Influencers Must Disclose Who Is Influencing Them

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The rise of social media and influencers has led us to consume incredible quantities of content every day, often without realizing that advertisements are disguised within it.

When merchants and advertising agencies use the services of an influencer, they expose themselves to both reputational risks and legal risks, because there can be a fine line between sponsored content and spontaneous recommendation. In fact, this line is governed by Advertising Standards Canada ("ASC") and the Competition Bureau (the "Bureau"). The *Competition Act* or the *Consumer Protection Act* ("C.P.A.") may also apply.

Influencer marketing covers all practices by which an advertiser promotes products through influencers with accounts on various social media platforms, such as Twitter, Facebook, Instagram, Snapchat, and YouTube.

Influencers' power in the digital marketing world is undeniable. Their social media presence allows them to have a direct connection with consumersand this genuine connection then enables advertisers to reach their target clientele.

A material connection is conclusive in determining the responsibilities of the parties

Any testimonial, endorsement, review or other representation (regardless of the medium used) must clearly indicate the existence of a material connection between the person making the representation and the entity that makes the product or service available to the endorser.[1]

The following may constitute a material connection:

> receipt of a product free of charge in exchange for mentioning it on social media;
> loan or rental of a product free of charge in exchange for mentioning it;
> payment in exchange for mentioning the product;
> being an employee of the advertiser; and
> an incentive to promote the product (such as a coupon or discount for a subsequent purchase).

Under the *Canadian Code of Advertising Standards*, the material connection must be clearly and prominently disclosed in close proximity to the representation about the product or service,[2] by:

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Publishing a clearhashtag (#Ad, #Sponsored, or #Promoted) within the first three lines of a post'sdescription,[3] in order to allow viewers to see the sponsored content disclosure without scrolling down the page;[4]
Using the tools available on social media platforms, such as the "paid partnership with" designation on Instagram, so that users can clearly identify sponsored content while also enabling advertisers or agencies to access the post's statistics.

The following should be avoided:

Hashtags such as #Ambassador, #Client, and #Partner, which are ambiguous and do not explain the nature of the relationship between the influencer and the brand.[5]

Does disclosure of a material connection, through a hashtag or one of the other measures discussed above, necessarily lead consumers to conclude that influencers are representatives of the merchants whose products they are praising?

The definition of "representative" in the C.P.A. includes a person "regarding whom a merchant or a manufacturer has given reasonable cause to believe that such person is acting for him". When this is the case, statements made by the influencer may become an advertisement within the meaning of the C.P.A., and the influencer could be considered an "advertiser" within the meaning of the C.P.A.[6]

An influencer need not disclose the nature (free travel, free products, direct payment, purchase discount, etc.) or total value of the incentive received.[7]

Can the advertiser dictate the influencer's message?

An influencer's representation must be true and accurate. Section 238 C.P.A. provides: "No merchant, manufacturer or advertiser may, falsely, by any means whatever,(*a*) hold out that he is certified, recommended, sponsored or approved by a third person, or that he is affiliated or associated with the latter;[or] (*b*) hold out that a third person recommends, approves, certifies or sponsors certain goods or services."[8]

This means that testimonials, opinions or statements of preference that are part of an advertising message must not contain inaccurate, deceptive or otherwise misleading claims.[9] In addition, failure to disclose a material connection between the advertiser and the influencer could amount to failure to mention an important fact, which is prohibited under section 228 C.P.A.

Below are some recommendations for composing an influencer's message:

The message must not make any omissions that would render the advertisement deceptive or misleading.[10]
The message must not exaggerate the nature or importance of competitive differences or disparage competing products or services[11] under the *Canadian Code of Advertising Standards*.
The message must present real opinions about the products or services, as expressed by users of these products or services.

Advertisers must not use influencers to convey a message that would be a false or misleading representation if it were published directly by the advertiser.

See the real-life case below:

In 2016, American retailer Lord & Taylor, in collaboration with the virtual magazine Nylon, recruited 50 influencers to publish, all on the same day, a photograph of a specific dress, along with a link to an article in the magazine (advertising content ordered by Lord & Taylor) as well as the link to buy the dress. Lord & Taylor's sponsorship of the magazine article and the material connection (receipt

[12]

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of the dress free of charge and payment of between $1,000 and $4,000 per influencer) were not disclosed. The campaign reached 11.4 million Instagram users. The FTC ruled that this failure to disclose constituted false and misleading advertising and the company was required to agree to an approval program for subsequent advertising campaigns, among other sanctions.[13] In Quebec, the combined effect of the *Canadian Code of Advertising Standards* and the C.P.A. could lead to a similar result.

Must disclosure still occur when the consideration received for the social media mention is minimal?

Yes. Whenever a consumer places weight on a recommendation, it is best to be transparent and disclose the material connection.

Who is responsible for disclosing the connection: the advertiser or the influencer?

Because the *Canadian Code of Advertising Standards* applies specifically to agencies, corporations, institutions or organizations seeking to improve their image or advance a point of view,[14] it can be said that the responsibility for disclosing the connection rests on the advertiser. However, if the question is considered from the standpoint of the C.P.A., the obligation to disclose could also rest on the influencer.

What consequences can arise out of non-compliance with disclosure obligations?

In the United States, the FTC has the power to investigate and impose sanctions on offenders under section 5 of the *Federal Trade Commission Act*,[15] which prohibits false or deceptive commercial practices.

In Canada, ASC is a self-regulatory body, meaning that it can only respond to complaints and has no power to impose fines or penalties. In cases of flagrant refusal to cooperate, however, ASC could refer the complaint to the Competition Bureau, which deals with false and misleading commercial advertising if the effect of the representations is to interfere with free competition. The Bureau has also confirmed that influencers and advertisers who do not disclose a material connection are engaged in “astroturfing”, a practice by which false comments by consumers are published online, thereby affecting consumers’ perceptions of a product.[16]

In Quebec, the Office de la protection du consommateur has broad investigative powers and could also take action in a situation involving false or misleading representations or where influencers fail to disclose the material connection between themselves and the entity providing them with the product.

Does disclosure of a material connection interfere with the impact of the advertising message?

Disclosing that a product or service is sponsored does not diminish the influencer’s authenticity. On the contrary, failing to disclose the sponsorship can mislead consumers who are looking for information online, thereby having a negative effect on the company’s image and eroding consumer confidence in the digital economy.

The onus is now on stakeholders to adopt exemplary practices regarding their relationships with influencers and the disclosure of the material connections that exist in these relationships. The social media sector is a hotbed of creativity, and advertisers can use this obligation to disclose, which allows their company’s name to reach a wider audience, to their advantage.

Appendix: Bodies that oversee influence marketing practices

In Canada:

Advertising Standards Canada (“ASC”)

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Canadian Code of Advertising Standards (published by ASC);
Interpretation Guideline #5 - Testimonials, Endorsements, Reviews (published by ASC)

Competition Bureau (the "Bureau")

The Deceptive Marketing Practices Digest (published by the Bureau);
Guidelines for Traders and Marketing Professionals (published by the International Consumer Protection and Enforcement Network,of which the Bureau is a member)

A number of sources lay down the criteria for acceptable advertising in social media and the responsibilities of influencers,such as:

Guides Concerning the Use of Endorsements and Testimonials in Advertising (published by the FTC), to which Interpretation Guideline #5 expressly refers.

General statutes could also apply to influencer marketing. One example is the *Competition Act* and the provisions of that Act regarding deceptive marketing practices;[17] another is the *Consumer Protection Act* (Quebec), which provides that merchants or participants in the advertising industry may not, by any means whatsoever, make false or misleading representations to a consumer, or fail to mention an important fact.[18]The Office de la protection du consommateur is responsible for enforcing the C.P.A. and the president of the Office may investigate any matter relating to it.

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1. Ad Standards, *Interpretation Guideline #5* - Testimony, Endorsements, Reviews, October 2016, available online: http://www.adstandards.com/en/Standards/interpretationGuideline5.aspx.
2. Ibid.
3. Federal Trade Commission, *Influencers, are your #materialconnection #disclosures #clearandconspicuous?,* Tips & Advice, April 2017, available online: https://www.ftc.gov/news-events/blogs/business-blog/2017/04/influencers-are-your-materialconnection-disclosures.
4. Federal Trade Commission, *How to Make Effective Disclosure in Digital Advertising,* March 2013, p. 9, available online: https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.
5. See footnote 3.
6. Section 2 C.P.A.: "advertiser" means a person who prepares, publishes or broadcasts an advertisement or who causes an advertisement to be prepared, published or broadcast;
7. Federal Trade Commission, *Endorsement Guides: What People Are Asking*, September 2017, available online: https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.
8. An "advertiser" is defined a follows in section 1(*m)* of the C.P.A.: "a person who prepares, publishes or broadcasts an advertisement or who causes an advertisement to be prepared, published or broadcast".
9. Section 1(a), *Canadian Code of Advertising Standards*; ss. 219 and 229 C.P.A.
10. Section 1(b),*Canadian Code of Advertising Standards.*
11. Section 6, *Canadian Code of Advertising Standards*; s. 228 C.P.A.
12. https://www.ftc.gov/system/files/documents/cases/160315lordandtaylcmpt.pdf.
13. Ibid.
14. Definition in the *Canadian Code of Advertising Standards.*
15. Section 5, *Federal Trade Commission Act*.
16. Reference? Maybe: "What Canadian Influencers Need to Know About Disclosure Rules",https://www.newswire.ca/blog/Influencer-Marketing-Disclosure-Canada.html
17. Section 52(1), *Competition Act*, R.S.C. c. C-34.
    Title II of the C.P.A.

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