



OLIVERAS  
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*Oliveras Legal LLC Presents:*

# INFLUENCERS

*The Legal Aspects of Social Media*

BY GILBERTO J. OLIVERAS MALDONADO

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# INFLUENCERS

**Influencer marketing has grown from an exclusive niche for a ‘select few’ to a thriving business model for the masses. From big time influencers to micro-influencers, studies have shown that the way for brands to interact with consumers, in our time, is through influencers. While it may seem as simple as an influencer reaching out to a brand, or a brand reaching out to an influencer, and both parties agreeing on a deal to promote a specific brand or product in exchange for compensation of some kind, there is a legal side to influencing that most people are oblivious to. The Federal Trade Commission (FTC) regulates consumer relationships with the aim of protecting consumers and promoting competition, as such, the FTC has clear rules about influencer marketing.**

## WHAT IS AN INFLUENCER?

The definition of “influencer” is actually a pretty loose one, considering the broad scope of social media users that it covers. Initially influencers used to be high-profile celebrities with millions of followers, however, recently, micro-influencing and self-proclaimed influencers have changed that. Micro-influencers are influencers that may not have the million-reach capacity of a celebrity influencer, but have an impact on incredibly engaged followers, maybe ten thousand to fifteen thousand followers. In the broad sense, anyone who has the potential to impact (influence) other people’s decisions in a specific area can count as an influencer.

The broad definition of the term means that anyone who has either, specifically hired someone or been hired by someone, to promote a product by personally endorsing it, review a product in exchange for a sample product, or be an affiliate marketer/salesperson, is bound by the FTC legal influencer marketing guidelines. According to these FTC guidelines “if you endorse a product through social media, your endorsement message should make it obvious when you have a relationship (“material connection”) with the brand. A “material connection” to the brand includes a personal, family, or employment relationship or a financial relationship – such as the brand paying you or giving you free or discounted products or services.”

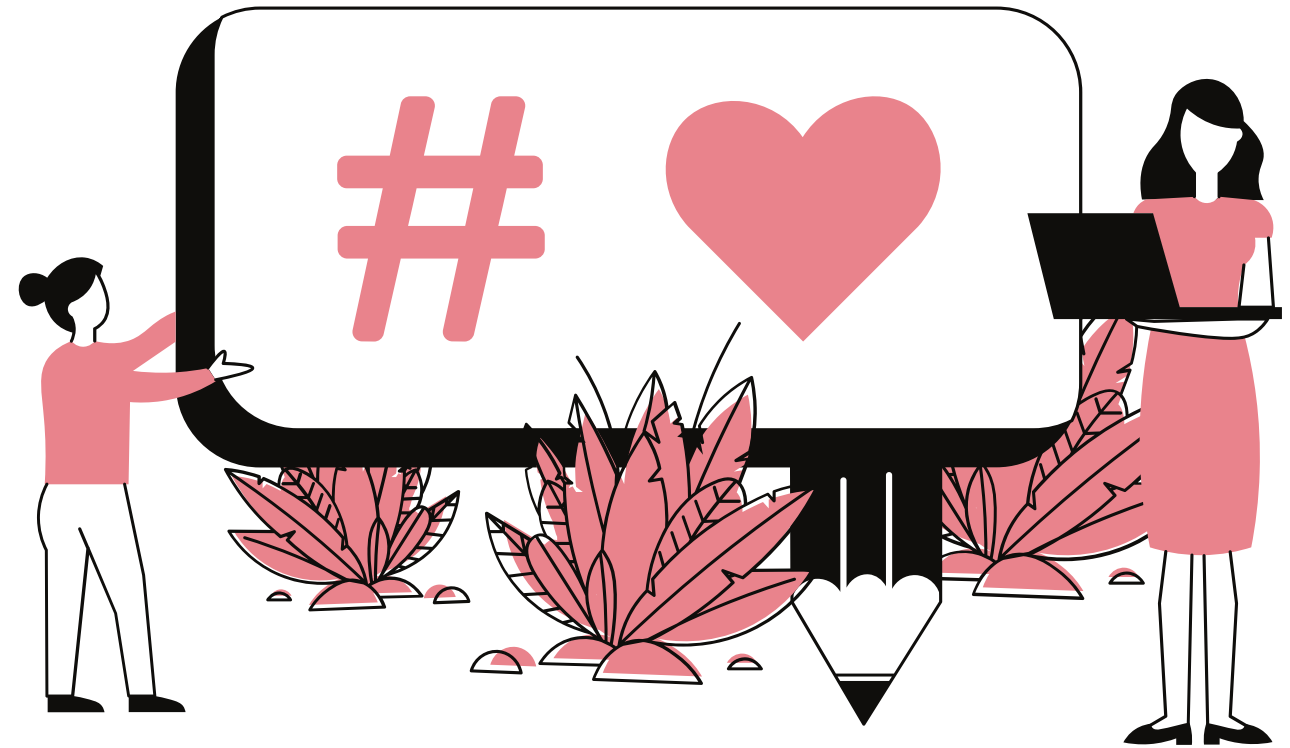
# TO DISCLOSE OR NOT DISCLOSE?

Influencers have to disclose any time they are endorsing a product because of a paid partnership or personal affiliation with the brand, which includes family relationships and free products, as well as employment and financial relationships. Financial relationships are not just about money and can include the exchange of anything of value for mentioning a product. Even without being specifically asked to mention a product, if a brand gives an influencer free or discounted products or other perks and afterwards, the influencer mentions one of the brand's products, disclosure is required. Disclosure is required even if the influencer's evaluations are thought to be unbiased, which makes it essential for influencers to assume that their followers do not know about their brand relationships. According to the FTC "tags, likes, pins, and similar ways of showing you like a brand or product are endorsements." Influencer marketing guidelines need to be followed on all platforms, which includes email marketing campaigns, blog posts, and social media.

## HOW TO DISCLOSE?

The essential element in any disclosure is to **make sure people will see and understand the disclosure**. This means that the disclosure needs to be in a location that is hard to miss by the followers. The disclosure should be placed alongside the endorsement message itself.

The FTC does not promote placing disclosures only on "about me" sections or on profile pages, as it is likely to be missed by followers. Disclosures at the end of posts or videos, or anywhere that requires a person to click "more," and disclosures mixed into a group of hashtags or links, are also looked at with suspicion by the FTC.



Disclosures need to be located in places where the viewer has enough time to notice and read it. This means that on platforms like *Snapchat*, *Instagram Stories*, and *Facebook Stories*, the disclosure must be superimposed over the picture and given enough screen time, for viewers to see it. This also means that endorsements in *videos*, must be disclosed in the video itself and not just in the description. The FTC recommends that for video endorsements, disclosures be made in both audio and video form, as some viewers may watch without sound and others may not notice superimposed words. Lastly, this also means, that in *live stream* endorsements, disclosures should be repeated periodically to afford viewers who only see part of the stream, the opportunity to get the disclosure.

Disclosures must use a **clear and simple language** and should be in the same language as the endorsement itself. Confusing terms, like "spon" or "collab," and abbreviations should be avoided; stand-alone terms, like "thanks" or "ambassador," should be treated in the same manner. Simple explanations are often enough, like "thanks to [brand name] for the free product," or terms like "advertisement" and "sponsored," if they are placed in hard to miss locations. A #sponsored hashtag can be used, but according to the FTC it is not necessary. If a platform, like many today, has its own disclosure tools, its use should be considered, but only in addition to the person's own good disclosure.





# ESSENTIALS OF DISCLOSURE

Influencers cannot talk about an experience with a product that they have not tried or used as they say. In the same vein, if an influencer is paid to talk about a product and thought it was bad, they cannot say that they liked it. An influencer cannot make up claims about a product if such claims would require proof that the advertiser does not have, like scientific proof of the health benefits of a product. Brands should not intentionally use influencer campaigns that do not allow for the required disclosure, for example, paying influencers to publicly “like” posts.

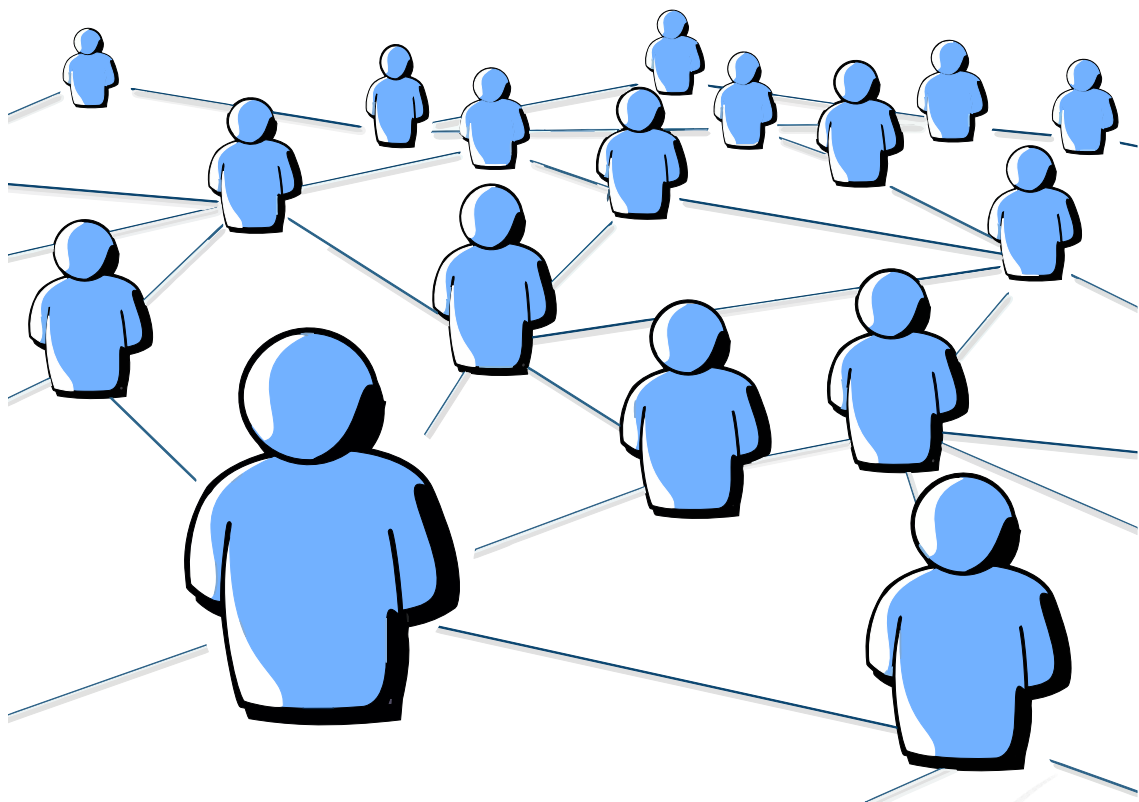
Brands and marketers need to make sure that influencers are following the guidelines and rules of the FTC and the individual platforms that they are appearing on. This means that for brands, it is a good idea to monitor influencer’s posts about the brand’s business and to take the responsibility of explaining the guidelines to the influencers. Before using an influencer’s services, brands should explain these guidelines in detail. While a contract provision is a good to have, it is probably not enough, and brands should educate influencers about the standards for clearly disclosing “material connections” and the possible legal ramifications if they don’t. Mainly, brands need to be aware of not intentionally using unrepresentative testimonials in an attempt to mislead consumers. These testimonials must include the realistic range of results that customers can expect. If a brand represents, says, or implies that consumers who use their product will gain health benefits, like weight loss, or that the product prevents or treats serious medical conditions, the brand needs to prove these claims with sound scientific evidence.

While the FTC only regulates relationships with U.S. consumers, these guidelines might affect influencer marketing from outside of the United States. If posting from abroad, foreign law applies, but U.S. law will apply if it is reasonably foreseeable that the post will affect U.S. consumers.

## INFLUENCER/BRAND DISCLOSURE CHECKLIST

- Influencers must disclose relationships between themselves and the brand if they have sponsored content.
- Disclosures need to be easily noticed and understood.
- Disclosures on social media should appear before where the cut-off, or the “click to read more” button, would appear.
  - YouTube influencers must put the relationship/endorsement disclosure in the actual video.
- If using a #sponsored hashtag, make sure it’s at the front of your hashtags instead of being buried deep, and as it’s not combined with other words to make it more difficult to notice.
  - Brands shouldn’t intentionally utilize influencer campaigns that don’t allow for disclosure, such as paying for “likes.”
  - If an influencer is paid to review a product, and had a bad experience, they can’t say that it was great.
  - Influencers shouldn’t talk about their experience with a product or service if they haven’t actually tried it or used it as they say.





## EXAMPLES OF DISCLOSURES

“In paid partnership with [brand name]...”

“Thanks to [brand name] for the free product...”

“This was a sponsored post from [brand name], but the opinions are entirely my own...”

“#Sponsored”

## TAKE AWAY

Influencers are taking over the marketing world, but few know that being an influencer has legal implications beyond getting freebies for posting about a brand. There are legal obligations that must be observed, by both brand and influencer, and if ignored could lead to FTC violations that could potentially irreparably damage the sponsoring brand or the influencer’s brand. As always, when in doubt, contact an attorney with experience in these matters.

At Oliveras Legal LLC we understand your passions and want you to have peace of mind so you can focus on your craft. Allow us to worry about the legal part and go out and create.

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[goliveras@oliveraslegal.com](mailto:goliveras@oliveraslegal.com)





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[goliveras@oliveraslegal.com](mailto:goliveras@oliveraslegal.com)



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