

## Media Hotline

June 09, 2021

### SOCIAL MEDIA VS. REALITY (CHECK): ASCI'S NEW INFLUENCER GUIDELINES

Gone are the days when products were flashed on billboards and TV, and only celebrities, i.e., film and sports stars ruled the advertng industry. Social media has given a fillip to traditional advertising. Your screen is now the billboard and commoners turned "influencers" and "vloggers" with mass followers are the ones marketing, reviewing and vouching for products even for big brands.

With the prevalence of advertising through influencers, the lines between what is, and what is not, an 'advertisement', have become increasingly blurred. For instance, a consumer may not realise when an influencer discussing about their favourite skincare product is giving a genuine review or being paid to do so by the brands! This may result in sub-conscious marketing by influencer to the follower. Indian courts are also taking cognizance of the fact that influencers attain considerable following and credibility in their fields and are in a position to employ goodwill to influence the public's mind.<sup>1</sup>

To address this, the Advertising Standards Council of India ("ASCI") has released the *Guidelines for Influencer Advertising in Digital Media*, ("Guidelines"). This is to enable consumers to identify when influencers are deriving some benefit for promoting a product, and for influencing opinions and behaviours. These Guidelines prescribe stringent disclosure requirements for influencers, place obligations on advertisers and influencers.

In this article, we will discuss the key provisions of the Guidelines, the nature of compliances, and key takeaways for influencers and advertisers.

### THE GUIDELINES

ASCI is a self-regulatory body, and the codes and guidelines released by the ASCI are not binding under law<sup>2</sup> for most modes of advertising including internet/digital advertising. The Guidelines are binding on members of ASCI, as members have agreed to abide by them. Most Indian advertisers are members of ASCI. The Guidelines serve as a benchmark for non-members as well.

### WHO IS AN INFLUENCER?

Interestingly, an 'influencer' has been defined widely as someone who 'has access to an audience and the power to affect their audiences' purchasing decisions or opinions about a product, service, brand or experience, because of the influencer's authority, knowledge, position, or relationship with their audience.' There is no minimum threshold of followers, nor any criteria for the influencer being 'verified' on the social media platform to be considered an influencer. Anyone that could impact consumers' decisions may be considered an influencer as per this definition.

This is in contrast with the treatment of influencers adopted in some other jurisdictions. For instance, the UK's Advertising Standards Authority has held<sup>3</sup> that having 30,000 followers would render a blogger a 'celebrity' for the purposes of the UK's *Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)*. In this case, the blogger 'ThisMamaLife' had 30,000 followers, and her Instagram feed featured over 1000 posts that included recommendations on different products, qualifying her as a 'celebrity.'

Another interesting aspect of the Guidelines is that 'virtual influencers' are also covered under their ambit. Virtual influencers are defined as 'fictional computer generated 'people' or avatars who have realistic characteristics, features and personalities of humans, and behave in a similar manner as influencers.' Since virtual influencers are digitally created by individuals, it can be surmised that the obligations under the Guidelines are intended to be imposed on the entity that controls the posts of the virtual influencer.

### WHAT ARE THE OBLIGATIONS UNDER THE GUIDELINES? WHEN DO THEY APPLY?

The Guidelines place compliance obligations on both influencers as well as advertisers, some of which are summarized below.

- **Material Connection Test.**
  - The Guidelines specify that where the advertiser has a 'material connection' with the influencer, the advertiser must ensure that the influencer's advertisement is compliant with ASCI's Code for Self-Regulation of Advertising Content in India ("Code"), as well as the Guidelines.
  - A 'material connection' is essentially any benefit or incentive provided by the advertiser to the influencer. This could be monetary compensation, free products, discounts, gifts, trips or hotel stays, awards, media coverage, an offer of employment, among others. Importantly, even if an influencer was *not specifically asked* to talk about a product or service, or if an influencer's review of a product/service is *completely unbiased* and fully originated by the influencer, they would need to disclose their post as an advertisement, if there is such a 'material connection.'

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- Given the wide definition of 'material connection,' it would be prudent for influencers to evaluate whether disclosures are required before they post any review or endorse a product/service. Advertisers should also call upon the influencers to create their posts in compliance with the Code and the Guidelines.
- **Virtual Influencer:** A virtual Influencer (i.e., the creator behind the influencer) must additionally disclose to consumers that they are not interacting with a real human being.
- **Nature of Disclosure:** Guidelines clarify that the use of a social media platform's disclosure tool would *not* be sufficient to satisfy *an* influencer's disclosure requirements under the Guidelines. Hence, simply inserting the 'Sponsored' tag on Instagram may not be sufficient for an influencer to discharge their obligations under the Guidelines. Advertisements published by social media influencers (or their representatives on their accounts) are required to carry a disclosure label **clearly identifying it as an advertisement**, when there is a '*material connection*' between the advertiser and influencer.
- **Prominence of Disclosures:** The Guidelines require disclosures to be prominent and 'hard to miss' by average consumers<sup>4</sup>.
- **Format of Disclosures**
  - Given that social media platforms have a wide variety of formats through which influencers can advertise – posts, stories, reels, livestreams, podcasts, etc., the Guidelines prescribe disclosure requirements for each type of advertisement depending upon its format. For example, depending upon the length of a video (less than 15 seconds, longer than 15 seconds but less than 2 minutes, 2 minutes or longer), disclosures must stay for a corresponding duration of seconds. In live streams, disclosures must be announced at the beginning and end of the livestream, as well as in the caption, in case the livestream subsists as a post on the influencer's profile.
  - The Guidelines also require that disclosures should be in English, or in the language of the advertisement itself. They also provide examples of acceptable disclosure labels - *Advertisement, Ad, Sponsored, Collaboration, Partnership, Employee, Free gift*.
- **Due Diligence**
  - Apart from their disclosure obligations, influencers are also required to carry out their own due diligence and review and satisfy themselves that the advertiser is capable of substantiating the claims made in an advertisement, under the Guidelines.
  - o A similar obligation exists under the Consumer Protection Act, 2019, ("**CPA**") as well, under which 'endorsers' may be penalised for featuring in misleading advertisements, unless they exercise due diligence to verify the veracity of claims made in the advertisement. A draft of the *Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines, 2020* was introduced for public comments. The draft guidelines place stringent and onerous obligations on endorsers, which are unreasonable at some places. However, these guidelines have not come into force yet.

## TAKEAWAYS FOR ADVERTISERS

Since the primary responsibility for compliance with the Guidelines remains on the advertiser, they must take special care in their agreements with influencers to ensure compliance with the Guidelines.

For instance, advertisers must incorporate appropriate creative controls and approval clauses in their agreements with influencers, to allow them to edit, modify and approve influencer content before it is published. They may also seek representations and warranties from the influencers that their endorsements of products/services are based on their actual experiences with the products/services, and they have carried out their own due diligence before endorsing them. This would mitigate advertisers' liability for misleading advertisements.

Apart from compliance with the Guidelines, it would be prudent for advertisers to contractually require influencers to comply with applicable content laws while creating content – content should not hurt religious sentiments, should be non-defamatory, non-derogatory and made with due respect to third party rights. Any content related issue could have a severe impact on brand reputation as well.

Further, advertisers may consider building in appropriate termination provisions in their agreements with influencers if they become the subject of negative publicity. They may also require influencer to take down all content relating to the brand from their social media platforms. In the age of 'cancel culture,' advertisers may also want to refrain from associating with influencers that could bring disrepute to their brands.

## TAKEAWAYS FOR INFLUENCERS

The Guidelines as well as the CPA require influencers to exercise their own due diligence to ensure that the advertiser is capable of substantiating the claims made in an advertisement. Given that influencers are the ones publishing the advertisement, they are the ones in the 'limelight,' vis-a-vis a product or service. However, since influencers are not members of ASCI, ASCI may be unable to enforce the Guidelines against the influencer. If the advertisement is misleading in nature, i.e., falsely describes the product/service, or gives a false guarantee as to the nature, substance, quality/quantity of the product/service, deliberately conceals important information about the product/service, etc., the consumer may file a complaint against them under the CPA as 'endorsers' for featuring in a misleading advertisement. In such cases, unless the influencer can demonstrate that they undertook due diligence, the Central Consumer Protection Authority<sup>5</sup> may impose penalties on them or even prohibit the endorser from making endorsement of any product/service for upto three years<sup>6</sup>.

Therefore, it is extremely critical for influencers to verify that any claims they are asked to make while advertising, are in fact accurate. For instance, if they are asked to discuss the benefits of certain healthcare products, they must ensure that the claims they make are accurate. Influencers may contractually require advertisers to provide representations and warranties backed with indemnities that these claims are capable of being substantiated.

Secondly, and importantly, influencers should always remember that they have the power to influence the followers. Hence, it is critical for them to be socially responsible, and ensure that their content does not hurt or harm any

individual or society in any manner, else they may attract liability under consumer protection law and even criminal law in certain cases.

## OUR TAKE ON THE GUIDELINES

India is one of the foremost nations to introduce strict disclosure requirements for influencers. In the UK, a parliamentary committee has recently opened an inquiry on influencer culture and influencer impact, following a spate of complaints involving influencers to their Advertising Standards Authority (ASA).<sup>7</sup> Therefore, it may be a matter of time before similar regulations are introduced in other countries as well. The ASCI Guidelines may serve as a benchmark for other nations seeking to introduce similar regulations.

Influencers wield significant influence over consumers' thoughts, opinions and purchasing habits. The ASCI Guidelines are the need of the hour at a time when most advertising is carried out through social media influencers. It is about time that influencers, boasting a sea of followers, are made accountable for their conduct and content. The Guidelines are a step in the right direction towards regulating them.

– Tanisha Khanna, Aarushi Jain & Gowree Gokhale

You can direct your queries or comments to the authors

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<sup>1</sup> *Marico Limited v Abhijeet Bhansali* Notice of Motion No. 1094 of 2019 In COMIP No. 596/2019, Bombay High Court

<sup>2</sup> They are legally binding for TV broadcasters, for advertising on cable television, under the Cable Television Networks Rules, 1994

<sup>3</sup> <https://www.theverge.com/2019/7/4/20682087/instagram-twitter-celebrity-30000-followers-advertising-standards-authority-uk>

<sup>4</sup> The Guidelines clarify that disclosures in certain places *would be likely to be missed* by consumers – on the profile page or bios of influencers, at the end of posts/videos, anywhere which requires a user to click 'more', or buried in a group of hashtags or links. Therefore, influencers should avoid inserting disclosures in these places.

<sup>5</sup> The CCPA has been constituted under Section 10 of the CPA to regulate matters relating to violation of consumer rights, unfair trade practices, and false or misleading advertisements which are prejudicial to the interests of the public and consumers, and promote, protect and enforce the rights of consumers.

<sup>6</sup> Section 21(2), Section 21 (3), CPA

<sup>7</sup> <https://committees.parliament.uk/call-for-evidence/428/influencer-culture/>

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