

False Influencing

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Gun companies can't advertise their wares on Instagram or Facebook, but they can pay social media influencers to do it for them. Drug and device manufacturers are required to disclose extensive information in their marketing materials, from approved uses to risks and side effects, but influencers usually omit that information in their sponsored posts. Alcohol and tobacco companies similarly engage influencers to skirt the rules and capitalize on consumers' trust in the sincerity and authenticity of the influencers they follow. And influencer marketing doesn't enable only sellers in vice markets to evade regulations—all commercial producers of goods and services are prohibited from making false or misleading statements in advertisements, but when it comes to sponsored content on social media, those rules are rarely if ever enforced. Influencer marketing works, and the industry is growing faster than any regulatory regime can keep up: it's projected to reach \$10-20 billion by 2020, with more than 85% of brands earmarking a portion of their 2019 marketing budget to spend on influencer partnerships. Influencers make false efficacy statements, post misleading images, share dishonest testimonials, and shill for brands without disclosing their material connections to them. Influencer marketing is an advertising loophole, and it's one big enough for Kylie Jenner to fly a private jet through.

Social media influencers and the brands that engage them are bound to comply with the portions of the FTC Act that regulate advertising and endorsement. But many don't. While the FTC has promulgated guidelines, sent warning letters to repeat offenders, and very occasionally brought actions against influencers and brands whose practices run afoul of its guidance, it lacks the resources to force industry-wide change. Private parties, meanwhile, don't have standing to challenge competitors' practices based on violations of the FTC Act. The Lanham Act provides companies with a false advertising cause of action, but so far few have called upon it in attempts to enjoin false or misleading claims their competitors make via influencer marketing. It's time that they start. Can an influencer's failure to disclose that a post is a paid endorsement constitute a misleading representation under §43(a)(1)(B)? If an influencer's testimonial about a product or the verbal or visual representation accompanying that endorsement is untrue or unsubstantiated, might that misrepresentation be material and thus actionable? This Article explores the potential for private actors to use the Lanham Act to challenge competitors' "false influencing" — disseminating false or misleading advertising messages via influencer marketing — as a means to protect consumers and increase consistency in how ads are regulated across platforms and types of media. While several prongs of the false advertising cause of action may pose challenges, including adequate dissemination (for claims by micro-influencers), actionable false statements (for personal testimonials, visual claims, and nondisclosure), and deception (for claims that are misleading but not literally false), §43(a)(1)(B) case law is capacious, and does not rule out successful causes of action based on any type of influencer misrepresentation.