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Analysing developments impacting business

ADVERTISING IN THE DIGITAL AGE: ENDORSEMENT REQUIREMENTS FOR CELEBRITIES AND INFLUENCERS

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In contrast to traditional advertising (which would typically take place through television commercials, radio or print advertisements), advertisements in today's day and age come in different shapes and forms. In this age of social media, users are vulnerable to covert advertisements and masked endorsements by celebrities and influencers who are promoting certain goods and services without the appropriate disclosures.

Acknowledging that there is a need for accountability, regulatory authorities in India have sought to strengthen the legal and regulatory framework relating to advertisements. To this end, the Department of Consumer Affairs has issued the '*Endorsements Know-hows! for celebrities, influencers and virtual influencers on social media platforms*' (**Endorsement Know-Hows**) on 20 January 2023, aimed at curbing misleading endorsements by celebrities, influencers and virtual influencers and ensure compliance with the Consumer Protection Act, 2019 (as amended) (**CPA**) as well as the rules and guidelines framed under it.

Key considerations for endorsements under the consumer protection framework

At the outset, it is relevant to note that the legal and regulatory regime relating to advertisements is fragmented across different laws and regulations including *inter alia* the CPA, codes and recommendations by the Advertising Standards Council of India (**ASCI**) (a voluntary self-regulatory organization), and various sectoral laws (e.g., relating to food, health and medical products, etc.).

With a view to regulate misleading advertisements and endorsements, the Central Consumer Protection Authority (**CCPA**) (constituted under the CPA) issued the '*Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements*' (**Misleading Ads & Endorsement Guidelines**) in 2022. The Misleading Ads & Endorsement Guidelines *inter alia* set out certain requirements for endorsements including due diligence to be carried out by an endorser to avoid deceptive claims and disclosure of any 'material connection' between the endorser and trader, manufacturer or advertiser of the endorsed product.

According to a press-release accompanying the Endorsement Know-Hows, the Government acknowledges that increasing reach of social media and popularity of influencers has led to an increased risk of consumers being misled by advertisements and unfair trade practices by these individuals on social media platforms. Through the Endorsement Know-Hows, the Government seeks to ensure that required disclosures are prominent and clear, and different forms of 'material connections' are adequately disclosed in line with the consumer protection regime.

Salient features of the Endorsement Know-Hows

- Applicability: The Endorsement Know-Hows apply to celebrities and influencers, including virtual influencers, who have access to audience and the power to influence their purchasing decisions or opinion about a product, service, brand etc., owing to their authority, knowledge, position or relationship with their audience. The Endorsement Know-Hows provides definitions of terms such as celebrities, influencers and virtual influencers.
- Material connection: A celebrity or an influencer is required to disclose any 'material connection' between themselves and the advertiser, which may impact the weight or credibility of the representation made by them. For context, 'material connection' can include *inter alia* benefits and incentives such as monetary compensation, free products, discounts, awards, personal or employment relationship etc.
- Disclosure requirements: Disclosures are required to be made in a manner that is clear, prominent, and extremely hard to miss. Specific requirements have also been set out for endorsements made through different forms such as pictures, videos, live stream, etc. Further, the document also sets out guiding principles for such disclosures in terms of language of disclosure, use of simple and clear language, terms that are allowed and making of separate disclosures apart from platform disclosure tools.
- Due diligence: Celebrities and influencers have been encouraged to undertake due diligence steps before endorsing a product or service of an advertiser to their audience. For instance, celebrities and influencers have been advised to always review and satisfy themselves that the claims made by an advertiser can be substantiated. To this end, endorsers have been recommended to use and experience the product or service that they are endorsing.
- Consequences for non-compliance: While the Endorsement Know-Hows do not expressly set out any penalties or sanctions, it is relevant to note that Endorsement Know-Hows contain a 'warning' stipulating that failure to disclose any material connection or non-compliance of the CPA and the rules framed under it, would "make such violators liable for strict action under the law". Under the CPA, the endorsers can be met with financial penalties as well as face the risk of getting prohibited from making endorsement of any product or service for up to one year, which may extend up to three years for every subsequent contravention.

Comment

In today's day and age where word-of-mouth and customer-trust are key ingredients of effective marketing, influencers hold the power to make or break a brand. Owing to their persuasive power to influence purchasing decisions, influencers have now been tasked with additional responsibilities to ensure that they do not mislead their audience.

With more and more businesses, including start-ups, opting for influencer marketing to establish and promote their brands, it is imperative to strike a balance between endorsements and consumer rights in the interest of transparency and accountability. Businesses may consider encouraging endorsers to comply with any legal and regulatory requirements from their end, as any non-compliance may lead to reputational damages for such businesses also.

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