

**BuzzFeed, Inc.****Shopping Guides – St. Ives Renewing Collagen & Elastin Moisturizer**

*Challenger:* National Advertising Division

*Product Type:* Websites/Web Services

*Issues:* Administrative/Jurisdictional; Online Advertising

*Disposition:* Administratively Closed

**Basis of Inquiry:** As part of its routine monitoring, the National Advertising Division requested substantiation for statements about St. Ives Renewing Collagen & Elastin Moisturizer made by BuzzFeed, Inc. (“BuzzFeed” or “advertiser”), an online publisher, in one of its “shopping guides.” The following statements are representative of those that served as the basis for this inquiry:

“A paraben-free facial moisturizer infused with collagen to hydrate your face and soften the appearance of wrinkles.”

“It’ll have your skin looking smoother! The collagen and elastin proteins in this formula help reduce the appearance of fine lines.”

**Advertiser’s Position:****I. Background**

BuzzFeed is a leading independent digital media publisher that creates and publishes a variety of news and entertainment content, including news reporting, pop culture quizzes, “listicles” and the “shopping guides” NAD reviewed here. BuzzFeed noted that “shopping guides” are lists of product recommendations from its editorial staff, a popular feature available on many prominent web publications. It explained that the products and content in its “shopping guides” are chosen by BuzzFeed writers and editors, and noted that brands or retailers are strictly forbidden from influencing the content. BuzzFeed inserts web links to retailers for the recommended products as a convenience for its readers. Over time, BuzzFeed has instituted a practice of monetizing the purchasing links in its articles; however, not all links are monetized. If a reader reaches a retailer site through a monetized link, called an “affiliate link,” and purchases the product, BuzzFeed is compensated. It noted that, in line with FTC guidelines on this topic, its “affiliate link” relationships are disclosed at the top of each shopping guide page. The disclosure states, “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 statements referenced in NAD’s inquiry came from one of its “shopping guides” entitled “35 Skincare Products That Actually Do What They Say They Will.”<sup>1</sup> NAD requested substantiation for statements made by the author about one of the recommended products, St. Ives Renewing Collagen & Elastin Moisturizer. BuzzFeed noted that the article was written by a BuzzFeed staff writer with no input from any advertiser or seller of the products identified in the article. Rather, the author based the recommendations on her own research and independent evaluation of

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<sup>1</sup> Available at [https://www.buzzfeed.com/anamariaglavan/skin-care-products-that-actually-do-what-they-say-they?utm\\_term=.ii8ZmGG2D#.gmgavVVKk](https://www.buzzfeed.com/anamariaglavan/skin-care-products-that-actually-do-what-they-say-they?utm_term=.ii8ZmGG2D#.gmgavVVKk).

consumer experiences with various skincare products. Each product recommended in the article included a picture, a synopsis of BuzzFeed’s views on the product, a consumer’s review of the product found on the web and a link to enable readers to purchase the product. Some, but not all, of the links were “affiliate links” that could generate revenue for BuzzFeed.

## II. The Statements are Not Advertising

BuzzFeed argued that the statements about the products recommended in its article are not advertising and do not require the type of substantiation needed for advertising claims. As a result, it contended that NAD does not have jurisdiction over the content of its shopping guide. Although it may have attained income from affiliate links in the article, it argued that the content is not advertising. It noted that NAD’s jurisdiction is limited to “national advertising,” a term that is defined by NAD Policy & Procedure §1.1(A). That section states,

“The term ‘national advertising’ shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser.”

It noted that the statements made as part of its recommendation of the St. Ives product at issue were not “national advertising” under this definition because they were (1) not a “paid commercial message” and were (2) not “controlled by the advertiser.” It stated that it was not paid to recommend St. Ives Renewing Collagen & Elastin Moisturizer, but rather recommended the product based on its own writing staff’s editorial choice. It also stated that the product manufacturer or retailer asserted no “control” over the content of the article or had any say in what was said about the product.

### a. The Statements Are Not a “Paid Commercial Message”

BuzzFeed stated that the “message” in its article is purely editorial and is neither “paid” nor “commercial” as meant by NAD’s rules. The editorial staff chose the products listed in the article and all of the copy about those products. It asserted that those decisions were made without influence by the potential for affiliate link revenue and editorial staff is not beholden to the business teams that add affiliate links to content. While affiliate link revenue is a potential commercial *consequence* of the article’s content, it maintained that the included links did not alter the message of the article. If affiliate links are available for a recommended product (and they are not always available), they are added to “shopping guides” by a separate arm of its business *after* the article is completed, such that writers are not influenced by the links. BuzzFeed does not allow its business teams or affiliate partners to dictate or affect the content of its “shopping guides.”<sup>2</sup> Rather, it stated that BuzzFeed “shopping guide” writers recommend

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<sup>2</sup> BuzzFeed stated that it has refused to make changes to its posts at the request of brands except to correct incorrect or misleading information such as mistaken pricing, and then only at the discretion of the editorial team.

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products they like or believe their readers will like. Their incentive is to create engagement with readers in the same way all of BuzzFeed's content creators are.

It also noted that BuzzFeed did not "pay" for the affiliate link, such that the associated content cannot be considered a "paid commercial message." It maintained that the product manufacturer and retailer asserted no "control" over the content of the article or had any say in what was said about the product. BuzzFeed does not instruct its writers to rely on a product manufacturer's own claims, but rather to use their own unique voice and rely on their experience and research. To that end, the statements were not advertisements "controlled" by another entity.

It contended that its affiliate links are different from paid endorsements because there is a different cause and effect relationship between the content and the commercial activity associated with it. In a paid endorsement, the transaction leads to the creation of specific content and has a strong influence over that content. Its "shopping guides" are the opposite. The creation of the content is done editorially and independently without the impetus of a monetary transaction, and the affiliate link is subsequently added without influencing the content of the "shopping guide."

#### **b. BuzzFeed Follows FTC Guidance In Its Use of Affiliate Links**

BuzzFeed maintained that the statements made in its shopping guide were not advertising, but noted that even if NAD considered them to be advertising they are compliant with all current law regulating the use of affiliate links. It argued that NAD should not create further requirements for publishers using affiliate links, which, it argued, would create untenable precedent.

BuzzFeed stated that the FTC has provided express instructions for how an influencer, blogger, or other publisher should protect consumers from misimpressions that may result where affiliate links appear adjacent to editorial/endorser content. In the FTC's "Guides Concerning the Use of Endorsements and Testimonials in Advertising," it states that affiliates should "disclose [their] relationship to the retailer clearly and conspicuously on [their] site, [so that] readers can decide how much weight to give [an] endorsement."<sup>3</sup> It asserted that at the top of each "shopping guide" article, that relationship is clearly and conspicuously disclosed. It argued that, notably, FTC's guidance does not impose a claim substantiation obligation on the editorial content put out by a publisher that uses affiliate links. Accordingly, the act of adding affiliate links to editorial content introduces an obligation to provide transparency about the nature of the relationship between the publisher and the retailer, but it does not transform the editorial content into advertising. BuzzFeed contended that its disclosure sufficiently put consumers on notice of the relationship between it and the retailers.

#### **c. Consumers Interests Are Protected**

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<sup>3</sup> Citing FTC, "The FTC's Endorsement Guides: What People Are Asking," (2015), available at <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#affiliateornetwork>.

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While BuzzFeed asserted that it does not have an advertiser’s burden to substantiate claims, it nonetheless stated that it is not free to disregard the truth and accuracy of its content. It maintained that as a responsible publisher and media company, it strives for accurate content supported by facts. It stated that its responsibility to be accurate when drafting shopping guides is the same as when reporting news stories. Its credibility and reader retention depends on providing reliable information on both accounts. BuzzFeed noted that inaccurate information in its “shopping guide” recommendations would cause its audience to not trust those recommendations and ultimately abandon them. Here, its statements about St. Ives Renewing Collagen & Elastin Moisturizer are based on the research of the article’s author, consisting of a review of the manufacturer’s statements about the product on its Amazon retailer page, an independent review of consumer experiences on social media, and an assessment of the general reasonableness of the statements.

BuzzFeed argued that expanding the definition of “national advertising” to include this type of content would intrude into traditionally protected areas of unbiased, independent product reviews and criticism. It noted that instituting a substantiation standard, or limiting a publisher to those statements presumed to be substantiated by a brand, would function as a limit to editorial discretion and a chill on free speech. It argued that creating a standard with respect to the use of affiliate links is only valuable if it is workable and protects editorial discretion. To that end, the correct standard is that already laid out by the FTC and met by BuzzFeed—clear and conspicuous disclosure of affiliate relationships.

**Decision:**

NAD inquired about an article on BuzzFeed entitled “35 Skincare Products That Actually Do What They Say They Will.”<sup>4</sup> The article recommends a series of skincare products to readers, including St. Ives Renewing Collagen & Elastin Moisturizer, about which BuzzFeed makes a number of statements regarding efficacy. Prominently at the top of the article, before the list of recommended products, there is a disclosure that states, “We hope you love the products we recommend! Just so you know, BuzzFeed may collect a share of sales from the links on this page. Oh, and FYI — prices are accurate and items in stock as of time of publication.”

Digital publishers are increasingly monetizing content in new and creative ways including the prevalent use of the type of “affiliate link” relationship reviewed here. At the same time, consumers have broadened the sources from which they acquire information about the products and services they purchase, regularly looking to consumer reviews, social media and influencers, and online publications spanning from trusted media sources to specialized blogs and websites. In this widely diverse information environment, the line between what is advertising and what is not often gets blurred. This gray area became apparent years ago when “native advertising” became widespread on the internet, but the blurring is not limited to such content. As content about product and services moves from advertising (that clearly requires substantiation) to content that may not fall into the category of “commercial speech,” important questions arise related to whether consumers are receiving truthful information about the products they

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<sup>4</sup> See n. 1.

purchase. Tension arises because publishers' editorial content is protected by the First Amendment and may comment on products and services without the support of any reasonable evidence.

NAD's jurisdiction is limited to "national advertising," defined as:

"any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States, or is test market advertising prepared for national campaigns; and if the content is controlled by the advertiser."<sup>5</sup>

Editorial content is not a "paid commercial message," does not have the "purpose of inducing a sale," and is not "controlled by [an] advertiser." As such, it falls outside of NAD's jurisdiction. However, merely stating that content is editorial is not sufficient to provide its protective veil. When affiliate links are added to content it is important to analyze the affiliate link and the associated commercial relationship to determine whether the content is "advertising."

The FTC has noted that publishers using affiliate links in association with content that reviews or recommends a product should disclose their relationships to retailers clearly and conspicuously so that consumers can decide how much weight to give the endorsement.<sup>6</sup> NAD's concern here, however, is not whether consumers are aware of the affiliate relationship—BuzzFeed disclosed its use of affiliate links and its potential to earn revenue from sales made through those links. This inquiry did not raise the sufficiency of those disclosures. Rather, the issue here is whether online publishers using affiliate links can use the aegis of editorial independence to avoid the requirement that it have substantiation for any product claims in the content. While such claims may not have been *directly* paid for by a brand or retailer, if the publisher is "paid" because it included the affiliate link, the associated content may stand in the place of a traditional advertisement for the "purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service."<sup>7</sup> If the publisher is acting as an advertiser, then it can be held responsible for the truthfulness of the statements made about the products it promotes.<sup>8</sup>

The "affiliate link" is not placed in "paid-for advertising" in the traditional sense.<sup>9</sup> NAD's jurisdiction in this matter would not be in question if the link were placed in a paid-for

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<sup>5</sup> NAD Policy & Procedure §1.1(A).

<sup>6</sup> See, *supra* n. 3

<sup>7</sup> See, *supra* n. 5.

<sup>8</sup> See American Media, Inc. (Shape Water Boosters), Report #5665, *NAD/CARU Case Reports* (December 2013).

<sup>9</sup> NAD noted that, while not the case here, affiliate links can be placed in paid-for advertising. The FTC posted a blog post about the content of affiliate marketing advertising last year. See, "What's affiliate marketing? Should I care?," available at <https://www.consumer.ftc.gov/blog/2017/09/whats-affiliate-marketing-should-i-care>. The article discusses affiliate marketers that are explicitly "hired by the owner of the product." Here, the brand did not pay for the content and did not direct the placement of the affiliate link. Rather the link was placed by the publisher using third party affiliate networks or through a relationship with a large online retailer.

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advertisement.<sup>10</sup> Rather the issue at hand is whether the presence and influence of the affiliate link transforms the publisher's own content into advertising for the product it promotes. Thus, the question at the center of this matter is whether embedding affiliate links into content, particularly content that reviews products for sale, renders it "national advertising" that requires substantiation. Relevant precedent, albeit not exactly on point, includes NextAdvisor, Inc. (Credit Card Reviews), in which a credit card review website had affiliate relationships with a number of credit card companies and made strong claims about those products in placed advertisements that linked to its own website.<sup>11</sup> NextAdvisor argued that the advertising in question was for its website, not for the credit card it referenced, and that it did not need to substantiate the claims. NAD disagreed and stated that,

"NextAdvisor's affiliate marketing relationship with American Express imposes an obligation on NextAdvisor to insure that the claims it makes about the value or benefits of the American Express card are truthful, accurate and not misleading. Third-party or affiliate entities who 'persuad[e] the audience of the value or usefulness of a . . . product' engage in 'national advertising' under NAD's Policies and Procedures and are considered themselves to be advertisers for those products."<sup>12</sup>

However, the Next Advisor, Inc. (Credit Card Reviews) case dealt with a placed advertisement, not the content of its website directly.

The FTC also does not directly address whether the act of placing an affiliate link next to content about the related product renders the content "advertising" that requires substantiation. Its document, "The FTC's Endorsement Guides: What People Are Asking," requires disclosure of the affiliate relationship based on the presence of the link, but it does not address the content of the associated review or recommendation.<sup>13</sup>

FTC also uses the five factors described in R.J. Reynolds Tobacco Co., to determine whether speech is commercial.<sup>14</sup> It considers,

"(1) the content of the speech, i.e., whether it contained a message promoting the demand for a product or service; (2) whether the speech referred to a specific product or service; (3) whether the speech included information about attributes of a product or service, such as type, price, or quality, including information about health effects associated with the use of a product; (4) the means used to publish the speech, including whether it is paid-for advertising; and (5) the speaker's economic or commercial motivation."<sup>15</sup>

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<sup>10</sup> NextAdvisor, Inc. (Credit Card Reviews), Report #5992, *NAD/CARU Case Reports* (August 2016).

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> See, *supra* n. 3. In that way, the FTC document contemplates the affiliate link itself to be the "advertisement" and is silent on whether the associated content is also "advertising."

<sup>14</sup> R.J. Reynolds Tobacco Co., 111 F.T.C. 539, 544-46 (1988), *appeal docketed on other grounds*, No. 13-1060 (D.C. Cir. Mar. 8, 2013).

<sup>15</sup> POM Wonderful, LLC, 155 F.T.C. 1, 74-75 (citing R.J. Reynolds Tobacco Co., *supra* n. 14).

These factors can be applied to product reviews or recommendations accompanied by affiliate links, and can serve as a guide for determining whether content adjacent to affiliate links is advertising or editorial.

Assessing the BuzzFeed content at issue here, the product recommendation “promot[es] the demand” for a “specific product or service” by discussing the relevant “attributes,” including “type, price, or quality.”<sup>16</sup> However, as discussed above, the “affiliate link” itself is not placed in “paid-for advertising.” Additionally, in assessing BuzzFeed’s “economic or commercial motivation,” BuzzFeed maintained that it separates the function of writing content from any economic motivation which might arise from the affiliate links. If the primary economic motivation driving the content is the same as other digital editorial content—to attract page views and develop a readership—the content would not be advertising and would fall outside of NAD’s jurisdiction. However, if a publisher creates content with the purpose of directly influencing readers to purchase products through its affiliate links, the economic motivation would match that of an advertiser’s commercial speech. In such a case, the content may be “advertising” within NAD’s jurisdiction.

Turning to BuzzFeed’s “shopping guide,” NAD determined that the content was created independent of the “economic or commercial motivation” introduced by affiliate marketing revenue. The product at issue was chosen for its recommendation list by editorial staff without the input of business staff regarding the potential for affiliate link revenue. The retailer or brand did not have any say in whether the product was recommended or what was said about it. Those entities also are not permitted to subsequently alter BuzzFeed’s “shopping guide” content. The affiliate links were added to the “shopping guide” after the editorial content was completed and the recommendations were not changed after the fact based on the availability of affiliate link revenue. In sum, the content was created independently of and prior to the addition of affiliate links to the article. As a result, the content is not tied to the “economic or commercial motivation” that could, under different circumstances, be introduced by the presence of affiliate links.

For these reasons, NAD found that the “shopping guide” content regarding St. Ives Renewing Collagen & Elastin Moisturizer is not a “paid commercial message” and is not national advertising as defined under ASRC procedures. NAD noted that, while sufficient in this matter, the enumerated elements of BuzzFeed’s process are neither exhaustive nor necessary to show that such content is not a “paid commercial message.” Because NAD determined that the statements identified in its inquiry were not “national advertising” pursuant to NAD Policy & Procedure §1.1(A), it declined to retain jurisdiction over the matter.

**Conclusion:**

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<sup>16</sup> As alluded to in Reynolds, NAD noted that if content includes information about the “health effects” of a product or service, it may require heightened scrutiny, as the potential harm for consumers could be increased if the content is unsubstantiated.

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Because NAD determined that the statements “A paraben-free facial moisturizer infused with collagen to hydrate your face and soften the appearance of wrinkles” and “It’ll have your skin looking smoother! The collagen and elastin proteins in this formula help reduce the appearance of fine lines” were not “national advertising,” pursuant to NAD Policy & Procedure §1.1(A), it declined to retain jurisdiction over the matter. **(#6210 HH, administratively closed 09/18/2018)**

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