



Ad Standards Community Panel
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Ad Standards Limited
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Case Report

1. Case Number :	0131-21
2. Advertiser :	The Wellness Club
3. Product :	Food/Bev Groceries
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	9-Jun-2021
6. DETERMINATION :	Upheld – Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram post on the @hannahemmerson page includes an image of a reusable shopping bag with 'the wellness club' written on it. The bag has green vegetables in it, and is on the ground resting against a fence. The caption to the post is, "essentials".

THE COMPLAINT

A sample of comments which the complainant/s made regarding this advertisement included the following:

Instagram post not marked as sponsored or paid promotion

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

Advertiser did not provide a response.

THE DETERMINATION

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the Code).



The Panel noted the complainant's concern that the Instagram post does not have sponsorship transparency.

The Panel viewed the advertisement and noted the advertiser did not provide an official response. The Panel noted that the advertiser had previously advised that the product had been gifted to Ms Emmerson with no request for her to post.

Section 2.7: Advertising or Marketing Communication shall be clearly distinguishable as such.

Is the material advertising?

The Panel noted that it must consider two matters:

- Does the material constitute an 'advertising or marketing communication', and if so
- Is the advertising material clearly distinguishable as such?

Does the material constitute an 'advertising or marketing communication'?

The Panel noted the definition of advertising in the Code. Advertising means: "any advertising, marketing communication or material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer,

- over which the advertiser or marketer has a reasonable degree of control, and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct".

The Panel considered that the clear placement of the product with the brand name in the advertisement did amount to material which would draw the attention of the public in a manner designed to promote the brand. The Panel also noted that the brand had been tagged in the photo.

As to whether the advertiser or marketer has a reasonable degree of control, the Panel noted that although the advertiser had not provided a response to the case, it had previously indicated that Ms Emmerson had been sent the product but with no request to post content.

A minority of the Panel considered that the advertiser did not have a reasonable degree of control over the advertisement as there was no formal agreement in place between the advertiser and the influencer about her posting the material. A minority of the Panel considered that the advertiser did not request that the influencer post the product and did not have direct control over what was posted. The minority of the Panel considered that the influencer was in control of what was posted, not the advertiser.

The Panel noted that the Code does not define 'reasonable degree of control'. The Panel noted that there is no indication of timeframes around which the advertiser can



be seen to exert control. The Panel noted that in the case of gifts to influencers the context in which the product is given cannot be ignored. The Panel noted that influencers operate as an advertising medium utilised by businesses to promote their brands and products. The Panel noted that many influencers have agents and that businesses exist which put brands and influencers in touch with each other. The Panel noted that influencers are sometimes paid, sometimes provided with free product and sometimes post about products in the context of longer term relationships without immediate incentive. The Panel noted that influencers' posts may also be created in circumstances in which there is no relationship context. The Panel considered that the Code's requirements should be interpreted with its purpose in mind, that is to ensure that consumers are informed, and that influencers should be transparent about their relationship with a brand, whatever form it takes.

The Panel noted that the precise nature of the relationship between the advertiser and Ms Emmerson was not known, however it is likely the advertiser was aware of her position as an influencer. The Panel noted that the advertiser chose to send Ms Emmerson a gift. The Panel considered that while there was no direct request or stipulation for Ms Emmerson to post about the gift, it is reasonable to assume that the motivation for an advertiser to provide free product to an influencer with whom they have a positive relationship is that they will post about the product or otherwise draw the attention of their followers to the brand as Ms Emmerson did in this case. The Panel considered that the advertiser has undertaken the activity of giving a gift to an influencer, and in choosing to send the gift they are exercising a degree of control, and the post did draw the attention to the product.

For these reasons, the Panel considered that the post did meet the definition of advertising in the Code.

Is the material clearly distinguishable as such?

The Panel noted the Practice Note for the Code states:

"Influencer and affiliate marketing often appears alongside organic/genuine user generated content and is often less obvious to the audience. Where an influencer or affiliate accepts payment of money or free products or services from a brand in exchange for them to promote that brand's products or services, the relationship must be clear, obvious and upfront to the audience and expressed in a way that is easily understood (e.g. #ad, Advert, Advertising, Branded Content, Paid Partnership, Paid Promotion). Less clear labels such as #sp, Spon, gifted, Affiliate, Collab, thanks to... or merely mentioning the brand name may not be sufficient to clearly distinguish the post as advertising."

The Panel considered that there was nothing in the wording of the post and no hashtags which clearly demonstrated the relationship between Ms Emmerson and the brand and the circumstances surrounding the posting of the product.



The Panel considered that tagging the brand on its own was not sufficient to satisfy the Code's requirements and that the post was not clearly distinguishable as advertising.

2.7 conclusion

In the Panel's view the advertisement was not clearly distinguishable as such and did breach Section 2.7 of the Code.

Conclusion

Finding that the advertisement did breach Section 2.7 of the Code, the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO DETERMINATION

I have spoken to Hannah in regards to her post and she has agreed to hashtag #ad on the post.

Although I did express to you that Hannah received the bag as a free product, there was no intention made for Hannah to advertise this tote bag for us.

It's really unfortunate that this case has come about, being a new small business we will take this on board and learn from this experience. As we are only just trying to get people to trust in our brand and products.

As Hannah has now clarified that is post is deemed advertising, I hope this will allow you to rectify this case.