

Influencers in Social Media: New Developments, Guidance, and Pitfalls

Melissa L. Steinman

Partner | 202.344.4972 | mlsteinman@Venable.com

Jennifer M. Malloy

Counsel | 310.229.9936 | jmmalloy@Venable.com

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Regulatory and Litigation Developments for Advertisers and Marketers

Ad Campaigns Incorporating Influencers Must Follow FTC and State Law/Guidance

- **Influencers** = Individuals who typically have large online/social media followings and use endorsements/brand mentions to promote various products and services—may or may not be celebrities.
- How are brands and agencies interacting with influencers now and what are their legal responsibilities?
- Who is regulating?
 - FTC has challenged influencer advertising from multiple angles and is currently updating guidance, as well as general rules on disclosures and specific rules for various types of content.
 - State Attorneys General
 - Multidistrict Investigations and Actions
 - In Some States, District Attorneys
 - National Advertising Division of the Better Business Bureaus National Programs
 - Class Actions and Private Litigation
 - Consumer Groups (e.g., TINA)

Rules of the Road: FTC Endorsements and Testimonials Rule

Part IV

Federal Trade Commission

16 CFR 255

Guides Concerning the Use of
Endorsements and Testimonials in
Advertising Federal Acquisition
Regulation; Final Rule

§ 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.

Rules of the Road

- Be transparent, not deceptive.
- All claims you make (express and implied) must be truthful, substantiated and typical;
- If you can't say or do it yourself, people should not say or do it for you;
- No hiding: Any connection with the brand by the person posting must be disclosed;
- Social media must play by the same rules as other advertising media.



FTC Influencer Regulation Updates

Influencer Regulation Timeline

| | |
|------------------------------|---|
| May 19, 2022: | FTC Releases Proposed Updated Endorsement Guides |
| May 19-July 19, 2022: | Comment Period for Updated Endorsement Guides |
| June 3, 2022: | FTC Unexpectedly Announces Request for Comments for .Com Disclosure Guide |
| June 3-Aug 2, 2022: | Comment Period for .Com Disclosure Guide |
| Oct 19, 2022: | FTC Virtual Event: Online Advertising and Children |
| Oct 19-Dec 19, 2022*: | Comment Period for Advertising and Children |
| Q1 or QII 2023*: | FTC Releases Updated Endorsement Guides |

*: Anticipated

Source: FTC, PRNEWS research

FTC Update to Guides

Reasons for Update/Goals:

- Changes in technology since last update.
- Dominance of social media.
- Loss of Section 13(b) authority after the Supreme Court's ruling in *AMG Capital Management LLC v. FTC*; FTC is looking for alternative approaches for penalizing violators.



Office of the Chair

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

**Statement of Chair Lina M. Khan
Regarding the Endorsement Guides Review
Commission File No. P204500**

May 19, 2022

Today, the Commission is voting on releasing proposed revised “Guides Concerning Use of Endorsements and Testimonials in Advertising” and publishing a Notice seeking comment on them (“Revised Guides”). These Guides tell companies how to use endorsements, testimonials, influencers, and consumer reviews in ads without deceiving consumers.

These revisions come at a time when influencer marketing is becoming increasingly prevalent and as consumers increasingly rely on online consumer reviews to decide what to buy. Reports indicate that the global influencer marketing industry is set to grow to approximately \$16.4 billion in 2022.¹ Indeed, more than 75% of brand marketers intend to dedicate a budget to influencer marketing in 2022.² Influencers who are paid, receive free product or services, or have a relationship with a brand sometimes fail to disclose that material connection, hoping to appear more authentic to consumers. Consumers’ increasing reliance on online reviews can also incentivize advertisers to harness fake reviews, suppress negative reviews, and amplify positive ones.

FTC Notices of Penalty Offenses

- FTC sent out four rounds of letters with approximately 2,600 recipients: 1,100 for the money-making ventures; 700 on endorsements; 70 for-profit education companies; and 700 for companies in the health care industry. Investigations and settlements may still be ongoing.
 - Result of the *AMG* litigation wherein the Supreme Court limited the FTC's authority to seek equitable monetary relief on grounds that the FTCA does not expressly authorize equitable monetary relief under section 13(b).
 - FTC is instead using an old administrative procedure: that provides if a company is on notice that something is violative, and then a later investigation determines there *was* a violation, monetary penalties are still possible.
 - Questionable whether a generalized letter is legal “notice,” but could spur private litigation.
- Most recent letters, in April, attempted to put those companies on notice that “they should avoid deceiving consumers with advertisements that make product claims that cannot be backed up or substantiated.”
 - FTC states that it sent letters outlining notice of “specific unlawful acts and practices, including failing to have:
 - 1) A reasonable basis consisting of competent and reliable evidence for objective product claims;
 - 2) Competent and reliable scientific evidence to support health or safety claims; and
 - 3) At least one well-controlled **human clinical trial** to support claims that a product is effective in curing, mitigating, or treating a serious disease.”
 - The alleged unlawful acts or practices also include:
 - 1) Misrepresenting the level or type of substantiation for a claim, and
 - 2) Misrepresenting that a product claim has been **scientifically or clinically proven**.

Overview of Proposed Revisions

- Changes to certain defined terms expand scope
- Clarification of liability for advertisers, endorsers, and intermediaries
- Consumer reviews
- Product review sites
- Endorsements directed to children
- How to disclose material connections

[Billing Code: 6750-01-P]

FEDERAL TRADE COMMISSION

16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

AGENCY: Federal Trade Commission.

ACTION: Proposed changes to Guides; request for comments.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) is seeking public comment on proposed revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”).

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Proposed Revisions to Defined Terms

- “**Endorsement**”: modified to make clear that tags in social media posts can be endorsements.
- “**Endorser**”: modified to indicate that endorsers could simply *appear* to be an individual, group, or institution; therefore, Guides would apply to bots and fake social media accounts, as well as virtual influencers.
- “**Clear and conspicuous**”: modified to:
 - Stress importance of unavoidability;
 - Clarify that when the triggering claim is visual, at a minimum, the disclosure should be made in the visual portion of endorsement; if a claim is audible, at a minimum, the disclosure should be made in the audible portion; but using both types of disclosures is always better.
 - Note that when an endorsement targets a specific audience, the effectiveness of the disclosure will be evaluated from the perspective of a member of that group.
 - For example, when appealing to senior citizens, the disclosure will be evaluated from the perspective of senior citizens; with children, evaluate from a child’s perspective, etc.
 - FTC has also announced that it is updating its Dot.com Disclosures guidance, which, combined with this and its previous guidance, should be more specific as to individual platforms.

Disclosure of Material Connections

When an advertiser and an endorser have a relationship that the audience wouldn't reasonably expect (a "material connection"), the relationship should be disclosed.

- May include:
 - A business, family, or personal relationship;
 - A monetary payment;
 - The provision of free or discounted products or services, including those unrelated to the endorsed product;
 - Early access to a product; or
 - The possibility of winning a prize, being paid, or appearing on television or in other media.
- A material connection can exist regardless if the advertiser requires an endorsement.
- A material connection does not need to be disclosed with complete details, but the disclosure must be "clear and conspicuous" (as newly defined) and "must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance."
- Disclosure may not be needed when nearly everyone in the audience knows that the person posting about a product is a professional influencer and likely receives compensation, e.g., Kardashians—but what are the outlines?

Disclosures: What Must be Disclosed and How to Do It

Must disclose clearly and conspicuously (and generally early), but one size does not fit all

| Naughty List | Nice List |
|----------------------------------|---|
| [brand]ad | Ad, advertising, paid advertising, [Brand]Ad |
| Sp, spon | Sponsored |
| Ambassador, Employee | [Brand]Ambassador, [Brand]Employee [Brand]_Ambassador, [Brand]_Employee |
| Partner | [Brand]Partner [Brand]_Partner |
| Thanks, Thank You, Thanks[Brand] | Thanks [Brand] for gifting me/Thanks [Brand] for the free [detail the stuff given] |
| [Brand] | |
| Platform disclosure alone | |

Disclosures: How to Make Them

FAQs: The FTC's Endorsement Guides: What People Are Asking

How can I disclose on Snapchat/similar social media platforms?

You can superimpose a disclosure on Stories just as you can superimpose any other words over the images on those platforms.

How can I disclose on Twitter?

The words "Sponsored" and "Promotion"... "Paid ad"... Starting a tweet with "Ad:" or "#ad" would likely be effective.

Would a button that links to a full disclosure be sufficient?

No. A hyperlink like that isn't likely to be sufficient.

Video disclosures should be provided in audio and video and, for streaming or longer forms, may need to be repeated.

Can't be visible on web but not mobile.

Disclosures of Generally Expected Results

- Under existing Guides, disclosures must generally be (1) truthful; (2) substantiated; and (3) you cannot use an influencer or third party to make a claim when you cannot make it yourself.
- When an advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the ad must clearly and conspicuously disclose the generally expected performance in the depicted circumstances.
- The proposed Guides would add that the disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect.

Assume that WeightAway is a diet and exercise program and a person appearing in a WeightAway ad says, "I lost 50 pounds in 6 months with WeightAway." Very few WeightAway users lose 50 pounds in 6 months and the ad discloses, "The typical weight loss of WeightAway users who stick with the program for 6 months is 35 pounds." In fact, only one-fifth of those who start the WeightAway program stick with it for 6 months. The disclosure is inadequate because it does not communicate what the typical outcome is for users who start the program. In other words, even with the disclosure, the ad does not communicate what people who join the WeightAway program can generally expect.

Clarification/Update re Scope/Potential Liability

- The FTC has jurisdiction over anyone who participates in the “creation or dissemination of advertising” or anyone who “directly or indirectly” participates in presenting a commercial messages.
- **Endorsers/Influencers**
 - Endorsers could be liable for their own statements, such as when they make representations that they know or should know to be deceptive.
 - Clarifies that Endorser does not need to modify or delete past posts, so long as posts were not misleading when made, and dates of post are clear
 - Level of due diligence required will depend on their level of expertise and knowledge
 - Liable for failing to disclose unexpected material connections with an advertiser
- **Intermediaries (ad agencies and PR firms)**
 - Liable for disseminating what they knew or should have known were deceptive, such as ignoring shortcomings of “obvious” claims that they disseminate
 - May be liable for role with respect to endorsements that fail to disclose unexpected material connections
 - Guides clarify that **affiliate marketing relationships must be disclosed**, and affiliate marketers may be liable, although there could be more clarity about how they should be disclosed (e.g., small print “I receive a portion of all sales” at the bottom of a bio” vs. more)

Who's Liable and What Are Their Compliance Responsibilities?

Advertisers, agencies (ad and PR), publishers, influencers...all must comply with the Endorsements and Testimonials Rules, FTC Act or risk liability.

- Advertisers have a responsibility to make sure others comply.
- FTC will pursue enforcement against all parties.

Importance to FTC of: (1) existence of; and (2) compliance with Influencer Policy/Agreement.

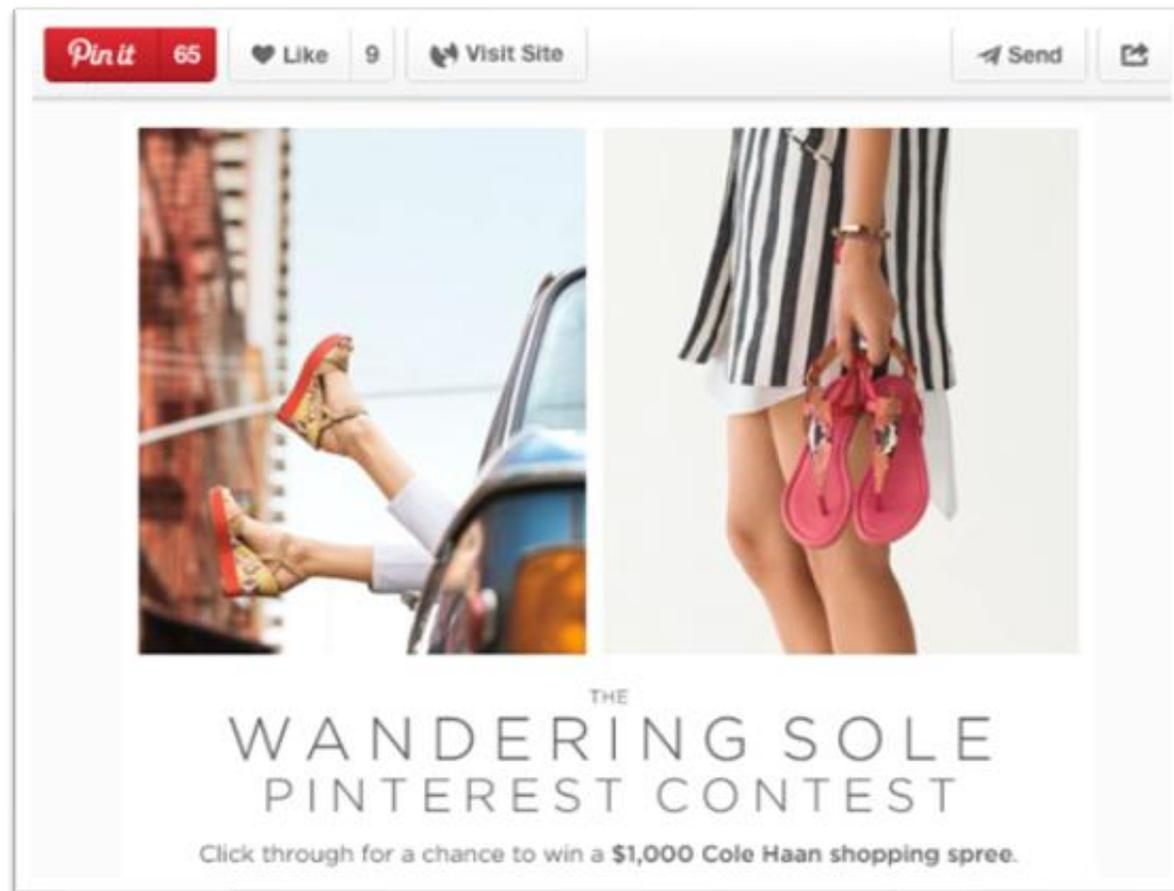
- Employees, agencies/third parties must be **trained**.
- Brands must **monitor** influencers for compliance and require that inadequate disclosures must be fixed.
- Brand must **enforce** requirements by contacting influencers who violate policy with direction on how to correct, provide contractual remedy for failures to disclose **and follow through**.



Influencers and Sweepstakes/Promotions

2014: FTC announced that pins and hashtags could be endorsements, and the fact that the pins/hashtags were incentivized by offering an entry to win a prize was a material connection that would not reasonably be expected by consumers.

- Sponsors—and influencers—offering sweepstakes must require entrants to disclose that their posts are sweepstakes entries.
- Acceptable disclosures/hashtags include: #[company]Sweepstakes; #contestentry; NOT #[company]sweeps
- Endorsements Guides Update make it clear that Brand will be responsible for noncompliant sweepstakes run by influencer.
 - But how can you have influencers run compliant sweepstakes?
 - What about “Loop Sweepstakes”?



E-Influencers and Advertising in the Metaverse

- **FTC Endorsements Guides Update** specifically states the Guides apply to virtual influencers. An endorser is “anything that appears to be an individual, group or institution.”
- Any company using a virtual influencer should ensure sufficient disclosures or information is available for the public to know:
 - The communications are advertisements;
 - The influencer is virtual/artificial intelligence and not real; and
 - The virtual influencer does not have the ability to try or test out a real product.
- **Advertising in the metaverse:** FTC’s Michael Ostheimer has said that the FTC is highly concerned and focused on AI, deep fakes and other synthetic media that pose major risks around fraudulent practices and dark patterns.
- Ostheimer: “It is critical” for companies to disclose any “material connection” between influencer and brand so consumers know when there is an incentive that underlies the promotion. A free sample provides such a material connection, as does an invitation to a party.



Social Influencer Campaigns Involving Children and Children's Products

- Targeting children audience
- Engaging child influencers
- Platforms are not always designed for children!
- Need different disclosures, different privacy concerns



Ryan ToysReview accused of misleading preschoolers with paid content

Watchdog group says kids under 5 can't tell the difference between organic and sponsored reviews on YouTube.



FAMILY

How Parents of Child Influencers Package Their Kids' Lives for Instagram

The platform's youngest stars owe their fame to their parents' intense work behind the scenes.

ALLIE VOLPE FEBRUARY 28, 2019

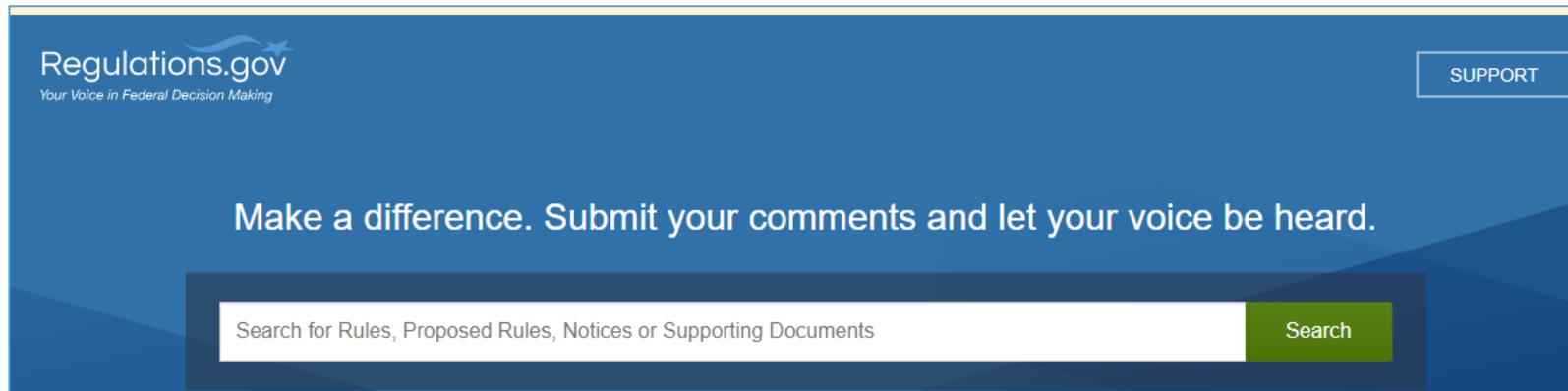


Additional Considerations When Engaging Child Influencers

- FTC proposes to add a new section to the Guides for endorsements directed to children because “Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.” Held an event on October 19, 2022 to address:
 - Children’s capacity at different ages and developmental stages to recognize and understand advertising content and distinguish it from other content.
 - The harms to children resulting from their inability to recognize advertising.
 - What measures should be taken to protect children from blurred content in digital marketing.
 - The need for and efficacy of disclosures as a solution for children of different ages, including the format, timing, placement, wording, and frequency of disclosures
- Practical issues with child influencer campaigns:
 - Agreement with parents – not kids, so involve parents. Have them attend events and participate with children.
 - Review all posts prior to publication.
 - Need to require adequate and kid-friendly disclosures in clear and simple language—both audio and video, repeat in long videos.
 - Keep child labor laws in mind—Coogan laws protect working children in Hollywood from exploitation and protect a child's income from their parents, but only applies in a few states.
 - Washington: House Bill 1627 aims to ensure that children who are heavily featured or star in online content have a right to financial compensation for their work and empowers children to maintain their privacy by requesting the deletion of videos and other content they're featured in once they reach the age of majority.
 - Similar law introduced by teen in Illinois.

What's Next?

- Stakeholders have had an opportunity to comment on the proposals and shape the final guidelines—30 comments received.
- FTC is currently considering—Staff will make recommendation and Commission will vote.
- Final version due sometime in Q3.
- Dark Patterns, Dot.com Disclosures updates will also inform; will also likely see more specific guidance in FAQs and other follow-up.
- The next time that FTC is likely to reconsider the Endorsement Guides is in 10 years.



Reminder—the FTC Isn’t the Only Game in Town

- Securities Exchange Commission looking at influencers promoting cryptocurrency.
- Section 17(b) of the Securities Act makes it unlawful for any person to promote a security without fully disclosing the receipt and amount of consideration received or to be received.
- SEC has settled several cases of improper celebrity crypto endorsements over the past several years. The [most recent](#) examples involved NBA hall of famer Paul Pierce, Floyd Mayweather, and Kim Kardashian.
- The crux of the SEC’s allegations in this, and similar settlements, is that the celebrities failed to adequately disclose the receipt and amount of the compensation they received for their promotions of securities.
- FINRA has similar regulations for broker-dealers.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10578 / November 29, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18906

In the Matter of

FLOYD MAYWEATHER JR.,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), against Floyd Mayweather Jr. (“Mayweather” or “Respondent”).

II.



FYRE FESTIVAL

HOW TO OVERPROMISE & UNDER DELIVER

FYRE STARTERS

To ignite the Fyre Festival we compiled 400 of the most influential personalities globally to launch a **coordinated influencer marketing campaign**.

On Monday, December 12th at 5pm an ambiguous orange tile was posted to the below accounts reaching over **300mm people in 24 hours**.

THESE AMBASSADORS STAND AS PART OF, AND REPRESENTATIVE OF, THE FYRE TRIBE.

They are **key personalities** to lead the attendance of an influential audience at the Fyre Festival around the world and therefore your potential brand partners.



Kendall Jenner
72.5m followers
6.3m likes



Emily Ratajkowski
10.6m followers
48k likes



Bella Hadid
9.7m followers
94k likes



Chiara Ferragni
7.8m followers
13 k likes



Hailey Baldwin
8.6m followers
56.1k likes



Rocky Barnes
885k followers
14.6 likes



Alessandra Ambrosio
7.6m followers
21 k likes



Nick Bateman
6m followers
34k likes



Yovana Ventura
4.7m followers
6.7k likes



Bella Thorne
14.8m followers
4.5k likes



Marcus Butler
3.6m followers
39.2k likes



Elsa Hosk
3.2m followers
19.2k likes



Jen Selter
10.5m followers
5k likes



Paulina Vega
2.7m followers
5.5k likes

Iconic Orange Title



 bellahadid Follow

88.1k likes 2d

bellahadid CANT wait for #FyreFestival
Coming soon 🙌🔥 fyrefestival.com 🏴‍☠️🏴‍☠️

view all 457 comments

conphection @amandafumba why so sure?

amandafumba Its because I looked at this site which has all the international festivals and parties.And also Fyre is going to be the new Coachella.And the tickets are in computer ticket @conphection

conphection @amandafumba let's hope

bexs_b @_theycallmesanaa 😏😏

jackbassrose 🍷

azizovo Channel orange

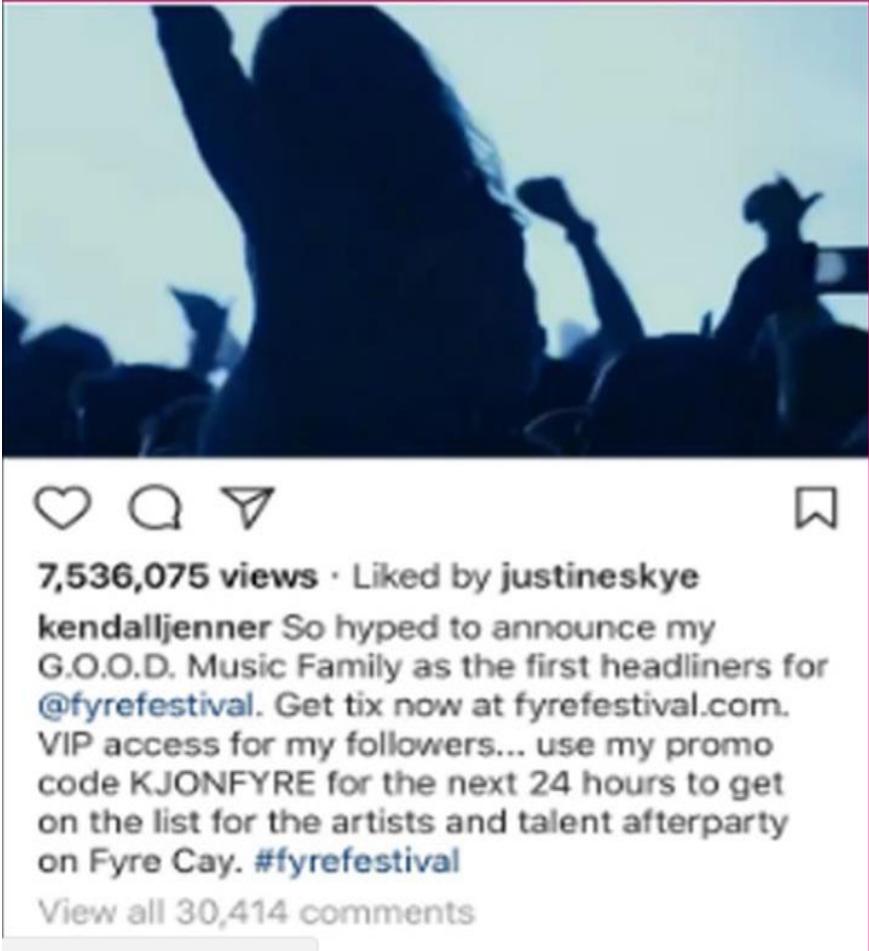
badaraofficial 🙌

otaviano_douglas Bacana 🤔

crave.her_ The Weeknd singing covers on my videos .. more soon

 Add a comment... ...

The \$275,000 Post



Luxury Accommodations as Marketed



THE DUO

A boutique housing option for traveling in pairs that includes a two twin beds and elevated amenities. The Double comes with two tickets per reservation.

-  Round-trip flights between Miami & Fyre Cay
-  2 Tickets to Fyre Festival
-  2 Twin Beds

Upgrades available

VIP tickets include upgraded food and access to VIP areas and events

[Special Request? Email us](#)

Actual Accommodations



Food



Swimming Pigs

29. In addition to the substandard accommodations, wild animals were seen in and around the festival grounds:



schapleigh
The Exumas Bahamas

Follow

schapleigh #fyre is a huge shitshow but it hasn't been a total loss. I got to meet this swimming pig yesterday. #fyre2017 #fyrefestival



210 likes

2 DAY AGO

Log in to like or comment.

GERAGOS & GERAGOS, APC
HISTORIC ENGINE CO. NO. 28
644 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017-3411

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Influencer Categories

- **Nano-influencers:** less than 10,000 followers
- **Micro-influencers:** 10,000 to 100,000 followers
- **Macro-influencers:** 100,000 to 1,000,000 followers
- **Mega-influencers:** more than 1,000,000 followers

Influencer Agreements

- Parties: Who are the parties to the contract?
- Term: What's the length of contract?
- Services/Deliverables: What does advertiser want the influencer to do? (e.g., the number and frequency of posts)
- Compensation and Payment Schedule
- Exclusivity: Category, competition, time
- Approval Rights and Procedure: Will Brand review/approve the content before it's posted? What approval rights, if any, does influencer have?
- IP Ownership: Who owns what?
- Usage Rights: Who can do what with the content?
- Incorporate Brand's Social Media Policy and FTC Endorsement Guides or attach as exhibits
- Morals clause
- Representations, warranties, indemnification and termination provision

The Parties to the Agreement

- Is the Influencer entering into the agreement as an individual or is the influencer using a loan out entity?
- If the Influencer is using a loan out entity, the contract must include the appropriate provisions and an inducement letter executed by the Influencer.
- Representations and warranties can vary depending upon the Influencer's age.
- If the Influencer is under 18 years old, need an appropriate signature block.

Term of the Agreement

- How long does Brand desire to engage Influencer?
- Is Influencer being engaged to generate hype for a specific event? Or is the goal to associate the Influencer with the Brand long-term?
- Risk to Brand generally increases the longer the engagement (e.g., situation where the Influencer becomes the voice and/or face of the brand)
- Renewal rights

Influencer's Deliverables

- What does Brand want the Influencer to do?
- Presumably, at a minimum, the Influencer will be publishing social media posts on his or her account on certain platforms – How often? What platforms?
- Identify the type of content to be published (e.g., story/reel) and what should be covered (e.g., product application).
- If video, specify the length of time, number of frames.
- Brand wants access to performance analytics and metrics (e.g., shares).
- Brand will need rights to repost and put paid media behind posts (e.g., boost, whitelist).
- Public appearances?

Exclusivity

- An exclusivity clause typically prohibits the Influencer from working for a competitor or another company within the same industry.
- Brand wants to prohibit the Influencer from promoting a competitor and its products or services.
- The Influencer wants to limit exclusivity to preserve its options.
- The Influencer may have an expertise in a certain field (e.g., cosmetics), such that he or she cannot agree not to work for another company within the same industry.
- An A-List celebrity may be willing to agree to an exclusivity provision for the right price.
- Key consideration is the length of the exclusivity clause.
- Will there be a “tail”? Will exclusivity clause survive beyond the expiration or termination of the agreement?
- The FTC has proposed a new rule that appears to bar non-competes except in limited circumstances. The proposed rule applies to independent contractors & independent contractors that enter into agreements using their own business entity.
- The Influencer may request carve-outs (e.g., events sponsored by a competitor, product placements).

Intellectual Property Ownership and Usage

- **Ownership:** Who ultimately owns the content created by the influencer promoting brand and its products or services
 - Except for influencer's NIL rights, brand typically owns the content created by the influencer
 - The influencer owns his or her NIL rights
 - Professional influencers may want to own the content they create. This may be acceptable to brand provided brand has usage rights to the content.
- **Usage:** Who gets to use what, when, where, and for how long
 - Brand wants rights to use influencer's image and likeness
 - Brand wants rights to use, copy, reproduce, and promote influencer's content
 - Influencer typically needs rights to use brand's trademarks and logos
 - Territory: worldwide for online campaigns
 - Channels: social media, broadcast, print, radio, home shopping, e-commerce, metaverse
 - Post-term rights

Third-Party Materials

- If Influencer’s social media posts contain third-party IP, Influencer must get third-party permission prior to publishing
- Do **NOT** assume that the Influencer has the necessary rights to publish
- Examples of Third-Party material:
 - Photographs/video that the Influencer does not own, e.g., the “Success Kid”
 - Photographs/video featuring other people, especially in the background
 - IP in the background, e.g., logos, paintings, branded products and clothing, Hollywood sign, Bean sculpture, Sydney Opera House
 - Memes
 - Emoji – sometimes protected
 - Music – often overlooked
 - Choreography – can be copyrightable
 - Tattoos
 - Handles and Hashtags containing names, monikers, trademarks (e.g, Grammys, Oscars, Olympics, Superbowl)

Common Missteps

- Infringing on a trademark by using a certain hashtag – do trademark searches on hashtags!
- Don't forget that claims can be contained in hashtags – make sure such claims are substantiated!
- Violating a person's right of publicity by using certain handles
- Repurposing old creative – e.g., expired rights, SAG/AFTRA issues

Morals Clause from Brand's Perspective

- Can mitigate Brand's risk if the Influencer engages in problematic behavior
- The behavior does not have to be against the law and the Influencer does not have to be convicted of a crime.
- How heavily the morals clause is negotiated depends on the bargaining power of the parties.
- Brand wants to be able to immediately terminate the contract in its sole and absolute discretion.
- Influencer wants to limit the morals clause.
- Does the clause cover conduct that occurred before the parties entered into the agreement?
- Public doesn't respond well to silence.

Morals Clause from Influencer's Perspective

- Influencer, if he or she has leverage, will not want a morals clause that gives Brand the right to terminate in its sole and absolute discretion.
- Clauses commonly allow termination if the Influencer engages in an act of moral turpitude or engages in behavior that could significantly injure the company's reputation and/or the product or service being promoted by the Influencer.
- Both parties should engage in due diligence by investigating the other party before entering into negotiations.
- Influencer will want to exclude past behavior that has already been publicized and/or reported.
- Influencer may push for termination right only in the case of a criminal conviction.
- Influencer may want the right to cure breach.
- Influencer may want carve-outs.
- Influencer wants to be compensated, especially if the services and/or deliverables have already been provided by Influencer.
- A-List celebrity influencers may request a reverse morals clause (*e.g.*, product recall).

Sample Morals Clause

If Influencer has committed or commits any act or becomes involved in any situation or occurrence which brings Influencer into public disrepute, contempt, scandal or ridicule or which shocks, insults or offends the people of this nation or any class or group thereof or reflects unfavorably upon Brand or its Products/Services, Brand shall have the right to immediately terminate this agreement. Brand's decision on all matters arising under this paragraph will be conclusive, provided that Brand's decision to terminate hereunder must be exercised, if at all, not later than forty-five (45) days after the facts giving rise to such right under this section are brought to Brand's attention.

Approval Rights

- Approval rights relate to which party ultimately controls the creative content.
- Provision outlines what the advertiser has approval over and what, if any, approval rights may be granted to the Influencer.
- Advertiser typically has approval over all content, images, tags, and language used in the social media posts.
- The Influencer should be prohibited from posting to social media platforms unless the advertiser has approved the posts in writing beforehand.
- Approvals generally should remain with Brand; rather than grant the influencer direct approval rights, Brand could grant the influencer “meaningful consultation” right.
- Mutual approval may be acceptable in certain instances (e.g., captions of social media posts, use of the Influencer’s image in rough cuts).
- Approval procedure: How long is review period? How many rounds of edits? Is silence approval? At what stage is approval?
- Approval standard: Sole and absolute discretion? Reasonable approval?
- Other talent

Reps, Warranties, and Indemnities

Representations/Warranties: Contains representations that the Influencer is ensuring are true as of the date the contract is signed and if are untrue, will constitute a breach of the contract.

- Influencer has not entered into any other conflicting agreements.
- Influencer has the right to grant the rights granted to Brand in the contract.
- Materials Influencer creates for brand shall not infringe any third party's IP rights.
- Influencer shall comply with all applicable laws, including FTC Guides and consumer protection statutes.

Indemnities: Provision states how the Influencer will protect the company if a 3rd party brings claims against the company.

- Who pays for legal counsel if there's an investigation?
- Who is in charge of the defense?

Influencer Must Comply with FTC Guidelines

- Content should reflect Influencer's actual experience with Brand's product or service.
- Influencer's statements must be truthful and factually accurate.
- Influencer should clearly disclose its connection to Brand.
- Specify the disclosure requirements (e.g., the actual language and placement of disclosures in the Influencer-created content).
- Applies to all Influencer-created content, even if not specified in the contract.
- At Brand's request, influencer must immediately remove non-compliant content.
- Also, Influencer should not compare Brand's products/services to competitors, and should not rely on social media platform's disclosure tools, especially when sharing content between platforms.

FTC is Planning to Update the Endorsement Guides

- In May 2022, the FTC announced that it will be updating its Endorsement Guides to address influencers, including fabricated influencers.
- In contracts, starting to see language that prohibits the Influencer from responding to negative comments on the Influencer's posts before consulting with the Brand and obtaining Brand's advance approval before responding

Kim Kardashian and Ethereum Max

- In June 2021, Kim Kardashian posted a story promoting Ethereum Max, a new cryptocurrency token, which contained a link to the Ethereum Max website which featured instructions about how to buy the token.
- “Are you guys into crypto? This is not financial advice but sharing with what my friends told me about Ethereum Max token”
- Kardashian told her 225 million followers, her “friends” were reducing supply of the token to give back to the entire E-Max community.
- Kardashian’s “friends” had paid her \$250,000 to promote the new token.
- Kardashian labeled her story as an “ad.”
- Labeling her story as an “ad” did not satisfy the SEC’s anti-touting laws which require that she disclose the nature, source, and amount of compensation she received – directly or indirectly – in exchange for the promotion.
- In October 2022, Kardashian settled with the SEC for \$1,260,000 in penalties, disgorgement, and interest for failing to disclose the \$250,000 payment and agreed not to promote crypto for three years.
- Web 3 version of the classic “pump and dump” – no returns, no chargebacks
- **Bottom line:** Influencers should engage in due diligence to understand potential legal ramifications of promotions; don’t want to get rich at your followers’ expense.

Kanye West and ADIDAS

- In 2016, West partnered with ADIDAS on a lifestyle brand including clothing, accessories, and shoes, including the Yeezy Boost 750, Boost 350, and Boost.
- In October 2022, West published antisemitic tweets on Twitter.
- ADIDAS eventually terminated the partnership, released a public statement, and stopped production of the Yeezy shoe line.

Questions? Contact Us



Melissa Landau Steinman

Partner

+ 1 202.344.4972

mlsteinman@Venable.com



Jennifer M. Malloy

Counsel

+1 301.229.9936

jmmalloy@Venable.com



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