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Client Alert Commentary

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Brands and Influencers: Navigating Influencer Agreements from Macro to Micro

Brands seeking to reach valuable social media audiences must carefully consider the legal requirements and consequences of engaging influencers.

Who Are "Influencers"?

An influencer is an individual who has the power to affect the purchasing behavior of others because of the individual's experience, knowledge, position, and/or relationship with his/her social media audience. Influencers generally fall into two primary categories: macro influencers and micro influencers.

Macro Influencers

Macro influencers have large social media followings and include well-known celebrities, athletes, and public figures who have legions of devoted fans who are eager to emulate the lifestyle and product preferences of such influencers. This group of influencers also includes experts and tastemakers in specific industries (including parenting, fashion, gaming, travel, entertainment, fitness, beauty, home, and food) who may not be household names but who have a significant number of devoted followers in their respective areas of expertise, which makes them attractive partners for leading brands in such industries.

Micro Influencers

Micro influencers are everyday consumers who have become known for their knowledge in a specialized market and have a significant social media audience of anywhere between 1,000 and 100,000 followers who are devotees of that niche (*e.g.*, a young, stay-at-home mom who shares fashion tips, recipes, and baby care advice on her blog and social media channels targeted to other young mothers). Although micro influencers generally have smaller social media followings than macro influencers, their audiences are hyper-engaged and have a consistent, interactive relationship with the micro influencer and a high engagement rate with the micro influencer's content. Such "everyman" influencers can have a significant impact on a targeted group of consumers.

Influencer Agencies / Representation

Influencers and the brands that seek to partner with them are represented by a mix of conventional agencies, influencer-specific agencies, and self-representation, depending on the type of influencer or brand and the nature of the relationship between the two. On the influencer side, many of the largest macro influencers are represented by traditional talent and/or modeling agencies, while influencers with fewer followers are either self-represented or represented by smaller niche agencies that focus primarily on digital influencers. On the brand side, some brands negotiate directly with individual talent, while others contract through agencies. Notably, PR agencies, advertising agencies, and talent procurement agencies are all starting to allocate part of their media spend to influencer procurement.

Why and How Do Brands Use Influencers?

Approximately three billion people — or 40% of the world's population — actively use social media, and by 2020, influencer marketing is projected to be a US$5 - $10 billion market. Brands work with social media influencers to reach these audiences for a variety of reasons. First, engaging influencers can be economical for brands because influencers' fees are usually lower than fees paid under traditional celebrity endorsement deals. Second, the launching of influencer marketing campaigns is often efficient because brands can identify, connect with, and hire relevant influencers relatively easily. Third, influencer posts can be targeted to a direct, engaged audience, often with specific demographics or shared traits. Relatedly, influencers (in contrast to traditional pitchmen) have necessarily achieved a level of credibility with their followers, and brands are therefore recognizing the value of tapping into these authentic and active relationships that have already been established with their audiences. Finally, it is easier for brands to accurately measure audience engagement with respect to an influencer campaign, since many social media platforms provide robust data and analytics that, in turn, provide valuable insights into the performance of influencer campaigns.

Brands utilize a number of social media platforms to exploit the messages of their influencers. Through these channels, influencers post branded content, video blogs, product shots, testimonials, and how-tos. In addition, influencers are often required to appear at live events, trade shows, and press junkets to further connect with their audience while promoting their brand partners.

A few examples of how brands have effectively used influencers to launch campaigns and reach targeted consumers include:

- Macro Influencer (Famous Celebrities): An online home-sharing / rental service strategically planned influencer campaigns with well-known celebrities in conjunction with popular sports and entertainment events (*e.g.*, the Super Bowl, music festivals) that are known to cause spikes in social media usage. In each sponsored post, a celebrity shared a picture from his/her glamorous vacation and thanked the service in the caption in exchange for a free stay at some of its most luxurious properties. Through these campaigns, the brand generated an enormous amount of media exposure and brand awareness among mass audiences.

- Macro Influencer (Industry-Specific Influencers): An electronics company recently partnered with several prominent photography influencers to develop and publish brand-sponsored photos on a popular social media platform to promote the release of the company's new smartphone with advanced camera features. By working with prominent photographers, the brand reached millions of people, inspired incredibly high levels of engagement, and doubled the prior year's number of smartphone sales.

- Micro Influencer: A popular beauty products company has utilized micro influencers, or regular people, who engage with the brand on social media and at pop-up events to post reviews of its products. The most engaged commenters and customers are included in special events and referral programs in which they receive promotional codes to share reviews and discounts with their followers in exchange for store credit. The company also has a more formal arrangement with official representatives who have landing pages on the brand's website. When people purchase products through a representative's page, the representative receives a combination of a monetary commission and store credit. The CEO estimates that the brand owes 90% of its revenue over the past few years to its fans on social media.

Legal Considerations

Generally speaking, macro influencers tend to have long-form engagement agreements that are often negotiated by their lawyers or representatives and are structured similarly to typical endorsement agreements. Micro influencers, on the other hand, are often self-represented and tend to be engaged pursuant to form agreements, handshake deals, and even text-messaged terms. In any event, brands should take into account the following considerations when structuring and negotiating influencer deals.

Scope of Services

Influencer relationships vary in scope and can range from the engagement of an influencer for a single social media post to long-term partnerships with influencers across multiple platforms with regular posting requirements. To avoid any uncertainty, brands should clearly define the scope of services, including the volume and frequency of posts/appearances, the timing of posts, and the type of branded content (if any) that they would like the influencer to create. The timing of post(s) and the scheduling of appearances are strategic decisions aimed at maximizing engagement and, depending on the deal, are usually dictated by the brand's marketing team. In addition, brands often partner with influencers to produce branded content (*e.g.*, short films, music videos, video blogs) that can also be used in conjunction with, or as the centerpiece of, a social media campaign.

Fee

Brands and influencers structure their fee arrangements in a variety of ways. In some relationships, the brand engages an influencer in exchange for free and/or discounted products or services in lieu of any fixed fee. In other arrangements, the brand agrees to pay an influencer a flat fee, either per post or per campaign. Alternatively, in affiliate programs, brands pay influencers a percentage of sales generated. In certain large macro influencer deals, brands may provide influencers with some form of equity participation in their companies. No matter the fee structure, brands may consider setting certain engagement thresholds and may tie the compensation structure to such thresholds. As an example, an influencer could be compensated based on the number of "likes" generated for a given post.

Morals / Social Responsibility Clause

Before entering into a contractual relationship with an influencer, brands should thoroughly investigate the influencer to confirm that his or her views, behavior, and reputation are consistent with the image that the brand hopes to project to its consumer audience. To further protect themselves, brands can (and should) include a so-called "morals" clause in influencer agreements in order to mitigate against future unforeseen events and conduct (as well as past transgressions that may come to light). A morals clause is a contractual provision that holds a contracted influencer to certain behavioral standards and prohibits socially irresponsible behavior that could tarnish the reputation of the brand. A violation of such a clause generally entitles the brand to terminate its agreement with the influencer and/or seek other specific remedies under the agreement, including the right to cause the removal of brand-associated content posted by the influencer. Given the increase in social and cultural awareness, a morals clause is a particularly important contractual protection that can help provide a brand with certain protections in case the brand is blindsided by an influencer's past or present indiscretions.

Exclusivity Windows / Scope of Exclusivity

Brands often negotiate exclusivity windows that prevent influencers from partnering with competitors and/or posting competitive content during an exclusive time period. The exclusivity window can range from 24 hours for a one-off post to a week or more for a series of posts to years for long-term branded-content partnership deals. The exclusivity right can also be limited to certain competitors or can include entire industry groups (*e.g.*, beauty, beverage).

Approval Rights / Creative Control

In general, influencers are valued for their unique, authentic voices. As a result, companies have found that posts tend to perform better when a brand allows an influencer to retain a certain amount of creative input, subject to the brand's final approval rights, rather than providing the creative content directly to the influencer. However, brands generally provide guidelines (including certain restrictions) that the influencer must adhere to and typically retain some creative control over the timing and platform of the posts to ensure that the promotional message is properly targeted to the intended demographics and fits within the desired timing of the campaign.

Ownership of IP

In general, brands own all content created by influencers in connection with the posts/campaign. But, if an influencer has created content outside of a promotion (*e.g.*, a video or song) and will allow a brand to "trade" on such IP, the brand may only be entitled to a license to use such IP specifically for such promotion.

Takedown / Removal Rights

Influencer agreements routinely include provisions detailing takedown and removal rights for the parties. Influencers are often concerned that their feeds will look inauthentic and sponsored, and therefore often want to reserve the right to remove branded content after an agreed upon period of time. Conversely, brands often want to reserve the right to take down content that is inconsistent with the brand's guidelines.

FTC Endorsement Guides[1] / 16 CFR Part 255[2]

As a general rule, the Federal Trade Commission's (FTC) guidelines for paid content require that all paid social endorsements — regardless of platform — be "honest and not misleading." This means that an endorsement must reflect the honest opinion of the endorser and cannot be used to make a claim that the product's marketer could not legally make. Moreover, if there is a connection between an endorser and a marketer that consumers would not expect, and such connection would affect how consumers evaluate the endorsement, that connection should be disclosed. Importantly, this disclosure rule applies if the endorser has been paid or given something of value to endorse the product, and such disclosures must be "clear and conspicuous."[3] For additional information and examples, the relevant sections of 16 CFR Part 255 and certain relevant hypotheticals published by the FTC are included on Exhibit 1.

Although there are no "fines" for violations of the FTC Act, enforcement actions can result in orders requiring the offending party to forfeit money it received in connection with its violations of the FTC Act and to abide by various requirements in the future. If enforcement becomes necessary, the FTC's focus is usually on advertisers or their ad agencies and public relations firms (even though, as noted below, the FTC could also assert claims against the influencers themselves). For example, in 2016 a well-known department store reached a settlement with the FTC over charges that the store did not properly disclose that it had compensated social media influencers as part of a marketing campaign.

With respect to advertiser liability, the general rule set forth in the FTC's guidelines is that advertisers need to have reasonable programs to train and monitor influencers who are paid and directed by the advertiser. The FTC's Endorsement Guides provide that every influencer campaign program should include the following elements:

- An explanation to members of an influencer network with respect to what they can (and cannot) say about the products (*e.g.*, a list of the health claims they can make for products, along with instructions not to go beyond those claims)
- An instruction to members of the network on their responsibilities for disclosing their connections
- Periodic monitoring of influencers' posts
- Follow-up if questionable practices are discovered

Recently, the FTC has enforced the FTC Act against influencers. In April 2017, the FTC sent out more than 90 letters to influencers and marketers reminding them to clearly and conspicuously disclose their relationships with brands on social media. This was the first time the FTC had reached out directly to educate influencers on the guidelines. In addition, at the end of 2017, the FTC settled its first-ever complaint against two social media influencers for not disclosing their connection to a business they touted to their online followers. In that case, two influencers in the gaming industry were charged with deceptively endorsing a gambling website without disclosing their part ownership.

In light of the FTC's actions, brands should consider including the following provisions in their influencer agreements:

- A covenant that the influencer will abide by all applicable laws, including the FTC's guidelines
- A covenant requiring the influencer to include clear and prominent disclosures in his/her posts that are compliant with the FTC's guidelines

Brands should also consider including the FTC's guidelines and/or influencer-specific hypotheticals as an exhibit to their influencer agreements.

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Exhibit 1

Relevant Sections of 16 CFR Part 255: Guides Concerning the Use of Endorsements and Testimonials in Advertising

- **§ 255.0 Purpose and definitions**. (b) For purposes of this part, an endorsement means 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. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

- **§ 255.1 General considerations**.
    - (a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [See § 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.]

    - (d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

- **§ 255.5 Disclosure of material connections**.
    - When 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. For example, when an endorser who appears in a television commercial is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser. Additional guidance, including guidance concerning endorsements made through other media, is provided by the examples below.

FTC Examples

- <u>Example 1</u>. A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services. [See § 255.5.] In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

- Example 2. A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship 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 his 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.

Endnotes

[1] Available at https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

[2] Available at https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf.

[3] The Endorsement Guides provide that disclosures should be: (1) close to the claims to which they relate; (2) in a font that is easy to read; (3) in a shade that stands out against the background; (4) for video ads, on the screen long enough to be noticed, read, and understood; and (5) for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand.