

?#advertisingcompliance: Influencer Marketing in the UK?

WRITTEN BY

Leigh Smith

The Advertising Standards Authority (“ASA”), the UK’s independent advertising regulator, recently added yet another well-known influencer to its published “naughty list” of influencers found to have repeatedly failed to disclose when their posts are advertisements. Publicly “**naming and shaming**” non-compliant influencers is just one aspect of the increasing scrutiny of online advertising in the UK. In parallel, the UK Government’s Online Advertising Programme is currently examining industry input on proposals for regulatory reform, in an effort to better address the challenges posed by online advertising.

This increased scrutiny emphasises the importance for brand owners of understanding how social media advertising is regulated in the UK, so they can avoid the legal and reputational consequences of non-compliance.

How Influencer Marketing is Regulated

Influencer marketing in the UK is currently regulated by the Consumer Protection from Unfair Trading Regulations 2008 (“The 2008 Regulations”) and by the ASA through the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the “CAP Code”), as explained briefly below:

Consumer Protection From Unfair Trading Regulations 2008

The 2008 Regulations govern the conduct of businesses and traders when promoting, selling or supplying to consumers in the United Kingdom. They are enforced by the UK Competition and Markets Authority (“CMA”) and through local government agencies known as “Trading Standards”.

The scope of the 2008 Regulations is broad and encompasses situations where the trader does not deal directly with the end consumer, as is most often the case with influencer marketing. The 2008 Regulations apply to any influencer marketing where the influencer receives payment for its content. Payment is defined broadly and includes payment in the form of free products or payment via affiliate marketing arrangements.

The 2008 Regulations contain three key categories of **prohibitions**; a general prohibition on what are deemed “unfair commercial practices”, specific prohibitions on misleading or aggressive commercial practices, and finally a list of 31 explicitly prohibited practices. Importantly, the use of paid editorial content in any media to promote a product without making the fact of payment clear is considered an “unfair commercial practice”. *Therefore, it should be made absolutely clear to the consumer that the influencer has been paid to endorse/recommend the*

brand owner's product and that the post is an advertisement. This can be achieved through appropriate labelling of the content (see the CMA guidance below under the CAP Code).

Failure to comply with the 2008 Regulations may result in the banning of the advertisement, or in extreme cases enforcement action by the CMA and Trading Standards, potentially including prosecution for a criminal offence.

The CAP Code

Influencer marketing in the UK is also subject to the CAP Code if it qualifies as advertorial content, namely that:

- the influencer has received payment from a brand (whether monetary or by way of free products, as under the 2008 Regulations); and
- the brand owner has some form of editorial control over the influencer's content.

The concept of "editorial control" is interpreted widely and a low threshold for control is applied. It goes beyond approval of the content itself, and can even include merely influencing the frequency or timing of content being posted online.

If the CAP Code applies, as under the 2008 Regulations, **influencers must disclose that they have received payment for their content.** This is accomplished by ensuring that advertisements are clearly identifiable as such with appropriate labelling. These labels should be viewable without further action required by the consumer, such as having to click "read more" to find the label. Labels recommended by the CMA include "ad", "advert" and "advertisement". The CMA also advises that brand owners should stay away from labels that are more ambiguous, including "in association with", "spon/sp" and "affiliate".

Contravention of the CAP Code may result in the application of sanctions by the ASA, including 'naming and shaming' of the influencer and requiring the withdrawal or amendment of the non-compliant advertisement. What should Brand Owners do?

When successful, influencer marketing increases brand visibility, capitalises on the trust built between influencer and audience, and affects the audience's purchasing decisions in favour of the brand. However, when influencer marketing is non-compliant, the reputational damage to the brand owner will likely far outweigh any of the legal consequences for the influencer outlined above.

A brand owner might query whether it is better to allow the influencer total control, such that the CAP Code would not apply. However, **we consider it wiser for a brand owner to be able to ensure content is compliant through a range of practical and legal steps, rather than seek to argue that the CAP Code does not apply after the event.** Ultimately it is the brand that is harmed when things go wrong, and prevention is always better than a cure. Implemented properly, such measures need not unduly impact the broad editorial freedom brand owners like to give to influencers to maintain the authenticity of the engagement with their audiences, but they can help reduce the risk that content associated with the brand owner results in an unforeseen reputational backlash.

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