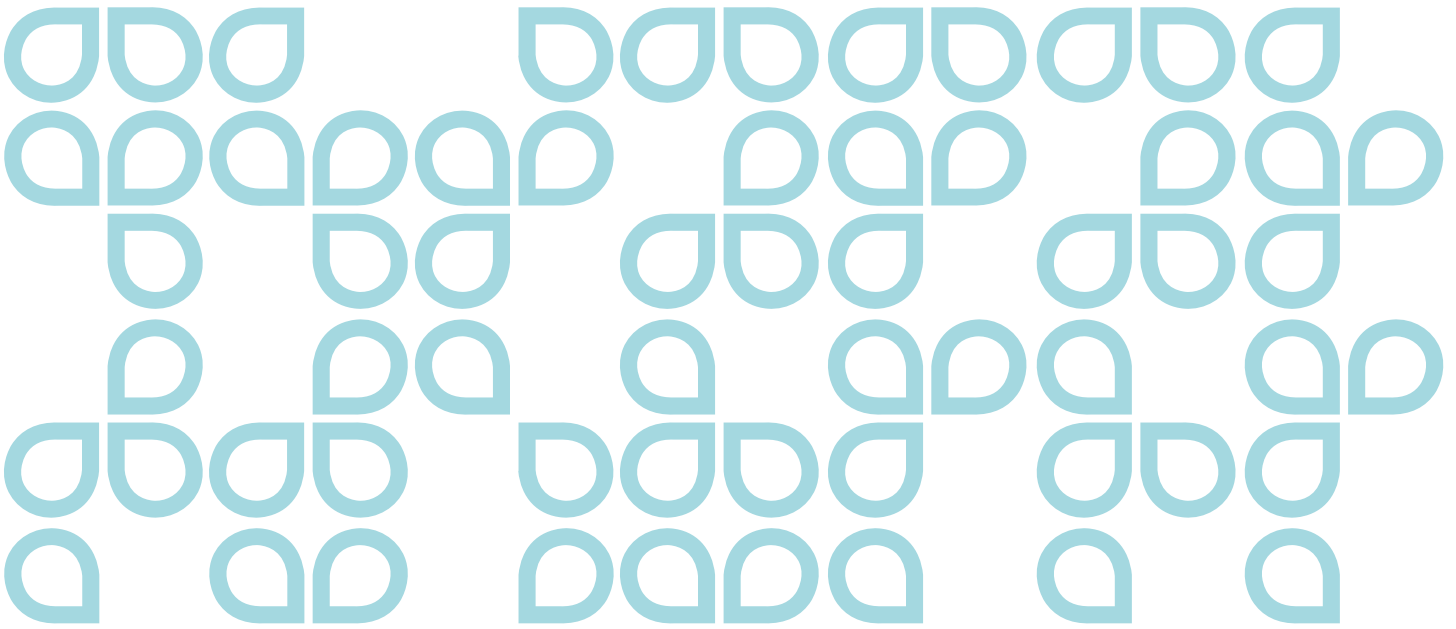




PERFORMANCE **MARKETING** ASSOCIATION



Compliance Guide for Influencer Marketing: What You Need to Know

*Compliance Guide created by the PMA Compliance Council
Performance Marketing Association*

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Who are Influencers?

Online marketers all have their definition for an ‘influencer,’ but really, who are influencers? The Federal Trade Commission defines an influencer *as individual or organization that provides an Endorsement*¹, According to eMarketer, influencers are individuals who can sway the brand preferences, buying decisions and loyalty of the broader population. Given the previous statements one could conclude that influencers are consumers of products that have the power to persuade other consumers in the purchasing journey. If that is true, then how is an influencer different from an affiliate or endorser? In this paper, we are going to explore this question and provide guidelines and best practices that online marketers can utilize when leveraging this highly-influential channel of marketers.

How are Influencers Different from Endorsers or Affiliates?

To help determine the difference between an endorser, influencer and affiliate, let’s break down each model:

Endorser- The party whose opinion, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group or institution, according to the Federal Trade Commission 16 CFR Part 255. An endorser role in the online marketing arena is to endorse products, which could be deemed as an endorsement. Often, we see the term “Endorser” bucketed in with other such terms like, “blogger or other endorser,”²

Affiliate- The Federal Trade Commission’s Endorsement Guidelines references affiliate links and within the guide it says, “You are endorsing the specific online retailer to whom you are linking. Knowing that you are getting paid if they buy an item from that retailer, rather than from another one, might affect the weight that readers give your endorsement of the retailer.”³

Influencer- “An individual or organization that provides an endorsement.”¹

Are we starting to see a theme around the term “endorsement”?

Whether you say influencer, affiliate, publisher, endorser, they are all the same from a regulatory perspective. If there is commercial intent behind the marketing of a product then that could be deemed an endorsement, and would therefore require a disclosure.

¹ <https://www.ftc.gov/system/files/documents/cases/160711warnerbroso.pdf>

² https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf

³ https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf

What is the Influencer's Responsibility?

As a third-party marketing partner, influencers are responsible for ensuring compliance with all federal, state and local laws. The Federal Trade Commission Act, Section 5 is one of the most referenced sections of laws for online marketers which states, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. ⁴" In essence, be truthful in your marketing.

Section 5, of the FTC Act is rather broad, so the federal government issued guidelines to help online marketers stay compliant with the law. One of the most referenced guidelines for influencer marketing is the Endorsement Guidelines and the Dotcom Disclosure Guide, which both outline the responsibility of the influencer to disclose their material connection with an advertiser.

One of the most important responsibilities of an influencer is to properly disclose their material relationship with an advertiser. Accurate and prominent disclosure language can make the difference between compliance and non-compliance. Let's dig a bit deeper into the language and laws around disclosures.

What is a Disclosure?

It is important to keep in mind a disclosure is a statement that modifies a claim, so if influencers are making unsubstantiated claims about an advertiser's products they will need to ensure they have the proper disclosure language included in that advertisement. Having proper disclosure language helps prevent consumers from being misled or deceived. It is important influencers provide all the information a consumer would need in order to make a purchasing decision.

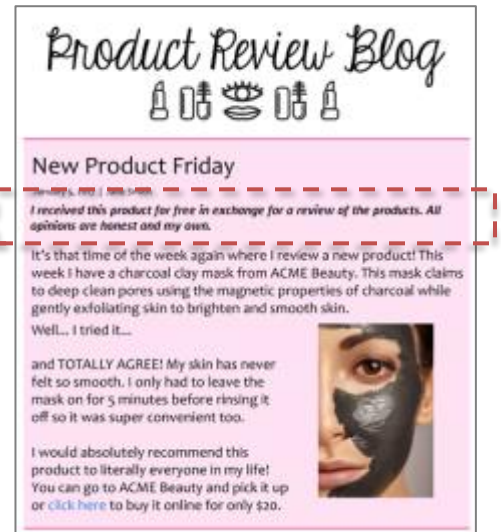
Disclosures should be clear and conspicuous. The FTC shared one mnemonic they use called **the 4Ps⁴**:

- Prominence- Is the disclosure big enough for consumers to read easily?
- Presentation. Is the disclosure worded in a way that consumers can easily understand?
- Placement. Geography matters. Is the disclosure where consumers are likely to look?
- Proximity. Is the disclosure close to the claim it modifies?

⁴ <https://www.ftc.gov/news-events/blogs/business-blog/2014/09/full-disclosure>

As you can see from the example on the right, the disclosure is:

- ✓ Prominently placed on the influencers blog
- ✓ The language of the disclosure is easily understood by consumers and not written in legalese
- ✓ The disclosure is easily identifiable by the consumer
- ✓ The disclosure is in close proximity to the content it is modifying



Social Media Guidelines and Disclosures

According to the FTC, "Simply posting a picture of a product in social media, such as on Pinterest, or a video of you using it could convey that you like and approve of the product. If it does, it's an endorsement and that needs to be disclosed."⁵

The FTC's Endorsement Guide references placement of the disclosure on social media platforms as a key factor to ensuring transparency to consumers. For example, one way to identify an endorsement is with the use of hashtag ad (#ad). However, burying the #ad in the middle of a bunch of other hashtags or at the end of a link could be overlooked by a consumer (see Example 1). Instead the guide suggests placing #ad at the beginning of a post to convey to a minority of reasonable consumers the message is commercial in nature (see Example 2). The guide also suggests that online marketers use disclosures in each ad, because one cannot assume a consumer saw the original ad that the disclosure was associate with (Endorsement Guide FAQs, n.d.)



Example 1

⁵ https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf

Furthermore the FTC suggests that consumers may not understand or identify as a disclosure of sponsorship such short-form text like “#sp,” “Thanks [Brand],” or “#partner” in an Instagram post. In the Native Advertising: A Guide for Businesses, the FTC adds “promoted” or “presented by X” as additional terms consumers may not likely understand as a disclosure.⁶

The warning letters the FTC sent out reminded online marketers to keep in mind mobile, specifically for Instagram, stating that consumers typically only see the first 3 lines unless they click “more” which many may not do. The FTC advised disclosing any material connection above the “more” button.⁷



Example 2

There are several recommendations that the FTC has provided to ensure that influencer posts are compliant. According to the federal government, consumers will likely understand that a post is sponsored if the post includes terms such as: “Ad,” “Advertisement,” “Paid Advertisement,” “Sponsored Advertising Content,” or some variation thereof.

Disclosures in Different Mediums

The FTC’s Dotcom disclosure guide states that whatever form an ad is communicated in, it must have the same form of disclosure. If you are promoting products through a social media platform like YouTube, you should use both audio and visual cues to disclose. You can’t assume a consumer has speakers or has the sound turned on. Therefore, using visuals as well as audio cues will ensure the consumer is aware the video is sponsored or an advertisement.⁸ The requirements for a visual disclosure are that the text should be displayed for a sufficient duration for a consumer to notice, read and understand.

Also, keep these best practices in mind for live video. Think about displaying a static disclosure on the video screen or having a rolling marquee. Also, the disclosure should be verbalized frequently throughout the message.

⁶ <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>

⁷ <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>

⁸⁸ <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>

And finally, if you are communicating your message in a foreign language then that disclosure must be in the same language.⁹

Marketing Claims

Free Claims

When online marketers make claims like, “Buy one, get one free”, “BOGO”, “2-for-1”, “gift”, “bonus”, “GWP”, or even “gift with purchase” online marketers can reference the CFR, code of Federal Regulations, to ensure compliance with the law. Within the code it states when making “Free” or similar claims, all terms & conditions that are contingent on receiving the free item should be set forth clearly and conspicuously at the outset of the offer, so there is no reasonable probability that the terms of the offer might be misunderstood.¹⁰

What does “outset of the offer mean?” The definition of outset means, ‘start’ or ‘beginning,’ which would indicate that all disclosure terms would be stated at the start of the consumer journey. In most cases, the consumer’s path-to-purchase starts on an affiliate site. So, one could conclude that all terms should be stated on the publisher site to ensure consumers are not misled and have all the information needed in order to make a reasonable purchasing decision.

Let’s look at an example. In the image to the right we see that the influencer is writing about a jewelry subscription. She directs consumers to put in her vanity code to receive a free trial. When a consumer clicks through her link and inserts her vanity code, she receives a commission.

However, the blogger fails to disclose the terms of the offer which states, “You have to pay a deposit to start the subscription service (should you decided to cancel prior to the trial period ending).” Going back to the free claims guide, all terms & conditions that are contingent on receiving the free item should be set forth clearly and conspicuously at the outset of the offer. It is recommended that this information be disclosed by the influencer to avoid potential customer confusion.



Guarantees

The FTC’s Guides for the Advertising of Warranties and Guarantees states, if your ad uses phrases like “satisfaction guaranteed” or “money-back guarantee,” you must be willing to give

⁹ https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf

¹⁰ <https://www.law.cornell.edu/cfr/text/16/251.1>

full refunds for any reason. As well, state all terms and conditions upon receiving that full reference clearly and conspicuously to the consumer.¹¹

Environmental Claims

The FTC's Green Guide states online marketers should not make broad, unqualified general environmental benefit claims like 'green' or 'eco-friendly' because broad claims are difficult to substantiate, if not impossible.¹²

The green guide also states online marketers should qualify general claims with specific environmental benefits and all qualifications should be clear, prominent, and specific.¹³

In addition, for online marketers who make Degradable or Bio-Degradable claims, those products need to degrade naturally within 1 year. If not, that claim will need to be modified with what classifies it as degradable, according to the green guide. (Green Guide, n.d.)



Let's look at another example. The image to the left displays an influencer writing editorial content about handbags. The influencer is using images of handbags that are labeled as being "ecofriendly" and the title of the blog post indicates the content will be focused on vegan handbags. As you can see one of the bags is labeled PVC tote which is a derivative of plastic and can

be harmful to the environment. In addition, the influencer is stating eco-friendly as a tagline in the post. Referencing the green guide, online marketers should avoid making broad general environmental claims. In addition, the influencer could be causing consumer confusion by mixing both eco-friendly and vegan in a similar bucket.

Made in USA Claims

The Made in USA guide says for a product to be called Made in USA, the product must be "all or virtually all" made in the U. S.¹⁴

"All or virtually all" means that all significant parts and processing that go into the product must be of U.S. origin. Online marketers that make claims like, "True American Quality," "Created in the USA," "Our products are American Made," should have a "reasonable basis" to

¹¹ <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road#general>

¹² <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>

¹³ <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>

¹⁴ <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>

support the claim at the time it is made. Meaning, online marketers will need competent and reliable evidence to back up the claim that its product is "all or virtually all" made in the U.S.¹⁵

According to the guide, making a qualified Made in USA claim describes the extent, amount or type of a product's domestic content or processing; it indicates that the product isn't entirely of domestic origin. For example, an online marketer could say, "60% U.S. content", "Made in USA of U.S. and imported parts", "Couch assembled in USA from Italian Leather and Mexican Frame", "Made in U.S. from Imported Parts", "Assembled in U.S.A."¹⁶

Jewelry Claims

The Jewelry Guide explains how online marketers need to make accurate and truthful claims about jewelry.

For instance, when marketing a pearl, it could be misleading to consumers if the word pearl is used by itself, if it is not a 100% natural pearl. Instead, the guide suggests you should tell consumers if the pearls are cultured or imitation, so that consumers are not misled about the type of pearl being offered. (Electronic Code of Federal Regulations, 2017)

The guide also suggests disclosing what type of cultured pearl it is, so "cultured freshwater pearl" or "south sea cultured pearl", and if the pearl is an imitation pearl, it is suggested that you disclose that by stating the word "artificial," or "imitation," or "simulated" immediately preceding the word pearl.¹⁷

Let's look at an example. In the image displayed to the right, the influencer is writing content about a pearl necklace she wore on her wedding day. She states it was a "single black pearl" and provides consumers a link to purchase the necklace from an online jewelry advertiser. According to the Jewelry



guide, this could be deemed misleading to a consumer because the pearl is not a natural pearl, it is an imitation pearl that has been dyed black. The influencer in this case failed to disclose key details that a consumer would need to know before making that purchasing decision.

¹⁵ <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>

¹⁶ <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>

¹⁷ https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=94b5a2c131bf43101f579853625a908b&ty=HTML&h=L&mc=true&r=PART&n=pt16.1.23#se16.1.23_11

Risk Assessment

Compliance is about managing risk. The spectrum of risk can range anywhere from high to low. It is important as an online marketer that you determine your company's appetite for risk. Understanding how your company manages risk will help you determine what levels of controls you need to put in place to mitigate that risk. There will almost always be an inherent level of risk, but putting proper controls in place will help you mitigate the dangers for consumer deception and misinterpretation. Some questions to consider when evaluating risk include:

- How highly regulated is your industry?
- Does your company work with influencers?
- How large is your influencer program?
- Have you ever received any enforcement action for the federal government before?

When you have determined your company's standards for exposed risk you can then begin to place monitoring controls that match your profile for risk.

There is a saying in the compliance world that if you don't document it, it never happened. So, it is important to always document how you are monitoring your controls. Without that documentation, you have no way of measuring the key risk indicators.

You Can't Afford to be Non-Compliant

Assessing risk is important because as an online marketer you may be held responsible for what influencers say about your products to consumers. The FTC's endorsement guide states, "Your company is ultimately responsible for what others do on your behalf." (Endorsement Guide FAQs, n.d.) The guide also suggests that advertiser's need to make a reasonable effort to monitor what influencers are saying on their behalf and ensure they are disclosing their material connection clearly and conspicuously. Because of your role in recruiting and directing influencers, your company could be responsible for any failures by the influencers you pay to adequately disclose that they received payments for their endorsements. Teach your influencers to adequately disclose their compensation for endorsements and take reasonable steps to monitor their compliance with that obligation.¹⁸

It is important when assessing your budget for influencers that you include a cost for compliance. Merely stating in the terms of the partnership program you require compliance is no longer enough. As an online marketer, you want the message of your product(s) to spread like a wildfire, but understand that non-compliance could spread just as fast.

In 2016, the maximum civil penalty amount increased from \$16,000 to \$40,000 for any violation of Section 5 of the FTC Act.¹⁹ This penalty can accumulate an additional \$40,000 per

¹⁸ https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf

¹⁹ <https://www.ftc.gov/news-events/press-releases/2016/06/ftc-raises-civil-penalty-maximums-adjust-inflation>

day until the violation has been resolved. The spike in penalties speaks to the importance the FTC is placing on the need for compliance in online marketing. As a brand working with influencers, be sure to conduct your due diligence and implement best practices and trainings to ensure you and your influencers are staying compliant with the law.



Compliance Guidelines for Influencer Marketing:

What You Need to Know

Compliance Guide created by the PMA Compliance Council

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