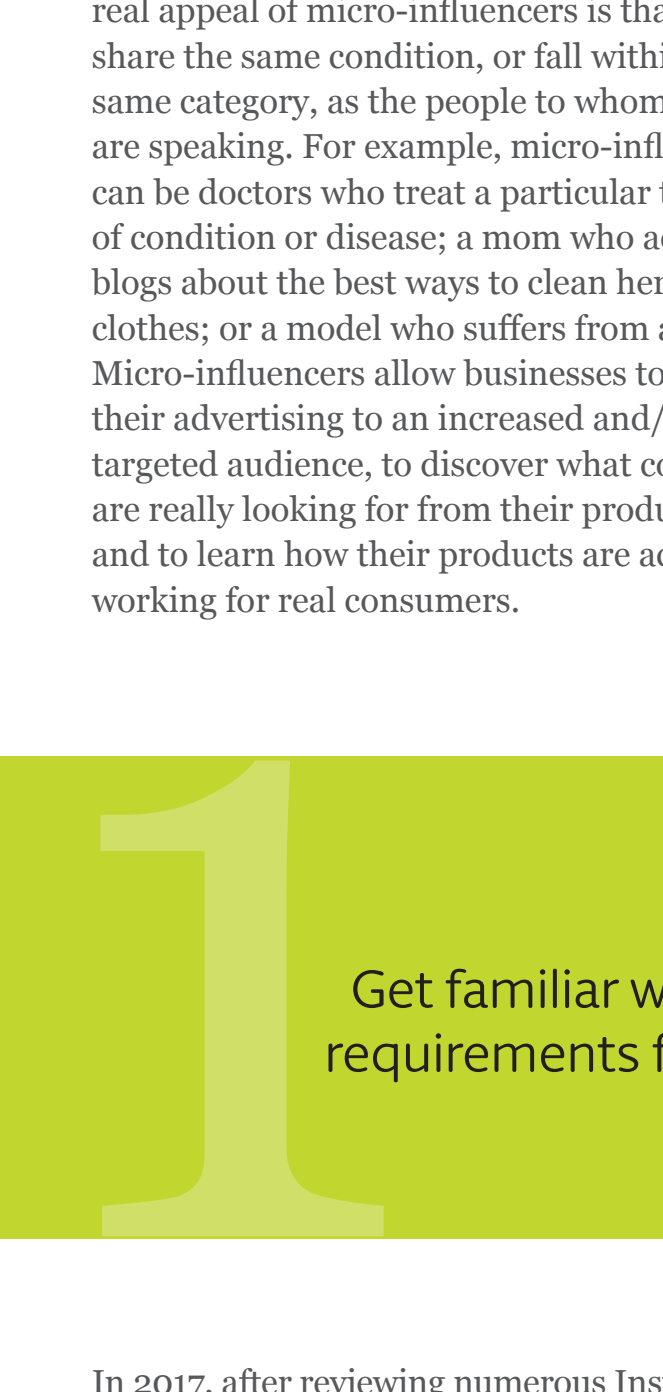


Tailor-made approach

Best practice for working with social media influencers

Find the price of a hot new product. Learn how the latest and greatest gadgets work. Compare consumer experiences.

Increasingly, the public turns to the Internet to find out all of these things, and specifically, to social media. As a result, social media platforms such as Facebook, YouTube, Twitter, Instagram, and Pinterest have become the place for consumer-facing companies to promote their products and services.



Unlike more traditional media, social media marketing allows companies not only to advertise their products, but also to interact directly with consumers to obtain feedback about their products and monitor the impact. Plus, they can see firsthand consumer reaction to messaging.

And while companies have long understood the impact of individual recommendations over more corporate-style messaging (i.e., “I’m not a doctor but I play one on TV”), companies are turning less to A-listers to sponsor their products and services and more to a new type of social media influencer: the micro-influencer, a person with access to a particular target audience.

While a “micro-influencer” may be a celebrity, that consideration is often secondary; the real appeal of micro-influencers is that they share the same condition, or fall within the same category, as the people to whom they are speaking. For example, micro-influencers can be doctors who treat a particular type of condition or disease; a mom who actively blogs about the best ways to clean her kids’ clothes; or a model who suffers from acne. Micro-influencers allow businesses to get their advertising to an increased and/or more targeted audience, to discover what consumers are really looking for from their products, and to learn how their products are actually working for real consumers.

In navigating this world, companies must comply with FTC guidelines for influencers and marketers, which require, among other things, that ads and endorsements be clearly identified and relationships with influencers that include any exchange of value, monetary or otherwise, be clearly disclosed. Companies can take advantage of the many benefits of social media influencers, and particularly micro-influencers, without running afoul of the myriad advertising and promotional regulations and requirements for their products.

Here’s how.

Below we offer a list of best practices on how to achieve compliance while working with social media influencers to promote your products or services online.

1 Get familiar with the latest FTC disclosure requirements for influencers and marketers

In 2017, after reviewing numerous Instagram posts by various types of influencers, the FTC sent out more than 90 letters reminding influencers and marketers alike to abide by the content of its Endorsement Guidelines and disclose their relationships with brands when endorsing or promoting products through social media. While the FTC only published the form letters and did not disclose the influencers’ and marketers’ identities, the FTC’s action indicates that it is actively monitoring and taking action against misleading social media advertising.

Click below for form letter examples

- 1
- 2



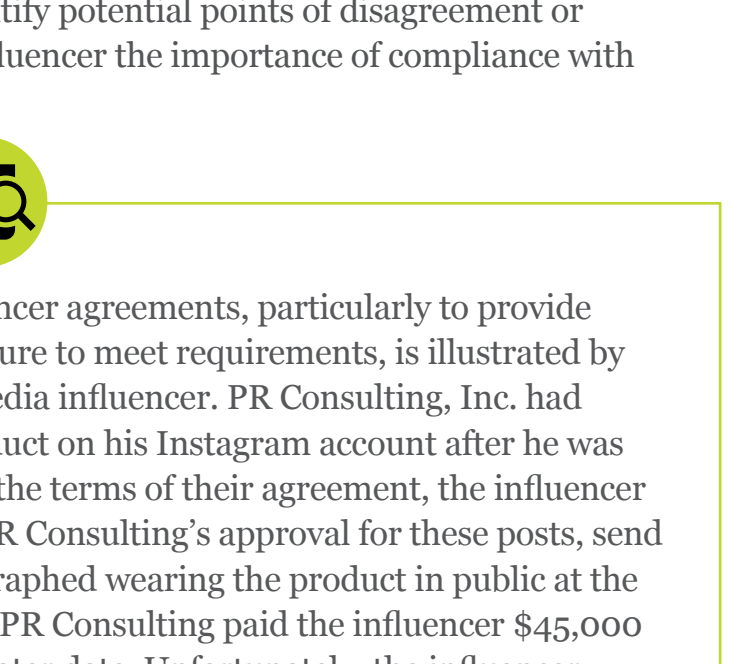
The FTC Guidelines require clear and conspicuous disclosure of any relationship between the influencer and business which consumers could reasonably perceive as affecting the influencer’s opinion. Such a “material connection” (i.e., a connection that might affect the weight or credibility that consumers give the endorsement) may include payment for the endorsement, free products or services given to the influencer, compensation for the social media influencer’s travel or accommodations, discounts for the influencer on products or services, donations from the company to charity for positive review from the influencer, etc.

While the Guidelines do not require the disclosure to be in any specific language, they do set forth a number of rules intended to help ensure compliance including:

- Disclosures should tell the full story of the influencer’s connection to the brand. Simply posting #thanks[INSERT COMPANY] is not enough, as the nature of the relationship between the influencer and the company may still be ambiguous to the public.
- Disclosures should be in an easily readable font, namely, in a color or shade that stands out against the background of the post or content.
- For video ads, the disclosure should be on the screen long enough to be noticed, read, and understood. For audio disclosures, the disclosure should be in terms easy to understand and read at a cadence easy for consumers to follow.
- Disclosures and endorsements should be in the same kind of language, and disclosures should appear proximate to the claims to which they relate.
- Disclosures should appear prominently, i.e. at the top of the post or caption. They should not be hidden or buried in footnotes, in blocks of text that people are not likely to read, or in the middle of a string of hashtags or in hyperlinks.
- On Instagram, disclosures should not appear after the “More” link in the caption.

In addition, while many social media networks have “in partnership features” or options that allow users to create “sponsored posts,” this feature is not always sufficient to satisfy the FTC’s disclosure requirements above. The FDA has advised that starting a post or caption with #ad can constitute a sufficient disclosure.

Another cornerstone of the FTC Guidelines is to require truth in advertising. Thus, a social media influencer cannot endorse a product or service with which they have no experience, that he or she did not like, nor make claims about a product that would require proof that is not available. The old stand-ins like “Results are not typical” and “individual results may vary” are not sufficient.



Click here for more specific information

2 Have a written contract with your social media influencer

Companies should always clarify the terms of their engagement with social media influencers up-front and in writing. Best practices would include the following provisions:

- Requirements for use of the sponsored products or services
- Requirements for content of the sponsored posts
- Requirements for timing of the sponsored content
- Requirements for compliance with FTC disclosure requirements
- Requirements for pre-approval by the company review of sponsored content
- Restrictions on content of the sponsored posts, such as not mentioning competitors, not using offensive language etc.
- Payment terms: consider making payment contingent upon certain milestones or activities achieved or performed by the influencer, instead of providing for a lump-sum up-front payment
- Penalties for non-compliance with 1-6 above: consider providing for withholding of pay or return of product
- Conditions for termination of the engagement: consider which actions by the influencer may be grounds for termination of the contract, including repeated violations of 1-6 above
- Specification of the length of the engagement or campaign

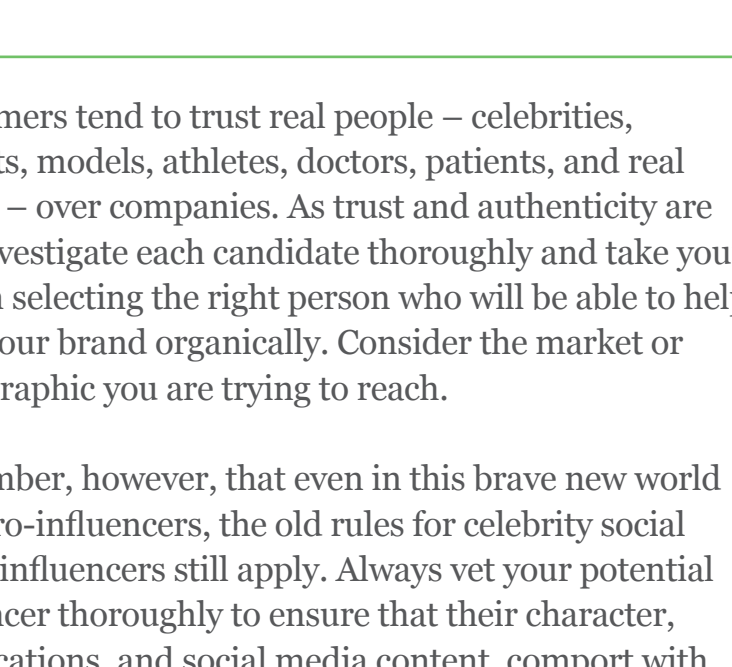
Outlining the terms of the engagement up-front help establish your company’s expectations for the social media influencer’s engagement, identify potential points of disagreement or discussion, and highlight for your social media influencer the importance of compliance with government regulations.



The importance of carefully structuring influencer agreements, particularly to provide incentives for milestones and penalties for failure to meet requirements, is illustrated by the case of PR Consulting, Inc. and a social media influencer. PR Consulting, Inc. had engaged the influencer to help promote a product on his Instagram account after he was photographed with Khloe Kardashian. Under the terms of their agreement, the influencer was required to make four unique posts, get PR Consulting’s approval for these posts, send the analytics to PR Consulting, and be photographed wearing the product in public at the Paris and Milan Fashion Weeks. In exchange, PR Consulting paid the influencer \$45,000 up front, and promised another \$15,000 at a later date. Unfortunately, the influencer only made two of the four required posts, did not obtain PR Consulting’s prior approval of the posts he did make, and did not send the analytics to PR Consulting. He also was not photographed wearing the product at either fashion week event. Nor did the influencer return the up-front payment. In October of 2018, PR Consulting had to file suit for breach of contract against him to try to reclaim its \$45,000. The suit also seeks interest, attorneys’ fees, and other damages.

3 Educate your influencer and hold periodic trainings

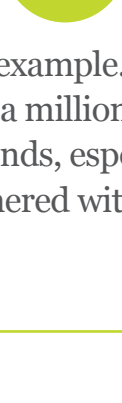
Ensuring that your social media influencer understand your products, as well the restrictions and requirements that come with their job, is critical. Your company should consider holding periodic trainings to educate your social media influencer on the kind of claims they can and cannot make and update him or her on FTC disclosure requirements. The regulatory department of your company is likely to be familiar with these requirements and can assist your marketing department to prepare these trainings.



Social media influencer trainings should also provide guidance on how the influencer can address the following common topics: **positive and negative stories, financial information, requests for more information, product complaints, mentions of branded products, derogators, offensive language, or threats.**

4 Monitor the influencer’s sponsored posts for compliance with disclosure requirements

Even if your company is pre-approving sponsored post content, it should still implement a system for regular monitoring to ensure compliance with FTC requirements, as well as your company’s guidelines and brand ethos. Content which may be compliant on one platform could become non-compliant if edited and shared on another. Having a monitoring and education system in place for your company’s social media influencers can also help mitigate your liability should the influencer post non-compliance content.



In 2015, the FTC settled charges against an online entertainment network called Machinima, Inc. for allegedly engaging in deceptive advertising by paying influencers to post YouTube videos endorsing Microsoft’s Xbox One system and games. The influencers did not disclose that they were being paid for their opinions on the system. While the FTC decided that Microsoft was responsible for the influencers’ failure to disclose their material connection to the company, the FTC considered the fact that these violations appeared to be isolated incidents that occurred in spite of, and not in the absence of, policies and procedures designed to prevent such lapses. Microsoft also quickly required Machinima to remedy the situation after they learned that Machinima was paying influencers without making the necessary disclosures. Thus, the FTC ultimately closed its investigation against Microsoft.

5 Select your social media influencer with an eye towards long-time partnership and vet them thoroughly

Consumers tend to trust real people – celebrities, activists, bloggers, doctors, patients, and real people – over companies. As trust and authenticity are key, investigate each candidate thoroughly and take your time in selecting the right person who will be able to help grow your brand organically. Consider the market or demographic you are trying to reach.

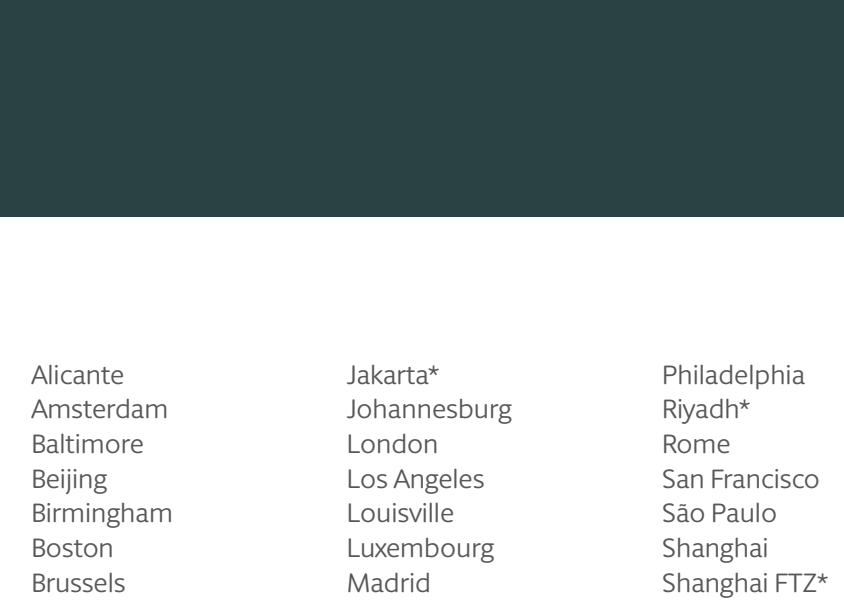
Remember, however, that even in this brave new world of micro-influencers, the old rules for celebrity social media influencers still apply. Always vet your potential influencer thoroughly to ensure that their character, qualifications, and social media content, comport with your company’s ethos.

6 Consider using a virtual social media influencer as an alternative

If the thought of placing your brand’s hard-earned image into the hands of someone outside of your own company gives you nightmares, consider creating a virtual social media influencer to promote your products. Virtual social media influencers are computer-generated imagery (“CGI”) created by influencers- or companies – who are designed to portray an ideal lifestyle or image.



Take Miquela Sousa, aka Lil’Miquela, for example. Lil’Miquela is a virtual influencer created by persons unknown, who has more than a million followers on Instagram. She is styled as a “normal girl”, who takes pictures with friends, espouses causes like Black Lives Matter, and gives media interviews. She has also partnered with brands like Prada and Chanel to endorse their products.



Fashion houses have already leaned in to this trend. Balmain recently introduced a “virtual army” of digital models to show off its latest designs comprised of three models named Shudu, Margot, and Zhi.

While this new virtual influencer trend allows for brands to retain more control of the activities of their influencers, it also brings some of its own challenges. Not only has the FTC made clear that virtual social media influencers are subject to the same truth in advertising and disclosure requirements as all other social media influencers, but the use of virtual influencers also raises intellectual property ownership concerns and morality issues. As a creative work, intellectual property ownership rights accrue to the creator of the influencer character. As a result, companies should be sure to have an agreement in place clearly outlining the ownership of such rights. Further, while the FTC does not currently require that brands disclose whether or not their influencers are real people or CGI, it may be considered best practice to make this disclosure, as virtual influencers have been criticized as setting unrealistic expectations, having suspect motivations, and lacking authenticity. Being upfront about the nature of social media influencer can help alleviate some of these concerns.



Let’s recap

- 1 Get familiar with the latest FTC disclosure requirements for influencers and marketers
- 2 Have a written contract with your social media influencer
- 3 Educate your influencer and hold periodic trainings
- 4 Monitor the influencer’s sponsored posts for compliance with disclosure requirements
- 5 Select your social media influencer with an eye towards long-time partnership and vet them thoroughly
- 6 Consider using a virtual social media influencer as an alternative

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