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Leveraging Influencers: Practical Legal Guidance for Consumer-Facing Brands

Brands engaging endorsers and influencers to post on social media without sufficient disclosures can face regulatory and legal challenge, fines, and negative PR. Some simple business practices will help keep you compliant.

Influencer and Endorser "Must Do's"

- Influencer postings must reflect the genuine, current opinion of the influencer.
- Influencers must not claim beyond what the product can actually deliver.
- Influencers must **clearly and conspicuously** disclose the **material connection** to the brand (e.g., if the influencer, celebrity, or consumer reviewer receives anything of value, such as money, free products, discounts, perks). Clear use of appropriate hashtags is a common disclosure.

Questions to Consider

- Do we engage or sponsor creators and influencers to create content for the company's social media accounts?
- Do we provide guidance on the creation of that content?
- Are creators using any material that they did not make themselves for paid or sponsored content?
- Does the company regularly like, share, reupload, or collaborate on social media posts with third parties?
- Do we have written policies that require creators to not use material that infringes a third party's rights and to abide by current Federal Trade Commission (FTC) guidelines regarding disclosures?

Working with Influencers

- *Contracts:* Have adaptable, form agreements for all endorsers that require them to comply with company policies and FTC guidelines.
- *Be Specific:* Tell influencers exactly how to disclose their material connection.
- *Endorser Guidelines:* Provide endorsers with clear guidance on content-related requirements.
- *Platform Tools:* Utilize social media platforms' disclosure tools, like Instagram's "Paid Partnership" tag. It is important to recognize that these alone may not be enough.
- *Monitor:* Routinely audit social media posts (e.g., spot checks, social listening) so that the company has a record of both auditing and enforcement against noncompliant posts.
- *Endorser Policy Awareness:* Require endorsers to review the FTC guidelines on endorsements and to represent and warrant that they will comply.

Wilson Sonsini has extensive experience in counseling and representing companies of all stages on such issues.

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