing the legal responsibility of negotiating and disputing large contracts, and clearly and conspicuously disclosing endorsements under the Federal Trade Commission Act (the “Act”).¹⁵

This Note examines why the current system of laws governing influencer marketing (or lack thereof) has proven to be largely inconsistent and unclear in regulation, enforcement, and dispute resolution remedies, ultimately leaving influencers at risk of getting

¹¹ Christian Allaire, *TikTok’s ‘Get Ready With Me’ Videos Are a Comforting Phenomenon*, VOGUE (Jan. 4, 2023), <https://www.vogue.com/article/tiktok-get-ready-with-me-videos> [<https://perma.cc/NSQ8-M29W>].

¹² Brandon Doyle, *TikTok Statistics—Updated Sep 2021*, WALLAROO, (Sept. 27, 2021) <https://wallaroomedia.com/blog/social-media/tiktok-statistics/> [<https://perma.cc/T23W-L4AU>]. *Distribution of Influencers Creating Sponsored Posts on Instagram Worldwide in 2019, By Age Group*, STATISTA (June 7, 2021), <https://www.statista.com/statistics/893733/share-influencers-creating-sponsored-posts-by-age/> [<https://perma.cc/S9RH-G78D>]. See *Instagram by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (Jan. 4, 2022), <https://www.omnicoreagency.com/instagram-statistics/> [<https://perma.cc/7Z9K-5LZL>] (“73% of U.S. teens say Instagram is the best way for brands to reach them about new products or promotions.”). See also *Best Ways for a Retailer/Brand to Communicate About New Products/Promotions According to US Teens, Spring 2019*, INSIDER INTEL. (Apr. 8, 2019), <https://www.emarketer.com/chart/227856/best-ways-retailerbrand-communicate-about-new-products-promotions-according-us-teens-spring-2019-of-respondents> [<https://perma.cc/BW5H-BYEJ>].

¹³ Abram Brown, *TikTok 7 Highest-Earning Stars: New Forbes List Led by Teen Queens Addison Rae and Charli D’Amelio*, FORBES (Aug. 6, 2020, 6:30 AM), <https://www.forbes.com/sites/abrambrown/2020/08/06/tiktoks-highest-earning-stars-teen-queens-addison-rae-and-charli-damelio-rule/?sh=527801685087> [<https://perma.cc/A3Z5-BA9Y>] (“These viral video creators—all of whom earned at least \$1 million in the 12 months through June—have only just begun to monetize their fame, primarily through sales of personally branded merchandise and sponsored content for brands such as Sony, Chipotle and Revlon.”).

¹⁴ GRIMMELMANN, *supra* note 2, at 52. Accessibility is a feature of generative systems of technology. The easier it is to obtain access to a technology, along with the tools and information necessary to achieve mastery, the more generative it is. Barriers to accessibility can include the sheer expense of producing the technology, taxes, regulations associated with its adoption or use, and the secrecy its producers adopt to maintain scarcity or control.

¹⁵ See Melissa J. Sachs, *Paid Online Endorsement? Better Disclose it, FTC Says*, 2016 WL 1441474, [https://1.next.westlaw.com/Document/Ib41203ad018b11e698dc8b09b4f043e0/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=\(Sc.Default\)](https://1.next.westlaw.com/Document/Ib41203ad018b11e698dc8b09b4f043e0/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(Sc.Default)).

sued or taken advantage of.¹⁶ Section II of this Note provides a background and history of influencers and influencer marketing and explores the current landscape of such. Section III.A identifies and examines the problems surrounding influencer contracts including biases and pay gaps. Section III.B discusses Federal Trade Commission (“FTC”) regulation and enforcement of influencer endorsement disclosures and examines why the FTC has failed to adequately enforce and resolve these types of disputes. Section IV offers a multistep alternative dispute resolution (“ADR”) which tackles both issues. This section divides the multi-faceted proposal into two main subsections: IV.A Negotiation and Mediation, and IV.B Systems Dispute Design. Section V concludes this Note.

II. BACKGROUND

A. *Defining the Influencer and Influencer-Marketing*

Influencers are people who have built a loyal audience through social media, blogs, and other communities.¹⁷ An influencer has the power to affect potential buyers due to specific knowledge, position, or relationship with the audience.¹⁸ Influencers are also referred to as “content creators” which may encompass photographers, performers, or videographers.¹⁹ Influencer marketing itself happens between the influencer and the brand, typically by means of social media platforms. Generally, influencers agree on endorsement deals and product mentions for money, and in turn, leverage the brand’s name and equity through engagement

¹⁶ See Rachel Jenkins, *Top 5 Social Media Influencer Lawsuits*, FOUNDER SHIELD (Apr. 10, 2021), <https://foundersshield.com/blog/social-media-influencer-lawsuits/> [<https://perma.cc/8RBL-PJHC>] (showcasing the top five biggest media influencer lawsuits to date).

¹⁷ Sarah Donawerth, *What is Influencer Marketing? Here’s How Influencer Marketing Works*, GET CARRO, <https://getcarro.com/blog/what-is-influencer-marketing/> [<https://perma.cc/3MV3-232E>] (last visited Nov. 23, 2022).

¹⁸ Andrew V. Morris, III, Jocelyn A. Merced, Ellen M. Zavian, *Under the Influence*, ACC DOCKET (Feb 11, 2021), <https://www.accdocket.com/under-influence> [<https://perma.cc/SK26-UWD6>]; Werner Geyser, *What is an Influencer?— Social Media Influencers Defined* [Updated 2022], INFLUENCER MARKETINGHUB (July 27, 2022), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/5UN9-DTUD>].

¹⁹ Slye Joy Serrano, *The Rise of TikTok Influencers: How Gen Z is Reinventing Influencer Marketing*, BUSINESS 2 COMMUNITY (May 12, 2021), <https://www.business2community.com/social-media/the-rise-of-tiktok-influencers-how-gen-z-is-reinventing-influencer-marketing-02404975> [<https://perma.cc/ZW7L-7UZM>].

with their audience, and social relationships.²⁰ As mentioned in the introduction, influencer marketing has reached \$13.8 billion in market value in 2021. In justification of this billion-dollar industry, it appears that influencers are more credible as compared to traditional celebrities, especially among millennials as viewers are better able to relate to them.²¹ Further, 94% of marketers deem influencer marketing campaigns successful, pointing to influencer marketing as the “fastest-growing online customer acquisition method.”²²

It is important to note that under existing regulations, an influencer contracted by a company to promote a brand or product is often classified as an “independent contractor.”²³ This means that an influencer is not afforded typical employment benefits, like a W-4 or 401(k), as would a typical employment contract offer.²⁴ Per New York’s Supreme Court in its decision in *Jianming Jyu v. Ruhn Holdings Ltd.*, influencers are defined as “individuals who create content on social media platforms such as Facebook, YouTube, TikTok, and Instagram with the hope of gathering a large public following [and] who are paid to promote, market, and advertise products and services to their fans and followers.”²⁵

²⁰ Jenn Chen, *What is Influencer Marketing: How to Develop Your Strategy*, SPROUT SOC. (Sept. 17, 2020), <https://sproutsocial.com/insights/influencer-marketing/> [<https://perma.cc/ZD6A-GU2L>].

²¹ In turn, advertisers have begun approaching influential vloggers to promote brands in their online videos. Steffi De Jans et al., *How an Advertising Disclosure Alerts Young Adolescents to Sponsored Vlogs: The Moderating Role of a Peer-Based Advertising Literacy Intervention Through an Informational Vlog*, 47 J. OF ADVERT. 309 (2019); See also Andrew Arnold, *Why YouTube Stars Influence Millennials More Than Traditional Celebrities*, FORBES (June 20, 2017), <https://www.forbes.com/sites/under30network/2017/06/20/why-youtube-stars-influence-millennials-more-than-traditional-celebrities/> [<https://perma.cc/QFM5-5D9L>].

²² Teodora Dobrilova, *How Much Do Firms Spend on Influencer Marketing in 2021?*, TECHJURY (Nov. 1, 2021), <https://techjury.net/blog/influencer-marketing-spend/#gref> [<https://perma.cc/ZX63-RQXF>].

²³ Reed Smith LLP, *Is Your Social Media Influencer or Blogger an Employee or an Independent Contractor? What Companies Need to Know Before They Engage Bloggers and Other Independent Contractors* (Apr. 9, 2015), LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=238ac2f1-b131-49ee-b15a-2bfd4c3619d> [<https://perma.cc/25AW-G66K>]. Note that the IRS tends to classify influencers as independent contractors. See Taxslayer Editorial Team, *Filing Taxes for Youtubers, Bloggers, and Other Social Media Influencers*, TAXSLAYER (Jan. 6, 2021), <https://www.taxslayer.com/blog/filing-taxes-for-youtubers-bloggers-and-other-social-media-influencers/> [<https://perma.cc/J6CG-F7YL>].

²⁴ See *401(k) Plan Overview*, IRS, <https://www.irs.gov/retirement-plans/plan-sponsor/401k-plan-overview> [<https://perma.cc/VGL4-BHDX>] (last visited Feb. 11, 2022); *Topic No. 753 Form W-4—Employee’s Withholding Certificate*, IRS, <https://www.irs.gov/taxtopics/tc753> [<https://perma.cc/A83C-DBAY>] (last visited Feb. 11, 2022).

²⁵ *Jianming Jyu v. Ruhn Holdings Ltd.*, No. 655420 (N.Y. Sup. Ct. 2020) (Justia U.S. Law Slip Op. 31541).

To date, there are four major types of influencers divided by follower numbers: mega-influencers (more than one million followers), macro-influencers (between forty thousand to one million followers), micro-influencers (between one thousand and forty thousand followers), and nano-influencers (fewer than one thousand followers).²⁶ Each range tends to have its own niche, but the bulk of influencer marketing today occurs predominantly among micro-influencers, though brands are increasingly tapping nano-influencers and kid-influencers (an influencer below the age of sixteen) for marketing opportunities.²⁷ The growth of micro-influencers will be an important theme throughout this Note, especially with relation to equitable contracts and bargaining power.

B. *The Shift from the Celebrity Influencer to the “Everyday” Influencer*

While influencers and influencer marketing seem to be new concepts, influencing has in fact been a part of society for centuries. In advertising folklore, it is said that the Queen and the Pope used to endorse medicine for the benefit of “the common people.” In a sense, they were the first influencers in the history of influencer marketing, promoting the use of medicine to people who were not yet believers.²⁸ Fast forward to the 1980s to early 2000s, influencers were mainly comprised of well-known celebrities endorsing a product on T.V., billboards, or in magazines.²⁹ Brands paid excessive prices to just attach their brand name and equity to actors, musicians, and athletes.³⁰ But ever since the steady rise of social media platforms in 2010 like Instagram and Facebook, celeb-

²⁶ Dobrilova, *supra* note 22. See also *Micro, Macro, Nano, Mega Influencers: Which Will Help You Grow?*, WEBSITEBUILDEREXPERT (Nov. 9, 2022), <https://www.websitebuilderexpert.com/grow-online/micro-macro-nano-mega-influencers/> [https://perma.cc/V6GW-VT27].

²⁷ *Id.*; see also *Influencer Marketing: Social Media Influencer Market Stats and Research for 2021*, INSIDER INTEL. (July 27, 2021), <https://www.insiderintelligence.com/insights/influencer-marketing-report/> [https://perma.cc/2PPQ-DSZ4].

²⁸ *The History of Influencer Marketing*, GRIN, <https://grin.co/blog/the-history-of-influencer-marketing-how-it-has-evolved-over-the-years/#the-earliest-influencers-the-queen-and-the-pope> [https://perma.cc/G7MY-GPL9] (last visited Nov. 18, 2021).

²⁹ Shane Barker, *Why is Influencer Marketing Better Than Celebrity Endorsements?*, SHANE BARKER (Sept. 18, 2021), <https://shanebarker.com/blog/influencer-marketing-celebrity-endorsements/> [https://perma.cc/A6ER-SK7E]; See also Brett Bernstein, *A Brief History Of The Influencer*, MEDIUM (May 24, 2019), <https://medium.com/@bhbern/a-brief-history-of-the-influencer-1a0ef2b36c6e> [https://perma.cc/ZD2P-2YN6].

³⁰ Barker, *supra* note 29.

rities were no longer exclusively relied on for endorsements and advertisements.³¹ In turn, Millennials and “Gen Zers” have disrupted and shifted influencer marketing as we knew it becoming the new faces of brands.³²

There are many reasons that explain this shift from the celebrity influencer to the “everyday” influencer, including cost-effectiveness, cost-flexibility, engagement, content creation, and reach for companies.³³ Engaging influencers can be economical for brands because influencer rates are typically lower than rates paid under traditional celebrity endorsement deals. Moreover, influencer posts can be accurately targeted at a direct audience segment. It is easier for brands to measure audience engagement and metrics with respect to an influencer marketing campaign, since most social media platforms provide robust in-app data and analytics that provide valuable insights into performance.³⁴

Of these reasons, one of the major perks to choosing influencers over celebrities, is cost-effectiveness.³⁵ Nailing out endorsement deals with celebrities is substantially more expensive: on average, celebrities with more than 7 million Instagram followers may charge as much as \$150,000 for one sponsored post, and generally, A-list celebrities get paid millions of dollars to become brand ambassadors. Beyoncé, for example, earned \$50 million to promote Pepsi in 2012.³⁶ Influencer costs on the other hand, are much more flexible and can range from a few dollars per post to tens of thousands of dollars per post, depending on a series of factors including influencers’ reach and engagement, the social media platform used, and industry or specialization.³⁷

The challenging legal questions raised in this context are further complicated by the fact that advertisers have moved away from traditional advertising campaigns, and instead, have em-

³¹ Paul Jankowski, *Not All Influencers Are Celebrities . . . Not All Celebrities Are Influencers*, Part 2, FORBES (Mar. 5, 2021, 10:52 AM), <https://www.forbes.com/sites/pauljankowski/2021/03/05/not-all-influencers-are-celebrities-not-all-celebrities-are-influencers-part-2/?sh=6af3896c1f35> [<https://perma.cc/LYQ6-D4S3>].

³² *The History of Influencer Marketing*, *supra* note 28.

³³ Barker, *supra* note 29.

³⁴ *Brands and Influencers: Navigating Influencer Agreements from Macro to Micro*, LATHAM & WATKINS CLIENT ALERT COMMENT. (Oct. 29, 2018), <https://www.lw.com/thoughtLeadership/Brands-Influencers-Navigating-Agreements-Macro-Micro> [<https://perma.cc/RS66-2N8F>].

³⁵ Barker, *supra* note 29.

³⁶ *Id.*

³⁷ Werner Geysler, *Influencer Rates: How Much do Influencers Really Cost in 2021?*, INFLUENCER MARKETINGHUB (June 28, 2021), <https://influencermarketingmarnghub.com/influencer-rates/> [<https://perma.cc/F58H-ACB9>].

braced alternative means of promotion such as social media and influencer marketing. These platform-driven tools add yet another level of intricacy to a field already fraught with legal complexity.³⁸

C. *Defining the Influencer-Brand Contract*

To define terms, an influencer-brand contract (also known as an “influencer agreement”) is an agreement between the influencer and brand who want to collaborate.³⁹ The influencer agreement governs the terms of the collaboration, including broadly the content or product to be created, compensation to be received, and legal protection for all parties. Furthermore, the contract should indicate the following additional terms: payment terms, scope of work, where and how any disputes should be resolved, FTC guidelines, intellectual property, and indemnification, among many other terms.⁴⁰ Certain other factors play a substantial role in deciding contract terms, such as which social media platform is utilized, type of influencer (e.g., nano or micro-influencer), length of collaboration, and types of posts (photos, videos, stories).⁴¹

Initially, as brands began contacting social media influencers for product promotions, there was virtually no regulation. In 2014, Roosh Williams, a former underground rapper from Houston, signed a six-month influencer contract with Simple Mobile.⁴² His social media posts were as basic and straight-forward as: “Using my @simplemobile phone to schedule tonight’s studio session.” Four years later, following the birth of TikTok, the legal landscape for influencer marketing changed dramatically.⁴³ Today, influencer contracts cover far more complex deals, terms, and regulations. As a result, legal counseling and dispute resolution are increasingly necessary for brands and influencers due to a plethora of legal concerns such as FTC compliance and intellectual property implica-

³⁸ KOLSUN & HAND, *supra* note 5.

³⁹ *Social Media Influencer Letter Agreement*, (Practical Law Standard Document, Westlaw 021-7153) (e.g., standard Influencer Agreement).

⁴⁰ *Id.*

⁴¹ Neal Schaffer, *How to Create a Rock-Solid Influencer Contract (+9 Influencer Agreement Templates)*, NEAL SCHAFFER (Sept. 2, 2022), <https://nealschaffer.com/influencer-contract/> [<https://perma.cc/9RH4-FN89>].

⁴² Alexandra Howerton, *Instagram Influencer Contracts: How FTC Regulations Have Spurred a Growing Legal Industry*, USC GOULD SCH. OF L.: USC GOULD’S BUS. L. DIG. (Nov 28, 2018), https://lawforbusiness.usc.edu/instagram-influencer-contracts-how-ftc-regulations-have-spurred-a-growing-legal-industry/#_ftn32 [<https://perma.cc/8TUUW-A347>].

⁴³ *Id.*

tions.⁴⁴ Generally speaking, macro-influencers and celebrities tend to have agreements negotiated by their lawyers or agents, while micro-influencers are often self-represented and tend to be engaged pursuant to form agreements, handshake deals, and even text-messaged terms.⁴⁵

D. *How Much Do Influencers Earn Through Influencer-Marketing?*

Influencers make money on Instagram through commissions on affiliate links, selling merchandise, and monetization tools. The range of earning capacity for any given influencer varies significantly due to several factors such as audience size, platform, and entertainment genre, such as comedy or dance. According to the 2020 Influencer Marketing Outlook Report, Instagram nano-influencers earn anywhere from \$10-\$100 per post, micro-influencers earn from \$100-\$500 per post, and mega-influencers can earn \$10,000 or more per post.⁴⁶ In the same study, it mentioned that TikTok influencers with tens of millions of followers can earn upwards of \$10,000 per post. To cite some examples, according to Influencer Marketing Hub's TikTok Influencer Engagement and Earnings Calculator, TikTok star Charli D'Amelio has 135.4 million followers and earns an estimate of \$56,000 to \$100,000 per post through endorsements. Comparable TikTok star Addison Rae has 87 million followers and earns an estimate of \$51,900 to \$86,500 per post.⁴⁷ Notwithstanding the hefty compensation, a TikTok influ-

⁴⁴ Luma S. Al-Shibib, *Social Media and Influencer Marketing Liability*, ANDERSON KILL ATT'YS & COUNS. AT LAW, <https://www.andersonkill.com/Practice-Areas/Social-Media-and-Influencer-Marketing-Liability> [<https://perma.cc/H769-83P2>] (last visited Nov. 23, 2022); Darren Heitner, *Why Social Media Influencers Need Specialized Legal Services*, INFLUENCER LAW FIRM (Mar. 26, 2020), <http://influencerlawfirm.com/2020/03/social-media-influencers-legal-services/> [<https://perma.cc/BZG9-DBLD>].

⁴⁵ *Brands and Influencers: Navigating Influencer Agreements from Macro to Micro*, *supra* note 34.

⁴⁶ Werner Geyser, *Influencer Rates: How Much do Influencers Really Cost in 2023?*, INFLUENCER MARKETING HUB (Dec. 19, 2022), <https://influencermarketinghub.com/influencer-rates/> [<https://perma.cc/2TEJ-VLS6>]; Werner Geyser, *The State of Influencer Marketing 2020: Benchmark Report*, INFLUENCER MARKETING HUB (Feb. 8, 2022), <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020/> [<https://perma.cc/Z5PH-LA8P>].

⁴⁷ Werner Geyser, *TikTok Money Calculator [Influencer Engagement & Earnings Estimator]*, INFLUENCER MARKETING HUB (Sept. 16, 2022), <https://influencermarketinghub.com/tiktok-money-calculator/> [<https://perma.cc/RRQ5-8FUP>]; Jessica Sager, *Addison Rae's Net Worth And Why Everyone Is So Obsessed With the He's All That TikTok Star*, PARADE (Jan. 27, 2022), <https://parade.com/1251352/jessicasager/addison-rae-net-worth/> [<https://perma.cc/FLT8-DB7Y>];

encer does not need to have millions of followers to earn money; in fact, once a user reaches a few thousand followers, companies have been known to pay \$200 to \$20,000 per branded video, depending on the influencer's level of engagement.⁴⁸

There are a multitude of ways in which an influencer can actually make money on a social media app, including (but not limited to): (1) affiliate marketing (influencers and website owners place special links or coupon codes into their posts, and when people click on the links, the influencer gets a small fee); (2) display advertising (influencers will display the ad similar to a radio commercial as an interruption to their video or podcast); (3) sponsored posts (this is one of the most common ways for influencers to make money, whereby they will create a post or series of posts with a product promotion, subject to FTC guidelines); or (4) promoting and selling digital products (this is a unique product to the influencer, e.g., food bloggers selling an eBook of recipes or financial gurus marketing subscription-based services).⁴⁹ While there are many other creative ways in which an influencer can make money on social media, this Note will primarily focus on methods that arise only between the influencer and the company.

III. DISCUSSION

The ever-expanding universe of social media covers an overwhelming range of jurisdictions and legal issues. As such, there are several legal pitfalls affecting influencers across all social platforms, requiring a more streamlined regulatory and dispute resolution approach.⁵⁰ Influencer-brand contracts are at the crux of the market-

Jason Pham, *Charli D'Amelio's Net Worth Reveals How Much She Makes Per TikTok & How Rich She Is Now*, YAHOO! FINANCE (Sept. 29, 2022), https://finance.yahoo.com/news/charli-d-amelio-net-worth-043020636.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LnNvbS8&guce_referrer_sig=AQAAAMQIZA40eoYNx3oy2NRf3baZDyWKGj4-E3S_aoxB-BpHBcvfMhiWEX-O9JQyInF93zXZiRYW68h5ouTZLaYCaJvPQLhBf_czJq06BZ97jWSi1A6RUtzD78OU5LM4HLJCjIoJgUwvQ7ZpneCry5XpAdwdlWozVU8as2MLLWeRImc [https://perma.cc/PF6G-Z6PE].

⁴⁸ *Id.*

⁴⁹ Neal Schaffer, *How Do Influencers Make Money From Social Media?*, NEAL SCHAFFER (Dec. 5, 2022), <https://nealschaffer.com/how-do-influencers-make-money/> [https://perma.cc/6H5M-V86W].

⁵⁰ Ellie Somfelean, *Addressing the Pitfalls of Influencer Marketing*, CMS CONNECTED (Oct. 1, 2019), <https://www.cms-connected.com/News-Archive/October-2019/Addressing-the-Pitfalls-of-Influencer-Marketing> [https://perma.cc/77QS-8QXB]; Gregory L. Cohen & Bryan Reece Clark, *Tech Transactions & Data Privacy 2022 Report: #Compliance: Legal Pitfalls in Social Me-*

ing industry, and yet influencers are facing severe inequities when it comes to negotiating fair pay and terms. Naturally, this comes in part from the uneven bargaining power between influencers and brands, due to the sheer young age, lack of experience, money, and power of an influencer compared to brands and corporations.

A second pitfall involves the subject of influencer-marketing itself: advertisement endorsements. By accepting compensation for endorsements, influencers in the fashion, fitness, or entertainment world are facing serious legal obligations and risks.⁵¹ In recent years, agencies like the FTC have addressed some ongoing problems with the billion-dollar influencer-marketing industry in the form of releasing guidelines and best-practices directed at influencers, as well as cracking down on violations in the form of warning letters and threatening monetary penalties and litigation.⁵²

Despite recommended guidelines for social media influencers, little is understood to the effect disclosure has on e-consumer outcomes, highlighting a serious gap in scholarly and practical application of the law on influencers.⁵³ Not to mention, much of the existing guidelines are merely recommendations, not substantive law. One could argue that these initial efforts to regulate influencers fail to meet the growing legal demands that plague the influencer-marketing space. This Note will address these two key pitfalls that arise from a lack of substantive industry regulations. Subsection A will address problems with the influencer-brand contract itself, highlighting the fact that there are serious pay gap issues resulting from industry biases. Subsection B will address the failures of the FTC to regulate the influencer-marketing industry.

dia Influencer Marketing, THE NAT. L. REV. (Feb. 11, 2022), <https://www.natlawreview.com/article/tech-transactions-data-privacy-2022-report-compliance-legal-pitfalls-social-media> [<https://perma.cc/PN2N-55LM>].

⁵¹ This includes clearly and conspicuously disclosing endorsements pursuant to FTC Guidelines. 16 CFR § 255 (2009), eCFR, <https://www.ecfr.gov/current/title-16/part-255> [<https://perma.cc/X5Y8-24JQ>]; see also *FTC's Teami Case: Spilling the Tea About Influencers and Advertisers*, FED. TRADE COMMISSION (Mar. 6, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers> [<https://perma.cc/UP6A-TRGF>] (e.g., a recent example of influencers facing legal implications with the FTC).

⁵² *Id.* See e.g., *Disclosures 101 for Social Media Influencers*, FTC (Nov 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/8Q57-Y4JA>]; FTC Letter Subject: Warning to Prominently Disclose Paid Endorsements, FTC (Mar. 5, 2020), <https://www.ftc.gov/system/files/documents/cases/1823174teamiwarningletters.pdf> [<https://perma.cc/DZ4Z-9HG3>].

⁵³ Samantha Kay, Rory Mulcahy, & Joy Parkinson, *When Less is More: The Impact of Macro and Micro Social Media Influencers' Disclosure*, 36 J. OF MKT. MGMT. 248 (2020).

A. *The Inequity of Influencer-Brand Contracts*

The influencer-marketing industry has set forth virtually no measures or standards that address influencer brand contracts.⁵⁴ As addressed earlier, most young and inexperienced influencers lack the bargaining power to negotiate rock-solid contracts and fair pay, and as a result of industry biases, members of the Black, Indigenous, and People of Color (“BIPOC”) community⁵⁵ are the main targets of these inequities.⁵⁶ This is due in part to continuing systemic racism which has existed among traditional marketing agencies for centuries,⁵⁷ consequently spilling over into our more modern influencer-marketing industry through functions such as algorithms and third-party intermediaries.⁵⁸ Racism in advertisement is not a new concept. Practices of narrow casting⁵⁹ frequent influencer economies as Black influencers are hired for fewer commercial campaigns, or function as “tokens” for diversity.⁶⁰

i. The Pay Gap Issue Among BIPOC Influencers

The truth is, Black and other minority influencers are being paid considerably less than their White counterparts.⁶¹ In particular, a key MSL study in 2021 revealed the racial pay gap between White and BIPOC influencers is 29%, and the gap between White

⁵⁴ Courtney Goldsmith, *The Influencer Marketing Sector is Booming—But Regulatory Problems Abound*, *NEW ECON.* (Dec. 14, 2018), <https://www.theneweconomy.com/strategy/the-influencer-marketing-sector-is-booming-but-regulatory-problems-abound> [<https://perma.cc/2P9G-JENC>].

⁵⁵ BIPOC is a widely used acronym which stands for Black, Indigenous, (and) People of Color. *BIPOC*, *MERRIAM-WEBSTER*, <https://www.merriam-webster.com/dictionary/BIPOC> (last visited Feb. 8, 2022) [<https://perma.cc/9SMV-PXF4>].

⁵⁶ Stacy M. Brown, *Study Reveals Racial Pay Gap for Social Media Influencers*, *AFRO BLACK MEDIA AUTHORITY* (Dec. 31, 2021), <https://afro.com/study-reveals-racial-pay-gap-for-social-media-influencers/> [<https://perma.cc/Z4E4-UQ6K>]; see also Schaffer, *supra* note 49.

⁵⁷ Christopher Boulton, *Rebranding Diversity: Colorblind Racism Inside the U.S. Advertising Industry*, *U. MASS. AMHERST* 1–2 (2012), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1622&context=open_access_dissertations [<https://perma.cc/XRY4-GPDH>].

⁵⁸ Bishop, *supra* note 4 at 3, 5.

⁵⁹ *Id.* at 5; Hitesh Bhasin, *Narrowcasting—Definition, Meaning, Applications, Advantages*, *MARKETING91* (July 3, 2020), <https://www.marketing91.com/narrowcasting/> [<https://perma.cc/Q9BT-PD5U>].

⁶⁰ Bishop, *supra* note 4 at 5.

⁶¹ *MSL Study Reveals Racial Pay Gap in Influencer Marketing*, *MSL* (Dec. 6, 2021), <https://mslgroup.com/whats-new-at-msl/msl-study-reveals-racial-pay-gap-influencer-marketing> [<https://perma.cc/ZM2T-REFL>]; Lindsay Dodgson, *Black Influencers Make Significantly Less Money Than Their White Counterparts, a New Study Says*, *INSIDER* (Dec 7, 2021), <https://www.insider.com/study-black-influencers-make-significantly-less-money-2021-12> [<https://perma.cc/T9UG-HTUB>].

and Black influencers is 35%.⁶² In comparing these numbers to the racial pay gaps of any other industry—8% for education, 16% for business and financial, 19% for construction, and 16% for media sports and entertainment—the influencer-marketing industry unfortunately takes the cake.⁶³ A report from a highly regarded marketing agency found that 99% of BIPOC community influencers who felt lowballed by brand deals cited their ethnicity as the reason why.⁶⁴ Social platforms have attempted to remedy this pay gap through programs like YouTube’s “Supporting Black Creators” initiative, or “TikTok for Black Creatives Incubator Program.”⁶⁵ While these programs functionally raise visibility in certain contexts, they have been found to do little to improve Black creators’ economic positioning on the platform.⁶⁶

Though many of these issues are pushed under the rug, one prominent creator named Adesuwa Ajayi is publicly calling out influencer pay gaps in effort to promote influencer transparency.⁶⁷ Adesuwa is the creator of @influencerpaygap, a 59,000 follower-strong Instagram page where creators can anonymously detail their highest or lowest paid gig. @Influencerpaygap is filled with examples of unfair contracts: one Black fashion influencer details a \$250 3-month contract with a fashion brand for monthly content shoots across TikTok, Instagram, and the brand’s website.⁶⁸ Another recounts an offer from Crocs that asks for Instagram Reels and grid posts in exchange for a pair of clogs.⁶⁹ Other examples reveal pat-

⁶² *Id.*

⁶³ *Id.* See also Bureau Lab. Stat., *Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2021*, U.S. DEP’T LABOR 7 (Jan. 19, 2022), <https://www.bls.gov/news.release/pdf/wky-eng.pdf> [<https://perma.cc/7ASH-WEZX>].

⁶⁴ *Lifting the Lid: The Influencer Pricing Report*, SEVENSIX AGENCY, <https://pages.sevensixagency.com/influencer-pricing-report> [<https://perma.cc/D9M5-QMFW>] (last visited Feb. 8, 2022).

⁶⁵ *Introducing the TikTok for Black Creatives Incubator Program*, TIKTOK (Jan. 13, 2021), <https://newsroom.tiktok.com/en-us/tiktok-for-black-creatives-incubator-program> [<https://perma.cc/ZZ9N-D3PZ>].

⁶⁶ Bishop, *supra* note 4 at 5.

⁶⁷ @influencerpaygap, <https://www.instagram.com/p/CMVU65ohN7y/> [<https://perma.cc/4W25-8L7E>] (Instagram account created by Adesuwa Ajayi in July 2020 encourages influencers to share the rates they were paid for campaigns along with their gender, race, audience, and engagement rate).

⁶⁸ @influencerpaygap, <https://www.instagram.com/p/CMVU65ohN7y/> [<https://perma.cc/4W25-8L7E>] (e.g., Instagram post of a Black fashion influencer who was lowballed by a brand).

⁶⁹ *Id.*

terns with major fashion brands like Fashion Nova, Zaful, and Shein who pay influencers only in clothes.⁷⁰

1. Why are BIPOC Influencers Experiencing Pay Gaps?

The 2021 MSL study reveals that the industry’s lack of pay transparency is the greatest amplifier of inequity. As such, the absence of pay standards disproportionately affects influencers of color more than any other group.⁷¹ In addition to lack of transparency, there exist two additional reasons: (1) affluence and connections play a significant role in creating equitable contracts, and (2) social platform algorithms are perpetuating inequity.⁷² White influencers are much more likely to have built a network of “lawyers, managers, and accountants” to support their social media enterprise.⁷³ We can compare this phenomenon to a child who is a double legacy at Harvard and has a leg up in college admissions; the same goes for the influencer who is born into privilege.⁷⁴

As for the racist algorithms, take the example of Twitter using a Photo Crop Algorithm that favors White faces over Black faces. In 2021, a study released by Twitter research scientists found the algorithm bias in 10,000 images.⁷⁵ Researchers found bias when the algorithm was shown photos of people from two demographic groups.⁷⁶ Ultimately, the algorithm picks one person whose face will appear in Twitter timelines, and some groups are clearly better represented on the platform than others.⁷⁷ Namely, when researchers fed a picture of a Black man and a White woman into the system, the algorithm displayed the White woman 64% of the time and the Black man only 36% of the time.⁷⁸ This example is one of many racist algorithms that are brushed under the rug.

⁷⁰ Beatrice Forman, *Wealth inequality exists among influencers, too*, VOX (Sept. 1, 2021, 10:58 AM), <https://www.vox.com/the-goods/22630965/influencer-pay-gaps-privilege-creator-economy> [<https://perma.cc/T2DZ-ZXSC>].

⁷¹ *MSL Study Reveals Racial Pay Gap in Influencer Marketing*, *supra* note 61.

⁷² *Id.*

⁷³ Forman, *supra* note 70.

⁷⁴ *Id.*

⁷⁵ Vinay Prabhu, *On the Twitter Cropping Controversy: Critique, Clarifications & Comments*, VINAY PRABHU (Sept. 21, 2020), <https://vinayprabhu.medium.com/on-the-twitter-cropping-controversy-critique-clarifications-and-comments-7ac66154f687> [<https://perma.cc/7AZ2-LCJU>].

⁷⁶ *Id.*

⁷⁷ Sam Shead, *Twitter to Investigate Racial Bias in its Picture-Cropping Algorithm*, CNBC (Sept. 21, 2020, 1:04 PM), <https://www.nbcnews.com/tech/tech-news/twitter-investigate-racial-bias-picture-cropping-algorithm-rcna130> [<https://perma.cc/YR9N-HEX8>].

⁷⁸ Khari Johnson, *Twitter’s Photo Crop Algorithm Favors White Faces and Women*, WIRED (Mar 19, 2021, 4:23 PM), <https://www.wired.com/?story/?twitter-?photo-?crop-algorithm-?favors-?white-?faces-?women/?> [<https://perma.cc/?DXP7-WQNX>].

2. Another Explanation: Third Party Intermediaries

Besides algorithmic “errors,” another explanation for perpetuating racism and inequities among influencers is third party intermediaries. Recently, a growing number of intermediaries are advertising their ability to “streamline and professionalize” the relationship between marketers and influencers for a fee, similar to traditional talent agencies.⁷⁹ These intermediaries are available to all kinds of influencers no matter the audience size (some specialize in micro-influencers, while others specialize celebrity-status influencers), and typically develop algorithmic management tools that allow an influencer to sell his or her expertise, and reassure brands that the influencer is capable of boosting their revenue.⁸⁰ On one hand, intermediaries resolve tensions between influencers and brands by formalizing this changing industry while simultaneously solidifying their role within it.⁸¹ On the other hand, as mentioned, these agencies have a long history of racial biases, and seem to perpetuate influencer-brand inequities.

Such third-party techniques include “vetting influencers, drafting contracts, monitoring campaigns, and administering payment.”⁸² The problem with putting too much trust in non-neutral third-party intermediaries, is that these organizations have algorithms that are inherently discriminatory, that take away the control and power of the influencer.⁸³

B. *The FTC Fails to Lay Down Clear Regulation and Enforcement for Influencers*

In recent years, the FTC has taken special interest in influencer marketing, specifically when influencers fail to disclose that they received payment for their posts.⁸⁴ As a general rule, the FTC

⁷⁹ Bishop, *supra* note 4 at 3.

⁸⁰ *Id.*

⁸¹ Ryan Stoldt, Mariah Wellman, Brian Ekdale, & Melissa Tully, *Professionalizing and Profiting: The Rise of Intermediaries in the Social Media Influencer Industry*, SOC. MEDIA + SOC'Y 1 (2019) <https://journals.sagepub.com/doi/pdf/10.1177/2056305119832587> [<https://perma.cc/BPV9-RYKQ>].

⁸² *Id.* at 2.

⁸³ *Id.* at 3.

⁸⁴ Stephen Conley & Duane Pozza, Wiley Rein LLP, *FTC Broadly Issues Notices on Endorsements and Testimonials to National Advertisers, Signaling a New Enforcement Approach*, JD SUPRA (Oct. 15, 2021), <https://www.jdsupra.com/legalnews/ftc-broadly-issues-notices-on-6081676/> [<https://perma.cc/47ZA-X5RZ>]; see also Jacinda Santora, *Key Influencer Marketing Sta-*

guidelines for paid content require that all paid social endorsements—regardless of the platform—be “honest and not misleading.”⁸⁵ As such, it is an influencer’s responsibility to read the disclosure protocols, comply with laws against deceptive ads, and be familiar with native app differences.⁸⁶ In addition, if there is a connection between an endorser and a marketer that consumers would not expect, and such connection would affect how consumers would act, that connection should be disclosed under 15 U.S.C. Section 45.⁸⁷

The problem with the current system of FTC regulation and enforcement is that the FTC has struggled to keep up with policing millions of social media posts every day. In addition, the sheer volume of social media output, plus the unrestricted growth of the industry, are among some other reasons. In a recent statement, FTC Commissioner Rohit Chopra went so far as to conclude that “it is not clear whether [the FTC’s] actions are deterring misconduct in the marketplace, due to the limited sanctions we have pursued.”⁸⁸

tistics You Need to Know for 2022, INFLUENCER MARKETINGHUB (Feb. 8, 2022), <https://influencermarketinghub.com/influencer-marketing-statistics/> [<https://perma.cc/LLP8-P4ME>] (“The FTC expanded its public role in safeguarding against this in 2017 by sending letters to 21 influencers, reminding them of their disclosure obligations.”).

⁸⁵ *The FTC’s Endorsement Guides: What People Are Asking*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/V6FZ-AQSL>] (last visited Jan. 18, 2023).

⁸⁶ One example of a dispute involving in-app differences, is the Proctor & Gamble Bounty complaint. The National Advertising Division brought claims against influencers by a series of TikTok videos featuring a “dance challenge.” “TikTokers” were required to utilize the #BountyPartner hashtag, but when it came time to share the TikTok videos to Instagram, they no longer included the disclosure hashtag due to in-app differences across platforms. See Gonzalo E. Mon, *NAD Addresses Disclosures on Influencer TikTok Videos*, AD LAW ACCESS KELLEY DRYE (Sept. 15, 2020), <https://www.adlawaccess.com/2020/09/articles/nad-addressees-disclosures-on-influencer-tiktok-videos/> [<https://perma.cc/7KH3-AGAR>]; see generally *Disclosures 101 for Social Media Influencers*, FTC (Nov 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/8Q57-Y4JA>]; *FTC Letter Subject: Warning to Prominently Disclose Paid Endorsements*, FTC (Mar. 5, 2020), <https://www.ftc.gov/system/files/documents/cases/1823174teamiwarningletters.pdf> [<https://perma.cc/DZ4Z-9HG3>].

⁸⁷ 16 CFR § 255 (2009); see also *Brands and Influencers: Navigating Influencer Agreements from Macro to Micro*, *supra* note 34, at 4.

⁸⁸ See Rohit Chopra, Comm’r., Fed. Trade Comm’n, *Statement of Commissioner Rohit Chopra Regarding the Endorsement Guides Review Commission*, File No. P204500 (Feb. 12, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf [<https://perma.cc/W7HE-T3TU>].

1. FTC Power and Authority

Advertising in the United States is regulated at the federal, state, and local levels as well as by self-regulatory organizations.⁸⁹ The FTC has broad authority to prohibit “unfair or deceptive acts or practices”⁹⁰, but it “focuses on the regulation of advertising to children, social media, and online advertising.”⁹¹ The sanctions that the FTC may impose range from a request to cease unlawful activities, to the imposition of civil penalties.⁹² Typically, these are based on federal legislation such as the Federal Trade Commission Act (the “Act”) or the Uniform Deceptive Trade Practices Act.⁹³ Aside from the FTC, self-regulatory organizations, such as the National Advertising Division (“NAD”)⁹⁴ or the National Advertising Review Council (“NARC”), are also highly influential mechanisms that purport to control false or deceptive advertising. These organizations are mainly responsible for addressing and resolving complaints between advertisers, consumers, and competitors.

Congress granted the FTC authority to enforce the Act under 15 U.S.C. Sections 45(a)(1),(2), which prohibits “unfair or deceptive acts or practices” and authorizes the commencement of administrative proceedings pursuant to Section 5 of the Act. Section 5 of the Act provides that “unfair or deceptive acts or practices in or affecting commerce . . . are declared unlawful.”⁹⁵ “Deceptive” practices are defined in the Commission’s Policy Statement on Deception⁹⁶ as involving a material representation, omission, or practice that is likely to mislead a consumer acting reasonably under the circumstances. An act or practice is “unfair” if it “causes or is likely to cause substantial injury to consumers, which is not reason-

⁸⁹ KOLSUN & HAND, *supra* note 5, at 702.

⁹⁰ 15 U.S.C. § 45 (2006).

⁹¹ KOLSUN & HAND, *supra* note 5, at 702.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The NAD was responsible for bringing claims against influencers promoting the Procter & Gamble Bounty paper towel campaign in a series of TikTok videos featuring a “dance challenge.” Gonzalo E. Mon, *NAD Addresses Disclosures on Influencer TikTok Videos*, AD LAW ACCESS (Sept. 15, 2020), <https://www.adlawaccess.com/2020/09/articles/nad-addressees-disclosures-on-influencer-tiktok-videos/> [<https://perma.cc/7KH3-AGAR>]; Jesse Brody & Manatt, Phelps & Phillips, LLP, *NAD Brings New Kind of Dance ‘Challenge’: TikTok Video-Sharing Tools May Create Liability for Brands*, JD SUPRA (Sept. 23, 2020), <https://www.jdsupra.com/legalnews/nad-brings-new-kind-of-dance-challenge-91258/> [<https://perma.cc/MH7R-CK2C>].

⁹⁵ 15 U.S.C. § 45 (2006).

⁹⁶ FTC POLICY STATEMENT ON DECEPTION (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/Y2B7-VX9V>].

ably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁹⁷

Procedurally, Section 5 of the Act authorizes the FTC to seek civil penalties following completion of the administrative process and the issuance of a final cease and desist order, and permits district courts to “grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the [FTC].”⁹⁸ Section 19 of the Act further authorizes district courts to grant “such relief as the courts find necessary to redress injury to consumers” in cases where someone has engaged in unfair or deceptive conduct with respect to which the Commission has issued a final cease and desist order.⁹⁹

Another piece of law that affects influencer advertisements is 16 CFR Part 255, which provides guides concerning the use of endorsements and testimonials in advertising.¹⁰⁰ This requires influencers to disclose any material connection that exists between them and an advertiser such as payment or free product received, in exchange for promoting a brand.¹⁰¹ The regulation notes examples of what constitutes an endorsement under the law, setting forth specific examples for reference. For instance, “Example 6” describes a well-known celebrity partaking in an infomercial for an at-home fitness system.¹⁰² According to the law, this constitutes an endorsement subject to FTC guidelines due to the fact that consumers are likely to believe it reflects the entertainer’s views.¹⁰³

2. Why FTC Enforcement is Unclear

While it is clear that influencers who do not make sufficient disclosures are at risk of violating the Act, it is unclear what kind of enforcement action the FTC will take for certain. While the FTC had power under Section 13(b) of the Act to seek equitable mone-

⁹⁷ 15 U.S.C. § 45(n); *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM’N (May 2021), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/5SR3-HYSP>].

⁹⁸ *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1343 (2021).

⁹⁹ 15 U.S.C. § 57b(b).

¹⁰⁰ See *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255 (2022), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf> [<https://perma.cc/QPW8-R9ES>].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

tary relief such as restitution,¹⁰⁴ the Supreme Court ruled otherwise on April 22, 2021, in *AMG Capital Management, LLC v. FTC*.¹⁰⁵ In this case, the FTC responded to petitioner Scott Tucker and his companies after filing a complaint, alleging deceptive payday lending practices in violation of Section 5(a) of the Act.¹⁰⁶ The District Court granted the FTC's request for a permanent injunction to prevent Tucker from committing future violations of the Act and relied on the same authority to direct Tucker to pay \$1.27 billion in restitution.¹⁰⁷ On appeal, the Ninth Circuit rejected Tucker's argument that Section 13(b) does not authorize the award, and the Supreme Court reversed, reasoning that Section 13(b) does not in fact authorize the FTC to seek, or a court to award, equitable monetary relief such as restitution or disgorgement.¹⁰⁸

The confusion behind this ruling stems from a bit of a history lesson of the Act and its enforcement power. Ever since the FTC's creation in 1914,¹⁰⁹ it has been authorized to enforce the Act through its own administrative proceedings set forth in Section 5 of the Act. If the FTC has "reason to believe" that a party "has been or is using any unfair method of competition or unfair or deceptive act or practice," it can file a complaint against the claimed violator and adjudicate its claim before an administrative law judge ("ALJ").¹¹⁰ The ALJ then conducts a hearing and writes a report on findings of fact and reaches a legal conclusion. If the ALJ concludes that the conduct at issue was unfair or misleading, the ALJ will issue an order requiring the party to cease and desist from engaging in unlawful conduct. The party may then seek review before the FTC, and eventually, in a court of appeals.¹¹¹ If judicial review favors the Commission, the FTC's order normally becomes final and enforceable.

In the 1970s, Congress authorized the FTC to seek additional remedies in court, circumventing the administrative process. In

¹⁰⁴ See *FTC v. Com. Planet, Inc.*, 815 F. 3d 593, 598 (2016); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (1982) (interpreting § 13(b) as empowering district courts to "grant any ancillary relief necessary to accomplish complete justice").

¹⁰⁵ *AMG Cap. Mgmt.* 141 S. Ct. at 1347-52 (holding that that § 13(b) of the FTC Act does not authorize the FTC to seek, or a court to award, equitable monetary relief such as restitution of disgorgement).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Our History*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/JD37-YKW3>] (last visited Feb. 9, 2022).

¹¹⁰ 15 U.S.C. § 45(b).

¹¹¹ 15 U.S.C. § 45(c).

1973, Congress added Section 13(b), permitting the FTC to proceed directly to court to obtain a temporary restraining order or preliminary injunction.¹¹² Congress also amended Section 5(l) of the Act to authorize district courts to award civil penalties against respondents who violate final cease-and-desist orders and to grant mandatory injunctions as they deem appropriate.¹¹³

3. FTC Enforcement on Influencer Marketing

After the Supreme Court case, there arose serious confusion as to what exactly the FTC's enforcement powers are, especially in the context of the rapidly expanding influencer marketing industry. After the Supreme Court took away the FTC's ability to threaten monetary penalties such as restitution under Section 13, the FTC instead bolstered Section 5(m) which enforces monetary penalties of up to \$43,792 on violators only after they have received a warning letter.¹¹⁴

Today, once the FTC notices that an influencer or brand has violated its guidelines, it will typically first issue an FTC warning letter¹¹⁵ with the purpose of warning violators that their conduct is likely unlawful and that they can face serious legal consequences such as federal lawsuit if they do not immediately stop.¹¹⁶ Nonetheless, it is unclear which circumstances lead to what civil penalties, and the potential for a federal lawsuit.¹¹⁷

In April 2017, for the first time, the FTC sent out more than ninety letters to influencers and marketers reminding them to disclose their relationships with brands "clearly and conspicuously" on social media.¹¹⁸ This was, in fact, the first time that the FTC educated influencers on FTC's Endorsement Guides. Twenty-one of the influencers who got the April letter received a follow-up warning letter, citing specific social media posts the FTC staff was concerned might not be in compliance with the Act. The follow-up

¹¹² 15 U.S.C. § 53(b).

¹¹³ *AMG Cap. Mgmt.*, 141 S. Ct. at 1346.

¹¹⁴ Wiley Rein LLP, *supra* note 84.

¹¹⁵ See, e.g., *Legal Library: Warning Letters*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/warning-letters> [<https://perma.cc/7SHS-5J4D>] (last visited Nov. 21, 2021).

¹¹⁶ *Id.*

¹¹⁷ See, e.g., Troutman Pepper, Ketan Bhirud, & Matthew Fay, *FTC Puts Everyone on Notice Over Deceptive Endorsements*, JDSUPRA (Nov. 1, 2021), <https://www.jdsupra.com/legalnews/ftc-puts-everyone-on-notice-over-9530731/> [<https://perma.cc/ZCD6-FY42>].

¹¹⁸ *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FEDERAL TRADE COMMISSION (Apr. 19, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship> [<https://perma.cc/J57M-NLPN>].

also asked the recipients to let the FTC know if they had material connections to the brands in the identified social media posts and to spell out what steps they would take to clearly disclose these material connections.¹¹⁹ In addition, at the end of 2017, the FTC settled its first complaint against two social media influencers for not disclosing their connection to a business they were collaborating with.¹²⁰ This spurred the FTC to produce “Disclosures 101 for Social Media Influencers”, purporting to give influencers tips on when and how to make proper disclosures and how advertisers and endorsers can stay on the “right side of the law.”¹²¹ One can argue that while helpful in enumerating the rules, the guide fails to offer clear enforcement or dispute resolution options between the FTC, influencer, or brand.

The “Disclosures 101” guide seemingly did very little to stop bad advertising practices on social media. In March 2020, the FTC brought another serious claim against a social media ad campaign. The FTC settled with Teami, LLC, and the complaint alleged the defendants took in more than \$15 million by deceptively claiming their array of teas could cause “rapid and substantial weight loss, fight against cancerous cells, decrease migraines, unclog arteries, and prevent colds and flu.”¹²² Prior to the complaint, Teami, LLC recruited a roster of celebrities and influencers to advertise their product, many of whom have subsequently received warning letters.¹²³

Further, on October 13, 2021, the FTC announced that it sent form Notices to over seven hundred national retailers, ad agencies, consumer product companies, and others across the United States, outlining conduct in endorsements and testimonials that it consid-

¹¹⁹ *Id.* See also Lesley Fair, *Three FTC Actions of Interest to Influencers*, FED. TRADE COMM’N. (Sept. 7, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers> [https://perma.cc/D8C6-8B9X].

¹²⁰ *Endorsements, Influencers, and Reviews*, FED. TRADE COMM’N. (Oct. 23, 2022), <https://www.ftc.gov/tips-advice/business-center/advertising-and-marketing/endorsements%2C-influencers%2C-and-reviews> [https://perma.cc/E5CN-NQBJ].

¹²¹ *Disclosures 101 for Social Media Influencers*, *supra* note 52.

¹²² Lesley Fair, *FTC’s Teami case: Spilling the tea about influencers and advertisers*, FED. TRADE COMM’N. (Mar. 6, 2020, 11:22 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers> [https://perma.cc/UP6A-TRGF] (e.g., a recent example of influencers facing legal implications with the FTC). See *Teami, LLC*, FED. TRADE COMM’N. (Mar. 20, 2020), <https://www.ftc.gov/enforcement/cases-proceedings/182-3174/teami-llc> [https://perma.cc/TJK8-3FXQ] (stating complaints, case summary, warning letters, and other pertinent documents relating to the proceeding).

¹²³ *Id.*

ered deceptive or misleading.¹²⁴ Each Notice of Penalty Offenses (“Notice”) warned the companies that the misleading use of endorsements or testimonials could lead to large financial penalties. The FTC also issued a press release¹²⁵ suggesting that they will be cracking down on allegedly deceptive practices in social media, with specific attention to reviewers who allegedly failed to disclose material connections. Though these notices did not suggest violative conduct, the FTC will use them to assert civil penalties on future violations by any of the recipients should they engage in the conduct described in the notices.¹²⁶

While the Notices and threats of civil penalties directly impact companies and influencers, they fail to provide a cognizable set of regulations and enforcement standards under which disputes ought to be remedied.

IV. PROPOSAL

This proposal will present a multi-step dispute resolution alternative designed to target the underlying inequities of the influencer contract as well as the inefficient system that governs the relationship between the FTC and the influencer. If elected by the parties, this resolution purports to protect influencers under contract and standardize FTC regulation and enforcement. The first step will require influencers to enter into negotiation and/or mediation, which is designed to address ongoing bias and pay gap issues, as well as level the bargaining power between influencers and brands. Currently, ADR procedures are becoming more common in contracts for employers or contractors.¹²⁷ As mentioned earlier, influencers are not classified as traditional employees but rather contractors who seek some level of protection through mechanisms like the influencer agreement.¹²⁸ Likewise, introducing ADR to

¹²⁴ *FTC Puts Hundreds of Businesses on Notice about Fake Reviews and Other Misleading Endorsements*, FED. TRADE COMM’N. (Oct. 13, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other> [<https://perma.cc/XV2L-ZYFQ>].

¹²⁵ *Id.*

¹²⁶ Lathrop GPM, *FTC Warns Endorsements Could Lead to Civil Penalties*, JDSUPRA (Oct. 14, 2021), <https://www.jdsupra.com/legalnews/ftc-warns-endorsements-could-lead-to-9420623/> [<https://perma.cc/4RCP-PYCW>].

¹²⁷ *Employment Arbitration Under AAA Arbitration*, AM. ARB. ASS’N (last visited Feb 9, 2022), <https://www.adr.org/employment> [<https://perma.cc/MD82-BBVA>].

¹²⁸ As personal brands, influencers are not employees to a company, but rather operate as a kind of independent contractor. Isabella Hindley, *Social Media Influencers are the Latest to*

the influencer brand relationship will serve to legitimize and streamline the process. The second step of this proposal will target FTC regulatory issues through Dispute System Design, which will offer a unique system of regulation and enforcement modeled after the CASE Act of 2020.¹²⁹

A. Negotiation and Mediation

When an influencer selects this process, the first step mandates negotiation prior to signing any influencer contract, as well as the addition of a mediation clause which offers a third-party neutral to resolve either pre or post contract disputes. This model covers three principles: (1) influencer negotiation training¹³⁰; (2) negotiation of terms such as pay, scope of work, and time; and (3) dispute resolution in the form of mediation.

Negotiation is commonly seen as the first step to dispute resolution.¹³¹ It takes place when parties are able to exchange information, reach an understanding about their conflicting issues, and achieve an outcome in immediate terms without the assistance or guidance of a third party.¹³² Historically, negotiation has always been a collaborative process that supports equity and inclusion while also striving to create satisfying solutions for all parties involved rather than a competition between adversaries.¹³³

Unionize, But Should They?, POL'Y INTERNS (Mar. 3, 2021), <https://policyinterns.com/2021/03/03/social-media-influencers-are-the-latest-to-unionize-but-should-they/> [https://perma.cc/79NF-X9LF]. See also Reed Smith LLP, *Is Your Social Media Influencer or Blogger an Employee or an Independent Contractor? What Companies Need to Know Before They Engage Bloggers and Other Independent Contractors*, LEXOLOGY (last visited Feb 9, 2022), <https://www.lexology.com/library/detail.aspx?g=238ac2f1-b131-49ee-b15a-2bfed4c3619d> [https://perma.cc/C9TQ-AAWJ] (“An independent contractor generally does not have certain legal protections like an employee. Typically, a company will engage independent contractors for a discrete period to perform a task or series of tasks outside the scope of expertise of the regular employee.”).

¹²⁹ CASE Act of 2020, H.R., 2426, 116th Cong. (1st Sess. 2019-20).

¹³⁰ This step is modeled after the “Seven Elements” framework developed by the Harvard Negotiation Project, purporting to help prepare people more effectively for negotiation. Katie Shonk, *What is Negotiation? Learn the Building Blocks of Indispensable Negotiation Business Skills*, PROGRAM ON NEGOT. HAR. L. SCH. (Oct. 14, 2021), <https://www.pon.harvard.edu/daily/negotiation-skills-daily/what-is-negotiation/> [https://perma.cc/FD9Z-EWVK].

¹³¹ Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 8–9 (1996).

¹³² SIMON ROBERTS & MICHAEL PALMER, *DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING* 113 (Cambridge Univ. Press, 2nd ed. 2012).

¹³³ Negotiation, U. WASH. FOR AM. INST. OF ARCHITECTS EQUITY & FUTURE ARCHITECTURE COMM. 5.1 (2nd ed. 2020), https://content.aia.org/sites/default/files/2021-06/AIA_Guides_for_Equitable_Practice_05_Negotiation.pdf [https://perma.cc/E4BR-VPDH].

When the negotiation process does not culminate in a joint decision, or if there is an unresolvable dispute following the creation of a contract, mediation will come into play.¹³⁴ At this point in the process, a neutral third party will be necessary to assist influencers and brands (or their agents) in reaching a mutually acceptable outcome¹³⁵ by either (1) assisting parties agree to important influencer contract provisions; (2) educating parties (especially inexperienced influencers) on specific terms, outcomes, or options; or (3) assisting parties sever their relationship as amicably as possible.

1. The Downsides to Negotiation

It can be argued that negotiation highlights discrimination. Typically, unprotected and new markets are subject to negotiation discrimination more so than older and established markets.¹³⁶ For instance, the market for new cars, much like the market for social media influencers, is an example of an unprotected market. In the 1980s, a study of more than 180 independent negotiations at ninety car dealerships conducted in the Chicago area examined whether negotiators of different races and genders using a uniform negotiation strategy would result in different outcomes.¹³⁷ The tests revealed that White males received significantly better prices than Blacks and women.¹³⁸ Though an old study¹³⁹, it provides evidence that negotiators of different races or genders may be subjected to price discrimination.¹⁴⁰

It has further been established that when people with dominant-group identities, as representative of a brand, negotiate with people who have nondominant identities, as representative of an influencer, the power imbalance may lead to unfair outcomes.¹⁴¹ Moreover, when people with nondominant identities, like people

¹³⁴ Williams, *supra* note 131, at 9.

¹³⁵ *Id.* at 10.

¹³⁶ Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818-19 (1991).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Contra Counteracting Negotiation Biases Like Race and Gender in the Workplace*, PROGRAM ON NEGOT. HARV. L. SCH. (Nov. 19, 2020), <https://www.pon.harvard.edu/daily/leadership-skills-daily/counteracting-racial-and-gender-bias-in-job-negotiations-nb/> [<https://perma.cc/94SK-LDAY>] (showcasing newer studies on the implications of racial and gender discrimination in negotiation).

¹⁴⁰ *Id.*

¹⁴¹ Negotiation, *supra* note 133 (this power balance may be manifested in ways of thinking, behaving, and communicating).

of color, women, or people with disabilities, try to negotiate using traditional norms and strategies, they often are penalized.¹⁴² These trends that are especially highlighted among BIPOC influencers, as evidenced in Section III.A of this Note, can be largely counteracted by large-scale movements towards more equitable negotiation processes, educational opportunities, and pay transparency.¹⁴³

2. Step 1: Influencer Negotiation Training

If selected, this process will precede pre-contract negotiation and involve a trained negotiator or expert in the influencer marketing industry.¹⁴⁴ This expert may offer key information to influencers, such as: properly valuing their work, bringing to light important statistics and data regarding pay transparency, educating on nonnegotiable terms in an influencer agreement, providing examples of sample influencer agreements, and offering knowledge on legal compliance. In addition, this expert will help the influencer develop a repertoire of negotiation tools by identifying bargaining chips. For instance, an influencer's key tool is their audience, as there is a direct correlation between a higher number of followers and higher pay per post (this is where micro vs. macro influencers come into play). Potential audience reach, niche, and audience engagement rate are also extremely powerful tools in leveling out the bargaining field.¹⁴⁵ Given the large shift to social media advertising and influencer marketing, brands are increasingly pressured to execute agreements with influencers in order to stay relevant.¹⁴⁶ As such, if given the right tools, such as proper negotiation, access, and training, influencers will be able to bolster their bargaining chips for higher pay and fairer terms. Not to mention,

¹⁴² *Id.*

¹⁴³ *Counteracting Negotiation Biases Like Race and Gender in the Workplace*, *supra* note 139.

¹⁴⁴ See generally Michael Lasky, *9 Best Practices for Influencer Marketing Agreements*, CONVINCE & CONVERT <https://www.convinceandconvert.com/social-media-marketing/influencer-marketing-agreements/> [<https://perma.cc/E4RT-XWPE>] (last visited Feb. 12, 2022).

¹⁴⁵ *Id.* See also Sarah Donawerth, *Negotiations with Influencers, 10 Steps of Influencer Marketing: A Complete Guide, Uncategorized*, GET CARRO (Nov. 21, 2021), <https://getcarro.com/blog/6-negotiations-with-influencers-2/> [<https://perma.cc/C9NC-RYH7>].

¹⁴⁶ See *Influencer Marketing 2019: Key Statistics From Our Influencer Marketing Survey, Influencer Marketing 2019 Industry Benchmarks*, MEDIKIX, <https://mediakix.com/influencer-marketing-resources/influencer-marketing-industry-statistics-survey-benchmarks/> [perma.cc/39HW-YZ93] (last visited Nov. 20, 2021) (“Instagram and Instagram Stories will be the focal point of many strategies: nearly two-thirds of marketers are increasing their influencer marketing budgets in 2019, and 17% of companies will spend over half their marketing budget on influencer marketing.”).

the price of negotiation is significantly lower than the price of signing a bad contract or, worse, litigation.¹⁴⁷

Knowledge is power, and this step will assist influencers—particularly those who are young, micro, and/or BIPOC—to achieve fair pay, transparency, and legal protection. Drawing on the ideas of influencer transparency in Section III.A, this step will serve as an important intermediary: bringing to light the standard influencer pay of similarly situated influencers; as well as providing crucial tips on personal branding, licensing protection, and proper FTC disclosure protocols. The expert trainer will also brief the influencer on basic negotiation strategies like developing a BATNA¹⁴⁸ and “getting to yes.”¹⁴⁹ Ultimately, influencers will be able to develop a robust working knowledge of how to negotiate in this disruptive marketing influencer industry.

3. Step 2: Pre-Contract Negotiation

This next step will embody the crux of the influencer-brand contract. It has been well established that negotiating for higher pay is one significant type of negotiation that can contribute to equity and inclusion.¹⁵⁰ An example of pre-contract negotiation could be adding and agreeing to influencer contract terms.¹⁵¹ Negotiation in this step would assist the influencer and brand create an agreement with fair terms and pay, highlighting essential provisions necessary for protection on both sides. The importance of distinguishing this as a step is to signal to influencers—and the industry as a whole—that influencers are independent contractors or partners, obligated to full and fair contract terms and protections. This step is also crucial in highlighting a mediation clause, the scope of which is to be discussed among the parties.

Some important areas of the influencer contract include a detailed scope of work, duration of collaboration, and perpetuity of using the influencer’s “likeness.”¹⁵² More specific to the influencer

¹⁴⁷ See generally Nora Freeman Engstrom, *The Diminished Trial*, 86 *FORDHAM L. REV.* 2131 (2018); Shonk, *supra* note 130.

¹⁴⁸ BATNA means “best alternative to a negotiated agreement”. Guhan Subramanian, *What is a BATNA?*, PROGRAM ON NEGOTIATION HARVARD LAW SCHOOL (Dec. 2, 2021), <https://www.pon.harvard.edu/tag/batna/> [<https://perma.cc/8YMT-ML85>].

¹⁴⁹ See generally Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed. 2012).

¹⁵⁰ Negotiation, *supra* note 133.

¹⁵¹ *Infra* Section II.A.

¹⁵² Sanjay Ibrahim & Anthony Santoriello, *Cient [sic] Alert: How Social Media Influencers Can Effectively Protect Their Name, Image and Likeness*, *PIB LAW* (June 2, 2021), <https://>

agreement, clauses such as (1) deliverable date and time; (2) exclusivity; (3) licensing and usage rights (i.e., if a brand plans to repurpose an influencer's content, and who owns the rights to that content); (5) termination clause (so either party has a way out); (6) FTC disclosures; and (7) payment date and method of payment (net-30 days out means 30 days since the date of signing).¹⁵³ These examples are not an exhaustive list but should provide a basis on which influencers can rely for protection.

4. Why Negotiation Appeals to Influencers and Brands

Influencer discrimination principally occurs when (1) an influencer cannot afford an attorney or agent, (2) when there is no formal negotiation process between influencers and brands, or (3) when influencers are reluctant to negotiate for themselves out of fear of looking too pushy.¹⁵⁴ Generally speaking, traditional contracts tend to be negotiated with macro influencers and their attorneys/agents, while in contrast, micro influencers are often self-represented and engaged on a handshake or "short form" agreement, which may simply be a text or email exchange of terms.¹⁵⁵ Furthermore, as mentioned in Section III.A, White influencers have a leg up in terms of access to attorneys or agents who would advocate for them.¹⁵⁶

Bargaining power is an essential tenet of negotiation.¹⁵⁷ When a young, inexperienced, or BIPOC influencer is attempting to ne-

www.piblaw.com/newsroom-news-371 [https://perma.cc/PW8P-A7FB]. (Perpetuity clauses pose a serious risk: if an influencer sees any contracts that mention perpetual use, "in perpetuity" worldwide, or royalty free, it is advisable not to sign that contract. It highly difficult to value future and "forever" use of content and poses serious risk to the brand taking advantage of the influencer).

¹⁵³ Kameron Monet, *Influencer Contracts With a Lawyer, The Legal Tea*, YOUTUBE (Sept. 28, 2020), <https://www.youtube.com/watch?v=GANTsju4rMg> (See timestamps 4:10, 4:26, 06:37, 7:35, 9:03, 9:30 and 11:01).

¹⁵⁴ Kristopher Fraser, *Black and Latinx Influencers Speak Out on Pay Discrimination*, DAILY BEAST (July 27, 2020, 4:46 AM), <https://www.thedailybeast.com/black-and-latinx-influencers-speak-out-on-pay-discrimination> [https://perma.cc/RRF9-BRQT].

¹⁵⁵ Terese L. Arenth, *Influencer Marketing: Legal Concerns and Best Practices*, NASSAU LAWYER (Apr. 2020), <https://www.moriththock.com/wp-content/uploads/2020/04/Nassau-Lawyer-April-2020-TLA-Article.pdf> [https://perma.cc/M5MQ-G5US]; *Influencer Contracts: What Goes Into Agreements Between Brands and Influencers*, CJ FOX LAW, <https://cjfoxlaw.com/law/terms-for-contracts-between-influencers-and-brands/> [https://perma.cc/BCL2-5WDR] (last visited Feb. 9, 2022).

¹⁵⁶ See discussion *infra* Section III.A.

¹⁵⁷ Jeff Cochran, *What is Bargaining Power?*, SHAPIRO NEGOTIATIONS <https://www.shapironegotiations.com/what-is-bargaining-power/> [https://perma.cc/7DM8-RHQ7] (last visited Feb. 9, 2022). See also Joe Campolo, Esq., *Power in Negotiation: Why you Need It and*

gotiate a contract, the brand may inevitably tip the scales in terms of bargaining power.¹⁵⁸ While the average age of TikTok and Instagram influencers is around 20 years old¹⁵⁹, it is likely that the brand negotiator is significantly older and more experienced, as many young influencers lack proper guidance from a qualified attorney.¹⁶⁰ Moreover, the typical New York lawyer charges between \$122 and \$485 per hour, which is comparable to lawyers in California.¹⁶¹ Retaining legal representation is not always feasible, particularly for micro and BIPOC influencers, and especially when the scope of legal work may go beyond simple contract review.¹⁶²

Thus, an ADR alternative will enable influencers to take back their power without the need for an expensive attorney or agent; ultimately allowing influencers to feel more confident following the influencer negotiation training session. Negotiation has historically helped parties eliminate biases and uneven power dynamics while also alleviating wage gaps, promoting data transparency, and assisting parties establish a BATNA.¹⁶³ Thus, negotiation would appeal to BIPOC or other influencers who are likely experiencing uneven power dynamics with brands, severe pay gaps, biases due to algorithmic architecture, and lack of access to data and transparency.¹⁶⁴

On the flip side, negotiation will similarly allow marketers transparent access into influencer's true engagement and following.

how to Get It, CAMPOLO, MIDDLETON & MCCORMICK, LLP (Sept. 26, 2018), <https://cmmlp.com/power-in-negotiation-why-you-need-it-and-how-to-get-it/> [<https://perma.cc/M9DA-RZHN>].

¹⁵⁸ See generally Nancy L. Schultz, *Law and Negotiation: Necessary Partners or Strange Bedfellows?*, 15 *CARDOZO J. CONFLICT RESOL.* 105, 138 (2013) (“Bargaining power is generally a function of legal authority and financial constraints”).

¹⁵⁹ Brandon Doyle, *TikTok Statistics—Updated Sep 2021*, WALLAROO, (Sept. 27, 2021) <https://wallaroomedia.com/blog/social-media/tiktok-statistics/> [<https://perma.cc/T23W-L4AU>].

¹⁶⁰ Charles Toutant, *Grab Your Smartphone: Lawyers Are Cashing In on Representing Social Media Influencers*, *NEW JERSEY LAW JOURNAL* (Jan. 27, 2022), <https://www.law.com/njlawjournal/2022/01/27/grab-your-smart-phone-lawyers-are-cashing-in-on-representing-social-media-influencers/> [<https://perma.cc/5QNL-GDJ2>].

¹⁶¹ *How much do lawyers charge in New York?*, CLIO <https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ny/> [<https://perma.cc/Y77K-RCJB>] (last visited Feb. 11, 2022); *How much do lawyers charge in California?*, CLIO <https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ca/> [<https://perma.cc/HR63-XQGL>] (last visited Feb. 11, 2022).

¹⁶² *Influencer Compliance: What Are Influencers Laws? Just Ask This Influencer Attorney*, THE SOCIAL MEDIA LAW FIRM, <https://thesocialmedialawfirm.com/blog/influencer-compliance/what-are-influencers-laws-just-ask-this-influencer-attorney/> [<https://perma.cc/7ATW-PE32>] (last visited Feb. 11, 2022), (e.g., social media law firm and what services it offers).

¹⁶³ *Id.* *What is a BATNA?*, PROGRAM ON NEGOTIATION HARVARD LAW SCHOOL (Nov. 20, 2021), <https://www.pon.harvard.edu/tag/batna/> [<https://perma.cc/8YMT-ML85>].

¹⁶⁴ See *infra* Section III.A. See also *Counteracting Negotiation Biases Like Race and Gender in the Workplace*, *supra* note 139.

The influencer marketing industry is wrought with fake followers and scams that are detrimental to brands no matter the size. This system will encourage transparency on both ends encouraging less foul play. Negotiation will appeal to brands and marketers because it is in the brand's best interest to foster an authentic relationship with the influencer to advance and align their goals of generating sales and traffic through brand awareness.¹⁶⁵ In addition to developing a solid relationship, understanding an influencer's budget and value is key for marketers to achieve long-term success, and ensure the best possible content.¹⁶⁶

5. Final Step: Mediation Clause

Finally, the mediation clause will determine mediation as the primary source of dispute resolution between brands and influencers.¹⁶⁷ This clause will lay out who the mediator is prior to the dispute, for instance, a JAMS mediator.¹⁶⁸ This serves merely as an example, but the contract is free to specify any type of mediator through a like ADR program. When the negotiation process does not culminate in a joint decision (pre-contract dispute), or if there has been a breach of terms (post-contract dispute), the parties agree to use mediation as their first source of dispute resolution. At this point, a neutral third party will be necessary to assist an influencer and brand in reaching a mutually acceptable outcome.¹⁶⁹ This will effectively eliminate the need to litigate small claims in court, surely outweighing the cost of the contract breach itself.¹⁷⁰

As mentioned, with the popularity of "handshake" agreements among influencer-brand contracts, it is important to note that without proper definitions and inclusion of certain terms, an influencer who lacks legal representation, or a third-party neutral mediator, is at serious risk of signing an inequitable contract.¹⁷¹

¹⁶⁵ Lauren Moreno, *10 Most Effective Ways to Negotiate with Influencers*, BLOG SOCIAL MEDIA STRATEGIES SUMMIT (Jan. 21, 2021), <https://blog.socialmediastrategiessummit.com/negotiate-with-influencers/> [<https://perma.cc/FF2E-J7G3>].

¹⁶⁶ *Id.*

¹⁶⁷ *Sample Mediation Clause*, UNITED STATES ARBITRATION & MEDIATION (last visited Feb. 11, 2022), <https://usam.com/mediation/sample-mediation-clause/> [<https://perma.cc/JX6D-MYGL>].

¹⁶⁸ *The JAMS Mediation Process*, JAMS (last visited Feb. 11, 2022), <https://www.jamsadr.com/mediation> [<https://perma.cc/V8QR-WD26>].

¹⁶⁹ Williams, *supra* note 131, at 10.

¹⁷⁰ Williams, *supra* note 131, at 9.

¹⁷¹ Regan Cleminson, *The Ultimate Guide to Reviewing Contracts as an Influencer*, VENTURE TRAVELIST (Jan. 19, 2020), <https://theventuretravelist.com/2020/01/19/the-ultimate-guide-to-reviewing-contracts-as-an-influencer/> [<https://perma.cc/4J7G-7W2Z>].

This rings true especially when the level of sophistication between parties is unequal. As such, a neutral mediator will be able to fill the gaps in terms of pre- or post-contract dispute.

Besides assisting and educating influencers with nailing out terms, the mediator may also assist either party with a breach of any terms. For instance, say a brand failed to pay the influencer on time or the influencer did not deliver sufficient product; the goal of electing this model is that the parties have agreed to use mediation as their first source of dispute resolution. As such, a mediator will interpret the contract, offer suggestions on settlement, or recommend solutions. The only significant downside to this model is enforceability. In general, mediation clauses are enforceable, however mediation is a consensual process, and a settlement or resolution is unlikely if one party is unenthusiastic to participate.¹⁷²

In sum, this model will be favorable to influencers and brands due to (1) higher accessibility and affordability, (2) eliminating pay gaps among the BIPOC community; and (3) offering a resolution that is educational, fair, and transparent to both parties.

B. *Dispute System Design*

This second part serves to specifically address the problem of FTC enforcement and standardization among the influencer marketing industry. While the FTC has enumerated guidelines requiring brands and influencers to disclose relationships, these have ultimately proven unsuccessful due to the sheer difficulty of policing millions of social media posts daily. Moreover, the FTC has done very little in terms of enforcement. In a recent statement, FTC Commissioner Rohit Chopra went so far as to conclude that “it is not clear whether our actions are deterring misconduct in the marketplace, due to the limited sanctions we have pursued.”¹⁷³ As such, this proposal offers an alternative and creative solution to the current system, in the form of a Dispute System Design.

¹⁷² *Sample Mediation Clause, supra* note 167.

¹⁷³ See Rohit Chopra, Commissioner, Fed. Trade Comm’n, *Statement of Commissioner Rohit Chopra Regarding the Endorsement Guides Review Commission*, File No. P204500 (Feb. 12, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf [<https://perma.cc/W7HE-T3TU>].

1. What is Dispute System Design?

Dispute System Design (“DSD”) involves the creation of a set of dispute resolution processes to help a given entity or set of individuals better manage a particular set of conflicts.¹⁷⁴ DSD is applied to prevent, manage, and resolve streams of disputes or conflicts such as employment discrimination, or court issues and access to justice.¹⁷⁵ The rationale is to minimize transaction costs (time, money, and emotional energy), increase disputants’ satisfaction with the process and outcome, enhance relationships among the disputants, and reduce recurrence of disputes with the disputants.¹⁷⁶ DSD focuses on identifying optimal solutions for preventing, managing, or resolving a specific kind of dispute. These solutions may include creating newer or traditional court designs; including administrative agencies, collaborative lawyering, and problem-solving courts.¹⁷⁷

Some relevant guiding principles of DSD include: (1) create a DSD that is fair and just; (2) consider efficiency for the institution and participants; (3) engage stakeholders and users in design and implementation; (4) seek prevention; (5) provide multiple interest-based and rights-based process options; (6) ensure user flexibility in choice and sequence of process options; (7) match and design the available resources including training and support; (8) train and educate system providers, users, and other stakeholders; and (9) make DSD accountable through transparency and evaluation.¹⁷⁸

One example of a successful DSD is the Copyright Alternative in Small-Claims Enforcement (“CASE Act”) Act in 2020. On December 27, 2020, President Trump signed the CASE Act¹⁷⁹ which establishes a Copyright Claims Board (“the Board”). Congress created the Board to address the challenges of litigating copyright cases in federal court, including the significant costs and time required. The Board has the authority to hear various copyright infringement claims under Section 512(f) of the Copyright Act. The Board is a voluntary, alternative forum to federal court for parties seeking resolution of copyright disputes with low economic

¹⁷⁴ LISA BLOMGREN AMSLER ET AL., *DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* 7-8 (Stanford University Press, 2020).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 13.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 13-14.

¹⁷⁹ *The Copyright Alternative in Small Claims Enforcement*, Copyright Litigation Handbook (WestLaw 2020.)

value.¹⁸⁰ While the creation of CASE does not displace or limit the ability to bring small copyright claims in federal court, it is intended to provide an alternative, more efficient forum, to address the challenges of litigating copyright cases in federal court. The key distinction here is that participation in the Board is voluntary for all parties, and all determinations are non-precedential (like arbitration).¹⁸¹

2. Proposing a DSD to the Influencer Marketing Industry

Just like the CASE Act addresses the dynamics of filing a claim under the Copyright Act, this proposal offers an alternative to the current system of addressing FTC violations in federal court or in administrative proceedings. This works well because the FTC would ultimately have more authority to enforce violations, while also sending a clearer message to influencers and brands as to what constitutes a violation. In turn, influencers and brands will be more likely to come to this alternative court for the opportunity to dispute their violations, if applicable, avoid the possibility of federal court, and inconsistent monetary penalties administered by FTC administrative proceedings.

DSD is an alternative to current FTC enforcement practices because it will serve to streamline the process of handling violations if the parties choose to do so. The FTC will first elect a Board of enforcers who will sit on a “court” to examine violations. The subsequent steps are as follows: (1) disputant (e.g., influencer) voluntarily chooses to enter this alternative system either before or after receiving a warning letter; (2) disputant faces a Board which assesses whether disputant’s actions are in breach of Section 5 of the Act; (3) disputant has the opportunity to argue why they have not acted in breach of the Act (e.g., fact finding period); (4) the Board issues either further warning with notice of potential amount of monetary penalty, or if disputant’s breach meets the requirements, the Board issues a monetary penalty award.

It is worth noting that while this model provides a comprehensive DSD process whereby influencers, brands, and the FTC can

¹⁸⁰ H.R. Rep. No. 116-252, at 18–20 (2019); S. Rep. No. 116-105, at 7–8 (2019). In developing the CASE Act, Congress drew on model legislation in the Copyright Office’s 2013 policy report, *Copyright Small Claims*, (“Copyright Small Claims”) and incorporated the Office’s report and supporting materials into the CASE Act’s legislative history.

¹⁸¹ See generally Stephen J. Ware, *Is Adjudication a Public Good? “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 *CARDOZO J. CONFLICT RESOL.* 899 (2013). See also Timothy Hedeem, *Remodeling the Multi-Door Courthouse to “Fit the Forum to the Folks”*: *How Screening and Preparation Will Enhance ADR*, 95 *MARQ. L. REV.* 941 (2012).

efficiently handle claims and issue awards, it is not by any means the only dispute resolution solution to the ongoing concerns. Instead, this model can serve as an example to how a creative dispute resolution system can be achieved to address the rapidly expanding and unregulated influencer marketing industry. Thus, this model can serve as a basis for DSD engineers to craft a more sophisticated and narrowly tailored system if need be.

3. Why DSD works for FTC Claims in Influencer Marketing

This unique model purports to promote clarity in enforcement, efficiency, and predictability for all disputants involved, which is ultimately favorable to the influencer marketing industry as a whole. The current system of FTC enforcement in the influencer-marketing realm has proven to be quite the opposite. The issuance of the warning letters represents the FTC's latest efforts to find ways to seek monetary penalties for FTC violations following the Supreme Court's AMG holding, but even so, influencers are at risk of large and unpredictable monetary obligations.¹⁸²

Influencers are earning tens of thousands of dollars per post and the industry is clearly valuing them at extremely high numbers. The amount in controversy is capped at \$43,792 per FTC violation, following a warning letter.¹⁸³ This means that influencers and brands have the capability of incurring serious penalties per post. It would therefore be most favorable to settle these claims in front of a Board that understands the industry under the lens of expert knowledge, and ultimately sets forth a clear and conspicuous maximum and minimum dollar amount in controversy.

V. CONCLUSION

As explored throughout this Note, social media influencers reach billions of people. Notwithstanding, players in the industry are left unequipped to navigate the wild west of laws governing the space. This multistep proposal offers an alternative solution to the current system (or lack thereof) that governs influencer contracts and the influencer marketing industry as a whole. This proposal covers both enforcement and lawmaking: it ultimately decreases an influencer's risk of getting fined or sued in federal court, protects

¹⁸² *FTC Broadly Issues Notices on Endorsements and Testimonials to National Advertisers*, supra note 84.

¹⁸³ *Id.*

an influencer's name and business, and in turn, fosters better economic relations in the e-commerce space. Moreover, this model will serve to protect and encourage the emerging BIPOC micro-influencer community feel confident to negotiate and dispute fair terms and fair pay in an influencer agreement.