

International Franchise Association
2025 IBA/IFA Joint Conference
May 6–7, 2025

Franchise Advertising and the Use of Influencers in Social Media

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Introduction

Social media influencing has become an increasingly popular and effective tool for brands to reach consumers. The rapid growth of the industry has, in turn, raised questions about transparency, consumer protection, and fair advertising practices. Media platforms have long since embraced the breadth and effectiveness of influencer marketing. As people spend an increased amount of their lives online and consume advertising through social media platforms, companies have aimed to insert brand awareness into these online spaces in a way that captures consumers' attention without jarring the consumer from their daily scrolling. What makes influencer marketing so effective is the strong relationships consumers form with their preferred influencer and the trust that consumers place in the influencers they follow. Influencers now invite consumers into their private lives and share details on their friends, family, lifestyle, and more. These interactions strengthen the level of trust between consumers and influencers. They also allow influencers to impact the spending habits of their followers. If executed properly, working with an influencer can allow companies to introduce and strengthen their brand and products to consumers in a creative, engaging, and authentic manner. The impact can be tremendous given the reach of some influencers, and even smaller influencers can stumble into a viral moment that reaches millions of eyeballs.

I. LEGAL AND REGULATORY GUIDANCE OVERVIEW

Social media advertising, including marketing conducted through social media influencers, is generally subject to the same laws and regulations governing advertising, including false and misleading representations. Regulatory bodies around the world have implemented guidelines to ensure that influencer-sponsored content is clearly disclosed and adheres to established advertising standards. The following section will first describe who is included in this industry and then will discuss key US guidelines and international guidelines governing influencer content.

A social media influencer is, at a minimum, someone who has an online presence and shares content via social media platforms such as Instagram, Snapchat, YouTube, or TikTok. The term "influencer" now commonly refers to someone who does more than just create and post content but is also someone who engages in social media marketing through endorsements and product advertising. Influencers are typically considered to have some form of expertise or social influence in their field such that a significant number of followers or viewers of the content may be likely to value their opinion. There are numerous types of influencers, including fashion and beauty influencers, food influencers, travel influencers, mommy/daddy influencers, and even general lifestyle influencers who document their lives.

¹ The authors gratefully recognize the contributions of Jay V. Prapaisilp and Margaret H. Ulle, associates at Venable LLP, to this paper and the related presentation.

Regulators have typically focused on the conduct of the advertising when attempting to define or describe an influencer. The Federal Trade Commission (“FTC”) is the federal government agency in the United States that regulates general advertising and marketing activities. In that vein, the FTC also regulates social media influencer content by enforcing truth-in-advertising standards. The FTC has noted that anyone who “work[s] with brands to recommend or endorse products” must comply with the law when making a recommendation or endorsement.² Someone whose “opinions, beliefs, findings, or experiences” with a product or service that are used by an advertiser to influence consumers is viewed as giving an endorsement.³ In this context, an influencer is essentially anyone—a celebrity, expert, or ordinary consumer—who shares content that could influence others’ purchasing decisions. The rules apply regardless of the person’s level of fame or follower count.

Outside of the United States, the European Union has classified influencers as “anyone making money through creating social media content” in the European Commission’s Influencer Legal Hub resource.⁴ More specifically, they have described influencers as “content creators who often advertise or sell products on a regular basis.”⁵ The United Kingdom’s Advertising Standards Authority (“ASA”) has defined an influencer as “any human, animal or virtually produced persona that is active on any online social media platform, such as Facebook, Instagram, Snapchat, TikTok, Twitch, YouTube, and others.”⁶ In Canada, the applicable guidelines on deceptive marketing practices apply to “anyone who is promoting a product, service, or any business interest.”⁷ Canada’s Competition Bureau has stated that this includes influencers.

In addition to the legal and regulatory requirements and prohibitions surrounding social influencers, individual social media platforms have their own rules for advertising and promotions and may enforce those rules by shutting down the page or feed of an advertiser perceived to be violating those guidelines or the law.

A. US Legal Guidelines Related to Influencers

The FTC is the federal agency in the United States responsible for protecting consumers, promoting competition, and preventing deceptive, unfair, or anti-competitive business practices. The FTC has broad investigative and enforcement powers to regulate influencer marketing and hold advertisers accountable for misleading endorsements. The

² Federal Trade Commission, *Disclosures 101 for Social Media Influencers*, <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers>.

³ Federal Trade Commission, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 CFR Part 255 (2023), <https://www.federalregister.gov/d/2023-14795>.

⁴ European Commission, *Influencer Legal Hub* (2023), https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/influencer-legal-hub_en.

⁵ *Id.*

⁶ Advertising Standards Authority, The Committee of Advertising Practice & The Competition and Markets Authority (2023), *An Influencer’s Guide to making clear that ads are ads*, <https://www.asa.org.uk/static/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf>.

⁷ Competition Bureau Canada, *Influencer marketing and the Competition Act* (2022), <https://competition-bureau.canada.ca/deceptive-marketing-practices/types-deceptive-marketing-practices/influencer-marketing-and-competition-act>.

FTC enforces truth-in-advertising standards, requiring influencers to disclose relationships with brands when promoting or endorsing products. The FTC requires that both brands and influencers share responsibility for ensuring disclosures are made correctly.

The FTC conducts investigations and can bring cases under Section 5 of the FTC Act, which prohibits deceptive advertising. The FTC Act applies to product or service recommendations, or other endorsements made on behalf of a sponsoring advertiser. The FTC can investigate advertisers, brands, or influencers who fail to disclose material connections or make misleading claims in influencer marketing. The FTC considers influencer content to be testimonial or endorsement advertising. The following paragraphs will discuss key FTC guidance that must be followed by advertisers to ensure compliance when using social media influencers: FTC’s Endorsement Guides, the Rule on the Use of Consumer Reviews and Testimonials, and Disclosures 101 for Social Media Influencers.

i. FTC Endorsement Guides

The FTC’s Guides Concerning the Use of Endorsement and Testimonials in Advertising (“Endorsement Guides”) are guidelines designed to help advertisers, influencers, and businesses ensure that testimonials and endorsements are truthful, transparent, and not misleading.⁸

An “endorsement” is defined as “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.” Endorsements include statements, demonstrations, or depictions of the name, signature, likeness, or other identifying characteristics of an individual or the name or seal of an organization. The FTC’s Endorsement Guides were updated and clarified in June 2023 and address questions triggered by new and emerging technologies.

The Endorsement Guides are important for social media influencer advertising as they outline how endorsements must be disclosed to prevent deceptive advertising. The FTC has made it clear that rules regarding disclosure of material connections apply in the social media context. Influencers must clearly disclose any material connections, such as payments, free products, or other incentives, when promoting a brand or product on social media. Additionally, the Endorsement Guides state that the endorser (in this case, the influencer) should not talk about an experience with a product they have not tried. They should also not make claims about a product that would require proof they do not have.

⁸ Federal Trade Commission, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 CFR Part 255 (2023), <https://www.federalregister.gov/d/2023-14795>.

The FTC has provided additional business guidance on its website to interpret the Endorsement Guides.⁹

The FTC Endorsement Guides state that “material” connections must be disclosed. Critically, some connections may be immaterial because they are too insignificant to affect the weight or credibility given to endorsements. However, a material connection needs to be disclosed when a significant minority of the audience for an endorsement does not understand or expect the connection. A disclosure of a material connection does not require the complete details of the connection, but it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.

While not legally binding, practices that are inconsistent with the Endorsement Guides may result in enforcement actions under Section 5 of the FTC Act. The Endorsement Guides can provide guidance on how the FTC interprets the FTC Act. As a result, the Endorsement Guides are an important resource to be followed. Additionally, courts often look to them as persuasive authority in disputes even though they don’t have the force of law. Courts may refer to them to interpret provisions of the FTC Act or state consumer protection laws. The Endorsement Guides can provide context to assist courts in determining whether the conduct violated these laws or to assess whether a business’ practices align with industry standards. Compliance with the Endorsement Guidelines can support a business’ claim of good faith, while noncompliance may suggest deceptive or unfair conduct.

The FTC evaluates possible violations of the FTC Act case by case when concerns come to their attention. If enforcement becomes necessary, the FTC will typically focus on the advertisers or the advertising agencies and public relations firms rather than individual influencers. In certain circumstances, the FTC may find it appropriate to take action against an individual endorsement—for example, if the endorser hasn’t made required disclosures despite warnings. The FTC does not hold influencers to a higher standard than reviews for traditional media outlets. The FTC Act applies across the board.

ii. FTC Rule on the Use of Consumer Reviews and Testimonials

Also, the FTC Rule on the Use of Consumer Reviews and Testimonials (“Rule”) applies to influencer marketing by prohibiting businesses from manipulating consumer reviews and requiring transparency in endorsements. The Rule recently went into effect in October 2024.¹⁰ Unlike the Endorsement Guides, this Rule is a federal regulation that the FTC can file a lawsuit under if advertisers violate any of its provisions. There may, however, be some overlap in the topics covered between the Endorsement Guides and the Rule.

To comply with the Rule, a business must avoid engaging in what the FTC considers deceptive and unfair conduct involving consumer reviews and testimonials.

⁹ Federal Trade Commission, *FTC’s Endorsement Guides: What People Are Asking* (2023), <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking>.

¹⁰ See Federal Trade Commission, *Trade Regulation Rule on the Use of Consumer Reviews and Testimonials*, 16 CFR Part 465 (2024), <https://www.federalregister.gov/d/2024-18519>.

Some requirements applicable to influencers include: material connections to brands must clearly be disclosed; the disclosure must be conspicuous and easy for consumers to understand; and brands cannot encourage only positive reviews or prevent negative ones from being posted. The FTC holds both brands and influencers accountable. Brands must educate influencers on proper disclosure practices and monitor compliance. Where an influencer violates the agreement, compliance policies, or the law, the company should take corrective action such as suspending the influencer, pausing payments to the influencer, and, in some instances, terminating the influencer as a partner.

The FTC can pursue multiple remedies for violation of the Rule, including: injunctive relief; consumer redress and restitution; and disgorgement of gains. In addition, the FTC can refer the matter to the Department of Justice to pursue civil penalties of up to \$53,088 per violation for violating the Rule.

iii. FTC Disclosures 101 for Social Media Influencers

The FTC has issued specific guidance on disclosures titled “Disclosures 101 for Social Media Influencers.”¹¹ This guidance document provides tips for when and how to make effective disclosures. Influencers must disclose any material relationship with a brand—this includes any personal, financial, or employment relationship, payment, gifts, discounts, or other incentives. It is important to disclose these relationships to followers because it helps keep recommendations honest and truthful and lets consumers weigh the value of the endorsements.

The FTC has provided multiple examples of the types of disclosures that companies should make in different types of media. It has provided the following principles in its guidance documents:

- Tags, likes, pins, and similar ways of showing you like a brand or product can be endorsements.
- If posting from abroad, U.S. law applies if it is reasonably foreseeable that the post will affect U.S. consumers.
- If a person does not have a brand relationship and is just telling people about a product they bought and happen to like, they do not need to declare that they do not have a brand relationship.

The FTC provides the following guidance about how to disclose a “material connection”:

- Use simple and clear language.

¹¹ Federal Trade Commission, *Disclosures 101 for Social Media Influencers*, <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers>.

- Simple explanations like “Thanks to Acme brand for the free product” are often enough if placed in a way that is hard to miss.
 - Terms like “advertisement,” “ad,” and “sponsored” are often enough if placed in an unavoidable way.
 - On a space-limited platform, like X, the terms “AcmePartner” or “Acme Ambassador” (where Acme is the brand name) are also options.
 - The FTC states that it is acceptable to include a hashtag in addition to the disclosure, such as #ad or #sponsored.
 - Do not use vague or confusing terms like “sp,” “spon,” or “collab,” or stand-alone terms like “thanks” or “ambassador,” and influencers should stay away from other abbreviations and shorthand when possible.
- The disclosure should be in the same language as the endorsement itself.
 - Influencers should not assume that a platform’s disclosure tool is good enough, but the influencer should consider using it in addition to their own, good disclosure.

These disclosures must be clear and conspicuous, which the FTC defines as difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers. The FTC provides the following guidance for placement of the disclosure:

- The disclosure should be placed somewhere that is hard to miss. In other words, the disclosure should be unavoidable.
- The disclosure should be placed with the endorsement message itself.
- Disclosures are likely to be missed if they appear only on an ABOUT ME or profile page, at the end of posts or videos, or anywhere that requires a person to click MORE.
- Disclosures should not be mixed into a group of hashtags or links.
- Disclosures should also match the method of marketing used for the advertisement.
 - If your endorsement is in a *picture* on a platform, like Snapchat and Instagram Stories, the disclosure should be superimposed over the picture and viewers should have enough time to notice and read it.
 - If making an endorsement in a video, the disclosure should be in the video and not just in the description uploaded with the video. Viewers

are more likely to notice disclosures made in both audio and video. Some viewers may watch without sound, and others may not notice superimposed words.

- If making an endorsement in a *live stream*, the disclosure should be repeated periodically so viewers who only see part of the stream will get the disclosure.

An influencer cannot talk about an experience with a product they have not tried, cannot say something was terrific if they thought it was terrible, and cannot make false or unsubstantiated claims.

iv. Notices of Penalty Offenses

The FTC has demonstrated that it takes violations seriously. In April 2023, the FTC warned nearly 700 marketing companies that they could face civil penalties if they make deceptive advertising claims.¹² The notices reminded companies that health-related claims for over-the-counter drugs, supplements, and similar products must be backed up by reliable scientific evidence. The notices did not accuse recipients of wrongdoing but served as a warning to ensure compliance with truth-in-advertising claims.

v. The National Advertising Division of the Better Business Bureau National Programs

The National Advertising Division (“NAD”) of the BBB National Programs is a non-governmental, industry-regulatory body that oversees advertising disputes among member companies. On its own initiative or through a competitor challenge, NAD reviews claims in product advertising to ensure proper substantiation exists. The challenger’s and advertiser’s positions, NAD’s decision, and a statement by the advertiser are made public. Reviews are conducted by attorneys with expertise in claims substantiation, advertising and trade regulation, litigation, and arbitration. While compliance with NAD decisions is voluntary, companies often engage in the process and comply with NAD’s decision because if a business refuses to make the recommended changes, the NAD will refer the case to the FTC for its enforcement consideration.

The NAD has evaluated a number of cases relating to social influencers. It has set forth multiple guidelines that address social influencer advertising.

The NAD has rejected celebrities’ arguments that no disclosure is required where their followers are likely aware of their connections to brands due to long-standing and public endorsements. Thus, even where a celebrity has a high-profile status and extensive promotional activities for brands, NAD has found that a significant minority of the audience for an endorsement might not understand or expect the connection or would

¹² Federal Trade Commission, *FTC Warns Almost 700 Marketing Companies That They Could Face Civil Penalties if They Can’t Back Up Their Product Claims*, Federal Trade Commission (Apr. 13, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-warns-almost-700-marketing-companies-they-could-face-civil-penalties-if-they-cant-back-their>.

evaluate it differently knowing that the endorsement was motivated by a material connection. In this regard, NAD has noted that consumers might have varying levels of engagement with brands and celebrity endorsements, some viewers might not have seen prior promotions, and others might only be familiar with the brand through other influencers and advertising. Even where celebrities have millions of followers and promote their brand partnerships elsewhere, the NAD found that the celebrity must, nevertheless, provide a clear and conspicuous disclosure of the connection and sponsorship.

The NAD has analyzed specific disclosures in context to determine if they are adequate. It has found that the disclosure #brandpartner, where the word “brand” was a company’s name, was insufficient to “clearly and conspicuously” disclose the connection between an influencer and the brand. Instead, NAD has found that the language should state “#brand_partner.” Similarly, NAD found the disclosure “#giftedbybrand” insufficient because the words run together and, thus, made it difficult for consumers to understand the disclosure. The NAD has also stated that a disclosure should be “hard to miss” and customers should not be required to click “more” to see the disclosure.

NAD has also evaluated social media advertising where a company had a gifting relationship with its influencers and the influencers tagged the brand (“@brand”) but did not explicitly explain the connection between the influencer and the brand. NAD stated that it did not consider this sufficient to disclose the connection.

NAD also found disclosures insufficient where the influencer tagged multiple brands because it was unclear the specific brand that was sponsoring the post or that a brand was sponsoring the post. The NAD noted that the FTC does not mandate specific wording for sponsored posts or the placement of the disclosure, it advises that “[t]he words “Sponsored” and “Promotion” at the beginning of a post might also be effective, but “Sponsored by brand” or “Promotion by brand” would be clearer.” In that case, NAD recommended that the advertiser take steps to ensure that its influencers’ posts make clear the influencers’ material connection to the brand.

NAD has evaluated companies’ social influencer training and compliance policies. In one case, NAD analyzed a brand’s social media policies where it gifted products to various influencers. NAD found insufficient a company’s email to influencers informing them of the gift and next steps with instructions on how to clearly and conspicuously disclose the gifting relationship they have with the company, because the instruction appeared deep in the email in a block of dense text. The NAD cited to the FTC’s guidance, which specifically addresses instances where a company sends influencers free products. The FTC’s guidance states:

For influencers who only get free products, is just sending them training material sufficient? It’s important, but insufficient. If a company sends influencers a free unsolicited product and nothing else, it should ask them to disclose the gift clearly and conspicuously in any resulting social media posts or other endorsements, tell them how it should be disclosed, and ask them to tag the brand. The company should monitor the resulting tagged

posts. We understand that software solutions exist to monitor compliance online.... Also, even if the only things you're sending influencers are unsolicited free products, you're still on the hook for their deceptive claims, so the training material should describe what they can and can't say about your products.

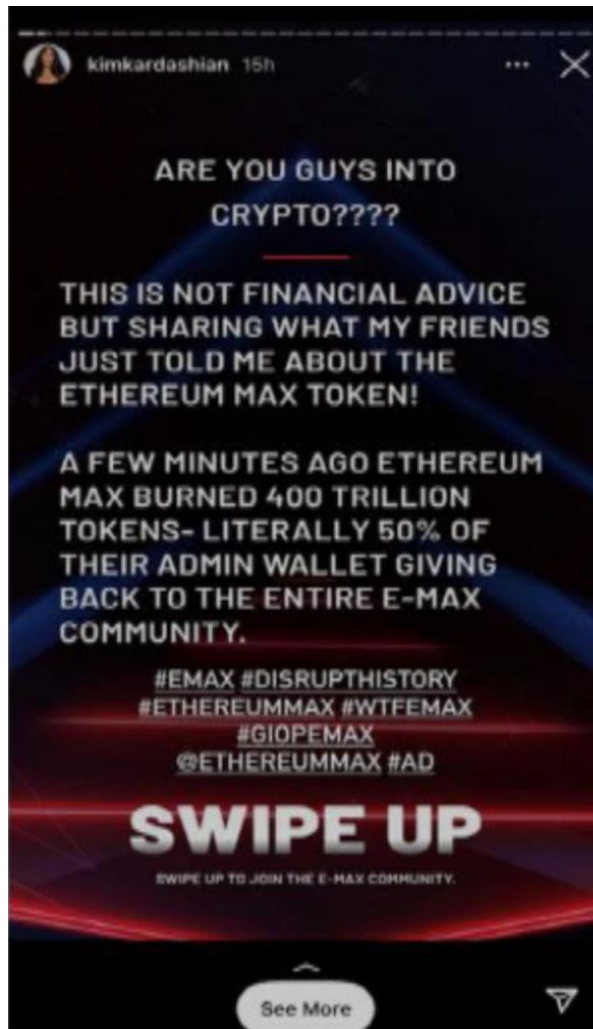
The NAD found that the email guidance was not sufficient in providing influencers with guidance as to how and where to disclose that the products are gifted.

vi. Court Decisions Involving Influencer Advertising

There have been relatively few cases filed in courts in the United States challenging influencer advertising. However, the guidance to date indicates that courts will look to the FTC's guidance but also that courts will be more skeptical of the FTC's and NAD's positions on these issues.

For example, a putative class action lawsuit was filed in U.S. federal court for the Central District of California, asserting claims against several celebrities who had promoted the Ethereum Max (EMAX) cryptocurrency, also called tokens. The lawsuit was filed in 2022 against Kim Kardashian, Floyd Mayweather, and former professional basketball player Paul Pierce, challenging their EMAX endorsements and social media posts. In that case, the court is analyzing a number of social media posts to determine whether they violated various state securities laws as well as state consumer protection laws in California, Florida, New Jersey, and New York.

Although the court found that the plaintiffs sufficiently alleged violations of various securities and consumer protection law, it rejected the plaintiffs' arguments that Kardashian had not sufficiently disclosed her connection with the company offering the tokens. The plaintiffs had argued that the disclosure "#AD" in the following Instagram post was not sufficiently clear and conspicuous because it was toward the bottom of the post and in a chain of hashtags:



The court rejected the plaintiff's theory. It held that because "#AD" appeared before the swipe-up banner, "any reasonable consumer would inevitably see the hashtags before swiping up to purchase the Tokens." It observed that Kardashian is a well-known influencer who is paid for many of her social media posts, and, therefore, "it should not come as a surprise to any reasonable consumer that she was paid" for the post, given that it included the "#AD" disclaimer. The court, thus, rejected the plaintiffs' challenge to the disclosure and concluded it was clear that the post was sponsored advertising.

Similarly, in *Lokai Holdings LLC v. Twin Tiger USA LLC*, the court dismissed claims under California law, challenging a company's failure to disclose compensation made to various influencers.¹³ The court held that because the FTC's Guidelines were the plaintiff's sole basis for alleging a violation of California's false advertising statutes, the FTC does not provide a right of action and the plaintiff could not engineer one through California law. Further, the plaintiff had not alleged any facts that plausibly raise an

¹³ 306 F. Supp. 3d 629, 641–42 (S.D.N.Y. 2018).

inference that the non-disclosure of paid endorsements is likely to lead consumers to believe that the endorsements are unpaid.

The court in *Sava v. 21st Century Spirits, LLC* reached a different conclusion. In *Sava*, the plaintiffs alleged that the influencers claimed that Blue Ice liquor is “handcrafted,” has between 52 and 57 calories per ounce, is “fit-friendly” in that it helps with personal fitness and weight management, and that Blue Ice cocktails have fewer calories than an apple, implying that Blue Ice “is the healthier alternative.”¹⁴ The plaintiffs also alleged that the influencers misrepresent “the material connection they have with the brand by promoting Blue Ice products without disclosing the fact that they were paid to do it” and instead “pretending [to be] disinterested consumers.”

The defendants moved to dismiss the case, arguing that any connection between the influencers and 21st Century would be “reasonably expected by the audience.” The court disagreed. First, it held the plaintiffs had sufficiently alleged that the posts constituted advertising because the influencers were advocating the purchase of Blue Ice, and that “a reasonable consumer” viewing the influencers’ posts in their totality, would be “likely to believe that these messages reflect the opinion or belief of the influencers posting them.”

Next, the court found that plaintiffs adequately alleged that the connection between the advertiser and Influencers was not known by consumers because the influencers were not well known. Further, the plaintiffs specifically alleged that they took the influencers to be offering “honest advice” about Blue Ice and “would not have purchased [Blue Ice] products if they knew that the influencers were paid” to promote it. In short, the court agreed with plaintiffs that the influencers’ posts come within the scope of the FTC’s Endorsement Guides and the material connection between the influencers and 21st Century “might materially affect the weight or credibility of the [influencers’] endorsements.” Therefore, the court concluded that the paid relationship between 21st Century and the influencers should have been disclosed by the influencers. Further, the court noted that whether the Instagram posts are “deceptive ... depend[s] on the specific factual circumstances” surrounding the posts, and the court held that the plaintiffs plausibly alleged that the influencers’ failures to disclose were “deceptive acts” within the meaning of Florida’s Unfair and Deceptive Trade Practices Act. In other words, these failures to disclose are omissions that are “likely to mislead the consumer acting reasonably in the circumstances,” and, as plaintiffs allege, that they would not have purchased Blue Ice had the paid relationships been disclosed, so these omissions are also “to the consumer’s detriment.”

B. International Guidelines Related to Influencers

Countries outside the US have adopted guidelines on social media influencer marketing with similar themes to the FTC’s guidelines. Advertisers should be aware of international guidelines on influencer marketing should they wish to target these markets. Influencer content may need to comply with international laws and guidelines when

¹⁴ No. 22 C 6083, 2024 WL 3161625, at *18 (N.D. Ill. June 25, 2024).

advertised to international markets or when posts may affect consumers in other countries. The below paragraphs include guidance from the European Union, the United Kingdom, and Canada as examples of international guidelines. This is not a complete list of international guidelines. An individual country's applicable laws and regulations should be researched carefully as needed.

i. European Union's Influencer Legal Hub

The European Commission is the primary executive body of the European Union ("EU") and is responsible for enforcing EU laws and maintaining policies. The European Commission created an online platform called the "Influencer Legal Hub" to help advertisers and influencers understand how to comply with EU laws.¹⁵ The website offers a wide collection of resources, including several video trainings, covering topics such as when and how to disclose advertising activities on social media. It also provides links to applicable European consumer rules and applicable guidance from its member states. Influencers subject to EU laws must follow similar guidance to that in the US, such as having disclosures about any relationship between the influencer and brand.

EU law distinguishes between when influencers are acting as "advertisers" and as "sellers." When an influencer is advertising through brand partnerships on social media or through affiliate marketing, existing European consumer law requires that the advertising be disclosed. The Unfair Commercial Practices Directive applies in these situations. Disclosures are required to be both clear and easily visible. When, and if, an influencer is selling goods or services to consumers, certain rules must be followed related to transparency and additional rights must be provided to consumers, such as the right to return goods. The Consumer Sales Directive applies here.

ii. United Kingdom's Ad Codes

In the United Kingdom, the Advertising Standards Authority ("ASA") serves as the country's independent advertising regulator. The ASA, along with the Competition and Markets Authority and the Committee of Advertising Practice ("CAP"), released guidance to help influencers follow the applicable Ad Codes and regulations.¹⁶ The relevant Ad Codes for influencers are the CAP Codes that provide guidance for non-broadcast advertising. The ASA enforces the CAP Codes.

These rules require that advertisements are recognizable as advertisements and should not be misleading. An advertisement should be obvious, meaning that consumers shouldn't have to click through or otherwise interact with it to determine that it is an advertisement. At a minimum, a prominent disclosure should be included at the beginning

¹⁵ European Commission, *Influencer Legal Hub* (2023), https://commission.europa.eu/live-work-travel-eu/consumer-rights-and-complaints/influencer-legal-hub_en.

¹⁶ Advertising Standards Authority, The Committee of Advertising Practice & The Competition and Markets Authority (2023), *An Influencer's Guide to making clear that ads are ads*, <https://www.asa.org.uk/static/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf>.

and not buried in other hashtags. A general disclosure that is separate from the content is insufficient.

Influencers should also be aware of the Consumer Protection from Unfair Trading Regulations (“CPRs”). The CPRs make “unfair commercial practices” against the law. Posting content to promote a product without disclosing that the influencer has been paid to post that content could be an unfair practice. An influencer falsely representing themselves as a consumer could also be viewed as an unfair practice.

iii. Canada’s Regulation of Deceptive Marketing

The provisions on deceptive marketing practices in Canada’s *Competition Act* apply to influencers.¹⁷ The Competition Bureau, an independent law enforcement agency protecting consumers, has issued guidance on how influencers can comply with these legal requirements when promoting a product or service.

This guidance discusses when to disclose material connections, best practices on the disclosures, and guidance on making accurate claims. What counts as a “material connection” is broad: receiving payment in money or commission, free products or services, discounts, free trips or tickets, and any personal or family relationship all would require a disclosure. Disclosures themselves must be as visible as possible, as well as clear and contextually appropriate. In addition, any reviews or testimonials should be based on actual experiences. Broad claims that cannot be backed up should be avoided. At a high level, the Competition Bureau applies the same principles as the FTC.

II. CONSIDERATIONS ABOUT USING INFLUENCERS IN FRANCHISE SYSTEMS AS OPPOSED TO CORPORATE NETWORKS

A. Protecting the Brand is the #1 Priority

A company’s brand is its most important asset.¹⁸ A brand is more than a trademark — it includes the company vision, priorities, its voice, and its customer-facing messaging. Successful companies align their advertising strategies with the company brand. These strategies necessarily evolve during the life cycle of a brand. Social media has been a crucial advertising venue for a long time. New platforms are being added and engagement opportunities are entering the market every day.¹⁹ Fast-paced social media marketing requires thoughtful planning, keen attention to details, and quick responses. Engaging with social media influencers adds another component to the high-stakes social media

¹⁷ Competition Bureau Canada, *Influencer marketing and the Competition Act* (2022), <https://competition-bureau.canada.ca/deceptive-marketing-practices/types-deceptive-marketing-practices/influencer-marketing-and-competition-act>.

¹⁸ Blair Brady, *Your Brand Is Your Greatest Asset*, Forbes Agency Council (Feb. 24, 2020, 6:15 AM), <https://www.forbes.com/councils/forbesagencycouncil/2020/02/24/your-brand-is-your-greatest-asset/>.

¹⁹ Scott Duke Kominers & Liang Wu, *Threads Foreshadows a Big — and Surprising — Shift in Social Media* (July 13, 2023), https://hbr.org/2023/07/threads-foreshadows-a-big-and-surprising-shift-in-social-media?utm_source=facebook&utm_campaign=blog-retrospective-tools-2021&utm_rep=RR&utm_sq=gpydz2tz47&utm_medium=post.

marketing world.²⁰ It can make a big difference if the influencer is working with a corporate brand owner, a franchisor, or a franchisee.

B. Corporate Brand Owners Have All of the Control and Responsibility

Corporate brand owners develop and evolve the company brand. They determine the voice of the brand or any individual campaign. Corporate owners then align their brand with an advertising strategy and roll out advertising campaigns. When decisions about the brand, the messaging, and the advertising reside in the corporate offices, decision making is easier. There may be in-house departments that need to coordinate efforts, and inside or outside counsel that need to sign off on advertising, but the ultimate constituent is the brand owner itself. Corporate brand owners have more control, can plan short and long term, and can react quickly when necessary.

When the advertising campaign calls for a social media influencer, the corporate brand owner decides on the selection of the influencer and identifies the desired effect on a brand or campaign. If the campaign is successful, the corporate owner is solely responsible for the outcome. If the influencer goes “off script,” runs afoul of the brand image or messages, or has some other incident that negatively impacts the marketing campaign, the corporate brand owner can promptly implement its crisis plan²¹ and take any necessary action.

C. Franchise Systems are More Complicated

Franchise systems are more complicated. The franchisor is typically either the owner or primary licensee of the franchise trademarks and the franchise brand. Franchise systems are governed by agreements (legally) and relationships (practically).

Franchisor-managed influencer campaigns often impact the franchisor and local franchisees differently depending upon many factors. Franchisors typically prefer to control advertising for all the same reasons as a corporate brand owner. A franchisor that engages an influencer can set the tone, the requirements, monitor the campaign, and manage any potential fallout if something does not go as planned. The central messaging will typically focus on the brand and any main products that are available at company owned locations and franchisee locations. The Franchisor’s perspective is that the entire franchise system benefits from such advertising efforts.

Franchisees, on the other hand, are more interested in advertising’s local impact on their unit sales. Franchisees offer unit-level and regional campaigns, specials, and events. They may not have a strong connection to an influencer that the franchisor engages at the national level. Franchisees may see value in engaging a local celebrity, coach, or other personality as an influencer to drive sales to the local unit. However, from

²⁰ Harvard Business Review, *How Brands and Influencers Can Make the Most of the Relationship* (2023), <https://hbsp.harvard.edu/product/F2303A-PDF-ENG>.

²¹ See Section VII infra; Ellen T. Berge, Susan Crane, Dominic Mochrie, Stuart Youngs, *Reddit and Weep? Protecting Your Brand and reputation in Social Media — A continuum of Approaches from Engagement to Litigation*, International Franchise Association 50th Annual Legal Symposium (2017).

a franchisor perspective, allowing local influencer agreements cedes some control of the brand and messaging, invites challenges, and requires additional safeguards to manage risk.²²

III. INTELLECTUAL PROPERTY

Almost every kind of intellectual property is involved in a social media influencer relationship. The brand owner needs to scrutinize the agreements, educate the influencer, and monitor the relationship to protect the company intellectual property.²³ This includes everything from the company trademark, trade dress, and “brand” generally, to its copyrighted materials, and, even occasionally, its confidential information.²⁴

A. Trademark

A company’s “mark used in trade” identifies the company as providing its goods and services.²⁵ A trademark can be a word, a design, a slogan or tagline, a sound, a color, or any combination of these and/or other elements. In order to protect the integrity and strength of the company mark(s), it is crucial that the influencer use the proper mark in the correct manner. This means paying attention to spelling, logos, colors, links, and other indicia of the company. It also means using any notices that the brand owner requires. The influencer must operate within the defined scope of the company’s trademark protection. The influencer cannot make claims that are unsupported.²⁶

B. Trade Dress

Earning rights in trade dress can be a long process. Companies pay close attention to their branding and public claims in order to maintain their rights in the “look and feel” of their offerings. Trade dress may include non-functional product design, location interiors, and combinations of elements (colors, sounds, and the like). It is crucial that all advertising and influencers align messages with the protectable trade dress.

C. “Brand” Generally

A company invests significant time and resources into building a brand. A successful brand message can reinforce positive consumer interactions and generate sales and good will. Therefore, connecting the brand to a social media influencer is a big decision. It is very important that a company understand who the prospective

²² See sections IV, V, VI, VII.

²³ Nicole Jaiyesimi, *Influencer Marketing and IP Rights: Navigating Collaborations*, NYU Journal of Intellectual Property & Entertainment Law (Nov. 9, 2023), <https://jipel.law.nyu.edu/influencer-marketing-and-ip-rights-navigating-collaborations-and-endorsements/>.

²⁴ Jess Dance, Marisa Faunce, Susan Meyer, Kathryn Thomas, *Basics Track: Trademarks and Intellectual Property*, International Franchise Association 56th Annual Legal Symposium (2021).”

²⁵ United States Patent and Trademark Office, *What is a trademark?* <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Mar. 25, 2025).

²⁶ Abigail Dagher, *The Influencers and the Influenced: Effects of Social Media Influencers on Enforcement of Trademark Law in the U.S. and Europe*, 37 EMORY INT’L L. REV. 741 (2023) <https://scholarlycommons.law.emory.edu/eilr/vol37/iss4/5>.

influencer is, what they stand for, and, generally, how they behave; essentially, what the company is signing up for.²⁷ It is also essential that the company be able to articulate its brand, priorities, and values in a manner that the influencer can honor (or at least not offend).

D. Copyright

A brand owner likely has a lot of original works of authorship²⁸. These may be images, videos, advertisements, and other content. Such content may have been created and is solely owned by the brand. It may include media that is licensed. The brand owner's content may have been co-created and is co-owned with others. The rights in copyrighted materials last a long time and should be carefully managed.²⁹ The social media influencer should be instructed to honor those original works that have value to the company. The key here is to ensure that the Influencer does not co-opt or otherwise imperil valuable protected works.

E. Trade Secrets

A trade secret is information that has economic value because it is not generally known, it has value to others that cannot access it, and is information which the owner has taken reasonable steps to maintain as secret.³⁰ These are extremely valuable and, once lost, cannot be regained. Simply put, don't let an influencer anywhere near company trade secrets. Include confidentiality clauses in all agreements and explain to the influencer what is confidential. As a practical matter, however, such contractual restrictions are very difficult to enforce, so the best position is to not divulge trade secrets at all.

IV. WHAT TO INCLUDE IN AN INFLUENCER AGREEMENT

Engaging with influencers can take on many forms and will depend on the influencer, their content, and the audience they reach. Given the endless possibilities, it is important to formally document the engagement with the influencer, and this is often accomplished through a written agreement. By formalizing the parties' understanding, both the company and the influencer can avoid misunderstandings and miscommunications that can sour the relationship. Often times, companies and

²⁷ Thomson Reuters, *How to Select a Social Media Influencer for Your Campaign*, <https://legal.thomsonreuters.com/en/insights/articles/how-to-select-social-media-influencer> (last visited Mar. 25, 2025).

²⁸ U.S. Copyright Office, *Copyright protects original works of authorship fixed in a tangible medium of expression*, <https://www.copyright.gov/what-is-copyright/> (last visited Mar. 25, 2025); 17 U.S.C. 102 *et seq.*

²⁹ U.S. Copyright Office, *How Long Does Copyright Protection Last?* <https://www.copyright.gov/help/faq/faq-duration.html> (last visited Mar. 25, 2025) (“[F]or works created after January 1, 1978, copyright protection lasts for the life of the author plus 70 years; for an anonymous work, or work made for hire, the copyright lasts for 95 years from publication or 120 years from creation, whichever expires first.”)

³⁰ United States Patent and Trademark Office, *Trade secrets / regulatory data protection*, <https://www.uspto.gov/ip-policy/trade-secret-policy> (last visited Mar. 25, 2025); 18 U.S.C. § 1836, *et seq.* (Defend Trade Secrets Act of 2016).

influencers are eager to work with one another and for good reason. A successful influencer campaign can lead to future collaborations that can lead to a long-term, mutually beneficial relationship. At the same time, companies should be vigilant when working with influencers and prepare for situations where the parties disagree. This section outlines some of the key provisions companies and brands should consider when drafting influencer agreements. While each agreement will differ based on the particular circumstances, these provisions serve as an initial foundation for most influencer agreements.

A. Clear Deliverables

The company should first consider what specific content they expect from the influencer and in what forms and which channels. What topics or discussion points should the influencer touch on? Are there any issues the influencer should avoid speaking or posting about? Does the company want to require displaying certain product images or logos? Can the influencer mention other companies? This will be especially pertinent in the franchise model where the company will need to determine whether each individual franchise may take creative liberties, or if the company prefers a global corporate message.

Will the content be a written post, a static photo, or a video? If a video, will the influencer be required to use a voiceover? Where will the content be posted? While it may seem tempting to request the influencer to post on every platform, companies should be cognizant that not every platform is the same in terms of the types of users. One platform may attract a certain demographic or curate a different kind of content. One particular post may be applicable for one platform, but not resonate or not align with another platform. A strong influencer operating on multiple platforms will likely have key insights into their various audiences, and opening a dialogue to discuss this will benefit both the company and the influencer. For example, if the influencer believes that a certain post will do well on one platform, but perhaps alienate their audience on another platform, that is information the company should be aware of and take into consideration.

Also consider the posted content's number, frequency, and duration. If the collaboration is over an extended period of time, the company should consider how it will monitor the posted content for compliance with the agreement. Does the company want to set the schedule for the content to be posted, or rely on the influencer to post when they think they will receive the most views and engagement?

How will the influencer collect content for what will be ultimately posted? Some arrangements will need additional oversight and planning, for example, if the company wants to schedule a day or event to film content. Those arrangements will have their own expectations and terms including travel costs, photo/video releases, the duration and how often the influencer is expected to be at the event, whether other influencers will be involved, and overall expectations.

B. Compensation and Payment Schedule

Unsurprisingly, compensation is one of the most important factors that influencers consider when deciding if they want to engage with a company. Often times, companies assume wrongly that influencers will be starstruck by large companies reaching out and be willing to post content for free or for free products or services. Not only does this risk offending the influencer and starting the discussion on the wrong foot, but it could also result in the influencer posting negatively about the company or brand. At the very least, any offer to an influencer should reflect a genuine respect for the influencer, their content, and their audience.

When deciding on a compensation model and payment, there are generally two methods. First, the company can pay the influencer a lump sum per post or per collaboration. This method is fairly straightforward, and once the payment amount is decided, the parties can dedicate more time to other details of the agreement. Some influencers may request or require an upfront full or partial payment before their content is posted. The risk in agreeing to an upfront payment, especially if it is a sizeable amount, will be that the influencer may simply take the money and run without fulfilling their obligations.

The second method is tying the influencer's payment to their content's performance. For example, some companies will pay per view while others will pay per conversion—i.e., the number of consumers who use a company-provided code or link and complete a purchase. While this method is more targeted, it also poses risks. The influencer may be incentivized to undertake risky behavior that may run afoul of regulator guidance because their posts' performance is directly tied to their compensation. If the company determines that the influencer's actions do not align with the agreed-upon guidelines, it is incumbent to address the issue immediately. While the company may have a legal right to withhold or claw back compensation, it is difficult to do so without risking litigation and the accompanying reputational risks. If influencers hear that a company or brand has commenced litigation against one of its influencers, that is a strong disincentive to engage with that company in the first place. Influencers are likely to consider the ramifications of their reputations in such situations and, therefore, setting clear expectations on how and when influencers will be compensated is critically important.

C. Ownership

Determining ownership of the created content can be a sensitive issue as both parties often feel that they are the ones who are entitled to ultimate ownership. Typically, companies will claim the rights to the influencer's content that is created pursuant to a collaboration. This can involve claiming rights to the content's use in all media in perpetuity, including all media that may exist in the future. As influencers become more sophisticated and transparency regarding influencer agreement increases, it is increasingly likely for influencers to bargain over ownership rights to their content. For example, the influencer may not wish to grant rights in perpetuity and, instead, limit the company's use of the influencer's content only to the term of the agreement. Some influencers may allow future use but require payment to do so.

When claiming rights to the influencer's content in perpetuity, the company and brand should ensure that if it does reuse such content, that the influencer still prescribes to the beliefs and statements in the posted content. Problems can arise if, for example, the influencer is working with a competitor at the time the content is reposted.

Companies tend to include broad, boilerplate ownership language in their influencer agreements. However, ensure that the provisions align with common legal understandings of what can and cannot be owned. For example, a company or brand cannot own an individual's name and likeness. Name and likeness can be licensed, but a person's ownership to one's name and likeness cannot be transferred.

D. Term

How long does the company contemplate working with the influencer? Is the influencer being engaged to generate views, impressions, and hype for a specific event or launch only, or is the goal to associate the influencer with the brand or company in the long-term? If the influencer is new to the company, then it may make sense to draft the agreement to be a shorter, limited term that would allow the company to assess whether future collaborations are possible. For long-term agreements, consider the impact of associating with a specific influencer, including the risks with tying the company or brand image closely to one individual. While there may be benefits to advertising consistently to a particular audience, influencers may also experience organic growth or change in their content in a manner that may not align with the company's ethos. And there is always potential for a scandal or an event that may bring the influencer to disrepute. It will be more difficult to distance the company from the influencer if there has been an ongoing relationship.

E. Third Party Rights

The parties need to consider who else has an interest in this relationship and the agreement between the parties. The owner of a trademark, or a party who has an interest in one of the property rights involved in this marketing arrangement may insist on being included with some measure of rights. For instance, if the influencer agreement is between a franchisee and a local influencer, then the franchisor should be included as a third party beneficiary. The franchisor will seek to protect its brand and its system but likely not want to be primarily responsible for the obligations of the agreement. If there is some contractual indemnification between one of the parties and some other entity, that party may need to be included.

F. Exclusivity

Before entering into an influencer agreement, the company and brand should have a full understanding of the competitive landscape if it wants to incorporate an exclusivity provision. Is the company only concerned about specific competitors or the industry as a whole? The boundaries of the exclusivity provision must be clearly defined, and it is helpful to list out examples for reference. For example, if the product in question involves

baby toys, should the exclusivity provision be limited only to competing baby toy products, to any company that sells baby toy products, or to any baby-related product?

Influencers are likely to be hesitant to agree to overly broad exclusivity requirements, especially if creating content is their sole source of income. Also consider how ownership rights and the duration of the posted content will interact with an exclusivity provision. For example, how long after the content is posted is the influencer bound by the exclusivity provision? If the company has the right to reuse the influencer's content, there may be a conflict if the influencer has entered into another agreement with a competitor that also contained an exclusivity agreement.

G. Representations and Warranties

Any influencer agreement should contain representations and warranties from the influencer. Including them will allow the company or brand to ensure that those statements are true as of the date the agreement is executed and, if untrue, will constitute a breach of the agreement. The representations and warranties should be consistent with the other provisions of the agreement. For example, the influencer should always represent and warrant that the agreement will not breach any agreement with a third party.

The agreement may also require the influencer to represent and warrant that they agree to follow the laws of the applicable jurisdiction, whether it be federal, state, or local laws. Additionally, the company can include representations and warranties stating that the influencer will follow specific guidelines outlined in an appendix—for example, the FTC guidelines or company-specific guidelines.

H. Preapproval Procedures

Companies typically want the influencer to stay “on message” or “on brand” which can lead to provisions in the influencer agreement giving the company the right to review and preapprove created content before it is posted. As discussed above, regulatory guidance emphasizes that all influencer content must be true and reflect the influencer's actual experience. At the same time, the company is not obligated to use anything and everything the influencer decides to include. Balancing the company's desire to maintain certain messaging themes against the influencer's authentic and true content can often be a difficult line to straddle. For these reasons, including overtly specific talking points or scripts can invite risk because this may conflict with the influencer's ability to be truthful. Generally, any preapproval provisions should avoid dictating what the influencer communicates in their content. At the very least, there should be a caveat incorporated that allows the influencer to raise any disagreements with the company and that the influencer must raise any concerns before the content is posted. The company should outline what the influencer cannot say because it would be misleading or against the company or brand image.

I. Usage Rights

Companies will want broad usage rights to the influencer's content to maximize the impact of the collaboration. In the context of franchises, consider whether all franchisees should be allowed to use and disseminate the content or if the usage rights are limited to a small subset. If working with partners such as an agency, does the company need to sublicense the content? If so, the agreement should be clear that the influencer's content may be sent to other parties such as marketers or even other influencers to repost.

J. Morals Clause

While the company and influencer only expect positive results from a collaboration, in the age where a single viral clip can take down an influencer or even a brand, an increasing number of companies are including "morality" clauses. These clauses are meant to list out actions, activities, or statements that have been historically inappropriate. Of course, these can change over time as societal norms shift, and both companies and influencers should be cognizant and sensitive to these changes. Differences can originate from a variety of sources including politics, demographics, culture, and generations. Staying attuned to these factors will be important and will interplay with the influencer's specific audience. Because it will be the company potentially enforcing the morality clause against the influencer, the clause should ensure that the company has the sole direction to determine what actions or statements will constitute a breach of the clause.

K. Takedowns

Despite the extensive planning that may go into collaborations, the ultimate content may not be the message that the company or brand intended to convey, or the company may simply disagree with what was ultimately posted. That could be due to the company's misunderstanding or miscommunication, either internally or with the influencer. Or it may be that the content did not resonate or that the audience perceived it in a way that the company did not expect. In these instances, it will be important for the agreement to include takedown procedures that the company can invoke. The procedures should be feasible and practicable. For example, requiring the influencer to take down posted content within 24 hours after receiving notice from the company is fairly standard. However, if there are additional steps that must be taken such as needing to communicate with the influencer's manager or agency, those should be taken into account.

L. Confidentiality

Confidentiality provisions can apply both to the company or brand materials shared with the influencer and can also cover the influencer agreement itself. Consider what materials the influencer is given access to during the collaboration, such as marketing plans and strategies, products, or services. If the influencer is required by law to produce any materials covered by the confidentiality provision, it would be prudent to require the influencer to provide the company with written notice as soon as possible. The confidentiality provision should not prevent the influencer from disclosing in confidence to retained attorneys, accountants, and tax professionals as deemed necessary.

M. Indemnification

Indemnification provisions are often inserted as boilerplate measures to protect the parties in the event of litigation. Take this hypothetical: an influencer enters into an agreement and collaboration with a brand to market their product. The brand and influencer work well together, and the posted content performs well and reaches a wide audience. Unfortunately, the content reached the brand's competitor, and they notice some striking similarities to their product. Indeed, the competitor discovers that the brand's product may be infringing on their intellectual property rights. The competitor files a lawsuit. The influencer, thinking they have no responsibility because they were only following the brand's instruction, is shocked.

If the influencer's agreement had included a mutual indemnification provision, the influencer would likely have had recourse by invoking the provision, and the brand may have been required by contract to defend the influencer. Other important details, such as which party will be responsible for damages, attorneys' fees, and costs, can be included. The point of including indemnification provisions should not be to burden either party with unreasonable expectations, but, rather, set clear and defined procedures and to understand each party's obligation for when a lawsuit is filed.

One overlooked mechanism for an indemnification provision is more procedural but can serve as an important litigation mechanism. If the influencer files a lawsuit against the company or brand, a well-drafted complaint will typically list all the allegations against the company. While the company will eventually get to respond, it may not be able to do so for an extended period of time due to procedural reasons. In that case, the influencer's filed allegations will remain the sole narrative available to the public. This case risks damaging the company or brand's reputation, and it may be unable to issue a substantive public response due to litigation considerations. However, if the company includes an indemnification provision in the agreement, it can file a motion to indemnify. Within the motion, the company can then include facts and arguments that rebut the influencer's allegations. This serves as a potential effective tool to get the company's side of the story out to the public.

N. Non-Disparagement

Non-disparagement clauses are meant to limit the influencer's ability to denigrate or disparage the company or its products or services. The clause should be broad enough to cover the company's business reputation, practices, employees, representatives, and affiliates. It also provides a legal recourse for the company if the relationship between the company and influencer turns sour and the influencer begins to publicly air their grievances. This may occur if the influencer believes that doing so might benefit them in a dispute with the company, for example, by creating negative press to pressure the company to acquiesce to the influencer's demands. In today's online environment, negative content often outperforms other forms of posted media and allowing the influencer to continue to disparage the company risks undoing any positive impressions or goodwill the company established beforehand. The unfortunate reality, however, is that

these contractual protections have limited practical value against the damage that the influencer can impose on the company.

O. Addendums

As briefly mentioned before, the influencer agreement can also contain an addendum that lists out the guidelines the company or brand wants the influencer to adhere to. These can include regulatory guidelines or regulations as discussed in the first part of this paper and even company/brand specific guidance.

V. FRANCHISE AGREEMENTS

The relationship between a franchisor and a franchisee is governed by contract and may be long-lasting. The Franchise Agreement is the guiding document that addresses the rights, responsibilities, and obligations of the parties. Because no franchisor can predict the advances that will occur during the lifetime of a franchise agreement, franchise agreements often include provisions that allow for adjustments over time. This flexibility may be implemented by referring to operations manuals, periodic updates, and policies that can each be amended as circumstances evolve. Franchise Agreements typically have advertising provisions that address system-wide and local advertising. There will be sections that address proper use of the trademark, trade dress, system materials, and the like. When a franchisor is drafting a franchise agreement today, it will necessarily include provisions for social media, influencers, and use of artificial intelligence. These sections need to have flexibility to include changes to influencer agreements and arrangements as circumstances evolve. Where a franchisor is locked into longstanding franchise agreements that may not have anticipated the needs for social media influencers, the franchisor can look to the other tools of the franchise relationship such as the manuals, updates, and policies to implement the requirements of a social media influencer program.

A. Franchisor Perspective

From the franchisor perspective, every franchisee would see the world like the franchisor, be fully engaged in the brand, and operate its location as the franchisor would a company owned location. But that is never the reality. When it comes to use of the trademarks, branding, and advertising, the franchisor wants as much control as possible in order to protect the brand and the system. But most franchisors have limited resources to support the franchise system. The franchisor is also reliant upon the franchisees to drive business. This can set up a conflict between a franchisor's priorities and those of a franchisee. Therefore, for most systems, it is appropriate to find a balance between what appears in a national advertising campaign and what may be allowed at the local level. In all circumstances, a franchisor must have a training program for proper local advertising and trademark usage protocols, procedures, and clearances. Traditionally, franchisors provided guidance on proper local media advertising placement. That evolved to online use of brand materials. This required understanding applicable privacy laws, obtaining model releases, name, image, likeness clearances, and the like. Now that social media has become such an important advertising venue, franchisors need to add this

training to their toolbox. So, a franchisor that consents to local social media influencer relationships and campaigns must provide proper training and guidance before an influencer is engaged and then monitor the activity closely. There must be a plan for success and crisis.³¹

B. Franchisee Perspective

A franchisee needs to manage local events and promotions for the betterment of the unit level business. Many franchisees are frustrated with a requirement to obtain franchisor approval for local advertising. The delay for such approval often negates the ability to react to local, time-sensitive opportunities. Being able to promptly engage the local hero as an influencer may be a way to increase notoriety and drive sales. A franchisee will seek as much freedom as possible to manage such a campaign tailored to the needs and circumstances of the unit. The successful franchisee-franchisor relationship is built on open dialog, understanding the priorities and capabilities of all parties, managing expectations, and cooperation. A capable, sophisticated, diligent franchisee may be able to competently manage a local social media influencer campaign. It must do so in cooperation with the franchisor in order to protect itself and the brand.

C. Expectations

This is crucial for the franchisor to manage the expectations of the franchise company, the influencer, and the franchisees. This means explaining the campaign, the limits, and the expectations. It also means being realistic about what results the parties can hope for but may not achieve. A local franchisee may not have the resources to engage an influencer, conduct the proper training, manage the campaign, monitor and track results, and otherwise afford what is necessary. If an influencer campaign will be managed at the franchisee level, the parties should also carefully review the indemnification provisions of the franchise agreement. In the event that something goes wrong, the costs to the brand in goodwill can be significant, but, also, the actual attorney fees, potential litigation, investigation, and other costs can add up quickly. The parties should be clear about how this will all be managed.

D. Who is the Influencer Promoting?

Social media influencers — like celebrity spokespeople — have their own fame and influence beyond promoting the company brand. It is important for the parties to understand that the public may confuse the influencer with the brand and/or the products. The brand owner, franchisor, and franchisee may become irretrievably tied to the influencer. This can happen at the local business level only or for the brand generally at the national level. The parties need to understand who has ties to followers of the influencer.

³¹ Ellen T. Berge, Susan Crane, Dominic Mochrie, Stuart Youngs, *Reddit and Weep? Protecting Your Brand and Reputation in Social Media — A Continuum of Approaches from Engagement to Litigation*, International Franchise Association 50th Annual Legal Symposium (2017).

E. Norms

Brand owners should research what to expect when engaging a social media influencer. They should consider who is setting the norms for the influencer agreement and who is enforcing behavior. These norms can vary across product and service categories and levels of influencers.

F. Best Practices

Best practices dictate caution before engaging a social media influencer. Brand owners should engage in thorough due diligence for any prospective influencers. Managing expectations and transparency in the relationship is prudent. Conducting training about the brand, its elements, and the requirements of the influencer should happen before the influencer embarks on any campaign. If a franchisor is going to consent to local social media influencer agreements, the franchisor should implement proper training. In all events, the brand owner should be sure that there is a crisis plan in place with a clear chain of communication and action before the influencer begins.³²

VI. USE OF LOCAL OR REGIONAL INFLUENCERS

A. Who are the Influencers?

A franchisor should require that a franchisee submit a proposed social media influencer arrangement and overall plan to the franchisor for approval. The parties should then work together to understand who the prospective influencer is and conduct proper due diligence to avoid unhappy surprises. Franchisors should consider conducting background checks on the influencers. The parties need to understand what else the proposed influencer is doing and to what other brands they may be obligated.

B. Why Does the Franchisee Want to Use the Influencer?

A franchisor should understand why the franchisee wants to engage the prospective influencer. Is the reason aligned with the company brand, vision, and messaging? Will this be a single campaign? Will there be a long-term agreement? What impact could this relationship have on other nearby franchisees? How involved will the franchisor need to be on this campaign? What is the crisis-management plan?

C. How Does the Franchisee Compensate/Acknowledge the Influencer?

The franchisee needs to explain to the franchisor how the franchisee plans to compensate the prospective influencer. Will the franchisee be providing the product, hosting events, or is there some other scheme involved? Is this compensation aligned with the franchisor brand message? As described earlier, all compensated influencer arrangements must be disclosed. The parties need to understand what that will look like in the actual posts and listings. Will such a disclosure detract from the proposed effect? Will it detract from the brand message of the franchisor? How is the franchisee accounting

³² See Section VII.

for this expense in its franchise reports? Will this compensation be charged to advertising costs, will the amounts due as royalties be impacted?

VII. CRISIS MANAGEMENT

Even after companies and brands have considered all the applicable regulatory guidance and drafted an impeccable influencer agreement, they cannot anticipate every crisis, but a proactive strategy can mitigate risks if and when things do go wrong. As we have all seen, influencers can deviate from the planned collaboration or do something in their personal lives that is now linked to the company's brand. Sometimes they are minor issues that are easily rectified. But some deviations are major and could cause severe reputational harm. In those instances, it is important for companies and brands to have an action plan to avoid being caught unprepared.

The first step is gathering as much information as possible about the situation and determining the who, what, when, where, and why. Franchisees, particularly if they have been involved in engaging the influencer, should advise the franchisor of any issues they become aware of. Next, identify the relevant stakeholders. Who needs to be contacted during the crisis and how will they be reached? Companies need to create a clear line of communication and ensure that the most important and relevant information is channeled to the appropriate decisionmakers. Often during a crisis, it is natural for those involved to want to be involved in every step. There may be multiple issues that need to be addressed simultaneously: business, marketing, legal, or public relations. But not all issues require escalation, so companies should categorize potential crises based on severity, distinguishing between minor reputational concerns and those requiring executive intervention. However, including too many stakeholders in the crisis management and response team could backfire. Although this can possibly create some frustration, it also prevents confusion and differing and inconsistent responses. It also helps to minimize the spread of confidential and sensitive documents. This confidentiality could become important if a legal challenge results from the crisis.

By implementing a structured approach, brands can navigate challenges effectively while maintaining trust with their audience. To avoid being overwhelmed with the flood of information, categorize each issue and determine what needs to be escalated. Create a working environment where people feel comfortable bringing up issues and escalating them to management. The actual response can be multi-pronged. Sometimes, it may be easiest to simply apologize for the influencer's action. A well-crafted apology can help mend any reputational damage to the influencer and brand and show contrition and accountability. Of course, companies 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. Companies can often feel as though they have done nothing wrong and refuse to admit fault. In some circumstances that may be the appropriate response, but it may not play well in the court of public opinion, especially if the public is sympathetic to the influencer. To take a completely different approach, the company can also issue a demand letter or consider litigation. This, of course, will prolong any resolution, and the company should carefully consider whether an adversarial approach is worth the cost. Sometimes the best response is...no response. In the fast-paced digital age, news and

drama unfold at a constant rate and public attention can be fickle. Silence may prove to be the company's greatest asset as the public grows bored from the lack of response and moves on to the next scandal.

When responding to a crisis, keep the audience in mind. While the company will be directly interfacing with the influencer, it will also need to consider how the public reacts. Is the company apologizing for the influencer, and/or distancing itself from the influencer? Additionally, if the crisis reaches far and wide, regulators may take note and, thus, any public statement or action should be considered and reviewed by legal counsel. Assume all communications are discoverable and may be viewed externally. During times of crisis, people tend to shoot off emails or statements quickly as there is a desire to take action. But more measured, thoughtful approaches will win the day.

Companies should also consider when and how to engage legal counsel. Oftentimes, to 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. Additionally, legal counsel can help identify essential third parties for managing the crisis and ensure that they understand the importance of 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. This 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.

Of course, the best crisis management strategy is to avoid a crisis at all. Companies should foster an environment that empowers employees to act as in-house brand ambassadors. This way, employees will feel a sense of responsibility and pride for the brand and work diligently to protect its reputation.

One of the highest-profile social influencer missteps was the Fyre Festival incident, a music festival that was advertised as being a luxury event in the Bahamas. The event was promoted on social media by multiple influencers, actors, reality TV stars, and models. Many of the influencers posted videos and images of themselves in luxury locations in the Bahamas and did not initially disclose they had been paid to promote the event. The event experienced problems related to security, food, accommodation, medical services, and artist relations, resulting in the festival being indefinitely postponed and eventually cancelled. Instead of the gourmet meals and luxury villas for which festival attendees had paid thousands of dollars, they, allegedly, received packaged sandwiches and were lodged in poorly furnished tents. McFarland ultimately pleaded guilty to wire fraud and was sentenced to six years in prison and ordered to forfeit \$26 million.

False advertising class actions have been filed challenging claims made by influencers and the failure of influencers to disclose their material connections with the sponsoring company. For example, in *Sava v. 21St Century Spirits, LLC* (discussed above), the plaintiffs challenged the influencers' statements that Blue Ice liquor is "handcrafted," has between 52 and 57 calories per ounce, is "fit-friendly" in that it helps with personal fitness and weight management, and that Blue Ice cocktails have fewer calories than an apple, implying that Blue Ice "is the healthier alternative."³³ That case is ongoing.

Another example of a collaboration gone extremely wrong was Kim Kardashian's partnership with Ethereum Max as discussed above. In June 2021, Kim Kardashian posted a story promoting Ethereum Max, a new cryptocurrency token, which contained a link to the Ethereum Max website that 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, her "friends" were reducing 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. Although Kardashian labeled her story as an "ad," it did not satisfy the Securities and Exchange Commission'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.

Given Kardashian's status as a high-profile celebrity, it was no surprise that this made waves with the public. Perhaps taking advantage of the immense public interest, the SEC Chair put out a lengthy statement:

This case is a reminder that, when celebrities or influencers endorse investment opportunities, including crypto asset securities, it doesn't mean that those investment products are right for all investors," said SEC Chair Gary Gensler. "We encourage investors to consider an investment's potential risks and opportunities in light of their own financial goals." "Ms. Kardashian's case also serves as a reminder to celebrities and others that the law requires them to disclose to the public when and how much they are paid to promote investing in securities," Chair Gensler added. "The federal securities laws are clear that any celebrity or other individual who promotes a crypto asset security must disclose the nature, source, and amount of compensation they received in exchange for the promotion," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "Investors are entitled to know whether the publicity of a security is unbiased, and Ms. Kardashian failed to disclose this information."

³³ No. 22 C 6083, 2024 WL 3161625, at *18 (N.D. Ill. June 25, 2024).

The SEC went a step further and released a video of the SEC Chair explaining how and why Kardashian’s actions ran afoul of SEC law:



The bottom line is that all parties involved in a social media influencer campaign should engage in due diligence to understand potential legal ramifications of promotions, and companies need to be there to help guide, assist, and ensure that the influencer understands their obligations both to the company and to their followers.

VIII. CONCLUSION

Social media influencer campaigns can be an effective and powerful part of a brand’s marketing efforts. The marketing and regulatory environment is evolving rapidly. Like all business relationships, the parties need to approach the contract between them with an understanding of what both parties want to achieve – and how they intend and plan to go about that. The contract needs to be clear and allow for some ability to adapt

to changing technology or regulations. The parties need to consider and plan for success. They also need to have a contingency plan in case something unexpected occurs.