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# Praxis

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## Advertising

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### Recent FTC Guidance for Brand and Social Media Influencers

The Federal Trade Commission (FTC) recently released a new guide and related video titled, “Disclosures 101 for Social Media Influencers.” The Disclosures 101 Guide describes in plain, easy-to-read language the disclosure requirements applicable to endorsements on social media in order to avoid misleading consumers or acting in a manner deemed unfair or deceptive advertising under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (the “FTC Act”).

Although the Disclosures 101 Guide targets social media influencers directly, it’s important that brand owners/advertisers also stay apprised of influencers’ obligations, not only to protect their consumers, but also because the brands/advertisers themselves can be held liable for their influencers’ unlawful endorsements if they do not take the appropriate steps to help prevent such violations.

As background, the FTC Act, which is enforced by the FTC, generally prohibits unfair, deceptive, and misleading advertising. The FTC previously published its Endorsement Guides, which provide the FTC’s interpretation of the FTC Act’s disclosure

requirements for endorsing a product, service, or company. The FTC’s latest Disclosures 101 Guide is the FTC’s interpretation of certain disclosure requirements for any such endorsements on social media.

This is not the first time the FTC has specifically addressed social media influencers—in 2017, it sent letters directly to influencers and marketers reminding them of their disclosure obligations. *See* “FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship” <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>. The publication of the Disclosures 101 Guide suggests the FTC believes failures to make appropriate disclosures on social media is a pervasive and persistent issue.

Below are high-level summaries of the FTC’s guidance for both influencers and brands.

#### **1. Influencer Disclosure Requirements Relating to Social Media Endorsements**

- **Who is an influencer, and when might the FTC’s guides apply?**
  - The FTC does not expressly define the term “influencer.” However, the

FTC’s view of who is subject to disclosure requirements is broad and is not limited to only those who are paid money by a brand in exchange for a product placement or review, or those with a certain number of social media followers. Rather, the disclosure requirements apply to *any* person (or entity) who (i) makes any endorsement (*see* below for more on what constitutes an endorsement) about a brand or its products/services, and (ii) has “material connection” to that brand, which includes a financial, employment, personal, or family relationship with the brand. A “financial” relationship does not require an exchange of money—it includes simply receiving a free product, service, or other benefit from the brand. In addition, the benefit received from the brand does not need to be directly tied to the specific social media post. For example, if a person has an ongoing contract with a brand, e.g., a brand sponsorship of an athlete, a disclosure is very likely required if that person posts endorsements of the brand or its products/services.

- If a person has no such “material connection” to the brand, but simply likes the brand or its product(s) and wants to give it a good review, no disclosure is required.
- It’s worth noting that the FTC Act will apply to influencers located outside the U.S. if it is

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reasonably foreseeable that U.S. consumers will see the post (in addition to any applicable advertising laws of the country in which the influencer is located, and other potential countries).

- **What constitutes an endorsement?**

- The FTC takes a broad view of what constitutes an endorsement, encompassing more than an express favorable review of a product. An endorsement includes any advertising message that consumers are likely to believe reflects the opinion of a person or entity apart from the sponsoring advertiser. In the FTC's view, each of the following could be an endorsement: (i) tagging a brand in a post; (ii) including a brand in a post even if the post doesn't say anything about the brand, if consumers will view it as promoting that product; or (iii) merely sharing or "liking" a post by the brand (although the FTC acknowledges not all social media platforms allow the endorser to make a disclosure when "liking" a post).

- **What must the disclosure say?**

- An influencer must disclose a material relationship with a brand clearly and unambiguously. The Disclosures 101 Guide provides a number of examples. Specifically, it states that disclosures such as the following may be sufficient, with or

without a "#" in front of the words: "ad," "paidad," "advertisement," "sponsored," "[insert brand] partner," or "thank you [insert brand] for the free product." Meanwhile, disclosures like "sp," "spon," "thank you," "partner," or "ambassador" alone (with or without a "#" in front of the words) likely will not be sufficient because consumers may not clearly understand the relationship to the brand.

- **How/where should the disclosure be made?**

- The disclosure must be placed with the endorsement message itself and in a place and manner that is hard for consumers to miss. This could be within a post's description if it is easily seen, i.e., not buried in a sea of hashtags or at the end of a long hashtag. Influencers must not require consumers to click any link or go to a different page in order to find the disclosure. For example, requiring consumers to either (i) click "more" on a post to see more text (such as in a long Instagram post description) or (ii) navigate to the influencer's profile page in order to see the disclosure would be insufficient.
- The FTC has also provided examples of how disclosures should be made in videos or time-constrained content to ensure consumers are likely to see the disclosure. For stories (e.g., Facebook or Instagram

stories, which could be a video or picture), the FTC suggests superimposing the disclosure text over the video/photo for enough time so that the viewer can clearly see and read the disclosure. For YouTube videos, a good practice is to have disclosures often and throughout the video. Disclosures that appear only at the end of the video or only in the text description below the video are likely to be missed and would thus be insufficient. Similarly, for live stream videos, the FTC suggests making the disclosure multiple times given that consumers may join at different times during the video.

- **Are disclosures of material relationships the only obligation of an influencer when endorsing a product or brand?**

- No. The Disclosures 101 Guide reminds influencers that the content of the endorsements themselves remain subject to general prohibitions against deceptive and misleading advertising. Specifically, influencers may not make any claims that the brand itself cannot make (e.g., an objective claim requiring substantiation that the brand cannot substantiate). Influencers also may not lie in their endorsements—they may not say a product is great if they in fact think it is not great or have never tried such product.

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## 2. Brand Obligations Relating to Social Media Endorsements

- **Could a brand be liable for the acts of its influencers?**
  - Yes, a brand could be held liable for the acts of its influencers, and the FTC has stated that if law enforcement becomes necessary, its focus will usually be on the brand or the advertising agency and/or public relations firm hired by the brand. See “The FTC’s Endorsement Guidelines: What People Are Asking at <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#socialmediacontests>.”
  - In addition to FTC enforcement, there is also some risk of unfair competition claims by competitors.
  - Brands should also be aware of the disclosure requirements to the extent they want to reuse any of the endorsements as testimonials on their own social media pages or websites.
- **What actions does the FTC suggest a brand take to help its influencers comply with their obligations and limit its own liability?**
  - The FTC acknowledges that a brand cannot police every word an influencer says, but it nonetheless requires a brand to have a reasonable training, monitoring, and compliance program in place for its influencers. For instance, the training should explain what types

of claims the influencer can and cannot make. Trademark monitoring or watch services can be helpful to ensure influencers using the brand are including appropriate disclosures. Finally, a brand should also take action in the event it becomes aware of violations, including notifying influencers and/or a third-party agency. Brands should be prepared to terminate the relationship in the event of chronic or repeated failures.

- **What are a brand’s obligations if its social media program is run by a third party, such as a social media or marketing agency, or a public relations firm?**
  - The FTC’s position is that a brand cannot evade its obligations simply by delegating its social media program to a marketing agency, public relations firm, or other third party. In addition, contractually requiring the third party and its influencers to comply with applicable law and the FTC guidance, though sound practice, is alone insufficient. The brand itself must (i) ensure that such third party has a reasonable program in place for training and monitoring its influencer network, and (ii) monitor and make reasonable efforts to know what the influencers in the network are saying about the brand.
- **What else should a brand do to protect itself?**
  - A brand should be sure to protect itself contractually. It should enter into contracts with its

third-party agencies or directly with influencers that expressly (i) require compliance with all applicable law, rules and regulations, as well as the FTC guidance; (ii) allocate responsibility for noncompliance; and (iii) clarify the independent contractor relationship between the parties. In some circumstances, the brand may wish to have approval rights over the influencer’s content, but there can be some downsides to doing so.

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