

Influencers on the "Free Stuff" Train Require Monitoring for False Claims

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A recent National Advertising Division (NAD) decision provides a warning that sending free stuff to influencers may make you responsible for what those influencers say, even without a formal relationship between the brand and the influencer.

Charlotte Tilbury Beauty recently challenged* claims made by its competitor Huda Beauty, concerning Huda's Easy Bake Setting Spray, such as statements that it is the "strongest setting spray ever?" and that it is stronger and lasts longer than Charlotte Tilbury's spray. But Huda did not make those superiority claims. Rather, they originated in a TikTok video posted by an influencer comparing the two products. Yes, Huda did regularly send free Huda product to the influencer, including the spray featured in the video, but Huda did not pay the influencer or otherwise provide any form of compensation to the influencer.

Huda Beauty subsequently reposted the influencer's content on its Instagram account and commented on the influencer's post, but both the repost and comment were removed before the NAD challenge commenced. This gave rise to a jurisdictional spat, with Huda arguing that NAD lacked jurisdiction to hear the challenge because Huda's Instagram repost was discontinued before the challenge. NAD disagreed, noting that the influencer's original TikTok video remained live at the time of the challenge and that Huda Beauty's founder's engagement with the influencer's post further suggested endorsement. NAD concluded it had jurisdiction, emphasizing that the mere discontinuance of claims in the advertiser's own channels does not necessarily eliminate ongoing responsibility if third-party content remains accessible.

Getting to the substance of the challenge, though, NAD concluded that brands may bear responsibility for claims made by influencers who are on the brand's "free stuff" train. That is, when the brand regularly sends out free stuff to influencers, the brand may be responsible for what those influencers say about the brand's products even without a more formal relationship such as specifically paying for social media posts.

Brands cannot pay third parties – influencers – to say things about the brand's products that the brand itself cannot say. And that maxim applies to situations where the brand regularly sends free product or merchandise to an influencer, because certainly the brand would pull an influencer off their free stuff distribution list if the influencer never posted about their product, or even worse, posted something negative. Influencers rarely post negative comments about brands that send them free merchandise. Here, NAD recommended that Huda Beauty make a good faith effort to request the influencer to remove the challenged TikTok video. This recommendation draws on prior NAD precedent and aligns with the Federal Trade Commission's (FTC) Endorsement Guides, which similarly require brands to (i) ask

influencers to clearly and conspicuously disclose receipt of free products, (ii) instruct on how disclosures should be made, and (iii) monitor resulting posts for compliance. Brands are “on the hook for [influencers’] deceptive claims,” even if only unsolicited free products are provided.

Huda Beauty voluntarily agreed to permanently discontinue the challenged claims and stated its intent to comply with NAD’s recommendation, including making a good faith attempt to have the influencer remove the video. NAD treated the voluntary discontinuance as the functional equivalent of a recommended discontinuance for compliance purposes.

*NAD SWIFT Case #7453 (*Charlotte Tilbury Beauty Inc. v. HB USA Holdings, Inc. d/b/a Huda Beauty*)

Practice Pointers

1. Brands should actively monitor posts by influencers on their free product distribution lists, even if there is no formal relationship or compensation.
2. When aware of potentially unsupported or misleading posts by such influencers, brands should promptly communicate with them to request corrections or removal of content.
3. Brands must instruct influencers to clearly disclose any material connection, such as the receipt of free products, in compliance with FTC guidance.
4. Maintain records of all communications with influencers regarding requests to modify or remove posts, as evidence of compliance with industry best practices and self-regulatory expectations.
5. Update influencer marketing policies and provide internal training to marketing teams to ensure understanding of these expanded obligations.