

## ERGO

*Analysing developments impacting business*

### CCPA RELEASES GUIDELINES FOR PREVENTION OF MISLEADING ADVERTISEMENTS AND ENDORSEMENTS FOR MISLEADING ADVERTISEMENTS, 2022

11 June 2022

The '[Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022](#)' (Guidelines) issued by the Central Consumer Protection Authority (CCPA) have been notified on 9 June 2022, and brought into force with immediate effect. The Guidelines are fairly detailed, and seek to curb misleading advertisements and protect unsuspecting consumers from falling prey to unfair trade practices. The Guidelines would be applicable to all advertisements regardless of form, format or medium and all manufacturers, service providers or traders whose goods, products or services are the subject of an advertisement. They would also be applicable to advertising agencies or endorsers whose services are availed for the advertisements of the said goods, products, or services.

#### **Overview of Guidelines**

Given that advertisements play an enormous role in facilitating sale of products or services across all ages and diverse backgrounds, there has been concern around advertisements that make untruthful or false or deceptive claims or seek to influence the consumers through misleading claims. Whilst the Consumer Protection Act, 2019 (Act) has general provisions in place for prevention of misleading advertisements, the CCPA, has now exercised its powers conferred under section 18 of Act and issued these Guidelines containing several principles and parameters to identify what is permissible and what is prohibited. The Guidelines also give teeth to the enforcement of several parameters contained in the 'Code for Self-Regulation in Advertising' (ASCI Code) issued by the self regulating body Advertising Standards Council of India, to the extent the provisions of the Guidelines overlap with the ASCI Code.

The Guidelines deal with the following issues:

1. General principles to ascertain what is a misleading advertisement
2. Conditions for bait advertisements
3. Prohibition of surrogate advertising
4. Guidelines for free claim advertisements
5. Conditions for advertisements targeting children or featuring children
6. Rules on disclaimers in advertisements

7. Due diligence and disclosure of material connection by an endorser
  8. Responsibilities of manufacturers, service providers, advertisers and advertising agencies
- General principles to ascertain what is a misleading advertisement

The Guidelines list the characteristics/standards of advertisements that shall not be considered misleading, and thus sets out indicative guidelines for advertisements. This is also to say that in the instance an advertisement does not meet the characteristics/standards set out in the Guidelines, as a matter of exclusionary principle, such advertisement may be considered to be misleading.

The key characteristics/standards set out in the Guidelines for advertisements to be not considered misleading are that an advertisement shall:

- (i) be honest and truthful representations;
- (ii) not mislead:
  - a. by exaggeration of scientific validity or accuracy or practical usefulness or capability of the goods; or
  - b. about the nature or extent of the risk to consumers' personal security;
- (iii) ensure that claims that have not been independently substantiated but are based merely on content of some publication, do not mislead consumers;
- (iv) not suggest that claims made are universally accepted if there is a significant division of informed or scientific opinion pertaining to such claims; and
- (v) comply with any other sector specific law.

- Conditions for bait advertisements

Bait advertisements are defined as advertisements where good, product or service is offered for sale at a low price to attract consumers. The Guidelines do not prohibit bait advertisements, however, has set out conditions which must be complied with, in respect of bait advertisements.

While issuing bait advertisements, it should be ensured that the good/product/service would be made available to the consumer at the price offered in the advertisement. Further, it should also be ensured that there is adequate supply for the foreseeable demand on the publication of the advertisement. In case of limited availability of the good/product/service advertised, it should be indicated as such in the advertisement. Similarly, any conditions associated with the supply/availability of such good/product/service, for instance, geographical restrictions or age restrictions should be clearly indicated. There should also be no inducement to purchase the

good/product/service in market conditions less favourable than normal market conditions.

➤ Prohibition of surrogate advertising

Surrogate advertisement or indirect advertisement has been prohibited by the Guidelines. The Guidelines clearly state that no advertisements can be made suggesting directly or indirectly that it is for products or services whose advertising is otherwise prohibited/restricted by law. Circumvention of such prohibition or restriction by portraying an advertisement to be an advertisement for other goods or services, the advertisement of which is not prohibited/restricted by law has been specifically called out in the definition of 'surrogate advertisement'.

A brief clarification has, however, been incorporated in the provision whereby a brand used for 'prohibited' goods/services could be used for other goods so long as it does not otherwise violate the Guidelines. This, in our view, is slightly vague and may have to be read with the rule 7(2)(viii) of the Cable Television Network Rules, 1994, which indicates in what circumstances use of the same brand as used on 'prohibited' goods could be advertised in the context of other permissible goods/services.

➤ Guidelines for free claim advertisements

'Free claims' advertisements or advertisements claiming that a good, product or service or feature is free or without any charge to the consumer have also been dealt with in the Guidelines. The Guidelines, in this regard, set out guidelines in respect of free claims advertisements as well as a negative list to describe what shall not be considered 'free' or 'without charge' good/product/service.

The Guidelines *inter alia* mandate that such advertisements shall not claim a good/product/service to be free if the consumer has to pay anything other than the unavoidable cost of responding to such advertisement and collecting or paying for delivery of such item, and further shall indicate the extent of commitment that a consumer shall have to make to take advantage of the free offer.

Under the Guidelines, goods, products or services cannot be described as free, if *inter alia* the quantity or quality of the goods, that the consumer shall have to purchase to take advantage of the offer, has been reduced, or if the consumer has to pay for packing, packaging, handling or administration of such good/product/service. Likewise, an element of a package cannot be described as free if such element is included in the packaging price.

➤ Conditions for advertisements targeting children or featuring children

Advertisements targeting children or featuring children should ensure that the inexperience or naivety of children is not taken undue advantage of. Any advertisement addressing or targeting or using children shall have to comply with a host of conditions set out in the Guidelines which *inter alia* include that such advertisements shall not:

- (i) condone, encourage, inspire or unreasonably emulate behavior that could be dangerous for children;
- (ii) claim any health or nutritional claims or benefits without being adequately and scientifically substantiated by a recognized body;

- (iii) be such as to develop negative body image in children;
- (iv) exaggerate the features of goods/products/services in a manner so as to lead children to have unrealistic expectations thereof; etc.

Such advertisements shall also not feature personalities from the field of sports, music or cinema for goods/products/services, which under any law, requires a health warning or cannot be purchased by children.

The Guidelines also lay down that an advertisement for junk foods, including chips, carbonated beverages and such other snacks and drinks shall not be advertised during a program meant for children or on a channel meant exclusively for children. Similarly, an impression cannot be given that the goods being advertised are better than the natural traditional food being consumed by children.

➤ Rules on disclaimers in advertisements

The Guidelines lay down parameters to be followed in respect of disclaimers in advertisements. These are similar to the disclaimer related provisions in the ASCI Code. For instance, disclaimers may expand, clarify, qualify or resolve ambiguities in a claim but should not contradict the material claim or main message of the advertisement, or attempt to hide material information with respect to any claim made in the advertisement, thereby having the effect of making the advertisement deceptive or concealing its commercial intent. The disclaimers shall also not correct any misleading claim made in an advertisement.

Further, standards pertaining to language, font, placement, speed and legibility of disclaimers have also been laid down in the Guidelines, to ensure that the disclaimer made is clear, prominent and legible to a normally-sighted person reading the marketing communication once from reasonable distance and at a reasonable speed.

➤ Due diligence and disclosure of material connection by an endorser

The Guidelines require that due diligence should be undertaken before endorsement of advertisements. Further the endorsement in an advertisement should not be deceptive, and should reflect the genuine, reasonably current opinion of the individual, group or organization making such representation and be based on adequate information about or experience with the identified goods/products/services.

The Guidelines also require disclosure of any material connection between the endorser and trader/manufacturer/advertiser that can materially affect the credibility of the endorsement. It is likely therefore that endorsers who hold any stake in the entity manufacturing the product/ rendering the services, will have to clearly disclose that connection in advertisements featuring them for such products/ services.

➤ Responsibilities of manufacturers, service providers, advertisers and advertising agencies

The Guidelines list out certain responsibilities/duties of manufacturers, service providers, advertisers and advertising agencies. The intent is to ensure that the claims made in advertisements are assessed, substantiated, verified, or supported by relevant data. For comparisons, claims and descriptions in advertisements which relate to matters of objectively ascertainable facts, should be capable of substantiation and the relevant party could be called upon to produce such substantiation, by the CCPA.

Duties as aforesaid also include that parties shall ensure that advertisements should not contain any reference to a person, firm or institution in any manner which confers an unjustified advantage on the product so advertised or bring such person, firm or institution to ridicule or disrepute, unless requisite permission from the concerned has been obtained. This may be significant in the context of comparative advertisements where products of two different manufacturers are sought to be compared whilst highlighting the benefits of one over the other. Exaggeration, omission or ambiguity of statements, that are likely to mislead consumers, also have to be checked by the concerned manufacturer/service provider/advertiser/advertising agency. However, a relaxation in terms of obvious untruths or exaggerations that may be clearly seen as humour or hyperbole, and are not likely to be understood as making a literal or misleading claim are permitted.

➤ Penalisation for non-compliance of the Guidelines

The Guidelines do not separately set out penalties for non-compliance. However, on conjoint reading with the Act, penalties stipulated under the Act including imposition of fines ranging from INR 10 to 50 lakh by the CCPA, would apply in case of violation of these Guidelines.

Similarly, although no specific enforcement mechanism has been set out under these Guidelines, the CCPA could exercise powers for investigation and enforcement including those as laid down under section 18 of the Act.

**Comment**

The Guidelines which stem from the Act will most likely have the effect of tightening the noose and could reduce the room that an advertiser usually had to play around in the grey areas whilst creating and publishing an advertisement. They constitute an important milestone in the regulatory regime for advertisements which till now was predominantly self-regulated through the ASCI Code. Restrictions imposed may also affect the commercial viability of advertisements for certain products/services. For example, 'junk food' advertisements which predominantly target children, may require substantial modifications to comply with the Guidelines.

Given that advertisements in all forms, formats, and media have been covered under the Guidelines, even unconventional forms of advertisements including social media influencers, advertisements in the metaverse, advertisements in the form of non-fungible tokens, or pop-up/disappearing advertisements on the internet shall need to adhere to the provisions of the Act and the Guidelines. The Guidelines would also play an important role in legal proceedings for comparative advertisement/disparagement disputes which until now were only governed under the law of torts and the jurisprudence developed through judicial precedents.

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