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#BadInfluence: How to Protect Your Brand When an Endorser Gets Mired in Scandal

In the wake of Sephora and TRESemmé's decisions to sever ties with influencer Olivia Jade Giannulli in the wake of her mother's arrest on charges stemming from the college admissions scandal, marketing and advertising law experts tell Corporate Counsel that morals clauses in influencer agreements should be drafted as broadly as possible to give the company the right to terminate the partnership when scandal involving the endorser arises.

By Kristen Rasmussen

#InfluencerFail.

It didn't take long for beauty and hair care brands Sephora USA Inc. and TRESemmé, respectively, to sever ties with Lori Loughlin's influencer daughter Olivia Jade Giannulli in the wake of her mother's arrest on charges stemming from the college admissions scandal.

While details about the terminations were unknown—representatives from both companies did not respond to emailed requests for comment—it appears they likely invoked morals clauses, legal experts say.

Morals clauses, which generally give companies the right to terminate an endorsement agreement if an endorser commits an act that falls within the scope of the clause, is often one



Sephora store/Photo by Mickael Denet via Wikimedia Commons

of the most-negotiated provisions in agreements with influencers and other endorsers, said Gonzalo Mon, a partner at Kelley Drye & Warren.

Added **Terese Arenth, a partner at Moritt Hock & Hamroff**: "Given how prolific [influencers] are now and how social media can be a little bit of the Wild West,

there are a lot of issues to think about, and the morals clause is one of them."

Corporate Counsel spoke with Mon, Arenth and other marketing and advertising law experts about what in-house lawyers should consider when entering into agreements with influencers hired to advertise their

products on social media.

All agreed that before entering into any formal agreements, companies should take a hard look at both potential influencers and their social media content, paying attention to, for example, how they present themselves on their influencer channels, whether they say anything inappropriate or use profanity, said Allison Fitzpatrick, a partner at Davis & Gilbert.

“Do some digging to see if they have been attached to any scandals,” she said. “They’re brand new—no one knew who they were until two weeks ago—so you need to find out if there’s anything in their past.”

This due diligence, Mon added, should include a review of whether the potential influencer has weighed in on controversial topics before and whether he or she can stay on script or tends to ad lib.

“Do as much digging as you can to get a sense of what they have talked about, whether they’ve said things that might be problematic,” he said. “There was no amount of due diligence that would have caught [the cheating admissions scandal],

but given how prominent these people are on social media, you can still spot a lot of things.”

While in the past morals clauses may not have been included in influencer agreements, given the proliferation and prominence of these figures, companies now generally “need to have a fully formed influencer agreement that looks really similar to your traditional, spokesperson talent agreement,” Fitzpatrick said.

She added: “I think there was a thinking that, ‘we don’t need [morals clauses] with influencers because if they do something scandalous, it’s not going to make the media, but you simply have to put it in the agreement because it can really save you.”

And the clause should be as broad as possible, allowing the company to terminate the agreement in the event of an act that could result in scandal or ridicule for the brand, or words to that effect, she added.

Depending on their sophistication, potential influencers are likely to push back on such broad language and request that the clause be as narrow and specific as possible—termina-

tion on an act that resulted in a felony conviction, for example—but it’s important for the brand to retain the right to determine what constitutes a controversy or scandal sufficient to invoke the morals clause, said Charulata Pagar, a partner at VLP Law Group.

“Some brands don’t shy away from controversies, while other brands will shy away from all controversies, so the determination as to what is a controversy that arises to the level of termination is a very brand-specific decision and something the brand gets to decide,” she said.

Another consideration, Mon added, is the morals clause’s applicable time period, given that some of the conduct that is attracting attention is behavior that occurred years ago but is just now coming to light.

“One of the things the company should think about: ‘Is the clause drafted so that it refers to the past tense?’” he said.

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