

April 20, 2020

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, DC 20580

RE: Request for Public Comment on Guides Concerning the Use of Endorsements and Testimonials in Advertising, P204500

The American Influencer Council (AIC) is a newly formed not-for-profit membership trade association representing the interests and livelihoods of U.S.-based social media influencers across all fields and creative content disciplines. AIC's mission is to advance the art of co-branded content and propel the growth of the influencer marketing industry in a globally connected world.

AIC would like to thank the Federal Trade Commission (FTC) for including the public in its regulatory review process. We believe that these public comments are an opportunity to positively evolve the Endorsement Guides as they relate to social media influencer paid and organic content and sponsored content marketing.

Summary

- (I) **PLATFORM STANDARDIZATION OF SPONSORED CONTENT:** The variance in copy disclosure prominence and positioning from social platform to platform doesn't allow for universal regulations with regards to sponsored advertisements on "influencer" pages. The FTC needs to encourage a partnership among the "Big 6" social media platforms in order to establish visual and language standardizations for sponsored content.
- (II) **TRIENNIAL REVIEW:** Ten years between Endorsement Guides reviews creates a detrimental lag in the notoriously accelerated world of social media. It behooves the FTC to compress the increments between the review process to account for newer platforms that launch in the interim. As a legitimate profession, content creators deserve and require timely occupational regulations, thus we recommend a 3-year review process.
- (III) **CONTINUED EDUCATION:** Many of those working in the influencer marketing space entered the industry with no formal business experience, as self-taught content creators, and thus learning about FTC regulations and any best practices with regards to adherence is lost on many of these entrepreneurs. Startup industries like influencer marketing are more vulnerable to deceptive consumer practices and require robust marketplace education.
- (IV) **ACCOUNTABILITY:** The brands and agencies contracting social media influencers need to take more stringent measures of adding the FTC's regulations to their standard contract language to keep both sides accountable and mold influencer behavior with regards to sponsored content.

- (V) **TRANSPARENCY:** There needs to be a high standard of consumer transparency from post to post and platform to platform that eliminates any veiling of sponsored posts as organic content. This needs to be prioritized not just for the sake of consumers, but for smaller businesses operating in the same space and within the established parameters set by the FTC.

AIC is the sole trade organization representing U.S.-based social media influencers. Our members are bloggers, vloggers, TikTokers, podcasters, GIF animators, illustrators, online personalities, creatives, and custom content thought leaders. We are a digital-first influencer content community fueling the creative, the storylines and the success behind the multi-billion-dollar influencer marketing industry in America. Our mission is to unite U.S.-based influencers across all fields and creative content disciplines to rally around the following shared goals:

1. Promote the art and authenticity of co-branded content
2. Support ethical conduct and sustained growth of the U.S. influencer marketing industry in a globally connected world
3. Mobilize expertise and information on key issues, such as advertorial content, affiliate marketing, consumer protection/transparency, and content measurement

AIC strives to unite U.S.-based social media influencers to cooperatively promote and improve the co-branded content experience on social media apps, including but not limited to, Facebook, Instagram, TikTok, Twitter, YouTube, Snapchat, Pinterest, Twitch, GIPHY, and Tumblr, while fostering the importance of transparency for paid endorsements as governed by the FTC under the rules of the Endorsement Guides.

Influencer marketing, endorser partnerships and branded content all rely on these three core principles:

- a) Borrowing a third party's brand equity
- b) Utilizing their creative capabilities
- c) Leveraging their audience distribution and scale

AIC aims to lay the foundation for a global code of ethics within the influencer marketing industry, which will help improve professional competence and further legitimize the social media influencer profession. Our goal is to sustain the integrity and viability of global influencer marketing for the ultimate benefit of society. The systems that govern the influencer marketing industry in America are loosely regulated and we must prepare for a more regulated future. When we emerge from COVID-19 quarantine, the marketplace will be different, and so will we.

(I) **PLATFORM STANDARDIZATION OF SPONSORED CONTENT:**

In the ten years since the Endorsement Guides have been amended, the advent of influencer marketing has skyrocketed within the social media space. The FTC directives outlined in "Disclosures 101 for Social Media Influencers" (Disclosures 101) note that these content creators need to be completely forthright with regards to any material connections with brands, within the endorsement caption, and not buried within a stack of hashtags or in a secondary comment on a post. With some of the well-established social media platforms, namely Facebook and Instagram, many consumers have been conditioned to spot a Sponsored post. A big reason for that is the prominence of copy in the platform interface like on Facebook and Instagram, and an ability to officially be whitelisted by a brand and tag a branded partnership at the top of the post.

Newer channels, such as Snapchat and TikTok, have interfaces that do not lend themselves to such disclosures; the copy is not so easily viewed and digested. To boot, sponsored banners on TikTok appear on blurry, transparent banners, making it particularly difficult to note on the screen. It is our recommendation that the FTC spark a partnership with the “Big 6” social media platforms (Facebook, Instagram, YouTube, Twitter, TikTok, Snapchat) to help establish a cross-platform visual standardization for sponsored content. It would aid the FTC to foster a conversation with the Big 6 and incentivize the platforms to create streamlined sponsored content solutions. Many Fortune 500 companies activate paid sponsored influencer campaigns across multiple platforms at the same time. Fostering governance for a consistent ad management ecosystem and messaging layout will ease consumer confusion. With a standardization set in place, it could also potentially influence the UX design of social channels set to launch anytime between 2020 and the next time the Guides are set to be reviewed. Establishing a caucus between the major platforms can level the playing field and set helpful precedents for future platforms. It is a goal of AIC’s to establish a dialogue forum with the Big 6 and the FTC.

(II) TRIENNIAL REVIEW:

Most social media influencers in America are small business owners who employ other creative professionals e.g. photographers, graphic designers, videographers, stylists, copywriters among others. Their entrepreneurial stewardship is fueling the launches of their own product lines, thus helping local economies by creating jobs across the U.S.¹ Those at the top tier of the influencer marketing industry are represented by global talent management companies like IMG, CAA and UTA/DBA.²

As reported by Statista, “In the second quarter of 2019, the fast fashion retail company Fashion Nova spent \$5.5 million U.S. dollars on influencer marketing on Instagram, while the French vodka brand Ciroc ranked second, with expenditures on influencer marketing amounting to nearly \$3.48 million dollars in the same period.”³

The influencer marketing industry is projected to exceed \$15B in spending by 2022.⁴ Working as an “influencer” is no longer a blanket term for a side-hustle – at least not for all. Mobile Marketer confirms that nearly 45% of social media users follow an influencer, and among them, 34% have discovered a brand solely based on influencer posts.⁵ It is a legitimate profession, one that can allow for contract negotiations and partnerships with Fortune 500 companies. “If someone is looking for a career in marketing, knowing how to become a social media influencer is certainly a profession for this decade, and the future of work.”⁶ The legitimacy of this business and its involvement in public endorsements calls for a more consistent review process.

¹Marina Liao, *10 Fashion Influencers Who Run Their Own Brands Like a Boss*, Marie Claire (January 3, 2019) <https://www.marieclaire.com/fashion/a25682449/fashion-bloggers-with-clothing-lines/>

²Booth Moore, *UTA Acquires Digital Brand Architects Influencer Management Agency*, Women’s Wear Daily (February 6, 2019) <https://wwd.com/business-news/media/uta-acquires-digital-brand-architects-1202999596/>

³A. Guttman, *Instagram Influencer Marketing Advertisers in U.S. and Canada Q2 2019, by spending*, Statista (January 31, 2020) <https://www.statista.com/statistics/1055246/leading-influencer-marketing-advertisers-north-america-by-spend/>

⁴Audrey Schomer, *Influencer Marketing: State of the Social Media Influencer Market in 2020*, Business Insider (December 17, 2019) <https://www.businessinsider.com/influencer-marketing-report>

⁵Nicole Fallon, *The Top 5 Social Media Influencers by Industry*, US Chamber of Commerce (January 2, 2020) <https://www.uschamber.com/co/grow/marketing/top-social-media-influencers>

⁶Peter Suci, *Is Being A Social Media Influencer A Real Career?*, Forbes (February 14, 2020) <https://www.forbes.com/sites/petersuci/2020/02/14/is-being-a-social-media-influencer-a-real-career/#57412236195d>

The occupational regulations that come with being a full-time social media influencer in an ever-growing space mean that there will be gray areas that will continue to turn up as new social media platforms are formed, e.g. TikTok which launched in 2017 and is the most downloaded non-gaming app worldwide⁷, presenting issues the FTC has yet to face. It would be in the FTC's best interest to modify its regulatory review process to every 3 years in order to fairly govern the industry.

(III) **CONTINUED EDUCATION:**

How active is the FTC in promulgating its regulations to up-and-coming influencers? Many influencers, particularly in the beginning stages of their businesses, rely on their brand partners to present them with a checklist of do's and don'ts. Many of these online creatives do not take it upon themselves to learn about the adherence to FTC's regulations, as made evident from countless posts across all platforms that fail to disclose material relationships. Some know they should, while others do not. But it is far from willful ignorance. In fact, "new research analyzing 800 Instagram influencers found that 71.5% attempted to disclose their relationships, but only 1 in 4 actually did it in a way that complies with FTC regulations. It seems like nearly half of influencers simply don't understand the rules."⁸ The "Disclosures 101" guide was made available to the public on November 5, 2019, which means that this literature has been in circulation for less than 170 days. The efficacy of influencer marketing first depends on how informed and knowledgeable the marketplace is of the rules that govern the space and the enforcement of those regulations. AIC advocates for education and incentivizing individual influencers and businesses to participate in an FTC-certified influencer disclosure/misinformation development program e.g. authorizing the creation of an occupational certification⁹, before severe regulations and the administration of civil penalties.

Crowell Morning recently reported that "the FTC also made clear that it is not targeting postings by smaller influencers because these are 'not a cause for major concern.'"¹⁰ Influence is not based on follower count. From nano (1k to 10k) to mega (1M+), a goal of an influencer is to elicit a particular action from their followers. It is wrong to assume that nano and macro-influencers (50k to 300k), who make up the majority of the space, don't command the same influence as someone with a mega-following, especially if this type of influencer specializes in a niche area. Not to mention, their engagement rates can often be higher than their larger peers. By that logic, the FTC will only be regulating an extremely minute piece of a very big puzzle.

According to the "Disclosures 101," influencers shouldn't "mix [their] disclosure into a group of hashtags or links."¹¹ The FTC must be clear with its directive and require one hashtag such as #SponsoredContent or #AD to be the first copy that appears in a paid post and establish uniformity.

⁷Rebecca Bellan, *TikTok Is The Most Downloaded App Worldwide, And India Is Leading The Charge*, Forbes (February 14, 2020) <https://www.forbes.com/sites/rebeccabellan/2020/02/14/tiktok-is-the-most-downloaded-app-worldwide-and-india-is-leading-the-charge/#791d87aa7266>

⁸Jim Tobin, *Ignorance, Apathy Or Greed? Why Most Influencers Still Don't Comply With FTC Guidelines*, Forbes (August 27, 2018) <https://www.forbes.com/sites/forbesagencycouncil/2018/04/27/ignorance-apathy-or-greed-why-most-influencers-still-dont-comply-with-ftc-guidelines/#160cf6547e9d>

⁹Zach Herman, *The National Occupational Licensing Database*, National Conference of State Legislatures (February 24, 2020) <https://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx>

¹⁰Michael Yaghi, *FTC Guidelines: Possible Civil Penalties to Deter Deceptive Influencer Marketing*, Crowell Morning (March 2, 2020) <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/FTC-Guidelines-Possible-Civil-Penalties-to-Deter-Deceptive-Influencer-Marketing>

¹¹ & ¹²Federal Trade Commission Guide, *Disclosures 101 for Social Media Influencers*, FTC.gov (November 5, 2019) <https://www.ftc.gov/news-events/press-releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influence>

Streamlining the process will help both the influencer and consumer. This will also produce a code of conduct within the influencer space. The “Disclosures 101” also states that influencers should not “assume that a platform’s disclosure tool is good enough but consider using it in addition to [their] own good disclosure.”¹² However, in order to facilitate compliance and promote consumer disclosure consistency at scale, it is critical for the platforms to bear the largest burden of disclosure. Unlike an individual influencer, the Big 6 have the ability to drive visual display and language standardization.

In the “State of Influencer Marketing 2020: Benchmark Report” by Influencer Marketing Hub, “The social networks (in particular Instagram) have made it easier for brands and influencers to comply with the requirements. However, influencers still have a long way to go to meet the requirements. We undertook research on a sample of 1,000 fashion micro-influencer posts for a month (over 4,200 posts analyzed). We found only 14% of posts to be fully compliant and meeting all regulatory guidelines as set out by the FTC. However, it is an improvement on last year’s results. In the equivalent survey we made last year, we found only an 11% compliance rate.”¹³

It would be extremely beneficial to the FTC, influencers, brands and influencer talent agencies if the FTC could create a structure for continued influencer education of the Endorsement Guides via online webinars or video learning on a quarterly or bi-annual basis. These valuable guidelines shouldn’t be created in a vacuum. Constant, pulsed dispersals of educational pieces are strongly recommended to help germinate the regulations across all tiers of influencer marketing.

(IV) **ACCOUNTABILITY:**

It is easy to suppose that all influencers are operating under their own agency at all times, but the truth of the matter is that a lot of the language found in the contracts presented to these influencers by the brands or their management are often the prime examples set by the FTC as unjustifiable jargon; they lack the transparent terminology consumers need to see for themselves. Sometimes all that is asked of these creators is to tag the brand and use a unique hashtag. More often than not, that is all that is asked. According to eMarketer, 41% of influencers disclosed material connections only when they were told to.¹⁴ Complacency often begets complacency, which is why it is so imperative for the FTC to begin to hold the active players (brands and agencies) in large contractual negotiations accountable for the compliance of its regulations. Otherwise, it is hard to imagine how influencers will begin to heed the word of the rules set in place.

This brings up the question of “civil penalties” as emphasized by the FTC Commissioner Rohit Chopra in his statement “Regarding the Endorsement Guides Review, Commission File No. P204500.” Commissioner Chopra states that he is in support of “codifying elements of the existing endorsement guides into formal rules so that violators can be liable for civil penalties under Section 5(m)(1)(A) and liable for damages under Section 19.”¹⁵

¹³The State of Influencer Marketing 2020: Benchmark Report, Influencer Marketing Hub (March 1, 2020) <https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020>

¹⁴ eMarketer Editors, *Why Disclosure Is Essential When It Comes to Influencer Marketing*, eMarketer (February 14, 2018) <https://www.emarketer.com/content/why-disclosure-is-essential-when-it-comes-to-influencer-marketing>

¹⁵Rohit Chopra, *Regarding the Endorsement Guide Review Commission File No. P204500*, Federal Trade Commission (February 12, 2020) https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf

Naturally, the FTC should hold accountable those parties brokering deals that essentially lead to advertising laundering. But to target “civil” parties, small businesses, without first doing the thorough due diligence required to ensure that those at the lowest level are being properly educated from the source itself on its own regulations, is unwarranted. In the age of “cancel culture,” where media-savvy consumers are quick to take to social media to air their distrust, these advertisers engaging in cloaked schemes are walking a fine line with a growing public dead-set on authenticity. “Industry does not benefit from engaging in deceptive advertising, as the exposure is too significant, and the damage deceptive advertising imposes on consumer confidence in a company’s products and services could be irreparable.”¹⁶

When brands, agencies, and social media platforms leverage content creators to participate in illegal payola, not only are consumers put at risk but the influencers as well, for these creatives can be easily lumped in by association with brands that know the FTC’s rules but decide to put the influencers in the crossfire, knowingly. While some brands can withstand the brunt of public outcry, many influencers who depend on their reputations for their livelihood, cannot. If the influencer marketing industry is to become heavily regulated in such a way that fines will be incurred, it must start with the players brokering the contracts and with a serious emphasis on educating influencers on disclosures.

We advocate for the development of universal influencer paid sponsored content contract language with the goal of harmonizing the disclosure requirements, whether you’re a large brand active in the influencer marketing space or just starting out. Either way, there can be a standard language and protocols of conduct that can then be easily tailored.

(V) TRANSPARENCY:

Helping influencers adhere to the disclosure regulations is all part of helping level the playing field in a highly competitive space. In fact, 1/5 of American consumers have made a purchase based on an influencer endorsement.¹⁷ If said endorsement comes with monetary compensation, even in the form of product gifting, in exchange for a positive review on an influencer’s channel(s), the lack of disclosure would absolutely put the genuine spirit of that endorsement into question. An influencer’s followers should be clearly notified of any type of exchange of this nature, for it directly affects a trusting consumer’s outlook on a product. Plus, it would be highly detrimental to a trusting consumer who sees a glowing endorsement that looks like an organic post for an exorbitantly priced product, as is often the case in particular with fashion influencers. If an influencer is not being paid for a positive review but is instead given gratis product in exchange for their services, we would recommend that this also be disclosed within the endorsement copy with a #freeproduct hashtag, once again – not buried in the comments section amongst 20-odd hashtags. That extra measure should at least give the consumer some kind of a glance at the true nature of the positive review in question.

That said, not every industry operates in the same way with regards to gratis products. In many cases, the implications are directly proportional to the cost of the product. While fashion influencers can be gifted high-priced items, which in turn get highlighted in style influencers’ look-of-the-day posts, other influencers – like book influencers – are often spotlighting advance reader’s copies (ARC), a token from the publisher, not the

¹⁶Michael Yaghi, *FTC Guidelines: Possible Civil Penalties to Deter Deceptive Influencer Marketing*, Crowell Morning (March 2, 2020) <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/FTC-Guidelines-Possible-Civil-Penalties-to-Deter-Deceptive-Influencer-Marketing>

¹⁷Kaitlin Augustine, *1/5th of American Consumers Have Made a Purchase Based on an Influencer*, Civic Science (January 16, 2019) <https://civicscience.com/1-5th-of-american-consumers-have-made-a-purchase-based-on-an-influencer>

author. The fashion influencer may not be disclosing that said item was a gift that costs upwards of thousands of dollars, while that book influencer is lending their thoughts on a product that will cost less than \$30 at most. It is a gray area that showcases how some regulations can't be used in a generalized manner. The FTC will have to get granular in its examination of how disclosures work from industry to industry. Should the FTC begin to fine those who do not disclose a monetary or material connection, perhaps the main variable to take into account would be how costly it would be to the trusting consumer.

(VI) **CONCLUSION:**

AIC looks forward to providing further comments and facilitating a discussion between the FTC and our Members whose content, creativity and ability to influence their social media audiences are fueling the influencer marketing industry in the U.S. Our goal is to work with the Commission to ensure consumer transparency, marketplace innovation, and fair commerce as a growing segment of social media influencers are part of a new wave of American small business owners.

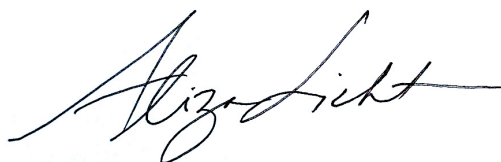
Sincerely,



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