



ERGO

Analysing developments impacting business

ASCI RELEASES INFLUENCER ADVERTISING GUIDELINES FOR DIGITAL MEDIA - EFFECTIVE 14 JUNE '21 ONWARD

28 May 2021

On 27 May 2021, Advertising Standards Council of India (ASCI) released the final 'Guidelines For Influencer Advertising In Digital Media' (Guidelines) which would have to be complied with for all posts published by influencers on or after 14 June 2021. The purpose is to enable consumers to identify and distinguish paid promotional content from other content posted by the influencers. The Guidelines are aimed at preventing manufacturers and advertisers using influencers for promotional posts or campaigns on digital media which may be misleading in nature and avoiding abuse of trust of consumers or exploitation of their lack of experience or knowledge.

Background and Overview of Guidelines

In February 2021, ASCI had released a draft set of guidelines for influencer advertising on digital media for stakeholders' consideration and comments. The deadline to send in comments to the draft guidelines was then extended by ASCI to 21 March 2021 (from 8 March 2021). The final Guidelines have now been released by ASCI and would be effective from 14 June 2021.

The Guidelines seek to define an influencer as *"someone having access to an audience and power to affect such 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"*. It also identifies 'virtual influencers' as fictional computer generated 'people' or avatars.

Per the Guidelines, all posts published by social media influencers or their representatives on digital media have to carry a disclosure label as per the specifications set out in the Guidelines, identifying such posts as advertisements. The criteria identifying when there is a requirement of such disclosure have also been set out in the Guidelines. Such instances include situations where there is any material connection between the advertiser and the influencer. 'Material connection' has also been specifically defined in the Guidelines to include even issuance of free products or unsolicited gifts, discounts, contest and sweepstake entries, trips or hotel stays, media barter, coverage, awards, or any family or employment relationship between the advertiser and the influencer in addition to the typical benefits and incentives such as monetary or other compensation. A broad definition of 'digital media', encompassing all plausible forms of digital content and platforms for delivery of such content, has also been laid down in the Guidelines. The Guidelines also mention that no disclosure would be necessary if the influencer is simply posting about any product or service that they may have purchased and liked without any material connection with the advertiser. However, if any material connection at all exists, a disclosure is required even if the

content of the post is an unbiased evaluation or originating independently from the influencer.

Specifics as regards placement, duration, visibility and manner of the disclosure have also been set out in the Guidelines to ensure that the disclosures are prominent, hard to miss, readily visible/audible to the consumers and not buried in hashtags or links. Labels including "**Advertisement**", "**Ad**", "**Sponsored**", "**Collaboration**", "**Employee**", "**Free Gift**" have been identified as permitted disclosure labels in the Guidelines, and such disclosure by the influencer has to be in addition to the platform's independent disclosure tool. Content in the nature of live streams and audio media have also been subjected to the Guidelines with specific requirements in this respect also set out therein. For content which is not accompanied by any text (for example, Instagram or Snapchat stories), the Guidelines mandate superimposing the disclosure label upon the photo/video in a manner clearly visible to the average consumer. A virtual influencer has also been directed to disclose to the consumers that their interaction is not with a real human being.

The Guidelines affix responsibility of the disclosure and of the content of the posts on the advertisers as well as the influencers and indicate that all content should be in adherence to the ASCI Code for Self-Regulation of Advertising Content in India (ASCI Code) and its guidelines. Under the Guidelines, influencers have also been advised to undertake due diligence before engaging in promotional advertisements and satisfy themselves that the advertiser shall be able to substantiate the claims made in the advertisement.

Comment

Whilst regulations governing 'celebrity' advertising are already covered under the parent ASCI Code, the Guidelines appear to create digital media specific regulations for the category of social media influencers who may not typically qualify as a 'celebrity' under the parent Code in view of the high thresholds set out therein (compensation of INR 20,00,000 or above or a listing in top 100 celebrities under Forbes or Times list etc.). However, it may be safe to say that in addition to influencers, celebrities advertising through digital media may also be required to adhere to the Guidelines as the threshold for qualifying as an influencer has been kept very basic and without definite criteria (for example, number of followers or amount of compensation received) and would typically fit all celebrities. It is also pertinent to mention that ASCI is a self-regulatory and voluntary governing organization without force of the statute, hence the Guidelines may not be statutorily enforceable. However, the ASCI Code has received judicial recognition from courts in India from time to time and is generally followed as an industry wide practice.

The Guidelines come in light of increasing popularity and reach of social media influencers on the internet who are being hailed as the new age marketing tool for almost all types of brands globally. Their wide reach amidst consumers and their ability to influence consumer behavior with content even as short as 15 seconds in duration, makes it important for certain oversight in the manner in which they operate and make commercial gains. The Bombay High Court, in its decision dated 15 January 2020 [*Marico Limited v Abhijit Bhansali (2020(81) PTC 244(Bom)*] had also identified "social media influencers" as a nascent category of individuals who have acquired considerable follower base on social media and certain degree of credibility in their space. The decision had also noted the need to impose certain responsibility on such influencers keeping in mind the power they wield over their audience and the trust placed in them by the public. Whilst the decision is under consideration in appeal, these guidelines may be a welcome move in the right direction.

A copy of the *Guidelines For Influencer Advertising In Digital Media* as available on the ASCI website can be accessed [here](#).

ERGO | ASCI RELEASES INFLUENCER ADVERTISING GUIDELINES FOR DIGITAL MEDIA - EFFECTIVE 14 JUNE '21 ONWARD

- Nishad Nadkarni (Partner) and Khushboo Jhunjhunwala (Associate)

For any queries please contact: editors@khaitanco.com

We have updated our [Privacy Policy](#), which provides details of how we process your personal data and apply security measures. We will continue to communicate with you based on the information available with us. You may choose to unsubscribe from our communications at any time by clicking [here](#).

For private circulation only

The contents of this email are for informational purposes only and for the reader's personal non-commercial use. The views expressed are not the professional views of Khaitan & Co and do not constitute legal advice. The contents are intended, but not guaranteed, to be correct, complete, or up to date. Khaitan & Co disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.

© 2021 Khaitan & Co. All rights reserved.

Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com