



Ad Standards Community Panel
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Ad Standards Limited
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Case Report

1. Case Number :	0204-22
2. Advertiser :	Esmi
3. Product :	Toiletries
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	14-Sep-2022
6. DETERMINATION :	Upheld – Modified or discontinued

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram story posted to the @sarahs_day account features an image of a shampoo bottle being held under running water in a shower. Superimposed over the image is the text "For my fellow dry hair blondes. I've used this for my last 3 washes and I'm surprised how much I like it. Not sponsored, just wanted to share because I have crap hair and I feel like it actually helps hydrate it. I usually use salon-grade hair products but wanted to give it a try and I think I may actually prefer it [thinking face emoji]".

THE COMPLAINT

The complainant was concerned that the story did not comply with the Distinguishable Advertising provision of the AANA Code of Ethics.

THE ADVERTISER'S RESPONSE

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

[The influencer] shared this post without any form of payment or expectation on our end. She does not receive any kind of commission from us. We work with her on a case by case basis and have no formal ongoing agreement in place.



All paid posts are always made clear when paid for. The post was shared organically on [the influencer]'s story and expired after 24 hours. There was no further sharing on our end.

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 was not distinguishable as advertising.

The Panel viewed the advertisement and noted the advertiser's response.

Section 2.7: Advertising shall be clearly distinguishable as such.

Is the material advertising?

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 depiction of the product and the caption promoting its benefits did amount to material which would draw the attention of the public in a manner designed to promote the brand.

With regards to whether the advertiser or marketer has a reasonable degree of control, the Panel noted that the advertiser did not state in its response whether it had provided the influencer with the product. The Panel noted the advertiser's response saying it works with the influencer on a case-by-case basis and does not have an ongoing agreement. The Panel considered that it was unclear whether the influencer had purchased the product themselves or if it had been provided as a gift, but that the influencer had previously received payment from this brand in exchange for posting material.

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, and sometimes provided with free product. 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 brands should be transparent about their relationships with influencers.

The Panel noted that the advertiser had chosen to partner with the influencer on previous occasions, knowing that she has a large social media presence and that given their relationship is likely to post positively about the brand. The Panel considered that while there was no direct request or stipulation for the influencer to post outside of the arrangements, the advertiser would have the ability to request that the influencer include distinguishing hashtags in material referring to it. As such, the Panel considered that the advertiser had a reasonable degree of control over the material.

For these reasons, the Panel considered that the Instagram 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 noted that the composition of the image with the clear focus on the product in addition to the caption referring to the benefits of the product may in other circumstances be distinguishable as advertising. However, the inclusion of "not sponsored" in the caption would suggest to people viewing the advertisement that there was no relationship between the brand and influencer. The Panel considered that the inclusion of the text "not sponsored" meant that the relationship between the brand and influencer was not clear, obvious and upfront as required by the Code.

The Panel considered that the advertisement was not clearly distinguishable to the audience.

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 breached Section 2.7 of the Code, the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO DETERMINATION

Ad Standards notes that this was a story advertisement and is no longer available.