



Julian Knight MP
Chair
Digital, Culture, Media and Sport Committee
House of Commons
London
SW1A 0AA

Advertising Standards Authority
Castle House, 37-45 Paul Street
London, EC2A 4LS
Telephone: 020 7492 2222
Email: enquiries@asa.org.uk
www.asa.org.uk

By email: dcmscom@parliament.uk

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Dear Mr Knight,

Digital, Culture, Media and Sport Committee inquiry – Chair’s comment on ASA response

I am writing to acknowledge your comment on the ASA’s response to the Committee’s report *Influencer culture: Lights, camera, inaction?* and I hope you won’t mind if I offer a few observations in turn. In doing so, I want to assure you of how seriously we take the issue of influencer marketing and how committed we are to proactive intervention.

In your comments on our response, you state that “ASA fails to commit to the Committee’s recommendation that the CAP code should require virtual influencers to be watermarked, to flag that the influencer is virtual **and make clear details of the owner**” [emphasis mine].

The Committee’s recommendation was that we should “introduce a requirement to the UK Code of Non-broadcast Advertising (CAP Code) for virtual influencers to be watermarked”. I note, of course, that concerns were raised in that part of the report that content should be “traceable to the creator” in order to ensure they were held accountable for breaches of the Code, but ‘making clear details of the virtual influencer owner’ was not the Committee’s recommendation.

What is crucial in ad regulatory terms is that influencer content that is advertising is obviously identifiable as such; and our mandatory rules (set out below my signature) require that already. If influencer ads are properly flagged as ads (as they must be), and assuming it is obvious which brand is being advertised (as is almost always the case), then it will be obvious to viewers “who is really pulling the strings and their intentions”. The advertised brand is pulling the strings and their intention is to promote their brand.

Moreover, our rules already allow us to assess whether an omission of “the details of the owner” is misleading, for example if the virtual influencer presents as an independent entity (whether real or virtual) when in fact it is a brand equity character. Our point is that the Consumer Protection from Unfair Trading Regulations 2008 (which our rules reflect) require a case-by-case assessment of misleadingness, unless a practice is designated by Schedule 1 of these Regulations as being prohibited in all circumstances. If we mandate a watermark on virtual influencer ads in all circumstances, without an assessment of misleadingness, our intervention will – if challenged – be susceptible to being overturned on judicial review.

Legal, decent, honest and truthful

Chairman Lord Currie of Marylebone Chief Executive Guy Parker

ASA Council Aaqil Ahmed, Tess Alps, Zaid Al-Qassab, Krystle Sargent, Alison Hastings, Claire Hilton, Rotha Johnston, Richard Lloyd, Kirsten Miller, Nita P Woods, Rebecca Rumbul, and Neil Stevenson

The Advertising Standards Authority Limited, registered in England No 733214, Castle House, 37-45 Paul Street, London EC2A 4LS

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In deciding whether and how to act, we must abide by good regulation principles: our interventions must be evidence-based and targeted where needed. The Committee's report bases its recommendation on three sources: two are press articles (a BuzzFeed report that discusses the World Health Organisation using a bot to help with youth outreach on coronavirus information and a piece on CNN about Lil Miquela, a virtual influencer that was active for two years before disclosing it was a bot). The third is the Influencer Marketing Trade Body's response to the Committee's inquiry, which notes that some industry advocates believe virtual influencers should be watermarked.

Those may serve as useful indications of trends in influencer activity or industry opinion, but they are not a robust basis on which to introduce a rule mandating watermarking.

The Committee's report talks of transparency and reputational damage, but your comments on our response raise body image concerns. There is no mention of virtual influencers in the section of the Committee's report dealing with body image (paragraphs 105-108) and we based our response on a quite different understanding of the Committee's concern as articulated in the report. The prevention of harm is an important basis for regulatory intervention, separate from the prevention of misleading advertising. We are presently preparing a statement on body image, following a call for evidence that closed earlier this year, and we would be happy to talk to you about that work. It is worth noting that virtual influencers were not mentioned by any of the respondents to our call for evidence.

As we said in our response to the Committee, we understand the Online Safety Bill might give Ofcom powers to consider the circumstances in which the use of virtual social media accounts (used by people, organisations etc. which conceal their identities) may lead to harm and, in such circumstances, the duty of care that might apply to the platform in scope of the Bill. To the extent that the Committee's concerns go to the very existence of these accounts and the harm arising from that, rather than from individual communications, it might be worth addressing this with online platforms directly or with Ofcom.

I hope you'll understand why I feel it important to put these points on the record. I assure you that we share the Committee's desire to see better compliance across the influencer marketing sector and we continue to work hard, including on proactive tech-assisted monitoring and compliance, to achieve that.

Yours sincerely



Guy Parker
Chief Executive

cc:

- Ruth Wye (ruth.wye@dcms.gov.uk)
- Sophie Marment (sophie.marment@dcms.gov.uk)
- Janis Makarewich-Hall (janis.makarewichhall@dcms.gov.uk)

Relevant rules on brand accountability in the CAP Code:

2.1

Marketing communications must be obviously identifiable as such.

2.3

Marketing communications must not falsely claim or imply that the marketer is acting as a consumer or for purposes outside its trade, business, craft or profession; marketing communications must make clear their commercial intent, if that is not obvious from the context.

3.5

Marketing communications must not materially mislead by omitting the identity of the marketer.

Some marketing communications must include the marketer's identity and contact details. Marketing communications that fall under the Database Practice or Employment sections of the Code must comply with the more detailed rules in those sections.

Marketers should note the law requires marketers to identify themselves in some marketing communications. Marketers should take legal advice.