

# ADVERTISING, MARKETING & PROMOTIONS

>>ALERT

## NAD'S *BUZZFEED* DECISION MAY BE A ROADMAP FOR AFFILIATE MARKETING

The National Advertising Division (NAD) declined to review the statements made by BuzzFeed, Inc. (*BuzzFeed*) about a moisturizer in one of its online "shopping guides," despite the inclusion of affiliate links in the article. Notably, this NAD decision offers guidance for online publishers as to whether the presence of affiliate marketing links in an article transforms editorial content into an advertisement and triggers an obligation on the publisher to provide substantiation for any product claims in the article.

### THE SHOPPING GUIDES

*BuzzFeed*, a digital media publisher, creates shopping guides, which consist of product lists that its editorial staff recommends to its readers. In one shopping guide, an editor made claims about St. Ives Renewing Collagen & Elastin Moisturizer, including that it will "have your skin looking smoother!" and "the collagen and elastin proteins in this formula help reduce the appearance of fine lines."

The NAD asked *BuzzFeed* to substantiate those and similar statements about the moisturizer included in the shopping guide.

In response, *BuzzFeed* asserted that these statements about the product were not "national advertising" and, therefore, were not subject to the NAD's jurisdiction. Moreover, because the statements were not "national advertising," *BuzzFeed* contended they did not require the type of substantiation needed for advertising claims.

### THE BOTTOM LINE

Online publishers using affiliate links in association with content that reviews or recommends products to consumers must disclose their relationship with the retailers. In addition, online publishers using affiliate links in paid-for advertising must be able to substantiate product claims in their content.

As the NAD's *BuzzFeed* decision makes clear, however, when content is not a paid commercial message but, rather, is independent editorial content, there is no requirement that the publisher be able to substantiate claims about the product made by its editorial staff despite the presence of affiliate links in the article. Other online publishers and marketers should be mindful of the steps taken by *BuzzFeed* to maintain independence between editorial content and commercial affiliate marketing activities.

### BUZZFEED'S ARGUMENTS

According to *BuzzFeed*, its writers and editors choose the products that they write about in its shopping guides, and brands and retailers are forbidden from influencing any of the content that they write. In this instance, according to *BuzzFeed*, the author's recommendations were based on her own research and experiences with various skincare products.

*BuzzFeed* also argued that the "message" in a shopping guide was "purely editorial" and was not "paid" or a "commercial" within the meaning of NAD's rules.

*BuzzFeed* acknowledged that its shopping guides include affiliate links and, if a reader accesses any of these affiliate links and purchases a product, *BuzzFeed* is compensated for the purchase. However, *BuzzFeed* further explained that it adds links to retailers'

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pages for products recommended in its shopping guides *after* an article is completed, and it does not “pay” for any affiliate links. *BuzzFeed* also advised that its editorial staff is “not beholden to the business teams” at *BuzzFeed* who add affiliate links to its content.

*BuzzFeed* further noted that the top of each shopping guide page discloses its use of affiliate links in compliance with the Federal Trade Commission’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, by stating, “We hope you love the products we recommend! Just so you know, *BuzzFeed* may collect a share of sales or other compensation from the links on this page. Oh, and FYI – prices are accurate and items in stock as of time of publication.”

### THE NAD’S DECISION

The NAD agreed with *BuzzFeed* that the content was not “national advertising” subject to its jurisdiction because it was not a “paid commercial message.” Instead, the NAD determined the shopping guide was editorial content that did not have the “purpose of inducing a sale” and was not “controlled by [an] advertiser.” The NAD reasoned that, in this case:

- >> The affiliate link was not placed on “paid-for” advertising;
- >> The moisturizer featured in the shopping guide was chosen by *BuzzFeed*’s editorial staff without its business staff’s input;
- >> The retailer or brand did not have any say in whether the product was recommended or what was said about it;
- >> The affiliate links for the product were added to the shopping guide after the editorial content was completed; and
- >> The recommendations in the shopping guide were not changed after the fact based on the availability of affiliate link revenue.

In summary, the NAD determined the *BuzzFeed* content was “created independently of and prior to the addition of affiliate links to the article” and was not tied to any “economic or commercial motivation” that could be introduced by the presence of affiliate links. Therefore, the NAD declined to retain jurisdiction over the matter. However, if the affiliate links had been placed in “paid for” advertising, the NAD’s jurisdiction would not have been in question.

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