

Grasping Social Media Ad Regulations: Influencer Contracts

By **Diego Gutiérrez and Steven Winters** (October 21, 2022)

This is part two of our three-part **series** examining the Federal Trade Commission's recent announcement that proposes to revise its current endorsement guides.

In this second part, we discuss contract terms, conditions and other practice tips that companies and influencers can use when drafting and negotiating agreements.

Social media is now the second-biggest market in digital advertising.[1] More than 75% of brand marketers intend to expand their social media footprint with a dedicated budget for influencer marketing.[2]

The FTC has recognized the need to modernize the endorsement guides to reflect consumers' increasing dependence on social media and influencer culture in purchasing decisions.[3]

The FTC is continuing to focus on deceptive social media ads and lax advertising disclosure rules; this focus will change how companies collaborate with influencers to reach consumers.[4]

An agreement between a company and an influencer needs to call out expectations and set parameters so that both sides comply with the endorsement guides. Initially, a letter of intent may help sort out these items.

The letter should be, typically, nonbinding and should specify each party's tasks, commitments and due dates. We recommend describing the compensation, the products or services covered, and the type of content to be generated for them. The letter should also include the usual, binding confidentiality and no-shop clauses.

While this may sound like basic advice, a surprising number of agreements fail to set out these basic business terms. The letter of intent will not cover all of the provision included in the final agreement. However, we recommend explaining in the letter certain tailored remedies for noncompliant posts — this helps the company and influencer set the tone for the more formal, written agreement to come.

One of the important goals of the more formal, finally executed agreement is to address, follow and comply with the most salient features of the endorsement guides — hopefully, minimizing exposure to FTC enforcement actions.

The following checklist summarizes some of the critical terms and conditions to consider in any influencer agreement.

Define the influencer's role and establish an independent contractor relationship.

The agreement should start by defining and describing who the influencer is, and the sphere of influence the influencer has on various social media. Influencers and their representatives should avoid overpromising and underdelivering, especially in terms of their subscriber base on various platforms, and promises to increase their followers or convert a certain number



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of prospects to purchasers.

Influencer agreements benefit from more detailed independent contractor provisions, rather than the usual one or two paragraphs of language found in most samples or forms.

Here, the influencer is an independent contractor hired to create online content for the company's products or services. The influencer should retain responsibility for the manner and form by which the influencer and any permitted third parties perform under the agreement.

This is different from editorial control over messaging. Although the influencer is not under the company's direct control, the agreement should describe the scope of work and minimum standards in any statements of work.

State law in this area has changed quite a bit in the past few years, especially in states such as Washington and California. Incorporating more detailed independent contractor provisions should help minimize the risk of having the agreement recharacterized, especially for tax purposes.

It is fair to say the state laws surrounding independent contractors vary wildly by jurisdiction. Therefore, both the influencer and the company will benefit from consulting an employment lawyer with deep knowledge of employment/contractor relationships in the applicable jurisdiction.

It is also important to know whether the influencer belongs to the Screen Actors Guild - American Federation of Television and Radio Artists. In 2021, SAG-AFTRA expanded its eligibility rules by allowing influencers to become eligible for SAG-AFTRA representation, including influencers' eligibility for benefits like health insurance and retirement.

Hiring an influencer that belongs to SAG-AFTRA will likely make the contract subject to a collective bargaining agreement. If possible, consult an attorney with SAG-AFTRA union experience. If not, the independent contractor provision should include a representation and warranty that the influencer is not a SAG-AFTRA member to avoid dealing with a collective bargaining agreement.

The "Scope of Endorsement Campaign" or "FTC Compliance" Provision

The agreement should delineate the legal restrictions, obligations, standards of conduct and marketing criteria for the influencer's content. A compliance provision should specify that the influencer cannot make false or misleading statements about the company's products or services. The influencer must also disclose the nature of the collaboration or material connection with the brand.

When drafting the agreement, try to strike a balance between, on the one hand, describing the constraints on posted statements — so they comply with the FTC recommendations and the law generally — and, on the other hand, giving the influencer sufficient ability and room to speak in his or her voice. This is also required by the FTC, and, after all, that is the point of engaging a particular influencer.

To this end, it is helpful to include substantiated claims for the company's products or services covered by the agreement. Tailor your provision to avoid controlling every aspect of an influencer's post — the agreement should allow the influencer to have creative freedom to express opinions, evaluate the products/services and to generally control the

content of the posts.

An influencer must become familiar with the endorsement guides, and the agreement should reference them and the minimum FTC criteria needed to comply. We strongly recommend attaching the endorsement guides and/or the "Disclosures 101 for Social Media Influencers" document from the FTC as an exhibit to the agreement.

The final article of this series will delve into greater detail about the post's content, editorial control, and what options a company might have if an influencer posts negative reviews or messages about the company during the campaign.

Compensation

Compensation will take different forms depending on the campaign's purpose and its duration. Compensation typically includes free products, incentives, services, cash or a combination of these items. The agreement should require the influencer to agree that the compensation described is the sole and entire compensation to which the influencer is entitled.

Be careful to consider the odd circumstance where the influencer is able to increase their income because they are reviewing a company's products or services — e.g., should the influencer receive any monetary compensation from the company if, by virtue of reviewing the company's product, the influencer is able to increase his/her subscription base by X%.

Compensation can be staggered over time depending on the campaign's duration and whether the agreement includes one or more advertisement, endorsement or other campaign. Regardless of the type of compensation, we recommend including the value of any service or product provided as compensation for tax reporting purposes.

Reviewing, approving, auditing and monitoring the campaign and related posts.

The proposed endorsement guides and previous enforcement actions make it clear that the FTC expects companies to monitor social media posts and take corrective action if a post is noncompliant. Influencers do not like to be monitored.

However, companies will want to exert editorial control over noncompliant posts that do not meet the agreed-upon contract-based standards. At minimum, review and auditing provisions should permit a company to informally audit posts and the influencer's activities under the contract to ensure compliance with applicable law, the FTC guidelines and the relevant contract terms.

For product evaluation and testing, the company generally should encourage influencers to post honest opinions about the product or service under review. There are follow-on issues to consider such as:

- What happens if a post is less than enthusiastic or expresses an opinion based on a misunderstanding of how a product works?
- What results if the company terminates the agreement with the influencer, and the influencer subsequently posts a less-than-enthusiastic review outside the scope of the surviving provision of the agreement?

These types of provisions are certainly more nuanced, and we believe there are both business and legal reasons to tread lightly in this area. We discuss these specific topics in more details in the third part of this series.

A company should have remedies if the influencer breaches the agreement for failure to comply with company policies or FTC regulations, whether the company can use such remedies on their own or in conjunction with other agreement-based remedies.

An influencer should have remedies against the company if the company gives the influencer misrepresentative/misleading information or defective products to evaluate.

Each side should ensure that the other is responsible for the acts, omissions, breaches or violations of its employees, agents, representatives and contractors — e.g., representations, warranties, indemnification and, where relevant, limitations on liability therefor.

Include a provision in the agreement that encourages a representative of the company to periodically meet and proactively catch up with the influencer, to discuss how things are going under the agreement.

Either the company's representative or the influencer should take notes and circulate an email to the other, after the meeting, summarizing what was discussed.

These meetings should be designated confidential to both parties and covered by the confidentiality provision in the agreement. Requiring these periodic status meetings can do wonders for the business relationship and often help avoid more formal legal disputes down the road.

Exclusivity

An influencer may be known for something in particular that fits the company's brand and marketing lifestyle. The parties will need to decide whether the influencer will be able to continue working with competing brands; this includes any affiliation with third parties that do not necessarily square with the company's communication platform, style or brand.

A successful influencer will tend to resist exclusivity, for both legal and business reasons. Influencers with a strong niche of followers — e.g., skincare products or musical instruments — are, typically, more effective when engaged on a nonexclusive basis.

Not only does nonexclusivity support an influencer's objectivity when reviewing a company's products but also, it gives the influencer the ability to compare and contrast the company's products with other like-kind or complementary products/services.

Confidentiality

A confidentiality clause should, at minimum, designate and protect company confidential information and data, and prevent the influencer from disclosing the same. We recommend a tailored nondisclosure agreement between the parties prior to engaging in negotiations.

The enforceable clauses in any letter of intent should also include a confidentiality provision and a no-shop clause.

Specify that the periodic, informal status meetings between influencer and company are

automatically deemed confidential, even if not subsequently reduced to writing.

Cross-Licensing

The parties will need to decide on the nature and scope of any cross-licensing and cross-promotions. The influencer will need a limited license to utilize the relevant trademarks, trade dress, if any, and company name. The company will need publicity rights from the influencer and the ability to utilize an approved name, likeness, photos and biographical information for cross-promotional purposes.

Cancellation/Termination

Both sides will benefit from more carefully negotiated termination rights. The company needs the ability to terminate if the influencer does not comply with FTC disclosure rules. The influencer needs the ability to terminate if the company does not perform.

The parties may want a transition provision, spelling out how to transition the relationship, if it goes south. This can ensure that neither the company nor the influencer is left with a soured relationship, while providing guideposts for post-termination activities.

Morality/Ethics Provision

Depending on the product and targeted audience, company representatives and brand managers should carefully choose whom they select to represent their brand. Values, attitudes, lifestyles — they all factor into the selection of an influencer that supports the company's marketing and advertising objectives and strategies.

A reputation or morals clause will protect the company from the influencer's misdeeds, misconduct or life-changing circumstances. This clause is often included in the termination section, but a statement of work helps bootstrap this point; influencers need to be clear about what they should not post and any issues concerning foul language or nudity.

Statement of Work

Statements of work come in various shapes and sizes. The statement of work is particularly important in an influencer agreement because of the nature of the services rendered by the influencer. The statement of work must include all aspects of the endorsement, review or posted content.

The statement of work can also benefit from detailing the brand's image, guidelines and what the influencer cannot say — without prescribing what the influencer should say — in respect of the brand's preferred style and creative direction.

We recommend that the statement of work not only define the scope of work, but also break down the structure for each post, list the platforms the influencer should use, such as Instagram or TikTok, and create a project timeline for deliverables.

Influencer agreements are deceptively complex. They cover a wide range of issues for risk allocation, including FTC compliance, contract law, dispute resolution, intellectual property and publicity rights, to name just a few.

Companies tend to work with influencers because it can be a cost-saving and effective advertising strategy to reach targeted consumers, instead of the more typical shotgun, A-

list celebrity endorsements.

Many influencers do not have representation or much experience negotiating contracts. The company and the influencer will benefit from an agreement that is relatively easy to understand and execute, while complying with the FTC guidance. The goal of the checklist outlined above is to help both the influencer and the company develop an agreement that allows both sides to understand expectations and performance.

In part three of this series, we will provide more practice tips and drafting suggestions. We will also analyze the pros and cons of how the disclosure requirements and specific terms of the influencer agreement can shape FTC-compliant internal policies and practices that companies can put in place.

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[1] See Claire Beveridge, 56 Important Social Media Advertising Statistics for 2022, Hootsuite Blog (Feb. 24, 2022) ("Brands will be spending more on social ads in 2022 . . . Social media will account for 33% of all digital advertising spending in 2022.").

[2] Werner Geysler, The State of Influencer Marketing 2022: Benchmark Report, INFLUENCER MKTG. HUB (Mar. 2, 2022).

[3] Public Statement from Lina M. Khan, FTC Chair, Regarding the Endorsement Guides Review (May 19, 2022).

[4] For more information regarding the key areas the FTC plans to update in its endorsement guides, see part one of our three-part series Grasping Social Media Ad Regulations: Key Proposals.