



**Ad Standards** Community Panel  
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**AdStandards.com.au**

Ad Standards Limited  
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## Case Report

<b>1. Case Number :</b>	<b>0324-21</b>
<b>2. Advertiser :</b>	<b>Happy Way</b>
<b>3. Product :</b>	<b>Food/Bev Groceries</b>
<b>4. Type of Advertisement/Media :</b>	<b>Internet - Social - Instagram</b>
<b>5. Date of Determination</b>	<b>24-Nov-2021</b>
<b>6. DETERMINATION :</b>	<b>Upheld – Modified or Discontinued</b>

### ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

### DESCRIPTION OF ADVERTISEMENT

This Instagram story posted by the @chloeszep account features a person using various products to make a smoothie. The brand @happywayau is tagged throughout.

### THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

*This advertisement did not include a disclosure of paid advertising or sponsorship, which I think breaches a code of marketing conduct that requires instagram influencers to be transparent about paid advertising.*

### THE ADVERTISER'S RESPONSE

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

*The protein was gifted but there wasn't any obligation to post and that Chloe posted out of her own accordance.*



## **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 did not disclose that it was sponsored.

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

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

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

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?

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 placement of the product, highlighting the product, the combination of six Instagram stories and the inclusion of a discount code 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 had advised they had given the product to the Ms Szep with no formal arrangement requiring her to post about it

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, 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 influencers should be transparent about their relationships with brands.

The Panel noted that the advertiser chose to send Ms Szep a gift. The Panel considered that while there was no direct request or stipulation for Ms Szep to post about the gift, it is reasonable to assume that the motivation for an advertiser to provide free product to an influencer is that they will post about the product or otherwise draw the attention of their followers to the brand as Ms Szep 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 Instagram stories 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 brand was tagged on each story and that in the sixth story a discount code and link to the brands website was visible.

The Panel noted that it had considered a similar issue in case 0207-21, and after an independent review was conducted the Panel had found:

*"...the Panel considered that the combination of the themes, visuals and language of the ad and the use of the brand and product name multiple times, did mean that the post was clearly commercial in nature...The Panel considered that the individual use of the brand name, hashtags or product images would not be sufficient to distinguish this material as advertising, but the combination of these elements meant that the commercial nature of this post was clear, obvious and upfront and expressed in a way that is easily understood."*

In the current case, the Panel noted that the advertisement was a series of Instagram stories rather than a static post. The Panel considered that the discount code and



website were not apparent until the last story, although the brand was consistently tagged throughout.

The Panel considered that while it may be clear to some people viewing the material that this was an advertisement, the stories could also be interpreted as an organic product promotion. The Panel considered that there was nothing in the wording or pictures of the material which identified the nature of the relationship between the influencer and brand.

The Panel considered that in this case, the series of stories before the discount code and website link made the overall context of the advertisement unclear and the Panel considered that it was not clearly distinguishable to the audience that the stories were an advertisement within a reasonable timeframe.

## **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**

We won't be using any of Chloe's Instagram stories material for advertisement and will discontinue.