

# Brands' Influencer Marketing Practices in Regulators' Crosshairs on Both Sides of the Atlantic

November 2021



## Overview

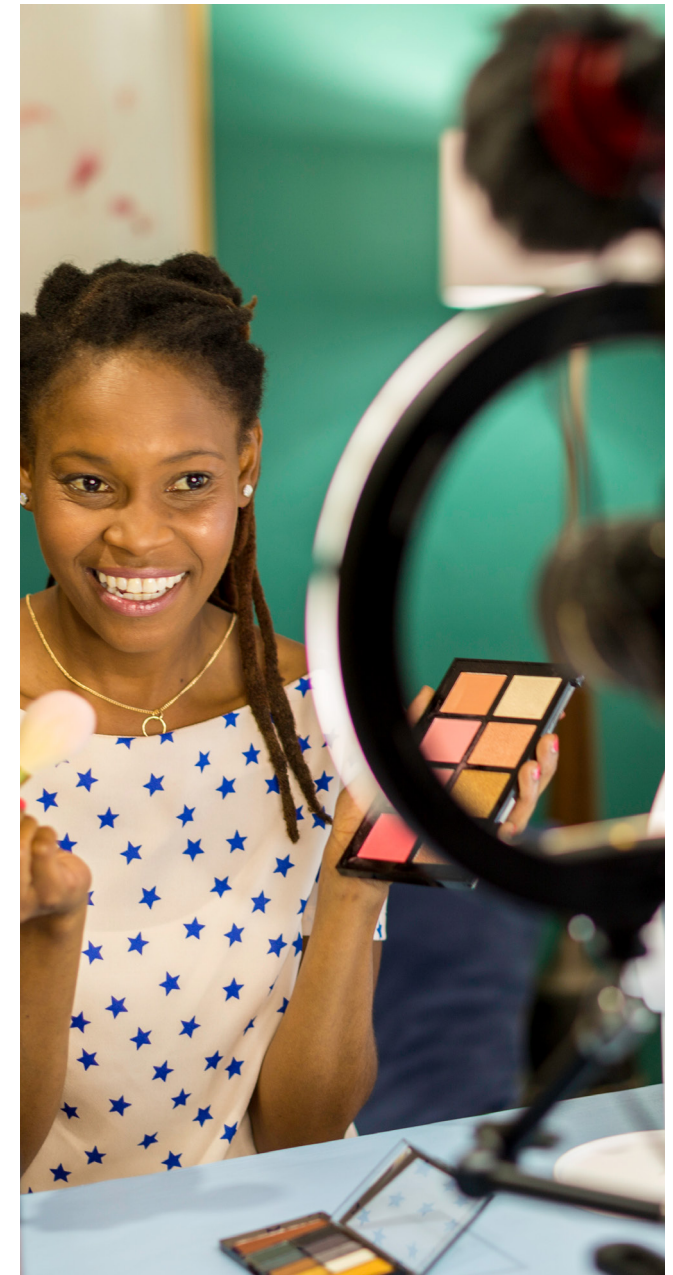
The influence of influencers on social media is a modern day phenomenon that marketers harness to develop more organic and grassroots connections with consumers, and influencers are able to monetize those connections. It is a symbiotic relationship, though one that is not necessarily clear to consumers.

When an influencer gets something of value to promote a product, that may impact how a consumer interprets that endorsement, and thus consumer protection authorities worldwide have long required clear, conspicuous and effective disclosures of those kinds of material connections. Recently authorities in the US and the UK have turned up the heat on influencer marketing practices. We break these efforts down for you so that you can adapt your influencer marketing programs to avoid problems.

On October 13, 2021, the US Federal Trade Commission (FTC) put hundreds of businesses on [notice](#) about fake reviews and other misleading endorsements, [warning](#) that if a company “uses endorsements to deceive consumers, the FTC will hold them responsible with every tool at [the FTC’s] disposal.” A list of companies that received a copy of the FTC notice can be found [here](#). The FTC flexed its penalty muscles again on October 26, 2021, and [issued notice letters](#) to more than 1,100 companies “that pitch money-making ventures ... that if they deceive or mislead consumers about potential earnings, the FTC won’t hesitate to use its authority to target them with large civil penalties.” The full list of recipients of this batch of notices is available [here](#). The 1,100 companies that received the October 26 notice also received a copy of the notice regarding endorsements and testimonials.

Over in the UK, regulators have also recently turned their attention to similar advertising and marketing practices. On July 22, 2021, the UK’s Advertising Standards Authority (ASA) provided [seven key tips](#) on how to ensure compliance with its CAP Code (which is the rulebook for UK non-broadcast advertising) in relation to the provision of testimonials and endorsements. These include ensuring that the advertiser holds evidence to demonstrate that any testimonials or endorsements used by it are genuine and accurately reflect what the person featured said. Additionally, advertisers and paid third parties must not pretend to be a consumer. Where influencers are engaged, they must make it clear that promotional activities are ads.

On October 16, 2020, the UK’s Competition and Markets Authority (CMA) [secured undertakings](#) from a large social media company, requiring it to do more to prevent hidden advertising (which is unlawful in the UK) being posted on its Instagram platform. On March 18, 2021, following a monitoring sweep for ad disclosures in 122 UK-based influencers’ social media posts, the ASA published its [Influencer Monitoring Report](#), warning those influencers and a number of brands that spot-checks would be conducted in the future. We previously commented on this report [here](#). On June 17, 2021, the ASA launched a [dedicated page on its website](#), highlighting individual influencers who, despite being put on notice that they would face further sanctions for flaunting advertising rules, have repeatedly failed to disclose when their Instagram posts are ads. Named influencers will be on the webpage for three months and subject to a period of enhanced monitoring spot-checks. The ASA has further noted that if such influencers, or indeed their brand partners, continue to break the ASA rules on non-disclosure, the ASA will implement further sanctions, such as taking out ads against the influencers, working with social media platforms to have their content removed, or referring them to statutory bodies for possible fines.



## Key Takeaways

- In the US, the FTC sent two rounds of notices to more than 1,800 companies warning that certain practices pertaining to endorsements, testimonials and potential earnings from moneymaking ventures may constitute unfair or deceptive acts or practices under the FTC Act.
- Violations of the FTC Act may result in steep civil penalties of up to US\$43,792 per knowing violation of a clearly unfair or deceptive practice.
- Aside from the FTC, states attorneys general may enforce their own laws regarding unfair and deceptive acts and practices (UDAP), and false advertising, with legal consequences and penalties that are separate and distinct from the FTC Act.
- Further, a number of state UDAP laws provide for a private right of action, which would subject businesses to consumer lawsuits for misleading or deceptive endorsement, testimonial or earnings claims.
- Non-US businesses may be liable under the FTC Act for unfair or deceptive marketing and advertising practices too, if such conduct affects or targets US consumers.
- In the UK, when marketing communications include testimonials or endorsements, there are specific CAP Code Rules to be mindful of. These include not posing as a consumer (Rule 2.3); not using testimonials and endorsements in restricted product categories, such as to endorse medicines (Rule 12.18); holding documentary evidence of any such testimonial or endorsement and seeking permission to use the testimonial or endorsement (Rules 3.45 and 3.48); and only using testimonials that are relevant to the product and not taken out of context or misleadingly edited (Rule 3.46).

Prior ASA rulings, such as [Official iPhone Unlock Ltd](#) and [Vindicta Digital](#) indicate that directly and explicitly incentivizing consumers to leave positive reviews or testimonials is likely to be considered problematic.

- With respect to influencers, when a brand gives an influencer a “payment” (including monetary payment, free products/services, incentives or commissions), or where a brand has editorial control over an influencer’s content, any resulting posts promoting the brand become subject to advertising regulation (including the CAP Code) and UK consumer protection law (which is enforced by the CMA).
- The overarching requirement for advertisers (and influencers) in Section 2 of the CAP Code is that all advertising must be obviously identifiable (i.e., when a consumer sees an ad, it should be apparent to them that they are looking at an ad). As a minimum, the ASA will expect such posts to include an “ad” label, which is prominent enough that consumers will easily notice it and early enough that they will do so prior to engaging with the content.
- The CAP Code also contains other important obligations for any marketing communications – for example, not to materially mislead or be likely to mislead consumers (Rule 3.1), not to omit material information (Rule 3.3) and not to exaggerate the capability or performance of a product (Rule 3.11).
- The ASA’s sanctions for non-compliance with the CAP Code include the publication of upheld complaints on its website (and typically the associated bad publicity is a persuasive tool), arranging for advertisers to be refused advertising space or imposing pre-vetting requirements on advertisers’ ads. To the extent that influencers repeatedly breach their advertising obligations, the ASA may refer matters to UK Trading Standards, which can issue court actions. Additionally, uncooperative broadcast advertisers could be referred by the ASA to Ofcom (the UK’s communications regulator), which has the power to take regulatory action, including imposing financial penalties.



# The FTC's Rounds of Notice of Penalty Offenses

In the FTC's first round of notices, issued to more than 700 companies across industries, the FTC recognized that companies use endorsements and testimonials to advertise and market their products and services online and on traditional marketing platforms. The FTC warned that certain marketing and advertising practices run afoul of Section 5 of the FTC Act if they:

- Falsely claim an endorsement is by a third party;
- Misrepresent an endorser as an actual, current or recent user;
- Continue using an endorsement without good reason to believe that the endorser continues to subscribe to the view presented;
- Misrepresent that an endorsement represents the experience, views or opinions of users or purported users;
- Use an endorsement to make deceptive performance claims;
- Fail to disclose an unexpected material connection with an endorser;
- Misrepresent the endorser's experience as representative of a consumer's typical or ordinary experience; or
- Use positive consumer reviews that are fake or based on a material connection that is inadequately disclosed.



The FTC also advises that it believes that these types of FTC Act violations are at this point so obvious to be knowing violations and as such entitle it to seek civil penalties of up to US\$43,792 per violation (see 15 U.S.C. § 45(m)(1)(B)). Whether it can prevail on such a theory will certainly be tested, but the new Commission under the Biden administration seems prepared to turn up the heat on marketers by seeking penalties.

In an accompanying [press release for the first round of notices](#), Samuel Levine, the newly appointed director of the FTC's Bureau of Consumer Protection and former attorney-advisor to Commissioner Rohit Chopra, made clear that the FTC considers fake reviews to be a form of "deceptive endorsements [that] cheat consumers and undercut honest businesses," and warned that "[a]dvertisers will pay a price if they engage in these deceptive practices."

These notice letters are hardly surprising. It was nearly a year ago that the FTC approved a [settlement with Sunday Riley Modern Skincare](#), LLC concerning the company's use of allegedly fake product reviews. The final order prohibited Sunday Riley from misrepresenting the status of any endorser or person reviewing a Sunday Riley product as an independent or ordinary user of the product, and required that the company "clearly and conspicuously disclose any unexpected material connection between endorsers," the company, the CEO or any entity associated with the product. Then-Commissioner Chopra's [sharply worded dissent](#) disapproved the no-fault, no-money settlement and urged the FTC to employ its authority to "seek penalties against parties who engage in conduct known to have been previously condemned by the Commission." The notices show that the FTC is now poised to do exactly as urged by its former commissioner.

The FTC's second round of notices warned a significant number of businesses that market money-making ventures, including a number of well-known multilevel marketing (MLM) companies, "gig" employers, investment and business coaching, franchises, business opportunities and others, that misleading consumers about their earning potential in these programs could be an unfair or deceptive trade practice under the FTC Act. The FTC warned that it is a violation of the FTC Act to:

- Make false, misleading or deceptive representations that participants will make a profit, or that represent profits are typical.
- Falsely tell consumers they do not need experience to earn an income.
- Falsely tell consumers that they must act immediately to participate.

## Why This Is Important

The notices signal that the FTC is closely monitoring the marketing and advertising practices of businesses across industries, and that the FTC is geared up to pursue violators more aggressively and to seek civil penalties, likely starting with those companies in receipt of the notices that are found to engage in conduct that runs afoul of the FTC Act.

**Scope of authority** – The FTC’s notices reflect the breadth of its enforcement authority over unfair or deceptive marketing and advertising practices beyond traditional advertising forums. Indeed, the notices highlight the FTC’s eye on the “gig” economy, including its close monitoring of truthfulness in business opportunity marketing.

**Enforcement actions and potential litigation** – Insofar as likely enforcement actions are concerned, at the federal level, any such actions will be pursued by the FTC itself. While the FTC Act does not provide a private right of action, it does empower the FTC to seek injunctive relief and to pursue civil penalties of up to US\$43,792 for unfair or deceptive acts or practices taken “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited.” Notwithstanding this new FTC’s apparent willingness to flex that muscle, the greater risk of enforcement might lie with the state attorneys general that have an even broader authority to seek civil penalties and have historically not shied away from using that authority. Each state has its own mini-FTC acts (UDAP laws), prohibiting unfair or deceptive acts or practices, that are regularly enforced, and many have broader authority than the FTC Act grants the Commission. The FTC’s notices have put the names of more than 1,800 companies on the radar of the state attorneys general, crating low-lying fruit for an AG looking to score some publicity. For violations of their state laws, attorneys general can often seek consumer restitution, disgorgement, civil penalties and lawyers’ fees, as well as injunctive relief. A number of state UDAP laws also provide for a private right of action enforceable by consumers directly, posing additional litigation risks for named companies.

**Non-US businesses beware** – Section 5 of the FTC Act includes unfair or deceptive acts or practices involving foreign commerce that cause, or are likely to cause, reasonably foreseeable injury within the US or that involve material conduct within the US (see 15 U.S.C. § 45(a)(4)(A)). As such, non-US businesses may be held liable for unfair or deceptive marketing and advertising practices, like posting fake reviews and consumer testimonials, if such conduct affects US consumers.

**Unfair or deceptive practices under UK law** – For those companies that also advertise in the UK, a comprehensive review of advertising practices should be conducted to ensure compliance under the US and UK regulatory regimes. Under the UK’s Consumer Protection from Unfair Trading Regulations 2008 (CPUTR), there is a general prohibition on unfair commercial practices (Regulation 3), which are categorized as misleading actions (Regulation 5) and misleading omissions (Regulation 6).

In particular, a commercial practice is deemed to be a misleading action if:

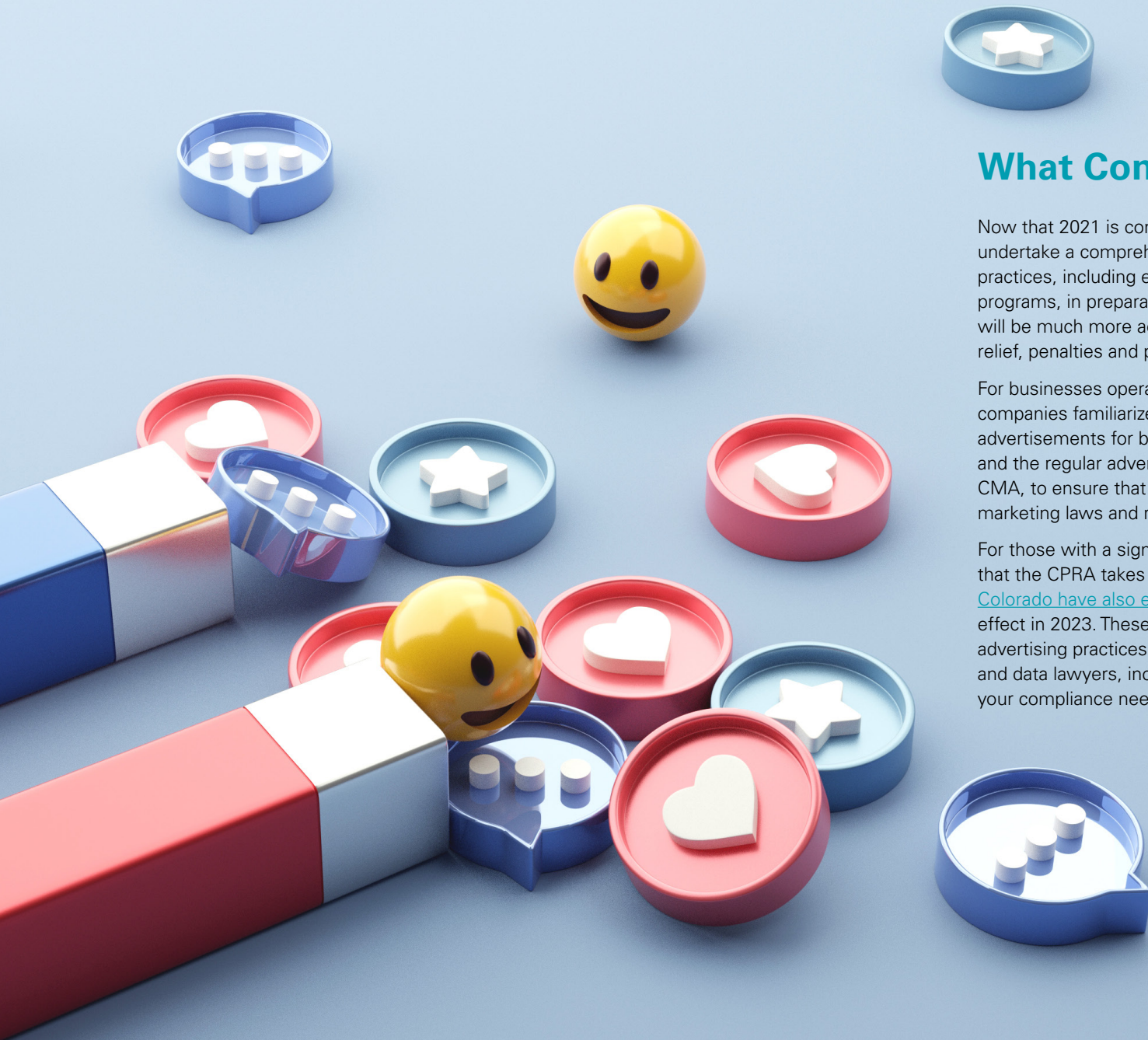
- Its overall presentation in any way deceives, or is likely to deceive, the average consumer in relation to any of the matters set out in Regulation 4 paragraph 5 (e.g., the main characteristics of the product or the extent of the trader’s commitments) or Schedule 1 (which sets out commercial practices that are always considered unfair).
- It causes, or is likely to cause, the average consumer to take a transactional decision they would not have taken otherwise.

A commercial practice is deemed to be a misleading omission if it:

- Omits or hides material information (required by law or needed to allow the average consumer to take an informed transactional decision).
- Provides material information in an unclear, unintelligible, ambiguous or untimely manner.
- Fails to identify its commercial intent (e.g., failing to state that a social media post is sponsored), unless this is already apparent from the context.

And, as a result, it causes, or is likely to cause, the average consumer to take a transactional decision they would not have taken otherwise.

A breach of the CPUTR is a criminal offence, with penalties ranging from a fine to up to two years’ imprisonment.



## What Companies Can Do Now

Now that 2021 is concluding, we recommend that businesses undertake a comprehensive review of their general advertising practices, including endorsement, testimonial and other marketing programs, in preparation for 2022. The FTC has already shown that it will be much more active under this administration, and seek monetary relief, penalties and perhaps an admission of guilt.

For businesses operating in the UK, our team recommends that companies familiarize themselves with the CAP Code (or if preparing advertisements for broadcast, the BCAP Code), as well as the CPUTR and the regular advertising guidance provided by the ASA and the CMA, to ensure that their advertisements are compliant with UK marketing laws and regulations.

For those with a significant business presence in California, remember that the CPRA takes full effect on January 1, 2023. [Virginia and Colorado have also enacted laws similar to the CPRA](#) that also take effect in 2023. These laws increase transparency and choice for digital advertising practices. Our team is staffed, worldwide, with advertising and data lawyers, including former regulators, who can assist you in your compliance needs and in minimizing your litigation risks.

# Contacts



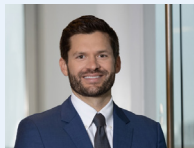
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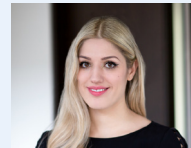
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