

# **INFLUENCERS:**

## **ARE YOU COMPLYING WITH THE FEDERAL TRADE COMMISSION GUIDELINES FOR ENDORSEMENTS AND TESTIMONIALS?**

Apparently, during Covid-19 pandemic social media has become the only “social” type of gathering allowed lately and the only place where people can see and be seen. People, who never thought they would promote services and products on social media are now active through partnerships with brands or promoting their own brands. Those people are known as the influencers.

However, what the majority of those who consider themselves influencers do not realize is that what they are doing is advertising on social media, and in the United States the Government body who controls this type of advertising is The Federal Trade Commission (FTC). The FTC has Guidelines that should be followed by the Influencers. Furthermore, the Guidelines should be complied with not only by Americans but also by foreign influencers if the products and services that they are sponsoring are sold and seen by US consumers.

Considering that, this paper will discuss who are the influencers, the applicable federal laws and guidelines to them, the required disclosures that they should make when endorsing a brand or giving testimonials and what is next for them.

### **Who are the influencers? It is not about how many followers one has on social media but rather the material connection one has with a brand**

An Influencer is not someone who has many followers or has the verified checkmark on Instagram, Twitter or any other social media platform. According to the Guidelines an influencer is someone who has a “material connection” with the brand<sup>1</sup>. This material connection can be (1) financial (e.g. the brand pays the influencer or gives him/her products or services for free or with a discount), (2) personal (e.g. the influencer is the designer of the brand, or has a financial interest in the company), (3) family (e.g. someone in the influencer’s family is the founder of the company, president, CEO etc.) or (4) employment (e.g. influencer works for the brand). Thus, if an influencer has any of those types of connections with the brand and is endorsing or giving a testimonial about the brand they should comply with the FTC Guidelines and make effective disclosures on social media about their relationship with the brand.

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<sup>1</sup><https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>

## Applicable Federal Laws to Influencers

The FTC Guidelines for influencers are not a law but as its name indicates only Guidelines meaning conducts and procedures that should be followed.

However, the FTC has the power to conduct investigations and bring cases involving endorsements made on behalf of advertisers according to Section 5 of the FTC Act, which prohibits deceptive advertising. The law is mainly directed to the advertisers who are the ones to suffer the major financial consequences of an investigation and also who are sued. The influencer normally will receive a letter from FTC requiring that he or she make the appropriate disclosures according to the FTC Guidelines. If the influencer does not comply with the FTC requirements during an investigation the FTC could bring a lawsuit against the influencer for deceptive advertising. Thus, even though the Guidelines themselves don't have the force of law, any conduct inconsistent with it may result in law enforcement actions alleging violations of the FTC Rules. Considering that, it is important for the influencer to be aware of the FTC Guidelines and make the required effective disclosures. An investigation letter from the FTC is a legal procedure and also could damage the personal brand of the influencer. No influencer would like to associate his or her image with a deceptive advertising practice because this would also hurt his/her personal brand.

The Guidelines focus on avoiding unfair or deceptive advertising practices to mislead “a significant minority” of consumers. This is why, the Guidelines require that the influencer make effective disclosures of his or her relationship with the brand and express an honest opinion because he or she is advertising in social media and influencing a consumer to purchase a product or a service.

Imagine, for example, that a fashion influencer is posting a picture wearing clothes gifted by Brand X and “tags” the brand but does not disclose that she is an ambassador or received the clothes for free. This will be considered a violation of the Guidelines because the consumer would be mistaken about the fact that the influencer has a specific taste for this merchandise when in reality this is not true because the influencer received clothes for free in order to endorse Brand X. Regarding this topic, the explanation on the FTC website makes clear that this kind of relationship must be disclosed. For educational purposes we will change the FTC example to fashion as follows: *“I have a YouTube channel that focuses on fashion, beauty, and lifestyle. Sometimes I do product reviews. Beauty brands know how much I love skin care products, so they send me such products as free gifts, hoping that I will review them. I am not under any obligation to talk about any product... and getting these products as gifts really doesn't affect my judgment. Do I need to disclose when I'm talking about a product I got for free?”* Even if you don't think it affects your evaluation of the product, what matters is whether knowing that you got the skin care product for free might affect how *your audience* views what you say about the product. It doesn't matter that you aren't required to review every skin care product you receive. Your viewers may assess your review differently if they knew you got the product for free, so we advise disclosing that fact<sup>2</sup>.

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<sup>2</sup> <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#ftcactapply>

## **Required disclosures for influencers when endorsing a brand or giving testimonials.**

The Guidelines contain details about the type of disclosures that an influencer shall make when endorsing or giving a testimonial about a brand but the main disclosure that must be made is about the relationship between the influencer and the brand (financial, personal, family or employment). On the other hand, of course if someone is just telling people on social media about a product or service that he/she purchased and liked but has no relation with the brand no disclosure should be necessary.

Another important observation is that if the Influencer is posting from a foreign country he/she shall comply with the Guidelines if it is reasonably foreseeable that the post will affect U.S. consumers.

### *How to disclose*

The disclosures must be made in a place that people can see right away and clearly understand the connection between influencer and the brand. It also should be in proximity with the relevant claim made by the Influencer. Here are some examples:

- ⇒ The disclosure must be made in the endorsement message itself and the consumer should not need to click “more” to be able to read it.
- ⇒ If the endorsement is in a picture superimpose the disclosure over the picture and make sure the viewers have enough time to notice and read it.
- ⇒ If the influencer endorsement is in a video the disclosure should be in the video and not in the video description.
- ⇒ If the disclosure is made on a *live stream* the disclosure should be repeated periodically in order for viewers who see only part of the stream will get the disclosure.

The disclosure should also be clear and conspicuous:

- ⇒ Using simple explanations like “Thank you, Brand X, for the free product”, “advertising”, “sponsored”, ad, #sponsored, paid promotion, Brand X paid for my trip, thanks Brand X for the trip.
- ⇒ For posts made abroad or in another language the disclosure should be made in the same language as the post.
- ⇒ When using a hyperlink make the link obvious to your target audience.
- ⇒ Only “tagging” a brand is not an enough disclosure, you must tell consumers about your relationship with the brand, such as Brand Ambassador, #BrandXambassador (the brand being Brand X).

## **What is next for influencers**

In 2017 the FTC sent over 90 letters to influencers and marketers advising them to clearly and conspicuously disclose their relationship with the brands when promoting or endorsing a product through social media. The letters were sent in response to a sample of Instagram posts analyzed by FTC which contained endorsements or referencing brands, and the consumer could not see if in fact the ads were sponsored. The letters informed the Influencers that when multiple tags, hashtags, or links are used, readers may just skip over them, especially when they appear at the

end of a long post. Some of the letters also addressed that some particular disclosures used by Influencers were not sufficiently clear because they were not pointing out that many consumers will not understand a disclosure such as the following: “#sp,” “Thanks [Brand X],” or “#partner” in an Instagram post to mean that the post is sponsored.

This year, in February 2020, the Commissioner Rohit Chopra from the FTC issued a statement about the need for a review of the endorsement guides and to establish new requirements for social media platforms and advertisements regarding civil penalties liabilities. The Commissioner also said that FTC’s main concern is the advertisers and not small influencers: *When individual influencers are able to post about their interests to earn extra money on the side, this is not a cause for major concern. But when companies launder advertising by paying someone for a seemingly authentic endorsement or review, this is illegal payola. If these companies are also pressuring influencers to post in ways that disguise that their review or endorsement is paid advertising, those advertisers especially need to be held accountable. I am concerned that companies paying for undisclosed influencer endorsements and reviews are not held fully accountable for this illegal activity. I agree with my colleague, Commissioner Noah Joshua Phillips, who noted that “posting deceptive or inaccurate information online, or engaging in other deceptive conduct like selling fake followers, distorts the online marketplace, preventing consumers from making informed purchasing decisions and creating an uneven playing field for those that follow the rules.” When we do not hold lawbreaking companies accountable, this harms every honest business looking to compete fairly.* The Commissioner also concluded that the next steps for the endorsement guides were developing technology for the social media platforms to facilitate and either directly or indirectly profit from influencer marketing, codify the existing endorsements guide for advertisers into formal rules in which violators can be liable for civil penalties and establish requirements which specifies contractual arrangements that companies shall adopt when hiring influencers.

## **Conclusion**

Whether you are an established Influencer or you are planning on becoming one, it is important that you comply with the FTC Guidelines. Even though the Guidelines are not binding themselves, they contain some principles of ethical advertising practices that anyone in social media should be following, especially about clear and conspicuous communication. This is an important strategy in social media communication because your personal brand is the most important and valuable asset you have. If you associate your personal brand with an advertiser who is being investigated or sued by the FTC for misleading advertising practices your personal brand will be damaged as well, and consumers will associate you with the unethical brand causing you to lose your credibility in social media.

Despite that, the Commissioner’s review proposal for endorsements guides was issued before Covid-19. After Covid-19, we saw a tremendous explosion of social media interaction and this only tends to grow since our interactions become mostly online. Considering that, there is a huge chance the FTC will increase its investigations among advertisers and influencers. If you are an influencer you should take note and make sure you follow the guides strictly, even if your advertiser does not.