

HOW TO BE AN INFLUENCER AND NOT GET SUED

By: Jack Garson, Esq.
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You're popular, social media savvy and have a growing flock of followers. You want to be just like your mega-influencer role models Kendall Jenner, Bella Hadid, Emily Ratajkowski, Floyd Merriweather, and DJ Khaled. Guess what? Like them, you may get sued.

Take your typical influencer. She promotes brands as if there are no rules. She gets money or swag to endorse products and services. But she rarely (as in never) discloses the compensation or her connection to the brand. She just acts like a big fan ("people always ask me why my skin looks so good..."). The public views these posts as simple praise, not paid endorsements. But in the eyes of the law, this is deceptive — and illegal — advertising. Our enthusiastic patron saint of body lotion could be sued by any number of federal or state agencies, members of the public and possibly even foreign governments. That's an awful lot of risk for a year's supply of free skin cream.

If You Tout, You Must Tell

When it comes to deceptive advertising in the U.S., the Federal Trade Commission (FTC) acts like my parents when I was growing up — a lot of warnings and then the occasional PUNISHMENT ("if I have to come upstairs..."). Lately, the FTC has taken on influencers, as well as the brands and marketing agencies that thrive on their influence.

Under FTC rules, influencers must disclose if they are getting compensated to provide endorsements or if they have a relationship with a brand they promote. To trigger the disclosure requirement, you don't need to get a six-figure check or a gold-plated Mercedes. Here's the test: Let's say a brand provides an influencer with free sneakers and asks for his review. If knowing about the free sneakers would affect the weight or credibility that viewers give to the review, disclosure is required.

All kinds of things can be endorsements. If you click a "like" button, pin a picture or share a link — for compensation — you've likely just made an endorsement. Even posting a picture of a brand's product can be an endorsement.

Some important takeaways:

- Disclosures don't require special wording. Just clearly say that you were compensated ("XYZ gave me these shoes and I love them") or that you have a relationship with the brand ("I work for XYZ and love their shoes").
- You can't create the impression you got less compensation than you actually did. If you got free shoes and a check for \$1,000, you can't just disclose the nice shoes.
- Ixnay on one general disclosure for all endorsements, like saying "I get a lot of free stuff to review" on your Insta. You must provide disclosure for each endorsement.
- Don't hide the disclosure. You can't make people scroll or click to see it.
- The disclosure must be prominent and clear. A noticeable display of "Sponsored," "Promotion" or "Paid ad" checks the box (but is quite the mood killer).
- Don't get cute. For example, don't combine "Cool Stytle" with "Ad" to produce #coolstyllead. Disclosures aren't "Where's Waldo" puzzles.
- Avoid near-miss disclosures, like a "Thank you" to the brand, or mentioning you are a #client, #advisor or #consultant. Still, even the FTC seems confused. It thinks #ambassador is ambiguous and confusing, but #CocaColaAmbassador is probably fine.
- If you have NOT tried a product, you can NOT provide an endorsement saying you did. And if you DON'T like it, you can NOT say you did. (Then again, until Apple rolls out its iMindReader, who's to know?)



Overall, disclosures should be:

1. Close: Viewers should see your disclosure when they see your endorsement.
2. Conspicuous: Disclosures should be hard to miss, not hard to find.
3. Clear: Viewers should understand you're getting compensation or have a relationship with the brand.

You're trying to communicate. If your favorite sixteen-year-old niece doesn't understand, start over.

FTC Ramping Up Enforcement

Recently, the FTC has issued influencer guidelines, sent over one hundred warning letters and sued numerous brands, marketing companies and influencers. It has pursued and won settlements from Lord & Taylor, Deutsch LA, Inc., Machinima, Inc., and Warner Brothers. In the Warner Bros. case, the FTC alleged that WB's influencer marketing for its "Shadow of Mordor" video game was illegal and deceptive advertising. A 2017 settlement required Warner Bros. to engage in an extensive influencer compliance program. Interestingly, the government did not pursue PewDiePie, the controversial Swedish video gamer who received undisclosed compensation to review the game. But in another 2017 case, the FTC did charge the influencers. Here, the government sued Trevor Martin, a/k/a TmarTn, and Thomas Cassell, a/k/a Syndicate, for posting numerous tweets and videos promoting their own brand, CSGO Lotto, without disclosing their control and ownership of the company. The FTC also asserted that TmarTn and Syndicate recruited and paid other influencers to promote the brand. Ultimately, Martin, Cassell and their company settled the charges, agreeing to extensive compliance, monitoring and reporting requirements. The legal risks are growing.

Securities And Exchange Commission

The U.S. Securities and Exchange Commission (SEC) charged world champion boxer Floyd Mayweather and music producer DJ Khaled for endorsing bitcoin offerings in 2017 without disclosing they were paid hundreds of thousands of dollars. In 2018, the duo settled with the SEC, but the price was high. Mayweather and Khaled had to forfeit all of their fees, pay substantial six-figure fines and agree to a multi-year ban on similar endorsements.

State Laws And Private Lawsuits

Lawsuits against influencers may soon skyrocket. Usually, upset customers can't force the government to take action. But most states regulate advertising — and allow their residents to sue influencers for false or deceptive ads. So, all on their own, disgruntled customers can sue influencers — a significant new threat. The now infamous Fyre Festival — which turned into

the Fyre Fiasco — has attracted no less than nine lawsuits. One of these suits alleged more than 400 public figures, including Kendall Jenner, Bella Hadid and Emily Ratajkowski, unlawfully posted to Instagram, Twitter and Facebook, without disclosing compensation they received for promoting the event. Kendall Jenner was reportedly paid \$250,000 for a single Instagram post endorsing the festival. This case was voluntarily dismissed. But, the real impact of this lawsuit may be the message that any dissatisfied customer can sue both the brand and its influencers.

NGOs

Some nongovernmental organizations (NGOs), like ad watchdog Truth in Advertising, Inc. (TINA.org), also police influencers and brands.

TINA.org investigates brands and influencers and then publishes verbal smackdowns. Earlier this year, TINA.org sent a "snitch" report to the FTC, alleging illegal influencing by actress Vanessa Hudgens (on behalf of Chad Wood Hair, Alice and Olivia, and Le Specs), by actress Sophia Vergara (for Payless Shoes, Head and Shoulders, Lorraine Schwartz, Ninja Coffee, Rooms To Go, etc.), singer and model Ciara (touting Revlon, Alaska Airlines, Buffalo Long, etc.), and Kourtney Kardashian's baby daddy and TV personality Scott Disick (for endorsing Talentless, Jetlux, Polaroid, SoleStage, Stadium Goods and Wheels Up).

Plenty of businesses are also starting to regulate influencers. Among others, Facebook and Instagram have also adopted policies requiring disclosure of compensation for endorsements.

There's No Escape: International Rules

Many foreign countries have laws that regulate influencers whose endorsements of brands appear on social media in their countries. Europe is particularly active. In France, both influencer and brand can be severely penalized for any failure to disclose the compensation paid to an influencer. Influencers who violate French law can be fined up to €300,000 (approximately \$336,000) and can be imprisoned for up to two years, while brands can be fined up to €1.5M (approximately \$1,680,000). Similar laws exist in Belgium, Germany, Italy, the Netherlands, Spain and the — maybe in/maybe out — United Kingdom.

Rules, Rules, Rules

Influencers are also finding out — the hard way — that the normal rules of business apply to them. Increasingly, brands and their marketing arms are suing their own influencers for breach of contract. Studio 71 sued YouTube star Bethany Mota, claiming she failed to provide required video and posts, despite agreeing to pay her a talent fee of \$325,000. PR Consulting sued actor Luka Sabat for failure to provide required Instagram

posts or to be photographed wearing Snap's Spectacles at fashion shows. All in all, it's getting harder to skip work — and still make those yacht payments.

What's A Rising Star Influencer To Do?

As your influence and compensation grow, so does the target on your back. Consider the following to limit your exposure:

- **Understand and Negotiate Contracts.** If there is a written contract, let's all close our eyes and pretend you're going to read it. Next:
- **Don't overpromise.** If you are not going to wear Spanx — and nothing else — to Coachella, don't say you will.
- **Do get protection, like indemnification.** If anything goes wrong with the product and people start suing, the brand should take care of that mess.
- **Obey the Law.** Spend a little time and money figuring out what you should do, instead of a lot of time and money getting out of trouble.
- **Do Your Due Diligence.** Stay away from sleazy brands that are bound to get sued.

- **Get Insurance.** Insurance companies have started offering influencers special coverage for claims of defamation, breach of advertising laws, intellectual property infringement, negligence and violation of others' privacy rights. Let's say a prominent influencer retweets someone else's post and is sued for libel. The right coverage will pay for legal defense costs and any judgment against the influencer, up to the policy limits. If you're building a business — along with fame — insurance helps manage your risks.

- **You Get What You Pay For.** Don't make the mistake of copying the "Compliance Program" of your BFFs. Plenty of teen influencers are borrowing tremendously inadequate disclosures from each other. The following was recently seen posted by one available defendant: "By entering, entrants conform (sic — I'll be doing that a lot) the (sic) are at least 18+ years of ages (sic), release Instagram of responsibility, and agree to abide by Instagrams (sic) terms of use." I just get sic when I read that.

Not every influencer is going to get busted, especially the guys who get free Nerf Blasters for posting rave reviews. But, on the path to influencer stardom, your risk grows. Lawsuits and other legal hassles are not signs of success, but they come with fame. Understand the risks and protect yourself.

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Jack Garson's practice focuses on Real Estate, Construction and Business law. He serves as a legal advisor for numerous local, regional and national companies. In his role as legal counsel, Jack also serves as a strategic advisor and lead negotiator. Further, Jack provides guidance on the structure of complex transactions, the resolution of business disputes, the growth and sale of companies, and the management of issues such as liability and risk reduction, employment practices, and enhancing profitability.

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