



# #BadForTheBrand: What to Do When Your Influencer Goes Rogue

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# Today's Topics

1. Federal Trade Commission Guides
2. National Advertising Division
3. Your Influencer Goes Rogue
4. Influencer Agreements
5. Influencer Crisis
6. Game Plan and Response
7. Best Practices



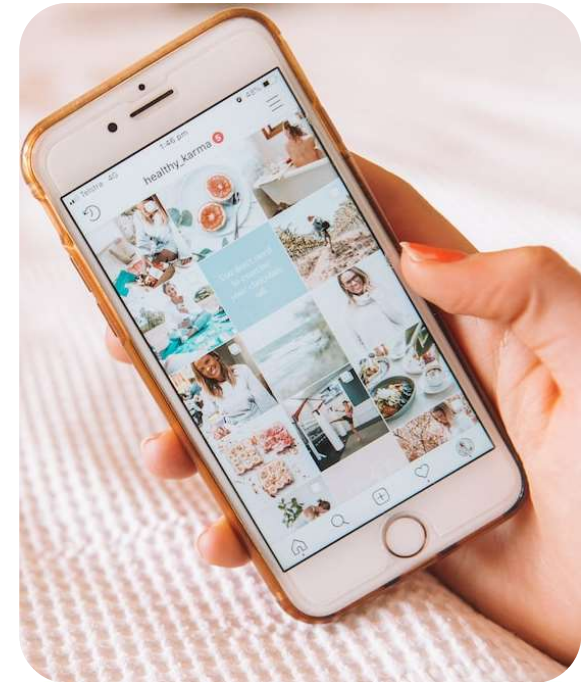
# FTC Updated Endorsement and Testimonial Guides

- In June 2024, the Federal Trade Commission (FTC) announced its updated “Guides Concerning the Use of Endorsements and Testimonials in Advertising.” The FTC also announced that it has published updated FAQs: FTC’s Endorsement Guides: “What People Are Asking.”
- The Guides are not law but provide guidance on the FTC’s position on false and misleading endorsements in advertising.
  - Practices that are inconsistent with the Guides may result in enforcement actions under Section 5 of the FTC Act.
- The FAQs include 40 new questions and numerous new examples designed to reflect the changes in the advertising industry since 2009.

# Endorsements Guidelines

1. Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser.
2. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented.
3. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information about the performance or effectiveness of the product.
4. The endorser must have been a bona fide user of the product at the time the endorsement was made.
5. "Material" connections must be disclosed when a significant minority of the audience for an endorsement does not understand or expect the connection. Complete details of the connection are not required, but the endorsement must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.

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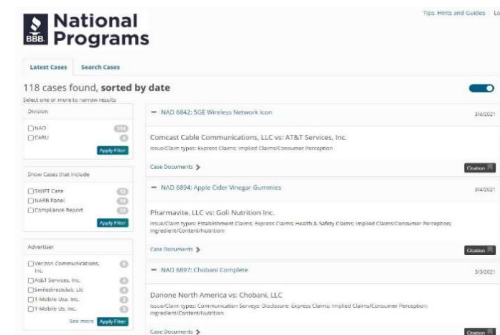


## “Clear and Conspicuous” Standard

- When endorsers have a material connection to the advertiser, they must disclose the connection clearly and conspicuously.
- “Clear and conspicuous” is defined as a disclosure that is “difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers” and **unavoidable!**
  - A disclosure must stand out from surrounding text or audio by its color, font, size, location, duration, speed, and/or cadence, depending on the context, and should appear in the same medium as the triggering claim.
- The disclosure must also not contradict the net consumer takeaway. Commonly used disclosures that don’t contain the brand or product name may be ambiguous, since they may not properly identify the sponsoring advertiser. While #ad or #sponsored may still be effective in certain contexts, the FTC advises that “Sponsored by [BRAND]” or “Promotion by [BRAND]” would be clearer.
- The FTC warns advertisers not to assume that a social media platform’s disclosure tools alone will produce a disclosure that is unavoidable.

# National Advertising Division: Background

- The National Advertising Division (NAD) monitors national advertising in all media, enforces high standards of truth and accuracy, and efficiently resolves disputes to build consumer trust and support fair competition.
- NAD reviews advertising based on challenges from businesses or complaints from consumers, or on its own monitoring initiative, covering a wide variety of both industries and issues.
- NAD's decisions represent the single largest body of advertising decisions in the United States.







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# Influencers Gone Rogue

## Examples

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# NAD Inquiry: *Fabletics, Inc.* (2025)

## Influencer Marketing and Disclosures

### Claims at Issue:

- Undisclosed Endorsement: An influencer who was also an equity owner and brand ambassador for Fabletics Men promoted the brand without always making his relationship clear.
- Misleading Consumer Perception: Some posts lacked disclosures, or they were placed below the “more” button, making them less visible.

### Allegations:

- Influencer promoted Fabletics Men but did not always include clear disclosures of his financial relationship with the brand.

### NAD’s Standard of Review:

- FTC Endorsement Guides: Any material connection between an endorser and a brand must be disclosed clearly and conspicuously, so consumers understand its significance.
- Expectation of Consumer Awareness: If a significant portion of consumers do not recognize an endorser’s financial ties to a brand, a disclosure is required.
- Placement and Clarity: Disclosures should be immediately visible and not hidden behind expandable text.



# NAD Inquiry: *Fabletics, Inc.* (2025) (cont.)

## Influencer Marketing and Disclosures

### NAD's Holding:

- Inadequate Disclosure Practices
  - Some of the influencer's Instagram posts included no clear disclosure of his financial relationship.
  - In other cases, disclosures such as “#FableticsPartner” were placed below the fold, requiring users to click “more” to see them.
- Assumed Consumer Knowledge Was Insufficient
  - Fabletics argued that the influencer's connection to the brand was widely known, and that disclosure was unnecessary.
  - However, NAD found that not all consumers would be aware of his financial stake, making disclosure necessary under FTC guidelines.
- Failure to Align with Clear and Conspicuous Disclosure Standards
  - NAD and FTC standards require disclosures to be upfront, easy to read, and immediately visible.
  - Since some disclosures were not prominent enough, Fabletics did not fully meet transparency requirements.

### NAD's Recommendations:

- Ensure that all influencers and ambassadors clearly disclose their material connection to Fabletics.
- Modify social media disclosures as they appear above the “more” button, making them immediately visible.

# Kim Kardashian and Ethereum Max

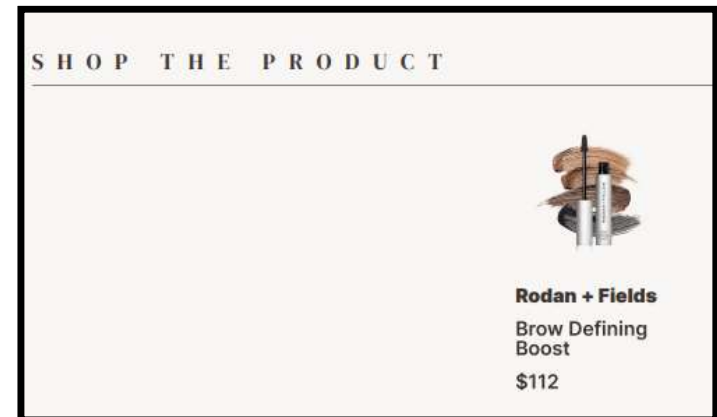
- In June 2021, Kim Kardashian posted a story promoting Ethereum Max, a new cryptocurrency token, which contained a link to the Ethereum Max website, which featured instructions about how to buy the token.
- “Are you guys into crypto? This is not financial advice but sharing with what my friends told me about Ethereum Max token.”
- Kardashian told her 225 million followers that her “friends” were reducing the 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 required 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.

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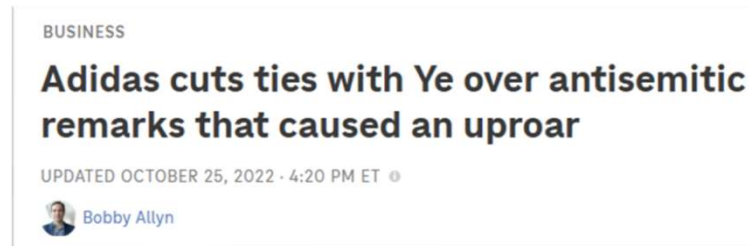


## ***Petunia Products v. Rodan & Fields***

- Petunia filed suit against both Rodan & Field and their hired influencer, alleging the parties infringed on its trademarks for “BROW BOOST.”
- The influencer used “#*BROWBOOST*” in an online post that directed consumers to Rodan & Fields’ product, “*Brow Defining Boost*,” stating that R+F sent her the brow product and she thanked R+F for sponsoring her post.
- Influencer filed a motion to dismiss, arguing that liability for trademark infringement should not cover third parties, like her, who author sponsored blogs about a product without confirming that the product does not violate trademark rights.
- Court denied the motion, holding Petunia sufficiently pleaded that the influencer’s post was likely to create confusion about the source of the product.
- If influencer agreement had contained an indemnification provision, she could have moved to have R+F defend her in litigation.



# Influencer Crisis



- 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 anti-semitic tweets on Twitter.
- ADIDAS eventually terminated the partnership, released a public statement, and stopped production of the Yeezy shoe line.
- **What would your brand do in a similar situation?**



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## **Proactive Measures: Starting with a Strong Foundation**

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# Social Media Campaign

*Scenario: You're launching a new skincare line and planning to collaborate with social media influencers to promote your product.*

- What steps would you take to ensure these influencers represent your brand accurately and comply with advertising regulations?
- What risks do you see in working with influencers to promote your skincare products?
- **Do you have a formal written agreement with the influencer?**
- **Have you provided the influencer with guidance, training, and compliance requirements?**





# Best Practices for Managing Social Media Influencers



- **Provide your influencer with a brand messaging and posting guideline that states what they can and cannot say.**
  - **Do:** Stick to your personal experience with the product and use claims the brand has approved (ex: “Helps reduce the appearance of blemishes”). Be honest and use qualifiers.
  - **Don’t:** Make extreme or absolute claims that the product “cures,” “guarantees,” or magically fixes something overnight. Avoid any medical or health claims that aren’t officially allowed.
  - **Do:** Use the proper disclosures (#Ad, #sponsored, “paid for by”), so it’s clear there is a paid partnership.
  - **Don’t:** Exaggerate results or share statistics that haven’t been verified.
- **Create a social media influencer training program.** Don’t assume every influencer automatically knows the rules. When you start a campaign, walk your influencers through the key dos and don’ts. Explain why the rules matter (ex: “We don’t want to mislead our customers or face implications with regulators”). Sometimes giving the context will help influencers understand the seriousness.
- **Standard contract terms.** In addition to providing your influencers with posting guidelines, ensure you have a strong influencer agreement. Any contract with an influencer or their agent should include clauses that protect your brand from false claims. Key terms to include:
  - Disclosure Requirements, Truth-in-Advertising Clause, Enforcement
  - “Influencer shall comply with [Company’s internal Influencer Guidelines] and the Federal Trade Commission’s (FTC) Endorsement and Testimonial Guides.”

# Influencer Agreements

1. Parties: Who are the parties to the contract?
2. Term: What's the length of the contract?
3. Services/Deliverables: What does advertiser want the influencer to do? (e.g., the number and frequency of posts)
4. Compensation and Payment Schedule.
5. Exclusivity: Category, competition, time.
6. Approval Rights and Procedure: Will Brand review/approve the content before it's posted? What approval rights, if any, does influencer have?
7. IP Ownership: Who owns what?
8. Use Rights: Who can do what with the content?
9. Brand Policy, FTC Endorsement Guides, etc.
- 10. Representations, warranties, indemnification and termination provision.**
- 11. Morals clause.**

**Not a one-size-fits-all approach!**

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## Representations and Warranties

- Contains representations that the influencer is ensuring are true as of the date the contract is signed, and if they 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.
- Content 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.

# Indemnification

- Provision states how the influencer will protect the company if a third party brings claims against the company.
- Who pays for legal counsel if there's an investigation or lawsuit?
- Who assumes decision making for the defense?
- Who has settlement authority?
- *Can the influencer even afford to pay for defense and indemnity?*
- Using indemnification during litigation:
  - Introducing the brand's side of the story.
  - A legal motion but also a way to communicate to the public.

# Morals Clause

- 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?
- 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.
- Celebrity influencer may request a reverse morals clause, e.g., product recall.
- Both parties should engage in **due diligence** by investigating the other party before entering into negotiations.



# Best Practices for Managing Social Practices Media Influencers

- **Discuss corrective action plans:** If an influencer does post a misleading claim, have a plan. For example, you might ask them to edit the caption, rephrase the claim, or post a corrective follow-up.
- **Ensure that influencers disclose their relationship with you:**
  - “Sponsored by XYZ” is preferable, and disclosure hashtags should not get cut off or truncated. Explaining to influencers **how** and **where** to disclose is important as well.
- **Follow Influencer Content:** An obvious but important step – someone on your team should be following all of the influencers on every platform they’re active on. Check each sponsored post when it goes live.
- **Have a checklist:**
  - Did they use the disclosure?
  - Did they stick to the approved claims?
  - Is anything phrased in a potentially misleading way?







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## **Mitigating the Fallout and Minimizing Damage**

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# What happens if your influencer makes a false claim?



When an influencer makes a claim about your product, those claims become your brand's claims. In other words, if an influencer says: "This cream cures acne overnight," it is as if your company made that claim directly.

- Under FTC regulations, brands are responsible for ensuring statements are truthful and substantiated.
- *If a claim cannot be made directly by a brand, it cannot be made through an influencer either.*

## **NAD Inquiry: NuOrganic Cosmetics (2024)**

- Social media influencer/product reviewer's statements (e.g., "naturally grown long lashes") were attributable to the brand. Advertiser was asked to have the videos containing unsupported claims discontinued.

# Game Plan

1. Learn as much about the situation as possible.
2. Respond swiftly, but deliberately: Assume that any public statement will be republished and criticized.
3. Identify relevant stakeholders.
  - ✓ Who needs to be contacted?
  - ✓ How will they be reached?
4. Organize and streamline information flow.
  - ✓ Business, marketing, legal, public relations?
5. Escalate to appropriate decision makers.
  - ✓ All issues should be considered, but not all need to go to senior management.
  - ✓ Too many stakeholders, information, or escalations can backfire.
6. Engage with legal counsel if necessary.
7. Decide on official brand response.



# Potential Responses

## Do Nothing/Apologize

- Silence may prove to be the brand's greatest asset as the public grows bored with the lack of response and moves on.
- A well-crafted apology can help mend any reputational damage to the influencer and brand and show contrition and accountability.
- But brands should be mindful that an apology could be challenged as an admission of guilt and could create optics issues in any future challenge or reputational battle.

## Adversarial

- Demand letter.
- Litigation.
- Shows that brand takes its reputation seriously and is willing to defend itself.
- But may draw more attention and prolong the situation.

## Back Channel

- Directly communicate with influencer or their representative.
- Come to an agreed-upon response.
- Influencer and brand may have conflicting motivations and end goals.

# When to Engage Legal Counsel

- To potentially enhance attorney-client privilege protections over communications that are broader than those between just attorney and client, involve legal counsel at the outset of a crisis.
- Legal counsel can oversee the structure of third-party relationships and provide guidance on maintaining privilege, ensuring that all communications—particularly those related to legal strategy or risk management—are handled appropriately.
- Can help identify essential third parties for managing the crisis and ensure that they understand the importance of protecting and how to protect sensitive information.
- If there is any possibility of litigation resulting from the crisis, work product protections also become extremely important and provide additional protection over discussions with third parties who may be essential to the development of a legal strategy.
  - Can help protect documents prepared by third parties that are created because of the pending or impending litigation.
  - For example, in the public relations context, courts have recognized that communications with public relations consultants, who need to understand the attorney's strategy to advise properly, do not waive work product.

## Questions? Contact Us



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