

# SOCIAL MEDIA INFLUENCERS AS ENDORSERS: PITFALLS AND BEST PRACTICES TO AVOID THE IRE OF THE FTC

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During the last decade, social media influencers have become as important in advertising campaigns for major brands as traditional celebrity endorsers in print and broadcast media. According to a report from *Business Insider*, brands are projected to spend \$15 billion on influencer campaigns by 2022, up from \$8 billion in 2019. Audrey Schomer, *Influencer Marketing: State of the Social Media Influencer Market in 2020*, Business Insider (Dec. 17, 2019), <https://www.businessinsider.com/influencer-marketing-report>. Individual influencers are cashing in, too: some have earned as much as an estimated \$1 million per Instagram post as of 2018. *Id.* And the business of influencers is not limited to celebrities: the market has expanded to include “micro-influencers,” with a social media following between 5,000 and 100,000, and “nano-influencers,” with a following of less than 1,000. While their following may be small from a relative standpoint, micro- and nano-influencers have proven to be very effective at driving traffic to the brands they endorse because their followers tend to be very engaged.



This trend has not gone unnoticed by the Federal Trade Commission (FTC). In 2017, the FTC filed its first law enforcement action against individual online influencers Trevor Martin and Thomas Cassell—known on their YouTube channels as TmarTn and Syndicate—who allegedly deceptively endorsed the online gambling site CSGO Lotto without disclosing that they owned the company. That same year, the FTC sent over ninety “educational” letters to major brands “reminding” them that, if influencers are endorsing a brand and have a “material connection” to the marketer, that relationship must be clearly disclosed, unless the connection is already clear from the context of the endorsement. *See* Lesley Fair, *Three FTC Actions of Interest to Influencers*, FTC (Sept. 7, 2017), <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers>.

The FTC followed up this campaign with twenty-one letters to influencers who received the initial correspondence, asking them to specify if they have “material connections to the brands” identified in specific social media posts, and if they do, to “spell out the steps they will be taking to make sure they clearly disclose their material connections to brands and businesses.” *Id.* And in 2019, the group truthinadvertising.org filed a complaint with the FTC regarding what they claim is one of the most viewed YouTube channels of all time,

Ryan Toys Review, featuring seven year-old “kidfluencer” Ryan Guan. The complaint alleges that Guan purportedly failed to disclose material connections to the companies that manufactured products or provided services he reviewed on his channel. *See* Laura Smith & Bonnie Patten, Letter Complaint on Behalf of truthinadvertising.org to Andrew Smith, Director, Bureau of Consumer Protection, and Mary Engle, Associate Director, Division of Advertising Practices, FTC, *Re: Ryan ToysReview’s Deceptive Native Advertising* (August 28, 2019), [https://www.truthinadvertising.org/wp-content/uploads/2019/08/8\\_28\\_19-ltr-to-ftc-re-Ryan-ToysReview\\_Redacted.pdf](https://www.truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-ftc-re-Ryan-ToysReview_Redacted.pdf).

This article provides an overview of federal and California law applicable to influencers in this rapidly growing field. As discussed below, updated guidelines published by the

FTC in December of 2019 go a long way towards providing brands with a roadmap that will help them avoid the potential problems that can arise in using influencers in connection with a marketing campaign.

### The FTC Act and the FTC’s Endorsement Guides

The federal statute governing unfair or deceptive advertising is the Federal Trade Commission Act or “FTC Act,” and is codified at 15 U.S.C. §§ 41-58. Neither the FTC Act nor FTC regulations or guidelines define what the FTC considers to be an “influencer.” However, the FTC has long regulated celebrity and other endorsements of products, and published “Endorsement Guides” at 16 C.F.R. Part 255. When the FTC sent out letters to influencers and brands in 2017, it expressly ref-

erence to the message appears to reflect . . . and may be an individual, group, or institution.” *Id.* As made clear in examples provided by the FTC in the Endorsement Guides, as well as in its recent publication directed to influencers discussed below, this broad definition of “endorser” includes social media influencers.

The Endorsement Guides provide that one of the critical issues for posts by social media influencers and brands that republish or cite to their endorsements is that any “material connection” between influencer and brand must be “fully” disclosed. As the FTC puts it, “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.” 15 C.F.R. § 255.5.

As an example, the Endorsement Guides cite a hypothetical in which a college student who has a reputation as a video game expert posts entries about his gaming experiences on his popular personal blog. The manufacturer of a new video game system sends him a free system and asks him to write about it on his blog. He then tests it and writes a favorable review. The FTC notes that in this scenario:

Because his review is disseminated via form of consumer-generated media in which his relation-

ship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to this endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

15 C.F.R. § 255.5, Example 7.

The Endorsement Guides also warn that

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erenced the Endorsement Guides, and noted that they “apply to marketers and endorsers.”

The Endorsement Guides apply to anyone who makes an “endorsement,” not just those who are paid to review or endorse products or brands, or who have a social media following at a particular level. The FTC defines “endorsement” as “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.” 16 C.F.R. § 255.0(b). The FTC defines “endorser” as “[t]he party whose opinions, beliefs, findings,

both endorser and seller of advertised products may be liable for false advertising if the endorser makes statements that are false or misleading, regardless of whether a material connection between the endorser or seller is disclosed. 15 C.F.R. Part 255.1(d). And an endorser must be a bona fide user of the product at the time the endorsement is given, and must reflect the endorser's honest opinions and beliefs. *Id.* at §§ 255.1(a), (c).

### The FTC's December 2019 Publication "Disclosures 101 for Social Media Influencers"

Because the Endorsement Guides were not tailored specifically for influencers, and in light of the explosive growth of influencers since the Endorsement Guides were published, the FTC issued a brochure in December 2019 targeted specifically at influencers, with the straightforward title "Disclosures 101 for Social Media Influencers" (the "Disclosures 101 Brochure"). See FTC, Disclosures 101 For Social Media Influencers (Nov. 2019), [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf). The FTC also produced a companion video illustrating compliance issues for influencers that it published online. See FTC, Do You Endorse Things On Social Media (Nov. 4, 2019), <https://vimeo.com/370971397>.

The Disclosures 101 Brochure outlines some very useful information for influencers and brand owners about when disclosures of material connections should be made, including the following:

- Any financial, employment, or personal relationships should be disclosed. Financial relationships aren't limited to money and include anything of value. Influencers should make a disclosure when they receive any product or thing of value, even if they weren't asked to review that particular item. Disclosures should be made even if an influencer believes their review is unbiased, and regardless of whether the influencer's followers know about a brand relationship.
- Hashtags and other tags, likes, pins, and similar ways of showing an influencer likes a brand constitute endorsements.
- If posting from abroad, U.S. law still applies if it is reasonably foreseeable that the post will affect U.S. consumers, and foreign laws may also apply.
- There is no need for an influencer to disclose that they do *not* have a relationship with a particular brand if they are simply telling people they like a product, and have no material connection to the brand.

See Disclosures 101 Brochure, at 3.

The FTC also provides valuable information in the Disclosures 101 Brochure regarding *how* influencers should disclose material connections to brands, including the following:

- Place the disclosure "so it's hard to miss"—i.e., within "the endorsement message itself." The FTC notes that "[d]isclosures are likely to be missed if they appear only on an ABOUT ME or profile page, at the end of posts or videos, or anywhere that requires a person to click MORE." And disclosures should not be mixed "into a group of hashtags or links."
- Endorsements in the form of photographs on platforms like Snapchat and Instagram (including Instagram Stories) should "superimpose the disclosure over the picture and make sure viewers have enough time to notice and read it."
- If the endorsement is in a video, the disclosure should be in the video itself, "and not just in the description uploaded with the video." Also, visual and audio disclosures should be made because "[s]ome viewers may watch without sound and others may not notice superimposed words."
- For live stream endorsements, disclosures "should be repeated periodically so viewers who only see part of the stream will get the disclosure."
- Use simple and clear language. For example: "Thanks to Acme brand for the free product" will usually suffice "if placed in a way that's hard to miss;" terms like "advertisement," "ad," and "sponsored" are acceptable if similarly placed; on a space limited platform like Twitter, "AcmePartner" or "Acme Ambassador" (where Acme is the brand name) are acceptable options; using hashtags such as #ad or #sponsored with the disclosure is not necessary, but "is fine"; vague or confusing terms such as "sp," "spon," or "collab" or stand-alone terms like "thanks" or "ambassador" (without the brand name) should be avoided; and disclosures should be in the same language as the endorsement itself.
- Don't assume that a platform's own disclosure tools are sufficient to avoid liability. Rather, use such tools "in addition to your own, good disclosure."

See Disclosures 101 Brochure at 5.

Finally, the FTC reiterates in the Disclosures 101 Brochure that you "can't talk about your experience with a product you haven't tried," that "[i]f you're paid to talk about a product and thought it was terrible, you can't say it was terrific," and that "[y]ou can't make

up claims about a product that would require proof the advertiser doesn't have—such as scientific proof that a product can treat a health condition." Disclosures 101 Brochure at 6.

In sum, the FTC has now issued *very* specific guidelines to help influencers and brands avoid running afoul of the FTC Act on various social media platforms. While the guidelines themselves do not have the force of law, they provide a clear roadmap as to how the FTC will apply the FTC Act in this context. Influencers and brand owners would be well advised to follow the straightforward suggestions described in the Disclosures 101 Brochure if they want to avoid being the subject of the next high-profile complaint to the FTC or enforcement action by the FTC itself. Brands should also consider including the guidelines set forth by the FTC in the Disclosures 101 Brochure in their agreements with influencers.

### Potential Pitfalls for Influencers and Brands Under California Law

In addition to the FTC Act, posts by influencers can constitute advertising that, if false or misleading, can run afoul of California's False Advertising Act (Cal. Bus. & Prof. Code §§ 17500 *et seq.*), Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*), and/or Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*). This is all the more reason to disclose any material connections between influencers and brands, and to otherwise follow the disclosure guidelines outlined by the FTC.

Finally, brand owners should make sure that they comply with any requirements outlined in California's new Assembly Bill 5, which went into effect on January 1, 2020, so that any influencers they may have relationships with are properly classified as independent contractors or employees, as the case may be. See Cal. Lab. Code §§ 3351, 27503; Cal. Unemp. Ins. Code §§ 606.5, 621.



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*This article first appeared in Orange County Lawyer, April 2020 (Vol. 62 No. 4), p. 37. The views expressed herein are those of the author. They do not necessarily represent the views of Orange County Lawyer magazine, the Orange County Bar Association, the Orange County Bar Association Charitable Fund, or their staffs, contributors, or advertisers. All legal and other issues must be independently researched.*